



R Sri Lanka's New Constitution

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1. Historical Background

The current constitution, effective from 7th September 1978, was promulgated by the National State Assembly. Since then it has been amended 19 times. The recent amendment, done in April 2015, recommended establishment of constitutional council and independent commissions as provisioned by the 17th Amendment.

The 1978 Constitution contains 3 provisions which not only undermine the supremacy of the Constitution, but are unparalleled in constitutional democracies. These are Articles 16, 80 (3) and 84 of the Constitution.

- Article 16 declares that ALL existing law, written and unwritten is valid even if it is inconsistent with the Supreme Law, the constitution.
- Article 80(3) prevents the people from challenging provisions in laws that are unconstitutional. This is a right that the people in India, Nepal, Bangladesh, Pakistan, South Africa, the U.S.A., Canada etc and is a vital safeguard for the people in protecting their rights and upholding the supremacy of their constitution.
- Article 84, instructs Parliament how it can introduce unconstitutional laws!

These 3 provisions are instructive in demonstrating the (lack of) commitment of Sri Lanka's constitutional framers to the principle of the supremacy of the constitution. If the new constitution is to be compatible with international best practice and basic principles of constitutionalism and promote good governance and accountability, these 3 provisions should not be part of the new constitution.

1.1. Why a new constitution?

The first two republican constitutions were partisan, were not supreme, and suffered from the same basic flaws-

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

The First Republican Constitution of 1972 was essentially a United Front Constitution which introduced what Neelan Tiruchelvam has called the "instrumental" use of constitutions by governments to further their own political agendas.

The Second Republican Constitution of 1978 was instrumental in introducing what its most credible critic, Chanaka Amaratunga, described as the authoritarian and realpolitik vision of its principal architect, J.R. Jayewardene.

Both constitutions were introduced by governments that possessed two-thirds majorities in Parliament thereby removing the need for consensus across the political and ethnic divide.

Both constitutions concentrated power in a single institution (the National State Assembly or Parliament under the 1972 and the office of the Executive President under the 1978). Both were drafted and adopted with little meaningful public participation. Despite the fundamental flaws being the same, the most vocal critics of one were the principal architects of the other.

There is also the immunity clause, by which the President was totally immune from judicial review for his actions

If Sri Lanka is serious about consolidating the democratic achievements of 2015, and preventing a return of the authoritarianism of a kind experienced in the country since 1982, it must introduce a new constitution that divides power, promotes effective checks and balances and empowers the people so that their elected politicians remain accountable to them between elections. A new constitution that is a non-partisan, consensus document is essential for responsive and accountable governance.

2. The Conflict - What is the ethnic problem in the state?

- Sri Lanka has been ravaged by a long running and bloody civil war, due to ethnic tensions between the Buddhist Sinhalese majority and the Hindu Tamil minority. The need for the amendment comes from the struggle of Tamils in Sri Lanka for their pride and dignity.
- Tamil ethnicity in the island nation is well known. The nation which has come to occupy a strategic position in South Asia unfortunately still has Tamil speaking people struggling for their freedom.
- While the North and East provinces have been able to grab media attention due to the long ethnic war, however the plantation workers in the serene regions of tea estates are still living in subhuman conditions. The outcome of the injustice done to Plantation workers lingers in the minds of Tamil people who are compelled to serve their masters in Plantations without any basic comforts, despite getting citizenship in 1980s.

2.1. How should a new constitution be adopted? Challenges of process

The Government has made it absolutely clear that it intends to follow the procedure for constitutional reform spelled out in the existing constitution (Articles 82 and 83). Parliament will have to pass the new constitution with a two-third majority vote and thereafter the constitution will have to be approved by the people at a national referendum.

Given the rationale for a constitution outlined above it is far from ideal for Parliament or a Select Committee of Parliament to draft and adopt a constitution. Parliament is a creature of the Constitution and should be subordinate to the Constitution which is expected to reflect the will of the sovereign People and protect and empower the People from the politicians.

3. Structure envisioned for the new constitutional assembly

A committee of Parliament, designing a constitution without active and effective public engagement, will involve a serious conflict of interest. In some countries which have been mindful of the need for a broader and more inclusive approach to constitution making such as South Africa and Nepal, special measures such as the election of an inclusive Constituent Assembly to draft and adopt a new constitution, were adopted to ensure that the sui generis character of constitution making was recognized.

A Constituent Assembly has constitutive powers to draft and adopt a new constitution. Such an option is not available in Sri Lanka as there was no mandate from the People to support such an extra-constitutional process.

Furthermore, notwithstanding the theoretical anomalies with respect to parliamentarians drafting constitutions, practical considerations and political realities require that Parliament which consists of the elected representatives of the people provide leadership in the constitution making process. One can only hope that they recognize the special responsibilities involved in constitution making as opposed to their normal legislative functions.

It has proposed that Parliament should sit as a Constitutional Assembly (not a Constituent Assembly) to focus exclusively on deliberation on the substance of a new constitution in a manner that facilitates maximum public scrutiny and engagement.

The Constitutional Assembly will then present the draft Constitution to Parliament so that Parliament can adopt it with a two thirds majority vote. If this is done then the draft Constitution will be presented to the People for their approval in a national referendum.

The Road Map

The main tasks of the Constitutional Assembly (CA) would be –

1. to deliberate on a New Constitution,

2. to seek views and advice of the people for the above, and
3. to prepare a draft of a Constitutional Bill for the consideration of Parliament. Then Parliament will exercise its powers under Article 75 of the Constitution in deliberating on it. Hopefully, there will be no legal hurdles in the process.

The resolution also outlines the secretarial and organizational arrangements for the CA. There shall be sub-committees of the CA. There shall be a Steering Committee to steer the deliberations, to conduct necessary consultations, and then for the nitty gritty drafting. All the inputs from other sub-committees would come to that. The proceedings of the CA will be open to the public. An important link between the CA and the public will be the 'Public Representation Commission.' It shall setup and maintain a website and use other appropriate methods, towards giving due publicity to the process. Most importantly, it will also be the main conveyer belt of people's submissions to the Constitutional Assembly.

It is the Steering Committee which is tasked to submit a 'final report' and a 'resolution on a draft constitution.' However, there is no time frame given at the moment. The procedure is outlined in detail in adopting and/or amending the draft (Clause 26). For example, "If two-thirds of the Constitutional Assembly does not approve the resolution on the draft Constitution, the Constitutional Assembly and the Committees referred to in this Resolution shall stand dissolved."

The legal or the constitutional procedure outlined in the draft resolution is not discussed here. On its face value, it appears feasible and constitutional. The procedure also includes the submission of the draft after it becomes a "Bill to every Provincial Council, and seek their views as required by Article 154G (2) of the Constitution." Then comes the referendum.

4. How does it impact India-Sri Lanka ties?

The formation of new constitution has given hopes for the marginalised and ethnic minority present in Sri-Lanka of equal and apolitical consideration. The 25 years of strife torn life of Tamilian population is hopeful of a new beginning.

India has always led by example in the democratic principle of governance. India considers the present initiative of new constitution as Sri-Lanka's internal matter. This action will also mark a change in Indo-Sri-Lankan ties as India has Indian foreign policy on a political solution to the ethnic conflict in Sri Lanka has been consistent for close to three decades.

The Indo-Lankan accord of 1987 led to the 13th amendment to the Sri Lankan constitution, recognising Tamil as an official language and devolving power to the provinces — two longstanding demands of the Tamil minority. Since then, India has consistently called for the full implementation of the amendment and meaningful devolution.

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