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**The 1972 Republican Constitution in the
Postcolonial Constitutional Evolution of
Sri Lanka**



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“The old is dying and the new cannot be born; in this inter-regnum there arises a great diversity of morbid symptoms.” – Antonio Gramsci, *Prison Notebooks*.

K.M. de Silva writes in his *History of Sri Lanka*, “the survival of the Soulbury Constitution after 1956 was...not so much a matter of conviction as of convenience.”¹ Despite constant assaults on its integrity from a wide array of interests, it remained in force for twenty-five years. The new republican Constitution of 1972 was in some sense a radical departure. Sri Lankans had always felt disgruntled that their constitution was not a product of the nationalist struggles which had surrounded the drafting of the Indian Constitution. In addition they were acutely aware that the Soulbury Constitution still placed the English Queen as nominal head of state. The 1972 Constitution was in many ways a symbolic assertion of nationalism, twenty-five years after independence. This was manifested in the political rhetoric which heralded the new constitution as an ‘autochthonous’ constitution drafted by a Constituent Assembly. The Prime Minister, Mrs Sirimavo Bandaranaike, accentuated this in her July 1970 communication to the House of Representatives: “It is your unchallengeable right to set up a Constituent Assembly of our own, chosen by us and set up by us as a free, sovereign and independent people who have finally and forever shaken off the shackles of colonial subjection.”²

Though ‘autochthonous’ implied a national consensus-gathering approach, the provisions for the new constitution needed the plurality of votes of members of the House of Representatives. With an overwhelming victory in 1970, the United Front appeared to confuse the concept of mandate with that of consensus. By the end of the Constituent Assembly, the opposition parties had either walked out of the proceedings or expressed vehement dissent. As a result, the process was seen as a partisan affair,³ ushering in what Neelan Tiruchelvam called an era of ‘instrumental constitutions’ unilaterally imposed by the party with

¹ K.M. de Silva (1981) *History of Sri Lanka* (London: Macmillan): p.510.

² Quoted in J.A.L. Cooray (1973) *Constitutional and Administrative Law of Sri Lanka* (Colombo: Hansa): p.76.

³ K.M. de Silva, ‘Tale of Three Constitutions’ (1977) *Ceylon Journal of Historical and Social Studies* 7(2): p.ii.

the largest majority in any given election.⁴ Constitutions were seen to carry the aura of a party programme and therefore often lacked the legitimacy to become the fundamental law of the land.

Even though the drafters of the 1972 Constitution saw it as a radical departure, the changes envisaged in the constitution still embraced the notion of a constitutional democracy. Despite the coalition of nationalist, socialist, Trotskyite and Communist forces, the liberal concept of parliamentary democracy was never challenged. The words of J.B. Gent, “The principle of the British Government is an independent House of Commons. If that be safe, all is safe. If that be violated, all is precarious”⁵ seemed to apply with equal force to perceptions of the Sri Lankan House of Representatives. Though the 1972 Constitution called it the National State Assembly, it was essentially a House of Representatives, which embodied the sovereign will of the people. The notion of indirect participation through elected representatives was tacitly accepted as the form of democracy which was most practicable. Since the left coalition had won 115 of the 157 seats in Parliament, giving them a three-fourths majority necessary for any type of decisive action, there was little reason to doubt its efficacy. Interestingly, however, the SLFP, the major party in the coalition, won only 36.9 per cent of the popular vote as against 37.9 per cent won by the UNP opposition.⁶ The peculiar mechanics of an electoral system which gave weightage to certain areas, and which gave victory to the ‘first past the post’ had allowed for this type of representation. And yet, none of the parties in the spectrum from right to left had really questioned the validity of the process. Though the leftist parties had ideologically challenged the system as an instrument of bourgeois domination, from the inception, they had followed a strategy of using the structures of parliamentary democracy to their own advantage.⁷ Only the Janatha Vimukthi Peramuna

⁴ N. Tiruchelvam, ‘*The Making and Unmaking of Constitutions: Some Reflections on the Process*’ (1977) *Ceylon Journal of Historical and Social Studies* 8(2).

⁵ J.B. Gent (1775) *Political Disquisitions, or an Inquiry into Public Errors, Defects and Abuses* (London: Edward & Charles Dilly): p.1363.

⁶ Tiruchelvam (1977): p.22.

⁷ A.J. Wilson (1979) *Politics in Sri Lanka, 1947-1979* (London: Macmillan): Ch.4.

(JVP), which led the 1971 insurrection, was to deviate from this radical acceptance of the parliamentary system of democratic participation.⁸

Qualitatively, however, the actual nature of participation in Sri Lanka's democracy had some unsatisfactory features. Its operation in a developing society such as Sri Lanka was often perverse. In some instances, the feudal system of patronage which existed before independence, now merely shifted to the Member of Parliament. He became the provider of jobs, was symbolically venerated at all public functions, and was seen as the main vehicle for the advancement of individual ambition. Unlike the traditional feudal lords, he could be rejected every six years, but during the interim his will was seen to be sovereign. The extraordinary power of the Member of Parliament has only recently been chronicled in Sri Lankan social science literature. For example, in discussing the insurgency of 1971, Gananath Obeyesekere, writes:

“Since jobs are scarce, all competitive or open methods of recruitment have been abandoned and the government M.P. of the area is given tremendous power in these appointments...Very often the person who gets the job is a kinsman of the M.P. or one who has access to the patronage system through elite connections.”⁹

Nevertheless, the reverse dialectic, of a Member of Parliament becoming hostage to his clientele often at the expense of a macrovision of society, has been clearly recognised. Even though electoral participation had led to a Sri Lankan type of 'spoils system,' few were willing to question its fundamentals. It was tacitly accepted as the least dangerous alternative.

Though the skeleton of a liberal democratic form of government remained, the 1972 Constitution was to articulate in clear provisions the aspirations of cultural nationalism which had become a political norm. These attributes were parts of the

⁸ See, in this volume, L. Bopage, *Insurrection amidst Constitutional Revolution: The Janatha Vimukthi Peramuna (JVP) and the 1970-72 Constitution-making Process.*

⁹ Cited in Tiruchelvam (1977): p.23; see also A.C. Alles (1976) *Insurgency 1971* (Colombo: Colombo Apothecaries Co.): p.227.

constitution which were seen as non-negotiable. Buddhism was given ‘the foremost place’¹⁰ and Sinhalese was made the official language, with the use of the Tamil language guaranteed by statute.¹¹ Despite the protective and assertive legislation on behalf of the Sinhalese language, English continued to play a vital role. In many ways social and economic advancement continued to require a fluent knowledge of English. A linguist in analysing the role of a bi-lingual system of power has said that English is “impersonal, brassy, and powerful” and that native languages are often “freely improvised, intimate and a refuge of motherly care.” The juxtaposition of English with power and native languages with intimacy often creates a “subtle, yet painful distance” which leads to psychological and social disturbances.¹² A generation of Sri Lankans educated in the vernacular have yet to resolve the dislocation between their culturally induced aspirations and the realities of social and economic power. In addition, with English falling into disuse at the school levels and with the two ethnic communities being educated in their respective languages, the scope for communication and understanding between communities is narrowly limited. Though the assertion of linguistic nationalism may be seen as a progressive step away from colonialism, it has resulted in a dangerous segregation of communities. The younger generation of Tamils and Sinhalese can no longer communicate with each other. Finally, they receive different sets of information which are often conflicting, and which perpetually reinforce cultural prejudice and racial distrust.

The 1972 Constitution also enshrined the Buddhist faith as a state religion by granting the state an affirmative duty to protect and foster Buddhism.¹³ The other religions were only protected by the chapter on fundamental rights in the constitution and were therefore subject to certain limitations. The role played by Buddhism in the post-independence era found legitimacy as a non-negotiable constitutional provision. Buddhism became an

¹⁰ Constitution of Sri Lanka (1972): Section 6.

¹¹ Ibid: Section 7.

¹² P. Zwerg, ‘The Education of Richard Rodriguez’ *New York Times Book Review* 28th February 1982: p.1.

¹³ Constitution of Sri Lanka (1972): Section 6. See also, in this volume, B. Schonthal, ‘Buddhism and the Constitution: The Historiography and Postcolonial Politics of Section 6.’

essential aspect of political symbolism and the Buddhist clergy was given its reverential place in Sri Lankan society.¹⁴ And yet, for those who were privy to the Buddhist agitation of the 1950s, the constitution of 1972 appeared in many ways to limit the Buddhist influence to matters of the spirit. Unlike Burma, Sri Lanka remained secular in its modes of political and economic decision-making. Social scientists have analysed this combination of factors as being the Sinhalese Buddhist desire to separate westernisation from modernisation.¹⁵ The principles of rational economic organisation along with representative democracy were internalised as accepted norms for the governing of a modern nation-state. The Buddhist influence was most perceivable in the cultural life of the society and in the symbolism which is attached to political rhetoric.¹⁶ Since 2009, there have been attempts to move beyond the 1972 Constitution to make Buddhism a part of every aspect of life, including political life, but the drafters of the 1972 Constitution saw Buddhism in more symbolic terms. Nevertheless, this along with Sinhala being the sole official language caused consternation among the minority parties at that time and paved the way for Tamil politics to march toward separation.

The guiding principle which appeared to motivate the structural reforms of the 1972 Constitution was the search for ‘decisional mobility’ with which the political executive could accelerate socio-economic development. The checks and balances envisioned by the Soulbury Constitution appeared to obstruct decision-making, perpetuating a *status quo* of privilege and elite domination. There is little doubt that the voters in the 1970 elections expected the elected policy-makers to create mechanisms which would radically alter the stalemate created by the 1947 Constitution.

The instrument chosen by the 1972 Constitution to be the centre of decision-making was the National State Assembly or

¹⁴ For a detailed study, see U. Phadnis (1976) *Religion and Politics in Sri Lanka* (London: Hurst).

¹⁵ See M.A. Ames, ‘Westernization or Modernization: the Case of Sinhalese Buddhism’ (1973) *Social Compass: International Review of Socio-Religious Studies* XX(2): p.139.

¹⁶ *Ibid.*: p.143.

Parliament. It was conceived of as embodying the sovereign will of the people. The legislature would be the source of executive power as well as of judicial power through courts created by the National State Assembly.¹⁷ As Roberto Unger writes, “those governmental institutions closest to the citizenry and with the broadest scope for popular decisions must also be the ones to make the choices that involve most dramatically the lives and fortunes of the people.”¹⁸ By 1971, the composition of Parliament had undergone a transformation. As A.J. Wilson writes, “its membership (had) changed considerably from what it was in 1947 when it was first constituted.”¹⁹ Recruitment is more from the lower rungs of society, and members speak in Tamil and Sinhala. In comparing the social characteristics of the MPs who contested, Professor Wilson notes that despite the fact that leaders were still the well-educated members of the elite, “a fair number were unsophisticated villagers who never used a cheque book in their lives or even knew what a bank account was...”²⁰

The radical difference between the 1947 parliamentary elite and the MPs of 1971 was that the latter were unschooled in the customs and conventions which made Parliament the ‘self-restrained’ sovereign body of the people. They brought with them a sense of Parliament as an instrument to achieve certain ends. They were therefore easily manipulated by the party leaders in support of any Machiavellian scheme of power.

The republican constitution did not embody a concept of separation of powers as present in the U.S. Constitution. The executive was drawn from the National State Assembly and it had substantial ‘decisional mobility’ if it enjoyed the confidence of the House. Though Parliament was supreme, an executive enjoying the support of Parliament was all-powerful. Despite the heralding of parliamentary sovereignty in the 1972 Constitution, it may be said that, “Parliament had become more of an instrument for ratifying the decisions of the supreme policy-framing body, the Cabinet, than the forum where government and opposition would

¹⁷ Constitution of Sri Lanka (1972): Sections 3 and 4.

¹⁸ R. Unger (1981) *Politics* (unpublished), Harvard Law School: Ch.IV, p.118.

¹⁹ A.J. Wilson (1975) *Electoral Politics in an Emergent State: The Ceylon General Election of May 1970* (Cambridge: CUP): p.30.

²⁰ *Ibid*: p.72.

normally seek to accommodate each other.”²¹ This state of affairs aided by large parliamentary majorities would characterise Sri Lankan political life in the 1970s and 1980s.

In addition, the position of the parliamentary executive was augmented by the Public Security Ordinance, which gave it power to rule without accountability during times of national emergency.²² As nearly six of the eight years governed by the 1972 Constitution was a period of emergency power, this auxiliary source had become the norm of executive government. Under the 1972 Constitution, a declaration of emergency limited parliamentary scrutiny of executive acts, prohibited judicial review, and suspended the bill of rights protecting individual citizens. With the presence of extensive emergency power, the concept of ‘decisional mobility’ could easily be translated into the arbitrary use of state power.

The content and scope of the Sri Lankan Public Security Ordinance is extensive and emergency regulations have been regularly issued by governments for national emergencies ranging from guerrilla insurgency, to ‘security risks,’ to the cutting of rice rations, wage and cost of living allowances, and measures for agricultural and food production. In fact, an examination of past practice during the period of the 1972 Constitution and afterwards clearly indicates that the use of emergency regulations has been characterised by their manifest abuse.²³

With the singular rise to power of the parliamentary executive, the legislature as a collective institution began to play a diminishing role. Another reason for the decline in the importance of the legislature was that it had not ‘technologically’ come of age. It still gave the highest value to the rhetorician and the debater. Legislation was rarely scrutinised with regard to

²¹ Ibid: p.4.

²² There was nominal accountability to the President who was a symbolic head of state: Section 134 of the Public Security Ordinance (1947). Though this power was present before 1972, it was given constitutional sanction in the 1972 Constitution.

²³ See Wilson (1975) for a complete and thorough examination of the issues concerned.

necessity and impact. There were few statistics or information gathering services. The 1972 Constitution did not accept the concept of 'advisory' or 'consultative' committees aimed at preventing the House from becoming a mere 'voting machine.' It was expected that there would be more consultation between members of the House and Ministers of government. And yet, it did not address the issue of updating the processes of Parliament to increase informed debates and the understanding of complex issues which face a developing society. This 'technical gap,' therefore, not only qualitatively diminished parliamentary input into legislation but also prevented executive accountability with regard to a programme of action.

The 1972 Constitution was heralded by its drafters as an idealistic expression of a new, socialist era in Sri Lanka where the executive was accountable only to Parliament and therefore had the power to bypass any obstacles which may be placed before it by invidious vested interest groups. Quick 'decisional mobility' for the people and for rapid development was the general motto of the day. However, despite these laudable objectives, the legal concepts as expressed in the 1972 Constitution also appeared to serve some practical ends. With the governing party enjoying a three-fourth majority in Parliament, legislation could be passed without any effective checks on the abuse of power or the pursuit of government self-interest. The callous, instrumental use of institutions delegitimised important values and discredited government policy. The need to combine radical reform with political integrity still remains a major dilemma for a liberal system in a developing society.

The supremacy of the National State Assembly as envisaged by the 1972 Constitution naturally entailed a lessening of the powers of the other branches of government. The President remained a nominal head of state. But other aspects of the executive were radically transformed. The 1972 Constitution removed the notion of an independent civil service and brought the entire administrative structure of the country under the Cabinet of Ministers (Section 106). The argument put forward was that 'independence' and 'neutrality' were not possible in a rapidly developing society and thus the public service remained a partial instrument of the elite. However, instead of introducing a concept

of meritocracy that would have populist elements, the 1972 Constitution merely made way for the politicisation of the bureaucracy. Commentators have claimed that the republican constitution moved away from an independent public service but introduced a “spoils system.”²⁴ A powerful executive armed with a bureaucracy manned by sympathetic political cadres may have helped implement a well-defined party programme. At the same time, it bore the seeds of authoritarianism and a reckless disregard for issues of credibility and legitimacy in a political system.

The most crippled arm of government under the 1972 Constitution was undoubtedly the judiciary. There were ideological reasons for the government bias against the role of the judiciary in a developing society. Early Supreme Court decisions with regard to the right to property had convinced many progressive individuals that the judiciary would block progressive legislation aimed at accelerating change. As the 1947 Constitution had not produced a ‘rights consciousness,’ the concept of the judiciary as an instrument of social reform was not considered a valid possibility. Under the 1972 Constitution the traditional judiciary was denied scrutiny over executive action except in so far as to determine that executive action was not arbitrary and obeyed the principles of natural justice.²⁵ In addition, the traditional judiciary was denied jurisdiction to scrutinise the validity of laws passed by the legislature.²⁶ The task of constitutional scrutiny was given to a separate body appointed by the President, which remained aloof from the jurisdiction of the traditional judiciary. Like the French highest court, the Sri Lankan Constitutional Court was in many ways an advisor to the National State Assembly. Questions with regard to inconsistency with constitutional provisions were referred to it by the Speaker, the Attorney General or by a citizen within one week of when the notice was placed on the agenda of the legislature.²⁷ The Court was required to give its decision within two weeks of ‘the reference to the court.’²⁸ The short period of notice and the quick process for judicial decision-making combined to ensure that judicial

²⁴ De Silva (1977): p.7.

²⁵ Interpretation Act, No.18 of 1972.

²⁶ Ibid.

²⁷ Constitution of Sri Lanka (1972):Section 54,55.

²⁸ Ibid: Section 65.

review would not be a cumbersome process. In addition, though the decision of the Constitutional Court was binding, it could be overridden by a two-third majority in the National State Assembly.

This power of the National State Assembly to override the Constitutional Court and even the constitution reached what appears to be an absurd limit in Section 52(1) of the constitution. The National State Assembly was given the right to enact laws which were inconsistent with the constitution if passed with two-third majority. The existence of laws which were repugnant to the constitution appear to challenge the legitimacy of a constitution as the fundamental law of the land.

While common law trained jurists would find the swift procedure of constitutional adjudication somewhat jarring, the constitution made provision for even speedier decision-making. If the government 'in its discretion' decided that a Bill was 'urgent in the national interest,' the Bill had to be referred to the Constitutional Court within seven days of its publication and the Court was required to give its decision in twenty-four hours. The justification put forward was that urgent economic legislation would require this swift, flexible process. However, a study of the urgent interest legislation during the period 1972-1977 shows that it included a wide array of subjects, from monetary law to minor legislative details.²⁹

Though the urgency of national development may require a speedy process of constitutional inquiry, the procedure outlined in the 1972 Constitution appears extremely unsatisfactory. Most importantly, due to the *Kodeswaran Case*,³⁰ which challenged the Sinhala Only Language Act fifteen years after enactment, the 1972 Constitution prohibited the challenge of legislation after enactment.³¹ In many ways this accentuated the formal rather than technical aspect of law and judicial decision-making. The law was never to be evaluated in practice, only according to the

²⁹ Ibid: Section 55; see also S. Wickremesinghe (1977) *Emergency* (unpublished).

³⁰ *Kodeswaran v. Attorney General* (1969) 70 NLR 121.

³¹ Constitution of Sri Lanka (1972): Section 54(4).

language, text and plain meaning. The rather formalistic strait-jacket imposed on the judiciary by the 1972 Constitution made it appear even more technical, completely removed from national sentiments of justice and fair play. The 1972 Constitution in many ways forced the judiciary into a crisis of legitimacy from which it has yet to emerge. The fear of a ‘vested interest’ judiciary is a major preoccupation with progressive people in the developing world. However, the institutional reforms suggested by such documents as the 1972 Constitution substitute expediency for the creative formulation of institutions which will better serve the cause of justice.

Unlike the Soulbury Constitution, the 1972 Constitution did contain a bill of rights.³² But the limitation provision is the most interesting section in the chapter. It reads,

“The exercise and operation of the fundamental rights and freedoms provided in this chapter 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 public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy set out in section 16.” (Section 18(2))

In actual fact, neither the protections outlined in Section 18 (1) nor the limitations of Section 18 (2) were particularly relevant to the ‘emergency’ period during which the 1972 Constitution operated. And yet, it conveys an important ideological message. Without encouraging a ‘rights consciousness,’ progressive decision-making was to be paternalistic. Even after the removal of the right to property, individuals in society were to be denied their essential rights if these rights conflicted with government policy. The ideological justification put forward was that ‘rights’ were a bourgeois concept which only the middle classes would use to obstruct progressive legislation.³³ Yet, in many ways it reflected

³² Constitution of Sri Lanka (1972): Section 18(1).

³³ For e.g., in the Philippines, this was the justification for martial law see: G. Gunatilleke, N. Tiruchelvam & R. Coomaraswamy (1983) *Ethical Dilemmas of Development in Asia* (Lanham: Lexington): Chapter on Human Rights versus Basic Needs in the Philippines.

the strategies mapped out by progressives in South Asia. Influenced by the Russian model, they believed that change should be instituted top down by state institutions after the capture of state power. The notion of a 'rights conscious' populace pushing for reform through the courts on an individual or collective basis was considered utopian. As a result, along with the right to property, the 1972 Constitution removed the elementary safeguards that a liberal democracy gives to its citizens. In many instances citizens as well as the judiciary were impotent and could not even attempt to counteract some of the more blatant violations of human rights.³⁴

Despite the constant agitation of Tamil political parties, the 1972 Constitution enshrined the expectations of Sinhalese Buddhist nationalists without a single concession to the Tamil-speaking minority. The government which introduced the 1972 Constitution had its genesis in the Sinhala Only policies of the 1950s. During their time in opposition, they had strongly opposed any major concessions to the Tamil minority. Even the socialist and left-wing parties joined an organised public protest on the day the Tamil Language (Special Provisions) Act of 1958 was passed; an Act which allowed for 'the reasonable use' of the Tamil language. To them the Tamil protest movement was a 'reactionary cause' of a disenfranchised minority which had fallen from privilege. And yet the realities which had created these perceptions in the 1940s had greatly changed by the 1970s. In addition, cultural impressions had hardened into racial prejudice, reinforcing racial stereotypes.

The Tamil population was seen as privileged, regardless of class, caste or place of origin. As a result, the government was not ready to accommodate Tamil demands causing the Tamil political parties to walk out of the Constituent Assembly. In addition, the government introduced an administrative system of standardisation in higher education, limiting the number of Tamil students who could enter university to their percentage in the

³⁴ For a comprehensive report, see the Civil Rights Movement (1979) *People's Rights* (Colombo: CRM).

population.³⁵ Education had been the principal vehicle for Tamil social mobility and an important aspect of their cultural expectations. The policy of standardisation coupled with the government's complete disregard for their demands culminated in the growth of youthful political movements which were soon to use violence as a means of political expression. The extremity of the situation was highlighted in 1976 when the Tamil political parties united under one banner calling for a separate state of Tamil Eelam in the north and the east.³⁶ The 1972 Constitution was evidence to the fact that twenty-five years after independence, certain issues affecting ethnic relations had become divisive with each side drawing lines in the sand. Increased violence coupled with extreme political sensitivity to instruments of compromise and accommodation by the respective political leaders had made rational deliberation and a negotiated settlement a near impossibility.

Unlike the Soulbury Constitution, the 1972 Constitution had a well-defined approach to economic and social policy. The non-justiceable Principles of State Policy as set out in Chapter V appeared to provide guidelines for economic policy aimed at 'full employment,' 'equitable distribution of resources,' and 'collective forms of property,' which would attack privilege and prevent socioeconomic disparity.³⁷ Laissez-faire was constitutionally abandoned for socialist policies of equality. While in opposition, the United Front had organised itself along the lines of a Fabian Society, with seminars, open discussions, and an attempt to construct a common socialist programme.³⁸

In one sense, the constitution merely enshrined the spirit behind government policy since the 1950s. The socialist challenge to the liberal ideology of laissez-faire began during the balance of payments crisis of the late 1950s. The government had enacted

³⁵ See C.R. De Silva, 'The Impact of Nationalism on Education: The School Takeover (1961) and the University Admissions Crisis, 1970-1975' in M. Roberts (Ed.) (1979) *Collective Identities, Nationalisms and Protest in Modern Sri Lanka* (Colombo: Marga): p.474.

³⁶ See Vaddukkodai Convention 1976 in (1977) *Race Relations in Sri Lanka*, *Logos*, Vol.16 (Colombo).

³⁷ Constitution of Sri Lanka (1972): Chapter V, see Sections 16,17.

³⁸ Wilson (1975): p.39.

policies with regard to import control and import substitution. This naturally involved extensive state monitoring and control of the economy. The break with laissez-faire economics was, in many ways, symbolised by the 1964 nationalisation of petroleum distributors prompting the United States to use the Hickenlooper Amendment to cut off aid to Sri Lanka.³⁹

The expansion of the public sector and the growth of a controlled economy soon led to a concentration of economic decision-making in the executive. Exchange control, import regulations, tax legislation, rationing, etc., were to characterise economic regulation from 1956 to 1977. Public law and administrative regulation were to be used as the primary instruments for the control of the economic sector. This increase in public sector activities merely reinforced the belief that a strong executive was absolutely imperative in a developing society. In addition, the social welfare network was sanctified as a political norm. The 1972 Constitution gave voice to all these aspects in the chapter on Principles of State Policy. However, it could be argued that it also reinforced the evils of paternalism. The state assumed managerial responsibility for a wide array of activities. These services were administered in a centralised, top-down manner: the dominant technocratic approach of the times. This often left room for inefficiencies, and abuse of discretion. It may have also accentuated the importance of certain social values, such as dependence over production and passivity over participation.⁴⁰

The 1972 Constitution also reflected the national dissatisfaction with the private sector. This sector which had not galvanised development in the early 1950s was looked upon with some suspicion. An added reason for this distrust was the perception that the private sector was dominated by foreigners and privileged members of the minority.⁴¹ As a result, while Sri Lanka's neighbours in South East Asia were devising mechanisms for private sector incentives to spearhead development, Sri Lanka

³⁹ The Hickenlooper Amendment: Section 620(e) Foreign Assistance Act of the United States as Amended, Pub. 2. Nos. 88-633, Section 301 (a) (4) 78 stat 1013.

⁴⁰ For a detailed study see, Marga Institute (1977) *Welfare and Growth* (Colombo: Marga).

⁴¹ De Silva (1981): pp.519-23.

was preoccupied with limiting its area of activity. This was also augmented by a supreme contempt for foreign investment. By 1977, the tax laws regulating foreign investment had led to an effective tax rate of 88 per cent.⁴² In addition, the laws governing private sector activity remained unchanged, many of them dating back to the 1800s. It must be recognised, however, that in certain export industries the government did turn a blind eye to the ‘evils’ of capitalism.⁴³

The 1972 Constitution in effect replaced laissez-faire economics with a preference for a planned economy. However, the dismal failure of the Five Year Plan with its expectation of a 6 per cent growth rate and a 52 per cent contribution from the private sector called into question the veracity of the planning process.⁴⁴ The experience of the 1972 regime exemplifies the difficulties that face a government which attempts to govern a developing economy primarily through the use of state power.⁴⁵

The government which drafted the 1972 Constitution was pledged to radical economic reform and the Principles of State Policy were to provide the guidelines for such reform. There were four major pieces of legislation, which reflected this new ideology. The first was the creation of a Criminal Justice Commission to deal with currency offences and the black market. Economic crimes were seen as acts against the state, akin to treason. The second was the Land Reform Act of 1972 which attacked the primary basis of privilege in Sri Lanka, land-holding. It was noted that in 1971, 5,500 landowners owned 1.2 million acres. This was augmented by the Land Acquisition Act, which permitted the state to utilise private property for public purposes, and the Agricultural Productivity Act, which set standards of productivity with the threat of confiscation. Foreign investment in tea and other plantation industries were nationalised in 1975 and its

⁴² This was calculated with reference to income tax, business turnover tax, and repatriation tax. In Sri Lanka at the time, foreign investment required administrative approval, leaving room for control and abuse of discretion.

⁴³ For e.g., the creation of Ceylon Rupee Accounts to help the gem trade: see Budget Speech of the Finance Minister, 1974-1976.

⁴⁴ S. Ponnambalam (1980) *Dependent Capitalism in Crisis* (London: Zed Books): pp.135-42.

⁴⁵ Wilson (1975): p.185

management were transferred to state corporations. Thirdly, the government established a ceiling on disposable incomes, enforced compulsory savings⁴⁶ and imposed harsh tax rates (nearly 75 per cent) on the high-income brackets. The concept of 'economic crime,' the assault on privileged landholding, and the crushing of the activities of the elite, were the foundation of government policy on redistribution. Fourthly, the government enacted the Business Undertakings Acquisition Act of 1972 which empowered the state to takeover any business concern which employed more than 100 people if such acquisition was in the public interest.

However, despite these policies of radical redistribution, actual implementation of such policies exposed the limitations of such an approach. For example, if one analyses implementation of the Land Reform Act, it was noted that the government acquired 563,400 acres; one-third of this land was uncultivated, probably because of unprofitability, and one-fourth were estate lands. Only 1.2 per cent of the lands confiscated were paddy lands of the variety which is connected with 'the economic and political power of the village.' If one analyses the receivers of this land, 28 per cent went to co-operatives run by local MPs.⁴⁷

The policies of redistribution were, also, not matched by economic growth or increased national production. In fact the period of the 1972 Constitution were years of economic decline. Low growth, lack of production, high unemployment, and serious balance of payment deficits characterised the supply side of Sri Lankan economic life.⁴⁸ In addition, the population boom of the post-war period had led to an increase in demand for consumption, employment and higher education.⁴⁹ The Principles of State Policy never attempted to address the question of production and dynamic change. Yet it is now understood that

⁴⁶ See R. Coomaraswamy & S. Kadirgamar, '*Some Reflections on the Ideology of Law in Sri Lanka*' (1980) (unpublished), (Colombo: Marga): p.11, for a description of all these laws.

⁴⁷ Ponnambalam (1980): p.116.

⁴⁸ This has been the subject of much commentary. The Central Bank Annual Reports, 1972-1977 are the best primary sources for data. For e.g., the growth rate averaged around 3 per cent and the U.N. classified Sri Lanka as part of the Fourth World. See also Wilson (1979): Ch.3.

⁴⁹ De Silva (1981): p.538.

redistribution without growth often leads to a general sense of stagnation and closure in a developing society.

The chapter on Principles of State Policy nevertheless constituted an important aspect of the 1972 Constitution. Though the policies were non-justiceable, the chapter was often used to deny fundamental rights and freedoms in certain specific instances. As it envisaged a top-down approach to socialist development, there was no encouragement of criticism or participation in government decision-making. As a result, it became impossible to separate issues of abuse of power from problems of 'decisional mobility,' and questions of radical economic reform from the irrational planning of a developing economy.

Unlike the 1947 Constitution, the constitution of 1972 provided an easy process for amendment and self-revision. A Bill introduced into Parliament stating that it is a constitutional amendment and passed by a two-third majority was all that was needed to amend the constitution. As a result, as soon as a new government came into power, in 1977, it introduced a presidential system (through the Second Amendment to the 1972 Constitution). Indian case law with regard to the fact that an amendment could not change the basic structure of the constitution was apparently not considered relevant.⁵⁰ This easy amendment process may have had a 'self-revising' content, but it also served to accentuate the 'instrumental' nature of modern Sri Lankan constitutions.

After the 1972 Constitution was drafted and during the period of administration, it became evident that top-down policies cannot be the exclusive tool for growth and development. The government therefore added an administrative scheme of District Divisional Councils. All members were appointed by the executive, and it was expected that these councils would aid the government in implementing certain projects. However, despite the institutional framework, 21 per cent of the projects were 'non-

⁵⁰ See the debate on the Forty-Second Amendment to the Indian Constitution in H.M. Seervai (1979) *Constitutional Law of India*, Vol.III (Bombay: Tripathi).

starters.’ Lethargy and political interference prevented the effective use of the scheme.⁵¹

In addition, despite the rhetoric of radical change, political parties and political institutions continued to be controlled by an exclusive group of select individuals. As Janice Jiggins writes,

“Yet it is notable that despite universal franchise, parliamentary procedures, frequent transference of power at peaceful elections in an increasingly two party system and the emergence of the populist policies of post-1956, the grip of a few families on place and power in Sri Lanka has been diluted only marginally.”⁵²

The drafters of the 1972 Constitution attempted to forward radical economic and social reform within a liberal democratic framework. In attempting to bridge this gap it was likely that they would fall between two stools. The brutally violent insurrection of 1971 by youthful members of a radical left movement pointed to the fact that their reforms were not considered radical enough. In addition, the concentration of economic and political decision-making in an executive which was often tempted to abuse discretion alienated the government from the more enlightened members of the upper classes. The deep suspicion of markets and the private sector prevented natural engines of growth being developed in society.

There is a widespread belief that radical reform cannot be achieved with democratic participation, and that the failure of the 1972 Constitution is an example of radicalism being destroyed by ‘bourgeois’ concerns. Though the constraints posed by the economic and social conditions were formidable, one cannot escape the conclusion that the failure was also due to the strategy adopted by the United Front. After the collapse of election euphoria and the drafting of general constitutional principles, they had no programmatic vision to institutionalise their proposals in a

⁵¹ Ponnambalam (1980): p.114.

⁵² J. Jiggins (1979) *Caste and Family in the Politics of the Sinhalese 1947-1956* (Colombo: K.V.G. de Silva): p.96.

fair and just manner. Recent experiments such as the one by President Lula da Silva of Brazil prove that an emphasis on practical programmes which harness both the market and enabling state power have the capacity to succeed. Roberto Unger writes that the lack of a ‘programmatic vision’ to implement socialist principles always leads to frustration and withdrawal:

“Whenever a factional program combines a vagueness of definition with intensity of feeling, it easily becomes hostage to whatever specific interpretations of its murky promises may, for wholly secondary reasons, come to prevail.”⁵³

The 1972 Constitution cut the ties of colonial rule and made Sri Lanka a truly independent nation. However, it was a precursor to all the travails that would plague Sri Lanka for the next generation: divisive ethnic politics, instrumental use of institutions, abuse of emergency powers, and state control and distrust of the markets. By not working toward a consensual document and by unilaterally imposing a constitution, the drafters of the 1972 Constitution also created a precedent for future governments to do the same. They failed to ensure that their constitution was a social contract which would stand above partisan interests, where all citizens and communities would claim ownership. Perhaps the Marxist roots of the visionaries of the period prevented the drafters from subscribing to the idealism of liberal democratic principles, seeing institutions and laws as merely instrumental in the implementation of the party programme.

⁵³ Unger (1981): p.133.