



Sri Lanka's Efforts at Drafting a New Constitution: Is Consensus Possible?

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The Sri Lankan government has initiated a process of drafting a new constitution. A resolution was tabled in the Parliament in the first week of January. In this context, it is important to analyse the Constitutional initiatives in the past, the procedure proposed to draft a new Constitution, positive factors and constraints involved and expectations of various stakeholders and how feasible these expectations are in the present scenario.

Constitutional Initiatives in the Past

Introducing an inclusive Constitution in Sri Lanka is a major task given the history of Constitution making and its impact on ethnic relations. In the past, the B-C Pact of 1957 (between the then Prime Minister of Sri Lanka S.W.R.D. Bandaranaike and Tamil leader S.J.V. Chelvanayakam) and S-C Pact of 1965 (between Dudley Senanayake, the Prime Minister of Sri Lanka and S.J.V Chelvanayakam) agreed for some form of autonomy for Tamil people and restoration of language rights, but were not implemented due to opposition from majority community and differences within Tamil community. In 1972 and 1978, new Constitutions were introduced by the then Sri Lankan governments with the aim of consolidating majority rule. In 1972, the Sri Lanka Freedom Party (SLFP) was in power headed by Sirimavo Bandaranaike. Her government introduced many policies that gave

'prime place to Buddhism in Sri Lanka and the constitution proclaimed that the Republic of Sri Lanka shall give to Buddhism the foremost place' and that 'it shall be the duty of the State to protect and foster Buddhism'. The state patronage was given to Sinhala language as it was declared as the official language of Sri Lanka.

The 1978 Constitution was introduced when the United National Party (UNP) was in power, headed by J.R. Jayawardane. The Constitution of 1978 introduced the executive presidency, i.e, 'the President as head of the state, head of the executive and of the government and the Commander-in-Chief of the armed forces'. The Constitution also stipulated that the President will have to be elected through direct election. Given the ethnic and religious composition of Sri Lanka, the person who belonged to the Sinhala community had the maximum chance of winning the Presidential elections. It was proved through successive Presidential elections, which were held since 1978, in which the leader, who was perceived as representing Sinhala interests, won the Presidential elections. The Constitution of 1978 also proclaimed that, "it shall be the duty of the state to protect and foster the Budhha *Sasana*."¹ The Constitution gave Sinhala the official language status and Tamil a national language along with English.

The 1972 and 1978 Constitutions were introduced without public consultation that alienated minority communities from the state and also led to the emergence of violent ethnic conflict in 1980s. Since then, efforts were made to find a solution to the ethnic problem with the help of external actors and through unilateral measures by the Sri Lankan government. For example, the Indo-Sri Lanka Agreement of 1987 tried to provide space for minority interests by introducing 13th Amendment to the Constitution and by recognizing Tamil along with Sinhala as an official language of Sri Lanka and English as a link language. The People's Alliance (PA) government of Chandrika Kumaratunga tried to find a solution through Constitutional means by devolving more powers to the provinces as well as a change in the unitary structure of the state to gain the confidence of the minority community. This unilateral initiative of Kumaratunga did not get the much needed support from the opposition UNP. The draft constitutions of 1995, 1996, 1997 and 2000 could not get parliamentary approval due to lack of bipartisan approach. In parallel to the

constitutional initiative, the “War for Peace Strategy” was implemented to defeat the LTTE through military means. From 1995 to 2001, Sri Lanka witnessed a brutal war between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan Army (SLA). Amidst this background, the then Prime Minister Mr. Ranil Wickramasinghe signed a Ceasefire Agreement (CA) with the LTTE on 22 February 2002 with Norway as a facilitator.

The CA and the peace negotiations initiated thereafter could not bring a solution to the conflict and Mahinda Rajapaksa government that came to power in 2005, used military means to defeat the LTTE in 2009. The ‘All Party Representative Committee (APRC), which was appointed in 2006 to draft a proposal for Constitutional reforms, proposed strong power sharing arrangements; however, the government of Rajapaksa did not implement these recommendations’.² Throughout this period, the nature of the state and the issue of devolution of powers to provinces, particularly to the Northern and Eastern Provinces, remained a no consensus issue. The defeat of Rajapaksa in 2015 Presidential elections and the formation of “National Unity Government” with Mr. Maithripala Sirisena as President and Mr. Ranil Wickramasinghe as the Prime Minister (PM) have raised many expectations for a possible political solution to the ethnic question. The proposed initiative for drafting a new constitution has once again opened space for a debate on sharing of power between the majority and minority communities.

Resolution proposed to draft a new constitution

The resolution in detail proposed various measures to draft a new Constitution. Some of these are listed below:³

1. There will be a committee of the Parliament referred to as the “Constitutional Assembly” (CA) that will consist of all members of Parliament, for the purpose of deliberating on, and seeking the views and advice of the people, on a new Constitution for Sri Lanka. The CA will prepare a draft of a Constitution Bill for the consideration of Parliament in the exercise of its powers under Article 75 of the Constitution.

2. The Speaker of the Parliament will be the Chairman of the CA and there will be seven deputy Chairmen of the CA, elected by the CA.
3. The resolution also proposed to set up a Media Staff (including Social Media) to maintain a website and use other appropriate media, towards giving due publicity to the process used for the adoption of a new Constitution. The media staff will have to document and publish all public representations and submissions.
4. The resolution also proposed to set up Sub-Committees of the CA, i.e., a Steering Committee consisting of Prime Minister as Chairman, leader of the opposition, leader of the House, the Minister of Justice, and not more than eleven members of the CA to be appointed by the CA. This committee will be responsible for drafting a new Constitution and conducting the business of the CA. Such other Sub-Committees, consisting of members of CA, may be appointed by the CA, consisting not more than eleven members.
5. The Steering Committee may seek the services of any institution for carrying out the objectives of the CA and may appoint experts to aid and advice the CA.
6. The proceedings of the CA and Sub-Committees will be open to public and CA will have the powers to invite any person for consultation or to make submissions before the CA.
7. The Steering Committee will appoint a Public Representation Commission (PRC), consisting not more than fifteen persons (not members of CA).
8. Within one week of the appointment of the PRC, the PRC will call for public presentations to be made in writing and oral submissions can be made in appropriate situations. The PRC will submit its final report to the CA within three months of its appointment or within such extended period as may be granted by the CA.
9. The Steering Committee upon taking into consideration the reports of Sub-Committees and PRC, will submit a report to the CA, and the report may be accompanied by a draft Constitution.
10. Thereafter, the CA will debate the general merits and principles of the report and the draft constitution (if applicable), and may also debate proposed amendments.

11. At the end of such debate, the Steering Committee, considering the amendments if any proposed during the debate, submit a final report and resolution containing a draft Constitution for the consideration of the CA. The PM will move such final report and the resolution containing the draft Constitution would be approved by the CA.
12. If the CA approves the resolution on the draft Constitution by two-thirds majority, the President will refer the Bill to every Provincial Council to seek their views. After seeking the views of Provincial Councils, the PM will present the Bill to the Parliament. The Constitution Bill, duly passed by the Parliament by two-thirds majority, shall not become law until approved at a Referendum by the people.

Above are some of the steps proposed to draft a new constitution for Sri Lanka. However, there are a few positive aspects and constraints that can have an effect on the entire process of drafting a new constitution.

Positive Aspects

Adopting a bipartisan approach to form the government at the Centre is a positive aspect. During the Presidential and Parliamentary elections last year, the President and the PM promised a number of political, economic and social reforms, which can reverse the losses occurred due to the ethnic war. President Sirisena's "100 days programme" on the basis of which he sought votes for his candidature during Presidential elections, tried to touch upon various issues faced by Sri Lanka. Among the promises made in the programme were abolition of executive Presidency, introduction of mixed electoral system, Commission to investigate corruption, and establishment of independent commissions.

The President termed "the programme as a national policy programme not a policy of merely a political front."⁴ The government was able to fulfill some of the promises made, such as the formation of Independent Commissions, implementation of 19th and 20th amendments, wherein the former restored the independent commissions and the latter proposed a change in the electoral system.

Another positive aspect is the coalition government's willingness to initiate a reconciliation process. In the past, lack of bipartisan approach between the two majority Sinhala political parties acted as a barrier to arrive at a solution on Tamil ethnic question. The UNHRC resolution on Sri Lanka in 2015 'welcomed the Sri Lankan government's commitment to adopt a comprehensive approach to deal with the past, for instance, by proposing to establish a Commission of Truth, Justice, Reconciliation and Non-Recurrence'. Last year, the government had setup a Task Force on National Reconciliation with former President Chandrika Kumaratunga as the Chairperson. To handle complaints regarding missing persons, the government proposed 'issuing "missing" certificates to the families of thousands of people, who disappeared during the civil war.'⁵

The government also took a few positive steps at demilitarization and rehabilitation of war affected Northern and Eastern Provinces. Thousand acres of farm land was released in Keppapulavu in Mullaithivu early last year and more than seven hundred acres of land was released by the military in Northern Province in December 2015. In the first week of January 2016, the 'President promised to provide land to settle as many as 100,000 war victims displaced by the three-decade long war within six months. He also promised to setup a mechanism to complete the process'.⁶ To provide voice to the minority interests, 'the TNA leader Mr. Sampathan has been appointed as the leader of the opposition in Parliament. He is the second Tamil-speaking opposition leader in the country's history after Appapillai Amirthalingam'.⁷

Possible Constraints

Issue of Devolution of Powers

Differences in how the majority and minority communities perceive the state may create hurdles in arriving at a consensus. The "Tamil minority did not grant its consent to the enactment of 1972 and 1978 constitutions because it entrenched a unitary state".⁸ The devolution of power under a unitary state as it stands today may not be changed as demanded by the Tamil leadership, given the majority community's apprehension to adopt a federal structure of governance. However, the TNA manifesto in 2015 Parliamentary

elections 'articulated the Tamils' right to self-determination, federal structure and a merged Northern and Eastern provinces within a united and undivided Sri Lanka'.

The government's emphasis on full implementation of 13th Amendment as a solution to political problem is not acceptable to Tamil leadership, as the amendment provided more powers to the Centre and it's appointed Governor to recall some of the Provincial powers, if need be. After India's intervention, the Northern and Eastern Provinces were temporarily merged and the North-Eastern Provincial Council was constituted in 1988. However, the council was dissolved two years later. While the Eastern Provincial Council was constituted through elections held in 2008, the Northern Provincial Council elections were held in 2013. The 13th Amendment states that the power over land would be devolved to the provinces, which was not implemented fully. Tamil demands, such 'as devolution of power on the basis of shared sovereignty over land, law and order, security and safety of Tamil people; socio-economic development through direct foreign investment in the North-East' is difficult to achieve. Because, arriving at maximum consensus through a Parliament dominated by representatives from majority Sinhala community is a complex exercise. The merger of Northern and Eastern Provinces is also opposed by the Muslim leadership 'as the merger will reduce the percentage of Muslim population from 35 per cent to 17 per cent in the North-East'.⁹

Differences within Tamil leadership might become a hurdle in finding consensus to draft a new Constitution. The Tamil People's Council (TPC) was formed by the Chief Minister of Northern Province, C.V. Wigneswaran, due to differences with Tamil National Alliance (TNA) leadership.

The TPC's constitutional proposals released in Jaffna recently stated that 'it will be pointless to re-write the constitution without first entering into an agreement with the Tamils on the "basic vision of the state" on the lines of the 1998 "Good Friday" Agreement (between the UK and the Northern Ireland groups), and the 1995 "Dayton" Agreement (a multi-national pact relating to Bosnia and Herzegovina)'. TPC also took a stand that the Tamils' right to self-determination must be recognized, the Northern and Eastern Provinces

must be merged to form a single Tamil-speaking province with special provisions for Muslims and Sri Lanka must be a Federal State and should be called the "Federal Republic of Sri Lanka."¹⁰

Issue of Accountability

Parallel to the process of drafting a new constitution is the question of reconciliation and implementation of United Nations Human Rights Council (UNHRC) 2015 resolution by the government on accountability. Various estimates and the UN reports suggest that gross human rights violations were committed by the LTTE and the SLA for many years and in the final phase of the war, around 40,000 civilians lost their lives in 2009. The question is – who will take the responsibility of the deaths that occurred? The establishment of mechanisms to address the issue of accountability with the consent of all the political parties remains a challenge for the government and, as of now, the mechanisms are not in place.

Even though the government approved the UNHRC 2015 resolution of establishing a 'special court integrating international judges, prosecutors, lawyers and investigators, with an independent Sri Lankan investigative and prosecuting body, but the details of this body are still to be worked out. Recent statements by the President indicate that the government is, as of now, noncommittal about involving international actors. For instance, the President, in a recent interview to the BBC, said that, 'he will not allow any international participation in the enquiry and domestic investigation involving domestic actors is the priority'. "We have more than enough specialists, experts and knowledgeable people in our country to solve our internal issues," he said.¹¹ However, reconciliation cannot be achieved without the participation of minority communities in the process. Given the mistrust between communities, particularly on domestic mechanisms to bring justice to the victims of war, the government will have to specify the procedure it is planning to follow at the earliest. Because, the Tamil leadership clearly specified that they want a justice mechanism involving international actors.

Demilitarization in North and East

Consensus building on the new Constitution may not be possible without addressing the immediate issues faced by the people in the north and east of the country, such as militarization. Demilitarization in the Northern and Eastern Provinces promised by the government might take longer time, as there has to be a common understanding between the government and the Sri Lankan army over the need for releasing land for rehabilitation purpose. Given the role the Sri Lankan army played to defeat the LTTE, the army can exert considerable influence over the decisions taken to release the land. According to reports, “In 2014, there were at least 160,000 almost entirely Sinhalese soldiers stationed in the North having a population of little more than one million people, and the occupation means there is one soldier for every six civilians.”¹² The British Tamil Forum also alleged that 42,000 acres of land in the North-East is still under the SLA.¹³ There are also allegations against the state over systematic colonization of Tamil speaking Eastern province even after the end of the war in 2009. The state sponsored settlements in the province were criticized consistently by the Sri Lankan Muslim Congress (SLMC) and All Ceylon Makkal Congress (ACMC) as these are altering the demographic composition in the East dominated by the Muslim community.

Repeal of Prevention of Terrorism Act (PTA)

The government plan of introducing the Bill of Rights through the new constitution containing civil, economic and political rights is a positive step. However, the Tamil demand for abrogation of Prevention of Terrorism Act (PTA) is still to be implemented. The opposition leader, Dr. Sampanthan, in his address to the Parliament in December last year said that, “for the Tamil leadership, the repeal of PTA is a political issue not a legal issue and want the release of all in custody arrested under this Act.”¹⁴ According to the UNHRC 2015 report, there are around 258 detainees as of September, last year. Even after government formation in January, 2015, 19 persons were arrested under the PTA. The question of release of ex-militants and supporters of the LTTE, who are in custody, continues to be a concern for the Tamil leadership apart from the rehabilitation of ex-militants.

According to the Bureau of Commissioner General of Rehabilitation report, 'after the end of war, 12,000 ex LTTE cadres surrendered out of 300,000 Internally Displaced Persons (IDPs)' and by 2013, around 9000 ex-combatants in rehabilitation centres were released and reintegrated into the society'.¹⁵ According to the UN's Integrated Regional Information Networks (IRIN) report, by 2014 "more than 11,800 former LTTE fighters have been rehabilitated through government-sponsored programmes'. However, genuine reintegration into the society has been a difficult task for most of the ex combatants as 'work is difficult to find due to conflict-related disabilities and persistent stigma against ex-combatants'.¹⁶

Procedural difficulties

Another hurdle in implementing the new constitution is the procedure proposed. The new constitution will have to be approved by two-thirds majority followed by approval from provinces and a national referendum. This process might take long because getting two-thirds majority is not easy, given the composition of the Parliament. Out of 225 members in the Parliament, the UNP led United National Front for Good Governance (UNFGG) has 106 seats and SLFOP led United People's Freedom Alliance (UPFA) won 95 seats. The TNA has 16, JVP 6, SLMC and EPDP has one member. Since none of the party enjoys two-thirds majority in the Parliament, the government has to ensure consensus of majority of members on the controversial issue of devolution of powers to the provinces. Here, former President Rajapaksa and hard line elements might influence the process by objecting to any possible concessions the government plans to give to the Tamil minority. Former President Rajapaksa suggested that constitutional changes should follow a step by step process. The steps proposed are:¹⁷

- The abolition of executive presidency and electoral reform should precede all other matters.
- Provisions inimical to the unitary character of the Sri Lankan state may find their way into the new constitution if it is passed as a single document.

- On the question of devolution of powers to the provinces, a study should be done of the Indian constitution, particularly powers vested in the PM, President and Parliament in relation to its Indian states.
- The mixed electoral system (mix of first past the vote and proportional representation) should be introduced at regional and parliamentary levels. This system is in place currently at the local government level.

Sirisena does not have complete control over the party. This is going to be another hurdle in getting two-thirds majority. According to reports, there are around 30 to 50 parliamentarians, who oppose the President in the party and have formed a “Joint Opposition.”¹⁸ In the last Presidential elections, 62 lakh people voted for Sirisena and 58 lakh people voted for Rajapaksa. Maha Sangha and Buddhist organizations in Sri Lanka appealed to the government to preserve the country’s unitary character, territorial integrity and sovereignty in the new Constitution.

Steps taken so far to draft the new constitution

The Committee of Public Representations on the Constitution (CPRC) was appointed by Prime Minister, Ranil Wickremesinghe to seek public opinion on the proposed constitutional reforms. The CPRC is responsible for compiling all input taken from all corners of the country covering all 25 districts into an initial first draft for overview. Its office is located in Colombo and is open to accept public ideas and views from January 18 to March 31. The 24-member committee consisting of representatives from political parties and civil societies is chaired by Attorney Lal Wijenayake and includes President's Counsel, Faizer Mustapha among others.

Conclusion

Given the above mentioned possible constrains, the drafting of a new constitutions will take time. Achieving social democratization as promised by the Sri Lankan President through good economic management by ending corruption, fraud and irregularities also includes reconciliation. Drafting a new constitution with the consent of all the political

players, civil society and people will be a major positive step in the reconciliation process. However, the process has to identify and address the question of equal respect and representation to all identities in the society. Only then, the Sri Lankan government's promise of evolving a fresh universal approach to end extremism, violation of human rights, conflict and exploitation will be successful.

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The Views expressed are that of the Researcher and not of the Council.*

End Notes

¹ The Government of Sri Lanka, 1978 Constitution without Amendments, <http://www.priu.gov.lk/Cons/1978Constitution/1978ConstitutionWithoutAmendments.pdf>.

² R Yogarajan, M.P and M NIZAM Kariapper (ed), "Proposals Made by the All Party Representatives Committee to Form the Basis of a New Constitution,"

, <http://www.satp.org/satporgtp/countries/shrilanka/document/papers/images/APRC%20Report.pdf>

³ Prime Minister's Office, Sri Lanka, Parliamentary Resolution on Constitutional Assembly, January, 2016, [www.pmooffice.gov.lk/download/Constitutional % 20 reform % 20-%20 Resolution%20E%2020151117.pdf](http://www.pmooffice.gov.lk/download/Constitutional%20reform%20-%20Resolution%20E%2020151117.pdf)

⁴ President of Sri Lanka, President Reviews Progress of the 100-day Plan, <http://www.president.gov.lk/news/president-reviews-progress-of-the-100-day-plan/>

⁵ "Sri Lanka to Issue Missing Certificates to Families of Civil War Disappeared," *The Guardian*, 1 October 2015, <http://www.theguardian.com/world/2015/oct/01/sri-lanka-issues-certificates-families-missing-people-civil-war-un>

⁶ "Sri Lanka President Promises Land to War Displaced in Camps within Six Months, *Colombo Page*, 3 January 2016, http://www.colombopage.com/archive_15B/Jan03_1451837827CH.php

⁷ "TNA Leader R. Sampanthan – The New Leader of the Opposition," *Asian Tribune*, 3 September 2015, <http://asiantribune.com/node/87832>

⁸ "Manifesto of the Tamil National Alliance – Ilankai Tamil Arasu Kadchi, Parliamentary Elections 2015," *Tamil Guardian*, tamilguardian.com/files/files/TNA%20Amnifesto%202015-Final.doc.pdf.

⁹ D.B.S, Jayaraj, "North-East Muslim Majority Council Based on India's Pondicherry Mode," *Daily Mirror*, 15 January 2016, <http://www.dailymirror.lk/103091/north-east-muslim-majority-council-based-on-india-s-pondicherry-model#sthash.8hAYN3mc.dpuf>.

¹⁰ P.K, Balachandran, "Tamil Peoples' Council Demands Framework Pact before Constitution Making," *New Indian Express*, 1 February 2016, <http://www.newindianexpress.com/world/Tamil-Peoples-Council-Demands-Framework-Pact-Before-Constitution-Making/2016/02/01/article3256097.ece>.

¹¹ "Sri Lanka President Wants 'Internal' War Crimes Court," *BBC*, 21st January 2016, <http://www.bbc.com/news/world-asia-35376719>

¹² "Sri Lanka Accused of Waging 'Silent War' as Tamil Land is Appropriated by Army," *The Guardian*, 28 May 2015, <http://www.theguardian.com/global-development/2015/may/28/sri-lanka-army-land-grabs-tamil-displacement-report-oakland-institute>

¹³ "One Year on Sri Lanka – Torture, Rape and Abductions Continue Says BTF," *Tamil Guardian*, 11 January 2016, <http://www.tamilguradian.com/artcle.asp?articled=16978>.

¹⁴ "Speech of the Hon. Rajavarithiam Sampanthan – Leader of the Opposition," *News.lk*, 7 December 2015, [news.lk/news/related-news/item/11196-Speech-of-the-Hon.-Rajavarithiam-Sampanthan-Leader-of-the-Opposition?tmpl=component&print=1](http://www.news.lk/news/related-news/item/11196-Speech-of-the-Hon.-Rajavarithiam-Sampanthan-Leader-of-the-Opposition?tmpl=component&print=1).

¹⁵Bureau of the Commissioner General of Rehabilitation, Sri Lanka, *Rehabilitation of Ex-Combatants*, http://bcgr.gov.lk/flip_book.html#/0.

¹⁶ Sri Lanka's Rehabilitated Ex-combatants Struggle to Adjust, *IRIN News*, 4 July 2014, <http://www.irinnews.org/report/100303/sri-lanka-s-rehabilitated-ex-combatants-struggle-to-adjust>

¹⁷ "Rajapaksa Wants Election for New Government Under New Constitution," *Lanka.com*, 17 January 2016, <http://www.lanka.com/news/items/2016/01/17/Rajapaksa-Wants-Election-for-New-Government-Under-New-Constitution/>

¹⁸ T. Ramakrishnan, "So Far, So Good," *Frontline*, 5th February 2016, <http://www.frontline.in/world-affars/so-far-so-good/article8123596.ece?homepage=true>.