



Constitutional Developments in Sri Lanka: Positions Taken by Political Parties and implications for Constitutional Reforms in Sri Lanka

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The National Unity Government (NUG) of Sri Lanka after coming to power in 2015 has embarked upon constitutional reforms by constituting various committees to draft a new constitution replacing the 1978 constitution. The six sub-committees on fundamental rights, judiciary, law and order, public finance, public service, and centre periphery relations have submitted their reports to Constituent Assembly in November 2016. Another Committee is the Public Representation Committee (PRC) on constitutional reforms. The PRC submitted its recommendations on various matters of constitution in May 2016. Another committee a Constitutional Task Force on Reconciliation Mechanisms (CTFRM) submitted its report in January 2017.

The Steering Committee (SC) is responsible for functioning of Constituent Assembly (Parliament) and for drafting constitutional proposals. The Committee is assisted by six sub-committees appointed by the Constituent Assembly. The SC consisting of 21 members representing various political parties, presented an interim report to the Constituent Assembly on 21st September 2017 taking in to account recommendations of committees mentioned above as well as recommendations submitted by various political parties in Sri Lanka to its draft report of 8th August 2017. The report of the SC was debated in parliament on 30 and 31st October and on 1st, 2nd and 8th of November. Prime Minister Mr. Ranil Wickramasinghe is chairman of the SC. The SC dealt with subject matters such as:

- Matters covered by Chapter 1 and 2 of the Present Constitution
- Principles of Devolution

- State Land
- Central legislation on Provincial List Subjects
- The Capital Territory
- Second Chamber
- Electoral System
- Executive
- Constitutional Council
- Due Representation for Women
- Public Security

Given the above developments the viewpoint will briefly dwell upon a few important recommendations of the SC on above subjects, submissions by various political parties to the SC on above subjects, positions taken in parliament during the debate on the report and implications for constitutional reforms in Sri Lanka.

On Nature of the State

Chapter I of the Constitution of Sri Lanka deals with the subject of “people, the state and sovereignty” of Sri Lanka which include Articles such as the state, unitary state, sovereignty of the people, exercise of that sovereignty, territory of the republic, the national flag, national anthem and national day. On Article related to the nature of the state the SC proposed that “*Sri Lanka is a free, sovereign and independent republic which is an undivided and indivisible state, consisting of the institutions of the Centre and of the Provinces which shall exercise power as laid down in the Constitution*”.ⁱ The power to amend the constitution or to repeal and replace the constitution will remain with the Parliament and the people of Sri Lanka as provided in the constitution. Regarding the *territory* the SC proposed that “*no provincial council or other authority may declare any part of the territory of Sri Lanka to be a separate state or advocate or take steps towards the secession of any Province or part thereof, from Sri Lanka*”.

Regarding the status of **Buddhism (Chapter II)**, one of the proposals by the SC mentioned that, *Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while treating all religions and beliefs with honour and dignity, and without discrimination, and guaranteeing to all persons the fundamental rights guaranteed by the Constitution*ⁱⁱ.

On Devolution

The second subject matter dealt by the SC was on ***Principles of Devolution***. The SC report proposed that “the Province should be the primary unit of devolution”. However, on merger of provinces, the SC opined that the matter requires further consideration and proposed three options such as:

- referendum of the people of province

- Constitution should not provide for merger
- recognise the Northern and Eastern Provinces as a single provinceⁱⁱⁱ.

Regarding *division of powers* the SC proposed that a National List covering sovereignty, territorial integrity, defence/national security and economic unity of Sri Lanka and a Provincial List should be there and 'opined that the Concurrent List specifying subject areas can be retained'^{iv}. The SC proposed that the constitution should have a separate Article dealing with formulation of a *National Policy* on matters contained in the Provincial List. The SC also proposed that 'the *Governor* should be appointed by the president and act on the advice of the Board of Ministers'^v and should not engage in any party politics while holding the post and be apolitical.

On State Land

On State Land and its use the SC proposed that 'land alienation or disposal should be in accordance with the constitution and with National Land and Water Use Policy'. The central government retains the power over maritime zones of Sri Lanka and on reclamation of land from within the territorial waters of Sri Lanka. The centre also has the power to use state land controlled or occupied for national security and defence purposes in accordance with the due processes of law. In case of dispute over land between the centre and the province, the president has the power to refer the matter for arbitration to a tribunal consisting members appointed by the PM as well as CMs. The tribunal's decision is binding on the centre and provincial council and the decision can only be questioned in constitutional court.

On Second Chamber

The SC report proposed to set up a *second chamber* largely representing provinces and no constitutional amendment shall be enacted into law unless passed by both the parliament and the second chamber.

On Electoral System

On changes to the *electoral system*, the SC proposed that the system should be a Mixed Member Proportional (MMP) system. For the distribution of 233 seats in parliament, 140 (60 percent) seats should be distributed on the basis of first past the post (FPP) and 93 seats (40 percent) marked as compensatory seats, required for ensuring proportionality. The compensatory seats shall be distributed at provincial or national level. The voter shall have two votes; one vote for the single-member constituencies (SMC) and the second vote for the party.

On Executive

On the subject of *Executive*, the SC report recognised that a general consensus exists in Sri Lanka on the abolition of executive presidency. The report also mentions that the president should be elected by parliament for a fixed term. To elect the PM, the report provided three options such as direct election of the prime minister, pre-nomination of the PM and the Westminster system^{vi}.

The report recommended establishing a **Constitutional Council** in order to make recommendations with regard to the appointment of specified high-ranking public and judicial officers as well as independent commissions. The report also recommended to facilitate due **representation for women** in all constitutional, legislative and statutory bodies.

The report submitted by the SC to the CA in September 2017 on subject matters mentioned above was based on suggestions it has received from political parties to its interim draft report released on 8th August 2017. Recommendations proposed by various political parties to the draft interim report suggest that significant differences exist among political parties on subject matters mentioned above. The debate which took place in October last week and in November first week of 2017 in parliament on the SC report also suggests that in Sri Lanka the room for compromise and cooperation to adopt a new constitution with consensus is shrinking.

Points of difference and response to the draft by political parties in Sri Lanka

The Sri Lanka Freedom party (SLFP)

The SLFP is not in favour of making any amendments to the Chapter I and II of the present constitution and strongly supports the unitary character of the state. At the same time, the party supports the idea of province as a unit of devolution and implementation of 13th amendment as one of the options to devolve power. The party is also of the opinion that ‘the governor of a province should not be a ceremonial head and should be vested with powers to act in instances such as an attempt to break away from centre and breakdown of law and order in the province’^{vii}. The party is also of the view that state land can be taken by the centre and power of the executive should not be subjected to scrutiny and judicial challenge. It also proposed not to abolish executive presidency as it is not prudent in present-day conditions.

The Tamil National Alliance (TNA)

According to the TNA, Sri Lanka should be a union of provinces/states and it should be a federal state within the framework of a united/undivided and indivisible country. Sri Lanka should be a secular state and the Northern and Eastern Provinces shall constitute one province/state.

Regarding division of powers, the TNA urged that the government should look into various reports released by previous governments which made significant recommendations on the matter. Reports of the Mangala-Moonesinghe Select Committee, the Constitution Bill of 2000 under Chandrika Kumaratunga government, the report of the Multi Ethnic Experts’ Committee appointed by the ex-president Mahinda Rajapaksa and the report of the All Party Representative Committee (APRC) chaired by Prof. Tissa Vitharana also approved by the ex-president Rajapaksa. According to the TNA the above committees’ reports have proposed far reaching changes on the issues of division of powers and nature of the state.

The TNA leader Mr. R. Sampathan in his speech in parliament on the interim report of the SC on 1st November 2017 presented a view that reflected the thinking of moderate Tamil leaders, who are part of TNA and who believe that ‘the process is legitimate and credible’^{viii}. The TNA also argued that the Sri Lankan government’s got considerable international support to defeat the LTTE which was projected as an impediment to find a political solution. Therefore, it is the responsibility of the Government to find a political solution in the absence of LTTE^{ix}. For the Tamil parties, ‘the present drafting process provides the best opportunity to address the needs of minority communities ‘as it is being written, for the first time, based on bi-partisan consensus between two main political parties’^x.

People’s Liberation front (JVP)

While recognising that the system of provincial councils has become a reality the JVP proposed that the executive presidency should be completely abolished. It also proposed that the constitution should not allow the merger of one or two provinces into one single unit and should not weaken the powers of the governor.

The Jathika Hela Urumaya (JHU)

The JHU while responding to the draft of SC of 8 August 2017 said that the “government should not try to formulate a constitution as a means of response to foreign pressure that occurs from time to time and to suit the individual political ideologies held by constitution makers”^{xi}. According to JHU, the constitution that does not reflect majority opinion of the country will neither be approved nor receive the required legitimacy.

The concept of devolution is vehemently opposed by the JHU and it looks at it as merely a political demand not a logical one for finding a permanent solution. According to JHU, devolution of land and police powers to provinces will only benefit the 32 percent Tamil population which live in the Northern Province; and, 64 percent of Tamil population are excluded from that system as they live outside the province^{xii}. The party argued that ‘the Provincial Council system in Sri Lanka “was introduced in Sri Lanka due to huge pressure amidst India’s direct political and military influence and the pressure simultaneously exerted by LTTE’s terrorism”.^{xiii} Therefore, the party supports the idea of local government as the unit of decentralisation.

The JHU is not in agreement with changing the current provisions of the constitution regarding the status of Buddhism and state land. It also opposed the proposal of second chamber and the concept of federalism.

The Joint Opposition (JO)

The positions taken by the JO on SC draft report is similar to the positions taken by the JHU. The JO response to the interim draft report of the SC of 8th August 2017 suggests that the coalition is trying to

mobilise public opinion against the constitutional reform process in a systemic way. The JO response points out that ‘international actors having economic and political interests are behind the entire exercise to divide the country and bring in federal system’.^{xiv} It also rejected the sub-committees reports on the ground that the reports are not inclusive as these failed to include the views of influential Bikkus as well as oral submissions by the JO. The JO in totality rejected the proposals by the SC. Devolving power to the provinces is opposed by the opposition.

Rajapaksa has argued in Parliament against devolving powers to the provinces on the following lines:

- Since the land, province and financial powers are going to be devolved to the provinces, the central government cannot take them back even with the combined authority of a two-thirds majority in parliament plus a country wide referendum.
- A devolved power can be taken back only if each and every provincial council gives its assent to the proposed change.
- A federal unit or an independent state in the northern and eastern provinces has been a political project pursued by politicians of the North and demand for devolution of power touted as an argument to hide a separatist agenda.
- In India the vast majority of Tamils live in Tamil Nadu, whereas in Sri Lanka the majority of Tamils are permanently residing outside the North-East.

He reminded the government that here are 40 MPs who won the last parliamentary election under his leadership and ‘they can defeat the constitution in parliament’. According to the former president of Sri Lanka the government should ‘give up the quest for a new constitution which is going to serve the interests of northern politicians’.

Joint Proposals by four parties

The APMC, Eelam People’s Democratic Party (EPDP), Sri Lanka Muslim Congress (SLMC) and Tamil Progressive Alliance (TPA) submitted joint proposals on the draft submitted on 8th August 2017 by the SC. For long, the Muslim community is opposed to merger of Northern and Eastern Provinces and ‘expect the Tamils to recognise the Muslims as a separate entity for historical and cultural reasons although they speak the same language’^{xv}. Sri Lanka Muslim Congress (SLMC) Leader Rauf Hakeem also took a position that his party is not against giving priority to Buddhism in the new constitution but highlighted the need to include provisions where other religions are treated with dignity and respect.^{xvi}

Implications for Constitutional Reforms Process

Different perspectives on the constitution drafting process indicates that differences of opinion on important constitutional matters persist and introducing an all-encompassing constitution before the next presidential elections of 2020 -- as expected by the Tamil parties and the Sri Lankan government -- may not be possible. The SLFP, JVP and JO are against changing the unitary character of the state.

There is also no agreement among political parties on devolving powers to the provinces or the unit of devolution. Devolution of power to the provinces is equated with bringing in a federal system or accommodating separatism within the country. Apart from divergent views on constitutional matters, the constitution drafting process is also linked to the government's handling of human rights violations, implementation of "good governance" programmes and rebuilding of the economy.

The constitutional reform process was initiated by the government in the hope that it will promote reconciliation through constitutional means; address the issues raised by the UNHRC resolution on Sri Lanka; and, build a positive image of Sri Lanka. The UN asked the government to promote transitional justice mechanisms which can address the matter of truth, justice and reparation, and guarantee of non-recurrence.

To address the issue, the government set up mechanisms such as 'the Secretariat for Coordinating the Reconciliation Mechanisms (SCRM), different technical working groups, Consultation Task Force on Reconciliation Mechanisms (CTF) and enactment of Office of Missing Persons (OMP) law'.^{xvii} The government also allocated Rs. 1.4 billion for establishment of OMP and it will be operational by the first quarter of 2018. Apart from OMP, it also has to set up mechanisms such as truth-seeking commission, a judicial mechanism with a special counsel and a repatriation office as promised to the UN.^{xviii} The government has got two more years' time to implement these mechanisms.

The government of Sri Lanka is in the process of implementing the UNHRC resolution and took initiatives to improve the ground situation in the North and East of the country. For example, it maintains that the number of Internally Displaced Persons (IDPs) reduced considerably after the war. At the end of the war in 2009, the 'IDPs number stood at 300,000 and the number reduced to 3000 individuals belonging to 765 families in 2017'.^{xix} Regarding compensation to the victims, the government claimed that it had spent Rs. 574 million as of October 2017. On demilitarisation in the Northern and Eastern Provinces, according to the government, 'armed forces had vacated 57,278 acres of state lands and 24, 675 acres of private land in the North and East. At the end of conflict in 2009, the army occupied around 88571 acres of state land and 30,337 acres of private land'.^{xx}

Some of these measures may provide temporary relief to the victims of war but the presence of the military for civilian activities and surveillance in the North and East is creating an atmosphere of fear and intimidation among the civilians. The Tamil political parties have urged the government to withdraw the security forces and repeal the Prevention of Terrorism Act (PTA). The recent reports of torture and rape of victims of war belonging to the Tamil community in Sri Lanka by security forces for their alleged past links with the LTTE and 'accused of trying to revive a rebel group on the losing side of the civil war' had put a question mark over the government's efforts at addressing transitional justice issues.^{xxi}

In another instance, the president of Sri Lanka came out in support of Gen. Jagath Jayasuriya (who served as Sri Lanka's ambassador to Brazil) after the human rights groups in South America filed lawsuits against him for overseeing military units that attacked hospitals and killed, disappeared and

tortured thousands of people at the end of the war. The support the General got from the president indicates that the government is still not ready to probe war crimes against high-profile military officers. Meanwhile, in response to allegations of torture report by the Associated Press the secretary to the ministry of foreign affairs, Prasad Kariyawasam, in his letter to *The New York Times* mentioned that in the year 2017, 'disciplinary action has been taken against 33 members of the police for assault and torture, and disciplinary matter pertaining to 100 police officers are currently pending'^{xxii}.

Split within TNA

The support of Tamil parties to the NUG was instrumental in building a positive image of the Sri Lankan government in international fora. However, the split within the TNA and differences between the chief minister of the Northern Province and the TNA leadership might undermine the constitutional reform process. In November 2017, the Eelam Peoples' Revolutionary Liberation Front (EPRLF) and Tamil National People's Front (TNPf) decided to split from the TNA on grounds that the TNA is silent on registering itself as a single political party and ceased to be in alliance with various parties'^{xxiii}. The EPRLF was also of the opinion that the TNA is "too lenient towards the government in presenting the demands of the Tamil people" and 'in the grip of Ilankai Tamil Arasu Katchi (ITAK) leadership comprising R.Sampanthan, Mavai Senathiraja and M.A.Sumanthiran'^{xxiv}.

The EPRLF and the TNPf are also part of Northern Provincial Council chief minister's party, the Tamil People's Alliance (TPC), which 'describes itself as a Tamil national movement not as a political party'^{xxv}. Splits within the Tamil political establishment and lack of agreement on how to proceed with the constitutional reform process is going to strengthen the opposition forces against the constitution drafting process.

Differences between UNP and the SLFP

The government's main slogan after coming to power in 2015 was to bring in good governance reforms. The fight against corruption was projected as one of the main goals of the unity government. But, the unity among political parties required to pass a new constitution might be affected by handling of corruption cases by the government and due to postponement of the provincial council (PC) and local council elections. Differences of opinion between the UNP and the SLFP over the handling of corruption cases had surfaced recently. For instance, the UNP minister accused the 'government of targeting the UNP members in the Treasury Bond scam through the Presidential Commission which started investigations on the scam since 2015 rather than since 2008'^{xxvi}. The UNP stressed that its leader Prime Minister Ranil Wickremesinghe will go before the Bond Commission to give evidence -- not as a suspect in the case but as one who would appear before the commission voluntarily. The lack of progress in dealing with cases pertaining to the former president and his allies on corruption cases is seen as favouring the past establishment led by Rajapaksa. Newspaper reports suggest that the arrest of former defence minister and brother of Rajapaksa, Gotabaya Rajapaksa 'due to alleged misappropriation of over Rs. 90 million of government funds for the construction of a memorial for his parents when he was the defence secretary was evaded due to intervention by Maithripala Sirisena'^{xxvii}.

The postponement of PC elections is another issue. The government postponed the PC elections that were due in late 2017 by making amendments to the constitution. Future elections will be held based on the mixed representation system. Local council elections have also been postponed for the past two years. The UNP, JO and the JVP accused the government of postponing the elections for political gains. The JVP submitted a no-confidence motion against the provincial councils and Local Government Minister Faizer Mustapha for not conducting the elections on schedule. The UPFA allies also boycotted the meeting called by the president on 21st November 2017 to discuss matters relating to local council elections citing policy differences. The Democratic Left Front (DLF) led by Vasudeva Nanayakkara, the Mahajana Eksath Peramuna (MEP) led by Dinesh Gunawardane, the Lanka Sama Samaja Party (LSSP) and the Sri Lanka Mahajana Party (SLMP) did not attend the meeting'.^{xxviii} The Sri Lanka Muslim Congress (SLMC) backed holding the local government (LG) elections under the old system.

Both the Sinhala parties, the SLFP and the UNP, are trying to increase their base among Sinhala voters and, simultaneously, the leadership is trying to maintain the balance of power that exists at present. This is evident from the president's statement recently that "the SLFP passed the 19th Amendment to the Constitution in the Parliament at a time when the UNP had only 47 seats in the Parliament. 142 MPs from SLFP and UPFA voted for that. We should strengthen the SLFP not only to win elections but also to create a better political culture".^{xxix} Both the UNP and SLFP are planning to contest the local council elections separately.

The SLFP led by Maithripala Sirisena is not in favour of abolishing the executive presidency altogether, whereas the UNP led by Ranil Wickramasinghe is in favour of abolition and for strengthening the parliamentary system. There is also an argument put forward by the JP and some of the SLFP members that 'since the UNHRC resolutions on Sri Lanka since 2012 to 2017 asked the government to ensure devolution based on the 13th amendment to the constitution' there is no need for bringing in new constitution'.^{xxx}

Regarding devolution of powers, even the governor of the Northern Province expressed his reservations as the province is unable to utilise the powers granted to the province. At the 'Provincial Council level the devolved powers can be empowered by passing statutes. The governor has the power to pass the statutes. The Northern Provincial Council according to the governor has passed only eight statutes'.^{xxxii} In his opinion the allotted money for the development of Northern Province could not be spent due to contradictions among politicians. For instance 'projects such as Iranamaduru water scheme, economic centre in Vavuniya and a botanical garden in the North could not be completed due to opposition from politicians and due to non-cooperation. He said the PC of North has become a failure now'.^{xxxii}

Lack of consent from religious leaders

The lack of support for the constitution drafting process from influential Buddhist monks is another issue which will impact the outcome. For instance, the Buddhist monk, Ven. Elle Gunawansa Thera

asked ‘the government not to deceive the people with regard to SC report and urged the MPs to avoid supporting it when presented in Parliament’. The JO is strongly backing the views of the monks in public rallies against the constitution. The three steps announced by the president regarding the constitutional reforms in October such as All Party Conference (APC), with participation of the political parties represented in parliament, a conference of all religious leaders and conference of scholars and intellectuals who are interested in this national issue might address the problem to some extent’.^{xxxiii}

Rebuilding of economy

Reconciliation and peace is a necessity to rebuild the economy. Therefore, amidst the constitutional developments, the National Economic Committee was established after consultations with ADB, IMF and the WB. To revive the economy the government also released its new economic policy document, Vision 2025, in September 2017. The document presents intermediate targets which the government would want to achieve before the presidential elections of 2020, and to become an upper-middle income country by 2025. These targets are: ‘rise in per capita income to US\$ 5,000 per year, creation of one million new jobs, increasing FDI to \$ 5 billion per year, and doubling exports to \$ 20 billion per year’.^{xxxiv} Achieving these targets is important for the prime minister and his party, the UNP, as he is handling the economic policy of the government as part of the coalition. Rising inflation and debt is a concern for the government along with corruption charges in the Central Bank Bond Scam.

Conclusion

According to the Sri Lankan president, “the regaining of the GSP+ and the withdrawal of the ban on exporting fish by the EU are the direct outcomes of the positive image of Sri Lanka and his government being “able to dissuade the global community hauling Sri Lanka leaders from the previous Government before the International Criminal Court (ICC)”^{xxxv}. However, the final outcome of the constitutional exercise in Sri Lanka would depend on continuation of a bi-partisan government at the centre, unity among minorities’ parties, accessibility of the governance structures to all communities and sharing of state power. These features are lacking in the present political set-up. The debate in Sri Lanka on constitutional reform is bogged down by the same ideas and obstacles that were responsible for emergence of conflict. Competitive party politics are slowly dominating the discourse on reconciliation and constitutional reform as evident from the debates in parliament on constitutional reforms.

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Disclaimer: The views expressed are that of the Researcher and not of the Council.

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