A TALE OF THREE CONSTITUTIONS
1946-8, 1972 and 1978*

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Sri Lanka has had three constitutions since independence, each reflecting a distinctive style in the mechanics of constitution-making. The first, of British origin, lasted all of twenty-five years; the second, an autochthonous constitution produced by a constituent assembly barely survived the defeat of the government that introduced it; and the third, the product of a Select Committee of the National State Assembly as the legislature of the first republic was called, was introduced on 7 September 1978.

If the constitution under which the new Dominion of Ceylon began its political existence—the Soulbury constitution—was of British origin, in contrast to the autochthonous constitution drafted for India by her constituent assembly, it was also true that it was basically the constitution drafted locally for D. S. Senanayake in 1944—and subsequently overwhelmingly approved by the State Council—modified to suit the needs of the changed circumstances of 1947-8. And these modifications, as we shall presently see, were few and not very substantial.

The most striking feature of this constitution was that it came closer to the Westminster model than most other Commonwealth constitutions. The draft scheme of 1944 provided for a cabinet form of government adhering to the principles of collective responsibility, a unicameral legislature, and a governor-general as head of state. Whether or not there was to be a second chamber was left for the future legislature to decide, by a simple majority. The Soulbury constitution took over the scheme but added to it a second chamber. The draft constitution incorporated a scheme of representation which, without compromising the territorial as against the communal principle, gave weightage to minority groups and to backward and sparsely populated areas. This scheme was adopted in its entirety by the Soulbury Commission (and survived the supercession of the Soulbury constitution in 1972).

The guiding principles behind the draft scheme of 1944 (and the Soulbury constitution) were: that Sri Lanka was a multi-racial democracy; and the commitment to the maintenance of the liberal concept of a secular state in

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which the lines between state power and religion were scrupulously demarcated. D. S. Senanayake placed himself in direct opposition to an influential current of opinion which viewed the Sri Lanka polity as being essentially Sinhalese and Buddhist in character, and which urged that government policies should be fashioned to accommodate a far-reaching transformation to build a new Sri Lanka on traditional 'ideal', Sinhalese-Buddhist lines. Implicit in this latter was a rejection of the concept of a multi-racial polity, as well as the concept of a secular state.

Article 8 of the draft constitution of 1944[1] imposed restrictions on legislative power as "a general protection to minorities, whether racial, social or religious". These provisions were incorporated in the Soulbury constitution (S. 29[2]), and were the only serious limitation on the powers of the new parliament. In retrospect, the rights of minorities do not appear to have received adequate protection in the Soulbury constitution, but at the time of the transfer of power the constitutional guarantees against discriminatory legislation seemed sufficiently reassuring to the minorities, largely because of the trust and confidence they reposed in D. S. Senananayake. The constitution did not incorporate a bill of rights. It was a unitary constitution, surprisingly flexible in practice despite its apparent rigidity, and the courts—as in other Dominion constitutions—could review the constitutionality of legislation and the legitimacy of the use of power.

From its inception the Soulbury constitution came under attack from the very vocal left-wing of the island's political spectrum. For two main reasons their contention that the independence achieved in 1947-8 was spurious evoked a positive response from a wider circle of the political nation than merely their own ranks and fellow-travellers.

The first and most important of these two reasons was the contrast between the two processes of transfer of power in the Indian sub-continent and Sri Lanka. The Indian experience seemed to be more emotionally satisfying than the Sri Lankan. The island's political leadership within the Board of Ministers under the Donoughmore constitution took pride in the fact that the transfer of power had been smooth and peaceful. The last British governor of the colony of Ceylon, Sir Henry Monck-Mason-Moore became the first Governor-General of the new Dominion. If there was a parallel for this in the

1. *Sessional Paper* XIV of 1944.

2 For a discussion of the background to these agreements see H. Duncan Hall, *Commonwealth: A History of the Britsh Commonwealth of Nations* (London, 1971), pp. 795-810. Sir Ivor Jennings, *The Constitution of Ceylon* (3rd ed., O.U.P. Bombay, 1953) pp. 252-54. See also my paper 'Sri Lanka : D. S. Senanayake and the Passage to Dominion Status, 1942-47,' read at the Commonwealth History Postgraduate Seminar of the Institute of Commonwealth Studies, University of London, on 26 May 1977.

case of India and Mountbatten, there was a notable difference between the constitutional and legal instruments which conferred independence on Sri Lanka and the cognate process in the rest of the British *raj* in South Asia—for India and Pakistan there had been Acts of Parliament, for Burma, a specially negotiated treaty, for Sri Lanka a mere Order-in-Council. Certainly there was no qualitative difference in the nature of independence achieved by Sri Lanka and that attained by India and Pakistan, and no meaningful difference in status was either intended by Britain or accepted by Sri Lanka's leaders. Yet inevitably there were disadvantages in making the process of transfer of power so bland as to be virtually imperceptible to those not directly involved.

Opposition critics focussed attention on the British origins of the new Constitution. Indeed the left wing composed of the Trotskyist Lanka Sama Samaja Party (LSSP) and the Communist Party (CP) urged the establishment of a constituent assembly on the Indian model to draft a constitution for the island. The LSSP, the most articulate exponents of this line of action argued that: "... an independent country, or rather a country achieving independence after foreign subjection required to mark its independence by the framing of a constitution for itself—and that the proper instrument for so framing a constitution was classically the constituent assembly..."

Secondly, the Agreements on Defence and External Affairs appeared to give credibility to the argument that Sri Lanka's independence was flawed. The Agreements themselves were regarded as badges of inferiority and checks on full sovereignity in external affairs. Moreover fears were expressed about secret clauses not divulged or a secret treaty even more detrimental to the island's new status as an independent nation. Events were to prove that these fears and suspicions were without foundation in fact, and certainly no secret undertaking had been given by Sri Lanka in 1946-8, but until 1956-7 suspicions on this score persisted.

It might have been expected, in these circumstances, that Sri Lanka would soon jettison the Soulbury constitutional framework, and develop instead a political style appropriate to the conditions of its own society. Yet this framework remained intact without any significant modifications till 1972.

In the period 1947 to early 1956, the years of the UNP domination of Sri Lanka's politics, there were no moves to introduce any significant amendments to the constitution, much less to replace it with another. The 1952 elections had given the UNP government an effective two-thirds majority, which might have been used for such a purpose had it been so minded, but it was not, though there were occasional murmurs about the need for republican status for Sri Lanka. The left-wing, both within and outside parliament, persisted in its opposition to the constitution but its power-base was not strong

enough or wide enough to make this opposition more than symbolic or ritualistic. The emergence of the Sri Lanka Freedom Party in 1951 did not initially strengthen the forces of constitutional reform, for the new party did not have or demonstrate the same dogmatic opposition to the Soulbury constitution as the left-wing groups.[3] The Federal Party in the meantime, had set forth its proposal for a federal constitution, but it was not much more than a voice in the wilderness; its following among the Tamils was less substantial than that of G. G. Ponnambalam, the acknowledged leader of the Tamils who for most of this period was a member of the Cabinet, and whose party the Tamil Congress was an integral unit of the government.

During the years 1956-77 the SLFP was the dominant force in Sri Lanka's politics, ruling either on its own or as the predominant influence in a coalition with left wing parties for over fifteen years. Till about 1968 the SLFP thought in terms of amendments to the Soulbury constitution rather than its replacement by an autochthonous constitution. In this it was continuing a line of policy first adopted by its founder. When S. W. R. D. Bandaranaike became Prime Minister in 1956 he was more concerned about the defence agreements signed at the time of the transfer of power than with the Soulbury constitution itself. Soon he was able to satisfy himself that these agreements were not detrimental to the country's status as a sovereign state, (and it is significant that these agreements, for all the criticism they have been subjected to from time to time, have never yet been abrogated). At the Commonwealth Prime Ministers conference in 1956 Bandaranaike secured the agreement of his fellow Prime Ministers for his country's transition to republican status within the Commonwealth. He was anxious at the same time to introduce amendments to the Soulbury constitution. On his initiative a Joint Parliamentary Select Committee on Constitutional Reform was set up on 2 November 1957 to prepare the basis of a new constitutional structure. But the political instability of the last phase of his tenure of office as Prime Minister put paid to any prospects of introducing amendments to the constitution.

The SLFP's manifesto for the elections of 1960 envisaged the amendment of the Soulbury constitution in regard to : '... the position of the Senate, the definition of democratic and economic rights, and the establishment of a democratic republic ....'. Its manifesto of 1965 re-iterated the theme of a republic and the need to revise the constitution "to suit the needs of the country". More significantly, this latter manifesto had the endorsement of the LSSP which had joined the SLFP in coalition in late 1964, and the C. P. (Moscow wing) prospective partners in the event of electoral success, all of whom had an

3. S. W. R. D. Bandaranaike, founder of the SLFP had been a member of the Board of Ministers and the Cabinet at the time the constitution and the transfer of power had been negotiated. Indeed he had seconded D. S. Senanayake's formal motion introduced in the State Council on 8 November 1945, accepting the Soulbury proposals

electoral agreement against the UNP. The Federal Party by this time was the main political influence among the Tamil minority, but the federal constitutional structure they advocated was not a viable proposition because all other political groups in the island were either suspicious of federalism or intuitively opposed to it as the thin edge of a separatist wedge. As for the UNP, the SLFP's main rivals for power, its policy in government and opposition had been a revision of the Soulbury constitution: in particular the UNP was in favour of Sri Lanka becoming a republic within the Commonwealth. But when in power (1965-70) it lacked the parliamentary majority (two-thirds of all members of the Lower House) necessary to secure amendment of the constitution.

The survival of the Soulbury constitution, without fundamental change, during this decade of SLFP-dominated governments can be explained on a different basis as well. The comparative flexibility of the constitution, and the lack of a bill of fundamental rights enabled the political structure to accommodate itself to a series of far-reaching changes, most if not all of which adversely affected ethnic and religious minorities. As early as 1948 the *Ceylon Citizenship Act* eliminated the vast bulk of the Indian plantation workers from the electoral registers by the simple device of defining the right to citizenship far more rigidly than under the Donoughmore constitution. It was thus demonstrated that the constitutional obstacle of Section 29 (2) (b) would not operate as long as legislation was so framed that there might be a restriction in fact but not in legal form, and the restriction was made applicable to all sections of the community and not to a specific group. When S. W. R. D. Bandaranaike's *Official Language Act* was introduced in the House of Representative in 1956, the Speaker ruled that it was not a constitutional amendment and therefore required only a simple majority. In 1960 the Roman Catholics found to their dismay that the constitution provided no protection for them in their campaign to preserve the *status quo* in education.

Equally important, nationalisation of local and foreign business ventures was facilitated by the fact that there was no provision in the constitution for just and expeditious payment of compensation. Thus there was no constitutional protection for special economic interests and property rights in general.

It could be argued that if the constitution had been more effective in protecting the interests of minorities, and such advantages if not privileges as they had acquired during colonial times and which they continued to enjoy after independence, pressures for amendment of the constitution, or for its replacement by an autochthonous one would have been impossible to resist. As it was, constitutional reform received very low priority in the 1960's from the SLFP.

Midway during the UNPs term of office in 1965-70 the constituent parties of the United Front (UF) coalition—the SLFP, LSSP and CP (Moscow wing)—made a momentous re-appraisal of their attitude to the question of constitutional reform. Abandoning their previous policy of a more revision of the Soulbury constitution they committed themselves to establishing a constituent assembly which would derive its "authority from the people of Sri Lanka and not from the power and authority assumed and exercised by the British Crown and Parliament in establishing the present [Soulbury] constitution ...nor from the constitution they gave us." Since this was no more—and no less—than the adoption of the orthodox LSSP and CP stand on an autochthonous constitution for Sri Lanka, the question naturally arises as to how it was that the SLFP acquiesced in, and indeed enthusiastically endorsed, this line of action. The answer, one suspects, lay in an *obiter dictum* of the Judicial Committee of the Privy Council in London in 1966 in which it had held that Section 29 (2) (b) of the Soulbury constitution—the clause relating to minority safeguards—was an entrenched provision which could not be amended in any revision of the constitution. To the SLFP—as the unabashed advocates of the Sinhalese-Buddhist domination of the island—this would have been ample justification for accepting the view that a new constitution should be drafted and that a constituent assembly would be the most appropriate means of doing this.

II

Its overwhelming electoral victory in May 1970—in which the UF coalition secured 113 out of 151 elected seats, well above the number required for effecting any amendments they desired to the existing constitution—gave the new regime the opportunity it sought to put its new policy into effect. One of their first acts after assumption of office was the summoning of a constituent assembly. The intention was quite deliberately to provide for the establishment of a free, sovereign and independent republic through an autochthonous constitution. To underline the autochthonous nature of the new constitution, the constituent assembly consciously and consistently acted outside the framework of the Soulbury constitution; indeed its framers claimed that in its "essential procedures and entire functioning [it was] counterposed to the [Soulbury] constitution".

Colvin R. de Silva, the Minister of Constitutional Affairs of the new government, who had been a critic of the Soulbury constitution from the time it was introduced in 1947 now had the satisfaction of presiding over its supersession. More important, the new constitutional structure that emerged bore the imprint of his ideas, even though his was not always the main influence in this enterprise of constitution-making. In a broadcast talk on 10 September 1970 he set out the shortcomings of the Soulbury constitution as the UF government saw them: an entrenched clause (29[2][b]) which safeguarded minorities against discriminatory legislation; the right of judicial review by the courts over the constitutionality of legislation passed by parliament; colo-

nial-oriented administrative machinery; a bicameral legislature; and the inequality of the vote under the existing system of delimiting parliamentary constituencies with its weighted bias in favour of the rural areas and remoter parts of the country.

The new constitution eliminated all except the last of these—the system of delimiting constituencies passed almost unchanged into the new constitutional structure. Its survival reflected the realities of political power in Sri Lanka. Originaly designed to swamp the radical urban vote, the system of delimitation had come to form the basis of the SLFP's hold on power—the rural constituencies. The urban areas have become, by and large, more conservative in outlook, while the rural constituencies have become correspondingly less so.

The first republic of Sri Lanka (1972-78) was a centralised democracy in which the dominant element was the political executive. There were indeed few institutional checks on its use of political power. Dr. Colvin R. de Silva as the guiding spirit of the new constitution preferred to emphasise the role of the National State Assembly—an unicameral legislature—in the new constitutional structure: "It constitutes the legislature; the executive is drawn from it, and made answerable to it; and the courts are of its creation ... The legislative, the executive and the judicial functions are only three aspects of the single power of the people and that organic unity of the three aspects of power is carried into the organization of the state".

The conception of the National State Assembly as the vehicle of the sovereignty of the people found final expression in the provisions which denied to the courts the power or jurisdiction to pronounce upon the validity of laws enacted by the Assembly. The functions of the courts were confined to the interpretation of the laws. A constitutional court—strikingly similar to that under the Fifth Republic in France—was established to participate in the process of legislation as the adviser to the National State Assembly on the question of whether any provision of a bill, or a bill itself, was unconstitutional. Its advice was made binding on the National State Assembly which had to provide a special majority of two-thirds of its membership to override a decision of that court that the provisions of a bill were unconstitutional.

The 1972 constitution brought the entire administrative structure of the country under the control of the Cabinet of Ministers. The provisions relating to the bureaucracy in that constitution gave legal and constitutional form to a fundamental departure from the British concept of an independent public service and to the introduction of a version of the American spoils system.

The head of state under the first republic was the President whose position was perhaps unique in that he was nominated by the Prime Minister and not elected directly or indirectly. In so far as he was the Prime Minister's nominee there was no change from the position of the Governor-General under the Soulbury system except that it was clearly laid down that the President was appointed for a period of four years.

In two respects, both of crucial significance, the powers of the President under the new constitution were inferior to those of the Governor-General under the Soulbury sytstem. First, there was the removal of the residuary powers derived by the head of state from the Public Security Act, and the vesting of almost all these in the head of the political executive. Secondly, the new constitution incorporated as law some of the constitutional conventions relating to the powers and functions of the head of state. Under the Soulbury constitution these powers and functions had been exercised in accordance with the constitutional conventions governing their use by the Queen in the United Kingdom. These British conventions have nowhere been authoritatively laid down, and constitutional lawyers sometimes hold contradictory views about them. In Sri Lanka difficulties and doubts had arisen in the paste especially over the obligation of the Governor-General as head of state to acceed, to a Prime Minister's request for a dissolution of parliament. The 1972 constitution spelled out the circumstances in which such a dissolution may be granted or refused. The initiative and discretionary authority of the head of state were thus substantially reduced.

The 1972 constitution, unlike its predecessor, incorporated a chapter on Fundamental Rights and Freedoms, including: the equality of all persons before the law; the prohibition of discrimination in public employment on the grounds of religion, race, caste or sex; freedom of thought, conscience and religion; protection of life and personal liberty; freedom of speech, of peaceful assembly and of association; and freedom of movement and residence.

In practice, however, their effect was largely nullified by the wide-ranging scope of the restrictions on these rights and freedoms incorporated in Section 18(2) of the constitution, which read thus:

> The exercise and operation of the fundamental rights and freedoms provided in this chapter shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of rights and freedoms of others or giving effect to the Principles of State Policy set out in Section 16.

Section 16 of the constitution set out certain Principles of State Policy, which bore the strong imprint of the government's political outlook and commitments—the realisation of the objectives of a socialist democracy. These principles are not justiciable, and the constitution in fact stated that

they confer no legal rights and are not enforceable in any court of law. The principles were set out, as in some constitutions, in order to guide the making of laws and the governance of the country.

The differences between the 1972 constitution and its predecessor were vital. On the eve of its promulgamation in May 1972 Dr. Colvin R. de Silva claimed that "the new constitution not only marks a change in the status of our land and people but also has a foundation or root which is entirely different from the foundation or root of the constitution which will be displaced today". Nevertheless though in little more than a formal way it did resemble the Soulbury constitution and, through it, the draft constitution of 1944.

The unicameral structure went back to 1944, as did the system of demarcating constituencies, and so for that matter, though to a lesser extent, did the provisions regarding the public service.[4] The constitution of 1972 incorporated two pieces of legislation which were in fact some of the most important policy formulations of D. S. Senanayake himself though they were outside the 1944 draft. Section 67 of the new constitution essentially retained the laws relating to citizenship enacted in 1948 and 1949 with their consequential amendments, while section 134 incorporated the *Public Security Act* of 1947 with the amendments to it introduced subsequently.

On 19 July 1970 when the then Prime Minister Mrs. Bandaranaike had moved a resolution that the MPs of the new Parliament proclaim themselves the constituent assembly of the people of Sri Lanka for the purpose of adopting and enacting a new constitution her resolution was unanimously accepted and there was the apperance of a national consensus on the basic elements of constitutional reform. A demoralised opposition confronting a government

4. The draft constitution of 1944 provided for a public service commission which would advise the Governor-General *only* on new appointments carrying an initial salary of at least Rs. 3,600 a year—in effect, the higher burcaucracy. The promotion, transfer, dismissal and disciplinary control of other officers was to be vested in the Governor-General, who could delegate any of these powers to any minister of state or public officer. The Soulbury constitution adopted this scheme. It was expected that progressively the Governor-General would act on ministerial advice over appointment to, and promotions in, the higher bureaucracy and disciplinary matters, or delegate powers to ministers, and in this way enable the ministers answerable to parliament to discharge their responsibilities. Section 106 of the republican constitution of 1972 followed similar principles in vesting such powers in the hands of the Council of Ministers and made them clearly answerable to the National State Assembly for their actions in these matters.

at the height of its very real popularity and prestige was too weak to do more than follow the government, even though many of them had strong reservations about the process of constitution-making adopted by the government, and the proclaimed aims of the new constitution. By 22 May 1972 when the new constitution was adopted the political situation had changed to the disadvantage of the government. The remorseless pressure of economic decline—inflation, unemployment and falling output in every sphere of activity—combined with the mini-civil war of 1971 had perceptibly eroded the popularity of the government if not its self-confidence. As a result the process of constitution making which had begun as a national endeavour with popular support ended as a party affair with lukewarm public support.

By the end of the June 1971 the Federal Party, the main political party of the indigenous Tamil minority, had made the crucial decision to boycott the constituent assembly as a protest against the failure to provide adequate protection for minority rights. The rift between the Federal Party and the government had emerged over the question of language rights. To the official resolution that "all laws shall be enacted in Sinhala. There shall be a Tamil translation of every law so enacted," the Federal Party moved an amendment that Sinhala and Tamil should be the official languages of Sri Lanka, the language of the courts, and the language in which all laws should be published. This amendment led to an acrimonious debate. The government argued that the amendment was tantamount to a total rejection of the existing position on the national language, a consensus achieved through the years since 1956, and one which the Federal Party itself had come to accept. It added that this amendment would be totally unacceptable to the people.

On 28 June 1971 the Federal Party amendment was defeated by a vote of 87 to 13, upon which its members walked out of the constituent assembly, and did not return to participate any further in its deliberations.

That there was a consensus on language to which the Federal Party among others had given its tacit acceptance is incontrovertible.[5] At the same time it is important to remember that clause 29 of the Soulbury constitution—that relating to minority rights—was an integral part in this consensus. Though the protection this clause afforded to the minorities was less comprehensive than its framers intended it to be, it nevertheless acted as a deterrent against patently discriminatory legislation. The government scarcely concealed the fact that it was resorting to the device of a new constitution in preference to a reform of the old one partly, at least, because it afforded a means of eliminating Clause 29. Once this vital clause had been removed a significant element in the consensus on language had been unilaterally discarded to the

5. The strongest evidence of this was the decision of the Federal Party to join the UNP-led coalition government in 1965.

detriment of the Tamil minority. Thus it was no longer possible to speak of a consensus on language which the Federal Party itself had come to accept, tacitly or otherwise. Even more decisive as a factor in the withdrawal of opposition support for the new constitution was the decision of the ruling coalition to give itself an extended term of office to 1977, two years beyond the five-year term for which it had been elected in May 1970.

In June 1971 the constituent assembly resolved that the National State Assembly under the new constitution would go on for a period of six years after the constituent assembly adopted the new constitution. Since this latter body was no more and no less than the House of Representatives elected in May 1970, this would have meant that MPs elected in May 1970 would have a spell of eight years. This, the opposition urged, was a breach of faith with the people who had not been given any indication in May 1970 that they were electing a parliament for any longer period than the normal five-year term provided for by the existing constitution. They argued that the government had no mandate for thus extending the life of parliament. Under strong pressure from opposition groups in the constituent assembly the government decided to reduce the term of the first National State Assembly to five years (all future ones would sit for a term of six years). But this revision, which was announced in the constituent assembly on 8 May 1972, did not satisfy the opposition. For the fact was that the government had used its overwhelming majority in the constituent assembly to give itself an extended term of life.

This action by the government is probably unprecedented in the annals of constitution-making in democratic states. In taking the decision the government demonstrated scant regard for any considerations of its own sense of public integrity. Its immediate effect was to give these proceedings a patently partisan outlook, ensuring thereby a substantial erosion of what national consensus there remained on constitutional reform. Dudley Senanayake, former Prime Minister and late leader of the UNP declared that this unilal teral extension of the government's normal term of office was one of the main reasons for his party's decision to vote against the adoption of the new constitution. Thus a national endeavour became a partisan affair, and the 1972 constitution far from bringing the people together as the Prime Minister had hoped when she inaugurated the proceedings of the constituent assembly, ensured the perpetuation of ethnic disharmony and aggravated political rivalries.

In the final phase of the constituent assembly's life it became evident that the UNP would vote against the adoption of the new constitution. On 22 May 1972 at the final sessions of the constituent assembly, Dudley Senanayake explained at length why his party was voting against the new constitution. He declared that while his party were "... clearly and unequivocally... in full accord with the government that the new constitution should declare

Ceylon a free sovereign and independent republic," the constitution contained far too many objectionable and potentially dangerous features to merit their support.

Thus the establishment of the republic of Sri Lanka was the one feature of the new constitution which attracted support extending beyond the ranks of the government. And the constitution of 1972 like its predecessor started off with a large section of the political nation (a much larger section than in the case of the Soulbury constitution) vocally opposed to it, and quite definitely committed to its supercession or modification through far-reaching amendments.

III

When the Sri Lankan electorate is in one of its not so very infrequent moods of disenchantment with a regime in power it gives vent to its displeasure with an exuberance and vehemence which all but obliterates—in terms of parliamentary seats—the object of its displeasure. No defeat in the history of Sri Lanka's volatile parliamentary history is quite as comprehensive as that suffered by the rivals of the UNP in July 1977.

High on the new government's list of priorities was a fresh and searching look at Sri Lanka's constitutional structure. The constitutional changes they had in mind had been outlined as early as 1971 when these had been moved as alternative proposals to the then government's constitutional reforms during the debates of the constituent assembly. Subsequently they had been incorporated in the election manifesto of the UNP for the 1977 general elections thus:

"Executive power will be vested in a President elected from time to time by the people ... The constitution will also preserve the Parliamentary system we are used to for the Prime Minister will be chosen by the President of the Party that commands a majority in Parliament and the Ministers of the Cabinet will also be elected Members of Parliament".

The constitutional changes envisaged in the UNP manifesto became a major point of controversy in the election campaign of 1977. This was in sharp contrast to the previous election campaign—that of 1970—where constitutional reform *per se* was not an important issue. The difference lay in the fact that the reforms set out in the UNP's election manifesto of 1977 had received much publicity from well before the commencement of the election campaign, and had been recognized for what they were, a major structural change in the country's political-constitutional structure. By focusing attention on these regularly during the election campaign the UNP's opponents hoped, at once, to erode the credibility of the UNP's commitment to democratic government—the charge was that these constitutional changes were a

blueprint for authoritarianism—and to divert attention from their own record of administration over the previous seven years. Far from serving as ammunition for the discomfiture of the UNP, it worked to its advantage. Precisely because constitutional reform had been converted by its rivals into a key election issue the UNP was able to treat its shattering electoral triumph of 1977—for the first time at a Sri Lankan general election the winning party won a clear majority of the popular vote—as an unmistakably positive endorsement by the electorate of its proposals for constitutional reform. The first step was the adoption by the National State Assembly of a constitutional amendment establishing a presidential system of government. Under the terms of this amendment the Prime Minister, J. R. Jayawardene assumed office as the first elected Executive President of the country on 4 February 1978. Next came the appointment in September 1977 of a parliamentary select committee on constitutional reform, indicative of the government's intention to effect constitutional changes within the framework of the 1972 constitution. The result of the Committee's deliberations however was not an amendment of the constitution of 1972 but its replacement by another, the second major overhaul of the island's constitutional system since independence.

While the constitution of the first republic (1972-8) concentrated on strengthening the armoury of executive power, it nevertheless maintained almost intact, the Westminster model formulated for the island in 1946-8. The second republic of 1978 has, on the other hand, inaugurated a presidential system which brings into operation new political styles. The new constitution is a unique blend of some of the functional aspects of Sri Lanka's previous constitutions and features of the American, French and British systems of government—a presidential system designed to meet Sri Lanka's own special requirements in the light of past experience in the working of previous constitutions. The new political style included referendal democracy, consultative advisory committees to Cabinet ministers, an extensive charter of fundamental rights (more meaningful than that incorporated in the previous constitution) and proportional representation on the list system in place of the 'first-past-the-post' principle of representation based on the British model.

One underlying theme was the rejection of many of the authoritarian features of the constitution of 1972; by imposing more effective restraints on the powers of the executive and the state; by sustaining the rule of law; and strengthening the independence of the judiciary, the rights of the individual *vis-a-vis* the state, and most important of all in the current crisis in relations between the Sinhalese and the Tamils—the rights of the minorities.

There is both departure and continuity in this the first realistic structural change in the constitution effected since independence. For instance the legislature remains a major and supportive centre of decision-making; prime-ministerial and cabinet government are retained; and a unicameral structure is retained.

The concessions made to the Tamil minority, in regard to the status of their language in the Sri Lankan polity were a fulfilment of a pledge given in the government's first statement of policy in the National State Assembly on 4 August 1977 well before the outbreak of the communal disturbances of that month. Two articles in the new constitution set the tone. Article 19 declares that Sinhalese and Tamil shall be the national languages of Sri Lanka (with Sinhalese remaining the sole official language) a major departure from the language policy established since the mid-1950's. Equally important Article 26 abolished the distinction between citizens by descent and citizens by registration—an irritant to the Indian Tamils—thus removing the stigma of second-class citizenship attaching to the latter. In combination with the elimination, in December 1977, of the bar in force since the 1930s on plantation workers resident on estates from voting in local government elections, this ensured that persons of Indian origin, in the main plantation workers, are treated on par with Sri Lankan citizens by descent. The position of Indians resident in Sri Lanka was further improved by affording to stateless persons the same civil rights guaranteed by the constitution to citizens of the country.

So far the Indian Tamils have responded more positively to these conciliatory gestures than the TULF. J. R. Jayawardene's success in persuading S. Thondaman, leader of the Ceylon Workers Congress, the main political party cum trade union of the Indian plantation workers to accept Cabinet office with the introduction of the new constitution marks a major breakthrough in the island's politics for it brought the Indian Tamils within 'the political nation' for first time since the 1930's. It widened the breach between the C.W.C. and their erstwhile colleagues in the TULF.

The T.U.L.F. now very much a party of the indigenous Tamils has ostentatiously dissociated themselves from the process of constitution-making in their anxiety to underline their commitment to Eelam a separate state for the indigenous Tamils. The traditional left, not represented in Parliament today has rejected the new constitution as an exercise in Bournapartism. None of its representatives gave evidence before the Select Committee. This the SLFP did, but its MPs walked out of parliament during the debate on the constitution in protest against the processes of constitution-making adopted by the government, and against some of the salient features of the new constitution especially the Executive Presidency and proportional representation. In this sense the present constitution like its predecessor has has been opposed by all major opposition groups, in brief by large and very vocal sections of the political nation.

It seems unlikely however that the present constitution will be as short-lived as that of the first republic despite the fact that a large section of the political nation is publicly committed to replacing it with another. The draft constitution placed before the National State Assembly in July 1978 incorporated two processes for amendment of the constitution: a two-thirds majority in Parliament or a simple majority plus approval by the electorate at a referendum. [7] This latter was deleted at the committee stage, and the two-thirds majority remains, while the requirement for an extension of the life of Parliament is even more formidable, a two-thirds majority plus approval at a referendum. The island's electoral system under the Soulbury constitution and the first republic had one peculiar feature—a major shift of popular support was often magnified by the electoral system and a new regime was returned to power with a far higher proportion of seats in the legislature than was warranted by the popular vote it received. Since 1959-60 the distortions of the electoral system worked to the disadvantage of the UNP but in 1977 the SLFP found itself with just 4.8% of the seats though it obtained 29% of the vote. Proportional representation will eliminate distortions of this sort. It would take political skills of a very high order to cobble together a coalition within the legislature which could command the two-thirds majority required to amend the constitution. Given the country's multi-party political structure ideology and ethnicity are likely to pose formidable if not insurmountable obstacles in any search for common ground in amending the constitution.

Whether the constitution can be replaced by another through the device of a Constitutent Assembly as the Soulbury constitution was in 1972 is an altogether different proposition. This course of action worked successfully in 1970-72 for a number of reasons: the moral authority the UF derived from what was, up to that time, the most decisive election victory—in terms of parliamentary seats—in Sri Lanka's parliamentary history; a united front of the centrist SLFP and the traditional left; and a thoroughly demoralised UNP, its leadership sharply divided on tactics and strategy, which by participating in the proceedings of the Constituent Assembly gave it the semblance of a national consensus on constitutional reform. The most telling factor was the two-thirds majority in parliament the UF commanded (even though the parties in the UF coalition received only 48% of the votes polled nationally). Had this majority dropped to 55% or even 60% of the seats in the national legislature it is most unlikely that the UF could have pulled off the constitutional 'coup' that a Constituent Assembly represented.

The then Leader of the Opposition, J. R. Jayawardene, in a speech on the occasion of the inauguration of the Constitutuent Assembly on 19 July

6. Section 82(5) (a).
7. Section 82(5) (b).

1970[8] pointedly referred to the complex constitutional, legal and political problems involved in this process of constitution making through a Constituent Assembly. Three short extracts from his speech are quoted below:

"This government has more than two thirds of the whole number of members of the House and can pass legislation to amend or repeal any of the provisions of the constitution. The Judiciary, constitutional authorities and some members of my own party believe that the amendment or repeal of some of the clauses of the constitution, including the clause which creates and defines Parliament as consisting of "Her Majesty and two Chambers", is not legally possible even with a two-thirds majority. If the Ceylon legislature cannot replace the constitution with another of its own creation even with a two-thirds majority, how then can we establish a Republic?

"Those who accept this argument seek to get rid of this fetter by drafting a new constitution *ab initio*, by means of a Constituent Assembly which does not derive its authority from the existing constitution but from the people themselves..."

His views on constitutional reform were diametrically opposed to these.

"I am one who holds the view that our constitution can be amended and repealed, and a new constitution not rooted in the past can be enacted by our sovereign parliament with a two-thirds majority. If a Constituent Assembly composed of members of parliament can 'adopt, enact and establish' a constitution for Sri Lanka which will declare Sri Lanka to be a free sovereign and independent republic; and if the people and the Judiciary can be made to accept it as legal and valid, so can they be made to accept a similar constitution" adopted, enacted and established "by the parliament to which we have been elected by the free vote of the people."

He went on to cast doubts on this process of resorting to a Constituent Assembly to "adopt enact and establish" a new constituent. "A mandate from less than fifty per cent of the people is alone no mandate or authority to draft a constitution and replace or repeal the existing one. The authority given to the members of the House of Representatives is to work within the framework of the existing legislature, for it is an election to that legislature with all its entrenched provisions. You should not therefore asuume a power you do not have under the present fundamental law, nor should you enlarge the scope of your victory".

8. For this speech see J. R. Jayawardene, *Selected Speeches and Writings* 1944-1978 (Colombo, 1979, revised edition of a volume originally published in 1974), pp. 115-117.

With the Constituent Assembly of 1970-2 very much in mind the Select Committee which drafted the present constitution sought to impose (through clause 157 (1) (2) (3) (4) and (5) of the draft constitution of July 1978) severe penalties on any person or 'body of persons' 'corporate or incorporate' who advocate attempt, abet, instigate, participate or engage" in any conspiracy for the amendment, whether by way of alteration of addition or repeal or replacement of the Constitutive or any provision thereof otherwise than in accordance with the provision [sic] of Chapter XII..." But when this clause attracted heavy criticism in the National State Assembly when the draft constitution was debated, the government responded by deleting it altogether from the constitution. Despite this however, it is difficult to foresee the same combination of factors and political forces which succeeded in the constitutional coup of 1972 working toegther again so smoothly and so effectively and without legal challenge on a future occasion. On that occasion, 1970 to 1972, the novelty of a constituent assembly, and the element of surprise involved also contributed to the success of this process of constitution-making. Future attempts at establishing a constituent assembly will have neither novelty nor surprise. For all these reasons the odds are in favour of the present constitution lasting longer than its predecessor.