

# **The Future Of Liberal Democracy In Sri Lanka: A Sceptical Account**

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## Introduction

It is a defensible proposition to make that the term 'democracy' has an enduring, ingrained and intuitive appeal to South Asians. Compared against other regions of the world apart from the West, South Asia is perhaps unique in the spontaneity with which its inhabitants would lay claim to a commitment to democracy and its institutional trappings, occasional aberrations notwithstanding. The region is home to the largest democracy in the world, and the relative success of the construct known as the Indian State in evolving as a coherent whole over fifty years of independence is due in large measure to a maturity of innovation and astuteness of political vision, based on a profound commitment to an enlightened conception of democracy of both its founders and their successors.

It is perhaps incongruous then that the crisis of democratic institutions and the fundamental failure of its promise in many States in the South Asian region have been as palpable as the ordinary South Asian's commitment to the basic democratic ideal. Many States in our region have known, and continue to experience, authoritarianism and absolutism in many forms and flavours, and in the case of Sri Lanka, a State that has had at least a nominal democratic façade ever since its birth stands imminently on the edge of cataclysmic failure.

This essay concerns the future of democracy in Sri Lanka. As an exercise in assessment therefore, it is also essentially an expression of opinion and as such, its persuasive potential lies in the defensibility of its assumptions, analytical methods and arguments. For that reason, the first section of the paper will articulate an ideal of democracy, both in terms of values and institutions, which will then be used, in the following section, as the basic analytical standard in a critical examination of democracy and its forms in Sri Lanka since 1931 when universal franchise was first introduced. Based on that discussion, an attempt will be made in the last section to chart the possible future trajectories along which democracy may flourish, perish or otherwise evolve in Sri Lanka.

## The Liberal Ideal

The ideal of democracy sought to be developed here is one that may be described as 'liberal democratic'. This term is used advisedly, and seeks to make a distinction between the conception which sees democracy defined as majority rule as an end in itself - what Hayek would term 'dogmatic democracy' and Fareed Zakaria 'illiberal democracy' - and the idea that democracy is merely the best form of political decision-making known to civilisation, whose ends are better determined by recourse to principles developed in other ways.

In the latter view, democracy is only the means, albeit the best means, by which decisions are arrived at, not because the will of the majority constitutes the sole principle of legitimation of public decisions, but because democratic institutions allow for the widest articulation of diverse viewpoints, and thereby maximising choice, reduces the possibility of arbitrariness. However, the value of majority rule is restricted by recourse to principles that protect individual liberty, because majority rule per se is as totalitarian as any other form of government unless checked, and poses a threat to liberty, i.e., political, personal and property. Thus in this view, the object of democracy is emphatically not the expression of the will of the majority simpliciter, but the maximisation of individual political liberty, which in turn enhances democracy through the protection of the freedom of society as a whole.

On the other hand, the 'pure democracy' discourse, which has throughout had widespread currency in Sri Lanka, also corresponds to notions of popular sovereignty in the sense that the latter as the fountain of all political power has been always defined in majoritarian terms to the exclusion of minorities. Exacerbating this definition is also the dominant argument from command-theory positivism that sovereignty is indivisible and illimitable. As will be discussed later, this has not only created major conflict in the context of ethno-pluralism, but in doing so, has also conceptually negated the republican nature of the Sri Lankan State.

The liberal conception of democracy rejects majority rule as legitimate in itself because of the possibility of what Mill called the 'tyranny of the majority'. Because there are legitimate purposes for which coercive collective action in the form of law is necessary in a democracy, then in a worldview that seeks to maximise liberty, limits on that sphere of coercion are imperative corollaries.

The question then arises as to how the principles limiting the operation of majority rule are to be discovered. Liberal democracy presupposes that democracy can only survive in a society that protects the interests of minorities, not only on the utilitarian basis that only then can their loyalty to democracy be ensured, but also for the more significant moral reason that majority rule is by definition inimical to individual liberty. There is no more justification for oligarchic authoritarianism than there is for majoritarian totalitarianism.

But are the principles, indeed the value, of political liberty the result of a higher rationality or the evolutionary product of spontaneous rules of conduct individuals have developed in communal life? There is no need to explore this debate here, because either way, the value of political liberty is the result of a mixture of innate human yearning and natural ingenuity. If we proceed on the assumption then that freedom is a universal human desire, then we are left to identify the values, principles and institutions through which the ideal may be achieved.

## **The Four Pillars of Liberal Democracy**

There are four primary pillars upon which this ideal of a free society is built. These are individual liberty, the rule of law, limited government and the free market.

### **Individual Liberty**

Individual liberty stems from the principle of self-ownership over one's mind, body and life. This implies a rejection of paternalism as well as regimented moral homogeneity. A monopoly of limited coercion is granted to the State for the coordination of common purposes by a confederation of individuals (society) enjoying the primary right of self-ownership: choice.

The protection of individual liberty is important in a liberal democracy because violations of freedom and individual autonomy are to be expected from any collectivity, not only by the State as the ultimate expression of collectivism but also from social groupings such as ethnicity and religion. Since social life involves multiple membership in collective identities, the potential for incursions into individual freedom is never far away. Therefore, a guaranteed space for self-expression, autonomy and choice is vital for the liberty of the individual and thereby of the whole. In this way, the fundamental promise of democracy that government is by consent and choice is safeguarded.

However, the liberal premium on individual liberty does not in anyway inhibit the voluntary association of individuals in groups, whether it concerns the adoption or nurturing of a religious, ethnic or other similar identity, or indeed the freedom to associate with others on the basis of shared values and interests, as in the case of a sports club, political party or trade union. What is sought to be protected is individual autonomy without prejudice to entitlements of citizenship in the case of membership of a State, and in the case of other associations and identities, the uninhibited space to express difference and the absolute right of exit.

Moreover, the emphasis on individual rights does not foreclose the possibility that groups within States cannot organise collective identities so as to seek cultural or regional autonomy through federal arrangements. In fact, federalist institutions are most concordant with liberal values for the way in which they promote greater democracy through power diffusion, whether territorially or otherwise, and check majorities.

### **The Rule of Law**

The rule of law ideal is principally concerned with the liberal imperative of legal and political equality. There can be no democracy in which there is unreasonable discriminative treatment with regard to the rules of political participation. Equality as the basis of political participation is essential in the liberal conception of 'deliberative democracy', as opposed to simplistically majoritarian democracy. Deliberative democracy requires that public decision-making is conducted within institutions, that

there is an encouragement to rational deliberation, that there is a general commitment to reasoning for political decisions, and that political decision-making is legitimate only if these qualities are present. An open society demands not only open government, it calls for the fullest public participation as well.

The rule of law is also important in ensuring that the generality of laws apply to equally placed citizens equally, and that government is conducted according to predictable, preordained rules that are formulated through democratic institutions and deliberative processes. As a further safeguard, immutable values insulated from precipitate actions of temporary majorities are, in most liberal democracies, enshrined in a constitutional document which enjoys legal supremacy over ordinary laws and the actions of institutions and officials.

Animating this framework is a culture of constitutional behaviour and a respect for precedent, convention and tradition developed over a period of time. Since these conventional rules are, qualitatively-speaking, not laws, they are both more durable and supple in governing political behaviour. Also called constitutional government, this condition precludes arbitrariness and thus authoritarianism.

## **Limited Government**

Limiting the scope of governmental action is an obvious consequence of the requirements of individual liberty and the rule of law. Assuring an inviolable personal space for individuals entails prohibiting excessive governmental intrusion. Similarly, the rule of law requires that government is strictly circumscribed by a rules-based regime that disallows the capricious arrogation of power by officials. In democracies that are not checked by this liberal injunction, the State soon becomes all-pervasive. This is particularly true in the economic life of the community.

## **The Free Market**

The free market is not a label for a particular type of economic policy. It is an indispensable element of individual liberty. The inherent genius of the human spirit for self-development must be allowed to flourish without the oppressive paternalism of a State that considers itself best placed to make economic choices for its citizens.

This is obviously not to displace the legitimate regulatory functions of the State such as the enforcement of contractual and property rights and the regulation of currency, companies and competition and so on. In most cases, such functions can only be performed by the State. It is also not, in the special context of a developing country such as Sri Lanka, to deny the State the function of ensuring a level playing field to its more disadvantaged citizens so that the latter may reap the full benefits of the free economy. However, there must be clear limits to its welfare egalitarianism if a thoroughly reprehensible culture of dependency is to be discouraged.

The free market is the only mechanism through which the full potential of capitalism may be released. In a functioning capitalist society, consumption, savings and investments are a mass phenomenon, not the domain of a privileged few. In encouraging the attributes of self-reliance, innovation and entrepreneurship, capitalism under the rule of law democratises the economic sphere, and thereby supports individual autonomy.

## **The Institutional Features of Liberal Democracy**

Based on these basic pillars, liberal societies have developed a panoply of institutions through which the objectives of political freedom may be realised. In other words, there are several, easily identifiable, key features in the institutional architecture of liberal democracies that seek to provide the forms and processes of freedom.

These constitutional features include the supremacy of the Constitution, the separation of powers, an independent judiciary with powers to review executive and legislative action for constitutionality, provision for the separation of religion from politics, bills of individual rights that guarantee civil and political freedom, counter-majoritarian instruments such as legislative second chambers, mechanisms for power-sharing and subsidiarity including local government, a professional civil service and independent mechanisms for the conduct of periodic elections.

In plural societies where there is a multiplicity of ethnic, cultural or religious identities making up the social foundation of the State, liberal democracy would refocus its key constitutional features to achieve the maximum possible accommodation of constitutive groups, including through federal-type arrangements and special electoral systems for ensuring fair representation.

## **The Informal Features of Liberal Democracy**

Besides these formal institutions, there are several other important features that characterise liberal democratic orders. These are the characteristics of a vibrant civil society that expands the political space so as not to be restricted to politicians and officials. Vital civil societies are imperative to the creation of ideas, to the articulation of diverse viewpoints, to the expression of dissent and to the resistance of anti-constitutional or authoritarian behaviour of government. Thus, traditions of academic independence and excellence, artistic freedom, a free media and independent non-governmental associations are always to be found in liberal democracies.

An associated feature is multi-party democracy, albeit that the desired competition between parties in electoral politics is always framed by broad subscription to a common set of rules provided by the values of liberal democracy. These include tolerance of diversity, the freedoms of thought and expression, the right to dissent and oppose policy choices, and respect for the political choices of others. In a functioning liberal democracy, the rules of the game are sacrosanct because the players are able to agree that their interests are best served by obedience to the rules, and hence should be kept above the fray. In a malfunctioning democracy, the rules themselves are always contested.

The decisive feature, however, of thriving liberal democracies is not the mere existence of the formal trappings of constitutional democracy as set out in foundational documents or paper constitutions. That feature is the tradition of constitutional behaviour framed by liberal values as a living political culture of wide social subscription and habitual official compliance.

Textual articulation of most, although certainly not all, of these formal features are to be found in constitutions such as Sri Lanka's, but there is nevertheless a real crisis of democratic governance and consequently, fundamental challenges to the legitimacy of the State. Put another way, despite constitutional commitments, the state of local democracy is widely felt to be dysfunctional.

Constitutional rules and institutions have been historically abused, manipulated or ignored. This has been facilitated by context, because there is a general social tolerance for authoritarian behaviour by government and rulers. The cycle of authoritarianism and constitutional manipulation continues until that tolerance is exhausted, whereupon the State is resisted through recourse to violence. A new cycle then begins in terms of the State's own violent response for its desperate survival.

On the other hand, in countries such as the United Kingdom where there is no single document called a Constitution, liberal democracy flourishes - relatively-speaking. This is because liberal democracy is so inherent to the historical legacy of the United Kingdom, whereas in Sri Lanka, democracy was introduced from outside. There was also no comparable process such as in India, where society achieved independence (i.e., democracy) through struggle, and a genuinely local and inclusive effort at devising the institutions of constitutional government was undertaken subsequently.

The State and access to political power has historically been the domain of socio-economic and political elites, but increasingly, there is the clear emergence of a non-traditional class of rulers aspiring to political power and control of the State whose contemptuous rejection of liberal constitutionalism is even more marked than that of the traditional elites. The emergence of these, in Chanaka Amaratunga's phrase, 'fraternal twins' on either side of the ethnic divide in the form of the LTTE and the JVP will be discussed further below.

In this way, we may discern that in countries such as Sri Lanka, the total absence of a culture of liberal constitutionalism, gained either through historical experience or through a successful effort at building one during the colonial transition or post-Independence, has resulted in a continuing crisis of democracy.

## **Reincarnations of the Sri Lankan State: 1931, 1948, 1972 and 1978**

Sri Lanka has had four constitutions underpinned by the franchise. As legal frameworks for democracy, however, they have all, to varying degrees, been problematic.

### **The Donoughmore Constitution of 1931: Quasi Representative Democracy**

The Donoughmore Constitution of 1931 introduced the principle of universal suffrage. Coupled with this, it provided for a structure of government fashioned along the lines of the prevalent form of local government authorities in Britain. The elected members of the State Council were all divided into executive committees. The chairpersons of these committees, along with three unelected officials constituted a Board of Ministers. The Governor along with the Board of Ministers constituted the executive, but legislators were also given a stake in executive decision-making through the committee system.

The establishment of popular democracy through the franchise and the grant of significant executive and legislative responsibility to elected representatives were curtailed by a corresponding extension of the reserve powers of the Governor. The extended powers of the Governor as well as the areas of responsibility retained by the three Officers of State were sufficiently significant as to render the scheme envisaged by the Donoughmore Constitution only quasi-democratic.

The Report of the Donoughmore Commission adduced several justifications for the constitutional scheme it proposed. In rejecting a conventional Westminster model for Ceylon, the Commission alluded not only to the absence of a party political system, but that if the development of one were to be immediately expected through the establishment of a parliamentary model, it was felt that a system based on insidious common bonds such as race, religion and caste would be the result. It was therefore argued that the innovative system of government proposed would serve as a training ground not only for the electorate with democracy, but also for the development of policy interest based political parties as preconditions for full responsible parliamentary government.

The proposal for introducing universal adult franchise was an initiative of the Commission, for with the sole exception of the urban working class based Labour Party, all other local submissions at the Commission's consultations argued against its introduction. However, the concerns with regard to political mobilisation around unwelcome grounds such as race and caste that would be inimical to the formation of a Ceylonese identity influenced the Commission in this regard. It was argued that an electoral politics transcending narrow sectarian and class interests could only be achieved through an extension of the voter base.

These arguments of the Donoughmore Commission are grounded on what appears to be a reasonably judicious assessment of the dynamics of political relations existing in Ceylon at the time. The Low Country Sinhalese elites, who had displaced the old Kandyan feudal aristocracy, had strong motivations for maintaining the status quo for the preservation of their economic interests. They were also primarily organised along race and caste lines, and the Commission calculated that an extension of the franchise would perhaps have a diluting effect on these dynamics.

On the other hand, the minority Tamils were anxious about universal franchise without adequate safeguards against an all engulfing majoritarianism. The Kandyan Sinhalese were also apprehensive and made representations on a federal model that would assure the Kandyan areas regional autonomy.

While the Commission's political assessments may have been perspicacious, the remedy it prescribed in the form of universal franchise was to prove counter-productive. This was because, quite apart from catalysing a policy and common interest based political system, universal franchise in fact institutionalised a clientalist politics around notions of proximity such as class, caste, religion and

ethnicity. The patron-client relationship between rulers and the ruled have a real and historical resonance in the Sri Lankan polity, whereas a political culture encompassing the ideas of (at least notional) equality and consent so essential to the operation of democracy was wholly absent. Therefore, caste, religion and ethnicity were instituted into the potent dynamics of electoral democracy, without any of the countervailing safeguards, such as they were, inherent to benign paternalist feudalism.

Similarly, and more culpably, the Commission failed to take into consideration the burgeoning self-identities of the minority communities. Legitimate minority aspirations, as well as adequate regard to the seriousness of their apprehensions in the face of organised majority rule were disregarded. The concession made through the classic British colonialist modality of providing for nominated legislative membership to ensure minimal representation was pitiable. Although the federalist demand of the Kandyanans seems archaic now, it is symptomatic of a sense of anxiety regarding their distinctiveness.

## **The Soulbury Constitution of 1948: Independence**

Ceylon's independence Constitution was based on the Westminster model, with some significant departures from the constitutional principles underpinning that model. In particular, this included Section 29, which sought to protect minority interests by limiting the plenary power of Parliament to legislate for the peace, order and good government of the Island. That is, by setting out a constitutional injunction that Parliament could not by law impose a disability on or grant an advantage to any community that was also not imposed on or granted to others, Section 29 was described by its proponents as an attenuated bill of rights limiting absolute legislative competence, a conventional bill of rights being excluded from the constitutional instrument.

This was accompanied by the provision for the judicial review of legislation for constitutionality: the fundamental principle of liberal constitutionalism. This is a product of the American tradition, not of the British, which regards parliamentary sovereignty as omni-competent.

The Soulbury Constitution was secular and unitary in character, although an express self-description was shrewdly avoided. It was unfortunate that the Soulbury Commission did not consider incorporating federal features into the Constitution of 1948, because even though explicit Tamil demands for federalism came only later, the ethno-political composition of the society the Constitution was meant to serve warranted at least the exploration of federal options. Similarly, the non-incorporation of a traditional bill of rights, the relative ineffectuality of the Senate and the simple plurality electoral system were all matters in regard to which stronger counter-majoritarian options ought to have been considered.

Nevertheless, compared with all the other Sri Lankan constitutions, the Soulbury Constitution conforms best to the normative requirements of the liberal democratic conception outlined above. However, this constitutional instrument failed to withstand the powerful assaults made upon the crucial assumptions and delicate balances on which it was constructed.

Even before the rise of Sinhala nationalism made its mark in the watershed general elections of 1956, acts of majoritarian arrogance and pernicious partisan advantage were evident. The typical example is the disenfranchisement of the Tamils of recent Indian origin resident in the tea plantations areas of the central hills, through citizenship legislation. In this example, not only did a majority dominated Parliament enact legislation to remove plantation Tamils from the electoral roll under the guise of citizenship control, but recourse to the courts for the enforcement of Section 29 proved futile as well.

A purposive, activist constitutional construction by the courts could have upheld the spirit of Section 29, struck down the legislation and inspired minority confidence in the institutions of the new State. In rejecting the legal challenges to the legislation by adopting a narrow and legalistic line of reasoning, judicial attitudes also illustrated the fundamentally anomalous nature of the constitutional State in respect of the polity in which it was supposed to operate.

This validates a key argument of this essay: that without a culture of liberal democracy and constitutionalism buttressed by habitual political subscription and wide social resonance, constitutions, however elegantly and intelligently drafted, are inadequate by themselves as instruments of conflict management in a plural society. The animating constitutional culture is vital for legal constructs to be at all useful.

This argument is even more starkly illustrated by the events following 1956, when Sinhala nationalism hijacked the State through the ballot. The ratchet effect of 1956 in the rise of Sinhala nationalism in the context of party political competition resulted in such obnoxious legislative adventures as the imposition of Sinhala, the language of the majority, as the medium of administration in a multilingual society. Nationalism's endemic potential, that is to say, once it has taken root in a society, it is difficult if not impossible to remove, is illustrated by the party political dynamics of the Sinhala South post-1956. In the period between 1956 and 1972 every effort taken to address increasingly vehement minority concerns through limited power-sharing and devolution were met with an attitude of uncompromising rejection by the dominant Sinhala nationalism.

In turn, this radicalised Tamil politics. Thus initial Tamil demands for power-sharing at the centre through consociational arrangements developed into moderate demands for federalism and regional autonomy. By the early 1970s, Tamils were convinced that they were suffering the worst of a Faustian bargain in terms of their participation in the democratic processes and constitutional channels. With final rebuff being delivered in the form of the 1972 Constitution, the stage was set for secessionism and the onset of violence as the primary modus of settling grievances with the State.

The independence Constitution, which had the potential to be developed as the unifying instrument of a pluralist and inclusive national identity, had been destroyed by the use of unadulterated British constitutional principles such as parliamentary sovereignty and of a feral majoritarian nationalism which controlled democracy to the exclusion of all others. The notion that the Constitution embodied a finely balanced scheme facilitating nation-building, with Section 29 representing a solemn compact between the communities as its centrepiece, seems ludicrous today. Two of its principal architects, Lord Soulbury and Sir Ivor Jennings, seeing their creation ravaged by the forces of nationalism (both majoritarian and minoritarian) by the 1960s, lived to rue the tragic assumptions they made regarding the cosmopolitan nature of the Ceylonese elite to whom the British transferred power in 1948.

An important factor in the politics of the South is the class dynamic. The right of centre United National Party which was formed just prior to independence, sought to fulfil the role of the Grand Old Party of moderate conservatism. The most appropriate analogy for the formative political stimuli behind the UNP is British One Nation Toryism. Staunchly non-ideological, the UNP elevated pragmatism to a virtue. It sought to serve as an umbrella party around which Colombo and Western Province capitalists as well as rural elites could come together on the shared interests of stability, strong leadership, middle class common sense and an ostensibly cosmopolitanist political outlook. The latter was to prove superficial, in the later dynamics of Sinhala nationalism. The UNP was Sinhala in the same way that One Nation Toryism tends to be predominantly English.

These characteristics were also the predominant personal traits of its progenitor, D. S. Senanayake, ultimately to become the first Prime Minister of independent Ceylon. Anecdotes about Senanayake's political career from the 1920s reveal a pragmatic and wily politician, who was equally at home in constitutional negotiations in Whitehall as he was in his country estate ploughing paddy fields in the fashion of the lionised peasant of Sinhala Buddhist lore. In fact, Senanayake's ascent to the undisputed leadership in Ceylonese politics during the empenage of British rule is due in equal measure to factors. Firstly, his shrewd capitalisation of his role as Minister of Agriculture throughout the currency of the Donoughmore Constitution to convey to the Sinhala polity the evocative persona of the agrarian monarch of Sinhala historiography. Secondly, the respect he won from British administrators as a dependable pair of hands and trustworthy proxy in the context of the war-effort during World War II, in stark contrast to the uncompromising attitude of the Indian independence leadership.

The principal opposition to Senanayake's UNP in the transitional period between 1947 and 1950 came from the then electorally strong Old Left, representing ideological antagonism to the conservatism of the UNP. It is nevertheless interesting, especially in a retrospection of the Old Left's demise after 1977, to note that its electoral support, both in terms of the urban proletariat as well as rural support bases, came not so much from their success in ideological indoctrination of the electorate, but from older notions of proximity such as caste and a limited engagement in patronage politics.

The Old Left in Sri Lanka, comprising primarily of the Lanka Sama Samaja Party (LSSP), the Communist Party (CP, and later to divide into Peking and Moscow wings) and the Bolshevik-Leninist Party, were characterised by all the arcane ideological schisms of the Communist world. Their leaderships comprised, however, of highly educated and urbane individuals from the middle and upper middle classes. It is perhaps fair to say that polemical rhetoric notwithstanding, none within the leadership of the Old Left would have been comfortable with the physical privations necessitated by revolution in

the Maoist or Guevaraist sense. Exceedingly at home in parliamentary institutions and bookish, even pedantic argument, the Old Left was intellectually Gramscian or Trotskyite, and in the case of some, socially *avant garde* in the mould of the Parisian left.

It is prescient that a political opposition belonging to and representing the same interests as the UNP, and therefore observing the same rules of the game, was absent at the outset. When this did emerge following the departure of SWRD Bandaranaike owing primarily to personality conflicts within the leadership of the UNP, an alternative government by his new party, the Sri Lanka Freedom Party (SLFP), was only possible through the exploitation of discontent against the ineptitude and elitism of the UNP on the part of subordinate rural indigenous elites. The latter in the Sinhala polity were driven by a powerful ethno-religious nationalist ideology, galvanised by an anti-colonial revivalism and fed by potent historical grievances that were to prove explosive in a pluralist political setting on the cusp of independence.

The emergence in the late 1960s of the Janatha Vimukthi Peramuna (JVP) further radicalised the polity sustaining the sentiments of the essentially bourgeois 'revolution' of 1956. The JVP was explicitly located within the revolutionary Guevaraist and Maoist strains of the Communist ontology, the latter perhaps explaining to some extent the strong Sinhala nationalism characterising its organisational ideology from the inception.

Thus while the burgeoning militancy of the Tamil youth movement borrowed from Leninist and Stalinist accounts of nationhood and self-determination in relocating Tamil grievances in rhetoric of the Left, its counterpart in the South exploited the same philosophical ground to obtain very different conclusions. Tapping into mass disillusionment with the democratic process to deliver on working class youth aspirations, the JVP in April 1971 attempted an armed insurrection against the State. This was unsuccessful, but the armed challenge of its counterpart in the Tamil polity was not to prove so easy to quell.

Both Tamil and Sinhala youth militancy therefore shared at least three aspects of common ground. Firstly, a reliance on Communist ideology for philosophical arguments and political rhetoric. Secondly, a complete disenchantment with the institutions and processes of the constitutional State. Thirdly, both youth movements in the two polities emanate from the same class background of relatively educated but economically disadvantaged groups with extremely restricted access to opportunities for social advancement. Some commentators also adduce a dimension of (low) caste commonality as well.

However, the fact that a shared discontent did not coalesce into a common front of class and ideological solidarity bridging ethnicity points to the widening cleavage in the post-independence trajectories of the two communities. In turn, the generational radicalisation of the divided polities afforded no political space for an ethnic reconciliation; rather, it provided for the precise opposite consequence of radicalising ethnic antagonism, and both groups' total inability to engage one another continues to this day.

Is there a possibility for an argument to be adduced from these empirical factors, that a constitutionalist culture of liberal democracy did not take root, because the critical intermediary in its birth and nurture, a cosmopolitanist elite transcending ethno-religious and caste divides, did not exist? Such an argument is enticing, particularly when the constitutional instrument so depended on liberal elitism for its success, in a polity whose cultural and political worldview was quite alien to such values. If such an elite did exist, bound by shared interests in peace, order and common prosperity of all Sri Lankans if not by the celebration of liberal ideals, it is possible that the essential conservatism of the Sinhala and Tamil polities could have been harnessed in working out pragmatic solutions to political problems within institutional politics. This would have prevented the perception of the irrelevance and failure of constitutional government, the cross-ethnic frustrations regarding which, in turn opened the space for intolerant nationalisms and other sentiments of discontent that led to the invalidation of the State.

## **The Constitution of 1972: Autochthony and Autarky**

The general elections of 1970 was overwhelmingly won by the United Front (UF) comprising the SLFP and the parties of the Old Left - the entire array of parliamentary centre-left parties - on a platform of repatriating the Constitution and introducing a socialist economy. It was argued that the constitutional link between the colonial power and Ceylon in the form of the British Crown was no longer fitting for

an independent country, and accordingly a formal Republic deriving its sovereignty directly from the people had to be established. That is, a mandate for the exercise of their autochthony was asked of the people.

Moreover, since the economic development shibboleths of the day also required a planned socialist economic policy, it was felt that an instrumental Constitution enshrining the values of the socialist paradise had to replace the 'value neutral' Soulbury Constitution. Needless to say, Communist-inspired political institutions involved a high degree of authoritarianism needed to enforce a particular ideology upon a whole society.

Thus while the Constitution of 1972 was skeletally Westminster in form, many of its features diluted the liberal constitutionalist expectations of the Westminster model. For example, it discontinued the special protection accorded to minorities by Section 29 of the Soulbury Constitution, expressly entrenched the unitary nature of republic, and impinged not only on the secular principle, but also trampled upon multicultural sensitivities by giving constitutional recognition to Buddhism as having a 'foremost' status in the state, entitling it to the latter's protection. The entreaties of the Tamils for a consideration of federalism and power-sharing were peremptorily rejected. Considering that this rejection was the watershed in transmogrifying the hitherto peaceful Tamil autonomy struggle into violent secessionist militancy, it is also a study in a particularly myopic type of hubris.

The new Constitution whittled down the principle of horizontal separation of powers at the centre and strengthened majoritarianism. The obsession with power and - in Rohan Edrisinha's phrase - executive convenience, was reflected in the new structures, whereby the Prime Minister and the Cabinet enjoyed an accumulation of power unchecked by sufficient constitutional safeguards through the other branches of the State. The independence of the judiciary and the public service was weakened. The new Constitution introduced a limited bill of fundamental rights, but rendered it useless by the non-provision of effective judicial enforcement. In sum, the Constitution of 1972 offered what Lord Hailsham called an 'elective dictatorship.' In this way, the substance of Sri Lanka's first autochthonous Constitution only served to aggravate ethno-political tensions by replicating the very constitutional anomalies at the heart of minority concerns.

The Constitution of 1972 was enacted through recourse to a 'constitutional revolution' in the exercise of the right to autochthony. This is where colonial or semi-colonial communities seek a complete severance of their constitutional links with the imperial power as a symbol and demonstration of absolute independence. Thus they would abrogate a constitutional order derived from the imperial legislature and devise a new order that derives its authority directly from the people. Deliberately therefore, the amending procedures of the colonial constitutions are disregarded and new mechanisms and procedures, most commonly a Constituent Assembly directly elected for the purpose of drafting a new Constitution, coupled with a referendum to ratify the product are adopted.

In the 1970 general election, a popular mandate for executing a complete break with the constitutional past was asserted by the UF which won two-thirds of the seats in Parliament (but only 49% of the popular vote). The Prime Minister, Mrs. Sirimavo Bandaranaike, sent individual letters of invitation to each Member of Parliament elected at the 1970 general elections to participate in a Constituent Assembly, to be convened outside Parliament, for the purpose of drafting and adopting a new republican Constitution. As stated earlier, the principal party representing the Tamil-speaking people of the Northeast, the Federal Party, made a final appeal to the Constituent Assembly to take into account the concerns and aspirations for regional autonomy of Tamils. With the tacit acquiescence of the rump Southern Opposition of only eleven seats, the largely Sinhala UF government ignored this plea, leaving the Federal Party no honourable option but to walk out of the entire process.

The Constitution adopted by the Constituent Assembly in 1972, was thus flawed both in substance and process. A constitution-making process designed by reference to crudely majoritarian devices of legitimation, i.e., the majority of one political group represented in the Constituent Assembly, is bound to produce a partisan and defective product that is devoid of legitimacy and public support. There was no 'constitutional conversation' involving society at large, including most importantly minorities in a plural society that could have articulated the constitutional aspirations of the people as a whole. The absence of a reflective, deliberative process, disallowing stake-holding and thereby partnership, was bound to generate a grotesque constitutional document that any group outside its legitimating majority was free to discard. This is, in fact, what happened to the vaunted exercise in 'autochthony.' The Federal Party recreated itself as the Tamil United Liberation Front (TULF) and at its convention in Vaddukoddai in 1976 adopted the now famous resolution calling for a separate Tamil

State in the Northeast of the Island, and went on to win all of the seats in the Northeast in the 1977 general elections on a platform for secession.

Quite apart from the empirical failure of autochthonous constitutions and constitution-making in Sri Lanka, there are also profound conceptual challenges posed by the manner in which the assertion of autochthony was executed. The Constitution of 1972 is often mis-described as the first 'Republican' Constitution of Sri Lanka. Certainly in the most superficially formal or descriptive sense, the Constitution of 1972 is republican: there is no monarchical sovereign at the head of the country. But if the normative requirements of genuine republicanism are to be applied to the circumstances of its creation, it is clearly apparent that the State created by the Constitution of 1972 is no republic at all.

The best exposition of modern republican government is perhaps to be found in the debates framing the American Constitution in the late 18<sup>th</sup> century, in particular Madison's definition in Federalist No. 10 of republicanism approximating representative government in contradistinction to pure or direct democracy. The Indian Constituent Assembly deliberations of 1948 - 50 and the same in the South African experience culminating in that country's Constitution of 1996 build upon and enrich this intellectual tradition of republicanism. All of these examples fit with the concept of liberal democracy delineated at the outset.

For our purposes, the essence of the Madisonian view of republican government is that it denotes government by elected representatives (i.e. representative democracy), framed by constitutional structures that insulate certain foundational aspirations and values beyond the normal reach of ordinary majorities. This is to be contrasted with the Jeffersonian vision that constitutions ought to be amendable by each succeeding generation so that the dead past does not constrain the living present. Madison's response was that such a concept of constitutionalism would undermine rather than strengthen democracy in the longer term, and argued that political power ought limited, structured and vested in institutions (to which representatives are elected for the purposes of government). That is, firm constitutional constraints are necessary preconditions of (not antidemocratic fetters on) sustainable democratic government. The great fear of demagoguery and factionalism usurping the inherent potential for good of democracy shapes the Madisonian (and perhaps even the Periclean) conception of republican democracy and constitutionalism. However, pluralism and diversity are seen as democratic strengths, not weaknesses, *provided* they are channelled through constitutional frameworks that promote deliberation in dispute resolution. This ensures that groups check each others excesses, promotes peaceful inter-group accommodation, and prevents exploitation particularly of minorities.

Thus the intuitive democratic notions of government by popular consent and will are significantly qualified by limits both on *what* government can do, as well as *how* it is to do what it is supposed to do. Therefore, normatively sound republicanism envisages, first, limited space for governmental action (placing certain matters above the reach of ordinary politics) and, second, counter-majoritarian safeguards in the way governmental decisions are made. Both these elements are central to Sunstein's more recent characterisation of constitutions as 'pre-commitment strategies.'

Applying these arguments to the process through which autochthony was exercised in Sri Lanka - the constitution-making process - is as much if not more important in the context of ethno-political pluralism, particularly when potential for conflict intensification was readily apparent in 1970 - 72.

In negotiating competing claims for political power in plural societies, especially when such negotiations are constitutional in nature, it is obvious that a constitution cannot be made that reflects the diversity of aspirations in a plural polity, where the process through which it is made is not participatory and inclusive. This failing is exacerbated where even indirect cognisance of the views of those not in the majority are disregarded. In failing in these respects, the Constituent Assembly process cannot be said to have legitimately created a Republic of Sri Lanka, because a constitutive ethnicity of the polity was not bound in allegiance to the new State. On the contrary, the article of faith that legitimacy flows inevitably from (democratically obtained) majoritarian power underpinning positivist legal frameworks appears to have blinded the architects of the 1972 Constitution to the possibility that their chosen course of action in fact negated the claim of republicanism and promoted illegitimacy and secession.

## The Constitution of 1978: Presidentialism

When the United National Party (UNP) swept into power on a five-sixth parliamentary majority (and 51% of the popular vote) in the general elections of 1977, a sea change in the political landscape occurred. The economy was to an extent liberalised and a new Constitution radically altering the institutional architecture of the Sri Lankan State was introduced in 1978. A stable executive unhampered by the vagaries of parliamentary majorities was the leitmotif of the new dispensation that established a strong executive presidency elected independently of Parliament. Based on this, two rationales were advanced for presidentialism. First, political (i.e., executive) stability was seen to be good for a long-term reformist economic policy that relied on open markets, deregulation and foreign capital. Second, it was argued that a presidency elected by the entire country as one electorate would give minorities greater leverage at the centre, since the essentially two party system in the South required that a winning candidate at a presidential election should garner the support of the minorities.

The Constitution of 1978 has been described by early optimists as the 'de Gaullist experimentation in Asia', which is problematic because some of the significant checks (including constraints imposed by convention) on the admittedly powerful executive in the constitutional dispensation of Fifth French Republic are absent in this scheme. It is more appropriately, though less excitingly, described as a 'hybrid' system that incorporates features of both the parliamentary and presidential forms.

The French Constitution is also hybrid compared to the pure presidentialism exemplified by the American Constitution. Notwithstanding that the key inspiration for J. R. Jayewardene as constitution-maker may have been de Gaulle's Bayeaux Declaration of 1946, the Constitution of 1978 only belongs to the same hybrid *category* as its French counterpart. It is emphatically not a reproduction and, furthermore, was unsupported by the deep traditions of constitutional conduct (in spite of Louis Napoleon Bonaparte, Marshal MacMahon and Petain) that, for instance, enabled the French to develop the notion of co-habitation in 1986 during the Mitterand presidency, and resulted in constitutional deadlock in similar circumstances in Sri Lanka in 2004.

The Constitution of 1978 went some way in addressing some of the defects of its predecessor, particularly by enshrining a chapter of fundamental rights capable of direct judicial enforcement against executive or administrative actions (but not legislative action) of the State. The new arrangements for the independence of the judiciary and the public service were marginally better than in the previous Constitution. It introduced the significant tool of minority accommodation in the form of proportional representation. In 1987, with much constitutional anguish, a scheme of limited devolution as an alternative to secessionism was also introduced under the aegis of an Indian facilitated (read enforced) settlement involving the governments of Sri Lanka, India and the Tamil militant groups. However, the unitary nature of the State and the supremacy clause for Buddhism were retained, and no regard was had to giving constitutional expression to federalist regional autonomy.

The new Constitution was introduced through the formula set out in the Constitution of 1972 for its repeal and replacement, but the deliberations were secretive (being conducted away from the public in a parliamentary select committee), and the governing party's majority so colossal that genuine participation by a debilitated Opposition was rendered nugatory. Interestingly, the TULF emerged with a clean sweep of the parliamentary seats in the Northeast, making it the largest group within the Opposition and entitling it to leadership of the Opposition. As mentioned earlier, the TULF campaigned for a mandate to establish a separate State in the general elections of 1977. Thus a rare opportunity for a serious engagement on a constitutional reformulation acceptable to all communities was presented at this juncture. In what has become a recurring theme in the political history of Sri Lanka since Independence, this opportunity was squandered. Again therefore, the imperatives of a genuine constitutional negotiation between constitutive groups in the polity were ignored, paving the way for ethno-political challenges to the legitimacy of the new State.

In a broader sense, the most pungent criticism of the Constitution of 1978 relates to its democracy deficit. It has given positive incentives to authoritarianism through an 'over-mighty' executive. The complete lack of structural balance between the three organs of government - an imbalance in favour of the presidency - has resulted in a culture of autocratic governance that renders Parliament almost irrelevant and the judiciary impotent. Besides, the arrogance of a massive parliamentary majority encouraged some of the worst assaults on whatever remnants of a culture of constitutional behaviour that remained. Accordingly, the judiciary was upstaged in the victimisation of political adversaries, political violence encouraged and in the most infamous example of excess, a referendum was used to extend the life of Parliament (and its five-sixth majority in favour of the government) in 1982. The

parliamentary majority was used for constitutional amendments for the most parochial reasons, for example, the abolition of the safeguard of fixed presidential terms by the Third Amendment (1982), and the prohibition on even the peaceful advocacy of secession by the Sixth Amendment (1983). Even subsequent presidencies, operating with more even-handed distributions of parliamentary representation after 1989 when proportional electoral representation commenced, have amply demonstrated the potential for authoritarianism entrenched in the presidency of the Constitution of 1978. In sum therefore, the Constitution of 1978 aggravated the political alienation of minorities, and debilitated democracy by centralising and concentrating political power in a single institution.

Given this experience, it is unsurprising there is widespread cavilling that the executive presidency is the bane of democracy in Sri Lanka, and that its abolition (and reversion to the Westminster model) is the panacea. To the extent that the critique is about the particular form of presidentialism provided by the Constitution of 1978, the assessment is unassailable. However, if the critique is to the effect that presidentialism *per se* is detrimental to constitutional democracy, then it is clearly not valid.

The great political arguments for presidentialism, such as those to be found in Bolivar's Angostura Address of 1819 and de Gaulle's Bayeaux Declaration of 1946 - echoed by J. R. Jayewardene in a seminal speech in Colombo in 1969 - revolve around the themes of stability, strong leadership and direction as the beneficial features commending the presidential form of government to the maelstrom of democratic politics. There is also a recurrent sub-theme of patriotism and appeals to the *zeitgeist* of the nation, in which the institution of the presidency is comparable to a constitutional monarchy, albeit elected by the people and exercising real political power.

The more attractive arguments in favour of presidentialism are, however, rooted in the doctrine of the separation of power in the works of Locke and Montesquieu, and articulated best by Madison in Federalist No. 47. The functional and organic separation of absolute power into the three distinct branches of executive, legislative and judicial competences, guaranteed by a Constitution of general application, ensures government according to law. That is, by restricting the three branches of government to constitutionally mandated spheres of competence it ensures that one branch cannot customarily override the others. Thus, the judiciary confines the legislature to its proper function under and within the Constitution, and holds the executive to account in its function of executing the laws made by the legislature. The executive is also precluded from dominating the legislature so as to validate its own actions. By nesting the entire scheme within the framework of a generally applicable supreme Constitution, Madison is at one with the Hayekian logic of the 'Constitution of Liberty.'

If the critiques of the executive presidency are properly relocated in the debate about future form of executive power of the people of Sri Lanka, then it is clear that the liberal democratic paradigm advanced by this essay would support a presidentialism that fragments political power at the centre and thereby promotes greater democracy. Moreover, if there is a federal future for the Sri Lankan State, a properly conceived presidency would be a valuable shared rule institution.

## **Future of Democracy: Challenges of Peace and Governance**

The discussion in the preceding section has attempted to critically review Sri Lanka's experience with democracy, through a focus on the institutional forms that have been in existence during that period. Based on this experience, it remains now to outline the prospects and possible future directions of democracy in Sri Lanka.

The ethnic conflict, at its root, is a question about the failure of the promise of democracy. The post-Independence State, grounded in majoritarian democracy, failed to ensure the fair participation of minorities in the political process. Furthermore, when majoritarianism began to be fuelled by Sinhala-Buddhist nationalism, the political relations of the State with minorities were ethnicised, and majoritarian arguments were employed to rationalise institutionalised discrimination, the minoritarian response was also in the language of ethno-nationalism. In this way, the conflict is not one simply about addressing minority rights, but is a clash of nationalisms conducted through military and political power, often with zero sum calculations at the extremes of the debate. Thus the democratic discourse has been replaced by ethno-political and military power as the medium of negotiation. To the extent that any possibility of a negotiated settlement exists in Sri Lanka at this juncture, the options of such a settlement will be dominantly informed by the power discourse within which the negotiation takes place.

A brief survey of the positions of the parties to the conflict proves the point. From the LTTE's perspective, a recommencement of direct discussions with the government must be on the basis of its proposal for an Interim Self Governing Authority (ISGA) of November 2003. While ostensibly a proposal for interim arrangements, the content of the ISGA proposals clearly reveals that it has as much to do with the LTTE's perception of the causes of the conflict and its armed struggle, and consequently, its conception of what the institutional structure of the Northeast will resemble in a 'final' settlement. The ISGA proposals have a solid ethno-nationalist foundation and therefore necessarily contain assertions that diverge from the liberal constitutionalist hypothesis of this essay.

The crux of the ISGA proposal is to found in Clauses 9 and 10, respectively relating to the array of legislative and executive power, described as 'Jurisdiction', and the assertion of inherent judicial power, described as 'The Separation of Power.' One of the causes of great outrage in the South is the power conferring general assertion in Clause 9 (1) that 'the ISGA shall have plenary power for the governance of the Northeast', with the operative term being the adjective 'plenary'. It then goes on by employing the term 'includes', to enumerate some of the more significant areas of competences such as revenue raising powers, law and order and land, within the panoply of authority denoted by 'plenary power'. The term 'includes' is also used in Clause 9 (2) to reclaim by way of an extension of 'plenary power', the powers and functions currently exercised by the government of Sri Lanka over the territory of the Northern and Eastern Provinces.

What does 'plenary power' mean in a legal and constitutional sense? 'Plenary' in a literal sense means without any limit, absolute. In the legal sense, it is the same as providing a Parliament with the power to legislate for the 'peace, order and good government' of a nation. As Jennings says in reference to the Soulbury Constitution, "...the phrase is the lawyer's way of stating absolute and complete power. Power to legislate on any subject whatever; it is a power as 'plenary and as ample as the Imperial Parliament in the plenitude of its power possessed or could bestow.'"

The notion of a legislative body that is vested with plenary power is redolent of that fundamental, indeed quintessential, doctrine of British constitutional law, the supremacy, the omnicompetence of Parliament. It is perhaps not surprising that these notions find expression in the ISGA proposal, given the fact that influential advisors in the drafting of the proposals are Tamil nationalists as they are distinguished constitutional lawyers from a generation familiar with the Soulbury Constitution and British constitutional doctrines. Indeed, Clause 8 of the ISGA proposal on the 'Protection of All Communities' is substantially formulated by reference to Section 29 (2) of the Soulbury Constitution. Nevertheless, the cause for consternation is that it is precisely this type of supremacist constitutional thinking and notions of illimitable power that buttressed Sinhala majoritarianism in post-colonial Ceylon and which led to the injustices at the root of the Tamil liberation struggle.

The LTTE objectives of framing Clauses 9 and 10 in this way seem to be two-fold. Firstly, to institutionalise the political facts of a standing army, police force, revenue raising capacity, informal control of the administrative machinery of the Northeast, and decision-making over land and resettlement. Secondly, by defining 'interim' in terms that are intensely political and exceptionally autonomous, to invert the negotiation and federalising process, seen by Southern eyes as an intra-State devolutionary exercise (a holding-together-federation), into a confederating exercise (a coming-together-federation).

The present government's position has evinced several stages of evolution. The initial reaction of the SLFP (then in opposition) was to reject the ISGA proposal as a blueprint for a separate State. The JVP also wholly opposed to even countenancing the document as a basis for discussion. Once the SLFP regained power as the UPFA, its position changed somewhat in reverting to an earlier stance that negotiations on the establishment of an interim administration for the Northeast were acceptable so long as they are accompanied by parallel negotiations on a permanent political settlement. The JVP however insisted on its position that a resumption of discussions based on the ISGA document represented an act of betrayal of the sovereignty and territorial integrity of the country.

It is to be noted that the structural proposals of the LTTE and the rejectionist response of the UPFA government both emanate from a preoccupation with sovereignty and territory: in other words, the raw discourse of politics as power. The tragic re-enactment of the same positional behaviour in relation to setting up a joint decision-making mechanism for post-tsunami reconstruction has also, unsurprisingly, resulted in a seemingly insurmountable deadlock.

The attitude of the JVP - significantly, as a partner in the UPFA government - has stalled any progress whatever being made with regard to responding in any meaningful way to the challenging articulation

of Tamil aspirations as expressed by the LTTE. To the extent that the JVP represents the hard line Sinhala nationalist constituency in the South, it is to be seen that that constituency is far from a lunatic fringe at the margins of mainstream politics. The uncompromising Sinhala nationalism the JVP exploits derives its sustenance as much from a collective consciousness as from general disenchantment with democratic politics to deliver on economic and social aspirations among the subordinate classes in the South.

The decrepitude of the older political parties and their inability to capture the imaginations of these groups - by far the most politically organised and mobile in the polity - does not portend a healthy democracy. This is because anti-LTTE sentiment is only one aspect of the JVP's worldview; it extends to anti-elitism, anti-globalisation and markets, anti-NGOs, and as an aspect of anti-federalism, a fixation with the centralised State. Its notion of democracy is disquietingly intolerant of perceived fetters to majoritarianism. During its recent stage of engagement in electoral politics (as distinct from its distant past of outright commitment to violent destruction of the constitutional State), it has demonstrated vitriolic hostility to constitutional obstacles such as proportional representation and procedural requirements of constitutional amendment, as well as to other perceived obstacles in the form of media and non-governmental institutions that hold views different to its own. What is noteworthy, of course, is not the presence of democratic disagreement on fundamental matters of public importance; it is that the JVP's rhetoric seeks to deny detractors the right to express disagreement, and sometimes even the right to exist. In this way, the JVP is, ironically, a wholly reactionary political force committed to the preservation of the *status quo* - the centralised unitary State, financially unviable State economic enterprises - and is thus unlike many reformist 'third forces' in two-party polities.

Apart from the conclusion of the Ceasefire Agreement (CFA) in February 2002, and the six rounds of talks that followed (most notably the third round in Oslo in December 2003, when in a rare moment of mutual sanity the parties agreed to a form of words that seemed to suggest that a federalist peace may be possible), the path taken by the peace process supports the proposition that neither side in the conflict (leaderships in both cases, but constituencies as well in the case of the South) have reached the conflux - Zartman's 'ripe moment' - necessary to undertake the negotiations of a fundamental nature regarding a resolution. Thus the unhappy prognosis must be that Sri Lanka is not heading in the direction a maturing liberal democracy promising peace and prosperity. Rather, Sri Lanka appears to be sinking down a vertiginous vortex towards the inexorable reality of a bifurcated polity dominated by ethno-nationalist totalitarianism on either side of the divide.

This poses an appalling prospect for the future of liberal democracy in Sri Lanka, not least because liberal democracy is the antithesis of the proposition that power is the *raison d'être* of politics. It is abysmal because serfdom comes as often from the barrel of a gun as it does through the majoritarian ballot box. In Sri Lanka at this point of time, both these possibilities are chillingly real.