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## **The Failure of Jennings’ Constitutional Experiment in Ceylon: How ‘Procedural Entrenchment’ led to Constitutional Revolution**



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## Introduction

When the United Front (UF)<sup>1</sup> won a landslide victory of over a two-thirds majority in Parliament in the general election of May 1970,<sup>2</sup> the stage was set for radical constitutional changes that would signify the end of an era and the beginning of another, or to put it more dramatically: the death of Ceylon and the birth of Sri Lanka. In its election manifesto, the UF had sought a mandate to repeal and replace the constitution under which independence had been granted (known as the Soulbury Constitution) with a republican constitution. The manifesto also indicated that such a sovereign and independent constitution would be drafted and enacted by a Constituent Assembly separate from Parliament, signifying an exercise of popular sovereignty, effecting a complete break with the colonial past. The UF manifesto sought a mandate for these constitutional changes in the following terms:

“We seek your mandate to permit the Members of Parliament you elect to function simultaneously as a Constituent Assembly to draft, adopt, and operate a new Constitution. This Constitution will declare Ceylon to be a free, sovereign and independent Republic pledged to realise the objectives of a socialist democracy; and it will also secure fundamental rights and freedoms to all citizens.”<sup>3</sup>

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<sup>1</sup> A coalition comprising chiefly of the Sri Lanka Freedom Party (SLFP), and the two main Marxist parties, the Lanka Samasamaja Party (LSSP) and the Communist Party of Ceylon (Moscow Wing).

<sup>2</sup> The UF won 115 of the 151 elected parliamentary seats of the last Parliament under the Soulbury Constitution at the general election of 27<sup>th</sup> May 1970. See for a psephological account of this election, A.J. Wilson (1975) *Electoral Politics in an Emergent State: The Ceylon General Election of May 1970* (Cambridge: CUP).

<sup>3</sup> Cited in M.J.A. Cooray (1982) *Judicial Role under the Constitutions of Ceylon / Sri Lanka: An Historical and Comparative Study* (Colombo: Lake House): p.218; J.A.L. Cooray (1995) *Constitutional and Administrative Law of Sri Lanka* (Colombo: Sumathi): p.59.

Since 1964, the UF had brought together the principal adversaries of the Soulbury Constitution: sections of the Sinhala-Buddhist nationalist constituency, represented in and by the SLFP, who desired a more unequivocal expression of their primacy in the polity within the constitutional architecture of the state, and the Marxist Left which sought a new constitutional instrument that both expressed and facilitated the establishment of a socialist state in Sri Lanka. The cohering element in the unity of these otherwise disparate forces was a commitment to a political executive empowered to implement a socialist and nationalist ideological agenda without inconvenient constitutional impediments. In terms of constitutional substance, this entailed a preoccupation not only with the state as a tool of ideological social transformation, but also with the spatial and institutional centralisation of the political power and the legal authority of the state.

They were also united by what was then a pervasive sentiment in the decolonising world, an anti-imperial nationalism, which in terms of constitutional change translated into a commitment bordering on fervour to a complete break with all colonial institutions and appurtenances that had survived the grant of independence, and to this end, to effect constitutional change by revolutionary methods which would symbolically affirm the completeness of that rupture.

In this chapter, I revisit the one of the constitutional arguments that featured in the political debates of the 1960s, which led to the deliberate choice of a revolutionary process for constitutional change in order to establish the Sri Lankan republic in 1972. The justification of the need for a revolutionary process, that is, one that departed from the amendment procedure set out in the Soulbury Constitution (and therefore technically illegal) centred to a very large extent on the nature and scope of Section 29 of that instrument. While there were even at the time broadly two schools of thought with regard to Section 29, the interpretation that prevailed was

the one that held that it contained substantive (as opposed to procedural) restrictions on legislative power, rendering parts of the Soulbury Constitution absolutely unamendable. In addition to the view that elements of Section 29 were unalterable in perpetuity, other concerns raised at the time included doubts as to whether the Ceylon Independence Act 1947 (as one of the imperial instruments constituting the Soulbury Constitution) could be repealed by either the UK or Ceylon Parliaments, or whether the fundamental reconstitution of Parliament involved in becoming a republic by removing the monarch from the composition of Parliament was permissible.<sup>4</sup> This chapter only concerns the debate concerning Section 29.

Through a closer examination of the provision's textual formulation, its explicatory case law, the prevalent academic views on it, and in particular, through giving greater weight to the theoretical dispositions of its creator, Sir Ivor Jennings, than has hitherto been given, I present here a revisionist argument that suggests that one of the theoretical bases of the justification for a legal revolution was erroneous.<sup>5</sup> My argument rests on the centrality of the theory of 'manner and form' entrenchment to a more

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<sup>4</sup> See L.J.M. Cooray(1971) *Reflections on the Constitution and Constituent Assembly* (Colombo: Hansa): Ch.VIII, esp. pp.120-6 for a recapitulation of these contemporaneous legal concerns.

<sup>5</sup> I have elsewhere suggested that the revolutionary path to constitutional reform was determined by Marxist anti-imperialist ideological considerations, and that the legal arguments presented by UF spokespersons, in particular Dr Colvin R. de Silva, with regard to Section 29 were tailored to facilitate that predetermined ideological course of action. I have also discussed the historical, political and constitutional implications of this course of action in the context of ethnic and religious pluralism, and do not rehearse those observations here. See A. Welikala, 'The Sri Lankan Republic at Forty: Reflections on the Constitutional Past and Present' *Groundviews*, 25<sup>th</sup> May 2012, available at: <http://groundviews.org/2012/05/25/the-sri-lankan-republic-at-forty-reflections-on-the-constitutional-past-and-present/>. See also, in this volume, N. Jayawickrama, 'Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective', and K. David, 'The Left and the 1972 Constitution: Marxism and State Power'.

accurate understanding of Section 29, within a broader subscription to liberal democratic assumptions about constitutional – as opposed to parliamentary – supremacy and the limitation of political power.

One of the underlying implications of this argument is that such liberal constitutionalist attempts to discipline and order democratic politics and power through the constitution, in the context of an entrenched majoritarian political culture of procedural democracy – further charged with the potency of the dominant Sinhala-Buddhist nationalism<sup>6</sup> – only exacerbated the conviction among opportunistic elites for doing away with constitutional limitations standing in the way of naked majoritarianism. The 1970-72 republican constitution-making process was in this sense the first historical instance and demonstration of the dangers presented by populist majoritarianism to the constitutional state, and in the light of recent measures like the Eighteenth Amendment to the 1978 Constitution (2010),<sup>7</sup> this is a matter that continues to haunt our political and constitutional culture.

The chapter is structured in the following way. I first present an account of the circumstances in which the Soulbury Constitution and more particularly Section 29 were drafted, together with some reflections on that process and its contribution to subsequent perceptions of illegitimacy of the constitution. This historical context is critical to understanding post-independence political

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<sup>6</sup> See A. Welikala, 'The Devolution Project in Sri Lanka: Towards Two Nations in One State?' in R. Edrisinha & A. Welikala (Eds.) (2008a) *Essays on Federalism in Sri Lanka* (Colombo: CPA): Ch.III; for more sophisticated accounts see, in this volume, M. Roberts, 'Sinhaleseness and its Reproduction, 1232-1818'; D. Rampton, 'A Game of Mirrors: Constitutionalism and Exceptionalism in a Context of Nationalist Hegemony'; R. de Silva Wijeyeratne, 'Republican Constitutionalism and Sinhalese Buddhist Nationalism in Sri Lanka: Towards an Ontological Account of the Crisis of the Sri Lankan State.' <sup>7</sup> See the essays in R. Edrisinha & A. Jayakody (Eds.) (2011) *The Eighteenth Amendment to the Constitution: Substance and Process* (Colombo: CPA).

debates concerning the scope and meaning of Section 29, especially the motivations of detractors of the Soulbury Constitution, and therefore I have devoted some detailed attention to this aspect. Moreover, as a matter of historical reconstruction, it seeks to restore the due weight that must be given to Jennings' involvement in the formulation of the scheme of entrenchment that was eventually reflected in Section 29. The failure or refusal to acknowledge the influence of 'manner and form' theory on Section 29 has resulted in a distorted understanding of its purpose and scope, which, nevertheless, constituted the basis of the constitutional revolution.

Those who are familiar with the historical circumstances of the run up to independence may wish to proceed directly to the following sections, in which I discuss the main views on Section 29 as expounded by the Supreme Court of Ceylon and the Privy Council, the opposing views on it taken by the centre-right government and the centre-left opposition in the late 1960s, and then the more important academic views that have been expressed. Finally I present my alternative view on the procedure established, and the nature and extent of the limitations placed, by Section 29 on the legislative competence of the Parliament of Ceylon to amend the Soulbury Constitution. I reject the view that the Soulbury Constitution imposed any *absolute* limitations on legislative power, or put another way, that it contained by provision that was 'unalterable' in perpetuity, inasmuch as a legal revolution was required for its repeal and replacement in the establishment of the republic.

### **The Path to Independence: The Making of the Soulbury Constitution**

The central theme of Ceylonese politics in the first half of the twentieth century was the debate about constitutional reform. While the nature and substance of this debate

evolved from primarily one of more Ceylonese legislative representation in the government of the Crown Colony to greater responsibility for self-government, that Ceylon would become independent as a Dominion of the British Commonwealth was not apparent until the last possible stage prior to 1948.<sup>8</sup>

In May 1943, in response to political developments on the island, the British government made a statement of policy (which came to be known as the Declaration of 1943) which announced that it was committed to granting full responsibility for government under the Crown in all matters of civil administration while reserving defence

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<sup>8</sup> K.M. de Silva (2005) *A History of Sri Lanka* (Colombo: Vijitha Yapa): Chs.32, 33; W.I. Jennings (1946) 'Ceylon: Inconsequential Island', *International Affairs*, Vol.22, No.03 (July 1946): pp.376-388; W.I. Jennings (1949a) 'The Dominion of Ceylon', *Pacific Affairs*, Vol.22, No.01 (March 1949): pp.21-33; W.I. Jennings (1949b) 'The Making of a Dominion Constitution', 65 *Law Quarterly Review* 456-479; W.I. Jennings & H.W. Tambiah (1952) *The Dominion of Ceylon: The Development of its Laws and Constitution* (London: Stevens & Sons): Ch.3; W.I. Jennings (1953) *The Constitution of Ceylon* (3<sup>rd</sup> Ed.)(Oxford: OUP): Chs.1, 2, 3; Cooray (1995): p.34 et seq.; W.I. Jennings (2005) *The Road to Peradeniya: An Autobiography* (Colombo: Lake House / London: Institute of Commonwealth Studies): Ch.XI; L. Marasinghe (2007) *The Evolution of Constitutional Governance in Sri Lanka* (Colombo: Vijitha Yapa): Ch.4; R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) *Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: CPA): Ch.6; J. Darwin (1988) *Britain and Decolonisation: The Retreat from Empire in the Post-War World* (London: Macmillan): pp.101-106; D.J. Morgan (1980) *The Official History of Colonial Development: Guidance Towards Self-Government in British Colonies, 1941-1971*, Vol. 5 (London: Macmillan): pp.68-77. See also the wealth of detailed material in two compendia: K.M. de Silva (Ed.) (1997) *Sri Lanka: The Second World War and the Soulbury Constitution, 1939-1945* (Part I) and *Sri Lanka: Towards Independence, 1945-1948* (Part II) in S.R. Ashton (Gen. Ed.) (1997) *British Documents on the End of Empire* (London: The Stationery Office): Ser. B, Vol.2; and M. Roberts (1977) *Documents of the Ceylon National Congress and Nationalist Politics in Ceylon, 1929-1950* (Colombo: Department of National Archives): Vols.I-IV, esp. Vol.III.

and external affairs to the Crown, after the war was over.<sup>9</sup> Apart from the unequivocal ruling out of any further constitutional reforms until after the war was over, what the British government meant by this was made clear in a confidential Cabinet paper by the Secretary of State for the Colonies in the following terms: "...the proposals do not include the right of secession. Thus constitutionally, Ceylon while not attaining full Dominion status, would very much be in the position occupied by Southern Rhodesia."<sup>10</sup>

That what was being contemplated was not full Dominion status was not known to the Ceylonese leadership, which whilst entertaining certain reservations about the content of the Declaration of 1943, resolved to produce a draft constitution on the basis of its principles. The 'Ceylonese leadership' for the purpose of this exercise meant the Board of Ministers functioning under the Donoughmore Constitution of 1931, but in reality, it was driven almost exclusively by the dominant personality of the Rt. Hon. Don Stephen Senanayake, P.C., later to become first Prime Minister of independent Ceylon, assisted by a small group of political confidants and legal advisors among whom were Professor (later Sir) Ivor Jennings, then Vice Chancellor of the University of Ceylon, and O.E. (later Sir Oliver) Goonetilleke, then Civil Defence Commissioner, later Governor-General of Ceylon.<sup>11</sup>

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<sup>9</sup> 'Ceylon Constitution': War Cabinet Memorandum by Mr Oliver Stanley, Secretary of State for the Colonies, Annex: Amended Reforms Declaration, CO 54/980/13, No.8, WP (43) 204, 15<sup>th</sup> May 1943, reproduced in de Silva (1997, Part I): Doc.No.169, p.262.

<sup>10</sup> Para.8 of 'Ceylon Constitution': War Cabinet Memorandum by Mr Oliver Stanley, Secretary of State for the Colonies, CO 54/980/13, No.1, WP (43) 129, 27<sup>th</sup> March 1943, reproduced in de Silva (1997, Part I): Doc.No.161, p.246. See also de Silva (2005): p.559.

<sup>11</sup> See L. Marasinghe, 'Sir William Ivor Jennings (1903-1965)' in Law & Society Trust (2005) *Legal Personalities – Sri Lanka* (Colombo: LST): Ch.VIII at p.298; A.W. Bradley (2004) 'Sir William Ivor Jennings: A Centennial Paper', *Modern Law Review*, Vol.67, No.05 (September 2004): pp.716-733 at p.728; Jennings (2005): Ch.XI; C.



The Declaration of 1943 established the broad substantive parameters for the development of a new constitution and an important procedural requirement. In form, the future constitution would be based on the Westminster model of parliamentary Cabinet government like the other Dominions and would abandon the unique institutional structure of the Donoughmore arrangement.<sup>12</sup> Substantively, on all except the matters reserved to the Crown, responsibility for the administration of the country would be vested in a parliamentary executive. The most important matters reserved for the Crown included the personal prerogatives, defence and external relations. Significantly, it was also envisaged that legislation affecting religious or communal minorities would be reserved for discretionary assent. The procedural requirement set out in the Declaration of 1943, designed to ensure that any putative constitutional scheme had the consent of the minorities, was that such a proposal should gain the approval of no less than three-fourths of the members of the State Council (as the Donoughmore legislature was called). This was higher than the two-thirds majority required for legislation involving ‘important questions of principle’ set out in Article 80 of the Donoughmore Constitution.<sup>13</sup>

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Jeffries (1969) *OEG: A Biography of Sir Oliver Ernest Goonetilleke* (London: Pall Mall Press).

<sup>12</sup> On the Donoughmore Constitution and its innovative attempt at constitutional social engineering, see M. Wight (1946) *The Development of the Legislative Council, 1906-1945* (London); J. Russell (1982) *Communal Politics under the Donoughmore Constitution (1931-1947)* (Colombo: Tissara); Edrisinha et al (2008): Ch.2; Marasinghe (2007): Ch.3.

<sup>13</sup> Article 80 of the Ceylon (State Council) Order-in-Council of 1931, read: “When the Governor is of opinion that any bill introduced or about to be introduced into the [State] Council involves an important question of principle, he may at any time before the votes of members upon the third reading of the bill have been taken, communicate such opinion to the Council by message to the Speaker, and may require that the bill shall not be presented to him for his assent unless at any reading subsequent to that requirement it shall have been passed by a two-thirds majority of all the members of the Council, excluding the Officers of State and the Speaker or other presiding member.” This is

The Ministers' Draft Constitution<sup>14</sup> prepared on the basis of these principles was submitted to the British government in February 1944. It was in form an essentially Westminster-type scheme, but with certain limitations on legislative power. In respect of the minorities, the Ministers' Draft envisaged two major devices. The first was a scheme of weighted representation for Tamil majority areas whereby in addition to the allocation of parliamentary seats on the basis of population, the Northern and Eastern Provinces would be allocated an additional number of seats in appreciation of their required representation and taking into account that the two provinces were sparsely populated. Secondly, the Ministers' Draft envisaged a general limitation on the legislative power of the future Parliament whereby a constitutional prohibition against discriminatory legislation (by ordinary legislative procedure) would be emplaced against any attempted majoritarian excess.

It was one of the terms of the Declaration of 1943 that any draft constitutional scheme produced by the Ceylonese Ministers would be considered by a 'suitable commission or conference' after the war. With the presentation of the Ministers' Draft, Mr Senanayake pressed for its immediate consideration,<sup>15</sup> and the British government announced the appointment of a commission to consider constitutional reforms in Ceylon in July 1944. However, the commission's terms of reference included the consultation of 'various interests, including the

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another example of procedural entrenchment in the Sri Lankan constitutional tradition, except that the complications associated with Section 29 of the Soulbury Constitution did not arise here because as a colonial legislature the State Council under the Donoughmore Constitution exercised neither sovereign nor plenary legislative power.

<sup>14</sup> Ceylon Sessional Paper XIV of 1944.

<sup>15</sup> In this Senanayake secured the support of not only Sir Andrew Caldecott, the Governor, and Admiral Sir Geoffrey Layton, the Commander-in-Chief of British forces on the island, but also, decisively, Lord Louis Mountbatten, Supreme Allied Commander, South East Asia Command, which was with the fall of Singapore, then based in Ceylon.

minority communities concerned with the subject of constitutional reforms in Ceylon,' which seemed to expand the scope of the commission beyond that which was held out in the Declaration of 1943.

In the face of rising minority anxieties, especially regarding the closed and tightly controlled manner (notwithstanding the substantive safeguards in its text), in which Senanayake had produced the Ministers' Draft, it is unlikely that the British government could have done any differently.<sup>16</sup> Senanayake took the position, in terms of the Ministers' interpretation of the undertaking given in the Declaration of 1943, that the proposed commission should be restricted to reporting on the Ministers' Draft, and that both its substantive minority protections and the three-fourths majority required for its adoption taken together were more than adequate protection for minorities' concerns. The British government overruled these objections, and in September 1944, announced the appointment of members of the commission chaired by Lord Soulbury.

Senanayake responded by officially withdrawing the Ministers' Draft and announcing a boycott of the Soulbury Commission. However, when the commission visited the island for consultations between December 1944 and April 1945, Senanayake ensured that the commission was informally, but extensively, briefed on the details of the Ministers' position. For their part, the commissioners treated the Ministers' Draft as the main basis of their work although they were open to wider consultations. Groups representing minority interests used the opportunity to set out their concerns before the commission, the main proposal in this respect coming from Mr G.G. Ponnambalam, K.C., Member of the State Council and the leader of the All Ceylon Tamil Congress

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<sup>16</sup> See the various representations on behalf of the minorities made to the British government in de Silva (1997); Edrisinha et al (2008): Ch.6.

(ACTC), which was at the time the leading representative of Tamil interests in the State Council.<sup>17</sup>

With the prospect of some form of more or less independent status under a democratic constitutional scheme modelled on Westminster rapidly becoming a possibility, Mr Ponnambalam was forceful in the articulation of the fears of the minorities that they would soon become swamped under a permanent domination of the Sinhala-Buddhist majority. His main constitutional proposal, known as the ‘fifty-fifty’ scheme, providing for ‘balanced representation,’ was based on an analytical understanding of the socio-political structure of the country that was fundamentally different from the ‘mono-national’ or ‘Ceylonese’ conception of national identity underpinning both the Ministers’ Draft as well as the Soulbury Commission’s recommendations. It was argued that political representation should be based on the communal heterogeneity of Ceylon’s society, and the notion that the people of Ceylon were a single entity was firmly resisted. In substance, Ponnambalam’s proto-consociational scheme would ensure one half of legislative membership for the minorities (and commensurate representation in the political executive), thereby preventing an in-built institutional majority for the Sinhalese community.<sup>18</sup>

The Soulbury Commission quite rightly noted that, “...the relations of the minorities – the Ceylon Tamils, the Indian Tamils, Muslims, Burghers and Europeans – with the Sinhalese majority present the most difficult of the many problems involved in the reform of the Constitution of Ceylon.”<sup>19</sup> Presciently, it also noted that, “...when a minority, rightly or wrongly, feels itself to be forever debarred from obtaining an adequate share of the

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<sup>17</sup> Wilson (2000): Ch.5; Edrisinha et al (2008): Ch.6.

<sup>18</sup> The main features of Ponnambalam’s scheme are reproduced in Edrisinha et al (2008): p.190.

<sup>19</sup> Colonial Office (1945) *Ceylon: Report of the Commission on Constitutional Reform*, Cmd.6677 (London: HMSO): para.120 (The Soulbury Commission Report).

responsibilities of government, it becomes particularly apprehensive of the actions of what it regards as a permanent and unassailable majority.”<sup>20</sup>

While the commission gave a hearing to these serious concerns, it was clear when its report was published in September 1945, that it had in terms of the main principles substantially endorsed the content of the Ministers’ Draft Constitution.<sup>21</sup> The main difference between the two lay in the Soulbury proposal for a bicameral legislature, and in the complex details of the powers of the Governor-General, especially in relation to the reserved powers concerning external matters, defence and states of emergency. In terms of the process towards independence, the Soulbury Report did not recommend an immediate grant of Dominion status, but envisaged an intermediate stage of constitutional development wherein the Ceylonese would enjoy more responsibility for self-government than what was available under the Donoughmore Constitution.

Ponnambalam was naturally aghast, but all his strenuous attempts to influence the British government to reject the Soulbury proposals were unsuccessful. For Senanayake, the challenge now was to press for full Dominion status (i.e., without the imperial control over external affairs and defence), and for its grant sooner rather than later. The political basis for this was complex, including the mounting pressure from the Left parties for complete republican independence, and in any event, he had also formed the conclusion that the mutual undertakings in terms of the Declaration of 1943 – understood as interim measures in the overriding context of the war effort – were now superseded by events, the war having ended. To make his demand more palatable to Whitehall, he proposed that both the new constitution and Dominion

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<sup>20</sup> Ibid: para.177.

<sup>21</sup> The centrepiece of the Ministers’ Draft on minority protection, the constitutional limitation on the legislative competence of the future Ceylon Parliament to enact discriminatory legislation by ordinary process, would thus become Section 29 of the Soulbury Constitution.

status could be effected by the more expedient method of Order-in-Council, together with two binding agreements between the British and Ceylonese governments to deal with defence matters and external affairs.<sup>22</sup>

The British Cabinet was not inclined to grant full Dominion status for Ceylon ahead of India and Burma. The White Paper of October 1945<sup>23</sup> embodying its reception of the Soulbury recommendations did no major revisions to the latter in terms of constitutional content (thus signifying that the new constitution would be substantially what was proposed in the Ministers' Draft Constitution), but adopted an open ended form of words with regard to the question of Dominion status which, while noting the anxiety of the people of Ceylon for Dominion status, and assuring them of the British government's sympathy with that desire, nonetheless stated that the actual period of evolution towards independence depended on the success of the people in the operation of the new constitution. Senanayake was disappointed but not disheartened, and successfully moved the State Council to accept the White Paper, and the initial Order-in-Council enacting the new constitution was promulgated in 1946. Then with elections to the new Parliament scheduled for August-September 1947 and the announcement of partition and independence in India, Pakistan and Burma, Senanayake secured from Whitehall the official declaration in June 1947<sup>24</sup> that Ceylon would

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<sup>22</sup> The Order-in-Council would be issued pending the enactment of an Act of the Imperial Parliament to transfer power to the new Ceylon Parliament and the amendment of the Statute of Westminster to include Ceylon: see de Silva (2005): p.566; Jennings (1953): p.13 et seq. More generally, see K.C. Wheare (1947) *The Statute of Westminster and Dominion Status* (Oxford: OUP). Cf. in this volume, C. Saunders & A. Dziedzic, 'Parliamentary Sovereignty and Written Constitutions in Comparative Perspective.'

<sup>23</sup> Colonial Office (1945) *Ceylon: Statement of Policy on Constitutional Reforms*, Cmd.6690 (London: HMSO).

<sup>24</sup> See also 'Ceylon Constitution': Cabinet Memorandum by Mr Arthur Creech Jones, Secretary of State for the Colonies, on the Message to Mr Senanayake and the Announcement by HMG, Annex I: Communication to Mr Senanayake, Annex II: Draft Announcement by

receive ‘fully responsible status within the British Commonwealth of Nations,’ which duly occurred on 4<sup>th</sup> February 1948, presided over by the Duke of Gloucester.<sup>25</sup>

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HMG, PREM 8/726, 1<sup>st</sup> June 1947, reproduced in de Silva (1997, Part II): Doc. No.395, p.296

<sup>25</sup> The new Dominion was governed by the following constitutional documents enacted at Buckingham Palace and Westminster and agreements between the governments of the UK and Ceylon: the Ceylon (Constitution) Order-in-Council of 1946 (as amended), Ceylon Independence Order-in-Council of 1947, Ceylon Independence Act and Ceylon Independence (Commencement) Order-in-Council of 1947, Ceylon (Office of Governor General) Letters Patent of 1947, Royal Instructions of 1947, and the External Affairs Agreement and Public Officers Agreement of 1947, and the Defence Agreement of 1948. The House of Commons debate on the Ceylon Independence Act of 1947 is instructive of the nature and extent of the ‘autonomy’ being granted Ceylon: see House of Commons Debates (Hansard), 21<sup>st</sup> November 1947 (London: HMSO): cols.1477-1524 (note esp. the comments of the Secretary of State Creech Jones and Mr Gammans, MP). Professor Geoffrey Marshall has noted that, “In the case of Ceylon, it was suggested during the debates of 1947 that she was getting (a) more than Canada and (b) less than India or Pakistan”: G. Marshall (1962) *Parliamentary Sovereignty and the Commonwealth* (Oxford: Clarendon Press): p.125, pp.127-128. The reference to Ceylon as having ‘more’ than Canada is accurate given that in terms of the British North America Act of 1867 which served as the constitution of Canada prior to ‘constitutional repatriation’ in 1982, the British Parliament retained the power over constitutional amendment, unlike the other original Dominions of Australia, South Africa and New Zealand included within the scope the Statute of Westminster of 1931. Ceylon, on the other hand, by virtue of Section 1 (1) of the Ceylon Independence Act, which applied Section 4 of the Statute of Westminster to Ceylon, was in the same position of independence and legal autonomy as the other Dominions in respect of the power of constitutional amendment. The reference to India and Pakistan is perplexing, given that under the terms of the Cabinet Mission Plan of May 1946 (of the Cabinet Mission to India led by Lord Pethick-Lawrence, Secretary of State for India), and following partition and independence in August 1947, at least India was by this time well on the way to the creation of a new constitutional paradigm, that of the independent republic with membership of the Commonwealth. In the case of India, the Constituent Assembly elected in 1946 in terms of the Cabinet Mission Plan became, after independence, both the constitution-making body as well as the country’s central legislature in terms of the Indian Independence Act of 1947 and the Government of India Act of 1935, until the new constitution was promulgated in

## Reflections on the Process

Several issues with regard to the politics and form of this *process* leading to independence require closer examination, not only because it determined particular choices with regard to the constitution's *substance* (specifically the minority protection mechanisms), but also because of the incendiary political consequences it generated in the post-independence working of the constitution.

The liberal character of the Soulbury Constitution, and the elitist process by which it was produced, resulted in the paradox of attracting the opprobrium of both the Sinhalese and the Tamils. For the latter, its protection proved inadequate and wholly meaningless in practice in the face of the rising tide of Sinhala-Buddhist nationalist majoritarianism in the 1950s and 60s, while its implicitly unitary nature was anomalous with the burgeoning demand for federal regional autonomy in the north and east. For the purist Sinhala-Buddhist nationalists, its liberal constitutionalist, secular, and ethnic-neutral nature became an exemplification of all that was anathema with the colonial *ancien régime*, and the anglicised Ceylonese elite they associated with its creation. For the Left, it was a *comprador* instrument of class oppression and an elaborate disguise for the perpetuation of capitalist imperialism.<sup>26</sup> These two powerful forces in Sri Lankan

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November 1949. On these matters, see Jennings (1953): Ch.2; P. Hogg (1997) *Constitutional Law of Canada* (Toronto: Carswell); P. Oliver (2005) *The Constitution of Independence* (Oxford: OUP); H.M. Seervai, (1996) *Constitutional Law of India* (4<sup>th</sup> Ed.) (Bombay: Universal); G. Austin (2004) *The Indian Constitution: Cornerstone of a Nation* (New Delhi: OUP). See also, in this volume, C. Saunders & A. Dziedzic, 'Parliamentary Sovereignty and Written Constitutions in Comparative Perspective.'

<sup>26</sup> See Y.R. Amarasinghe (2000) *Revolutionary Idealism and Parliamentary Politics: A Study of Trotskyism in Sri Lanka* (Colombo: SSA) Amarasinghe (2000): p.72 et seq.; Roberts (1994): Ch.1; Jennings (1953): Ch.3; W.I. Jennings (1946) 'Ceylon: Inconsequential Island', *International Affairs*, Vol.22, No.03 (July



politics would coalesce from 1964 onwards in the eventual repudiation of the Soulbury Constitution.<sup>27</sup> D.S. Senanayake may have seemed the undisputed leader of the Ceylonese – certainly of the Sinhalese – on the cusp of independence, but the socio-political undercurrents of an overtly ethno-religious Sinhala-Buddhist nationalism were already in motion during the 1940s and would come to the fore after his death in 1952.

While Sinhala-Buddhist nationalism came into its own as a political force in the immediate post-independence period, its antecedents lay in anti-colonial cultural revivalist movements in resistance especially to aggressive Christian missionary evangelism of the nineteenth century. Nurtured in the nationalist intellectual ferment of the Vidyalankara and Vidyodaya *pirivenas* (the two leading Buddhist seminaries), its lack of a recognised political leadership was fulfilled when the movement coalesced around the Sri Lanka Freedom Party (SLFP) of Mr S.W.R.D. Bandaranaike,<sup>28</sup> together with the breakaway faction of the Lanka Samasamaja Party led by Mr Philip Gunawardene and several other smaller parties into the Mahajana Eksath Peramuna (MEP, People's United Front).

In regard to the constitution, the anti-establishmentarian MEP was committed, *inter alia*, to the establishment of a republic, the abrogation of the Defence and External Affairs Agreements with Britain, the enactment of Sinhala

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1946): pp.376-388. See also, in this volume, K. David, 'The Left and the 1972 Constitution: Marxism and State Power.'

<sup>27</sup> Although both main Marxist parties, the (Trotskyite) Lanka Samasamaja Party and the (Stalinist) Communist Party of Ceylon, had to undergo a fundamental discursive transformation from their original doctrinal position regarding minority rights, Tamil nationalism and self-determination, to a more pragmatic and electorally attractive if unprincipled position during the 1960s in order for this coalition to become possible. See esp. in this volume, K. David, 'The Left and the 1972 Constitution: Marxism and State Power'; Roberts (1994): Ch.1; Amarasinghe (2000): Ch.4; Edrisinha et al (2008): Chs.4, 5.

<sup>28</sup> See J. Manor (1989) *The Expedient Utopian: Bandaranaike and Ceylon* (Cambridge: CUP): Ch.7

as the sole official language, and the recognition of the rightful supreme status of Buddhism. It described its popular movement as the *Pancha Maha Balavegaya* (the Great Fivefold Force) of the groups marginalised by colonialism: the Buddhist clergy (*Sangha*), the farming peasantry (*Govi*), vernacular teachers (*Guru*), indigenous physicians (*Veda*) and the urban working class (*Kamkaru*). Thus the MEP appealed to the vernacular-educated rural, village elites (hitherto dominated by Senanayake's United National Party (UNP)) and the urban working class (hitherto the main constituency of the Marxist parties and their labour unions).<sup>29</sup>

This coalition swept to power in the general elections of 1956 in a remarkable (indeed until the Congress party was defeated in the 1977 elections in India, unique) exercise at the time in the post-colonial world: the peaceful change of government by the electoral process, which signified in many ways a deepening democratisation of the island's polity, but for the collision course with the non-Sinhala-Buddhist Ceylonese ordained by its intolerant nationalist ideology. In the same election, the Tamil Federal Party, utterly opposed to the MEP's 'Sinhala Only' language policy and demanding autonomy for the north and east, emerged as the overwhelming winner in the Tamil majority constituencies of the Northern and Eastern Provinces. Although as Prime Minister, Bandaranaike sought a settlement with the Federal Party involving devolution of power, he was forced to unilaterally abrogate that agreement under severe, militant pressure of the Sinhala-

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<sup>29</sup> See D. Rampton & A. Welikala (2005) '*The Politics of the South*', Vol.03 of the *Sri Lanka Strategic Conflict Assessment, 2000 – 2005* (Colombo: The Asia Foundation); D. Rampton & A. Welikala, '*Will the Real Dutugemunu Please Stand Up? The Politics of Sinhala Nationalist Authenticity and Populist Discontent*' in J. Goodhand, J. Spencer & B. Korf (Eds.) (2011) *Conflict and Peacebuilding in Sri Lanka: Caught in the Peace Trap?* (London: Routledge Contemporary South Asia Series): Ch.6.

Buddhist nationalist forces from within and without his party.<sup>30</sup>

Thus by 1956, the political settlement of conservative pragmatism that D.S. Senanayake had constructed had unravelled. As a favourable commentator has noted, Senanayake's version of 'civic' nationalism,

“...emphasised the common interests of the island's various ethnic and religious groups. It had as its basis an acceptance of the reality of a plural society and sought the reconciliation of the legitimate interests of the majority and minorities within the context of an all-island polity...In 1948, this version of nationalism seemed to be a viable alternative to the narrower [ethnic] sectionalisms...and held out the prospect of peace and stability in the vital first phase of independence. It was based on a double compromise: the softening of Sinhalese dominance by the establishment of an equilibrium of political forces, the keynote of which was moderation, and an emphasis on secularism, a refusal to mix state power and politics with religion, even though the concept of a special responsibility for Buddhism was tacitly accepted. This Sri Lankan nationalism had a crucial flaw. It was basically elitist in conception and it had little popular support extending beyond the political establishment. It required D.S. Senanayake's enormous personal prestige and consummate statecraft to make it viable.”<sup>31</sup>

After his death, Senanayake's successors had neither his reputation nor his political skill, and although we now

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<sup>30</sup> See K. Loganathan (1996) *Sri Lanka: Lost Opportunities* (Colombo: CEPRA): Ch.2; A.J. Wilson (1988) *The Break-up of Sri Lanka: The Sinhalese-Tamil Conflict* (New York: Hurst): Ch.3; Edrisinha et al (2008): Chs.9, 10; J. Jupp (1978) *Sri Lanka: Third World Democracy* (London: Frank Cass): Ch.9.

<sup>31</sup> De Silva (2005): p.609.

also know that this settlement was far more politically precarious than it seemed at the time, at least some of the seeds of its undoing were embedded within the process itself of negotiations on the Soulbury Constitution and independence.

As we have seen, the drafting of what became the Soulbury Constitution and the subsequent transfer of authority to an elected Ceylonese Parliament is, compared to others processes of African and Asian decolonisation, striking for its smooth, completely constitutional and peaceful nature. One commentator has noted ‘the flamboyant ease’ with which the Britain carried through the transfer of power in Ceylon, adding that, “With its Westminster-like constitution and its eagerness for British friendship, Ceylon indeed seemed the very model for the successful creation of new Asian dominions,”<sup>32</sup> although it is perhaps more truthful to say that to the extent there was any flamboyance displayed in the process, it was more by D.S. Senanayake (and his principal advisors, Goonetilleke and Jennings) than anyone else.<sup>33</sup>

Having said that, it was also an exceedingly opaque process in which none of the representatives of legitimate interests had a remotely meaningful opportunity of participation, let alone influence. Senanayake’s prestige and political dominance was such that not only were the rest of the Board of Ministers and the State Council reduced to merely rubberstamping his decisions, but he appears to have impressed all of his British interlocutors, and not least the Soulbury Commission, to an extent that he nearly always got what he wanted.<sup>34</sup> This lack of transparency and participation is remarkable even in the context of the times, quite apart from modern benchmarks of constitution-making. The absence of an Indian-style mass independence movement meant that

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<sup>32</sup> Darwin (1988): p.102.

<sup>33</sup> See for e.g. Marasinghe (2005).

<sup>34</sup> See Jennings (2005): p.175.

there was no open space in which the political articulation, contestation and popular engagement with notions of independent nationality and statehood could have occurred prior to independence. Thus while the process in Ceylon ensured a smooth and constitutional transfer of power, it also meant that the broader processes of nation-building were in effect postponed to begin, if at all, after independence. In retrospect, the manner in which these dynamics developed after 1948 ensured, not only the collapse of the settlement of 1948, but also the later descent into civil war.

We have seen that Ponnambalam vociferously voiced the displeasure of the Tamils from the outset about both the process and the substance of the emerging constitutional proposals. The main mechanism of consultation, the Soulbury Commission, did not result in more acute attention to stronger constitutional safeguards. While federalism of course was a Tamil demand that came later, devices such as a bill of rights (one more conventionally elaborated than the attenuated formulation of Section 29) or some form of consociational power-sharing in terms of the principle, if not the exact scheme, that Ponnambalam was promoting, certainly deserved more sustained attention than they in fact received. That Ponnambalam was wholly unable to persuade the British administration in Colombo, Whitehall or the Soulbury Commission about the seriousness of the concerns and aspirations of the Tamils in particular and the minorities in general may have many explanations,<sup>35</sup> but in hindsight, the absence of stronger counter-majoritarian safeguards against the

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<sup>35</sup> For e.g., Ponnambalam's proposal for balanced representation and the single-mindedness with which he advocated it is laudable in its principled consistency, but it was also an enormous strategic failure. It ought to have been abundantly clear to him relatively early in the process that the British government was not disposed to view his scheme with any degree of seriousness, and which, arguably, was a cue for both a change in strategy as well as the substantive negotiating position. On the other hand, perhaps there was nothing he could have done in the face of the formidable skill with which Senanayake, Goonetilleke and Jennings handled their case.

kind of rampant majoritarian excesses that were soon to follow, significantly contributed to the erosion particularly of the Tamils' loyalty to the new state, and thereby its pluralist legitimacy.

A particularly disreputable trade off was with regard to the question of citizenship and the franchise of Indian Tamils,<sup>36</sup> where the British government yielded to Ceylonese pressure. There was a fear among the Kandyan Sinhalese of the hill country, where the largely British-owned tea plantations were located and therefore the Indian Tamils were resident, that enfranchising them would render the Sinhalese a minority. Moreover, Marxist parties made a strong showing in the August 1947 first general election under the Soulbury Constitution, and the leader of the LSSP, Dr N.M. Perera, became the first Leader of the Opposition. The support for the LSSP among Indian Tamil plantation workers gave rise to the fear that the Communists were radicalising this community and establishing an organised presence in the plantations. The government enacted legislation soon after independence to ostensibly define citizenship criteria, but which in fact had the effect of removing the citizenship and voting rights of the majority of Indian Tamils. The main political objectives of disenfranchising Indian Tamils under the guise of citizenship regulation therefore were to assuage Kandyan sentiment and to undermine the Communist parties. That such legislation withstood constitutional muster before the courts was the first indication that Section 29 of the Soulbury Constitution would prove inadequate as a minority protection mechanism.

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<sup>36</sup> Indentured Southern Indian labour brought to Ceylon by British companies for work in tea, rubber and coffee plantations in the central and southern parts of the island. The plantations were the mainstay of the colonial economy. See D. Bass (2012) *Everyday Ethnicity in Sri Lanka: Up-country Tamil Identity Politics* (London: Routledge); A. Lawrence (2011) *Malayaha Tamils: Power Sharing and Local Democracy in Sri Lanka* (Colombo: SSA); see also, in this volume, P.P. Devaraj, 'Tamils of Recent Indian Origin and the Constitution-making Process of 1970-72.'

Without a formal framework of regularised participation and an open process of negotiation, the minority safeguards, such as they were, were not what the minorities themselves proposed or even desired, but what Senanayake (with Jennings adding comparative perspectives from Australia, South Africa and Northern Ireland) thought were necessary to persuade the British government to grant Dominion status as early as possible.<sup>37</sup> This is not only astonishing to modern eyes, but in the light of the bloody ethnic fratricide to follow in the next fifty years, also tragic.

### **‘Manner and Form’ Entrenchment and Parliamentary Sovereignty**

From this imperfect process emerged Section 29, the Soulbury Constitution’s principal minority protection device.<sup>38</sup> The scope of the legislative power of the Parliament of Ceylon was set out in Section 29. The provision was structured in three parts in which Section 29 (1) established the general legislative power of Parliament, subject to the provisions of the constitution; Section 29 (2) and (3) set out the non-discrimination limitations and the nullity of contravening legislation; and Section 29 (4) provided for Parliament’s power of constitutional amendment, which was the requirement of a two-thirds majority in the House of Representatives, the Lower House of Parliament (the implied requirement for constitutional amendment in the Upper House, the Senate, was a simple majority), with a certificate thereon by the Speaker.

These provisions established that the plenary power of the Ceylon Parliament to make laws for the peace, order and

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<sup>37</sup> See Jennings (2005): Ch.XI; Jennings (1953): Chs.1, 2.

<sup>38</sup> Others safeguards included the nominated membership in the Senate, a weighted system of delimitation for parliamentary constituencies, and an independent and neutral public service and judiciary.

good government of the island<sup>39</sup> was subject to the limitations that no such law shall (a) prohibit or restrict the free exercise of any religion; or (b) make persons of any *community* or *religion* liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any *community* or *religion* any privilege or advantage which is not conferred on persons of other communities or religions; or (d) alter the constitutions of any religious body except with the consent of the governing authority of that body: provided that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.<sup>40</sup> It was further provided that any ordinary law contravening these limitations would be void.<sup>41</sup> Thus the essence of the counter-majoritarian provision, seeking to protect minorities through a general prohibition on both negative and positive discrimination, was in Section 29 (2), read with sub-section (3). It was implicit that legislation contravening Section 29 (2) would be void in terms of Section 29 (3) only if passed by the ordinary procedure of a simple majority. It was open to Parliament to pass such legislation by a two-thirds majority under Section 29 (4). Legislation passed in this way would amount to a constitutional amendment.<sup>42</sup>

The Parliament of Ceylon was therefore not a ‘sovereign’ legislature in the orthodox understanding of the British doctrine of parliamentary sovereignty, because it was constitutionally circumscribed by Section 29 (2), and its legislation made judicially reviewable by Section 29 (3): “By virtue of subsection (3), the validity of an Act may be challenged in any court of law on the ground that it

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<sup>39</sup> Section 29 (1).

<sup>40</sup> Section 29 (2).

<sup>41</sup> Section 29 (3).

<sup>42</sup> Cooray (1982): pp.65-73. For a review of the issues of constitutional theory in relation to traditional theories of parliamentary sovereignty and manner and form entrenchment in the period under discussion here, see: G. Marshall (1971) *Constitutional Theory* (Oxford: Clarendon): Ch.III



infringes subsection (2).”<sup>43</sup> In *The Queen v. Liyanage* (1962) T.S. Fernando J. observed, “Nor do we have a sovereign Parliament in the sense that the expression is used with reference to the Parliament of the United Kingdom.”<sup>44</sup> This constitutional limitation on legislative omniscience had politically significant consequences in that it fed the perception that the settlement of 1948 was somehow a form of less than complete independence.<sup>45</sup> In fact, as Jennings pointed out at the time and is anyway abundantly clear from Commonwealth practice, there was no cause for worry about the efficacy of Ceylon’s full legal and political independence, but the myth prevailed.<sup>46</sup>

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<sup>43</sup> Jennings (1953): p.202.

<sup>44</sup> *The Queen v. Liyanage* (1962) 64 NLR 313 at 350. As Sinnatambay J. remarked in *P.S. Bus Company v. Ceylon Transport Board* (1958) 61 NLR 491 at 493, “...unlike the British Parliament the legislative bodies in the various dominions are creatures of statute. They are bound by the provisions of the Acts or Orders-in-Council by which they were created and they cannot act in contravention of these provisions.”

<sup>45</sup> Widespread but misplaced suspicions also attached to the Defence and External Affairs Agreements as curtailing Ceylon’s external independence and as evidence of a continuation of Britain’s control over Ceylon. Although he gave leadership in the MEP to many of those who regarded the 1948 settlement with suspicion, Mr Bandaranaike was persuaded once he was Prime Minister after the general election of 1956 that Ceylon’s free and independent status was not compromised by the two Agreements: de Silva (2005): p.627; see also Jennings (1953): pp.24-26.

<sup>46</sup> In addition to the limitations in Section 29, the several legal instruments comprising the Soulbury Constitution (more precisely, the constitution following the amendments by the Ceylon Independence Act of 1947 to the Ceylon (Constitution) Order-in-Council of 1946) set out two other technical limitations which were however of extremely small importance in practice. Of this the matter of theoretical importance was the technical retention by the British Parliament of a power to legislate for Ceylon if the latter so requested or consented. Section 1 (1) of the (UK) Ceylon Independence Act of 1947 extended the application to Ceylon of Section 4 of the Statute of Westminster of 1931, which provided that, ‘No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof.’ From the Dominion perspective, the reason for this provision was the

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desire to ensure common legislation in relation to matters connected with the British Crown and had (as of 1947) been used once in regard to Canada at its request during the Abdication Crisis of 1936. The plenary power of the Ceylon Parliament to legislate for the ‘peace, order and good government’ of the island under Section 29 (1) of the Soulbury Constitution was further elaborated in the First Schedule to the Ceylon Independence Act of 1947, in which paragraph 1 (2) specifically provided that the Ceylon Parliament had full power to amend or repeal any UK law having application in Ceylon. As Jennings observed, “The full law-making powers of an independent State are thus vested in Ceylon, though, like most legislatures, the Ceylon Parliament is not a sovereign body. Independent status is, however, as much a matter of convention as of law. The Ceylon Independence Act, 1947, goes as far as it can not only by vesting in Ceylon (though under the Constitution not in the Ceylon Parliament) full legislative powers but also by section 1 (2) depriving the Government of the United Kingdom of responsibility for the government of Ceylon”: Jennings (1953): p.24. Referring to the ‘increasing criticism’ of the Soulbury Constitution ‘particularly after the general election of 1956,’ Dr Joseph Cooray observed that, “There was also the argument against the Constitution based on its British legal origin, which was cited by some legal critics. Reference was made to Lord Sankey’s statement (*obiter*) in *British Coal Corporation v. The King* (1935)...that as a matter of ‘abstract law’ Parliament could repeal the Statute of Westminster...But, as Lord Sankey himself added, “that is theory and has no relation to realities.” Later cases such as *Ibralebbe v. R* [(1963) 65 NLR 433, discussed at length below], and *Blackburn v. A.G.* (1971) 2 All ER 1380, *per* Lord Denning, clearly show that freedom once given cannot be taken away”: Cooray (1995): p.51, fn.76. Unfortunately, Dr Cooray does not name the critics and so a fuller consideration of their contentions is impossible. But he appears to be referring to political sentiments and opinion of the time, and so it seems safe to conclude that such arguments were aspects of a general objection to Ceylon’s continuing connection with the British constitutional order, rather than as any specific politico-legal criticisms of the nature and extent of Ceylon’s independence status. Lord Sankey’s comment, with the helpful parentheses of Professor Ian Loveland, was that, “It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to [a Dominion] remains in theory unimpaired: indeed, the Imperial Parliament could as a matter of abstract law, repeal or disregard s.4 of the Statute. But that is [legal] theory and has no relation to [political] realities”: *British Coal Corporation v. R* (1935) AC 500 at 520. As Loveland observes, from the UK perspective, “As Lord Sankey suggested, the Statute of Westminster may more sensibly be seen as an exercise in *constitutional politics* rather than *constitutional law*”, which seems to be substantially the same conclusion on the matter by Cooray from the Ceylon perspective: see I.

Jennings has stated that Section 29 (2) was originally based on Section 5 of the UK Government of Ireland Act of 1920, although with substantial alterations.<sup>47</sup> He further observed that, “There is no definition of ‘community’ in the Constitution, which must therefore be understood in the light of the general understanding of that phrase in 1946. In popular language it would seem to include not only the so-called racial communities – Sinhalese, Ceylon Tamils, Moors, Malays, Indians, Burghers, and Europeans – but also the various castes.”<sup>48</sup>

In sum, therefore, Section 29 of the Soulbury Constitution was a classic representation of ‘manner and form’ entrenchment, which envisaged a general constitutional prohibition on ordinary legislation having the effect of discriminating, whether to impose a disability or to confer a privilege, on any community or religion (both terms being left undefined), subject to the review of the courts,<sup>49</sup> unless such legislation is passed as an amendment to the constitution by the supra-majority of two-thirds of the members of the Lower House and certified by the Speaker that the due procedure has been followed. The test of the efficacy of the provision, it would seem, would be in how the courts gave effect to it. As Jennings commented very early on, “The difficulty of all

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Loveland (2009) *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (Oxford: OUP): p.1, see also his observation on Section 4 of the Statute of Westminster in p.40, fn.63. The grant of independence to colonies has, given the doctrine of parliamentary sovereignty, perhaps created far more problems within UK constitutional law and theory (if not practice) than in the former colonies: see discussion on the ‘continuing’ and ‘self-embracing’ theories of the doctrine in Loveland (2009): Ch.2; and Oliver (2005): Chs.3, 4. See also, in this volume, C. Saunders & A. Dziedzic, ‘Parliamentary Sovereignty and Written Constitutions in Comparative Perspective.’

<sup>47</sup> Jennings (1953): pp.77, 202.

<sup>48</sup> Ibid: p. 202.

<sup>49</sup> In *Thambiyah v. Kulasingham* (1949) 50 NLR 25, the Supreme Court declared Sections 82C and 82D of the Parliamentary Elections (Amendment) Act No. 19 of 1948 to be repugnant to Section 13 (3) (h) of the Constitution and therefore void, but the remainder of the law to be valid.

such clauses is that they have to use general language whose meaning can be ascertained only by litigation... Vague phrases had to be used in Section 29 (2), and in fact the clause became vaguer because the definition of 'community' which was in the original draft [prepared by Jennings at the request of Senanayake within the framework of the Declaration of 1943] was removed by the Ministers [in the Ministers' Draft Constitution of 1944]."<sup>50</sup> But interestingly, he seemed to regard Section 29 (2) as an attenuated bill of rights, when he stated in his commentary to the provision that, "The insertion of 'fundamental rights' into a Constitution has been a common practice since the Bill of Rights was inserted into the Constitution of the United States of America [and referenced Articles 12 to 35 of the Indian Constitution as a footnote to this observation]."<sup>51</sup>

As noted above, the issues with regard to the citizenship and franchise of the Indian Tamil community were politically fraught. The first Parliament enacted three pieces of legislation, the Citizenship Act No. 18 of 1948, the Indian and Pakistani Residents (Citizenship) Act No. 34 of 1949, and the Ceylon Parliamentary Elections (Amendment) Act No. 48 of 1949, which "...while purporting to lay down guidelines for the acquisition of citizenship and the right to vote, in effect drastically restricted the voting rights of the Indian Tamil community."<sup>52</sup> The first two Acts were challenged in 1952, for the first time engaging Section 29, on the ground that they had the effect of depriving sections of the Indian Tamil community of citizenship and thereby the franchise. In *Mudanayake v. Sivagnanasunderam* (1951), the Supreme Court held that the words of the impugned Acts were plain and unambiguous, the purpose of which was to regulate and define citizenship and thereby entitlement to the franchise, and not to impose any

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<sup>50</sup> Jennings (1953): p. 77.

<sup>51</sup> Ibid.

<sup>52</sup> R. Edrisinha, 'Sri Lanka: Constitutions without Constitutionalism: A Tale of Three and a Half Constitutions' in Edrisinha & Welikala (2008a): p.15

disadvantage (i.e., the deprivation of the franchise) on any particular community as such. Since the meaning of the legislation was clear from the text, the court disallowed extrinsic evidence, such as affidavits from affected persons, on the practical effect of the legislation on the Indian Tamil community.<sup>53</sup> On appeal to the Privy Council, in *Kodakkanpillai v. Mudanayake* (1953), Lord Oaksey held that while legislation framed in such a way as not to offend Section 29, but which has the indirect effect of discrimination, would be constitutionally invalid, they could not impute an illegal motive to the Parliament of Ceylon (*omnia praesumuntur rite esse acta*), and that "...it is a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals."<sup>54</sup>

Thus by the technical application of seemingly apolitical rules of legal interpretation, on the very first occasion of its invocation itself, Section 29 was to prove ineffective against a legislative act that in actual practice did substantially and seriously discriminate against a community by depriving them of their franchise. As we saw before, the Ceylon government's intention in enacting this legislation was in fact to ensure the deprivation of both citizenship and the franchise from substantial sections of the Indian Tamils. While its motive

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<sup>53</sup> *Mudanayake v. Sivagnanasunderam* (1951) 53 NLR 25.

<sup>54</sup> *Kodakkanpillai v. Mudanayake* (1953) 54 NLR 433 at 435. On the question of the admissibility of 'extraneous evidence' in determining not only legislative intent but also the practical impact of constitutional provisions, the Privy Council, unlike English courts within England and Wales, has taken an expansive view: see Marasinghe (2007): p.129, fn.80. Cf. *Edinburgh Railway Co. v. Wauchope* (1842) 8 Cl. & F. 710. Even in *Kodakkanpillai*, notwithstanding the main conclusion, the Privy Council affirmed the admissibility, for example, of the Soulbury Commission Report in interpreting the Ceylon Constitution. *Per contra*, the Supreme Court of Ceylon refused admission of such evidence, and was unswayed by US authorities cited by the appellants: Edrisinha & Welikala (2008a): p.15-16. The American cases cited by counsel for the plaintiff-appellant were *Lane v. Wilson* (1939) 307 US 268 and *Yick Wo v. Hopkins* (1886) 118 US 256.

may not have been, at least directly, ethnic discrimination, the government was certainly impelled by partisan political objectives of obviating what it saw as the imminent peril of a Communist foothold in the plantations; a measure and its underlying motivation that would seem to be, with or without the presence of what would today be clearly regarded as racism, exactly of the kind prohibited by Section 29.

An altogether more clear-cut example of the expression of majoritarian nationalism in legislative form was the Official Language Act No. 33 of 1956 (known as the ‘Sinhala Only Act’). As we noted before, the general elections of 1956 had installed a new government that championed the cause of Sinhala-Buddhist nationalism and the centrepiece of its programme was the pledge to enact Sinhala as the sole official language.<sup>55</sup> While the

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<sup>55</sup> The MEP’s campaign slogan was ‘Sinhala Only in 24 Hours’. Since his crossover from the UNP in 1951 to form the SLFP (see above), the Mr Bandaranaike had been agitating for a revision of the Soulbury Constitution on a number of respects, of which what is most pertinent to the present discussion is that he advocated the establishment of a republic and some form of constitutional recognition for Buddhism. Both were central causes of Sinhala-Buddhist nationalism. As Prime Minister, he took two policy initiatives in this regard. In July 1956, he informed the other Commonwealth governments that Ceylon wished to become a republic while remaining a member of the Commonwealth on the model of India and Pakistan, and in April 1957, he initiated the appointment of a Joint Select Committee of the House of Representatives and the Senate to consider the revision of the constitution, among the terms of reference for which was the establishment of a republic. Between 1957 and 1959 the Joint Select Committee met several times under the chairmanship of the Prime Minister and published two reports, which confirm that there was a general consensus on becoming a republic with Commonwealth membership and on the abolition of appeals to the Privy Council. We can regard this as a ‘general consensus’ because the membership of the committee included all shades of parliamentary opinion and the minorities. The second of Bandaranaike’s initiatives was the appointment in 1957 of the Buddha Sasana Commission (i.e., the equivalent of a British Royal Commission) to consider and recommend ways in which government can support the Buddha Sasana (a descriptive term which encompasses all aspects of Buddhism, from doctrine and liturgy, its institutions and priesthood, and corporeal property of temples to its lay adherents) in appreciation

constitutionality of the Act was not immediately challenged, it marked a watershed in the interethnic political relationship between the Sinhala and Tamil communities. For the Sinhalese, it represented the restoration of the Sinhala language to its rightful status in the newly independent state, whereas the Tamils opposed what they regarded as an outright affront to their linguistic and cultural identity, equal rights and dignity. The controversial Act resulted in widespread Tamil protests and in 1958 the first of the serious communal riots in Sri Lanka post-colonial history necessitating the declaration of a state of emergency.<sup>56</sup>

Litigation with regard to the Sinhala Only Act under Section 29 arose when a Tamil civil servant challenged the validity of the Act, as part of an action seeking the recovery of salary increments he would have been entitled to but for the requirement of a Sinhala proficiency test, which he refused to take, pursuant to a Treasury Circular under the Act. The original court held with him, but on appeal in *The Attorney General v. Kodeswaran* (1967), the Supreme Court upheld the separate argument of the Attorney General that a public servant had no right to an

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of the deprivations it had suffered under colonialism and to restore it to the central place envisaged for it in Sinhala-Buddhist historiography. The main recommendation of the Commission was the setting up of a State-sponsored Buddha Sasana Council to promote and oversee all aspects of the religion. However, with the assassination of Bandaranaike in September 1959 and the dramatic political developments thereafter, nothing more came of the two initiatives immediately. See Cooray (1995): pp.52, 54; Interim Report of the Buddha Sasana Commission, Ceylon Sessional Paper XXV of 1957; for an excellent, comprehensive account of the politico-legal dynamics and conceptual history of Buddhism in the constitutions of Sri Lanka, see B. Schonthal, *Historicising Article 9: Fundamental Rites vs. Fundamental Rights* (provisional title of forthcoming PhD thesis), University of Chicago, work in progress, and in this volume, B. Schonthal, 'Buddhism and the Constitution: The Historiography and Postcolonial Politics of Section 6.' See also, in this volume, N. Jayawickrama, 'Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective.'

<sup>56</sup> Cooray (1995): p.51; T. Vittachchi (1958) *Emergency '58: The Story of the Ceylon Race Riots* (London: Andre Deutsch).

action in contract against the Crown (applying English law), and avoided thereby making any pronouncement on the constitutionality of the Sinhala Only Act.<sup>57</sup> On further appeal to the Privy Council in *Kodeswaran v. The Attorney General* (1969), the decision of the Supreme Court on the question of the contractual right was overturned (applying Roman Dutch law),<sup>58</sup> and the Privy Council indicated its willingness to consider the constitutionality of the Sinhala Only Act itself in relation to Section 29. However, their Lordships observed that, "...since the Supreme Court had not assisted with its opinion of the judgment in question we send it back to the Supreme Court to come to a conclusion on that matter [i.e., the constitutionality of the Act]."<sup>59</sup> It would have been interesting to see how the Supreme Court would have dealt with this the second time, but the re-hearing was postponed *sine die* in the light of the proceedings in the Constituent Assembly which had commenced deliberating on the repeal of the Soulbury Constitution by this time.<sup>60</sup>

These cases show that Section 29, in the hands of the Supreme Court,<sup>61</sup> failed completely to afford any fetter at all to majoritarian legislation having the self-evident effect

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<sup>57</sup> *The Attorney General v. Kodeswaran* (1967) 70 NLR 121.

<sup>58</sup> Sri Lanka is a plural or mixed legal system based on the Roman Dutch Law and English Law, together with the indigenous Kandyan Law, Thesawalamai and a form of Muslim Law distinct from Sharia law; see Jennings & Tambiah (1952); Cooray (1992).

<sup>59</sup> *Kodeswaran v. The Attorney General* (1969) 72 NLR 337.

<sup>60</sup> See Marasinghe (2007): pp.169-170.

<sup>61</sup> The Privy Council's early emollience in for e.g. *Kodakkanpillai v. Mudanayake* (1953) 54 NLR 433, see above, had by the 1960s given way to a more questioning realism about the pathological majoritarianism of the political culture animating the Ceylon Parliament, as evinced in for e.g. *Ibralebbe v. The Queen* (1963) 65 NLR 433, *The Bribery Commissioner v. Ranasinghe* (1964) 66 NLR 73, and *Liyanage v. The Queen* (1965) 68 NLR 265 (PC) (*The Queen v. Liyanage* (1962) 64 NLR 313 (SC)); but by then its activism only gave impetus to questions about its legitimacy, see below. From the standpoint of republican nationalism, the Privy Council was both a colonial relic that stood in the way of true sovereign independence, and an irritating check on the untrammelled exercise of parliamentary majorities by governments.



of discrimination ostensibly prohibited by the constitution.<sup>62</sup> Other policies such as the nationalisation of Christian denominational schools, against the wishes in particular of the Catholics, were never challenged on Section 29 grounds. The schools takeover was a policy based unambiguously on a majoritarian political agenda, in that the perceived Christianisation of culture through mission schools during the colonial period was one of the key grievances of Sinhala-Buddhist nationalists. Thus as far as both racial and religious minorities were concerned, Section 29 seemed to afford no protection whatsoever.

Paradoxically, these same arrangements were leading Sinhala-Buddhists to the conclusion that the independence in the form obtained in 1948 was hollow and meaningless. Even though it was more than evident that none of the constitutional fetters of the Soulbury Constitution were preventing Sinhala-Buddhist nationalists from dominating the political agenda and exercising power, the continuation of the British Crown as the head of state was a matter of huge symbolic importance that served as a rallying point for those seeking a more complete break with the colonial past. In specific constitutional terms, the constitutional limitation on legislative power (in this regard, absolute parliamentary sovereignty was consistently equated with political and legal independence) and increasing doubts as to Parliament's powers of constitutional amendment (see below); the constitutional position of the British Crown not merely as a symbolic figurehead but as part of Parliament together with the House of Representatives and the Senate; the final appeal to the Privy Council;<sup>63</sup>

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<sup>62</sup> As Dr Anton Cooray has noted, no statute was ever declared invalid on the ground of inconsistency with Section 29 (2) during the currency of the Soulbury Constitution: Cooray (1982): p.67. In addition to the *Kodakkanpillai* and *Kodeswaran* cases discussed above, the last unsuccessful attempt to engage Section 29 (2) was in *Sundaralingam v. Inspector of Police, Kankasanthurai* (1971) 74 NLR 457.

<sup>63</sup> This issue was extensively dealt with in *Ibralebbe v. The Queen* (1963) 65 NLR 433, discussed below. Something that hardened the republican resolve of the Ceylonese political class (not only the

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predictable Sinhala-Buddhist ideologues and anti-imperialist leftists, but also many others more generally subscribing to the 'Third World' nationalist sentiments of the time) especially in relation to the abolition of the appeal to the Privy Council was its judgment in the *Liyanage v. The Queen* (1965) 68 NLR 265. On the night of 27<sup>th</sup> January 1962, there had been an abortive attempt at an unconstitutional takeover of the government by force, involving senior members of the military, police and the civil service, which was prevented because the plot was apprehended, and the plotters arrested, hours before it was to be put into execution. It appeared the coup plotters were motivated by a kind of 'liberal autocratic' desire to impose control, civic discipline and the rule of law (a universal irony) on a society that they saw as rapidly disintegrating in the hands of nationalist demagogues and Communists. The episode came to be known as the 'Officers' Coup' not only because the individuals implicated in the criminal conspiracy were all military or police officers and civil servants, but also because they belonged to the upper and upper middle social class identifiable by commonalities of elite schools, clubs, regiments, *lingua franca* (English) and other such colonial accoutrements. That they were virtually all of them Christians and many belonged to minority groups such as the Burghers (generally referring to Ceylonese of wholly or mixed Dutch descent, but also including those with Portuguese, French, or British antecedents and other Eurasians) and Tamils was emphatically *not* lost on the Sinhala-Buddhist nationalists. For an excellent sociological account of the affair, see D.L. Horowitz (1980) *Coup Theories and Officers' Motives: Sri Lanka in Perspective* (New Jersey: Princeton UP). As part of the government's response, the Criminal Law (Special Provisions) Act No. 1 of 1962 was enacted which suspended a number of procedural and evidentiary protections for the accused in the criminal trial, reintroduced the death penalty, and purported to have retroactive effect in accordance with which the coup conspirators were tried, convicted and sentenced. On appeal against the convictions under its provisions, the Privy Council held that in its cumulative effects, the Act, *ad hominem, post facto* and directed at particular criminal proceedings, was wholly unconstitutional and "...a grave and deliberate incursion into the judicial sphere" (*per* Lord Pearce, *Liyanage v. The Queen* (1965) 68 NLR 265 at 284). See esp. Cooray (1982): Ch.8. Rohan Edrisinha has endorsed the "...refreshing boldness and creativity with which the Privy Council inferred the existence of a doctrine of separation of powers and the entrenchment of judicial power": Edrisinha & Welikala (2008a): p.19, and which Professor Stanley de Smith at the time described as, "...the most remarkable exercise in judicial activism ever by the Privy Council": S.A. de Smith, 'The Separation of Powers in a New Dress' (1966) *McGill Law Journal* 12: p.491 at p.492. For nationalist politicians in Ceylon, however, this was an insufferable intrusion from an illegitimate colonial institution. Significantly, the government that the

the Defence and Foreign Affairs Agreements; the secular and ethnic-neutral nature of the Soulbury Constitution were all seen as inhibitions on true independence and sovereign statehood. Aggravated by rising ethnic antagonism in which the Sinhala-Buddhist nationalists were determined to resist the intensifying demands for language parity of status and federal autonomy by the Tamils, the political situation was ripe for a thoroughgoing constitutional overhaul by the late 1960s.

### **Revision of the Constitution: Legal Continuity or Constitutional Revolution?**

There was plenty evidence throughout the 1950s and 60s as to the existence of a general desire to recreate the state as a republic.<sup>64</sup> Such a political consensus was evident across the left-right axis and was superincumbent on the various strains of nationalist sentiment, including Tamil nationalists. Insofar as Tamil nationalism's main vehicle at this time, the Federal Party, was concerned, so long as the future state was federal in form, there would be no objection to the creation of a republic. However, the consensus on the *substantive* principle belied a fundamental difference of approach as to the means, or the *process* by which the republic should be established as between the UNP (the main constituent party of the 'National Government' of 1965-70), and the SLFP and its Marxist allies.

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coup sought to displace was of the SLFP, and the duumvirate of the Prime Minister, Mrs Sirimavo Bandaranaike, and her kinsman and Minister, Mr Felix Dias Bandaranaike. She being in the Senate at the time, he was her Parliamentary Private Secretary. Both played a major role in the dismantling of the Soulbury Constitution after 1970, she as Prime Minister, he as the Minister of Justice. See generally, in this volume, N. Jayawickrama, '*Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective.*'

<sup>64</sup> See the observations on the Joint Select Committee on the Revision of the Constitution appointed in 1957, above.

With a general election approaching in 1970, and the intensifying popular appeal especially among the Sinhalese of the promise of a republican constitution, both sides tried to appropriate the cause. The SLFP formed a powerful electoral coalition with the two main Marxist parties, the LSSP and the Communist Party of Ceylon (Moscow Wing) in opposition to the UNP. The United Front (UF) thus created brought together substantial sections of the Sinhala-Buddhist nationalists and the Left, and unambiguously took up the position that if elected, they would convert Parliament into a Constituent Assembly to draft and adopt a republican constitution. The UNP tried to recapture the initiative on this increasingly popular issue by attempting to re-appoint a parliamentary joint select committee to draft a new constitution, whilst it still held power. Thus the momentous debate on the process of constitutional change to be adopted in the establishment of a republic took place on the government's motion to appoint the select committee on the revision of the constitution in August 1968. The theoretical fulcrum for a rehearsal of the politico-constitutional arguments on this issue in the Ceylon Parliament had been provided by the Privy Council sometime earlier, in two observations, both *obiter*, in the cases of *Ibralebbe v. The Queen* (1963) and *The Bribery Commissioner v. Ranasinghe* (1964).<sup>65</sup>

In *The Bribery Commissioner v. Ranasinghe* (1964), Lord Pearce observed, *obiter*,<sup>66</sup> in relation to Section 29 (2) that,

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<sup>65</sup> *Ibralebbe v. The Queen* (1963) 65 NLR 433, also reported as *Ibralebbe and Another v. Reginam* (1964) 1 All ER 251; *The Bribery Commissioner v. Ranasinghe* (1964) 66 NLR 73, also reported as *The Bribery Commissioner v. Ranasinghe* (1964) 2 All ER 785.

<sup>66</sup> The live issue in the case was whether a conviction handed down by a tribunal appointed by the Minister of Justice under the Bribery (Amendment) Act, No.40 of 1958, should be quashed on the ground that both the tribunal and the amendment Act were unconstitutional, being in contravention of the provisions of the constitution regarding judicial appointments. Both the Supreme Court of Ceylon and the Privy Council answered in the affirmative to this question, it being held that the tribunal exercised a judicial function, and in terms of the

“...religious and racial matters shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution; and these are therefore unalterable under the Constitution.”<sup>67</sup> In *Ibralebbe v. The Queen* (1963), Viscount Radcliffe, in an explicatory paragraph on the schematic framework of the Soulbury Constitution, stated that, “...by Section 29 there is conferred upon Parliament the power to make laws for the ‘peace, order and good government’ of Ceylon subject to certain protective reservations for the exercise of religion and the freedom of religious bodies.”<sup>68</sup> Lord Pearce’s words in *Ranasinghe* in particular were to have political ramifications beyond anything the relatively innocuous matter at issue in the case might have suggested.

On behalf of the government, the Minister of State, Mr J.R. Jayewardene (later the first executive President under the Second Republican Constitution of 1978),<sup>69</sup> took the position that what was ‘unalterable’ in terms of Lord Pearce’s opinion were the matters exclusively in Section 29 (2), which could ‘not be the subject of legislation.’ However, that did not in any way circumscribe the general power of constitutional amendment and repeal vested in Parliament by Section 29 (4). Therefore, the Parliament of Ceylon could do away with the fetter on its sovereignty in Section 20 (2) by repealing the entire constitution and replacing it with a new (republican) constitution. Jayewardene’s argument hence sought to maintain legal continuity between the present and any future constitution, with the legal validity of the latter

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constitution, only the Judicial Service Commission could make judicial appointments.

<sup>67</sup> *The Bribery Commissioner v. Ranasinghe* (1964) 2 All ER 785 at 789.

<sup>68</sup> *Ibralebbe and Another v. Reginam* (1964) 1 All ER 251 at 260.

<sup>69</sup> K.M. de Silva & W.H. Wriggins (1988) *J.R. Jayewardene of Sri Lanka: A Political Biography* (Honolulu: Univ. of Hawaii Press).

deriving from the compliance with the amendment procedure of the former.<sup>70</sup>

Dr Colvin R. de Silva, speaking for the opposition,<sup>71</sup> proffered a typological classification of legislative powers under the Soulbury Constitution. He suggested that,

“In respect of the powers of this House, from the point of view of section 29, our Constitution may be said to fall into three parts. There are those matters in which we have no power to legislate at all. Those are the matters referred to in section 29 (2). There are the matters we can legislate upon only by a two-thirds majority of the actual membership of the House. Those are what are covered by Section 29 (4). Then there is the rest of that wide field of matters on which we can legislate by a simple majority. Those are the three divisions of the Constitution which are vital from this point of view.”<sup>72</sup>

He then argued that the cumulative effect of the *dicta* of Lords Pearce and Radcliffe was that Parliament had no competence to amend or adopt a new constitution, unless the future constitution *also included* Section 29. That is, the exercise of the power of constitutional amendment in Section 29 (4) was subject not only to the procedural requirements of a two-thirds majority and the Speaker’s certificate, but also to the ‘unalterable’ substantive limitation on legislative power in Section 29 (2). This meant that there were only two ways that an unfettered Parliament could be established in a future constitution: by Westminster legislation repealing the Soulbury Constitution and replacing it with a new constitution *sans* Section 29 (2); or by an extra-legal overthrow of the unamendable Soulbury Constitution. The former not

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<sup>70</sup> Parliamentary Debates (House of Representatives), 16<sup>th</sup> August 1968: Col.1128 et seq.

<sup>71</sup> *Ibid*: Cols.1137 et seq.

<sup>72</sup> *Ibid*: Col.1152.

being an option suitable for the establishment of a future republic, Dr de Silva stated that the opposition would be appealing to the people in the forthcoming general election for a mandate to summon a Constituent Assembly to draft and enact a new republican constitution. Such a constitution, he argued, would not be constrained by narrow, legalistic dictates of the illegitimate colonial order, but derive its validity from the political sovereignty of the people. In his view, only such a revolutionary process could throw off the lingering shackles of empire.

Underlying the political postures of the parties in this debate were thus three major issues of constitutional law and theory. Firstly, the nature and scope of the restriction imposed by Section 29 on the legislative power of the Ceylon Parliament in the light of the Privy Council *dicta* in *Ranasinghe* and *Ibralebbe*; and secondly, the effect of Section 29 on the sovereign independence of Ceylon. In the light of the answers to those questions, thirdly, the process to be followed in the adoption of a republican constitution: whether by following the existing procedure or by way of a legal revolution.

With regard what had been said of Section 29 in *Ranasinghe* and *Ibralebbe*, there was no attempt to critically examine the full import of the two decisions, and in particular the sense to be made of the passages when placed in the proper context of the entirety of the respective judgments. Assuming that the meaning to be given to those observations was the interpretation given by Dr de Silva (uncontested by Mr Jayewardene), there was also no attempt to see whether the Pearce-Radcliffe position<sup>73</sup> was indeed the correct legal position, and

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<sup>73</sup> Neither Lord Pearce nor Viscount Radcliffe appear to have left a public record of any further explanation of their interpretation of Section 29 (2) aside from what appears in the reports of the cases. Between 1964 and 1972, there was no further opportunity for either the Privy Council or the Supreme Court to clarify the meaning of their comments, except in the *Kodeswaran* case (see above), which was effectively abandoned. For an account of how this transpired, see

specifically whether Section 29 (2) only prohibited contrary *ordinary* legislation, and the power of constitutional amendment under Section 29 (4) meant that, provided the two procedural requirements therein were met, Parliament could amend or repeal any provision of the constitution, including Section 29 (2) and (3). The force of Dr de Silva's legal argument in favour of a constitutional revolution depended on Section 29 (2) being permanently and substantively entrenched, the authority for which proposition, in turn, was based entirely on minute extracts from two broader judicial pronouncements, which did not form part of the binding element of the respective judgments.

While *ex facie* the two impugned passages (especially that of Lord Pearce) indeed suggested that the matters covered by Section 29 (2) could not be touched by any legislation, it appears from other observations of Lords Pearce and Radcliffe, in the course of the same judgments, that they did not contemplate substantive or absolute

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Marasinghe (2007): pp.169-170. However, it does not defy plausibility to consider the possibility, given that they were opining *obiter* in the statements that assumed such political significance only subsequently and in a manner they could not have foreseen, that they had not fully thought through the ramifications of their view on Section 29 (2), read in the light of the entirety of Section 29 (particularly subsection (4)), or at the very least, their choice of words in the passages that featured in the debate in the Ceylon Parliament in 1968. This seems to be reinforced by other observations about the sovereignty of the Ceylon Parliament they made in the course of the two judgments (see below). Cf. Professor Marasinghe's contention (which, without more, is only rather unpersuasive speculation) as to the material, including the record of the House of Commons debate on the Ceylon Independence Bill, that might have been considered by the Privy Council in *Ranasinghe* and *Ibralebbe* in arriving at the conclusion that Section 29 (2) is absolutely entrenched: Marasinghe (2007): p.132. While there is in fact an express reference to and reliance on the Soulbury Commission Report by Lord Pearce: *The Bribery Commissioner v. Ranasinghe* (1964) 2 All ER 785 at 787, there is no indication in the reported judgment that any other extraneous source of information of the kind suggested by Marasinghe was made available or relied upon by the Privy Council in this case.



entrenchment.<sup>74</sup> In *Ranasinghe*, Lord Pearce, after holding the Speaker's certificate – affirming that legislation having the effect of amending the constitution has been passed with the requisite two-thirds majority – to be an integral and mandatory part of the legislative process for constitutional amendments in terms of Section 29 (4), further observed that,

“No question of sovereignty arises. A parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the constitution there is only a bare majority, if the constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.”<sup>75</sup>

There could not be a clearer endorsement of ‘manner and form’, but not substantive, entrenchment, although it must be admitted that Lord Pearce's earlier reference to ‘unalterable’ provisions appears *prima facie* to be inconsistent with this line of reasoning. Dr de Silva's contention that Lord Pearce contemplated a category of legislation that was absolutely prohibited is, admittedly, strengthened by the distinction Lord Pearce appears to draw as between matters falling within Section 29 (2) and

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<sup>74</sup> Or at the very least, having the effect of creating some doubt about what was meant, in contradistinction to the certainty with which a particular meaning was ascribed to the relevant passages by Dr de Silva, without challenge from Mr Jayewardene.

<sup>75</sup> *The Bribery Commissioner v. Ranasinghe* (1964) 2 All ER 785 at 793.

(3) on the one hand, and Section 29 (4) on the other, when he stated that,

“The strongest argument in favour of the Bribery Commissioner’s contention [that the court is not entitled to question the validity of an Act of a sovereign Parliament, notwithstanding any procedural defect] is the fact that s 29(3) expressly makes void any Act passed in respect of the matters entrenched in and prohibited by s 29(2), whereas s 29(4) makes no such provision, but merely couches the prohibition in procedural terms.”<sup>76</sup>

Although from this it may seem as though Lord Pearce regarded Section 29 (2) and (3), and Section 29 (4) as independent of each other, and as dealing with separate categories of legislation with the former imposing substantive prohibitions and the latter merely a procedural restriction, the entire tenor of the rest of his reasoning shows an overriding concern to ensure the subjection of all legislation to the terms of the constitution.<sup>77</sup> The central issue in *Ranasinghe* – the demonstrable inconsistency of Section 41 of the Bribery Amendment Act with Section 55 of the Constitution dealing with judicial appointments (thereby invalidating the former) – did not fall within the ambit of Section 29 (2) (i.e., religious or communal discrimination), and Lord Pearce’s comments on this latter provision were therefore wholly incidental. The import of his reasoning on Section 29 (4) seems to strongly suggest that, had he applied his mind more directly to the relationship between Section

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<sup>76</sup> Ibid, at 791.

<sup>77</sup> Reinforced by his reliance on *A-G for New South Wales v. Trethowan* (1932) AC 526 and *Harris v. Minister of the Interior* (1952) 2 SA 428, distinguishing *McCawley v. R* (1920) AC 691. On the *Harris* cases in South Africa, see extensive commentary in I. Loveland (1999) *By Due Process of Law: Racial Discrimination and the Right to Vote in South Africa 1850 – 1960* (Oxford: Hart). See esp., in this volume, C. Saunders & A. Dziedzic, ‘Parliamentary Sovereignty and Written Constitutions in Comparative Perspective.’

29 (2) and (3) and Section 29 (4), he would have likely read Section 29 (2) and (3) *subject to*, rather than *independently of*, Section 29 (4).

The reason for this is that any ordinary law passed by simple majority challenged by reference to inconsistency with Section 29 (2) and voidable under Section 29 (3), is by definition a challenge regarding constitutionality. While it is true that a court may, without any reference to Section 29 (4), declare void under Section 29 (3) the provisions of a statute contravening Section 29 (2), such a fate would befall any ordinary law inconsistent with any provision of the constitution, as *Ranasinghe* itself showed. In terms of the Soulbury Constitution, nullity was not something that was unique to legislation dealing with religious or communal matters as laid down in Section 29 (2). However, the material point is that Parliament was not absolutely prohibited from legislating on these matters: it may not legislate by simple majority, but it may legislate by two-thirds majority. Such legislation may expressly or impliedly amend Section 29 (2) itself. Judicial supervision of the legislative process for constitutionality in these circumstances, in turn, was exclusively through the examination of the Speaker's certificate as to whether the impugned legislation had been enacted by the special majority as set out in Section 29 (4). Consequently, there is no merit to the argument that Section 29 (2) represented a substantive prohibition on certain types of legislation, or that it was itself unamendable.

The situation of course would have been very different had Section 29 (4) expressly declared that Section 29 (2) was unalterable. However, not only did it not provide such special protection to Section 29 (2), but it clearly provided that any provision of the constitution may be amended, provided the required two-thirds majority was secured. It is thus clear that, to the extent that he suggested the presence of substantive entrenchment in Section 29, Lord Pearce was wrong. On the other hand, the alacrity with which Dr de Silva seized upon these incongruous comments in the debate in 1968, four years

after they were in fact made in the judgment in *Ranasinghe* in 1964, suggests that he was only seeking to derive further political advantage for the revolutionary course of action in relation to the repeal of the Soulbury Constitution his alliance had already decided upon by that time. Likewise, it was in Mr Jayewardene's interest to go along with this interpretation, so that his government could attempt to enact a new constitution while it still held a majority, and thereby to take the popular credit for the establishment of a republic.

While it is true that Lord Radcliffe in *Ibralebbe* used the phrase 'fundamental reservations specified in Section 29' and thereby denoted that the matters set out in Section 29 (2) as absolute limitations on legislative competence, reading the entire passage in the context of which the phrase occurs, the question does arise as to what extent he had fully considered the ramifications of the phrase. As noted above, the words occur as part of a description by Lord Radcliffe of the Soulbury scheme, in the following terms:

“The 1946 Order [i.e., the Soulbury Constitution] is divided into nine separate parts, of which much the most considerable is, naturally, that dealing with the Legislature, Part III...Part III, which embraces s 7 to s 39, begins by enacting that there is to be a Parliament of the Island consisting of His Majesty and two Chambers. By s 29 there is conferred on the Parliament power to make laws for the 'peace, order and good government' of Ceylon, subject to certain protective reservations for the exercise of religion and the freedom of religious bodies. The words 'peace, order and good government' connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign. Apart from the fundamental reservations specified in s 29, the order contained only two qualifications on the full legislative authority of Parliament. One was set out in the following section, s 30, which reserved to His

Majesty power by Order in Council to legislate on certain matters of defence, security and foreign relations. The other was the provision made in s 39 that laws relating to certain Ceylon Government stocks should be capable of disallowance by His Majesty through a Secretary of State. The reservation embodied in s 30 was relinquished in the next year by the Ceylon (Independence) Order in Council 1947 (see s 4). This came into force on 4 February 1948, and as from that date, apart from the minor qualification introduced by s 39, the Parliament of Ceylon enjoyed unrestricted legislative power.”<sup>78</sup>

From this it is clear that the phrase that was extracted for the purpose of proving the Privy Council’s purported view to the effect that Section 29 was a substantive entrenchment was no more than a passing reference to that provision. From this, however, Dr de Silva managed to extrapolate the conclusion that,

“Then they speak of the qualifications – of the two-thirds majority and the Speaker’s certificate. Apart from the fundamental reservations specified in section 29 – that is fundamental. That cannot be touched. That is entrenched...I agree with the decision because it is a correct interpretation of the law, whether we like it or not...any effort to act otherwise is subject to the decision of the same authority, and it is only a set of fools who will think that the Privy Council will adopt another interpretation on the matter...Therefore, if we try to legislate in the face of, or in defiance of, this decision under the Constitution, then any citizen can take the matter to the Privy Council. In fact he need not go all the way to the Privy Council. The local courts are

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<sup>78</sup> *Ibralebbe and Another v. Reginam* (1964) 1 All ER 251 at 260.

under an obligation to apply this decision. That is the position.”<sup>79</sup>

For the reasons adduced above, however, it would seem that the correct legal position was that Section 29 (2) and (3) protected certain matters from attack by ordinary legislation passed by simple majority. However, those matters were not immune from legislation passed as constitutional amendments with the two-thirds majority contemplated by Section 29 (4). The entirety of the Soulbury Constitution was therefore susceptible to amendment, or indeed repeal and replacement, by the procedure laid out in Section 29 (4). There was no imperative *legal* justification therefore for the position that a republic could only be established by some extra-legal method. Objections to continuing constitutional links with the United Kingdom, while legitimate and with undoubted popular support among the peoples of Ceylon were, strictly speaking, political matters.

While Dr de Silva had his (political) reasons for attaching so much weight to these words, it seems to be the case that the Privy Council’s *obiter* comments were doing no more than reflecting the somewhat befuddled *dicta* on Section 29 that characterises the Ceylon Supreme Court’s own case law on it, wherein, in the absence of a direct decision on the question of the nature of the limitations contained in the provision (*Kodeswaran* might have settled this, but as we have seen, that case was superseded by events), judicial opinion reflects a certain amount of confusion. For example, in *Piyadasa v. The Bribery Commissioner* (1962), Tambiah J., stated that, “It is hardly necessary to state that the Ceylon Constitution, being a written constitution, is paramount legislation which can only be amended (*and that too, only in certain respects*) by a two-thirds majority of the members of the House of Representatives as provided by section 29 (4) of the

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<sup>79</sup> Parliamentary Debates (House of Representatives), 16<sup>th</sup> August 1969: Col.1155. Dr de Silva quotes Lord Radcliffe’s opinion in *Ibralebbe* reproduced above immediately prior to these comments.

Ceylon Constitution”<sup>80</sup> while maintaining that, “Section 29 (2) and (3) prohibits the Parliament from passing certain discriminatory legislation, except by a two-thirds majority of the members of the House of Representatives.”<sup>81</sup> These comments appear to lack logical consistency insofar as they support *both* the substantive and procedural views with regard to the restrictions on legislative power, and without apparent regard to the fact that if the constitution could be amended ‘only in certain respects’ (i.e., that it contained absolute limitations against its amendment), then the legislative power of constitutional amendment in Section 29 (4) could not, at the same time, extend to those absolutely entrenched provisions. There would have been no inconsistency in this position, however, if the learned judge referred to a constitutional entrenchment of certain matters against *ordinary legislation*, rather than the legislative power of *constitutional amendment*.<sup>82</sup>

As far as Section 29 as a procedural mechanism of minority protection was concerned, it might be added that it was not a particularly exacting, and certainly not an insurmountable, fetter on parliamentary majoritarianism. All that was required was a two-thirds majority in the House of Representatives (supervised by the courts by recourse to the Speaker’s certificate, but only as to procedural compliance<sup>83</sup>). It did not envisage any special role for the Senate in constitutional amendments as a second chamber might traditionally be expected to play, nor any extra-parliamentary requirement of consent such as through a referendum. Moreover, the electoral system under the Soulbury Constitution was straightforwardly first-past-the-post, which as the general elections of 1970 and 1977 showed,

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<sup>80</sup> *Piyadasa v. The Bribery Commissioner* (1962) 64 NLR 385 at 387 (emphasis added).

<sup>81</sup> *Ibid*: 388.

<sup>82</sup> See also the discussion of this case, *contra* the argument in this chapter, in C.F. Amerasinghe, ‘*The Legal Sovereignty of the Ceylon Parliament*’ (1966) *Public Law*: pp.65-96 at pp.77-79.

<sup>83</sup> See *Ibralebbe*, at 790-791.

was capable of producing governments with more than two-thirds majorities.<sup>84</sup> Section 29 was in no sense, therefore, a model of substantive constitutional entrenchment permanently and absolutely limiting Parliament's power, as in the case of the German Basic Law<sup>85</sup> or as certain elements of the Indian Constitution have been held to be by the Indian Supreme Court.<sup>86</sup>

Although he does not mention it in his speech, it is possible that Dr de Silva had read the seminal 1966 essay by Dr C.F. Amerasinghe (cited above) in which the latter had argued, *inter alia*, that Section 29 (2) contained substantive limitations. Dr Amerasinghe's principal argument in arriving at this conclusion (and concurring with the decisions in *Ranasinghe* and *Ibralebbe*) was an interpretational one concerning the wording of Section 29. His contention was that the legislative power of the Ceylon Parliament was subject to both substantive and procedural limitations. The latter were those in Section 29 (4) whereas the substantive limitations were that, firstly, the exercise of legislative power can only be for the peace, order and good government of the island 'and for no

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<sup>84</sup> In the general elections of 1970, the SLFP-led United Front (UF), which received only 49% of the total votes cast, obtained a parliamentary representation of 77%, or a two-thirds majority. Thus if it so desired, the UF enjoyed the necessary majority in Parliament to have enacted the First Republican Constitution legally in terms of the procedure laid out in the Soulbury Constitution. However, for reasons discussed below, it chose to adopt the new constitution by way of a Constituent Assembly. In the general elections of 1977, the UNP which received 51% of the votes, obtained as much as 83% of the seats in Parliament, or a five-sixths majority. See also A. Welikala, 'Representative Democracy, Proportional Representation and Plural Society in Sri Lanka' in R. Edrisinha & A. Welikala (Eds.) (2008b) *The Electoral Reform Debate in Sri Lanka* (Colombo: CPA): Ch.II.

<sup>85</sup> Article 79 (3). See also D.P. Currie (1994) *The Constitution of the Federal Republic of Germany* (Chicago: Chicago UP): pp.18, 26, 33.

<sup>86</sup> This is the 'basic structure' doctrine developed by the Indian Supreme Court as a means of limiting the scope of constitutional amendments in such cases as *Golak Nath v. State of Punjab* AIR 1973 SC 1643; *Keshavananda Bharathi v. State of Kerala* AIR 1973; *Minerva Mills Ltd. v. Union of India* AIR 1980 SC 1789, *Indira Gandhi v. Raj Narain* AIR 1975 SC 2299. See Cooray (1995): p.307; Edrisinha et al (2008): p.588; Marshall (1971): p.36.



other purpose’, and secondly, that ‘no law brings about the consequences specified in subsection (2) can be valid.’<sup>87</sup> He went on to note:

“Here it is relevant that subsection (4), which deals with changes of the provisions of the Constitution, states that such changes can only be made by Parliament “In the exercise of its powers under this section.” This, it is submitted, must mean that if the section limits the powers of Parliament to legislate in terms of the subject-matter of legislation as opposed to the form of legislation, then Parliament cannot change the Constitution so as to add to these power or detract from them, since the extent of the power given to legislate is determined by those limitations both as to the maximum and the minimum. Because it is stated that it is in the exercise of *these* powers that changes in the Constitution may be made, Parliament cannot enjoy any more or less than these powers. It is submitted that these qualifying words in section 29 (4) refer to the substantive legislative powers as conferred by section 29 (1) to (3) and that the effect of them is to deprive Parliament of the power to make a change in the extent of its legislative powers so that any limitations on legislative powers contained in section 29 (1) to (3) become permanent limitations which can neither be added to or derogated from.”<sup>88</sup>

The acceptance of Amerasinghe’s interpretative argument relies on whether one attaches the same significance to the phrase ‘in the exercise of its powers under this section’ in Section 29 (4), and whether it can introduce the limitations of Section 29 (2) to *constitutional amendments* (as opposed to ordinary legislation) in the context of the plenitude of power encapsulated in the

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<sup>87</sup> Amerasinghe (1966): p.74.

<sup>88</sup> Ibid.

phrase ‘make laws for peace, order and good government of the Island’ by which Section 29 (1) described the Ceylon Parliament’s legislative power. Interpretative critiques of this argument can of course be made,<sup>89</sup> but my purpose here is different, which is to give Sir Ivor Jennings’ voice the weight that it deserves in this matter, and through it, the constitutional theory of ‘manner and form’ entrenchment in understanding Section 29. It is important to note that in Amerasinghe’s article, he merely acknowledges in a one-sentence footnote that Jennings “thinks that limitations in s.29 can be removed under s.29(4)”<sup>90</sup>, which to me seems less than helpful given the latter’s central role in the conceptual creation of the provision.<sup>91</sup>

It is surely telling that Jennings, in his several commentaries on the Soulbury Constitution, not only gives a fundamentally different meaning to the limitations in Section 29, but also does not consider substantive entrenchment as even an interpretative possibility. These extensive comments include his observations on not only the political rationales and policy objectives underlying the choices relating to textual formulations in the legal provisions of what became the Soulbury Constitution throughout various drafts between 1943 and 1947, but also the provenance of the ideas drawn from comparative experience where such were used. In this context, if a restriction so fundamental as Section 29 (2) in the sense of the interpretation by Lords Pearce and Radcliffe (and in the sense attributed to some of their words by, *inter alios*, Colvin R. de Silva), was in fact what was contemplated by

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<sup>89</sup> See e.g., L.J.M. Cooray (1984) *Constitutional Government in Sri Lanka, 1796-1977* (Colombo: Lake House): pp.123-4; D.C. Jayasuriya (1982), *Mechanics of Constitutional Change: The Sri Lanka Style* (Colombo: Asian Pathfinder Publishers): Ch. 1.

<sup>90</sup> Amerasinghe (1966): p.74, fn.43.

<sup>91</sup> Although the text of the Order-in-Council, and therefore of Section 29, was drafted by Bernard Percival Peiris of the Ceylon Legal Draughtsman’s Department: see B. P. Peiris (2007) *Memoirs of a Cabinet Secretary* (Colombo: Sarasavi Publishers).

the drafters of the Soulbury Constitution,<sup>92</sup> it is inexplicable that Jennings would offer not a single comment on it, especially bearing in mind that the essential wording of Section 29 (2), according to Jennings, “...reproduce[d] verbatim section 8 of the Ministers’ draft,” which he himself had drafted.<sup>93</sup> Instead, what he said was,

“The legislative power of the Ceylon Parliament as contained in Section 29 of the Ceylon (Constitution) Order in Council, 1947, is not that of a sovereign legislature because it was thought wise to limit its powers in the interest of religious and communal minorities. *This limitation, though peculiar in form and substance because it relates to the social conditions of the Island, is similar in principle to that imposed by most written Constitutions.* It is indeed rare to confer upon a legislature the full unrestricted or sovereign power which is possessed, by an accident of history, by the Parliament of the United Kingdom. Absolute power unrestrained by constitutional law is generally considered to be dangerous because it is in fact exercised by transient majorities which may use it to suit themselves. *The limitation can, however, be altered or even abolished by the Ceylon Parliament itself by means of a constitutional amendment which satisfies section 29 (4) of the Constitution.* It is in fact a limitation which Ceylon chooses to impose

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<sup>92</sup> See also C.F. Amerasinghe (1970) *The Doctrines of Sovereignty and Separation of Powers in the Law of Ceylon* (Colombo: Lake House); L. Marasinghe (1971) ‘Ceylon – A Conflict of Constitutions’, 20 *International and Comparative Law Quarterly*: pp.645-674; Marasinghe (2007): pp.119-132; Loveland (2009): p.42. For the conceptual distinction between ‘substantive’ and ‘procedural’ entrenchment, see Loveland (2009): Ch.2, esp. p.36 et seq. The contrary view would be that the provision was only procedurally entrenched, and was consequently open to amendment provided the two-thirds majority together with the Speaker’s certificate under Section 29 (4) was obtained (see above).

<sup>93</sup> Jennings (1953): p.201.

on her legislature in the interest of her own people.”<sup>94</sup>

Even if all this were not enough, Jennings was, as Dicey’s leading critic of the mid-twentieth century, the main exponent of the ‘manner and form’ theory of legal sovereignty, which he plainly and tangibly imported into the Ministers’ Draft and thereby the Soulbury Constitution in the form of the *procedural entrenchment* of the limitations on legislative power in Section 29 (4), and which he described as “...*not strictly a limitation on legislative power*, for it deals with the *exercise* of the power rather than the *power itself*.”<sup>95</sup> It is therefore transparent that Section 29 (2) was not meant to be substantively entrenched but only procedurally protected from ordinary legislation, and further, that it could be amended or repealed by following the procedure for constitutional amendment set out in Section 29 (4).<sup>96</sup>

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<sup>94</sup> Ibid: p.23, emphasis added.

<sup>95</sup> Ibid: p.78, emphasis added

<sup>96</sup> While it is not theoretically impossible that Jennings’ view of parliamentary power could also encompass the entrenchment of *substantive* limitations, as Oliver has pointed out, “...Jennings’ ideas on Parliament limiting itself were focused on the ‘manner and form’ limitation. Jennings did not explore to the same extent the possibility of Parliament imposing self-embracing substantive limitations on itself”: Oliver (2005): p.85. On Jennings’ critique of Dicey, the ‘continuing’ and ‘self-embracing’ theories of parliamentary sovereignty, and the relationship between the doctrine in UK constitutional law and the Commonwealth, see W.I. Jennings (1958) *The Law and the Constitution* (5<sup>th</sup> Ed) (London: University of London Press): p.144-168; Loveland (2009): Ch.2, esp. p.37 et seq.; Oliver (2005): Ch.4, esp. pp.80-86. The leading cases cited in support of the ‘manner and form’ argument are the Australian case of *A-G for New South Wales v. Trethowan* (1932) AC 526 (PC), the South African case of *Harris v. Dönges, Minister of the Interior* (1952) 1 TLR 1245 / (1952) 2 SALR 428 (AD), and *Ranasinghe* itself (see above). Jennings (1958) discussed *Trethowan* and *Harris* in the fifth and last edition of *The Law and the Constitution*, but neither *Ranasinghe* nor *Ibralebbe*, which were decided in 1964 and 1963 respectively. It should be noted that in his discussion of *Ranasinghe*, Loveland (2009) suggests that the Soulbury Constitution, “...contained several principles (dealing primarily with religious discrimination) which were permanently and substantively

The second theoretical implication underlying the positions taken by the parties in the parliamentary debate in 1968 was the notion that the subordination of the legislative power of Parliament to a supreme constitution was incompatible with the sovereign independence of Ceylon.<sup>97</sup> To the extent the argument in favour of a republic was about the British provenance of the

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entrenched”: p.42. This apparently endorses Colvin R. de Silva’s reading of Lord Pearce’s comments, and thereby the tripartite typology of legislation under the Soulbury Constitution de Silva advanced in the parliamentary debate in 1968. See also Marshall (1971): p.57 et seq. See also, in this volume, C. Saunders & A. Dziedzic, ‘*Parliamentary Sovereignty and Written Constitutions in Comparative Perspective.*’

<sup>97</sup> Influential academic opinion in Ceylon seemed to be in favour too, not only on the adoption of a new republican constitution, but also that this should be done by way of an elected Constituent Assembly so as to effect a complete break with the past (in particular, Ceylon’s link to the British Crown). See J.A.L. Cooray (1957) *Sir James Peiris Centenary Lecture* (Colombo: Ceylon Printers); Marasinghe (1971). Dr Cooray, whose legal and constitutional advice had been solicited by both UNP and SLFP leaders since the 1940s, can be regarded as representing views that had the ear of political leaders during this time (if only selectively, for in addition to revolutionary methods of constitutional change as well as the need for a justiciable bill of fundamental rights, he was also a proponent of devolution, which both major parties had failed to introduce despite agreements with the (Tamil) Federal Party: see Edrisinha et al (2008): Chs.9, 10). In his 1957 lecture and thereafter, Dr Cooray’s views were as follows: “The proposal to establish a republican Constitution by an amendment or revision of the previously existing Constitution Order in Council evoked considerable criticism on the ground that what was wanted was a complete break with the past. The question had earlier been asked, whether in the exercise of the power of Parliament under section 29 (4) of that Constitution to amend or repeal any of its provisions Parliament could legally replace the Queen who was not only the source from which that Constitution derived its legal authority but also a constituent part of Parliament. It was also suggested that a way out of this difficult and doubtful position was the establishment of a Constituent Assembly for the adoption of a republican Constitution. There was also the advantage that the establishment of such an Assembly after a deliberate break in legal continuity or a legal revolution would result in the Constitution it adopted being entirely home-derived or ‘autochthonous’”: Cooray (1995): p.57. See also Marshall (1971): pp.57 et seq.; K.C. Wheare (1960) *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon): Ch.4.

Soulbury Constitution, and its continuing link in particular to the British Crown as head of state from which the people(s) of Ceylon desired severance, there is little to argue about. However, to argue that parliamentary sovereignty was essential to the legal and political sovereign independence of Ceylon was another matter.

The traditional theory of parliamentary sovereignty in the British Constitution, as most influentially articulated by Professor A.V. Dicey,<sup>98</sup> is predicated on the *unwritten* character of the British constitution, and it would seem its postulates become redundant in the context of a written constitution, *a fortiori*, one in which the manner and form of the exercise of legislative power was laid down by the constitution, and the exercise of legislative power was judicially reviewable for constitutionality.

However, the dispositions of both the government and the opposition displayed a ‘quasi-theological’<sup>99</sup> obsession with the Diceyan orthodoxy in regard to parliamentary sovereignty, in which anything short of illimitable legislative omnicompetence seemed to denote an absence or loss of sovereign independence, and this was a major ground of dissatisfaction with the Soulbury Constitution. In the context of the unwritten constitution, parliamentary sovereignty required that “...no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”<sup>100</sup> The doctrine of parliamentary sovereignty is the formal ‘top rule’,<sup>101</sup> or put another way,

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<sup>98</sup> A.V. Dicey (1950) *Introduction to the study of the Law of the Constitution* (9<sup>th</sup> Ed.) (London: Macmillan): Ch.I.

<sup>99</sup> The phrase used by Jennings to describe the origins of the concept of sovereignty, but equally apt in this context: Jennings (1958): p.147.

<sup>100</sup> A. W. Bradley, ‘Parliamentary Sovereignty – Form or Substance?’ in J. Jowell & D. Oliver (Eds.) (2004) *The Changing Constitution* (5<sup>th</sup> Ed.) (Oxford: OUP): Ch.2 at p.43.

<sup>101</sup> H. W. R. Wade, ‘The Basis of Legal Sovereignty’ (1955) *Cambridge Law Journal*: p.172 at pp.187-9.

the ‘rule of recognition’<sup>102</sup> in the British constitutional order is the legal omnicompetence of the ‘institutional complex’ of the Queen in Parliament. This all encompassing sovereign power was limited only in the requirement that Parliament could not bind its successors, which rule as Wade put it, “...was that an Act of Parliament in proper form had absolutely overriding effect, except that it could not fetter the corresponding power of future Parliaments.”<sup>103</sup> The more complete version of the rule is in MacCormick’s succinct restatement: “Parliament has an unrestricted and general power to enact valid law, subject only to two disabilities, namely, a disability to enact norms disabling Parliament on any future occasion from enjoying the same unrestricted and general power, and a disability to enact laws that derogate from the former disability.”<sup>104</sup>

As we have seen, although Parliament under the Soulbury was not sovereign in the sense of the British orthodoxy, both judicial authority in the Privy Council and the Supreme Court and Jennings insisted on more than one occasion that this did not affect the independence of Ceylon as a sovereign state. Moreover, in *Ibralebbe*, where a material issue in the case was whether the existence of an appeal to the Privy Council undermined the sovereignty of Ceylon, Lord Radcliffe averred that,

“...it seems...a misleading simplification to speak of the continuance of the Privy Council appeal as being inherently inconsistent with Ceylon’s status as an independent territory or as being bound up with a relationship between Her Majesty and colonial subjects. Historically, the assumption would in itself be inaccurate, and, constitutionally,

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<sup>102</sup> H. L. A. Hart (1994) *The Concept of Law* (2<sup>nd</sup> Ed.) (Oxford: OUP): Chs.6, 10.

<sup>103</sup> H. W. R. Wade, ‘Sovereignty – Revolution or Evolution?’ (1996) *Law Quarterly Review* 112: p.568 at p.574.

<sup>104</sup> N. MacCormick (1999) *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: OUP): Ch.6, p.80.

it is unnecessary. For, if it is recognised, as it must be, that the legislative competence of the Parliament of Ceylon includes power at any time, if it thinks right, to modify or terminate the Privy Council appeal from its courts, true independence is not in any way compromised by the continuance of that appeal, unless and until the Sovereign legislative body decides to end it.”<sup>105</sup>

None of this was sufficient persuasion for the Ceylonese political leadership that the status under the Soulbury Constitution was satisfactory. It should be reiterated that insofar as there was a groundswell of public opinion for a severing of ties with the United Kingdom more unequivocally than what had occurred in 1948, respect for democratic aspirations dictates that the establishment of a Sri Lankan republic was inevitable. However, it does not follow from this that there was any justification for either a constitutional revolution to effectuate a republic, nor the notion that sovereign independence, of necessity, required political institutions that were free of constitutional control. In terms of process and substance, these were unfortunately the contra-constitutionalist values of unbridled majoritarianism that fundamentally coloured Ceylon/Sri Lanka’s much-vaunted exercise of autochthony in 1970-72.

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<sup>105</sup> *Ibralebbe and Another v. Reginam* (1964) 1 All ER 251 at 261. Indeed, notwithstanding the UF’s reliance on the ‘unalterable’ theory of the Soulbury Constitution, which extended beyond Section 29 (2) to other matters such as the judicial power, given that the apex court was the Privy Council associated with the person of the monarch, once in government after 1970, it abolished appeals to that body effortlessly through its two-thirds majority and through the procedure laid down in the Soulbury Constitution. This too suggests strongly that the constitutional arguments in the 1968 debate were deployed instrumentally to merely buttress the revolutionary course of action determined on other grounds, rather than for their own sake.



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**Buddhism And The Constitution:  
The Historiography and Postcolonial  
Politics of Section 6**



*Benjamin Schonthal*

## **Introduction**

Of the many legacies of Sri Lanka's 1972 Constitution, one of the most controversial remains its provisions regarding Buddhism, contained in Section 6 (Chapter II). Depending on with whom one speaks, the provisions are controversial for differing reasons. Some claim that by proclaiming Buddhism to occupy the "foremost place" in Sri Lanka, Section 6 undermines commitments to state neutrality or non-discrimination, implicating the constitution in a larger project of religious majoritarianism. Others claim that Section 6 does not go far enough in its privileging of Buddhism, that it stops short of making Buddhism the official 'State Religion,' as it is in Cambodia and Bhutan. A third cohort of critics asserts that by mingling prerogatives for Buddhism with general fundamental rights protections for all religions, Section 6 teeters on the edge of incoherence, prescribing the state's relationship to religion in opposing, incongruous terms – on the one hand obligating state actors to specially protect the majority religion and, on the other hand, requiring state institutions to serve as an impartial arbiter of legal rights for all religious communities.

In another spirit, many jurists, lawyers and judges, as professional interpreters of constitutions, tend to read Section 6, and its contemporary iteration, Article 9 of the 1978 Constitution, differently, assuming a principle of 'harmonious construction' that undergirds the constitution as a whole. From this perspective, the Buddhism chapter is often said to sketch out some kind of unique, creative, coherent position with regards to religion in Sri Lanka, a kind of 'Buddhist secularism' or 'Buddhist liberalism,' in which patronage of Buddhism and guarantees of liberal rights counterbalance each other: the incipient religious biases of secular liberalism are eased (for Buddhists) by guarantees of protections for Buddhism, the potential excesses of Buddhist protections are, in parallel, neutralised (for non-Buddhists) by general liberal rights commitments for "all religions." Those who maintain this perspective tend to describe Buddhism's status using phrases like 'first among equals' and tend to view coincidence of Buddhist prerogatives and fundamental rights as embodying some sort of hazy, under-formulated, compromise – perhaps *détente* – between

Buddhists and non-Buddhists regarding the contours of religious pluralism on the island.

To an extent, all interpretations are right, and all are partial. However, if one looks historically at the political, religious and legal stimuli that led to the creation, alteration and ratification of Section 6, the clauses begin to take on a different hue. In what follows, I argue that Section 6 should be read as a historical product, the legal-rhetorical outcome of unresolved historical desires, grievances and claims which took shape, initially, in the years surrounding independence. Section 6 / Article 9 has its origins not in some kind of shared vision of law and religion or, even, in the constitution-drafting process of 1970-72, but in the groundswells of political discourse that started rumbling from the 1940s.

### **1948 Constitution and its Discontents**

When set alongside the drafting of the independence constitution in India, the process of drafting Sri Lanka's independence constitution appears comparatively diluted in its nationalism. The 1948 Constitution, under which the British transferred powers of self-government to Ceylon,<sup>1</sup> was not so much an independence manifesto but a document calculated to persuade the British to grant independence; it was not a declaration of self-rule, but a precondition for it. The text which would become the 1948 Constitution was designed mainly by the duo of D.S. Senanayake and Ivor Jennings, who together shielded the constitution-making process from nationalists on two sides: anti-colonial nationalists such as the Young Turks in the Ceylon National Congress, who proposed to make "Lanka" a "free republic" and communitarian nationalists who sought to embed in the new charter special protections for the island's Sinhalese majority or non-Sinhalese minorities<sup>2</sup>.

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<sup>1</sup> In the interest of keeping a consistency of terms with the sources I cite, I refer to the island before 1972 as Ceylon.

<sup>2</sup> See, in this volume, A. Welikala 'The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' led to Constitutional Revolution.'

The 1948 Constitution, from its earliest iterations to its final draft, included very few explicit provisions regarding religion. All of the provisions concerning religion appear in one section, 29(2), which lays out a series of limits on the law-making powers of the parliament, prohibiting it from enacting bills that would:

- a. Prohibit or restrict the free exercise of any religion; or
- b. Make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
- c. Confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or
- d. Alter the constitution of any religious body except with the consent of the governing authority of that body; Provided that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.

The provisions are relatively spare. Religious freedom is elaborated as a series of negative liberties, injunctions *against* laws that would encroach on it – a style of constitutional provision that treats religious freedom as though it was a condition which was already existing among Sri Lanka’s citizens, a *de facto* state of affairs to be preserved through limiting *de jure* encroachments on it.

Many on the island, however, did not consider religious freedom an already-existing state of affairs and did not view Section 29(2) as an adequate statement of religious rights. From its earliest drafts in 1943 and 1944, Section 29(2) had numerous critics, among the island’s smaller and larger political parties. In 1945, the leader of the All Ceylon Tamil Congress (ACTC), G.G. Ponnambalam, warned the Soulbury Commission of the growing “influence of religion on politics” and the rise of political parties which were organised along religious and ethnic lines and were

making “direct appeals...to arouse communal passions.”<sup>3</sup> Section 29(2), cautioned Ponnambalam, was not strong enough to protect the freedoms and rights of non-Sinhala communities.<sup>4</sup> Ponnambalam’s fears were shared by members of the Communist Party who objected to Section 29(2) for similar reasons and who argued that the Soulbury Constitution should integrate more explicit protections for community and individual rights. In particular, they advocated including provisions that would criminalise discrimination based on caste, race, community or religion, and sections that listed positive statutory guarantees for protecting social, economic, educational, political and religious rights.<sup>5</sup>

Section 29(2) also had its critics among the island’s largest political party, the Ceylon National Congress (CNC). Many in the CNC echoed the concerns of Ponnambalam’s Tamil Congress and the Communist Party, and proposed to resolve them through drafting a new section on individual and community freedoms, one that spelled out (among other things) the government’s responsibility to religious freedom. Instead of protecting individual rights through *injunctions against* prejudicial legislation (as had been done in Section 29(2)), certain members in the CNC proposed creating a comprehensive Bill of Rights that would enumerate the state’s *positive obligations* to uphold individual and group freedoms. A constitutional draft oriented around the concept of a Bill of Rights was produced and presented to the Board of Ministers by members of the CNC in 1944.<sup>6</sup> The draft outlined a series of fundamental rights, including the liberty of the person, education, association, freedom of the press and freedom of religion. The draft articulated the principles of “freedom of religion” in Section 7, saying:

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<sup>3</sup> CO 54/978/1, No. 96: Letter from G.G. Ponnambalam to Mr Hall on the Tamil Minority Case, 2<sup>nd</sup> November 1945, in K.M. De Silva (Ed.) (1997) *British Documents on the End of Empire: Sri Lanka* (London: Institute of Commonwealth Studies): p.145.

<sup>4</sup> Ibid: pp.156-7.

<sup>5</sup> Resolutions of the Ceylon Communist Party, 15<sup>th</sup> October 1944, in R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) *Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: Centre for Policy Alternatives): pp.111-2.

<sup>6</sup> K.M. De Silva & H. Wriggins (1988) *J.R. Jayewardene of Sri Lanka* (Vol.1) (London: Anthony Blond/Quartet): p.169.

“Freedom of conscience and the free profession and practice of religion, subject to public order and morality, are hereby guaranteed to every citizen. The Republic shall not prohibit the free exercise of any religion or give preference or impose any disability on account of religious belief or status.”<sup>7</sup>

Although the draft proved popular among certain sections of the CNC, the concept of a Bill of Rights was ultimately ruled out by the Board of Ministers during the drafting process. This was due in large part to the protests of Ivor Jennings who, in his teaching and writing at LSE and in Sri Lanka had argued stridently – against thinkers such as Harold Laski – against the ‘bill of rights model’ of constitution-making which, he felt, failed to provide adequate flexibility for governments. Instead, he insisted, bills of rights set up fixed regimes of unchangeable freedoms, fossilising for future generations, the prized values of present politicians, while, at the same time, involving judges regularly in defining and determining the precise meanings and implications of those freedoms. As Jennings would later quip, “...an English lawyer is apt to shy away from [fundamental rights] like a horse from a ghost.”<sup>8</sup>

Whereas political groups like the Tamil Congress, Communist Party and parts of the Ceylon National Congress objected to Section 29(2) because it failed to protect individual and minority rights, some Buddhists in Ceylon, particularly lay Buddhist organisations such as the All Ceylon Buddhist Congress (ACBC), objected to Section 29(2) because it did not redress the injuries that had been done to Buddhism during the colonial period, and because it failed to protect the current interests of Buddhist laymen and monks. Buddhist groups protested, particularly regarding one part of Section 29(2) – subsection (d) – which guaranteed that the government would not alter the constitution of an incorporated religious body without the consent of its “governing authority.”

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<sup>7</sup> J.R. Jayewardene’s Draft Constitution, 29<sup>th</sup> November 1944, in M. Roberts (1977) *Documents of the Ceylon National Congress and Nationalist Politics in Ceylon 1929-1950* (Colombo: National Archives): p.2593.

<sup>8</sup> Quoted in S.A. de Smith (1964) *The New Commonwealth and Its Constitutions* (London: Stevens): p.165.

Some Buddhist objections to Section 29(2) were expressed publicly in a letter submitted to Ceylon's first Prime Minister, D.S. Senanayake, by the ACBC in 1951. In the letter, G.P. Malalasekera, the President of the ACBC, voiced the "disappointment, almost resentment, growing among the Buddhists of Ceylon," and prevailed on the government to "extend to Buddhism the same patronage as was extended to it by Sinhalese rulers of old."<sup>9</sup> In the memorandum attached to the letter, the ACBC called upon the government to remedy some of the damage done to Buddhism during the reigns of the Portuguese, Dutch and British by offering greater state support for Buddhist education, monks and temples, and to appoint a Buddhist Commission to look into, among other things, an "autonomous" constitution for Buddhists like the ones referred to in Section 29(2)(d).<sup>10</sup> When, three years later, Senanayake failed to act upon the ACBC recommendations, the Buddhist Congress created their own Buddhist Commission of Enquiry. The ACBC Commission undertook a two-year investigation to explore the extent of the injuries done to Buddhism during the colonial period and to recommend actions that the state should take to repair them. The work culminated with the publication of a Sinhala report, the English summary of which was titled *The Betrayal of Buddhism*.

In *The Betrayal of Buddhism*, the ACBC elaborated on its critique of Section 29(2), particularly subsection 29(2)(d) which, it argued, kept Buddhists from developing their own autonomous, legally recognised, corporate bodies. The argument outlined in *The Betrayal* is complex. According to the ACBC Commission, subsection 29(2)(d) allows Buddhist groups to petition for an act of incorporation, but it limits the probability that those petitions would succeed because it bases the principle of incorporation on the notion that all religious groups have a clearly defined "governing authority." Yet, Buddhist monastic fraternities on the island, particularly in the 1940s and 1950s, often lacked any clearly determined or clearly agreed upon hierarchies of

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<sup>9</sup> All Ceylon Buddhist Congress (1951) *Buddhism and the State: Resolutions and Memorandum of the All Ceylon Buddhist Congress* (Maradana: Oriental Press): p.3.

<sup>10</sup> Ibid: pp.5-6.

authority.<sup>11</sup> *The Betrayal* argues that if a Bill to form a Buddhist organisation was moved in Parliament – for e.g., to incorporate a monastic fraternity (*nikaya*), or a temple – it could be challenged easily on the basis that the Bill cited an illegitimate governing authority. A Member of Parliament who disliked the mover of the Bill or who disliked the monk named as the governing authority in the Bill could readily find another senior monk who claimed that he was the real head monk of a *nikaya* or chief abbot of a temple, and therefore the *real* legitimate governing authority of the proposed corporation.<sup>12</sup> Thus, for the ACBC, Section 29(2)(d) was based on a hierarchical, Christian model of religious organisation and therefore advantaged Christian groups over and against Buddhists.

### **1950s and 60s: Politicising Constitutional Reform, Pairing Constitutional Criticism**

During the 1950s and 1960s, both criticisms of Section 29(2) – those couched in the demands for the elaboration of fundamental rights and in the demands for special Buddhist privileges – gained prominence in national politics. During the prime minister-ship of S.W.R.D. Bandaranaike, both criticisms were filtered into two large government initiatives. On one hand, calls to reconsider constitutional protections for minority and individual rights were addressed in a Joint Select Committee for the Revision of the Constitution, which was charged with, among other things, formulating a chapter on fundamental rights. On the other hand, calls to give Buddhism state support and protection were direct towards a newly appointed government Buddha Sasana Commission, which was mandated to investigate the claims and suggestions of the report of the All Ceylon Buddhist Congress and recommend administrative measures to strengthen the position of Buddhism in the country.<sup>13</sup>

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<sup>11</sup> K. Malalgoda (1976) *Buddhism in Sinhalese Society, 1750-1900: A Study of Religious Revival and Change* (Berkeley: University of California Press).

<sup>12</sup> Buddhist Committee of Enquiry (1956) *The Betrayal of Buddhism* (Balangoda: Dharmavijaya Press): pp.27-30.

<sup>13</sup> Sessional Paper No. XXV of 1957: *The Interim Report of the Buddha Sasana Commission* (Colombo: Government Press): p.1.



Promises to integrate fundamental rights into Sri Lanka's constitution had been a visible theme in S.W.R.D. Bandaranaike's political agenda since he separated from the ruling United National Party (UNP) and formed his own political party, the Sri Lanka Freedom Party (SLFP), in 1951.<sup>14</sup> Shortly after taking office, in November 1957, he introduced a motion to establish a Joint Select Commission on the Revision of the Constitution, saying:

“In our present Constitution there is no adequate statement of fundamental rights; fundamental rights as affecting all citizens, fundamental rights maybe as affecting the minority sections of the general community. There is no statement beyond Section 29 which itself is not very satisfactory.”<sup>15</sup>

The Joint Committee created by Bandaranaike – which included prominent representatives from the SLFP, UNP, Federal Party<sup>16</sup> and the Left parties, many of whom had proposed their own amendments to the Soulbury Constitution in the 1940s – produced a comprehensive list of fundamental rights one year later, one which included political rights, economic rights, “cultural and educational rights of minorities,” rights to enforce fundamental rights, and discrete rights to freedom of religion. Under the rights to freedom of religion, the Committee included provisions for the “freedom of conscience and worship,” “free profession and practice of religion” and the freedom to manage religious affairs. This list was based closely on the Indian constitutional model, reiterating its provisions *verbatim* in many cases.<sup>17</sup>

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<sup>14</sup> W.A.W. Warnapala (2005) *Sri Lanka Freedom Party* (Colombo: Godage International): p.91.

<sup>15</sup> S.W.R.D. Bandaranaike, ‘*Revision of the Constitution*’ (Speech Made As Prime Minister, 7<sup>th</sup> November 1957) in G.E.P. De S. Wickramaratne (Ed.) (1961) *Towards a New Era: Selected Speeches of S.W.R.D. Bandaranaike* (Colombo: Government Press,): p.137.

<sup>16</sup> S.J.V. Chelvanayakam withdrew from the Committee in 1958, following the failure of the Bandaranaike-Chelvanayakam Pact.

<sup>17</sup> Religion was also mentioned in the section on “cultural and educational rights of minorities,” ensuring that state grant aid would not be discriminatory on the basis of language or religion. J.A.L. Cooray (1973) *Constitutional and Administrative Law of Sri Lanka (Ceylon)* (Colombo: Hansa Publishers): p.69.

In order to examine the question of special state protections for Buddhism, Bandaranaike created a Buddha Sasana Commission consisting of ten monks and six laymen.<sup>18</sup> The Commission was formed in 1957 with an aim to evaluate the proposals of the ACBC commission, to recommend measures for effectively managing temple properties and educating the *sangha*, and to formulate a plan for placing all Buddhist monks and temples on a national register.<sup>19</sup> In its report, the Commission confirmed the suggestion of the ACBC commission that the government set up a Buddha Sasana Council, and further specified that the Council should oversee ordaining and registering *bhikkus*, help supervise a code of conduct for monks, promote the spread of Buddhism, and manage temple donations. The Commission also made suggestions for improving monastic education, setting up Buddhist public schools for laity, creating temple trusts for rural villages, regularising the building of temples, establishing *sangha* courts (*sanghadhikarana*) and drafting a Buddha Sasana Act which would formalise the state's supervisory role over Buddhist monks, property and lay officials.<sup>20</sup>

Both the Committee on the Revision of the Constitution and the Buddha Sasana Commission were dissolved following Bandaranaike's assassination (26<sup>th</sup> September 1959).<sup>21</sup> However, the agendas of both bodies were taken up by the major political parties and governments that succeeded Bandaranaike. Mrs Sirimavo Bandaranaike, who took over the leadership of the SLFP in 1960, promised in her first election manifesto that she would pursue both initiatives: she would work to create a republican constitution which included a chapter on fundamental rights, and she would implement the suggestions of the Buddha Sasana Commission.<sup>22</sup> In the SLFP policy statement from

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<sup>18</sup> Sessional Paper No. XXV of 1957: p.2.

<sup>19</sup> Ibid: p.1.

<sup>20</sup> Sessional Paper No. XVIII of 1959: *Budha Śasana Komiṣan Vārtāva (Buddha Sasana Commission Report)* (Colombo: Government Press): pp.277-290.

<sup>21</sup> The Committee on the Revision of the Constitution ultimately made little headway on fundamental rights, concentrating its attentions primarily towards the re-delimitation of electorates.

<sup>22</sup> Warnapala (2005): p.157.

November 1964, Mrs Bandaranaike folded these two objectives into one:

“In addition to steps taken by the late Mr S.W.R.D. Bandaranaike’s Government of 1956, and by the present Government to give Buddhism its proper place in the country as the religion of the majority and at the same time guaranteeing complete freedom of worship to all religions, my Government proposes to place before you legislation which will guarantee this proper place to Buddhism.”<sup>23</sup>

Clearly, by 1964, the promises of the SLFP adumbrate the language of Section 6 (and Article 9). Buddhism is to be given a “proper place” (rather than the “foremost” place) and, at the same time, all religions are guaranteed fundamental freedoms.

By the middle of the 1960s, even the UNP – the party whose founding father, D.S. Senanayake, worked to implement the 1948 Constitution – began to adopt similar language and approaches to those of Mrs Bandaranaike and the SLFP when it came to the subjects of Buddhism and fundamental rights. In their election manifesto from 1965 the party promised:

“While restoring Buddhism to the place it occupied when Lanka was free and Kings ruled according to the *Dasa Raja Dharma* (Ten Buddhist Principles) we shall respect the rights of those who profess other faiths and ensure them freedom of worship.”<sup>24</sup>

Later that year, at the party’s national conference in November, J.R. Jayewardene went further and proposed that a new constitution for the “Democratic Socialist Republic of Lanka is to be established on Feb 4, 1966 [*sic*]” and that it should contain a provision that “Buddhism, the majority religion of the country, where the population is about 75%, being given its rightful place.”<sup>25</sup> In 1967, the UNP-led government even reappointed a

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<sup>23</sup> *Hansard*, House of Representatives, 20<sup>th</sup> November 1964: Col.8.

<sup>24</sup> United National Party (1965) *Party Manifesto: The United National Party*.

<sup>25</sup> *World Buddhism* (Nov. 1965), Vol. 14(4): p.17.

Joint Select Committee on the Revision of the Constitution to carry on with investigations which began under S.W.R.D. Bandaranaike's government, charging it with investigating the same issues as the 1958 Committee, including the inclusion in the constitution of a chapter on fundamental rights.<sup>26</sup>

As the 1960s drew to a close, there seemed to be an irresistible political surge to abandon the 1948 Constitution and to replace it with a home-grown, "autochthonous" constitution which would give the Parliament full powers of law-making and constitutional amendment, and would redress the shortcomings with respect to fundamental rights and Buddhism in Section 29(2). It was clear that as soon as any one government could muster the required two-thirds majority in Parliament it would take up the task of rewriting the country's constitution.

### **Giving Buddhism the Foremost Place**

In the early 1970s, the talk of a new constitution, which had existed in the political scene since the 1950s finally gave way to actual constitutional change, and in the 1970-1972 Constituent Assembly process, members debated a Draft Basic Resolution on Buddhism (Draft Basic Resolution 3), which read:

"In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be given its rightful place and accordingly, it shall be the duty of the State to protect and foster Buddhism, while assuring to all religions the rights granted by Basic Resolution 5(4)."<sup>27</sup>

This resolution, entitled "Buddhism," ties together the two major criticisms of Section 29(2) in the Soulbury Constitution. It refers both to a state obligation to protect Buddhism (here underscored as "the religion of the majority of the people") and to "assure"

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<sup>26</sup> *The Joint Select Committee of the Senate and the House of Representatives Appointed to Consider the Revision of the Constitution*, Parliamentary Series No. 30, 3<sup>rd</sup> Session of 6<sup>th</sup> Parliament, 13<sup>th</sup> June 1968 (Colombo: Government Press).

<sup>27</sup> Constituent Assembly (1972) *Constituent Assembly Committee Reports*, 17<sup>th</sup> January 1972: pp.88-9.

certain fundamental rights to all religions. Regarding Buddhism, the passage draws from the language used in SLFP policy statements and manifestos during the 1960s, and it reiterated directly the election manifesto of the United Front from 1970, which promised:

“Buddhism, the religion of the majority of the people, will be ensured its rightful place. The adherents of all faiths will be guaranteed freedom of religious worship and the right to practice their religion.”<sup>28</sup>

Draft Basic Resolution 3 on Buddhism also made reference to the proposed chapter on fundamental rights, which read:

“Every citizen shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”<sup>29</sup>

Unlike the language regarding Buddhism, which was drawn up by the SLFP, the language of Section 5(4) on freedom of religion was imported verbatim from Article 18(1) of the 1966 International Covenant on Civil and Political Rights which was adopted by the United Nations, and to which Sri Lanka was a signatory.

When one looks at the Constituent Assembly debates regarding the formulation of Draft Basic Resolution 3 on Buddhism, one sees, for the first time, an extended debate among Members of Parliament, over how the country should balance and reconcile the two critiques of the Soulbury Constitution regarding religion: its failure to ensure adequate fundamental rights (particularly for ethnic and religious minorities) and its failure to protect the interests of Buddhists. The debates over Draft Basic Resolution 3

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<sup>28</sup> United Front, *Joint Election Manifesto of the United Front (1970) of the Sri Lanka Freedom Party, Lanka Samasamaja Party and Communist Party* (Colombo: Government Press), p. 12.

<sup>29</sup> Constituent Assembly (1972) *Constituent Assembly Committee Reports*, 17<sup>th</sup> January 1972, pp. 90-1.

provide a glimpse at what happened when political initiatives directed towards the creation of a regime of fundamental rights came into direct conversation with political initiatives directed at giving a special status to Buddhism; and they highlight the difficulties in moving those initiatives from *distinct* policy agendas in the rhetoric of campaigning political parties (the SLFP and UNP) to *coincident* legal principles in a new constitution.

Objections to the formulation of Basic Resolution 3 were expressed in three proposed amendments. The first resolution was introduced by A. Aziz, head of the Democratic Workers' Congress (a coalition partner in the United Front), who suggested that the resolution be altered so that it read:

“In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be given its rightful place and accordingly, it shall be the duty of the State to protect and foster Buddhism, while assuring to **Hinduism, Islam, Christianity and** all religions the rights granted by Basic Resolution 5(4).”<sup>30</sup>

Aziz explained that he agreed with the general message of the Resolution, i.e. that Buddhism should be awarded a special place in the constitution, but he argued that Hinduism, Islam and Christianity had also played “an important part in the cultural life of a section of the people of this country” and therefore deserved explicit mention in the resolution.<sup>31</sup> Such an amendment, he insisted, would “give a certain measure of confidence” to Hindus, Muslims and Christians, allowing them to feel equally included and represented in the constitution.<sup>32</sup>

A second amendment was proposed by the leaders of the UNP, J.R. Jayewardene and Dudley Senanayake. It read:

“In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be **inviolable and**

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<sup>30</sup> *Constituent Assembly Debates* (1972) (Colombo: Ceylon Government Press): Col.640.

<sup>31</sup> *Ibid*: Col.641.

<sup>32</sup> *Ibid*: Col.642.

**shall be** given its rightful place, and accordingly, it shall be the duty of the State to protect and foster Buddhism, **its rites, Ministers and its places of worship**, while assuring to all religions the rights granted by basic Resolution 5(4).”<sup>33</sup>

In their amendment, Jayewardene and Senanayake argued that the language of the original draft was not clear enough, and thus did not provide strong enough protections for Buddhism. To enhance the resolution, Jayewardene and Senanayake suggested including phrases from the Kandyan Convention of 1815, a treaty signed between Kandyan nobles and British officials which, although it ceded sovereignty of the kingdom to the King of England, made certain provisions for the protection of Buddhism. <sup>34</sup> Jayewardene explained the rationale for his amendment by saying that the expression “rightful place,” or *nisitāna*, was vague and people would not know what was meant by the phrase. In order to further clarify this duty of the government and to make sure that Buddhist interests were protected, particularly the preservation of Buddhist sacred sites, he insisted that language from the Kandyan Convention was appropriate, and so the terms “inviolable” and “its rites, ministers and places of worship” were added to the resolution.

A third amendment to Draft Basic Resolution 3 on Buddhism was proposed by the leader of the Federal Party, S.J.V. Chelvanayakam. The amendment rejected the entire premise of the resolution and argued the constitution’s main provision regarding religion should read:

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<sup>33</sup> Constituent Assembly (1972) *Constituent Assembly Committee Reports*, 27<sup>th</sup> February 1972: Col. 226.

<sup>34</sup> The amendment invokes parts of Section V of the Convention, which reads: “The religion of the Boodho, professed by the chiefs and inhabitants of these provinces, is declared inviolable and its rites, ministers, and places of worship are to be maintained and protected” in C. Parry (Ed.) (1969) *Consolidated Treaty Series with Index, 1648-1919* (Oxford: OUP): pp.484-486.

“The Republic of Sri Lanka shall be a secular State (Tamil: *matacārpārya*) but shall protect and foster Buddhism, Hinduism, Christianity and Islam.”<sup>35</sup>

V. Dharmalingam, who presented the amendment for Chelvanayakam, explained that the amendment represented a resolution agreed upon by the major Tamil parties at a conference in Velvettitturai. He questioned why the country needed a law to protect the rights of the *majority* religion and he asked how a resolution which linked the government with Buddhism could coexist with one which made Sri Lanka a socialist state, when the dictums of socialism demand that “affairs are run completely without any kind of link between the government and religion and...the government undertakes to keep religion outside of the state.”<sup>36</sup> Another Federal Party member, K.P. Ratnam, criticised Basic Resolution 3 for trying to please too many people at once:

“You’re trying not to offend those who oppose religion [the Left Parties] by saying that it won’t be our state religion. [And] you’re trying to say to those who want religion that, without recognising other religions, you will only give a place to Buddhism. I want to point out that this basic draft resolution takes a position between the two. Therefore, both will sour. I wish to tell you that this position will be a cause of continuous strife for this country.”<sup>37</sup>

For Ratnam, the resolution on Buddhism appeared worrisome because it did not articulate a clear, strong position with regards to the relationship between religion and state. Instead it took a vague, intermediate stance that attempted to reconcile the incompatible desires of two opposing political lobbies.

Ultimately the UF majority in the Constituent Assembly voted to ratify Basic Resolution 3. However, in the version of the

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<sup>35</sup> Constituent Assembly (1972) *Constituent Assembly Committee Reports*, 27<sup>th</sup> February 1972: pp.225-26.

<sup>36</sup> *Constituent Assembly Debates*: Col 939. Quote translated from Tamil.

<sup>37</sup> *Ibid*: Col.947. Direct quote translated from Tamil.



resolution that appeared nine months later in the draft constitution that Colvin R. De Silva presented at a press conference, the language of the chapter on Buddhism had changed slightly. In January 1972, Resolution 3, which became Section 6, on “Buddhism” read:

“The Republic of Sri Lanka shall give to Buddhism the **foremost place** (*S: pramukhasthānaya; T: mutanmai tānam*) and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by section 18(1)(d).”<sup>38</sup>

Between May 1971 and January 1972, De Silva and the drafting committee adjusted the resolution to reflect two aspects of the debates. Firstly, the drafters replaced the term *rightful* place with the stronger phrase *foremost* place (*S: pramukhasthānaya*). Secondly, the re-drafted resolution removed the phrase qualifying Buddhism as “the religion of the majority of the people.”

## Conclusion

On 22<sup>nd</sup> May 1972, the legal charter that the UF shepherded through two years of drafting, debates and committees became the constitution of a country newly renamed as “Sri Lanka” and the Buddhism chapter gained the status of the island’s official religious policy. The constitution was ratified by a vote of 119 to 16: the UNP voted against it; the Federal Party members did not vote at all, having walked out of the proceedings in late June after Sinhala was made the sole “official language.”

In the end, Section 6 appears to have left many people unsatisfied. Ultimately even Colvin R. De Silva, the primary drafter of the resolution and the primary architect of the constitution, admitted that he was not fully satisfied. In a speech given in 1978, he described the tense and conflicted process of finalising a constitutional provision on Buddhism, admitting that he would have preferred an entirely secular constitution but arguing that

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<sup>38</sup> Draft Basic Resolution 5(iv) was incorporated as Section 18(1)(d), although the wording remained identical.

Section 6 should be viewed as something of a compromise between secularism and Buddhist majoritarianism, if for no other reason, because it did not make Buddhism the “state religion.” De Silva recalled that his final rendering of Section 6 represented, in actuality, a much milder version of the measures that the state would take to privilege Buddhism, that it had eliminated certain attempts to make the language stronger by, for example, stipulating that the highest offices in government (the president, prime ministers, etc.) should be held by Buddhists.<sup>39</sup> However, as K.P. Ratnam predicted, the provisions in Section 6 continued to leave two groups wanting: those who felt that fundamental rights to freedom of religion were impinged upon by the inclusion of Section 6 in the constitution, and those who felt Buddhism should have greater, more explicit protections contained within it: desires, which one might consider as reincarnations of the two major disaffections with Section 29(2) of the Soulbury Constitution.

Looking at the evolution of the Buddhism Chapter historically, one might argue that controversy concerning its final form is perhaps inevitable. Section 6 did not so much resolve or reconcile competing, long-standing interests as acknowledge them by joining them together, if in rhetoric alone.

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<sup>39</sup> C.R. De Silva (1987) *Safeguards For the Minorities in the 1972 Constitution* (Colombo: A Young Socialist Publication): pp.10-11.