A TEST OF LEGITIMACY: THE VALIDITY OF THE PRINCIPLE OF CONSTITUTIONAL AUTOCHTHONY IN CONTEMPORARY CONSTITUTION MAKING WITH SPECIAL REFERENCE TO SRI LANKA

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Introduction

'Autochthony' can be identified as an exception to the generally unpredictable experiment of constitution making which came up with the desire of the dominions following Ireland or newly independent countries to be completely free from the political and legal clutches of the British Empire and create their own constitutions (Delan 1957). Political leaders of these countries with the influence of lawyers who perceived true independence to be the Constitution having homegrown roots promulgated autochthonous constitution making procedures in their countries. However, comparative experience of autochthony reveals mixed results of its success in application within countries; many had to face an added series of socio-economic and political chaos. In this backdrop, this study aims to review the validity of the divided position of the scholars that the idea of autochthony is essential a feature for constitution making in the contemporary context and accordingly to addresses the research question as to whether autochthony would serve modern constitution making processes. Advancing this question, it is argued with reasoning that that time has changed what autochthony means and that the neo-sense of autochthony is imperative as a test of legitimacy in constitution making. Even though autochthony provides an ideal procedure for constitution making for democratic states, it must be stressed that constitution making should not focus on the procedural aspect. On this premise, it is expected to present a comparative analysis with special reference to the constitutional history Sri Lanka on the effect of the process and substance on an autochthonous constitution based on the antithesis between them, this study would reason that both of them in the contemporary context are equally effective.

The Origin and Background of the Idea of Autochthony

"Autonomy is one fundamental principle in the constitutional structure of the Commonwealth. But for some Members of the Commonwealth it is not enough to be able to say that they enjoy a system of government which is in no way subordinate to the government of the United Kingdom. They wish to be able to say that their constitution has force of law, and if necessary, of supreme

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law within their territory through its own native authority and not because it was enacted or authorized by the parliament of the United Kingdom; that it is, so to speak, 'homegrown', sprung from their own soil, and not imported from the United Kingdom." Thus wrote KC Wheare (Wheare 1960, p.89) defining the principle of constitutional autochthony which bore more strength than the idea of autonomy. Clearly and effectively embedded in the Constitution for the Irish Free State of 1922, the principle constitutes four main components *i.e.* authority derived from local people, the principle of autonomy, the principle of self-sufficiency and break from the legal traditions of the past and from the source of legal authority. The Constitution for the Irish Free State was followed by a series of Commonwealth countries such as India, Pakistan, Federation of Malaya and South Africa to claim independence through home-grown Constitutions that owe its validity to no outside source of authority.

Autochthony: a prerequisite? – a divided scholarly opinion

Scholars have argued differently as to whether the principle of autochthony should be applied in contemporary constitution making. Several scholars have admired the concept: Heidegger (Geschiere P 2011, p.321-22) suggesting the term 'Bodenstandikeit' used autochthony to replace the individualistic Anglo-Saxon and French versions of nationalism in Germany with one more communitarian. The Zambian constitution-making process was based on "investing the constitution with the character of autochthony and popular legitimacy" (Anyangwe C 1997, p. 10-11). Dr. NM Perera called it a "great tradition" and Marshall explicated the autochthonous desire using an "off-spring mother" (Jayasuriya DC 1982, p. 25-40). Several jurisdictions (***Madzimbamuto v Lardner –Bruke*** (1968) 2 SALR 284, 307; ***The State v Dosso*** (1958) 2 PSCR 180 at 184-85) have also recognized the ability of adopting a new grundnorm. However, it is interesting to note that almost all countries that embraced autochthony rejected granted constitutions, the reasons for which are worth examined.

Above all, granted constitutions were not contemplated to carry people's wishes, for instance the Soulbury Constitution contained the wishes of the United Kingdom. In Addition, they were foreign work: Sir Ivor Jennings (Jennings WI 1953, p. 1-16; Kumarasingham K 2015; Jennings WI & Goonatileke HAI 2005) drafted the 1947 Constitution of Ceylon. Further, most granted constitutions restricted the government: especially its legislative power (***The Queen v Liyanage & Others*** (1965) 67 NLR 193; ***Liyanage & Others v The Queen***(1967) 1 AC 259; ***Bribery Commissioner v Ranasinghe***(1964) 66 NLR 73,78). Yet, experience predicate that autochthonous constitutions neither achieved the ideal autonomy, self-sufficiency, inclusiveness etc.; they have failed to demonstrate the wishes of the people: both post-independent autochthonous constitutions of Sri Lanka represented the wishes of the prevailing party in power (Tiruchelvam N 1977; Coomaraswami R 1996 p. 23; De Silva KM 1977, p.2; Coomaraswami R, 2012, pp. 127;

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Wickramasinghe R 2014, pp.49,58), public participation was minus (Welikala A n.d, p.7), questioning their legitimacy. When being faced by the practical reality of constitutions being created by one or a group of privileged elites, there seems no difference between them being local or foreign. Benjamin Franklin (Franklin B 1787 cited in Padover SK 1967, p.20) in his concluding speech at the constituent assembly in USA remarked: "when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be exposed?"

Nevertheless, granted constitutions being named unearthly, many Sri Lankan constitutional law scholars admire the Soulbury Constitution as the most outstanding constitution of the country (Welikala A n.d; Edirisinghe R & Selvakumaran N 1990 pp. 97,80), despite the contents of article 9 of the Constitution of Japan which was granted after the Second World War, it created a mighty state within a short time.

Rejection for constitutional autochthony has never been less effective than its acceptance; to Jacques Derrida (Derrida J cited in Geschiere P 2011, p.321-22) autochthony was a "too limited form of democracy which countries urgently need to surpass for a more universalistic version"; conductive factors for such rejection attract consecutive attention.

Although scholars like KC Wheare (Wheare KC 1960, p.89) proffered reputed views, due to the lack of an interpretation of universal consensus, the procedure of achieving autochthony is uncertain (Sir Roberts-Wray K 1966, p.291-2). Constitutions which are considered to be autochthonous to a higher degree have made use of different endemic procedures allowing any procedure to be called autochthonous. Especially if a political party profits secured sufficient support among the population in an election or a referendum, a government can replace an agreed constitution with one subsisting their own needs (Sir Roberts-Wray K 1966, p.291-2), this may even lead to an extreme of misusing the referendum: the best system yet found for legitimizing an autochthonous constitution. The political leaders who fought for independence were god worshipped in the post independent era of most commonwealth countries whose resolutions people accepted almost without any question letting the leaders do *ad-lib*; this resulted absolute despotism which is evident in many post-independent African Colonies.

Irrespective of the strength of the national sentiment and recognition of the court, the core elements of the principle are still vulnerable for effort lessaggression (Sir Roberts-Wray K 1966, p.291-2); for instance, the necessity of the sudden radical legal breach is questioned criticizing the scholars who advocated it for their blind eye on the demand for gradual development for which the Common Law provides explicit precedent (Ssekandi FM 1983, p.3). YP Ghai (Ghai YP 1972) insists that the whole theory emerged because of the "rapid", "extensive" desire of politicians who are poisoned with the idea that a republican constitution will only

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establish independence obtained from the colonial rule (Cooray JAL 1972, p.11), to change the constitution. A Sri Lankan scholar admits that a complete severance and going for a third republican constitution is debris while people have also affirmed such stance (Rajapakse R 2008, p.161-62).

Moreover, when improperly implemented autochthony can lead a country to a series of social, economic and political crux for which the so-called autochthonous constitutions of Sri Lanka provide ever the best example. Both these constitutions due to lack of a genuinely autochthonous process failed to address the minority concerns, thus aggravating the situation of the country: both constitutions promoted Majoritarianism; Dr. Colvin R. De Silva brought the discriminatory official language provisions provided by the Official Language Act, No.33 of 1956 to the 1972 Constitution (Article 7), which was further carried on in 1978 constitution (Article 18), Prabhakaran took arms because the 1972 constitution took away even the few rights they were left with (Virekanthan CV 2017). The 1978 constitution too contributed to authoritarianism and political crisis; the country had to face two youth insurgencies, thirty years of civil war, terrorism and ethnic conflicts; it's doubtful whether we should emphasize on autochthony anymore.

Rather, attention of the constitution-making of the 21st century has diverted from the idea of having 'home-grown' roots and the fact whether it is granted or autochthonous (Oliver PC 2017). The modern trend is towards a feasible result owned by the people (Public Representations Committee on Constitutional Reform 2016) and enshrined by openness, inclusivity and active involvement of people in all stages through participation. The conflict between universalism and localism has spread all over the comparative constitutional law field; though the constitution is a local instrument, international standards of democracy and human rights are expected to be reached. The modern anticipation is a reconciliation of these two aspects using internationally recognized scholars in designing the draft so that these standards will automatically be brought in a manner that suits the host country (Saunders C 2012). Pure autochthony *i.e.* the constitution should not take in any foreign concept is now outmoded and not an essential feature of modern day constitutions. Instead, the neo sense of autochthony has rendered undeniable in contemporary constitution-making.

Autochthony: procedure or substance?

Autochthonous constitution-making process is generally identified in two sectors: the prior consultation and post consultation; the former more significant with which most countries succeeded through autochthony. Designing a format of democracy for a country is arduous; neither can we guarantee that democracy even would correspond the specific context of such country. After winning independence, two constitutions in 1901 and 1940 were implemented based on democratic principles. For instance, in Cuba, the 1940 Constitution created by a Constituent Assembly during the presidency of Federico Lardeo Brú got fully suspended after the Cuban revolution. In 1976, after 16

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years of non-constitutional government, the revolutionary government of Cuba on Communist Principles. After the amendment in 2002 the Constitution acknowledged socialist system irrevocable.

Post consultation process ensures public participation in constitution-making, but people's deficiency in legal matters raise doubts on its results. For instance, when the founding fathers introduced to the Constitution of USA intellectual property provisions providing the Congress power under Article 1, Section 8, Clause 8 of the Constitution to promote the progress of science and useful Arts by securing for limited Times by Authors and Inventors the exclusive Right to their respective Writings and Discoveries and under Article 1, Section 8, Clause 3 of the Constitution to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes together with implied powers under Article 1, Section 8, Clause 18 to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof (not only the introduction of the intellectual property clause, the entire constitution itself is a unique experiment, thus making the constitution substantially autochthonous as well), if the public opinion on such provisions was concerned, the answer would be a definite negative; it is unlikely that the 18th century Americans had a broad understanding about intellectual property. Besides, if the prior consultation is explicit and correct, post consultation need not be worry much of, getting the final draft approved would suffice. An autochthonous Constitution in its process has to create a constitution that does not trace its validity to foreign legislation, 'autochthony' in this superficial sense is "purely procedural and most inadequate" (Ghai YP 1972, p.414) wherefore it is hard to agree completely with the proposition that the constitution-making process would ensure the autochthonous nature of the constitution.

The question probed is whether autochthony portend only a severance from the legal past and colonial clutches (Ayua, Guobadia & Adekunle 2003, p.30); experiences disclose the need for a deeper meaning that cherishes the substance of the constitution attesting that the constitution making process alone won't reach higher aspirations like autonomy, self-sufficiency, demonstration of the people's wishes, protection from discrimination, preservation of home-grown principles and institutions etc. (Ssekandi FM 1983, p.2). Autochthonous the process may be, yet no constitution would be autochthonous without a substance processing above qualities. As the significance of the making process shifts to the substance once a constitution is implemented, the difficulty of deciding a most suitable substance is no excuse.

Even the Constitution of USA- an ideal precedent for autochthony (Swaminadan S 2013) - can be questioned on the basis of the failure of constitutional functions due to substantive flaws of structure, rights and conventions. The 2016 Presidential Election results proved the time-tested system of Electoral Collage a failure; Donald Trump

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won the election because of the narrow victories in Pennsylvania, Michigan and Wisconsin despite Hillary Clinton got nearly 3 million votes more than Trump (Tushnet 2017): though the Constitution itself [The Preamble of the Constitution] and the judiciary (***McCulloch v Maryland***(1819) 17 US (4 Wheat.) 316) have asserted that the constitution demonstrates the people's wishes they were overturned in reality (Tushnet 2017). Political parties challenged constitutional theories: the Constitution had not initially provided for or even later added provisions for a situation where the political party of the President control over the Congress as the theory of the separation of powers has been challenged with timely rise of political parties (Tushnet 2017) and the President violated human rights. The executive order of President Trump on immigration to USA: the "temporary suspension of admission of people of seven nations" or in simpler terms the "Muslim Ban", have violated human rights through discrimination on the basis of religion or national origin, together with other basic constitutional values of the rule of law and equal protection of law. However, the Constitution had not provided immunity provisions for the Presidency, even judicial interpretations have held that the President can be amenable to judicial proceedings only after an impeachment and that his immunity from civil damages covers only official acts (Tushnet 2017; ***United Nations v Nixon***418 US 683; ***Nixon V Fitzgerald***(1982)475 US 731). Article 37 of the Constitution of India supplies another example where the judiciary has refused the existence of Directive Principles; adopting Seeravi's argument ***(State of Madras v SmtChampakamDorairajan***(1951) AIR 226) that the Directive Principles are only "political exhortations".

Still, the process cannot be underestimated; both scholarly ideas and case studies exemplify that a truly autochthonous substance is possible under a truly autochthonous process; a poorly planned process is a foundation of future problems; the constitution-making process in Nepal 2009 provides profound example (Acharya ML 2014, p.46; *Public Participation* 2015). A truly autochthonous process is expected to meet high aspirations of representation, inclusiveness and equal opportunity to tender public opinion; the very process which Sri Lanka lacked and is lacking in her endeavor to achieve autochthony.

Autochthony: a failed experiment in Sri Lanka

In Sri Lanka, Aldous Huxley's prediction (Aldous Huxley cited in Fernando B 2016, p.12) that due to changes in technology and communication systems, new forms of dictatorships may emerge, which would use novel methods of propaganda for adjusting people's minds to authoritarian rule came to be a reality and autochthony, for the past 40 years meant nothing but a "highly localized comedy" (Fernando B 2016, p.12). The divided mentality, selfishness and narrow party interests were the greatest barriers in the road to autochthony. Neither the 1972 Constitution nor the 1978 (Virekanthan CV 2017) were substantially autochthonous as they lacked autochthonous processes. The First Republican Constitution provided for

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many institutions, conventions and customs of the Westminster System; parliamentary democracy was never questioned, parliamentary sovereignty was used to establish an almighty legislature. Additionally, substantive conflicts between the provisions of the Constitution were remarkable. Under section 72 of the Constitution the National State Assembly consisted only of elected members whilst section 42 of the Constitution continues with the Soulbury Parliament together with its nominated members, *inter alia* Resolution 6 of the Draft Basic Resolutions mentioned that "the principles of delimitation of electoral districts shall be in accordance with the existing law (Virekanthan CV 2017; Coomaraswami R 2012, p.127; Nadesan S 1971, p. 11). Furthermore, the 1972 constitution was drafted by an illegal Constituent Assembly. Legality of the Constituent Assembly was challenged in ***Suntharalingam's Case***: an application brought for an injunction restraining the Minister of Constitutional Affairs from replacing the existing Constitution with a new one. The application was dismissed by HNJ Fernando CJ, (Wijayathilake J, agreeing) on the basis "that a Court cannot consider the validity or otherwise of a new Constitution, unless and until a new Constitution is established or purported to be established". However, after the implementation of the new Constitution the validity of the Constitution nor its making process could be questioned before courts as provided by the section 48 (2) of the Constitution (***Suntharalingam v The AttorneyGeneral*** (1972) 75 NLR 126,137). The Constitution-making process was initiated based on an assumed mandate: the manifesto of the United Front in 1970 General Election sought a mandate to permit the members of the Parliament that would be elected to function simultaneously as a Constituent Assembly to draft, adopt and operate a new Constitution which will declare Ceylon to be a free, sovereign and independent Republic pledged to realize the objectives of a socialist democracy securing fundamental rights and freedoms to all citizens. Though the United Front won the election, the so-called "unchallengeable mandate" they based their new Constitution on was no more than an assumption based on the defectives of the first-past-the-post system introduced by the very Constitution that they were so anxious to get rid of, neither as the election through which the Constituent Assembly was appointed was directed for the purpose (Nadesan S 1971, p. 7-11). Public opinion was ignored (Welikala A n.d), rejecting opposition ideas (Nadesan S 1971, p.8-9; Cooray JAL 1973 250-51; Coomaraswami R 1996, p.25), making the process an absolute party affair. The 1978 Constitution was drafted by a Select Committee headed by JR Jayawardane; after assuming power as the President the new Prime Minister, R. Premadasa was appointed as the chairman of the Committee. However, the President was invited to attend the meetings of the select committee, thereby he actively participated in the deliberations] (Jayasuriya DC 1982, p. 63). The similar procedural errors were repeated: the select Committee wasn't directed at the replacement of the 1972 Constitution (Bandaranaike SRD & Senanayake M 1977); it represented the authoritarian realpolitik

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dreams (Amaratunga C 1989, p.345; Wickramasinghe R 2014, p.49,58) of JR, UNP's colossal rejected the opposition (Welikala A n.d, p.7) and the deliberations were secretive (Welikala A n.d, p.7). The Executive Presidency was introduced by the 2nd amendment to the Constitution of 1972 by way of an urgent Bill. It is doubtful whether the executive presidency demonstrated people's wish as they have been voting to abolish it since 1994 and a high demand still subsists for an adequate system that would correct the mistakes of a doomed past. Moreover, both constitutions represented the "majority community" not the "indigenous whole" (Udagama D 2012), people were not allowed to approve the Constitutions referendums which would have provided the legitimacy (Cooray MJA 1982, p.130) they lacked.

A consequential alienation due to public discount with the existing constitutional scheme is visible with the current preoccupation of Constitutional reforms (Udagama D 2012) too in which the participatory approach has not reached the common man. The Business Times and the ColomboBased Research and Consultancy Bureau ('Most people in Sri Lanka say Provincial Council are a failure', The Sunday Times, 09 December 2012, viewed 28 March 2018, <www.sundaytimes.lk>; Public Representations Committee on Constitutional Reform 2016) conducted a survey through street interviews and emails (a more progressive mode of gathering opinion compared to public meetings organized by the Public Representations Committee on Constitutional Reform; it's most unlikely that common people have time to be in these meetings as they are more interestedly engaged in their life struggle) in seven provinces including the Northern Province based on the question whether the Provincial Councils were a success or otherwise. More than 70% of the people pf the country said that Provincial Councils are a failure; whether such a system should be continued or abolished merits questioning. Albeit considering this point, the Public Representations Committee on Constitutional Reform recommends continuing the Provincial Councils with more powers. It would have been more productive if the committee recommended that the provincial councils be abolished and instead strengthen the existing local government authorities. Neither the roots of which are genuinely ours (Jayasumana C 2017).

It is obvious that lack of participatory decision-making and overly centered government raised quenchless flames of ethnicity, wherefore Sri Lanka is in need of a theoretical framework for Constitution making process (Thiruvarangan M 2018) towards reconciliation and transitional justice using "positive ethnicity". The public representations for reconciliation in the frozen constitutional reform processes have demanded for better access to services, adequate representation and inclusive development for which the Public Representations Committee has made recommendation in directive principles, fundamental rights, judicial and electoral reforms, public services and independent commissions. Additionally, the government's Peace building Priority Plan of

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2016 (PPP) (Sri Lanka Peace building Action Plan (August 2016) supports the Government of Sri Lanka to implement its reconciliation and transitional justice commitments to the people as part of its peace building agenda. The United Nations has played a key role in developing and coordinating the implementation of the plan which also is a tool for coordinating development partner's support to peace building. Operation of the Plan is guided by the Government's four Pillars of support of: Transitional Justice; Reconciliation; Good Governance; and Resettlement and Durable Solutions. (Public Representations Committee on Constitutional Reform 2016; Juma L 2001, p.500).

Procedural autochthony, Conflict resolution and participatory Constitution-making

Substance was more important when constitution-making was confined to the hands of few powerful politicians. Instead, the contemporary constitution-making welcomes greater emphasis on due process due to increasing need of building trust and the importance of public participation (Saunders C 2012, p.3). Constitution-making after 1980s centers on conflict resolution in which participatory constitution-making is much useful; constitution-making serves conflict resolution both procedurally and substantively; a platform is provided for negotiation concerning the outcomes through the resolution of differences (Sangroula Y 2014, p.130). Procedurally and substantively autochthonous constitutions of South Africa (Saunders C 2012, p.6-8; Khanal K 2014), Kenya (Tobi N 1998), Nepal (Karkl B, Edirishinghe R 2014), Brazil and Uganda prove it being no more a unique experiment (Karkl B, Edirishinghe R 2014, p.47). Most importantly participatory constitution-making, recognized as a right by international law. Several international norms have provided for the right for participation that have been used for a right to participate in in constitution-making process: the right to take part in public affairs by Article 25 of the International Covenant on Civil and Political Rights, the right minorities to self-rule by the United Nations Declarations on Indigenous Peoples, and the right of self-determination by the United Nations Charter, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (United Nations General Assembly, 1966; United Nations General Assembly; 2007; United Nations General Assembly, 1945; United Nations General Assembly 1966; International Labour Organization, 1989). These norms pay attention on both the substance and the process (Karkl B, Edirishinghe R 2014). Though constitution-making processes are loaded with extreme expectation practically most constitutions fail (Ginsburg T, Elkins Z & Blount J 2009, p.5), public participation is not immune from defects (*Public Participation* 2015) and what constitutions can provide too is limited (Rajapakse R 2008, p.161). Thus, a profound mixture of both procedural and substantive autochthony shall make a constitution indeed autochthonous and legitimate (Saunders C 2012, p.2).

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Conclusion

In this essay, I have argued that the meaning and the scope of autochthony has widened from merely throwing away the colonial roots to ensuring the constitution to represent the true wishes of the people through the participatory in this modern sense is essential and that the constitution making process and the substance matters equally in ensuring that such constitutions are indeed 'autochthonous'.

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