

Forging Sri Lanka's Third Republican Constitution

The Constitutional Assembly officially commenced the process of drafting Sri Lanka's Third Republican Constitution on 6 April 2016 with the prime promise to abolish the Executive Presidency, to introduce electoral reform and to provide a constitutional resolution for the national issue. It is vital for the National Unity Government to forge a constitution that consolidates democracy and creates an environment to prevent the recurrence of another ethnic conflict.

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Marking the beginning of his second year in office on 9 January 2016, President Maithripala Sirisena promised Sri Lanka a new constitution. He further stated that it is necessary to stay united in formulating the new constitution towards building the modern Sri Lankan State in the 21st century.² The process of constitution making was then formally inaugurated by Prime Minister Wickeremesinghe, by presenting a resolution in Parliament where the House will be converted to a Constitutional Assembly³.

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² 'No foreign influences in drafting the new constitution', Presidential Media Division, Available at <http://www.president.gov.lk/news/no-foreign-influences-in-drafting-new-constitution-president-emphasized/>

³ 'Sri Lankan Parliament begins process to adopt new constitution', The Economic Times, 9 January 2016. Available at http://articles.economictimes.indiatimes.com/2016-01-09/news/69634746_1_new-constitution-constitutional-assembly-constitution-bill

The Constitutional Assembly met for the first time in Parliament on 6 April 2016 with the mandate to draft the new constitution in accordance with Article 75⁴ of the present constitution.

Why does Sri Lanka need a new constitution?

A need for a new constitution predominantly arises soon after a nation reaches a crisis point that transpires a change in the country, such as an ending of war or an ending of a rule of a ‘dictator’⁵. According to the legal philosopher and jurist, Hans Kelsen’s ‘Pure Theory of Law’, a constitution of a country is regarded as the ‘*grundnorm*’ or the basic norm of the land. This ‘*grundnorm*’ is the starting point of a chain of legal norms and it imparts validity on the whole legal order⁶. Consequently, it requires special care and a futuristic vision when designing the constitution of a country.

Since Sri Lanka’s independence in 1948, Sri Lanka was governed under three constitutions, i.e. the Soulbury Constitution (1946-1972), the 1972 Constitution (the first autochthonous constitution 1972-1978) and the 1978 Constitution (1978-present).

Sri Lanka’s need for a new constitution is intrinsically linked to two main facts, i) the end of the three decade old war and ii) the defects of the two autochthonous constitutions in 1972 and 1978. The end of the war warranted a recalibration of the legal norms and governance structures as a step to address the root causes of the war. Instead, the immediate aftermath of the war saw further centralisation of powers on one individual with the passage of the 18th Amendment⁷. Moreover, the previous government was more concerned on high scale

⁴ Article 75 of the Constitution -Parliament shall have power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution: Provided that Parliament shall not make any law –

(a) suspending the operation of the Constitution or any part thereof, or

(b) repealing the Constitution as a whole unless such law also enacts a new Constitution to replace it.

⁵ See ‘How are constitutions made’, International Institute for Democracy and Electoral Assistance, 30 October 2014. Available at <https://youtu.be/J36s0MTTxc8>. Accessed on 2 February 2016

⁶*The Pure Theory of Law*, Stanford Encyclopaedia of Philosophy, (First Published 18 Nov 2002-Substantive revision 4 January 2016), Available at <http://plato.stanford.edu/entries/lawphil-theory/#BasNor>. Accessed on 2 February 2016

⁷ The 18th Amendment enacted in 2010 repealed presidential term limits and the 17th Amendment and its de-politicisation framework.

infrastructure development rather than aspiring for a long lasting peace by ensuring justice, rights and freedoms of the Tamils.

Both 1972 and the 1978 constitutions are considered to be partisan documents. Rohan Edirisinghe argues that the two constitutions suffered from the following basic flaws⁸:

1. They were designed to promote the political vision and ideology of the party in power;
2. They entrenched rather than countered majoritarianism; and
3. They were designed with the convenience of the executive, rather than the empowerment of the People as their primary motivation or rationale

Accordingly, both constitutions were introduced when the governments possessed the absolute majority in parliament, both concentrated power on one body (on the National State Assembly under the 1972 constitution and the Executive President under the 1978 constitution) and both were drafted with minimal public participation⁹.

The Proposed Process

The resolution presented in Parliament on 9 January 2016, highlighted the clear public mandate given by the people at the January 2015 presidential elections to establish a political culture that respects the rule of law and that strengthens democracy. As a result, the new constitution envisages *inter alia*, to abolish the Executive Presidency, ensure a fair and representative Electoral System eliminating the preferential voting, strengthen democratic rights of all citizens and provide a constitutional resolution for the national issue¹⁰.

According to the resolution, the Committee of Parliament which is referred to as the Constitutional Assembly will comprise of all the Members of the Parliament and they are

⁸ Rohan Edirisinghe, 'The need for a new constitution for Sri Lanka', Ground Views, 08.01.2016. Available at <http://groundviews.org/2016/01/08/the-need-for-a-new-constitution-for-sri-lanka/>. Accessed on 12 January 2016.

⁹ See Edirisinghe *supra* note 8

¹⁰ Item no. 10 of the Order Paper of Parliament for Saturday, January 9, 2016 at 10.30am. Available at <http://www.parliament.lk/uploads/documents/orderpapers/1454668752082309.pdf>

entrusted in deliberating, seeking views and advice of the people and drafting the Constitution Bill in exercise of its powers under Article 75 of the Constitution¹¹. The Constitutional Assembly will be chaired by the Speaker. There will be sub-committees in the Constitutional Assembly and the Steering Committee comprised of the Prime Minister, Leader of the House of Parliament, Leader of the Opposition, the Minister of Justice and not more than seventeen other members of the Constitutional Assembly, shall be responsible for the business of the Constitutional Assembly and for preparing a Draft of a new constitution for Sri Lanka¹².

The proceedings of the Constitutional Assembly which will be open to the public, will equally be documented and published in the Hansard. The country will be able to observe the proceedings on television and listen to them in the radio. Sri Lankans living abroad too, will be given an opportunity to make representations via video conferencing¹³.

The resolution also gives room for the establishment of a Public Representation Commission, consisting members who are not Members of Parliament, to promote public awareness about constitution making and to welcome submissions/ recommendations from the public in respect of what should be included in Sri Lanka's Third Republican Constitution¹⁴. This is a progressive step and the first of the kind taken hitherto, adding meaning to the sovereign powers of the people of the country.

Once the Constitution Bill is drafted, it shall be presented to the Parliament as the Parliament retains the constituent powers to enact the new constitution. The Bill will then have to be passed by two thirds majority in Parliament and approved by the people at a referendum to become law and come into operation.

¹¹ See *supra* note 5

¹² Ibid

¹³ Jayamapathy Wickremeratne, 'The New Constitutional Edifice', Colombo Telegraph, 3 March 2016. Available at <https://www.colombotelegraph.com/index.php/the-new-constitutional-edifice/>. Accessed on 12 March 2016

¹⁴ Asanga Welikala, "Constitutional and Governance Reforms in Sri Lanka ; The Road to the Promised Land", Constitution Net, 30 November 2015. Available at <http://www.constitutionnet.org/news/constitutional-and-governance-reforms-sri-lanka-road-promised-land>. Accessed on 2 February 2016

The Content

The contents of the constitutions of the past were often criticised for failing to reflect the aspirations of the people of the country but rather being products of the party in power and being drafted to serve their own ends.

Having experienced the dire consequences over a period of three decades, Sri Lanka can no longer afford to suffer from constitutional defects. It is necessary that all concerned groups of Sri Lanka are represented equally in the country's constitution. Some of the current constitutional issues that require greater attention could be discussed as follows:

1. The Executive Presidency

Since its introduction to Sri Lanka, the executive presidency dismantled the concept of separation of powers - a vital element of democratic governance. It demonstrated authoritarian characteristics, abuse of power and corruption by inordinately vesting power on one individual. Therefore, abolishing the executive presidency is a welcome move. However, it is also important to take into account that replacing it with an equally powerful prime minister with minimal checks to his power, will negate the whole purpose of abolishing the executive presidency. Therefore, what is required is a Westminster model parliament which will ensure the accountability of the prime minister in the legislature. The fundamental guideline is thereby to incorporate an effective framework of checks and balances.

2. Devolution

An effective mechanism of devolution in the constitution, is perhaps the most arduous challenge that the Constitutional Assembly will have to face in the coming months. Though there is wider consensus amongst the public at large towards the abolition of the executive presidency, a system of devolved power is still a subject of controversy. Replacing Sri Lanka's unitary nature with a federal solution, might not only lead the whole constitution making process to a halt but might even lead to public distrust of the government. Nevertheless, during the past two elections, it was clearly demonstrated that moderate groups from both the North and the South were open to formulating a system of devolved power. Thus, in order to encourage moderate views on the issue, it is primordial to create public awareness and to provide detailed knowledge on why it

is important to implement a system of devolution for a better future with peaceful co-existence and demonstrate the strengths of unity in diversity.

The Thirteenth Amendment was the constitutional approach taken for devolution in 1987. Yet, the Thirteenth Amendment was never fully implemented and was often a subject that stirred nationalistic rhetoric from both the Sinhalese and the Tamil¹⁵. The constitutional design is required to spell out that devolution is not limited to mere transfer of decision-making powers to the provinces but that devolution is complemented with the devolution of responsibility and accountability¹⁶.

3. New Electoral system

A need for a new electoral system and the 20th Amendment Bill was the subject of much negotiations during the parliamentary debates of the 19th Amendment. Instead of a 20th Amendment, the new constitution envisages to implement a fair and representative Electoral System that will eliminate the preferential voting¹⁷. Preferential voting system had led to hyper-competitiveness amongst the same party members resulting in election malpractices and violence. The civil society members have proposed the government to adopt a Mixed Member Proportional System (MMP) consisting the best features of the Proportional Representation System and the First-Past-the Post system¹⁸.

4. Changes to the ‘foremost place’ given to Buddhism

Article 9, Chapter II of the constitution of Sri Lanka gives the ‘foremost place to Buddhism’ and ‘accordingly it shall be the duty of the State to protect the Buddha Sasana, while assuring to all religions the rights guaranteed by Articles 10 and 14 (1)(e)’ – (Article 10: Freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice. Article 14 (1)(e) : Freedom to manifest his religion or belief in worship, observance, practice and teaching)

¹⁵ Preliminary Submission by the Centre for Policy Alternatives (CPA) To the Public Representation Commission, 23 January 2016. Available at <http://www.cpalanka.org/preliminary-submission-by-the-centre-for-policy-alternatives-cpa-to-the-public-representation-commission/>

¹⁶ Ibid

¹⁷ See *supra* note 5

¹⁸ See *supra* note 9

The 'foremost place' has often been criticized for implying a state religion. Allowing constitutional primacy to one religion over the others, in a state practising different faiths, is fundamentally flawed under democratic principles.

However, it is noteworthy that perhaps secularism is not a theoretical generality applicable to all states, especially given the historical context of Sri Lanka, yet, it is desirable if the government could embrace a role of a neutral arbiter distancing itself equally from all religions but nevertheless formulating a constitutional framework assuring all religions equal rights.

5. Bill of Rights

The current Fundamental Rights specified in the constitution do not meet the international standards. The fundamental rights are enumerated in such a way where the executive/ legislative branch could easily curtail them. Article 15 of the constitution permits the executive and the legislature to impose restrictions on fundamental rights without adhering to any criteria of objectivity and proportionality¹⁹.

Similarly, the sole recourse to justice for an aggrieved party of an infringement or an imminent infringement of a fundamental right by an executive or administrative action, is by filing a fundamental rights application in the Supreme Court situated in Colombo. This procedural requirement makes it practically difficult for people living outside of Colombo to seek justice. Another vital lacuna in the current constitution regarding fundamental rights applications is that it does not provide for an appeal. Failing to provide for an appeal for an important area of jurisprudence could amount to a violation of the rule of law²⁰. It has been proposed that devolving the fundamental rights jurisdiction to the Provincial High Courts could address the above discussed shortcoming as it enables easy access to the public in the ground level²¹.

A bi-cameral legislature with an Upper House representing the provinces, an establishment of a Constitutional Court exclusively to deal with questions of constitutional interpretations, and incorporating judicial review of legislation are some other key components that have been proposed by constitutional law experts to be included in the new constitution.

¹⁹ See Edirisinghe *supra* note 8

²⁰ See Edirisinghe *supra* note 8

²¹ See *supra* note 15

Conclusion

Sri Lankans are faced with an exciting prospect of enacting their Third Republican Constitution. Yet, constitution making in a country divided by ethnicity, religion and politics is not an easy task. The drafters of the new constitution would have to find optimum solutions in resolving competing interests and arriving at a broader consensus. The unique feature that abets in achieving wider consensus in constitution making in Sri Lanka, is the unprecedented alliance of the United National Party and the Sri Lanka Freedom Alliance, the former political rivals, by forming a National Unity Government (NUG)²².

In 1972, the United Front²³ had two thirds majority and in 1978, the United National Party had five sixths in parliament. Yet, both the UNP and the Sri Lanka Freedom Party, were unable to gain similar support in parliament separately at the August General Election 2015. Yet, today both parties have come together and are working together under the NUG.

Dr Jayampathy Wickramaratne, Member of Parliament, in his speech made in Parliament on 23 February 2016 states:

*“We must begin this process with an open mind. All issues must be on the table for discussion. We have our own respective ideals. As a Leftist, my ideal is socialism. Some parties are for a mixed-economy. There are parties who wish to continue with a capitalist economy. There are parties that are committed to a unitary state and others who are for a federal state. Finally it will be a compromise. We need to agree on a compromise constitution, a consensus constitution, without imposing a constitution as was done in 1972 and 1978. All will not agree on all the provisions of the Constitution. This is an opportunity to adopt a constitution that is acceptable to the people as a whole and to all political parties.”*²⁴

²² Jehan Perera, ‘Ingredients for New Constitution are in Place’, The Colombo Telegraph, 11 January 2016. Available at <https://www.colombotelegraph.com/index.php/ingredients-for-new-constitution-are-in-place/> Accessed on 23 February 2016.

²³ “The United Front was a political alliance in Sri Lanka, formed by the Sri Lanka Freedom Party (SLFP), the Lanka Sama Samaja Party (LSSP) and the Communist Party of Sri Lanka (CPSL) in 1968. It came to power in the 1970 general election, but broke up in September 1975”. More information available at [https://en.wikipedia.org/wiki/United_Front_\(Sri_Lanka\)](https://en.wikipedia.org/wiki/United_Front_(Sri_Lanka)). Accessed on 12 April 2016.

²⁴ See Wickramaratne *supra* note 13

Therefore, keeping aside short-term political gains, it is imperative for the Sirisena-Wickremesinghe government to learn from past experience and genuinely attempt to consolidate democracy and forge a new constitution based on democratic principles with value for human dignity that will reflect the aspirations of all the people in the island.

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