



## THE IDEA OF CONSTITUTIONAL INCREMENTALISM

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## 1. Introduction

The Sri Lankan Parliament, sitting as a Constitutional Assembly, is currently deliberating on constitutional reforms that could see the promulgation of our third republican constitution in the next few months. Exactly two years after the remarkable regime change that made this possible, the reform process is admittedly looking threadbare, with what seems like the normal culture of corrupt and dysfunctional Sri Lankan politics beginning to clog the wheels of reformist hopes.<sup>2</sup> While the fears of this eventuality wrecking another reform opportunity are indubitable given our history, at least a part of the disappointment and anguish among reformists, however, is due to a particular understanding and expectation they had of 2015. The understanding was that the regime change was a democratic revolution, and the expectation was that it would deliver revolutionary constitutional changes. I think there is another way of understanding the change and the reforms it mandated, and this is important in order to manage our expectations of the process, and therefore our mode of engagement with it.

Alexander Hamilton's observation of the US constitution that it was the first to be the product of 'reflection and choice' rather than 'accident and force' has now become an aphoristic norm.<sup>3</sup> But that very deliberative nature of modern constitution-making is what subjects it as a political process to a myriad of uncertain variables, contending interests, competing forces, and unsettled concepts.<sup>4</sup> Even if therefore constitutional reform is typically an exercise in epistemic uncertainty, our current process is more than usually tangled, due to the unique circumstances that led to the change of government in the 2015 elections, and the ensuing experiment with political cohabitation in a national unity government, which, whilst not unprecedented, has never before been successful.<sup>5</sup>

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<sup>2</sup> See e.g., J. Uyangoda, '*Yahapalanaya in Sri Lanka: Remains of the Day*', *Groundviews*, 5<sup>th</sup> December 2016, available at: <http://groundviews.org/2016/12/05/yahapalanaya-in-sri-lanka-remains-of-the-day/>; S. Perera, '*The Curse of the Obstinate Patriarch*', *Groundviews*, 8<sup>th</sup> January 2017, available at: <http://groundviews.org/2017/01/08/the-curse-of-the-obstinate-patriarch/>

<sup>3</sup> A. Hamilton in *Federalist No.1* cited in M. Tushnet, '*Constitution-Making: An Introduction*' (2012-2013) *Texas Law Review* 91: p.1983.

<sup>4</sup> See e.g., J. Elster, '*Forces and Mechanisms in the Constitution-Making Process*' (1995) *Duke Law Journal* 45: p.364; L.E. Miller (Ed.) (2010) *Framing the State in Times of Transition: Case Studies in Constitution Making* (Washington: USIP); M. Brandt, G. Cottrell, Y. Ghai & A. Regan (2011) *Constitution-making and Reform: Options for the Process* (Geneva: Interpeace), available at:

<http://www.constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf>

<sup>5</sup> Dudley Senanayake's administration from March 1965 to November 1968 is sometimes called a 'national government' due to the United National Party's coalition with the Mahajana Eksath Peramuna, the Sri Lanka Freedom Socialist Party, and the Federal Party. Under the presidential constitution, President Chandrika Kumaratunga was compelled to cohabit with a government headed by Prime Minister Ranil Wickremesinghe of the United National Front from December 2001 to April 2004. For analyses of the first phase of reform under the new dispensation, see the essays in A. Welikala (Ed.) (2016) *The Nineteenth Amendment to the Constitution: Content and*

That does not mean, however, that we should abandon any attempt to understand the dynamics at play and to theorise the nature of the change we are undergoing, so that we may have some clarity about what it is we are doing and what is to come. There are three sets of questions that demand answers in this context: What is the nature of the 2015 regime-change? How does the nature of that change determine the nature of the current reforms process? And finally, what is the best way of understanding the current process and its probable outcomes in a way that allows us to make sense of the longer story of Sri Lanka's constitutional evolution?

In offering some answers to these questions, my argument is based on three main analytical premises: (a) that what happened in 2015 is not a political revolution in any sense even though it has been described as such by some,<sup>6</sup> and (b) while there is some arguable political and civic consensus about the more damaging consequences of the Rajapaksa regime and the necessary remedial reforms to address them, at a more deeper level we do not yet have a social consensus about a common vision for the Sri Lankan state, either in terms of collective identity or in terms of institutions: evinced *inter alia* in the irresolution on the abolition of presidentialism, and more deeply and seriously, in the federal versus unitary debate.<sup>7</sup> Consequently, (c) the best way to view and conceive the current exercise in constitution-making is as an incrementalist change towards improving democratic conditions, so that we may continue the constitutional conversation about matters that currently divide us, and commit to a process of continuous incremental constitutional change and adjustment. In other words, the current exercise is only one further notch in a broader narrative and agenda of constitutional development.

I will then elaborate the content of incrementalism as a theory of constitutional change, demonstrating that it is both a principled and a realist strategy for countries like Sri Lanka. That is, the theory of constitutional incrementalism is much more than a case of making a virtue out of necessity, although it is also that. I will show that it has the potential to meet current critiques of the process and substance of constitutional reform, how it eschews the unsettling repercussions of 'revolutionary' change, how it avoids essentialist and teleological approaches to the Sri Lankan constitutional settlement, and how it helps us escape the zero-sum trap of communities within our plural polity viewing themselves as either 'winners' or 'losers' in relation to constitution-making.

I should strongly underscore at the outset that the idea of constitutional incrementalism that I develop in this Working Paper is emphatically *not* the same

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Context (Colombo: CPA), available at: <http://constitutionalreforms.org/the-nineteenth-amendment-to-the-constitution-content-and-context/>

<sup>6</sup> See e.g., (largely self-congratulatory) accounts by two factions of the coalition behind the Sirisena candidacy: A. Abeygunawardana (2015) *The Revolution of the Era* (Colombo: No Publisher); D. Weerakkody (2015) *The Great November Revolution* (Colombo: Author).

<sup>7</sup> A. Welikala, 'The Sri Lankan Conception of the Unitary State: Theory, Practice, and History', CPA Working Papers on Constitutional Reform No.1, June 2016, available at: <http://constitutionalreforms.org/wp-content/uploads/2016/06/CPA-Working-Paper-1.pdf>

as the view being advanced in some sections of the Sri Lanka Freedom Party (SLFP) that what is needed is not a new constitution but piecemeal reforms over the course of the current Parliament. According to this view, electoral reforms can be embodied in a Twentieth Amendment to the current constitution to be enacted immediately. Then there could be further discussion about possible devolution reforms. The sting in the tail is the argument that the *quid pro quo* for devolution is the retention of the current executive presidency, on the grounds that more devolution requires to be balanced by a unifying national institution in the form of the presidency. In my view, the underlying rationale of this position is rather more prosaic than the constitutional justifications it proffers: some in the SLFP fear that if President Sirisena becomes merely a titular president, then they will have no access to state resources with which to fight the next general election against the United National Party (UNP), and before that, to withstand the challenge from the Rajapaksa rump known as the 'Joint Opposition.' While to be fair, President Sirisena has himself been nothing other than publicly consistent about the fact that his extraordinary mandate in the January 2015 presidential election was to abolish the office to which he was elected, if this line of thought within his party gains any traction, then the prospect of obtaining the two-thirds parliamentary majority for a new constitution vanishes, and with it the hopes for Sri Lanka's third republican constitution.

That would in fact be a severe setback for the incremental narrative of constitutional development that I hope to elaborate in what follows. My argument is based not only on a profoundly different conception of time and space, the *longue durée*, as opposed to their short to mid-term span of the next electoral cycle in 2020 (or before); it is also distinguishable by its foundation on the general principles of a substantively Burkean approach to constitutionalism, whereas theirs is not a normatively informed position but an interest-based calculation of party political advantage.

## **2. What Happened to the Sri Lankan Constitution in 2015: Rupture, Revision, or Both?**

We cannot make any informed judgements, whether analytical or normative, about the current process or the substantive reform options under discussion within it, if we do not have a clear conception of the nature of the regime change that was affected by the presidential election of January 2015, which was consolidated by the passage of the Nineteenth Amendment in May, and validated in the parliamentary elections of August. Basic intuition and experience tell us that the dramatic defenestration of the Rajapaksa regime was not merely a routine change of government. Given the centrality of potentially far-reaching constitutional reform promises in the campaign, it was certainly something more than that, although as a product of a negotiated, satisficing, reformist coalition winning the contest under the established rules of the game, it was also not quite a revolution. In order to understand both the change of regime and the resultant 'transition', we need then to look to the various types of processes through which such politico-constitutional changes can occur. Christine Bell's typology of

constitutional transitions is helpful in this regard, and the fact that the Sri Lankan case does not fit easily within it also gives us a number of useful insights.<sup>8</sup>

Bell's list of types categorises constitutional transitions under three basic categories: 'rupture', 'revision', and 'simultaneous rupture and revision'.<sup>9</sup> Constitutional ruptures decisively break legal continuity from one constitutional order to another. The effect of a rupture is the wholesale replacement of the existing order with a new one. They are triggered by several kinds of political events. These include revolution and war, serious economic crises, peace settlements and pacted transitions, and decolonisation. Processes of constitutional revision, on the other hand, change constitutions within the existing constitutional frame. Revision occurs through legislative acts of constitutional amendment under existing procedures, or through judicial acts of reinterpretation of existing constitutional provisions. Bell's third category envisages situations where rupture and revision occur simultaneously. In this regard, the two key phenomena are 'unconstitutional constitutional amendments'<sup>10</sup> and 'constitutional moments'.<sup>11</sup> The former occurs when courts find that constitutional amendments that have otherwise been passed through the established procedure rupture deep underlying principles – or the 'basic structure' – of the constitution.<sup>12</sup> The latter takes place when the judiciary in the

<sup>8</sup> C. Bell, '*Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison*' (2014) *Public Law*: p.446.

<sup>9</sup> Ibid: pp.448-453.

<sup>10</sup> A. Barak, '*Unconstitutional Constitutional Amendments*' (2011) *Israel Law Review* 44: p.321, available at: <http://law.huji.ac.il/upload/44Barak.pdf>; Y. Roznai, '*Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*', PhD Thesis, London School of Economics, February 2014, available at: [http://etheses.lse.ac.uk/915/1/Roznai\\_Unconstitutional-constitutional-amendments.pdf](http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf)

<sup>11</sup> B. Ackerman (1995) *We the People: Foundations* Vol.1 (Cambridge, MA: Harvard UP); B. Ackerman (2001) *We the People: Transformations* Vol.2 (Cambridge, MA: Harvard UP); Cf. S. Choudhry, '*Ackerman's Higher Lawmaking in Comparative Perspective: Constitutional Moments as Constitutional Failures*' (2008) *International Journal of Constitutional Law* 6 (2): p.193 and T. Sandalow, '*Abstract Democracy: A Review of Ackerman's "We the People"*' (1992) *Constitutional Commentary* 9: p.309.

<sup>12</sup> See *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973) AIR 1973 SC 1461; *C. Suntharalingam v. The Attorney General* (1972) 75 NLR 126; *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 SLR 312 per Wanasundera J. at pp.333-383. See also R. Edrisinha, M. Gomez, V.T.

Thamilmaran & A. Welikala (Eds.) (2008) *Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: CPA): Ch.26; U. Egalahewa, '*The Judicial Approach to the Devolution of Power: The Interpretation of the Thirteenth Amendment to the Constitution*' in L. Marasinghe & J. Wickramaratne (Eds.) (2010) *13<sup>th</sup> Amendment: Essays on Practice* (Colombo: Stamford Lake): Ch.5; M. Mate, '*Priests in the Temple of Justice: The Indian Legal Complex and the Basic Structure Doctrine*' in T.C. Halliday, L. Karpik & M.M. Feeley (Eds.) (2012) *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge: CUP): Ch.3; P.B. Mehta, '*The Inner Conflict of Constitutionalism: Judicial Review and the "Basic Structure"*' in Z. Hasan, E. Sridharan & R. Sudarshan (Eds.) (2005) *India's Living Constitution: Ideas, Practices and Controversies* (London: Anthem Press): Ch.8; G.J. Jacobsohn, '*An Unconstitutional*

course of constitutional interpretation is politically understood to have changed underlying principles so drastically as to amount to a rupture.<sup>13</sup>

If we apply this typology to the facts of the Sri Lankan situation post-January 2015, we seem able to conclude that it is a straightforward case of *revision through constitutional amendment*.<sup>14</sup> Despite ominous portents, the overnight transfer of power was peaceful after the presidential election on 8<sup>th</sup> January 2015.<sup>15</sup> The minority government that came into being under the new President won a majority in one of the more orderly parliamentary elections in living memory on 17<sup>th</sup> August.<sup>16</sup> Despite the radical ideological difference between the incumbent regime and the oppositional challenge, that the basic procedure for political change through the electoral process was respected, demonstrates that there was no revolution except in a rhetorical or metaphorical sense.<sup>17</sup> This point – that the state's formal institutional framework for the management of political change survived intact and was by-and-large adhered to by the critical players – is also significant for the incrementalism thesis, and I will return to it shortly.

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*Constitution? A Comparative Perspective' (2006) International Journal of Constitutional Law 4 (3): p.460.*

<sup>13</sup> E.g., *Schechter Poultry Corporation v. United States* (1935) 295 US 495, as discussed in Ackerman (2001): pp.295-6, 303. Possible Sri Lankan examples could be *Liyanage v. R* (1967) AC 259 (asserting courts' power to constitutionally review primary legislation), *Bribery Commissioner v. Ranasinghe* (1965) AC 172 (transforming a manner-and-form constitutional provision into an eternity clause, albeit *obiter*) and *Wijesekera and Ors v. The Attorney General* (2006) 1 SLR 38 (striking down an established inter-communal political consensus undertaken by way of an international treaty). See also S.A. de Smith, '*The Separation of Powers in New Dress*' (1966) *McGill Law Journal* 12 (4): p. 491; W.I. Jennings, '*Limitations on a 'Sovereign' Parliament*' (1964) *Cambridge Law Journal*: p.177; A. Welikala, '*The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' led to Constitutional Revolution*' in A. Welikala (Ed.) (2012) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Colombo: CPA): Ch.3, available at: <http://republicat40.org/wp-content/uploads/2013/01/The-Failure-of-Jennings'-Constitutional-Experiment-in-Ceylon.pdf>; Edrisinha et al (2008): Ch.35. In general, however, Sri Lankan courts have shied away from political questions: *C. Suntharalingam v. The Attorney General* (1972) 75 NLR 126; *The Republic of Sri Lanka v. Appapillai Amirthalingam*, Trial-at-Bar No.1 of 1976, decided on 10<sup>th</sup> September 1976, unreported but discussed in Edrisinha et al: Ch.13.

<sup>14</sup> Constitution of Sri Lanka (1978): Article 82 (7) provides that 'amendment' includes repeal, alteration, and addition, but Article 75 requires Parliament to enact a new constitution to replace the current constitution if it intends repealing the latter as a whole.

<sup>15</sup> Campaign for Free and Fair Elections (CaFFE), *What really happened on 8 January night? CaFFE observation report*, Daily FT, 24<sup>th</sup> January 2015, available at: <http://www.ft.lk/2015/01/24/what-really-happened-on-8-january-night-caffe-observation-report/>

<sup>16</sup> Centre for Monitoring Election Violence (CMEV), *Final Report on Election Related Violence and Malpractices*, Parliamentary General Election, 17<sup>th</sup> August 2015, available at: <https://cnev.files.wordpress.com/2016/02/final-report-on-election-related-violence-and-malpractices-parliamentary-general-election-17th-august-2015.pdf>

<sup>17</sup> See C. Johnson (1968) *Revolutionary Change* (London: Univ. of London Press); C. Tilly (1978) *From Mobilization to Revolution* (Reading, MA: Addison-Wesley).

The Nineteenth Amendment was passed in May through the established (and judicially supervised<sup>18</sup>) procedure set out in Chapter XII of the current constitution. Similarly, as paragraphs 21 and 23 of the parliamentary resolution of 9<sup>th</sup> March 2016 establishing the Constitutional Assembly make clear, Parliament will use its powers under Article 75 and the current constitution's procedure for its repeal and replacement in enacting the new constitution.<sup>19</sup> Thus the method of constitutional change consequential upon the change of government, while in some ways radical in substance are formal and conservative in terms of process, by being cast entirely in terms of the existing framework of the constitution in force. In other words, the byword is constitutional continuity and not constitutional revolution.<sup>20</sup>

The 2015 regime change was also in no sense the result of a peace settlement or pacted transition.<sup>21</sup> In fact, in building the broadest opposition coalition in history against a sitting President to include both Sinhala and Tamil nationalists, the Sirisena candidacy assiduously kept the issue of power-sharing and devolution off the opposition platform. The Tamil National Alliance (TNA) neither sought nor received any written guarantee on these questions, although there may have been informal verbal understandings. Sirisena's manifesto therefore contained no reforms with regard to changing the unitary structure of the constitution or the conception of nation-state underpinning it.<sup>22</sup> In the August parliamentary election, the manifesto of the United National Front for Good Governance (UNFGG), which won the election and is now in government, promised "Devolution of power while preserving the unitary status of the country."<sup>23</sup> On the other hand, the TNA, which won resoundingly in Tamil-majority areas in the north and east, demanded a

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<sup>18</sup> *In Re Nineteenth Amendment to the Constitution*, SC SD 04/2015-19/2015, SC Minutes, 9<sup>th</sup> April 2015.

<sup>19</sup> It is for the same reason that we have a *Constitutional Assembly* and not a *Constituent Assembly*. The former is a drafting body only, whereas the latter both drafts and enacts a constitution. In the current scenario, the power of enactment is retained by Parliament and the people.

<sup>20</sup> For the striking contrast of these procedures with the only instance of legal-constitutional revolution in Sri Lanka's post-colonial history, see D.C. Williams, '*Revolutions and Institutions: Political Violence and Sri Lanka's 1972 Constitution*' in A. Welikala (Ed.) (2012) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Colombo: CPA): Ch.14, available at: <http://republicat40.org/wp-content/uploads/2013/01/Revolutions-and-Institutions.pdf>; see also L. Marasinghe, '*Ceylon – A Conflict of Constitutions*' (1971) *International and Comparative Law Quarterly* 20: p.645.

<sup>21</sup> C. Bell (2008) *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: OUP).

<sup>22</sup> Even in those areas where he made explicit promises of reform, Sirisena limited the scope of those changes to what could be achieved without a referendum: see manifesto of the New Democratic Front, '*A Compassionate Maithri Governance, A Stable Country*', 19<sup>th</sup> December 2014: p.14, available at:

<https://www.scribd.com/document/250547427/Common-Candidaite-Maithripala-Sirisena-s-Election-Manifesto>

<sup>23</sup> United National Front for Good Governance (UNFGG), '*A New Country in 60 Months: Five Point Plan*', 23<sup>rd</sup> July 2015, available at: <http://www.asiantribune.com/node/87467>

federal solution for power-sharing.<sup>24</sup> The unitary-federal dichotomy in the Sinhala and Tamil perspectives on the Sri Lankan state was therefore yet again reproduced. This point – that there was no ‘pre-constitutional consensus’<sup>25</sup> among the Sinhalese and Tamil leaders about the foundations of the state – is again an important issue for the incrementalism argument that I will revisit below.

But there is a further layer of analysis to Bell’s scheme that is crucial to this discussion, and that concerns the interplay of the ‘legal constitution’ and the ‘political constitution’ within a given system. If the working of the legal constitution can be compared to the surface play of waves on an ocean, then the political constitution represents the mighty currents that swirl beneath. While of course the legal constitution is the written text, the political constitution “sits alongside or even behind the legal constitution” and reflects “the fundamental agreements on which the polity understands itself to be able to hold together”.<sup>26</sup> The legal constitution “might be understood as being revised when changed incrementally through methods which it contemplates, such as amendment and judicial interpretation, and ruptured when changed outwith those processes.”<sup>27</sup> The political constitution “might be understood as being revised when incrementally extended and developed, and ruptured when involving some sort of quick reversal of long-standing political assumptions.”<sup>28</sup> In relation to the political constitution, Bell notes that,

...the distinction between revision and rupture might be less clear, as what constitutes extension and development of political understandings will always be a matter of political debate that involves returning to re-investigate and re-argue the compromises of the polity’s foundation.<sup>29</sup>

In 2010, during the Rajapaksa regime’s hubristic turn to chauvinist authoritarianism in the euphoric aftermath of the war, I used the analytical vector of the relationship between the legal and political constitutions in trying to make sense of the emerging constitutional praxis (albeit slightly differently to the way Bell has subsequently developed the idea).<sup>30</sup> On that occasion I noted that, “The legal constitution is the document found in the statute book...Sri Lankan constitutions since 1931 have all been formally democratic, containing many if not all of the basic attributes and institutions usually associated with modern democratic constitutions.” I then noted that,

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<sup>24</sup> Tamil National Alliance, Parliamentary Election Manifesto, 26<sup>th</sup> July 2015, available at: <https://www.colombotelegraph.com/index.php/tna-manifesto-full-text/>

<sup>25</sup> H. Lerner (2011) *Making Constitutions in Deeply Divided Societies* (Cambridge: CUP): pp.26-29.

<sup>26</sup> Bell (2014): p.450.

<sup>27</sup> Ibid: p.453.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> A. Welikala, ‘Two Concepts of the Constitution: An Essay in Memory of Chanaka Amaratunga’, *Groundviews*, 19<sup>th</sup> April 2010, available at:

<http://groundviews.org/2010/04/19/two-concepts-of-the-constitution-an-essay-in-memory-of-chanaka-amaratunga/>

...it is now possible, from the empirical building blocks of our democracy experience since 1931, to identify a [discrete concept of a political constitution] that is generally consistent, habitually obeyed, and popularly subscribed...[which]...does *not* regard the legal constitution as its sole normative foundation, and in case of inconsistency, the political constitution *supersedes* the legal constitution.

I argued that,

...the preponderant content of the political constitution comes from the *ideology* of Sinhala-Buddhist nationalism. As an ideology, it contains historiographical, social, political, cultural, ethical and ethnographical theses about statehood. The political constitution is committed to procedural democracy of the consciously majoritarian type, and this gives it, at least among its supporters who constitute the permanent ethno-religious majority, a tremendous political legitimacy...<sup>31</sup>

I went on to observe that, what gives the political constitution,

...its specifically *constitutional* character is that it enunciates the foundational values of statehood, it articulates the historically contextualised aspirations for the future of the state, it provides the political morality governing the behaviour of officials, it indicates the real loci of political power, it sets out the rules of patronage allocation, it determines the real rules of constitutional change, and it is both obeyed and subscribed to by officials as well as the [majority within the] political community...

This was, of course, a description of the political constitution at one of its more coruscatingly waxing moments, corresponding to a waning of the legal constitution, in ways that threatened the precarious modernity of the Sri Lankan state. The consequence of state-capture by a family cabal was that it overturned the central achievement of constitutional modernity: the governmental authority of the state was no longer the product of an objective order aimed at the public good but the instrument and potentially the property of the ruling clique. The deployment of ethno-religious nationalism as the legitimating discourse of this otherwise illegitimate enterprise was as much if not more corrosive of what

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<sup>31</sup> I have elsewhere theorised these insights more elaborately by characterising the Sri Lankan state as an 'ethnocracy': A. Welikala, '*Constitutional Form and Reform in Sri Lanka: Towards a Plurinational Understanding*' in M. Tushnet & M. Khosla (Eds.) (2015) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge: CUP): Ch.11; A. Welikala, '*Southphalia or Southfailure? National Pluralism and the State in South Asia*' in S. Tierney (Ed.) (2015) *Nationalism and Globalisation* (Oxford: Hart): Ch.6. See also J. Uyangoda, '*Travails of State Reform in the Context of Protracted Civil War in Sri Lanka*' in K. Stokke & J. Uyangoda (Eds.) (2011) *Liberal Peace in Question: Politics of State and Market Reform in Sri Lanka* (London: Anthem Press): Ch.2, esp. pp.52-58; O. Yiftachel (2006) *Ethnocracy: Law and Identity Politics in Israel/Palestine* (Philadelphia, PA: Univ. of Pennsylvania Press).

qualities of modernity we had in our governing arrangements by making the majority nationalism “the basic structuring force of collective organization.”<sup>32</sup>

This is not to argue that modernisation, and especially when that complex process is equated to westernisation, is an unqualified good or the superior strategy of state-building. As with scholars in the broader social sciences who have defended a dialectical relation between tradition and modernity in South Asian post-colonial societies, my point is that, in the Sri Lankan socio-historical context, it is both better and prudent to have a constantly renegotiated equilibrium between the modern legal constitution and the traditional political constitution than to have one triumphing over the other.<sup>33</sup> In that spirit, 2015 can then be seen as a moment at which the republican values of the legal constitution reasserted themselves, while the ethnocratic political constitution receded.<sup>34</sup> The lunar metaphor underscores the nature of the relationship between the legal and political constitutions: in tangent with each other, they each have waxing and waning periods, but one’s cycle of dominance never extinguishes the other. But we need a more precise explanation of the state of the relationship between the legal and political constitutions after the 2015 presidential election to be able to account for the nature of the current reforms process. As Bell observes,

...a constitutional transition as opposed to a constitutional revision can be effected by a rupture at either level, although sometimes of course the rupture occurs at both. So, processes of revolution rupture both the existing legal constitution and the political constitution...by jettisoning both the political order and the document.<sup>35</sup>

The presidential election did not denote a revolution or the start of a deep transition in Sri Lanka because neither the legal nor the political constitution was jettisoned. The legal constitution was only amended, and that too without touching any entrenched provision requiring a referendum approval, and therefore its basic structure remains intact.<sup>36</sup> The political constitution may be momentarily diminished, but the avoidance of devolution and power-sharing reforms in the presidential election campaign clearly suggests that its latent

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<sup>32</sup> M. Loughlin (2010) *Foundations of Public Law* (Oxford: OUP): p.8.

<sup>33</sup> See e.g., S. Amunugama, ‘*Ideology and Class Interest in One of Piyadasa Sirisena’s Novels: The New Image of the ‘Sinhala Buddhist’ Nationalist*’ in M. Roberts (Ed.) (1997) *Sri Lanka: Collective Identities Revisited* (Colombo: Marga Institute): Ch.11 at p.342; L.I. Rudolph & S.H. Rudolph (1984) *The Modernity of Tradition: Political Development in India* (Chicago: Chicago UP); M. Roberts (2004) *Sinhala Consciousness in the Kandyan Period, 1590s to 1815* (Colombo: Vijitha Yapa); R. de Silva Wijeyeratne (2014) *Nation, Constitutionalism and Buddhism in Sri Lanka* (London: Routledge). Cf. E. Hobsbawm & T. Ranger (Eds.) (2012) *The Invention of Tradition* (Cambridge: CUP).

<sup>34</sup> See A. Welikala, ‘Yahapalanaya as Republicanism’ in Welikala (2016): Ch.4, available at: <http://constitutionalreforms.org/2016/05/10/chapter-4-yahapalanaya-as-republicanism/>

<sup>35</sup> Bell (2014): p.453.

<sup>36</sup> Cf. A. Galyan, ‘*The Nineteenth Amendment in Comparative Context: Classifying the New Regime Type*’ in Welikala (2016): Ch.12, available at: <http://constitutionalreforms.org/2016/05/10/chapter-12-the-nineteenth-amendment-in-comparative-context-classifying-the-new-regime-type/>

potency was acknowledged. To these extents the process so far has been categorically one of revision and not rupture.

In contrast, normal processes of amendment and development may change the constitution and its relationship to political values over time, but they do so within a narrative of continuity – continuity of the formal legal constitution with its symbolic narrative of legitimacy; and continuity of the political constitution and the values it encapsulates.<sup>37</sup>

Even after the parliamentary election, when a commitment to enact a new constitution was made and was endorsed by the electorate, a narrative of continuity has governed the process. This is evidenced in two ways: first in the commitment to follow the procedure set out in the current constitution for its repeal and replacement and second in the commitment to retain two of the key aspects of the ethnocratic political constitution.<sup>38</sup> The retention of the unitary state has been made explicit; it is implicit that the Buddhism clause would also remain untouched.<sup>39</sup> To the extent Articles 2 and 9 of the legal constitution might be reformulated,<sup>40</sup> it is unlikely that their essence in the terms understood by the political constitution would change too much, if at all. In both these ways, therefore, we are not contemplating rupture but revision, with any notion of rupture denoted by the promulgation of a new constitution closely circumscribed by both procedural consistency with the old legal constitution and, by-and-large, substantive fidelity to the continuing political constitution. The sub-state challenge of Tamil nationalism to this conception of the Sri Lankan state would only be partially met by modest improvements to devolution; it would be astonishing if the new constitution introduced federalism or remerged the Northern and Eastern Provinces.

Thus, even a wholly new constitution would only make *incremental* changes, its legitimacy dependent on majoritarian validation at a referendum by virtue of its continuing anchor in the political constitution. Consequently, the Tamil nationalist challenge to this conception of the Sri Lankan state would inevitably continue, with the upshot of the current process being not a ‘final’ settlement of the question of the Sri Lankan state but, at best, a gradualist improvement to existing

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<sup>37</sup> Bell (2014): p.453.

<sup>38</sup> That is, Articles 2 and 9 of the 1978 Constitution. Article 2 states that ‘The Republic of Sri Lanka is a Unitary State.’ Article 9 provides that ‘The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, which assuring to all other religions the rights granted by Article 10 and 14(1)(e).’

<sup>39</sup> See B. Schonthal & A. Welikala, ‘*Buddhism and the Regulation of Religion in the New Constitution: Past Debates, Present Challenges, and Future Options*’, CPA Working Papers on Constitutional Reform, No.3, July 2016, available at:

<http://constitutionalreforms.org/wp-content/uploads/2016/06/Buddhism-and-the-regulation-of-religion-in-the-new-constitution-Working-Paper-3.pdf>

<sup>40</sup> For e.g., by confining the substantive reach of the unitary state to a notion of territorial integrity only and thereby limiting its centralising potential, or by limiting the justiciability of the Buddhism clause so as to better balance the protections afforded to minority religions.

conditions through governance and fundamental rights reforms. This leaves us with what Neil Walker has recently theorised as a ‘state of constitutional unsettlement’.<sup>41</sup> This is not necessarily a negative situation, as Walker contends:

A constitutional unsettlement may not sound like something we should be particularly sanguine about...there is indeed much to be concerned with in our state of constitutional unsettlement. Nevertheless, the very idea of a condition of constitutional unsettlement need not be considered in principle and inevitably pathological. Rather, as a state of affairs that is in the process of becoming more and more embedded in contemporary public life and less and less capable of wholesale or even measured undoing or transformation, then, short of fatalistic acceptance, we may have no option but to look for the positives. And, having done so, we may find more positives than we might have anticipated.<sup>42</sup>

If the sociological reality of constitutional unsettlement is what we have to live with in the foreseeable future, then we need a descriptive theory to account for future constitutional development and a normative theory to persuade us of its benefits. Relying substantially on Hanna Lerner’s work, it is my submission that the idea of constitutional incrementalism can provide such a positive theory of constitutional change in and for the Sri Lankan context.<sup>43</sup>

### **3. The Positive Case for Incremental Constitutional Development**

The preceding analysis yields two key insights that I have flagged before. Firstly, despite many flaws and inadequacies, the legal constitution’s institutional, or rather *procedural* role – the framework of rules governing the conduct of democratic politics – is generally accepted among political players who would otherwise agree on very little.<sup>44</sup> Secondly, and contrariwise, there is little or no consensus on the *foundational* aspect of the state, i.e., the legal constitution reflects no negotiated consensus on the plural social foundations of the state, which therefore remains contested and unstable, while on the other hand, the political constitution embeds a majoritarian conception of both the Sri Lankan nation and state, further exacerbating contestation and instability.<sup>45</sup> The current Sinhala-Tamil polarisation around the unitary-federal axis, which in turn corresponds to mono-national and multi-national visions of the Sri Lankan state, is only the latest rehearsal of these debates, which have raged without resolution since at least the 1920s.<sup>46</sup> This state of relative consensus on procedural democracy but fundamental dissensus on the state’s foundations makes Sri Lanka a ‘deeply divided society’,<sup>47</sup> which is also what makes it so imminently suitable for the incrementalist approach to constitutional development.

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<sup>41</sup> N. Walker, ‘Our Constitutional Unsettlement’ (2014) *Public Law*: p.529 at pp.542-546

<sup>42</sup> Ibid: p.529.

<sup>43</sup> Lerner (2011).

<sup>44</sup> Ibid: pp.17-18.

<sup>45</sup> Ibid: pp.18-19.

<sup>46</sup> See Welikala (2016), fn.7 *supra*, and Edrisinha et al (2008).

<sup>47</sup> Lerner (2011): pp.30-33.

If the resolution of these deep divisions over the nature of the state were simply a matter of constitutional technicians devising an appropriate institutional arrangement, then Sri Lanka's requirements are unexceptional compared to more intractable conflicts elsewhere.<sup>48</sup> But it is the very incommensurability of the competing visions of the state informed by politicised ethno-cultural differences<sup>49</sup> that makes the problem immune to constitutional engineering, or more precisely, to a final and conclusive constitutional settlement. The failure of the peace process of 2001-06 thoroughly demonstrates this, even though that was the closest in the republican era that we got to a peace settlement-based pacted transition that would have effected a constitutional rupture with the past.<sup>50</sup> Instead, the political constitution prevailed.<sup>51</sup> What this – and the countless failed attempts at settling this question 'once-and-for-all' since the early twentieth century<sup>52</sup> – suggests to me is that we need a different mode of thinking about our constitutional development; by "reconceptualizing the moment of constitution-making."<sup>53</sup> The nature of our political culture, in the sense of the way the particular demographic configuration of our plural society determines the character and outcomes of electoral competition, does not seem to permit a decisive moment of constitutional transition from an ethno-culturally monistic vision of the state to a more pluralistic paradigm that has the capacity to unite the polity around a shared vision of the state while recognising its plural social foundations (And of course, neither has any attempt to overthrow the state through armed secession or revolution worked). At the same time, however, we have an enormous advantage over other comparable divided societies in having a procedural set of rules for democratic choice and change – including constitutional choices – that is on the whole accepted across social cleavages. These two contrasting features of the Sri Lankan state make for the perfect conditions for adopting the incrementalist approach to constitutional change, by providing a 'process solution' to seemingly intractable substantive problems (i.e., 'intractable' only insofar as their resolution is attempted in a conclusive attempt at constitution-making at any single point of time and space).<sup>54</sup> As Lerner argues, the incrementalist approach overcomes the

<sup>48</sup> A. Welikala, '*Sri Lanka's Failed Peace Process and the Continuing Challenge of Ethno-Territorial Cleavages*' in G. Anderson & S. Choudhry (Eds.) (forthcoming 2016) *Dealing with Territorial Cleavages in Transitions to Constitutional Democracy* (Oxford: OUP). See also J. McGarry, B. O'Leary & R. Simeon, '*Integration or Accommodation? The Enduring Debate in Conflict Regulation*' in S. Choudhry (Ed.) (2008) *Constitutional Design in Divided Societies: Integration or Accommodation?* (Oxford: OUP): Ch.2 at pp.85-7.

<sup>49</sup> S.J. Tambiah (1991) *Sri Lanka: Ethnic Fratricide and the Dismantling of Democracy* (Chicago: Univ. of Chicago Press): pp.93-102, 102-13.

<sup>50</sup> P. Saravanamuttu, '*Democratization of the Peace Process: Sri Lanka*' in J. Large & T.D. Sisk (Eds.) (2006) *Democracy, Conflict and Human Security: Pursuing Peace in the 21<sup>st</sup> Century* (Stockholm: International IDEA): p.207; J. Goodhand, J. Spencer & B. Korf (Eds.) (2011) *Conflict and Peacebuilding in Sri Lanka: Caught in the Peace Trap?* (London: Routledge); Stokke & Uyangoda (2011).

<sup>51</sup> N. Wickramasinghe, '*Producing the Present: History as Heritage in Post-War Patriotic Sri Lanka*' (2012) Research Paper No.2, July 2012 (Colombo: ICES).

<sup>52</sup> See Edrisinha et al (2008).

<sup>53</sup> Lerner (2011): p.39.

<sup>54</sup> N. Haysom, '*Nation-Building and Constitution-Making in Divided Societies*' in Welikala (2012): Ch.22, available at: <http://republicat40.org/wp->

incommensurability of competing visions of the state in divided societies by reconceptualising the *mode* of constitution-making:

Instead of perceiving it as a moment of revolutionary transformation, elements of gradualism may be introduced into the constitution-making process. Instead of viewing the moment of enacting a constitution as one that has a profound effect on the identity of the nation, it may be seen as one stage in a long-term evolutionary process of collective redefinition. Instead of perceiving it in terms of formal codification of clear and unequivocal decisions, it may be viewed as an opportunity for formulating ambiguous and opaque provisions, which in fact embody a decision to defer controversial choices on foundational issues to the future.<sup>55</sup>

Seen this way, incrementalist strategies like postponing solutions or avoiding clear-cut decisions on difficult questions, reflecting seeming contradictions in the constitutional text, using creative ambiguities in legal language, etc., are not the product of indolence and carelessness, but conscious choices informed by and directed at a mode of constitutional practice that is certainly more viable, and more likely to achieve peace and order in divided societies over the long-term.<sup>56</sup> In theorising the incrementalist approach – as a model not of ‘accident and force’ but of ‘reflection and choice’<sup>57</sup> – Lerner distils a set of four key principles that embody the approach and distinguishes it from revolutionary or other wholesale and conclusive models of constitution-making. These are: non-majoritarianism; a non-revolutionary approach; representation of ideological disagreements; and transferring the problems from the constitutional to the political sphere.<sup>58</sup> Let us now consider what these principles are and how they relate to the Sri Lankan context, reasoning dialogically with Lerner’s scheme while reframing the premises that have informed Sri Lankan constitutional reformism so far and contextualising the application of the principles to the Sri Lankan experience.

While political decision-making by majority vote is central to the democratic idea, the uncritical application of the principle leads to the exclusion of minorities from the political process and even to discrimination against them in heterogeneous societies.<sup>59</sup> Majoritarianism is even less useful in constitution-making in such societies where there are deep and fundamental disagreements over the nature of the state, as exemplified in the Tamil desire for federalism and the Sinhala commitment to the unitary state. A unified majority may decide that excluding minorities from constitutional decisions, or rejecting the accommodation of their aspirations, is politically possible at a given moment, as when the Constituent

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<content/uploads/2013/01/Nation-Building-and-Constitution-Making-in-Divided-Societies.pdf>

<sup>55</sup> Lerner (2011): p.39.

<sup>56</sup> See also Walker (2014); M. Foley (1989) *The Silence of Constitutions: Gaps, “Abeyances” and Political Temperament in the Maintenance of Government* (London: Routledge): pp.9-10.

<sup>57</sup> See Alexander Hamilton’s observation cited at fn.3, *supra*.

<sup>58</sup> Lerner (2011): pp.40-46.

<sup>59</sup> A. Lijphart (1999) *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven, CT: Yale UP).

Assembly gave short shrift to the Federal Party's proposals in 1970-72 in the making of the first republican constitution. But this came at an enormous long-term price in terms of conflict, instability, and the de-legitimation of the state's constitutional order.<sup>60</sup>

The majority-rule principle therefore has to be reformulated in a more nuanced way in plural societies, so that the prevailing majority on especially constitutional decisions about the nature of the state is constructed on the broadest possible consensus and by crosscutting appeal to plural ethnic communities. Maithripala Sirisena's winning majority in the 2015 presidential election was constructed in exactly this inclusive way, contrasting starkly with his predecessor's strategy of unifying the majority Sinhalese against the minorities. Yet at the same time, as noted, Sirisena's avoidance of the power-sharing question connotes the absence of substantive consensus within his coalition about the nature of the Sri Lankan state in terms of its social foundations. For the incrementalist, "to the extent that a broad consensus does not exist at the time of drafting the constitution, then this is an argument in favour of postponing decisions until such time as the relevant issues can be reformulated in a manner that is widely acceptable."<sup>61</sup>

Thus, the current constitutional reform process should *not* be understood as one that will produce a final and conclusive settlement to this challenge. Rather, it must be seen as being based on the will of a plural democratic majority represented in the two 2015 elections, that reflects consensus of some constitutional questions (improving the quality of governance, combating corruption, reducing executive unilateralism, strengthening fundamental rights and the judiciary), but deep dissensus on the most fundamental question: that of the substantive nature of the polity and therefore of the constitutional form of the state. The consensual compact might be stretched to improvements to the devolution framework, but this is firmly constrained by the parameters of the unitary state. Any attempt to misread the reform mandate as anything more than this will result in the collapse of the reform consensus, the process, and the government. It is best seen therefore as permitting modest and incremental changes that would enable the polity to revisit the nature of the state at a later time, and to create conditions for the continuation of the constitutional conversation on these issues in the meantime. Tamil nationalists should not characterise this short-term outcome as a defeat and retreat into fatalistic despair, but as the embodiment of S.J.V. Chelvanayakam's policy of 'a little now, more later.'<sup>62</sup>

Perhaps the most distinctive feature of incremental constitutionalism is its eschewal of 'revolutionary' constitutional change. This therefore rejects

<sup>60</sup> R. Sampanthan (interview with L. Ganeshathan), '*The Ilankai Thamil Arasu Katchi (Federal Party) and the Post-Independence Politics of Ethnic Pluralism: Tamil Nationalism Before and After the Republic*' in Welikala (2012): Ch.23, available at: <http://republicat40.org/wp-content/uploads/2013/01/The-Ilankai-Thamil-Arasu-Katchi1.pdf>

<sup>61</sup> Lerner (2011): p.41.

<sup>62</sup> Cited in A.J. Wilson (1994) *S.J.V. Chelvanayakam and the Crisis of Sri Lankan Tamil Nationalism, 1947-1977: A Political Biography* (London: Hurst): p.105.

revolution in the traditional sense, whether violent or legal revolutions, as well as the ruptures of pacted transitions, and instead “rests on the understanding that a consensus on the definition of the state’s identity...cannot be achieved by radical transformation but rather through an evolutionary process of gradual social and political change.”<sup>63</sup> As with Lerner, I am attracted to the conservative worldview of Burkean constitutionalism on the question of change and continuity, although perhaps with a heavier normative subscription to it than is visible in her work.<sup>64</sup> Consider this passage from Edmund Burke’s classic *Reflections on the Revolution in France* (1790) as a demonstration of this worldview:

...one of the first and most leading principles on which the commonwealth and its laws are consecrated, is lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it among their rights to cut off the entail, or commit waste upon the inheritance, by destroying at their pleasure the whole original fabric of society; hazarding to leave to those who come after them a ruin instead of a habitation – and teaching these successors as little to respect their contrivances, as they had themselves respected the institutions of their forefathers. By this unprincipled facility of changing the state as often, and as much, and in many ways, as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.<sup>65</sup>

The past is something to which we should pay constant regard, influencing our present view of society, and our obligation to pass on this knowledge to future generations. We should desist from the arrogance of presentist rationalism, thinking that we should always know better than our forebears and our successors. By highlighting the deep connections on the chain of continuity between the past, the present, and the future, Burke exhorts us to abjure a narrow and ephemeral view of the constitution of society from the sole perspective of the present, but to see it as a ‘partnership’ across the ages:

It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.<sup>66</sup>

Clearly, an approach to constitution and state informed by these historicist and organic perspectives necessarily privileges incremental evolution over revolutionary change. But it is important to dispel the myth that such an approach equates to an inflexible and obstinate adherence to conserve everything about the

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<sup>63</sup> Lerner (2011): p.42.

<sup>64</sup> Ibid: pp.42-43.

<sup>65</sup> E. Burke (1968) *Reflections on the Revolution in France* (London: Harmondsworth): pp.192-3.

<sup>66</sup> Ibid: pp.194-5.

inherited order at the expense of change. In fact, it means the very opposite in embracing change and adapting to evolving societal exigencies, albeit in a deliberative, proportionate, and incremental way. Indeed, the Burkean opposition to revolutionary change stems from the fear of the potential of revolutions to destroy the well-constituted constitutional order's capacity for gradual self-correction. As Burke famously observed, "A state without the means of some change is without the means of its conservation."<sup>67</sup>

There are of course cases such as South Africa where transformative constitutions have been made and adopted in transitioning from one order to the next, and perhaps in such cases, having to address egregious barbarities such as apartheid, incrementalism is wholly inappropriate as a philosophy of change.<sup>68</sup> Inspired by such examples, and perhaps by the constitutional revolution through which Sri Lanka became a republic,<sup>69</sup> there is a left-liberal consensus in Sri Lankan constitutional politics too that what is needed is such a decisive constitutional moment by which the country can make a clean break with the past. The recent history of left-liberal activism for constitutional reform abounds with the premise that the illiberal and anti-pluralist political constitution can and should be irreversibly reshaped or even destroyed by a radically reforming legal constitution.<sup>70</sup> But as the complete failures of the Kumaratunga (1994-2000) and Wickremesinghe (2001-2004) governments show, this is clearly not a method of constitutional change that can succeed in Sri Lanka. This lesson seems to be learnt by politicians (hence Wickremesinghe and Kumaratunga in their present avatars are supporting reform, not transformation), but it is a point that needs to be made more explicit in Sri Lankan constitutional discourse.

The Sri Lankan political constitution, heavily enmeshed in the ideology of Sinhala-Buddhist nationalism, sees itself as the continuing expression of an ancient body politic where the life of the state is inseparable from the cultural and political theology of the Sinhala-Buddhists. It is and continues to be deeply, intensely, and effortlessly ingrained even in the minds of children, and liberal and minoritarian

<sup>67</sup> E. Burke (1909-14) *Reflections on the French Revolution* (Cambridge, Mass: The Harvard Classics): para.35. See also J. Norman (2013) *Edmund Burke: Philosopher, Politician, Prophet* (London: William Collins): Ch.5; R. Bourke (2015) *Empire & Revolution: The Political Life of Edmund Burke* (Princeton: Princeton UP): Ch.13.

<sup>68</sup> H. Klug (2010) *The Constitution of South Africa: A Contextual Analysis* (Oxford: Hart): Ch.2. But cf. C. Murray & R. Simeon, 'Recognition without Empowerment: Minorities in a Democratic South Africa' in Choudhry (2008): Ch.14.

<sup>69</sup> A. Welikala, 'The Sri Lankan Republic at Forty: Reflections on the Constitutional Past and Present', *Groundviews*, 25<sup>th</sup> May 2012, available at: <http://groundviews.org/2012/05/25/the-sri-lankan-republic-at-forty-reflections-on-the-constitutional-past-and-present/>

<sup>70</sup> See also for an elaboration of this 'left-liberal consensus', A. Welikala, 'Transitioning from a Presidential to a Parliamentary State: Some Conceptual Questions for Institutional Design' (2016) *LST Review* 27 (339): pp.23-33; A. Welikala, 'The Case Against Constitutionalising Justiciable Socioeconomic Rights in Sri Lanka', CPA Working Papers on Constitutional Reform No.12, January 2017, available at: <http://constitutionalreforms.org/wp-content/uploads/2016/06/Working-Paper-12-1.pdf>

advocates alike inexplicably underestimate this formidable power.<sup>71</sup> However, the Sri Lankan political constitution, particularly as reshaped by the Sinhala-Buddhist nation's encounter with colonial modernity and the absorption of nineteenth century European ideas of nation and state,<sup>72</sup> has also shown itself to be chauvinistic and intolerant, bellicose and insecure, morally corrupt and incapable of reform, in short: a reactionary "majority with a minority complex."<sup>73</sup> This is very far from an intergenerational political constitution that is defensible on Burkean grounds. As Burke himself acknowledged, "To make us love our country, our country ought to be lovely."<sup>74</sup> What this tells us therefore is that there is something valuable about the arguments for social, political, and constitutional justice advanced by left-liberal and minoritarian advocates of legal constitutional reform, which no decent society can fail to reflect. But if the ends are laudable, their means are clearly faulty, primarily because they focus so heavily on the legal constitution as the instrument of progressive change and fail to take account of the political constitution and the means of its reform.<sup>75</sup> Further below, in an argument that will be utterly counterintuitive to legal constitutionalists, I will offer some thoughts on how this flaw can be addressed through the incremental strategy of de-legalising and re-politicising the societal discussion of central constitutional norms like tolerance and pluralism.<sup>76</sup>

Lerner's third principle concerns the incrementalist strategy of representing existing disagreement in the constitution itself. Rather than trying to find consensus or failing which to conceal deep divisions under a façade of constitutional unity, the incrementalist approach chooses to include in the constitution "...all the competing and mutually contradictory positions of the various factions. Instead of providing clear-cut decisions, the constitution embraces the conflicting visions of the state by including vague and even

<sup>71</sup> See Roberts (2004).

<sup>72</sup> Welikala in Tierney (2015); De Silva Wijeyeratne (2014): Ch.4; R. de Silva Wijeyeratne, 'Republican Constitutionalism and Sinhalese Buddhist Nationalism in Sri Lanka: Towards and Ontological Account of the Sri Lankan State' in Welikala (2012): Ch.10, available at: <http://republicat40.org/wp-content/uploads/2013/01/Republican-Constitutionalism-pdf>

<sup>73</sup> K.M. de Silva (1986) *Managing Ethnic Tensions in Multi-Ethnic Societies: Sri Lanka 1880-1985* (Lanham, MD: Univ. Press of America): p.368.

<sup>74</sup> Burke (1968): p.172.

<sup>75</sup> A. Welikala, 'Overcoming the Postwar Malaise: Why Sri Lanka Needs a Reform Ministry and What It Should Do', *Groundviews*, 27<sup>th</sup> May 2014, available at: <http://groundviews.org/2014/05/27/overcoming-the-post-war-malaise-why-sri-lanka-needs-a-reform-ministry-and-what-it-should-do/>

<sup>76</sup> The heavy reliance on Burke in the preceding discussion could make it less persuasive to those who oppose conservative thought to accept my argument for incrementalism. I cannot for reasons of space canvass this point much further, but when confronted with the political challenges of a divided society that require adequate constitutional responses, I would suggest that the failure of the left-liberal 'revolutionary' method so far means that we have, at least, to think afresh about the means of successful constitutional change, not doggedly pursue a failed strategy on grounds of ideological purity.

contradictory provisions.”<sup>77</sup> This overturns the maxim famously articulated by Sir Ivor Jennings that “The people cannot decide until someone decides who are the people”<sup>78</sup> although in the constitution he drafted for Ceylon in 1944-46, he chose to evade this question and prefer the option of constitutional silence on the definition of both the Ceylonese people and the Ceylonese state as a strategy of discouraging communalism.<sup>79</sup>

This latter is the likelier route for constitution-making in Sri Lanka in 2016, rather than Lerner’s third principle. The reason is that the open reflection of difference is not an option in a context in which the political constitution demands that the legal constitution reflects the minimum core of an express mention of the unitary state and the Buddhism clause. Perhaps some oblique preambular language with reference to the conflicts of the past and a statement of Sri Lanka’s multi-ethnic nature may be the most that the legal constitution would be able to accommodate. This makes it even more important that the legal constitution facilitates the continuation of the constitutional conversation towards the recognition of pluralism in the future. This is to be done by creating the space for an internal deliberation on the content of the political constitution, to rediscover certain submerged historical traditions, and to invite its reform incrementally, which could then be consolidated in stages through the legal constitution.

It is in this sense that Lerner’s fourth principle imparts the most important lesson of incremental constitutionalism for Sri Lanka, which is to transfer the arena of debate over deep disagreements over the vision of the state from the constitutional to the political realm.

Recognizing that decisions with respect to sensitive societal issues require long-term public and political debate, the incrementalist strategy channels the debate over these issues to the arena of ordinary parliamentary politics. Contentious foundational issues are thus transferred from the constitutional sphere of “high lawmaking” to the political sphere of “ordinary law-making”...<sup>80</sup>

As Lerner further argues, there are a number of advantages to this. It allows for greater flexibility and time over which to debate and accommodate conflicting viewpoints, it does not require special legislative majorities for compromises to be given effect, and it affords “...more room for innovative and nuanced solutions to intricate and complex ideational tensions.”<sup>81</sup> I have recently argued elsewhere<sup>82</sup> that this political conception of both the discourse and practice constitutionalism,

<sup>77</sup> Lerner (2011): p.44. For illustrations of this strategy from India, Israel, and Ireland, see Lerner (2011): Chs.3-5.

<sup>78</sup> W.I. Jennings (1956) *The Approach to Self-Government* (Cambridge: CUP): p.56.

<sup>79</sup> A. Welikala, ‘Specialist in Omnipotence? Nationalism, Constitutionalism, and Sir Ivor Jennings’ Engagement with Ceylon’ in H. Kumarasingham (Ed.) (2016) *Constitution-making in Asia: Decolonisation and State-building in the Aftermath of the British Empire* (London: Routledge): Ch.6.

<sup>80</sup> Lerner (2011): p.45.

<sup>81</sup> Ibid.

<sup>82</sup> Welikala (2016); Welikala (2017), fn.70, *supra*.

based on a republican view of public reason, "...encourages the various sides to hear and harken to each other; promoting mutual recognition through the construction of compromises. According to this political conception, the democratic process *is* the constitution. It is both constitutional, offering a due process, and constitutive, able to reform itself."<sup>83</sup> Yet as she also rightly acknowledges, there is a danger to this strategy:

The deferral of controversial choices may allow for the emergence of a material, unwritten, constitutional arrangements, which could in practice become more rigid than a formal one, since they lack a formal mechanism of amendment.<sup>84</sup>

This of course is precisely the problem with Sri Lanka's ethnocratic political constitution, which embeds majoritarian dominance, and entirely predictably, invites sub-state challenges to its legitimacy and authority from minorities who are excluded, disadvantaged, and disrespected by it. Such challenges in turn have, so far, had the effect of further entrenching it rather than encouraging its reform. This is why left-liberals, Tamil nationalists, and other minority perspectives place so much stock in the instrument of legal constitutionalism to check or negate its anti-pluralist tendency, albeit with little success so far.

But the substantive reform of the political constitution cannot be effected by the legal constitution, as we have seen. The proper role of the latter, then, is to establish the democratic procedures and space for 'long-term public and political debate' about the political constitution's content. The main purpose of that long-term debate must be to interrogate the many theses of modern Sinhala-Buddhist nationalism and to resurrect the traditions of pluralism, tolerance, and accommodation that lie dormant within the history and culture of the Sinhalese and Theravada Buddhism. Thus for example, the unitary state is an English concept of positive law that Sinhala-Buddhist nationalists have appropriated and today project as an inviolable tenet of the political constitution.<sup>85</sup> Yet this *argumentum ad antiquitatem* is belied by the South Asian state form that provided the institutional and ideational basis for the ancient Sinhala-Buddhist monarchical state, which was neither unitary nor centralised, but devolutionary, asymmetric, syncretic, and pulsating with ceaseless change.<sup>86</sup> As a pre-modern monarchy, this state form and its political practices might have made hyperbolic claims to the personalised sovereignty of the Sinhala-Buddhist king, but in practice, it allowed in fact for an extraordinary measure of what today will be called territorial autonomy to local rulers including Tamil chieftains and sub-kings that went well beyond the autonomy of Western medieval and early modern societies at a comparable period. Its notion of sovereignty (variously conceptualised as 'ritual

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<sup>83</sup> R. Bellamy (2007) *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: CUP): pp.4-5.

<sup>84</sup> Ibid.

<sup>85</sup> De Silva Wijeyeratne (2014): p.xv.

<sup>86</sup> S.J. Tambiah (1976) *World Conqueror and World Renouncer: A Study of Buddhism and Polity in Thailand against a Historical Background* (Cambridge: CUP): Ch.7. See also S.J. Tambiah (1992) *Buddhism Betrayed? Religion, Politics, and Violence in Sri Lanka* (Chicago: Chicago UP): pp.173-175. Cf. Roberts (2004): Chs.3-5.

sovereignty,'<sup>87</sup> 'tributary overlordship,'<sup>88</sup> and 'virtual sovereignty'<sup>89</sup>), for example, is fundamentally different from the absolutist *potestas* of the sovereign ruler that emerged in early modern Europe (and has subsequently informed doctrines of the Westphalian nation-state and global order).<sup>90</sup>

This tradition of dispersed authority that is inherent – and certainly much more longer standing than the unitary tradition – within the political constitution needs to be revived and re-envisioned for contemporary conditions, so that it can be compatible with the requirements of justice in a modern plural society. That is, admittedly, a long, arduous, and difficult task. But there is no shortcut out of it if we are to take a realist view of the politics of coexistence in this island, and it is better achieved through an incremental approach that permits the suppleness of the ordinary political process to negotiate the necessary compromises and reforms, rather than rarefy them through rigid constitutionalisation.

#### 4. Conclusion

In this paper, I intended to do two things: to offer a coherent analytical understanding of the nature of the constitutional changes we are presently undertaking in Sri Lanka through an explanation of the nature of the political regime change of 2015, and on that basis, to advance a theory of constitutional change that would be better able to account for the prospects and trajectory of constitutional development into the future. I believe that the incremental approach to constitutional change defended here is more consistent with the character of our polity, and perhaps more importantly, offers a means of constitutional change that has a higher likelihood of long-term success than the premises of rupture that have underpinned challenges to the Sri Lankan constitutional order, whether it be revolutionary socialism, sub-state secessionist nationalism, or the French and American revolutionary antecedents that serve as the inspiration for various strains of political liberalism. The argument was based on analytical realism about the nature of the post-war polity, which may jar some reformist sensibilities, but I hope that I have given a normatively persuasive account that might help to allay some of those concerns. Given the history of failed reform efforts, hoping for a rupture with the past so as to instantiate a liberal democratic constitution seems to me like an exercise in 'waiting for Godot'.<sup>91</sup> Embracing incrementalism, with all its imperfections and messy compromises, may make the difference between a happier future in which the Sri Lankan state and its constitutional order become gradually more congruent with its plural societal foundations, and a perennial dystopia in which all our more progressive constitutional aspirations are left lying wingless in the gutter.

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<sup>87</sup> C.R. De Silva, 'Sri Lanka in the Early 16<sup>th</sup> Century: Political Conditions' in K.M. De Silva (Ed.) (1995) *University of Peradeniya History of Sri Lanka*, Vol.II (Colombo: Sridevi): p.11. See also N. Dirks (1987) *The Hollow Crown: An Ethnohistory of an Indian Kingdom* (New York: CUP).

<sup>88</sup> Roberts (2004): pp.59-63, 75-84.

<sup>89</sup> De Silva Wijeyeratne (2014): pp.69-74.

<sup>90</sup> Loughlin (2010): p.184.

<sup>91</sup> S. Beckett ([1956] 1988) *Waiting for Godot* (London: Faber & Faber).