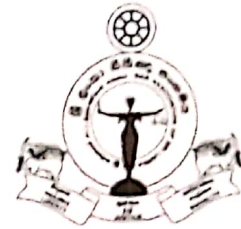


## Current Developments

# A New Constitution for Sri Lanka: A Process, Presage and a Hiatus



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### INTRODUCTION

The relationship between a State and its peoples that are founded on a constitution are much like a relationship between two individuals. The fundamental premises of both lie (no pun intended) in trust, adaptability, adherence to a set of rules that are accepted formally prior to and during the union, transparency, the success and durability of potential conflict resolution mechanisms, and adherence to a set of agreed redress mechanisms. However, the Sri Lankan constitution-making process has been tainted by a long history of broken promises, lost opportunities, and lessons not learnt. Even though the current constitutional reform process commenced with the change of administration in 2015, Sri Lanka has been grappling

with constitutional reform since independence. In 1972, with the introduction of the first republican constitution, Sri Lanka claimed to have shed all its past ties to colonial rule as the Republican Constitution replaced the 1946 Constitutional Order in Council (more commonly known as the Soulbury Constitution) which was a colonial legacy. However, this Constitution was replaced by the second Republican Constitution in 1978, which was then followed by many amendments in quick succession alongside proposals for repealing and replacing the entire constitution. Sri Lanka has had a process of constitutional proposals from mid-1990s to 2000, and within a span of forty years, the current Constitution has been amended nineteen times. Thus, the present reform process grapples with former failed

attempts, associated discourses and grievances, and struggles to build constitutional legitimacy on a broken foundation.

It is unlikely that the grievances associated with decades of mistrust would abstain from hindering the contemporary attempts at constitution-making. It is much like a relationship that attempts, at all costs and against all odds, to survive a scandal of infidelity. Like in any broken relationship, the constitutional relationship that Sri Lanka is embarking upon is strained by mistrust, disengagement, blame-shifting, sense of generalized victimization borne by all stakeholders, and a sense of secrecy maintained by the drafters which leave the peoples thoroughly dissatisfied and doubtful of the promised utopia. At the time of the finalisation of the paper, a constitutional crisis has arisen in Sri Lanka concerning the office of the Prime Minister. This crisis and the status quo has brought to light mistrust and infidelity that have plagued Sri Lankan politics and governance which further substantiate the argument presented in the paper that the such mistrust has hindered constitution-making.

The Sri Lankan constitution-making process, at least that which is applicable to amending the present Constitution - the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978, and/ or any attempts to bring forth a new constitution has been affected by three constitutional rites of passage. What I refer to in this paper as the constitutional rite of passage is how all constitution-making attempts post 1978 have had three common features: a process, presage, and a hiatus.

The first step in the constitution-making process begins with the expression of political will to undertake constitutional reform supported by the peoples through an election. This is followed by participation at making representations concerning constitutional development and leads to the drafting of the constitution and repealing and replacing of the existing constitution. During the constitution-making process political stakeholders attempt to secure public consensus towards both the process as well as the end product. Consensus creation is thus considered as a mechanism for validating both the constitution-making process as well as the outcome of this process. The consensus that is generated at this stage is

significant in ascertaining subsequent legitimacy of the constitution or the amendment. This legitimacy is salient since it determines the future acceptability and applicability of the constitution as well as its ability to prevail unaffected for a longer duration despite societal change. The consensus-generating attempts associated with constitutional procedure are more often than not intertwined with election manifestos, election results, and public involvement with the constitution-making process. However, an attempt is made in this paper to evaluate whether consensus generation continues to occur throughout the constitution-making process, and, in the event it does not continue, whether the lack thereof forewarns constitutional failures.

The second important feature that is visible in Sri Lankan attempts at constitutional remodelling is the presage. This is less apparent than the constitution-making process and one must take cognizance of socio-political realities, people's reactions, and be mindful of the insinuations that underlie discourses associated with the constitution-making process. Presage is less apparent as stakeholders directly involved in constitution-making appear to present their dissent through somewhat diplomatic, or nuanced manners thereby deflating the undercurrents that affect constitution-making. Within these nuances is the rationale underpinning dissent. This rationale, though in actuality premised on power dynamics existing between various political parties and the polity, may be covered up within an ideological narrative that is much grandiose than the covert reasons for opposition. For instance, questions of sovereignty, territorial integrity, religion, language, and devolution of power have often been utilised by the two political parties that have alternatively governed Sri Lanka for over seven decades as reasons that justify their inability to support constitutional reform. One who observes the constitutional processes of Sri Lanka cannot but be amazed at how the same debates have obstructed the adoption of liberal democratic constitutional values throughout the post-independent period. What is presented within this paper as the presage associated with the ongoing constitution-making process refers to this tug-of-war, which is infelicitously associated with political agendas as opposed to genuine concerns related to core constitutional values such as the rule of law, constitutionalism, and separation of powers. The constitution-making process presages the lack



of respect for rights, division along ethno-racial, socio-linguistic and cultural lines, and an overbearing tendency to disregard the necessity to arrive at workable consensuses through negotiations. Further, in the present context, though an attempt has been made to generate public consensus through public consultation processes, the pseudo-transparency of the process coupled with the lack of regard to adhere to grassroots constitutional concerns expressed primarily through the Public Representations Committee on Constitutional Reform, and lack of political will to genuinely engage in constitutional reform foreshadow the defeatist outcomes that can be anticipated.

The third aspect is the hiatus, which refers to the constitutional intermission that Sri Lanka has now reached even though constitution-making attempts commenced almost four years ago, in early 2015. It is questionable whether this hiatus has always hovered in the horizon of constitution-making as has been the case with regard to all post-independent constitution-making attempts, or whether this hiatus is a different form of suspension of progress. I refer to the contemporary hiatus as a *different* hiatus as there are stark differences in the former constitution revamping attempts and the one in progress. The former formal attempts at constitution-making of mid to late 90s and the constitution-making attempt of 2000 all of which sought to replace the 1978 Constitution, reached a constitutional stalemate. However, the present process is distinct from the prior attempts in that this process has taken cognizance, at least at a theoretical level, of the significance of the involvement of the common people in constitution-making. This was done through inviting the public to make representations to the Public Representations Committee which then submitted a report based on its findings to the State. However, the impasse lies in the political tug-of-war and disregard for concerns raised by the populace in their representations. These concerns do not necessarily appear to influence the constitutional process that is underway. This, coupled with many other factors, has contributed to a significant delay in introducing the new constitutional proposals. Given the constitutional crisis concerning the appointment of the Prime Minister, it is now questionable whether the constitutional proposals would further be pushed back in the country's agenda for governance.

Irrespective of whether the content of the constitution that is to be introduced is discernible, the three factors mentioned above – process, presage, and hiatus, have undoubtedly tainted the Sri Lankan constitution-making attempts. Firstly, the process has proved to be overly long, complicated, and perhaps infeasible. Secondly, despite all attempts of the drafters to strike a balance, the process has presaged future conflicts which ought to be taken cognizance of in order to set out possible and effective conflict resolution mechanisms in the constitution without which the constitutional mechanisms would either be unusable or be dissatisfactory and inconsistent with accepted constitutional norms. Thirdly, what has passed from 2015 to the present, has been an intermission of sorts in constitution-making. This hiatus will be strewn with disagreements primarily influenced by the inability of the peoples to agree upon the nature of the State, arrangements for devolution of power, secularity, and reconciliation mechanisms. In this light, this paper seeks to assess the contemporary constitution making attempts in three segments: process, presage, and hiatus. Where necessary a historiologically explanatory approach has been adopted to substantiate the arguments presented whereas the constitution-making attempts of the post 2015 change of administration have been assessed hermeneutically.

#### **PROCESS: THE THREE STAGES OF THE REFORM AGENDA**

Constitutional and legal reform gained momentum with the change of administration in Sri Lanka in early 2015. The first chapter of the Election Manifesto of the New Democratic Front's presidential candidate, Mr. Maithreepala Sirisena, proposed a 'Constitutional Amendment Guaranteeing Democracy'.<sup>2</sup> However, its primary focus was on amending the executive presidential system of Sri Lanka.<sup>3</sup> In addition, the Manifesto proposed changes to the electoral system and pledged to introduce a mechanism to supervise good governance.<sup>4</sup> Simultaneously, the former President Mr. Rajapaksa contented in 'Mahinda Chinthana: Path to Success 2015' that the 1978 Constitution is 'distorted due to the various amendments over the years, some of which are not consistent with others' and that action will be taken to introduce a new constitution representative of people's aspirations.<sup>5</sup> The constitutional process imagined in the Manifesto



is similar to the ongoing process in that, the Manifesto refers to a Constitutional Council made up of the entire Parliament, a Citizens' Advisory Council which will together form a draft constitution which is discussed amongst the said parties and then is submitted to the people at a referendum.<sup>6</sup> Subsequently it has been pointed out that the people who have voted for both candidates have indicated their preferences of having the 1978 Constitution reformed and that therefore 97% of the Sri Lankan populace have voted in favour of adopting a new constitution.<sup>7</sup> This amounts to consensus establishing.

Gaining the consensus of the people is an essential requirement in establishing the legitimacy and validity of the constitution. This stance can be substantiated with reference to Hon. Rajavarthiam Sampanthan's statement that the present constitutional reform exercise is the first opportunity where Sri Lankans could frame a constitution 'on the basis of a substantial, bipartisan consensus amongst its different people'.<sup>8</sup> He further contended that '[a] Constitution based upon such a reasonable consensus would give the Constitution, the basic and supreme law of the country, a legitimacy and credibility which the country direly needs'.<sup>9</sup> In this light, it is apparent that the subsequent acceptability and how the peoples relate to the constitution is dependent upon how much of the constitution has gained popular acceptance, and how far have the peoples been involved in the constitution-making process. Throughout the present constitutional reform process, there have been attempts to engage with the people to increase the sense of representative democracy, which is a cornerstone of liberal democratic values as envisaged by classical liberalism.<sup>10</sup> This sense of integrating classical liberal values was not a feature common to former reform attempts. Thus, the reform process should be commended for, at the least, creating a platform and an opportunity to both engage with such principles and assess their utility.

The second formal event affecting the current reform process occurred with the Parliamentary Elections which were held in August 2015. This resulted in the United National Party (UNP) led United National Front for Good Governance (UNFGG) winning 106 seats.<sup>11</sup> However, the UNP manifesto, which consisted of a five-fold proposed mechanism for the development of the country, did not contain any specific reference to constitutional reform.<sup>12</sup>

The closest this Manifesto has come to proposing constitutional reform, albeit inadvertently, was in the form of a statement attributed to the former Prime Minister (PM) Mr. Ranil Wickremesinghe which has been placed in the penultimate page of the manifesto. In this statement, Mr. Wickremesinghe refers to the necessity of establishing a form of consensus-based governance.<sup>13</sup> This statement refers to the 'Lichchavi' dynasty of ancient India which governed part of Indian territory and modern day Nepal, under a system of republic governance premised on negotiations and consensus. A further reference is made to the fact that the Lord Buddha has approved consensus-based governance by identifying it as a system of governance that contributed to the prosperity and sustainability of the *Vajji* – a system of confederacy between neighbouring States of which the *Licchavis* were a prominent ruling clan upholding the founding values of the confederation.<sup>14</sup> Two interesting preliminary observations can be made with respect to this statement. Firstly, it draws on Buddhism perhaps with an intent to appeal to the 'Sinhala – Buddhist' psyche that predominantly influences voting patterns of Sri Lanka. Secondly, it by implication proposes a system of confederacy drawing on consensus politics. This has been used to highlight the contemporary significance of consensus-based politics. What is noteworthy in this statement is its emphasis on Buddhist teachings said to have held consensus-based politics in high regard and attributing the success of *Vajji* governance to confederacy endorsed by the Lord Buddha. This is pertinent to the current constitutional discourse as it deals with three significant themes over which there is no consensus: nature of the State, appropriate system of power-sharing, and the relationship between the State and religion. It is unlikely for a Manifesto which ignores constitutional reform as a thematic topic to merely and superficially stumble upon the three most hotly debated themes of constitutional reform within Sri Lanka in its closing remarks. This statement therefore should be regarded as a prelude to the constitutional reform process that commenced subsequent to 2015 Parliamentary Elections.

Within the constitutional reform process of Sri Lanka three sub processes have been set in motion: the public consultations process, the Constitutional Assembly process, and the constitution adoption process. The first process for public consultations commenced



in January 2016, when the Cabinet of Ministers appointed the Public Representations Committee (PRC) and vested it with the mandate of receiving oral and written communications from the public in all twenty five districts of Sri Lanka on twenty subjects of constitutional significance. The PRC was set up to bring constitutional reform closer to the people thereby altering the traditional constitution-making process that has hitherto been resorted to in Sri Lanka by constitutions being drafted behind closed doors with the involvement of a privileged and select few. The 'bottom-up' sense that this process was expected to create was perhaps perceived as a way of making the 'peoples' consider the constitution as autochthonous in the strict sense of the word and have a sense of ownership over the constitution. The constitutional reform process underway was the first time in Sri Lanka where involvement of the populace with constitution-making was earnestly considered. The report that was produced by the PRC highlights the views of the populace concerning major topics of constitutional discourse and has contributed to viewing the entire reform process through a people's perspective and consensus-based governance. Furthermore, the reform process has been referred to as 'completely a bottom-up, and all inclusive process'.<sup>15</sup>

The second sub process in this reform agenda is the process associated with the Constitutional Assembly. On 9 March 2016, a 'Framework Resolution' concerning the appointment of the Constitutional Assembly (CA) was adopted by the Parliament.<sup>16</sup> This Resolution sought to appoint a Steering Committee for the CA.<sup>17</sup> The Steering Committee was set up at the first sitting of the CA. By virtue of Clause 6, the CA was authorised to determine, at its first sitting, what Sub-Committees should be set up. However, it was noted by the former PM at the first sitting of the CA that the said Sub-Committees should be determined as per the findings of the PRC of which the Report was expected to be submitted prior to 30 April 2016.<sup>18</sup> Sub-Committees were subsequently determined at CA's second sitting held on 5 May 2016,<sup>19</sup> five days *prior* to the actual submission of the PRC Report. Six Sub-Committees: on Fundamental Rights, Judiciary, Law and Order, Public Finance, Public Service, and Centre-Periphery Relations, were set up accordingly. It is then questionable whether the first process of representations, which was anticipated to inform and frame the second process, has practically

been used. This further raises the question why the State would employ consensus building mechanisms that are portrayed as contributing to a bottom-up approach if the finally adopted approaches are top-down approaches which are similar to those adopted in prior constitutional reform attempts of Sri Lanka.

Making preliminary remarks at the first sitting of the CA held on 5 April 2016, the Chairman – Hon. Karu Jayasuriya, noted that transparency should be maintained throughout the process. It was further remarked that the constitutional reform process is consistent with Article 75 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka, which *inter alia*, vests the Parliament with the power to repeal the Constitution as a whole by enacting a new constitution. At the third sitting of the CA when the Reports of the six Sub-Committees were presented, the discourse reverted to transparency and procedural requirements pertaining to the acceptability of a new constitution.<sup>20</sup> The opinions expressed at the sitting highlighted that the approval of a new constitution is contingent upon it being approved by the people at a referendum. Hon. Sampanthan – the Leader of the Opposition – stated:

*We are firmly of the view that there can be a new Constitution for this country only when that Constitution is approved by the people at a Referendum [...] We want the Constitution to be approved by all the People of this country because sovereignty is vested in the people.*<sup>21</sup>

Seeking approval for the constitution from the people at a referendum indicate two things. Firstly it indicates that it is necessary for the State to seek validation for the constitution from the peoples. Secondly, a referendum creates a representative democratic space for the enhancement of liberal democratic values. However, one may contend that there is a danger associated with opening up the proposed constitution for rejection at a referendum as those voting against the adoption of the new constitution may reject it not on valid grounds of it not being consistent with constitutional principles, but based on political agendas. In the Sri Lankan context, opening up the constitution for acceptance or rejection at a referendum would mean that the voters would invariably vote in accordance



with socio-linguistic and ethno-religious lines. Given that ethno-religiously biased nationalistic senses are generally politically manipulated to convince masses of how the new constitution would facilitate separatism, or lead to the undermining of the 'Buddha sasana', it is more probable than not for the constitution to be rejected at a referendum where a predominant number of voters are ethno-religiously Sinhala-Buddhists. Nevertheless viewed from the perspective of rights as well as representative democracy, presenting the constitutional proposals for acceptance or rejection at a referendum would be a laudable effort as the constitution, if unacceptable to a dominant majority, will not be able to cater to the needs of a minority as well. Thus, in this exercise it is essential to strike a balance and prevent the constitution from either being a document enhancing 'the tyranny of the majority' or being a 'counter-majoritarian' document. Success of the constitution is dependent on whether it prevents tyranny while preventing it from acting in contravention of any given community – be it the majority, or the minority.

During the CA debates, one of the key concerns that dominated the discussion was the 'nature of the State'. This phrase has often been utilised to refer to principles associated with the chosen mode of governance of Sri Lanka – or in other words, the unitary – federal debate. In response to the concerns raised by Hon. Dinesh Gunawardena regarding the unitary nature of the State,<sup>22</sup> the former PM noted that there is no intention to divert from the decisions delivered by Chief Justice Sharvananda and Justice Ranasinghe in the 13<sup>th</sup> Amendment determination.<sup>23</sup> The essence of the majority decision of the said determination, *inter alia* upheld that the setting up of Provincial Councils have not violated the unitary nature of the State.<sup>24</sup> According to the determination, the term 'unitary' is used in contradistinction to the term 'federal' and '[t]he essence of a unitary State is that the sovereignty is undivided [and that] the powers of the central government are unrestricted'.<sup>25</sup> With respect to the ongoing constitutional reform process, if adherence is going to be ensured against a determination that was delivered in respect of a specific amendment to the present Constitution, it is questionable as to what one should make of the prominence given to the 'nature of the State' by the PRC. The PRC had determined to receive public representations on twenty selected subjects of

which 'nature of the State' was ranked at the top.<sup>26</sup> In chapter 5 of the PRC Report, the committee has dealt in detail with the nature of the State. Three formulations for the provision on the 'nature of the State' have been proposed by the PRC. Of these formulations, one relates to an 'independent, free, sovereign, republic', the second refers to 'an independent, free, sovereign, unitary State', and the third proposition demands that Article 2 of the present Constitution – 'the Republic of Sri Lanka is a unitary State' is retained without any alteration.<sup>27</sup> Given that only one member of the committee had supported the third proposition, it is problematic to note that the CA process has completely disregarded the public representations process concerning the nature of the State.

Attempting to introduce federalism through a unitarily structured mode of constitutional governance is *ultra vires* the existing Constitution. However, when a new constitution is being introduced, there is the possibility of converting to a non-unitary system of governance in the event that is deemed appropriate. The fact that the PRC considered the varied opinions of the people concerning the nature of the State indicates that the interlude between the delivery of the 13<sup>th</sup> Amendment Determination of 1987 and the contemporary context has altered the peoples' perceptions as regards the suitability of a unitary structure of governance.<sup>28</sup> The PRC report indicates that the peoples<sup>29</sup> as well as the committee members<sup>30</sup> bear starkly divergent views on the nature of the State. These varied opinions ought to be considered in the constitution-making process if peoples' sovereignty is to be implemented. Relying on a three decade old determination which is only representative of the socio-political, ethno-religious, and domestic-regional dynamics of the then society by disregarding the contemporary realities is counterintuitive. A close reading of the debates of the CA reveal that the engagement between members is unstructured, overly simplistic, and is with a heavy reliance on the past. There is insufficient attention to the PRC Report or the contemporary realities that affect reform attempts. On the contrary, narratives pertaining to the past of Sri Lanka appear as common themes of engagement. However, such engagement has led to impassioned debates that have hitherto remained unresolved.



Apart from the question pertaining to the 'nature of the State'; there has been much discussion as to whether Article 9 of the present Constitution – Buddhism being granted the foremost place and the duty of the State to promote and foster the Buddha *sasana* should be retained. This question was given primacy at the PRC process, as well as the CA process. In chapter 4 of the PRC, the committee notes that 'public representations on religion, remain divided over the relationship between the State and religion and more specifically, between the State and Buddhism'.<sup>31</sup> During the CA process, Hon. Susil Premajayantha explained the rationale and the history of Article 9 of the present Constitution noting that it was introduced for purposes of bringing Buddhism back to the status it enjoyed prior to being inversely impacted by the invasions Sri Lanka suffered.<sup>32</sup> He then questions whether anyone has suffered consequences due to the existence of the said provision from 1972 – to the present.<sup>33</sup> While there may not have been instances of the State directly playing a role in unleashing violence against selected religions, it is questionable whether this statement could have been accepted in the light of attacks that occurred, for instance, in *Aluthgama*, and *Kuragala*, and subsequently in *Theldeniya* which have been perpetrated by extremists who have labelled themselves as either by or against Buddhists, or those of the Islamic faith, and to a lesser extent, in respect of the attacks reported against Christians from various parts of the island.<sup>34</sup> What the process should have generated is thus not a historiological discourse, but one that assesses the grievances that past incidents have created thereby impacting the present discourse on how to or how not to incorporate religion related provisions into the proposed constitution. While there have been many references to 'missed opportunities' with regard to the past reformist attempts, the present reform process would invariably be added to the list of missed opportunities if caution is not exercised to abstain from undermining the process within historical evaluations that are not meant to be forward-looking but rather meant to merely delay the process of adopting a new constitution.

While there have been many factors that have led to lengthy discourses in the CA, for purposes of this paper, I have selected the dialogue on fundamental rights as the third most debated issue. At the PRC process, it was established that peoples demand the

strengthening and broadening of the fundamental rights segment of the constitution and demand better implementation of the provisions within the framework of a new constitution.<sup>35</sup> Specifically, the right to life, the necessity to expand the coverage of the provision on right to equality, economic, social, and cultural rights dominated the public discourse as recorded and reported on by the PRC.<sup>36</sup> However, in the CA, there is a serious lack of engagement with the nuances associated with the introduction of new rights, the expansion of existing rights, and the potential of altering or removing some aspects of the existing fundamental rights jurisprudence. This is further aggravated by the disjointed nature of various segments of the reform process. For instance, rights that have gained prominence at the PRC process, have gained almost no space in the discourse at the CA level even though such topics have subsequently resurfaced in the Interim Report of the Steering Committee. For instance, although the right to life has been discussed in detail in the PRC Report and has also been portrayed as a right that will underscore and enhance all other rights,<sup>37</sup> there has been no discussion of it at the CA level. However, the Sub-Committee on Fundamental Rights lists right to life, right to be recognised as a person before the law, and the right to be free from being arbitrarily deprived of his or her life or punished with death under the broad heading of 'inherent rights of the person'.<sup>38</sup> Interim Report of the Steering Committee does not mention right to life, and hence, there is no indication as to whether it will be considered for incorporation into the new constitution as the fundamental premise on which all other rights arise and thrive on. This inconsistency as regards the themes of discussion is representative of the non-aligned, unfocused, and unstructured manner with which the constitutional reform process actually functions.

What I have referred to in this paper as the third sub process of the constitutional reform agenda is the constitution adoption process – or in other words, the final aspect of constitutional reform where the constitution is to be drafted, read, and approved. Subsequent to releasing the Interim Report of the Steering Committee, there has been no significant development in the constitutional reform process. While a 'zero draft' of the new constitution has entered mainstream discourse, attempts made by the author to directly liaise with those involved with the drafting



of the said 'zero draft' to obtain a copy of the same has proved futile. This draft has been referred to as a 'non-paper' which is merely intended to 'facilitate future talks'.<sup>39</sup> Subsequently, there have been references to presenting the draft constitution to the Parliament,<sup>40</sup> yet the entire process has been questioned for the pseudo transparency which has shrouded the adoption process with secrecy. For instance, the zero draft has only been made available solely for 'internal discussion' and has been made 'confidential' thereby preventing the ability of the public to access and assess the draft. In a series of eight newspaper articles, various aspects of the draft constitution have been critiqued.<sup>41</sup> However, no conclusive remarks can be made in that respect as the zero draft has not been available for assessment.

Even though lengthy discussions have occurred at the CA level as well as within the polity of Sri Lanka, there is no clarity as regards the adoption process or what procedure would be followed when a draft constitution – as opposed to a zero draft, is ready for adoption. Moreover, no timeline has been indicated as to when a draft constitution will be presented to the Parliament and, if need be, to the people at a referendum. While the first two sub-processes of the constitution-making process can be said to have made comparably remarkable progress in the light of former constitutional reform attempts, the same cannot be stated with respect to the adoption process.

Within the constitution-making process, the Steering Committee has met seventy three times for deliberations<sup>42</sup> and with respect to the zero draft of the constitution, it has been stated that further discussion is to take place.<sup>43</sup> This may be indicative of three things: firstly, this process has created a genuine space for deliberation; and secondly, the high number of deliberations points to the inability of stakeholders to reach a consensus as regards the content that should be incorporated in the new constitution. Thirdly, it is indicative of the 'legal indeterminacy' undergirding the entire constitutional reform process. While the phrase 'legal indeterminacy' is not employed here with reference to judicial involvement of declaring what the law is, it is utilised to represent the inability of making normative value judgments about what the law should be, in that, it refers to the impossibility of striking a balance between the competing claims, contentious rationales, backward looking narratives,

and forward-looking aspirations. Thus, it is possible to conclude, although the initial sub process pertaining to the PRC was determinate both in terms of mandate and temporality, the subsequent CA process which is to be followed by the adoption process lack determinacy not only in terms of temporality, but also in terms of content, and substance. This indeterminacy has been regarded in the content of this paper as being representative of the presage.

### **PRESAGE: SRI LANKA AS THE 'INCONSEQUENTIAL ISLAND'**

Sir Ivor Jennings wrote in 1946 that:

*'It has been alleged that the laws of cause and effect do not apply to Ceylon; and "Inconsequential Island" is one of her nicknames. Those who learned from press despatches that the Island was torn by dissension over the new constitutional proposals must have thought her well named when the State Council approved them [...]'<sup>44</sup>*

The above statement, though was of the Soulbury Constitutional Proposals of Ceylon – as Sri Lanka was called then, appears relevant to the current Sri Lankan constitutional reform process. Thus, this segment of the paper will assess presage through a deconstruction of the phrase 'Inconsequential Island' through examples drawn from the current reform process.

Although reform has been approached through a structured process segmented into public representations, constitutional assembly process, and the adoption process dealt with in detail above, the disconnection that exists between these processes forewarn of the dangers that may be encapsulated within a new constitution. Especially the two Republican Constitutions of Sri Lanka have been critiqued for not being representative of what the peoples expected from a constitution. As has been evinced in section I of the paper, it is questionable whether the outcome of the reform process would be representative of people's expectations that have been recorded in the PRC Report. Moreover, Sri Lanka appears to be an 'Inconsequential Island' as regards its collective conduct in the contemporary constitution-making which is



reflected in more ways than one. Firstly, though battered by a patchwork of constitutional derision composed of an array of amendments, its people – especially those harbouring racially, nationalistically, politically, or religiously influenced extreme views are incapable of genuinely cooperating in the constitution-making process. This incapacity is multi-fold. One part of it is formed by misguided notions of what a constitutional process ought to be. What is referred to as a misguided notion herein is that the process adopted in Sri Lanka indicates that the stakeholders are more interested in assessing historical developments pertaining to constitutional law as opposed to evaluating the contemporary realities that more closely influence the development of a new constitution. Constitution-drafting should be informed by contextually relevant historical developments. Nevertheless, in circumstances which prevent negotiations from leading to consensus due to historical grievances, fundamental principles and norms of constitutional law should be utilised as determinants as opposed to unascertainable historical narratives. Lack of political will to engage in a meaningful non-partisan constitution-making process is another facet obstructing constitution-making.

The second reason for Sri Lanka to be perceived as the 'Inconsequential Island' is the lack of transparency in the Constitutional Assembly process. There is a façade of transparency portrayed and protected through the first process of public representations through which the larger community has been led to believe that the contemporary attempts emanate through a bottom-up process which is utilised in the final outcome in a transparent manner. The lack of transparency is firstly evidenced by the manner in which a group of individuals was handpicked to be on the 'Panel of Experts' appointed to assist the Steering Committee.<sup>45</sup> Clause 4(a) of the Framework Resolution allows the appointment of experts to aid in the process of constitution drafting.<sup>46</sup> However, the transparency of the selection process could be called into question as no justification has been provided for the selection of said specific persons. While this is not to be construed as an allegation against the members of the 'Panel of Experts' or as an attempt to question their expertise on constitutional law, it is natural for one to recall the legal adage and alter it to read as *not only must the process be transparent; it must also be seen to be transparent*. The names of the 'Panel of Experts' were proposed at the

CA by Hon. Lakshman Kiriella on behalf of the former PM.<sup>47</sup> There is no data available on which it could be discerned whether these appointments were agreed upon by the members of the CA prior to the said names being formally proposed by the former PM or whether this decision lay entirely in his hands. If it is the latter, it is questionable why State power – especially that which is associated with initiating a new constitution – should be solely vested in the hands of one individual. If such amassing of power on one person occurs at the drafting process, it raises concerns as to whether genuine separation of powers, constitutionalism, or rule of law can be anticipated from the end product. Even if the outcome is compatible with accepted constitutional norms, it is still debatable whether 'ends justify the means' as the lack of transparency plaguing the drafting process could lead to the mistrust of the peoples which would thereby affect how the populace views their relationship with the constitution. This in turn inversely impacts the sense of ownership that the peoples should have regarding the constitution. Thus, the justifications and rationales that led to said selections ought to have been more transparently divulged to the peoples of Sri Lanka. Moreover, in a panel that consists of eight individuals, there is only one female expert. This perhaps reveals the underlying patriarchal approaches that prevent more women from being invited to perform in the capacity of decision-makers at the level of governance. The insouciant oversights concerning the fundamentals of constitution-making forewarn the drawbacks that will be associated with the new constitution.

The third factor leading to the reference 'Inconsequential Island' is caused by the lack of transparency pertaining to the adoption process which has commenced with the first draft of the new constitution. It is questionable as to why a discussion document which is expected to influence the final product that will be the next constitution of Sri Lanka should be confidential. This is more problematic in the light of the fact that the current constitution-making process has been portrayed as one in which the peoples are directly involved. However, the lack of political will to have an open process in the final stages of constitution-drafting makes Sri Lanka the 'Inconsequential Island' in which 'cause and effect' have been disregarded. The 'causes' identified to have impacted the validity and acceptability of the former constitutions and the present constitution were lack



of transparency, non-involvement of the peoples, and the incorporation of constitutional provisions that concentrated power in one organ or resulted in the denial of rights to the peoples. Thus, the current process should create the 'effect' of reversing those defects. However, the delays, negotiations that do not progress beyond vicious circles, lack of transparency have created a gap between 'cause and effect'. If the new constitution is to be adopted without rectifying these mistakes, and without further opening up the process to public scrutiny, the same fate that befell the two Republican Constitutions, of which the genuine ownership did not vest with the people, will befall the new constitution.

There are further aspects of the constitutional process which are not subject to cause and effect. In this regard, some interesting dynamics can be noted in respect of the membership of the Steering Committee. Even though the Steering Committee ought to be representative, its membership of twenty one is made up of an unbalanced gender ratio. Its gender (im) balance is twenty males to one female while its ethnic composition is fourteen Sinhalese, five Tamils, and two Muslims. While the Committee appears to be balanced in terms of ethnicity, the same cannot be said as regards its gender composition. Moreover, the six Sub Committees that were thematically set up are all chaired by males despite four of the said Sub Committees having a total of seven females in their membership with at least one female member in the said four Sub Committees.<sup>48</sup> Ironically, the Sub Committee on Law and Order and the Sub Committee on Public Service did not comprise of a single female representative. There is therefore a visible pattern of gender-imbalance prevalent across the Panel of Experts, the Steering Committee, as well as in the Sub-Committees. While one may argue that the reason for the gender imbalance with regard to the Steering Committee and the Sub-Committee arises due to significantly lower numbers of female representatives being elected to the Parliament, there is no justification that can be presented in defending the appointment of only one female representative to the Panel of Experts. Similarly, no defence lies against the non-appointment of a single female chairperson to head, at the least, one Sub Committee. The necessity to involve more women at decision-making levels of governance has been highlighted as a theoretical necessity in the recent past. However, the blatant

disregard for a similar approach within the constitution-making process portrays that – even with the adoption of a new constitution – such attitudes of condescension arising due to latent patriarchy cannot be eliminated. Thus, it is questionable whether the adoption of a new constitution would contribute to the advancement of the rights of women, and whether it would provide a platform upon which more women could be empowered to be actively involved in decision-making levels of national governance. Questions of transparency, lack of connection between the three processes, and the lack of inequality within the process creates an 'Inconsequential Island' out of Sri Lanka even with respect to contemporary constitutional reform attempts.

#### **HIATUS: THE LONG PAUSE AND THE LACK OF POLITICAL WILL**

What is referred to as the hiatus in this paper is the current lull that Sri Lanka is experiencing in constitution-making. In this segment it is argued that this hiatus is created by the lack of genuine political will to expedite the process of constitution-making even though nearly four years have passed since constitutional reform was undertaken under the present administration of Sri Lanka. While four years may appear to be a short time period, Sri Lanka has been grappling with the idea of adopting a new constitution to replace the existing Constitution since mid-1990s. Several constitutional proposals were released during this period in quick succession. It is therefore questionable whether this process was treated with adequate gravity. Moreover, irrespective of the multiplicity of the proposals, they proved to be futile and failed to generate sufficient consensus amongst the stakeholders. When the current constitutional process was adopted, the difference that was highlighted as demarcating this effort from previous reform attempts was the transparency of the process and the space given to ordinary peoples to have their opinions represented. While that is a commendable aspect, the current reform process is not devoid of political antagonisms that have created a pause in constitution-making. Thus, in this segment of the paper, an evaluation of the pauses in the contemporary constitutional reform process are examined alongside an assessment of the political will or lack thereof associated with the introduction of constitutional changes.



The contemporary process has been famed as being distinct from former constitutional reform attempts. This was mainly caused due to the inclusion of the public in the discourse. However, the debates of the CA indicate the lack of political will to reach actual consensus. The debates are often affected by heckling<sup>49</sup> and this was a concern during the constitutional reform attempts of 2000 as well.<sup>50</sup> Fourteen points have been presented by the Joint Opposition as unalterable, and non-negotiable constitutional principles. The fourteen points advocated for are that: (i) the State should be unitary in nature (ii) the territory of Sri Lanka should continue to be what is stipulated in Article 5 of the current Constitution comprising of 25 administrative districts and its territorial waters, (iii) the national flag and anthem should continue to be in accordance with Articles 6 and 7 of the 1978 Constitution, (iv) no changes should be effected to Article 9 of the Constitution on Buddhism, (v) the present presidential system should undergo changes, (vi) no two Provinces should be allowed to be amalgamated, (vii) the PM should be selected by the Parliament,<sup>51</sup> (viii) the Leader of the Opposition should be selected by the Parliamentarians of the Opposition, (ix) the Provincial Council system should not be a threat to the security and unitary nature of the State, (x) the powers listed in the Provincial Council List should be increased, (xi) priority should be given to the local business community, (xii) Sri Lankan lands should not be transferred to foreigners, (xiii) welfare should be continued, and (xiv) the election system should be a mixed system consisting of both 'first past the post' and proportional representation systems.<sup>52</sup> There is no indication that these fourteen points were developed after having consulted either the PRC Report or any other mechanism which records contemporary aspirations of the Sri Lankan populace. It could therefore be argued that these fourteen points have contributed to the hiatus as these contain some of the most contentious issues pertaining to the constitutional process. For instance, the first non-negotiable point presented by the Joint Opposition is on the nature of the State which has caused much debate not only at the grassroots level amongst the peoples, but also at the upper echelons amongst the members of the CA. It has also been noted that the people of the 'South' – the Sinhalese, are apprehensive of the term 'federal', whereas the people of the 'North' – the Tamils, are anxious of the use of the term 'unitary'.<sup>53</sup> It

is therefore clear that the adoption of a non-negotiable stance about a point which has been considered as fundamental to the reform process contributes to the creation of a hiatus. The inflexible manner in which these points have been presented indicates the lack of genuine political will which has prolonged the constitutional process.

As per clause 16 of the Framework Resolution, the Steering Committee was required to submit a Report to the CA amalgamating considerations of the Sub-Committees and the Public.<sup>54</sup> This report was to be accompanied by a draft constitutional proposal. However, as mentioned above, the draft constitutional proposal has not been opened up to the public on the ground that it is still at the status of a 'zero draft' which solely forms a basis for discussion on reforms. It is questionable why there has been a delay in opening up the actual drafting process to the wider public.

Moreover, the CA debates have also been impacted by delays; subsequent to the CA debate held on 10 December 2016, the next CA debate was held on 21 September 2017 after a gap of over nine months. At the CA debate held on 21 September 2017, the Interim Report of the CA was presented.<sup>55</sup> Presenting the Interim Report, the former PM has stated that the 'whole country' should be involved in debating on these proposals.<sup>56</sup> Nonetheless, subsequent to the PRC process, the public has not had the opportunity to engage meaningfully in the constitution-making process and given that the CA, the Sub-Committees and the 'zero draft' cannot conclusively regarded as internalizing the core values that emanated from the PRC Report, it is questionable whether the public involvement had created a major impact on the constitutional reform process. What is referred to as a 'meaningful' engagement is one in which the process is opened up for public scrutiny. Meaningful engagement is however lacking due to the lack of transparency affecting the drafting of the constitution and the lack of mechanisms that could be utilised in order to open up the process to the public.

One commendable aspect of the contemporary reform process is that it has created a space, however minimal, for dialogue. Hon. Hakeem has noted that a space was created through the CA for presenting 'divergent views' and bringing them 'into some acceptable



compromised formulas [...] to reduce the polarized positions [...].<sup>57</sup> But to what extent the extended dialogue has contributed to 'reducing the polarized positions' is yet to be seen. An overall reading of the CA debates indicate that much of the conversation that has occurred is backward looking as opposed to forward looking. Thus, even though the creation of a space for dialogue is commendable, it is apparent that the said space has at times been manipulated and been used as a justification to delay the progress of constitution-making. Moreover, each member of the CA who was given an opportunity to express his / her opinions have commenced their speeches referring to constitutional evolution of Sri Lanka without directly engaging with the core constitutional principles that ought to have been considered in greater detail. Not only has such references contributed to wasting the valuable time that ought to have been spent on debating content, substance, and value of constitutional principles that are to be incorporated into the new constitution, they have also contributed to diverting the attention of the CA from the immediate task of constitution-making to political agendas. Ironically, the controversies that were highlighted in the process have then been used to contend that the current reform process is part of an agenda of those representing non-governmental organizations which makes it a result of a conspiracy.<sup>58</sup>

Each time constitutional reform was attempted with the intent of repealing the current Constitution, the lack of political will to proceed with the proposals to achieve the end result has stalled the progress. Hon. Moulana succinctly presented the ever prevalent hiatus by stating that '[t]he central challenge of constitution-making in our country over the last 50 years has not been the lack of proposals or ideas, but rather the lack of political courage to adopt and then implement these proposal'.<sup>59</sup> Accuracy of the above statement can be substantiated with reference to the failed constitutional proposals of mid-1990s and the failed constitutional proposals of 2000. Hon. Moulana has also stated that this trend has been altered with the adoption of the current constitution reform process. However, given the lack of political consensus and will coupled with the backlash that has arisen against the constitution-making process, it is questionable whether the State would proceed with the adoption of a new constitution despite all the effort that has been taken towards that end as of now. The result that emanates

from these factors is a delay which could further extend if and when the draft constitutional proposals are considered by the Parliament for adoption due to the obvious lack of political consensus that has also been aggravated through the lack of a genuine will to engage in constitutional reform despite attempts taken to present the contemporary process as one that has as its goal the adoption of a utopian constitution capable of radically transforming Sri Lanka's constitutional experience. To further complicate matters, the attention of the Sri Lankan populace has now been drawn to a different type of constitutional issue – one in which an attempt is being made to ascertain the constitutionality of the removal of Hon. Wickremesinghe from the post of PM and the vacancy being filled by the appointment of former President Hon. Rajapaksa.<sup>60</sup> Given the complexity of the status of affairs and the attention of all stakeholders including the populace has now been drawn to the appointment of the new PM, it could be stated that the hiatus can be expected to last longer.

## CONCLUSION

The current constitution-making process of Sri Lanka has commanded approval of the people as the only constitution-making process within which an inclusive approach has been adopted. However, it has only been inclusive on its face as has been substantiated in this paper. It has also been claimed that the introduction of the new constitution would favour the ongoing reconciliation process by laying the foundation for the enhancement of democratic values and that it would enhance equality along with other core constitutional norms. However, closer scrutiny of the reform agenda proves that there are three aspects of the process that require detailed assessment in order to ascertain whether the current process is deserving of the glorification to which it has been subjected. An attempt has therefore been made in this paper to seek responses to the above concerns by evaluating the reform agenda from three aspects: process of constitutional reform, presage – or the forewarning features prevalent in the process, and the hiatus – meaning the temporal gap that exists between the commencement of the reform process and the end of the process.

This paper has advanced its first core argument that despite the glorification it has received the contemporary constitution reform process is flawed.



These flaws have been examined with reference to the three aspects of the process – the public representations process, the Constitutional Assembly process, and the adoption process. While the public representations process is commended for the top-down approach to constitution-making that it has showcased, scrutiny of the entire process has indicated that the outcomes of the representations process has had minimalistic impact on the Constitutional Assembly process as well as the adoption process. There is minimal engagement with the concerns expressed by the public and not even the setting up of the Sub-Committees of the Constitutional Assembly has been influenced by the public representations process. The paper has further elucidated that the debates of the Constitutional Assembly reveal the lack of political will to engage meaningfully with the constitution reform attempts. This aspect has also been presented as a part of the third core argument of the paper that the reform process is currently experiencing a state of hiatus partly influenced by the lack of political will to build genuine consensus. The paper has assessed the flaws of the third sub-process – the adoption process, by exposing the pseudo-transparent mechanisms adopted in appointing a Panel of Experts to draft the constitution. It has further been argued that this pseudo transparency is further entrenched by the lack of clarity as regards the content and substance of the 'zero-draft' of the new constitution which has strictly been made confidential and has thus been kept from public scrutiny.

The second core argument advanced in the paper is that the current reform process forewarns that the new constitution – if adopted, may contain features that are inconsistent with accepted constitutional norms. In this segment, drawing on Sir Ivor Jennings's metaphor that Sri Lanka is an 'inconsequential island', it has been argued that there is limited or no nexus between cause and effect within the reform process. The lack of transparency plaguing both the Constitutional Assembly process, and the adoption process have been regarded in this segment as signs of forewarning. Furthermore, gender imbalance in the Steering Committee, and the lack of a single female Chairperson on the Sub-Committees have also been identified as factors establishing that the promised equality and enhancement of constitutional bases cannot be expected through a process which is flawed and is unequal.

The third and the final argument sought to be established by this paper is that there is a long drawn out hiatus associated with constitution-making in Sri Lanka which has not only inversely affected the prior attempts at reform, but has also plagued the current process. This hiatus is substantiated not only with reference to the time gap, but also with reference to the lack of genuine political will to effect constitutional changes. At the time of the finalisation of this paper, another constitutional crisis has occurred in Sri Lanka where the removal of Hon. Wickremesinghe from office of PM and the appointment of the former President Hon. Rajapaksa is being subject to impassioned debates. This has effectively captured the attention of constitutional experts, media outlets, and the peoples. Thus, any discourse concerning the possibility of introduction of the new constitution will be overshadowed by dialogues which seek to ascertain whether President Sirisena is constitutionally authorised to remove the PM from office in accordance with Article 42(4) of the Constitution and whether the 'opinion' of the President referred to therein is subjective or objective. This argument will be assessed in the light of Article 46(2) which specifies the mechanisms with which the office of the PM becomes vacant – none of which have occurred in the current context. Thus, there is a possibility of reading Article 33(2)(f) of the Constitution with Article 42(4) which grant constitutional authority to the President to appoint a PM who in his opinion is most likely to command the confidence of the Parliament. Furthermore, there is also the controversy pertaining to Article 48(1) and whether the outcome is affected by the differences in the Sinhala and English texts of the provision.

The constitutional question now would not be concerning the scope and content of the proposed constitution, but the constitutionality of the unfolding events, and whether specific provisions are to be read as superior to other provisions of the Constitution thereby validating or invalidating the Prime Ministerial appointment made by President Sirisena. The status quo therefore further substantiates the arguments presented in the paper concerning the lack of genuine political will to uphold core principles undergirding the constitution and constitutional democracy which in turn divert attention from the reform process extending the existing hiatus.



## (Endnotes)

- \* I wish to place on record my thanks and gratitude to my friend and colleague - Ms. Achale Kurumage who always takes the time to read and comment on the drafts of my papers. I am also grateful to the editorial team of the Bar Association Law Journal for planting the idea of this paper in my mind. Special thanks are due to my students at the Faculty of Law who make me evaluate and assess laws in a different light every single day.
- 2 New Democratic Front, *A Compassionate Maithi Governance: A Stable Country* <<https://www.mfa.gov.lk/images/stories/pdf/manifesto-english.pdf>> accessed 18 August 2018, p 13.
  - 3 *Ibid*.
  - 4 *Ibid* 15.
  - 5 United People's Freedom Alliance, *Mahinda Chinthana: Path to Success (2015)* <<http://groundviews.org/wp-content/uploads/2014/12/mahinda-chinthana-path-to-success-2015.pdf>> accessed 22 August 2018, 17.
  - 6 *Ibid*.
  - 7 CA Deb 30 October 2017, cols 60 - 61.
  - 8 CA Deb 21 September 2017, col 34.
  - 9 *Ibid*.
  - 10 See generally, Robert D. Congleton, *Perfecting Parliament: Constitutional Reform, Liberalism, and the Rise of Western Democracy* (CUP 2011).
  - 11 *Party Composition of the Parliament* (Parliament of Sri Lanka) <<http://www.parliament.lk/members-of-parliament/party-comp>> accessed 16 August 2018.
  - 12 UNP, (Tr.) *Five-fold Mechanism for the Development of a New Country in 60 Months 2015*. The proposed five-fold mechanism consisted of proposals for economic development, elimination of corruption, establishing peace, investments for infrastructure development, and development of education, (N 2) 25.
  - 13 *Ibid*.
  - 14 CA Deb 31 October 2017, col 238.
  - 15 Parliament of Sri Lanka, *Resolution for the Appointment of the Constitutional Assembly* <<https://english.constitutionalassembly.lk/images/pdf/motion-en.pdf>> accessed 05 August 2018.
  - 16 *Ibid* Clause 5(a).
  - 17 CA Deb 5 April 2016, col 4.
  - 18 *Ibid* col 6.
  - 19 CA Deb 19 November 2016, cols 12 - 14.
  - 20 *Ibid* col 16.
  - 21 *Ibid* col 13.
  - 22 *Ibid* col 15.
  - 23 *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill [1987] 2 Sri LR 312*
  - 24 *Ibid* 319.
  - 25 Public Representations Committee on Constitutional Reforms, *Report on Public Representations on Constitutional Report (May 2016)* 211.
  - 26 *Ibid* 24 - 25.
  - 27 *Ibid* 25.
  - 28 *Ibid* 20.
  - 29 *Ibid* 20.
  - 30 Public Representations Committee on Constitutional Reform, *Report on Public Representations on Constitutional Reform* May 2016, 25. One committee member contended that Article 2 of the present Constitution should be retained without alteration while six committee members expressed their agreement to the phrase 'independent, free, sovereign, unitary State'. Ten committee members, comprising of all members representing ethnic minorities, preferred the phrase 'independent, free, sovereign Republic'.
  - 31 *Ibid* 16.
  - 32 CA Deb 01 November 2017, col 398.
  - 33 *Ibid* 398.
  - 34 For a general discourse on attacks against Muslims, and Christians, see generally, Gehan Gunatillake, *The Chronic and the Acute: Post-War Religious Violence in Sri Lanka* (ICES & Equitas 2015). This narrative however, completely fails to refer to or assess any incidents of religious violence that has occurred against the Buddhists. Neither has any reference been made to the competing claims that have been raised concerning the ownership of Kurugala archaeological site, nor has there been any assessment of whether the archaeological site ought to be possessed by any group. Neutrality of the work thus comes into question.
  - 35 Public Representations Committee on Constitutional Reforms, *Report on Public Representations on Constitutional Report (May 2016)* 91.
  - 36 *Ibid* ch 12.
  - 37 *Ibid* 94.
  - 38 *Ibid* 8.
  - 39 Sandun A. Jayasekera, 'New Constitution for Sri Lanka: Ten Experts Working on Initial Draft of Constitution' *Daily Mirror* (Colombo, 25 July 2018).
  - 40 Yohan Perera and Ajith Siriwardana, 'Draft for New Constitution Soon in Parliament', *Daily Mirror*, 07 September 2018.
  - 41 CA Chandraprema, 'New Draft Constitution' (Part I - VIII) *The Island* accessed respectively at: <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=188486](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=188486)>; <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=188786](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=188786)>; <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=189119](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=189119)>; <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=189224](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=189224)>; <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=189318](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=189318)>; <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=189649](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=189649)>; <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=189878](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=189878)>; and <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=190246](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=190246)> accessed 15 September 2018.
  - 42 CA Deb 30 October 2017, col 80.
  - 43 Sandun A. Jayasekera (N 39).



- 44 W Ivor Jennings, 'Ceylon: Inconsequential Island' [1946] *International Affairs* 376, 376.
- 45 CA Deb 05 May 2016, col 8. The panel is comprised of Prof. Suri Ratnapala, Prof. Austin Palle, Prof. AM Navaratne Bandara, Mr. N Selvakumaran, Prof. Camena Gunaratne, Dr. Kapila Perera, Mr. Suren Fernando, and Mr. Niran Anketell.
- 46 Parliament of Sri Lanka, 'Resolution for the Appointment of the Constitutional Assembly' <<https://english.constitutionalassembly.lk/images/pdf/motion-en.pdf>> accessed 05 August 2018.
- 47 CA Deb 05 May 2016, cols 7-8.
- 48 *ibid*.
- 49 See for instance, CA Deb 19 November 2016, col 13, CA Deb 21 September 2017, cols 43 - 46, CA Deb 30 October 2017, cols 53 - 59; CA Deb 31 October 2017, cols 194 - 200; CA Deb 01 November 2017, cols 376 - 382; CA Deb 02 November 2017, cols 543 - 554; CA Deb 08 November 2017, cols 7474 - 748.
- 50 See generally, *The Speech of the President Chandrika Kumarathunga on New Constitutional Bill - 7 August 2000* <<http://tamilnation.co/conflictresolution/tamilelam/cbkproposals/00chandrika.htm>> accessed 25 October 2018.
- 51 *In the light of the events that are unfolding in Sri Lanka as of now, i.e., on the 26<sup>th</sup> of October 2018 concerning the removal of Hon. Ranil Wickremesinghe from the post of Prime Minister and the appointment of Former President - Hon. Mahinda Rajapasha, it remains to be seen whether the Joint Opposition would alter their stance regarding the powers of appointment of the Prime Minister.*
- 52 CA Deb 30 October 2017, cols 101 - 102.
- 53 *The Constitutional Assembly of Sri Lanka, The Interim Report of the Steering Committee (21 September 2017) 1.*
- 54 Parliament of Sri Lanka, 'Resolution for the Appointment of the Constitutional Assembly' <<https://english.constitutionalassembly.lk/images/pdf/motion-en.pdf>> accessed 05 August 2018.
- 55 CA Deb 21 September 2017, col 30.
- 56 *ibid* col 32.
- 57 *ibid* col 40.
- 58 CA Deb 02 November 2017, cols 567 - 569.
- 59 *ibid* col 570.
- 60 'Mahinda Rajapaksa Sworn In as Sri Lanka's New Prime Minister', *Colombo Telegraph*, 26 October 2017 <<https://www.colombotelegraph.com/index.php/video-mahinda-rajapaksa-sworn-in-as-sri-lankas-new-prime-minister/>> accessed 26 October 2017.