



**THE SRI LANKAN CONCEPTION OF THE UNITARY  
STATE:  
THEORY, PRACTICE, AND HISTORY**

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## 1. Introduction

At the heart of the current constitutional reform process is the question of devolution and what to do about the entrenched principle of the unitary state. Common opposition candidate Maithripala Sirisena's manifesto for the January 2015 presidential election did not deal with the question of devolution, focussing instead on reforms to the executive. The manifesto of the United National Front for Good Governance for the August 2015 parliamentary election promised the 'devolution of power while preserving the unitary status of the country', without offering any further detail. It seems to be the case that the current government wishes to build upon the Thirteenth Amendment in offering a further measure of devolution in the proposed new constitution, but that it feels the time is not ripe for interfering with the unitary state principle.

This concern may stem from the requirement that the new constitution must not only secure a two-thirds majority in the Constitutional Assembly and Parliament but also the consent of the people at a referendum. While the strict legal requirement is only for a simple majority voting in favour in the referendum for the new constitution to be adopted, it would be politically crucial for the legitimacy and durability of the new constitution that it is supported by a substantial majority of the whole country, and that there are majorities in favour within all ethnic communities. It seems to be the government's calculation that the support of the Sinhalese would only be forthcoming if the new constitution preserves the unitary state principle. Virtually all the Tamil parties, on the other hand, have argued that, while the unity of the state must and can be guaranteed in the new constitution through express provisions to that effect, the unitary state is inimical to proper power-sharing and must therefore be removed from any fair Sri Lankan constitutional settlement.

The recent report of the Public Representations Committee on Constitutional Reform (PRC) also reflects this deep social division of opinion on the nature of the state (PRC 2016: Ch.5). The PRC's analysis of the submissions made to it makes it abundantly clear that there is very little consensus among the people of Sri Lanka on this central question (ibid: 20-23), and interestingly, the Committee was itself unable to recommend a consensus proposal in this regard (ibid: 24-25). It has instead recommended three different options; although it is perhaps significant that only one member of the committee has supported the retention

of Article 2 of the 1978 Constitution without change, namely, that ‘The Republic of Sri Lanka is a Unitary State.’

As a result of this fundamental absence of consensus on the nature of the state, the idea of the unitary state stands out prominently, as it has in constitutional reform debates since at least independence, and especially since its express legal incorporation into the republican constitutional order, as both the politically dominant concept in, and the conceptual determinant of the possible parameters of, constitutional reform. Despite its longevity and ubiquity in constitutional discourse, however, the unitary state in Sri Lanka remains inadequately theorised, with legal and political arguments for and against it being generally conducted at the empirical and institutional rather than the theoretical plane.

As a politico-legal concept, the unitary state is both a formal and a substantive idea. In the formal sense, it is primarily a classificatory category for constitutions, but it goes beyond a purely descriptive function to provide an important source of normative principles for constitutional implementation and adjudication. Its substantive content derives legally from specific constitutional provisions that centralise power, and politically by the normative and historiographical arguments of Sinhala-Buddhist nationalism, for which dominant ideology the unitary state constitutes a non-negotiable constitutional postulate. While the empirical linkages between the post-colonial unitary state, the British colonial state, and Sinhala-Buddhist nationalism have often been drawn in a substantial body of existing social science literature, there is a theoretical lacuna in relation to the connections between these insights of political sociology and historical anthropology on the one hand, and constitutional law on the other. In other words, an explanatory, normative, and critical account of this seemingly unassailable constitutional form is in need of articulation as a matter of constitutional theory, if we are to understand its resilience, the basis of its social resonance, and its role within current debates on constitutional reform. The modest aim of this paper is to make an initial foray into this gap.

The paper is structured in the following way. I commence with a recapitulation of the unitary state as it finds expression in constitutional doctrine, focussing on the discussion of its scope and nature by the Supreme Court in the seminal *Thirteenth Amendment Case (In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1987) 2 SLR 312)*, together with some

observations on its provenance as an express constitutional principle in the two republican constitutions. The makers of the first republican constitution in 1972 were enamoured with the Diceyan understanding of unconstrained parliamentary sovereignty, not only as an expression of sovereign independence but also as an enabling tool for socialist developmentalism (Welikala 2012a). By the (now rather quaint) words of Section 5 – ‘The National State Assembly is the supreme instrument of State power of the Republic’ – the emplacement of parliamentary sovereignty as the cornerstone of that constitution would necessarily have meant that the new republic was unitary in nature. Not content with that, however, the drafters decided that an express reference to the unitary state must also be included in the foundational provisions of the constitution (1972 Constitution: s.2; Jayawickrama 2012). The makers of the 1978 Constitution went a step further by entrenching the unitary state by the protection of a referendum lock in addition to a parliamentary two-thirds majority (1978 Constitution: arts.2, 83(a)).

In the context of escalating armed conflict in the 1980s, and under the aegis of the Indo-Lanka Accord of 1987, the Sri Lankan government sought to devolve a measure of power to proposed Provincial Councils (Loganathan 1996: Ch.5). This framework was embodied in the Thirteenth Amendment to the 1978 Constitution, together with a Provincial Councils Act elaborating upon the constitutional scheme, which in their pre-enactment constitutional review proceedings, divided the Supreme Court down the middle (Peiris 1989; Tiruchelvam 2000; Kamalasabayson 2009). Paradoxically, the judges in the narrow majority in favour of devolution were forced to construe the proposed framework of devolution in the most restrictive manner in order to conclude it compatible with the unitary state. The judges in the minority saw in this framework a dilution of central authority fatal to the unitary state, and at least in the case of the senior judge in the minority, Justice Wanasundera, the antipathy to the devolution of power to an amalgamated Tamil-majority North-East Province was a consequence of ill-concealed Sinhala-Buddhist nationalist political sympathies (Coomaraswamy 1997). Adding to several other structural weaknesses of the Thirteenth Amendment and its supplementary and consequential legislation, this interpretational anomaly has inhibited its fullest realisation as a meaningful framework of devolution (Welikala 2010). For present purposes, however, what is important to underscore is that in the Sri Lankan constitutional scheme, devolved institutions are placed within a unitary structural hierarchy in which they are firmly subordinate to central institutions.

Moving beyond this restatement of legal doctrine, I then explore two strands of politico-constitutional history that are pivotal to an appreciation of the centralising impulse – of which the reified unitary state is the ultimate institutional expression – in post-colonial politics. Firstly, the British colonial state which established the territorial unity, the bureaucratic rationality, and the infrastructural framework necessary to sustain the modern unitary state (Wilson 1988; Uyangoda 2010). Secondly, the norms of hierarchy and encompassment that underpinned the pre-colonial Sinhala-Buddhist kingdoms, and which today constitute key planks of Sinhala-Buddhist nationalism's justifications for the contemporary unitary state (de Silva Wijeyeratne 2007; Roberts 2004).

While the hierarchical and centralising dimensions of both these historical state forms have informed the centralising pathology of the post-colonial state, both historical traditions of the state have the potential for alternative readings in their use in constitutional reform today. Unlike in its Asian and African colonies, British constitutional law in metropolitan Britain never supported an 'overdeveloped' idea of the state (Alavi 1972; Bayly 2004; Mantena 2010), and in any case, British constitutional doctrines like the unitary state and parliamentary sovereignty have tended to be understood in literal terms in Sri Lanka, without any regard whatsoever to the liberal political culture within which they have taken practical shape in that country (Walker 2012; Halliday & Karpik 2012). Even more conspicuously, the radically devolutionary potential of the pre-colonial state has been studiously ignored after independence (Tambiah 1992), and the contemporary commitment of majoritarian nationalists to the unitary state involves significant distortions of the functional reality of the dominant state form that features in the very history that is advanced in defence of the unitary state (de Silva 1989; de Silva Wijeyeratne 2007). While the exploration of these themes in any great detail is beyond the scope of the present paper, it is nonetheless one of the suggestions of this part of the argument that pre-colonial history in particular may be usefully revisited in debates today about the post-war (re)form of the Sri Lankan state (de Silva Wijeyeratne 2012; Welikala 2015).

The principal challenge to the unitary state after independence has emanated from the sub-state Tamil nationalist demand for autonomy, which, except for the phase of armed separatism, has generally rested on the default constitutional position of federal or federal-type self-rule asserted on the basis of the international law principle of self-determination (Ganeshathasan 2012). What is

material to this discussion in this regard is however the highly formalist nature of Tamil constitutional demands (although, as illustrated in the discussion of the *Thirteenth Amendment Case* below, the propensity to legal formalism and command-theory positivism is something they share with the broader Sri Lankan 'legal complex': Coomaraswamy 1987; Udagama 2012). Tamil nationalism's focus on federalism as the alternative institutional form for the Sri Lankan state is 'radical' to the extent that federalism is the conceptual opposite of the unitary state for the purposes of formalistic constitutional classification, and to the extent that the claim to self-determination is grounded in international law rather than domestic constitutional law. But Tamil nationalism has never presented a *theoretical* critique of the unitary Sri Lankan nation-state at a more general and substantive level beyond arguments for institutional reform, and it has failed thereby to force a theoretical reevaluation of the fundamental normative precepts that inform unitary conceptions of not only the state, but also of the statal nation, in the way that similarly placed sub-state nations have presented in relation to their host states in the recent past (Tierney 2006; Keating 2001). Once again, this is not a theme that can be pursued at length here, but it is important to note that this void in the otherwise fundamental sub-state challenge has also contributed to the consolidation of the literalist, orthodox, conception of the unitary state in Sri Lankan constitutional law.

Pulling all these strands of the Sri Lankan case together, I then draw upon certain analytical distinctions made in recent theoretical accounts of the unitary state in the constitutional discourse of the United Kingdom (Walker 2012), to outline a theoretical framework for the Sri Lankan conception of the unitary state as *both* a formal and a substantive concept. While I do have a broad overarching normative commitment to the democratic value of pluralism in all its manifestations, which, in regard to ethno-territorial pluralism, implies a preference in structural terms for devolutionary constitutional reform, my theoretical interest here is solely explanatory and descriptive. The discussion is brought to a conclusion with some brief remarks about the prospects of the current constitutional reform process. In the light of the theoretical argument advanced in the essay about the constitutional character of the Sri Lankan unitary state, and the politically unitary discourse of constitutional order that underpins it, it may seem that it is a concept that is generally immune to reform. I am particularly attentive to the point that no progress in Sri Lanka's constitutional evolution – including crucially in the settlement of minority claims

– can take place in the current phase of reforms unless there is majoritarian support for the new constitution in the forthcoming referendum. Nonetheless, as the PRC and others have suggested, with a measure of constitutional imagination and political leadership, there may be a variety of forms through which a compromise can be achieved in regard to this most of vexed of Sri Lankan constitutional disagreements.

## **2. Constitutional Doctrine: The Unitary State as a Principle of Sri Lankan Constitutional Law**

Ceylon/Sri Lanka has been governed by three constitutions since independence, all of which have been unitary in nature to the extent that none have contemplated nor permitted federal-type diffusion of power, institutional pluralism, and the division and sharing of sovereignty (Edrisinha 2008). However, the Soulbury Constitution under which independence was granted in 1948 was silent on its self-classification and it was only with the establishment of the republican state in 1972 that Sri Lankan constitutions have contained the express description of unitary state. In the period between the grant of independence and the establishment of the republic, the increasingly hostile relationship between the majority Sinhala-Buddhist and minority Tamil nationalisms came to be characterised by the latter's demand for federal autonomy and the former's resistance to it. The desire for federal-type autonomy has been described by historians and exegetists of Tamil nationalism as essentially a 'defensive' posture (Wilson 2000), against the totalising claims of the majority nationalism to the ownership of the state (Welikala 2008a; Rampton 2012). Thus at the level of constitutional discourse, this political relationship has been typified by the conventional either/or dichotomy of formal classification as between federal and unitary constitutions.

It was in this context that when the Constituent Assembly was established following the general elections of 1970 to draft, enact, and operate a republican constitution, that the Tamil Federal Party presented proposals for the establishment of a federal state (Edrisinha et al 2008: Ch.11). These proposals were resoundingly and indeed predictably rejected in the Constituent Assembly, whereupon the Federal Party terminated its participation in its deliberations (Wickramaratne 2010). Instead the government presented a Basic Resolution to

the effect that the new republic would be a unitary state, which according to contemporary observers was intended mainly for the symbolic purpose of registering a vote against federalism. This purpose having been served, it appears that there were no immediate attempts to incorporate an express unitary clause in the emerging constitutional text (Jayawickrama 2012). This is understandable, because the radical centralisation of all political power and legal authority in the National State Assembly (or NSA, as Parliament under the 1972 Constitution was called) reflected in Section 5, read with Sections 44 and 45, would *necessarily* have implied a structurally unitary state order (Walker 2012: 447-448), although the converse proposition – that a legally established unitary state under a written constitution *must also* include parliamentary sovereignty – does not hold, because a unitary constitution could choose to recognise the supremacy of the written constitution to which all three organs of government are made subject (Walker 2012: fn.20 *pace* Wheare 1966).

The fundamental framework set out in Section 5 excluded the possibility of any territorial devolution (s.45), rejected the principle of the separation of powers by concentrating legislative, executive, and judicial power in the NSA (Edrisinha 2008; Coomaraswamy 2012), and recognised the legislature rather than the constitution as supreme (s.44), which could even pass laws inconsistent with the constitution (s.52). The only formal limitations on the power of the NSA were the procedural requirement of a two-thirds majority for the amendment of the constitution (s.51), and the exceptional substantive prohibitions against the suspension of the constitution, or its repeal without enacting a new constitution (s.44). By any standard, this was an extreme constitutional articulation of parliamentary sovereignty, in the sense of embodying the literalist essence of the Diceyan orthodoxy (Loughlin 1992; MacCormick 1999), but without also absorbing any of its ameliorative or ‘self-correcting’ features against the possibility of parliamentary authoritarianism (Saunders & Dziedzic 2012). Indeed, the Trotskyite architects of the 1972 Constitution could not have been more different ideologically from Dicey’s ‘conservative normativism’ (Loughlin 1992), and it is ironic that the principal mechanism of this constitution, unequivocally conceived as a tool for the prosecution of a socialist project of social transformation, should originate at the other end of the ideological spectrum with Dicey, who had “a fear of class legislation and a distaste for state welfarist intervention” (Walker 2012: 455).

More pertinently, this approach to parliamentary sovereignty should have obviated a specific need for an additional express provision concerning the unitary state. However, by a process that remains opaque as to the promoters within the government of the principle and their motivations (Wickramaratne 2010; Jayawickrama 2012), it did in fact find expression in the final text of the 1972 Constitution in the form of Section 2, which stated that, 'The Republic of Sri Lanka is a Unitary State.' The same provision was replicated in the successor 1978 Constitution as its Article 2, with the additional protection of entrenchment by referendum (art.83), although in this constitution, the separation of powers was, relative to its predecessor, more clearly articulated (art.4). While Article 75 cast Parliament's legislative power in plenary terms, it did not explicitly use the term 'supreme' in relation to that power as in Section 44 of the 1972 Constitution, but neither did the 1978 Constitution expressly recognise the principle of constitutional supremacy.

Given that the theme of centralisation characterises Ceylon/Sri Lanka's constitutional evolution from the consolidation of the British colonial state by the Colebrooke-Cameron reforms of 1833 (Mendis 1956; Wilson 1988), the express inclusion of the term in Section 2/Article 2 of the republican constitutions may not seem a revolutionary change or innovation. But in registering the wholesale repudiation by the Sinhalese majority represented in the Constituent Assembly of Tamil aspirations to autonomy within a united and republican but federal state, it had the momentous consequence of influencing the political transformation of Tamil nationalism from parliamentary agitation to armed secessionism (Loganathan 1996; Wilson 2000; Edrisinha et al 2008: Chs.12,13). Nevertheless, the unitary state clause remained largely a descriptive, if symbolically divisive, feature of the republican constitutional order until political circumstances forced the government to introduce devolution in 1987, which was when it assumed major significance as a source of normative guidance for constitutional adjudication.

Among the provisions entrenched in Article 83 of the 1978 Constitution are Articles 2 and 3, which some petitioners in the *Thirteenth Amendment Case* argued were affected by the provisions of the proposed Thirteenth Amendment and Provincial Councils Bills. As already noted, Article 2 provides that 'The Republic of Sri Lanka is a Unitary State'. Article 3 states that 'In the Republic of Sri Lanka, sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.' Thus two of

the main questions put to the Supreme Court in this case were whether devolution in the form set out in the two impugned Bills was inconsistent with Sri Lanka being a unitary state, and whether the devolution of legislative and executive powers to Provincial Councils was an unconstitutional alienation of the sovereignty of the people. If the Supreme Court determined that devolution in terms of the two Bills affected the unitary state and the sovereignty of the people in a material way, then a referendum would become necessary in addition to a two-thirds majority in Parliament to validly enact them.

In view of the political and constitutional significance of the matter, the Chief Justice nominated a full bench of all nine judges of the Supreme Court to hear the case. Chief Justice Sharvananda and three other judges, Justices Colin-Thomé, Atukorale and Tambiah held that the Thirteenth Amendment Bill did not require a referendum and once the Thirteenth Amendment was enacted by Parliament, the Provincial Councils Bill would also be constitutional. One judge, Justice Ranasinghe, agreed with this view, but held that two clauses of the Thirteenth Amendment Bill would require a referendum. Four other judges, Justices Wanasundera, de Alwis, Seneviratne and de Silva, held that the two Bills required a referendum. The government deleted the two clauses which Justice Ranasinghe held to require a referendum, thereby securing a narrow majority for the view that neither Bill required a referendum, and proceeded to enact both Bills, which were both certified as validly enacted on 14<sup>th</sup> November 1987 (as the Thirteenth Amendment to the Constitution; and the Provincial Councils Act, No. 42 of 1987).

In coming to their conclusion that the system of devolution sought to be introduced by the Thirteenth Amendment was consistent with the constitution, the majority of judges had to interpret Articles 2 and 3 – and define the concept of the unitary state and the location of sovereignty – in view of the argument that the proposed structure was federal or quasi-federal in nature. The judgment of the majority provided the following definition:

“The term ‘unitary’ in Article 2 is used in contradistinction to the term ‘Federal’ which means an association of semi-autonomous units with a distribution of sovereign powers between the units and the centre. In a Unitary State the national government is legally supreme over all other levels. The essence of a Unitary State is that the sovereignty is undivided, in other words, that the powers of the central government are unrestricted.

The two essential qualities of a Unitary State are (1) the supremacy of the central Parliament and (2) the absence of subsidiary sovereign bodies. It does not mean the absence of subsidiary law-making bodies, but it does mean that, they may exist and can be abolished at the discretion of the central authority." (*In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 SLR 312 at 319)

Considering the structure of devolution set out in the two Bills against this conceptual definition, the majority judgment concluded that,

"The question that arises is whether the 13th Amendment Bill under consideration creates institutions of government which are supreme, independent and not subordinate within their defined spheres. Application of this test demonstrates that both in respect of the exercise of its legislative powers and in respect of exercise of executive powers no exclusive or independent power [is] invested in the Provincial Councils. The Parliament and President have ultimate control over them and remain supreme." (ibid: 320)

The other major argument put to the Supreme Court by the petitioners was that devolution was inconsistent with Article 3 read with Article 4, which provides that legislative power shall be exercised by Parliament, executive power by the President, and judicial power through the courts. Relying on the 'basic structure' doctrine then being developed by the Indian Supreme Court, it was argued that these two provisions established the basic institutional structure of the state for the exercise of the sovereignty of the people (Edrisinha et al: Ch.26). It was contended that devolving legislative and executive powers to the proposed Provincial Councils would be an unconstitutional alienation of sovereignty contrary to Article 3, and a contravention of the basic structure of the constitution, since Article 4 did not contemplate any institutions (such as Provincial Councils) other than Parliament, the President and the courts as being entitled to exercise sovereign power (the Thirteenth Amendment Bill did not seek to add Provincial Councils as a separate category of (devolved) institution to those already mentioned in Article 4). It should be noted that Article 4 is not one of the provisions entrenched by Article 83, and therefore the petitioners were asking the court to regard Article 4 as an inseparable part of Article 3 (which is entrenched).

The majority rejected this argument (while the minority embraced it). It referred to the drafting history of Article 83 to conclude that the framers of the constitution intended to exclude Article 4 from entrenchment, and therefore it was not open to the court to interpret Article 4 itself as an entrenched provision, or as a part of the entrenched Article 3, when the framers had expressly excluded it. The majority of judges also argued that it was possible to introduce new institutions for the exercise of legislative and executive power, other than those mentioned in Article 4, so long as this did not impinge on the sovereignty of the people as provided in Article 3. In the view of the majority, the Provincial Councils system proposed in the Bills, which exercised only powers delegated by Parliament and the President, did not affect the sovereignty of the people.

The judges in the minority, especially the main dissenting opinion of Justice Wanasundera (ibid: 333-383), offered a powerful critique of these findings of the majority. In their view, the framework of devolution proposed by the two Bills would establish a federal or quasi-federal form of government that was contrary to the unitary state and the basic structure of the 1978 Constitution. Justice Wanasundera noted that the Provincial Councils would have the power to make statutes “which enjoy at least parity with laws made by Parliament,” enact statutes “that can suspend or render inoperative laws made by Parliament,” that they would enjoy “plenary power” to legislate in respect of competences set out in the Provincial Council List, and enjoy “terms of equality” with Parliament in respect to the competences in the Concurrent List. He further noted that the institutional structure and the devolved distribution of legislative and executive competences in the Thirteenth Amendment would be entrenched by virtue of the special procedures in Article 154G, and that “Parliament has disabled itself by placing fetters upon itself in the exercise of legislative power” in matters in which it hitherto had enjoyed unlimited power (ibid: 351-352). This being a quasi-federal system that would alter the basic unitary structure of the constitution, the minority concluded that the approval of the people at a referendum was necessary to validly enact the two Bills. However, as noted above, the government made changes to the Thirteenth Amendment Bill so as to address Justice Ranasinghe’s concerns, and thereby secured a majority in the Supreme Court for the view that a referendum would not be necessary. As an aside, it is interesting to note that Justice Wanasundera’s heavy use of the basic structure doctrine was aimed at preserving the pristine unitary state, whereas in its original context, the Indian Supreme Court developed it, *inter alia*, as a means

of restraining the Union government from encroaching upon states' autonomy in the Indian federation (Mate 2012; Mehta 2005).

In reconciling the devolution of power with the existing structure of a centralised unitary state as envisaged by the 1978 Constitution, the interpretational choices available to the majority in the Supreme Court were perhaps limited, in the presence of Articles 2 and 3 in the constitutional text and the arguments put to court with regard to them. The majority were impelled to stress that ultimate power and supremacy continued to be vested with the central Parliament and the President. Notwithstanding the views of the minority (subsequently endorsed by some commentators as being the better view: de Silva 1992; Egalahewa 2010), this meant that Provincial Councils came to be regarded from the outset as subordinate bodies to central institutions. This had implications for the way in which devolution was implemented, with administrative practices and subsequently enacted central legislation clearly being based on a notion of central supremacy and superiority (CPA 2008; Welikala 2010).

The introduction of devolution therefore was the occasion on which the normative force of the unitary principle and its pervasive reach within the constitutional architecture of the Sri Lankan state became most visible. While it did not prevent devolution – as it would have, had the minority view in the Supreme Court prevailed – the express unitary state provision certainly ensured two doctrinal and theoretical constitutional outcomes relevant to the present discussion.

Firstly, the subordination of any form of devolved institution to a hierarchical relationship with central institutions, in addition to its implied limitation on any further spatial devolution (e.g., 'Thirteenth Amendment Plus': Welikala 2010), also entailed a judicial reaffirmation of the 'sovereignty of Parliament,' assumed to represent and signify the 'sovereignty of the People,' as the necessary corollary of the Sri Lankan unitary state, in spite of a written constitution that is presumably supreme (Saunders & Dziedzic 2012; Goldsworthy 2010). As noted above, in traditional accounts of English constitutional doctrine (the position in Scots law is more ambivalent: MacCormick 1999), the unitary state is coterminous with parliamentary sovereignty because the formal 'top rule' of the British constitution is the latter (cf. Barber 2011), necessarily implying a unitary legal order, and in the absence of a written constitution that provides otherwise. In the context of a written constitution, it is questionable whether the majority

needed inevitably to invoke the doctrine of parliamentary sovereignty *in addition to* the constitutionally entrenched unitary state in reconciling devolution with the pre-existing constitution, especially as the 1978 Constitution does not contain an express provision akin to Section 44 of its predecessor recognising this principle. Ironically, this question applies with lesser force to the minority view in the *Thirteenth Amendment Case*, because for these judges, the meta-constitutional 'basic structure' of the state order demanded recognition of the unitary state *as well as* a supreme legislature unfettered by devolution, and as such the distinction was irrelevant.

As mentioned before, partly due its deceptive simplicity and intuitive appeal, and partly because of its evident utility to those opposed to both power-sharing and power-limitation, the Diceyan orthodoxy has long beguiled, and indeed befuddled, Sri Lankan constitutional imagination (Edrisinha 2008; Welikala 2012a). It may be that the judges in the majority were also captive to some of those misconceptions, using terms by force of habit. More likely, they probably adopted the rhetoric of parliamentary sovereignty in order to assuage fears about devolution raised by petitioners (Loganathan 1996: 136); fears, it needs be added, that were widely held by large sections of the Sinhalese community in 1987, and, as suggested by the government's determination to avoid a referendum, may well have resulted in the defeat of the Thirteenth Amendment Bill if it was put to the people.

But in so doing they overstated the importance of parliamentary sovereignty, or perhaps more accurately, made a major error of constitutional principle, with the unintended consequence of undermining the separation of powers at the centre as well. The judicial endorsement of parliamentary sovereignty as part of the Sri Lankan constitutional system has not gone unnoticed by politicians, as the assertion of parliamentary supremacy – as opposed to constitutional supremacy, enforced by the judiciary – in the impeachment of the 43<sup>rd</sup> Chief Justice of Sri Lanka showed in 2013 (*Jayarathne v. Yapa & Ors* (2013) SC Ref. 3/2012, CA (Writ) App. 358/2012, SCM 01.01.2013; *Parliamentary Debates*, 214(4) 11.01.2013: 510-666; Anketell & Welikala 2013).

Secondly, the textual/interpretational link between Articles 2 and 3 emphasised the conceptual nexus between the unitary state and a unitary sovereignty, reposed in a unitary 'People.' The unitary state as the emblem of a unitary sovereignty has been one of the principal arguments of those opposed to the

accommodation of Tamil claims through power-sharing and especially territorial autonomy (de Silva 2008). Implicit in this unitary view of sovereignty is not only the notion that it is illimitable and indivisible, but also that it can only be reposed and exercised by a people (or political community or nation), defined in singular terms, resident within a unified territory. Moreover, in this view, the nation is synonymous with the state. Thus the unitary view with regard not only to constitutional form, but also sovereignty, territory, and the nation, have presented major ideological and theoretical impediments to the recognition of plural national identities in Sri Lanka, as indeed it has elsewhere (Tierney 2006; Norman 2006). But as we will consider below, the explicit association of the majority ethno-religious nationalism with the power and indeed the very identity of the (unitary) state as a whole (Roberts 1978; Roberts 2013), exacerbates the effect of this problem for constitutional approaches to the accommodation of pluralism in general, and the Tamil claim to distinctive nationhood in particular.

### **3. Constitutional History and Historiography: The Colonial and Pre-Colonial Antecedents of the Post-Colonial Pathology of Centralisation**

The culture and impulse of centralisation that underpin the resilience of the post-colonial unitary state have two strands of antecedents in colonial and pre-colonial history. Sri Lanka's constitutional 'modernity' can be regarded as commencing in 1833 with the promulgation of the Colebrooke-Cameron reforms, which rationalised the administrative and judicial structure of the British Crown Colony of Ceylon in a legal form that can be recognised as a 'constitutional' framework (Marasinghe 2007; Cooray 1995). The annexation of the last Sinhala Kingdom of Kandy in 1815 had territorially unified the island under the British Crown, and a military-bureaucratic autocracy had been in place since control over certain coastal areas of the island passed from the British East India Company to the Crown in 1802 (Nadaraja 1972). But it is the constitutional settlement established in 1833 that instituted the modern unitary state, with territorial unification and centralisation of political power and legal authority, as the constitutional form of the island (Wilson 1988; Wickramasinghe 2006: 26-33; de Silva 2006). Admittedly, this 'diffusionist model' of colonial state formation (Bayly 2004) – that the modern state arose in Europe and arrived in

Asia and Africa via European imperialism – must be treated with caution in the Sri Lankan case in the related, but conceptually distinct, debates concerning the growth of *nationalism(s)* (Roberts 2004: Ch.1 *contra* Nissan & Stirrat 1990). But our focus here is on the state as a legal concept and entity, and in this regard, there can be no objection to the contention that the *modern state* was a nineteenth century, colonial instantiation (for a Foucauldian interpretation of these developments, see Rampton 2012).

While this describes a process that was common to virtually all British colonies in the nineteenth century, at the heart of this imposed legal modernity was a fundamental contradiction. On the one hand, British imperialism was premised “upon a foundation not merely of force, but on the universality of the rule of law,” which, however, was subject to two key theoretical reservations: the ‘law of exception’ and the ‘rule of difference’ (Halliday & Karpik 2012: 11-14). The law of exception related to the reservation of legally unrestrained and arbitrary emergency powers for the preservation of the colonial order, and the rule of difference concerned the racial differentiations that characterised the application of colonial law in practice. Both these reservations undermined the legitimacy and the universality of the rule of law in the colonial state, but what is pertinent to this discussion is that they were continued and replicated after independence (Udagama 2012. Marxist social scientists have addressed this problem with the concept of the ‘overdeveloped state’: Alavi 1972; Uyangoda 2010). The rise of Sinhala-Buddhist nationalism and its claims to the ownership of the post-colonial state reproduced the ‘rule of difference’ with regard to minorities, and the resulting tension and extra-institutional violence has necessitated recourse to the ‘law of exception,’ moreover as the norm rather than the exception (Welikala 2008b; Rampton 2012).

While both these actions induce, encourage, and entrench centralisation, it is at first instance the rule of difference at the fundament of the post-colonial constitutional order – a necessary element of Sinhala-Buddhist nationalism’s ideological commitment to an ‘ethnocratic’ model of unitary state (Uyangoda 2011; Harel-Shalev 2010) – in the context of ethnic, religious, and cultural pluralism, that creates a major anomaly between the plural socio-political foundations and the unitary constitutional form of the state. This is the perennial generator of intra-state conflict, and the conscious denial of this constitutional problem was, for example, at the heart of the Rajapaksa regime’s refusal to engage in post-war constitutional reform.

The dominance of Sinhala-Buddhist nationalism as an ideological and mobilisational entity in post-colonial politics, then, is the key to the development of the Sri Lankan unitary state. In political discourse, there are defences of the unitary state on grounds other than Sinhala-Buddhist nationalism (e.g., Jayatilleka 2013). Based on modernist universal principles of de-ethnicised and secular 'Sri Lankan' nationalism, these once mainstream views have, however, been relegated by the rise of Sinhala-Buddhist nationalism. There is no need to rehearse the extensive literature on this phenomenon, except to note the common thread in these explanations: in a plural society that contains one group that is an overwhelming majority, and in a culture of electoral democracy in which the most powerful vehicle of political mobilisation is ethno-religious nationalism, the maintenance of the unitary state with its benefits of centralisation, majoritarianism, and zero-sum decision-making, meshes with the interests of a numerically larger nationalism that not only considers itself entitled to the ownership of the state, but also so entitled on historical grounds.

The striking characteristic of Sinhala-Buddhist nationalist historiography is its employment of a powerful idiom of centralisation of state power, through an interpolation of the historical paradigm of the ancient Sinhala-Buddhist monarchy onto the institutions of the post-colonial republican state. According to the central legend of King Dutugemunu, which describes the ideal-type monarchical paradigm and informs popular conceptions of political leadership today (Kemper 1990; Roberts 1994: Ch.5; Roberts 2012), the greatest characteristic of a truly heroic occupier of the Sinhala kingship was the overthrow of foreign domination, or the subjugation of the internal 'other,' and subsequent 'unification of the country' under a single, central authority. In the *vamsa* tradition of Sinhala-Buddhist historiography, this is the imperative precondition of the good life: peace, stability, economic progress and cultural renaissance. On the other hand, dilution of central authority, often derisively attributed to vapid leadership, was seen to produce anarchy, pestilence, moral decadence and cultural degradation. Therefore centralised unity tied to territorial integrity is axiomatic in the traditional Sinhala-Buddhist ontology of the state and sovereignty, and explains its resonance in the contemporary nationalist hostility to any sort of political decentralisation.

The historiographical justifications advanced by Sinhala-Buddhist nationalists for the unitary state in the present – essentially as the modern continuation of

the ancient state tradition interrupted by colonialism – requires critical treatment, because it seems to be the case that these arguments are based on a selective reading of the pre-colonial state (e.g., the Sinhala Commission Report 2003). In other words, the centralising principles of hierarchy and encompassment in the pre-colonial state are stressed, and grafted onto the centralising model of the unitary nation-state as a further layer of (majoritarian) legitimation for the constitutional order, while entirely discounting the devolutionary principles that characterised the operation of that state form in practice (theorised in historical anthropology as ‘galactic polities’ or ‘*mandala*-states’: Tambiah 1976: Ch.7; Tambiah 1992; Roberts 2004; Day 2002).

A brief survey of the pre-colonial state form reveals the following characteristics. To the extent categories like ‘nation’ and ‘state’ had relevance in this kind of polity, there was a conflation of nation and state in the institution of the righteous monarch, which was seen as the fount of authority and order in the temporal realm, as well as the personification of the collective identity of the people (Roberts 1994: Ch.3). Just as the demonic is included within the scheme of the Buddhist cosmic pantheon, and plays a role of creative tension within it, ‘out-groups’ in the pre-colonial Sinhala-Buddhist polities were accommodated through a stratified system of social organisation, which placed them in inferior social positions but not outside it. The ‘sovereign’ legitimacy of this type of political order was secured through the subscription of both rulers and ruled to the religio-moral injunctions of Buddhism (Tambiah 1976). The organisation of the state order was in turn ordained by the principles of Buddhist cosmology, which was encompassing and hierarchical *as well as* pulsating and fissiparous (de Silva Wijeyeratne 2007). This cosmic tension was reflected in the *mandala*-type organisation of the pre-British monarchical polities of Sri Lanka, in which the principles of hierarchy and encompassment reflected in the rituals of Buddhist kingship and in the idea of *Sinhalē* were countervailed, not only by the decentralised structures and practices of government dictated by the galactic logic of the *mandala*, but by practical constraints of mobility, communications, geography, and *realpolitik* (Tambiah 1992. Cf. Roberts 2004: Ch.5).

Notwithstanding this, the notion of *Sinhalē* – which was a categorically Sinhalese and Buddhist, and *not* a modern, pluralistic, or egalitarian collective consciousness – served as a real and meaningful form of ideational coherence within a state form that did not derive its integrity from the norm of bounded territory (Roberts 2004: Ch.4). However, Tamil-speaking residents of the

physically remote, autonomous chieftaincies in the Vanni region may not have subscribed to the idea of *Sinhalē* despite paying homage and tribute to a Sinhala suzerain, and Tamils of the northern Vanni and the Jaffna peninsula certainly did not do so during the existence of the independent Jaffna kingdom (although the Tamil-speakers of the eastern littoral were tributary subjects of *Sinhalē*: Roberts 2013). But the more important point for present purposes is that the dynamism of the galactic polity allowed for substantial spatial autonomy at the periphery as a quotidian reality, and with none of the conceptual constraints associated with the centralised, bureaucratised, modern, unitary, nation-state.

In sum then, the pre-colonial Sinhala-Buddhist state was hierarchical and encompassing in intent, but pulsating, fissiparous, and asymmetrical in practice. This not only makes for a radical contrast between the pre-colonial and post-colonial state forms, but also negates the alleged provenance of the unitary state in the pre-colonial history of the island. Sinhala-Buddhist nationalists draw selectively from this pre-colonial political context in historicising the unitary state: they seize upon its hyperbolic ideology of centralisation without recognising its decentralised and fissiparous administrative realities: a selection that is akin to interpreting the French Republic from the imagery of *La Marseillaise* or the modern United Kingdom from the words of *Rule Britannia*.

#### **4. The Sub-State Challenge: Federalism and Self-Determination as Formalist Counterpoints**

The historical development of Sri Lanka's sub-state Tamil nationalism, based at the core in a collective sense of belonging around the Tamil language and culture, was driven by social responses to perceptions of cultural degradation under colonialism and discrimination post-independence (Gunasingam 1999; Ambalavanar 2008), and by political responses to changing institutional forms of power and representation in the colonial and post-colonial state (Wilson 2000; Wickramasinghe 1995; Russell 1982). The articulations of the nation by Tamil nationalists, and the politico-legal claims made on behalf of the nation, have been influenced by two main ideological and discursive sources: the rights discourse of conventional international law relating to the self-determination of peoples, and the Marxist approach to nations and nationalities (Cheran 2009).

One of the consequences of this reliance by Tamil nationalists on the categories of international law in particular has been an absence of engagement with the political and constitutional theory concerning democracy and the state. In contrast therefore to sub-state nationalisms in especially Western plurinational states, which in recent decades have produced some of the most fundamental theoretical interrogations of liberal democracy and the Westphalian nation-state (Tierney 2006; Keating 2001; Requejo & Caminal 2011; Kymlicka 1995; MacCormick 1999), Tamil nationalism has not greatly concerned itself with the theoretical coherence of its position as a sub-state nation within a sociologically plurinational polity that is, however, governed by an anomalously unitary constitutional order. The failure to present penetrating theoretical challenges “at a deeper and more general level to the fundamental normative precepts which inform contemporary constitutional theory and legal praxis” (Tierney 2006: 4) of the Sri Lankan state, including most importantly to the Westphalian assumption that there can be only be one nation – and therefore one sovereignty – within the state (the ‘monistic *demos* thesis’: *ibid*: Ch.1), has led to a fundamental paradox in the way the Tamil nation locates itself in relation to the state. It is perpetually either ‘understating’ its constitutional claims (as a mere ethnic *minority* rather than a sub-state *nation*) or ‘overstating’ them (as a proto-state that is imminently separated from Sri Lanka). In both dimensions, this paradox buttresses unitary order; in the former sense by reaffirming a majority-minority hierarchy within the existing state, and in the latter by reaffirming the Westphalian order in which nations can only exist as mono-national states.

Of course, in the political rhetoric of its autonomy claims, Tamil nationalism has critiqued such features of the host-state as ethnicised majoritarianism, discrimination, and the absence of power-sharing space in the centralised unitary state. Like Western ‘sub-state national societies’ (*ibid*: 6-8), Tamil nationalism also offers historiographical arguments about territorial nationhood, and in its pre-war and post-war federalist incarnations, constitutional claims to recognition, representation, and autonomy that potentially involve a major reorganisation of the Sri Lankan state. However, the point to note is that these critiques and claims are generally *empirical* and *institutional* in character, and are more directed at issues of constitutional *form* than the underlying theoretical implications of the sociological reality of more than one group claiming to be a nation (or ‘national pluralism’) in a polity and constitutional order such as Sri Lanka. These formalist positions have also suffered from mechanical comparativism and normative incoherence, although new thinking on these

issues seems to be emerging within Tamil nationalism (e.g. Rasaratnam 2012). At the level of the *theory* of the state, as opposed to its *form*, therefore, the Sri Lankan unitary state has emerged relatively unscathed from the sub-state challenge presented by Tamil nationalism.

## **5. Towards an Explanatory and Descriptive Theory of the Sri Lankan Conception of the Unitary State**

How can we fit these disparate elements and discourses into a coherent explanatory and descriptive account of the Sri Lankan unitary state? In seeking to escape its strictures in the search for a constitutional settlement of ethno-religious pluralism, some liberals have downplayed its significance as a legal principle. In one recent description, it is dismissed as an “impetuous, ill-considered, wholly unnecessary embellishment” (Jayawickrama 2012: 105). While true in many ways, the problem with such a minimalist view is that it cannot account for the ‘everyday plebiscite’ (Renan 1882) of Sinhala-Buddhist nationalism in Sri Lankan politics, and the strength of its holistic politico-constitutional commitment to the unitary state. This dominant political force has succeeded in entrenching the unitary state in the republican constitutional order (Rampton 2012), it compels political and administrative implementation of those constitutions in a unitary spirit (Uyangoda 2011; Ismail 2005), and in the *Thirteenth Amendment Case*, its influence was felt even in the highest forum of judicial deliberation. A different approach to explaining the unitary state is therefore needed, one that accords due weight to the foundations of its resilience, without also boarding the ideological bandwagon of Sinhala-Buddhist nationalism.

Adopting a comparative method, I rely on aspects of Neil Walker’s work on the unitary conception of the UK constitution to suggest a number of analytical distinctions that are needed, of which, the initial step is to draw an explicit distinction between the *legal* and *political* discourses of unitary order. This distinction has implicitly informed the discussion so far where the judicial approaches to constitutional doctrine (the official legal discourse) and the constitutional claims of Sinhala-Buddhist nationalism (the dominant political discourse of unitary order) have been treated discretely. But considering these

two types of discourse separately has a useful theoretical purpose, in that it allows us to distinguish, firstly, between the different types of power associated with each discourse, and secondly, to analyse more sharply the conceptual opposites within each discourse as between unitary and pluralist conceptions of constitutional order (Walker 2012: 450-452).

In the UK legal discourse, unitary order and authority is of the type Walker associates with MacCormick's theory of 'institutional normative order' (MacCormick 1999: Ch.1). It is the purely formal and non-substantive, and therefore flexible, nature of the legal principle of unitarism reflected in the British constitution that makes it compatible with institutional pluralism under devolution, multiculturalism and traditional competitive and pluralist democracy, and which prevents the authoritarianism associated with politically unitary conceptions of order and authority (Walker 2012: 450, 456-7). The Sri Lankan legal discourse of unitary order is rather different, as we have seen, due to the presence of written constitutional provisions that serve not only the classificatory function, but also to reinforce the formal principle with substantive provisions centralising legal authority. Political unitarism on the other hand, concerns "...de facto political power in all its forms and manifestations and the type of order that may be produced through the operation of that power" (ibid: 450-1). Sinhala-Buddhist nationalism is clearly such a politically unitary discourse which contextualises its argument for a unitary constitutional form of legal authority on the basis of a culturally monist historiography, and which gains and exercises power through majoritarianism.

In both British and Sri Lankan legal discourse, the conceptual opposite to the unitary state is the federal state (this is to simplify and stylise the formal conceptual opposites. Ibid: 451-2). Conceptually, the pure formalism of the UK unitary state only excludes formal federalism, and is thereby able to accommodate a wide diversity of political discourses including an extraordinary degree of territorial devolution, so long as, formally, ultimate authority rests with the UK Parliament. Sri Lankan legal discourse similarly counterposes federalism as the conceptual opposite of the unitary state, but here, the unitary state is not merely formal, but is also substantive. The scope for pluralist legal discourses within this unitary order are therefore restricted in proportion to the substantive reach of the unitary state provisions of the constitution (the scope of which are not confined to the interpretational possibilities of concrete textual

provisions, and may include meta-constitutional or sub-textual meanings: *vide* the ‘basic structure’ arguments in the *Thirteenth Amendment Case*).

In political discourse, the “unitary conception of political authority...like its legal counterpart, identifies and/or advocates one dominant centre of political power” (ibid: 452), and its conceptual opposites are the various pluralist conceptions: “Pluralism is a broad umbrella covering both any explanatory thesis which accounts for the political order in terms of a diversity of authorities and influences and any normative thesis which advocates a diffusion of power between different groups, mechanisms or sites of authority” (Walker 2012: 452; Dryzek & Dunleavy 2009). Sri Lankan political discourse includes a variety of pluralist discourses, but the comparative difference is that, under the dominant influence of the politically unitary discourse of Sinhala-Buddhist nationalism, the space for pluralist discourses (both explanatory and normative) is commensurately restricted. Hence the reason pluralist ideologies like political liberalism as well as minoritarian claims to accommodation are very distinctly inferior traditions in Sri Lankan constitutional politics.

We can thus sum up these theoretical insights as follows. The unitary state in Sri Lanka’s Sinhala-Buddhist nationalism dominated constitutional discourse (both legal and political) must be understood as both a formal as well as a substantive concept, going beyond its usual function in positivist constitutional law as a formalistic classificatory concept. Its classificatory and descriptive function is important in symbolic terms and as such it finds textual expression in the constitution, but the unitary state is also given substantive legal meaning in provisions of the constitution that centralise legislative, executive, and judicial powers. Beyond the legal realm, the political force of the unitary state derives from its linkage to the normative claims with regard to the state order inhering in Sinhala-Buddhist nationalism. The positivist unitary state in its most literal sense, as one in which all power within the territorial state is concentrated in a single, unitary authority, is thus transubstantiated by the hegemonic monism of Sinhala-Buddhist nationalism in relation to territory, polity, and power into both a descriptive assertion about the nature of the state as well as denoting a specific institutional and normative understanding of its structure. This tendency to centralisation is seen both in the antipathy to territorial devolution and in the reproduction of the ancient kingship in modern forms of monarchical presidentialism (Welikala 2015). By virtue of its historiographically and ethno-religiously contextualised nature through its enmeshment with Sinhala-Buddhist

nationalism, the unitary state is thus more deeply resonant than, and its performative meaning extends beyond, mere words on the paper constitution (Bell 2008).

## 6. Concluding Remarks

In the years after the brutal denouement of the civil war, there was no progress with regard to reforms towards a reconciliatory and inclusive constitutional settlement for Sri Lanka. If anything, the post-war realignment of politics was in the opposite direction, further entrenching the political and legal discourses of unitarism and away from pluralism. While the democratic environment has improved significantly since the regime change of 2015, it would be reckless to assume that the majoritarian conception of the Sri Lankan unitary state has changed in any significant way even where there is evidence of widespread support for enhancing the quality and extent of devolution (PRC 2016: Chs.8, 9).

At a multiparty conference on a new devolution settlement for Sri Lanka held in January 2016 in Scotland, the constitutional self-classification of the state under the new constitution was extensively discussed, including some of the important theoretical distinctions discussed in this paper, in particular the difference between the formal and substantive conceptions of unitarism. This arose in the political context noted at the outset, where for the purposes of a successful constitutional referendum at the end of the current process, an express reference to the unitary state in the new constitution may not be avoided. If the conclusion was that this was politically unavoidable, then it would be vital to ensure that the constitutional reference to the unitary state be purely or as close to formal and symbolic as possible, and not constitute a substantive obstruction to maximal or at least meaningful devolution. It would also be important if this approach were adopted to constitutionalise interpretative instructions to the courts so as to ensure that substantive unitarism is not introduced by a side-wind and denude devolution in the future as in the past (*vide the Thirteenth Amendment Case*). Another view was that if the majority community's commitment to the unitary state stemmed from a fear of a division of the country, then such guarantees could be explicitly provided without a need to mention the unitary state, or alternatively, that the unitary state could be narrowly and expressly defined to mean the unity and territorial integrity of the state only, rather than substantive

centralisation (these options have been recommended by the PRC as well: 24-25).

The participants discussed the need to transcend the formalistic unitary/federal dichotomy that has bedevilled Sri Lankan constitutional politics and poisoned relationships between communities. One way of doing this, it was felt, was to have constitutional silence on the self-description of the state. Another approach was to begin by focusing on the substantive framework of devolution within a united and indivisible state, and only then and if necessary, consider how to 'label' it. It was also noted that formulations from previous exercises (e.g., the Constitution Bill of 2000, options produced by the All Party Representative Committee, etc.) could be usefully revisited. A novel idea was the option of creating a neologistic term in Sinhala, Tamil, and English to capture the idea of a devolved but indivisible state, through which to avoid using loaded and historically divisive terms like 'unitary state' and 'federal state'.

It is hoped that the theoretical elucidation of the unitary state in this paper would help current constitution-makers avoid false choices. Acknowledging the resilience of the unitary state and the political difficulties involved in going beyond it, however, is not the same thing as avoiding any exercise of political leadership and constitutional imagination in relation to the question, especially in the context of the historic constitutional moment that we are presently in.

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