Background Paper

Constitutional Development in Sri Lanka

PILDAT Conference on Constitutional Development in Pakistan

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Constitutional Developments in Sri Lanka is a Background Paper authored by Mr. Lal Wijenayake, Chairman, Public Representations Committee for Constitutional Reforms, Sri Lanka for the PILDAT Conference on Constitutional Development in South in Islamabad on May 05, 2016.

The Background Paper aims to trace the Constitutional Development in Sri Lanka keeping in view the factors of Principles and Practices of Federalism, Evolution of Form of Government (Parliamentary vs. Presidential), Role of Religion, Provision of Local Government, Reservation of Quotas, and the Constitutional Issue of Languages. For each of these factors, the Background Paper highlights their current status, historic evolution, the challenges faced and possible lessons to be learnt.

Disclaimer

The views expressed in this paper belong to the author and do not necessarily represent the views of Pakistan Institute of Legislative Development and Transparency (PILDAT).

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Mr. Lal Wijenayake joined the Lanka Sama Samaja Party (LSSP) in 1963, which was considered to be *the most influential professedly Trotskyist party anywhere in the world*. In 1972 he was elected to the Central Committee of the LSSP and soon he was appointed to the politburo. After contesting the first ever Provincial Council election in 1988 and becoming *the* opposition leader of the Central Provincial Council, he served as a LSSP Provincial Councilor for almost fifteen years, continuously.

An Attorney-at-Law, he is currently, he is serving as the Chairman of the Public Reforms Committee on Constitutional Reforms, Sri Lanka.
Constitutional Development in Sri Lanka

At the moment Sri Lanka (SL) is in the process of drafting a new constitution. The process has already started with Parliament by resolution having resolved that there shall be a Committee which shall have the powers of a Committee of the whole Parliament consisting of Members of Parliament, for the purpose of deliberating and seeking the views and advice of the people, on a constitution for SL and preparing a draft of a Constitution Draft for the consideration of Parliament in the exercise of its powers under Article 75 of the Constitution.

Article 75 of the constitution states that “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”.

Therefore, it is seen that the Sri Lankan Parliament is in the process of enacting a new constitution under the existing constitution of 1978.

Under the provisions of the 1978 constitution Parliament should adopt such a constitution with a 2/3 majority of Members of Parliament and further has to be rectified by the people at a referendum by a simple majority.

Further, for the first time in the history of constitution making in Sri Lanka, Parliament in the resolution has expressly resolved that the Constitutional Assembly (which is a Committee of the whole Parliament) will seek the views and advice of the people. For that purpose the Cabinet of Ministers has appointed a Committee of 20 members to hear and report on the views of the public on “Constitutional Reforms” with the recommendations of the Committee.

This ‘Public Representations Committee on Constitutional Reforms’ (PRC) was given a very short time frame to carry on its mandate. The Committee was split itself into smaller groups and has during the last four months visited all 25 districts and held Public Sittings after extensive publicity being given about the sittings of the Committee.

The public has shown tremendous enthusiasm unexpected at the beginning of the work of the Committee. The Committee has received oral submissions from 2226 persons/organizations and written representations by way of e-mails, fax messages and through web-site running into over 2800.

The public representations from North to South of Sri Lanka show the common demand for the democratization of the state and national reconciliation. Another glaring demand was that the state machinery should reach the people and be people friendly.

These demands reflect the historic victory of President Maithreepala Sirisena over President Mahinda Rajapakse on 8th January 2015. It is the first time in the history of Sri Lankan politics after independence in 1948, that the people in the North (dominantly Tamil speaking) and of the South (dominantly Sinhala speaking) has voted with one voice for a common cause which was democratization of the state and national reconciliation.
The necessity of a new constitution has arisen due to the experience that the country underwent during the Rajapakse regime after the end of the 30 year war wedge against the state by the Tamil speaking people of the Northern and Eastern Provinces. The war ended in 2009 but the period after the war was seen as a period during which there was a complete breakdown of Rule of Law, Independence of the Judiciary (removal of the Chief Justice unconstitutionally and almost by force) and extensive violations of Human and Fundamental Rights.

The constitution of 1978 failed to protect the people against this encroachment into their Fundamental Rights and painful blows on democracy itself.

Sri Lanka has a long history of constitution making. At the time when Sri Lanka (then Ceylon) was under British rule and on the verge of gaining independence from British rule in 1948, Britten promulgated the constitution of 1946 by way of a Order in Council that is, Ceylon Constitution Order in Council of 1946 and establish a Parliamentary form of government on the Westminster model, on the recommendations made by the Soulbury Commission headed by Lord Soulbury.

This constitution with certain amendments lasted after the promulgation of independence by the British by way of the Ceylon Independence Order in Council of 1947 and the Ceylon Independence Act of 1947 of the British Parliament.

The Westminister model of Cabinet government was a highly centralized government which one would say was the clauses to the ideal of a Unitary State. But it was important that the word Unitary was not mentioned in the constitution.

There was no room for devolution of power and/or any form of sharing of power recognized under the constitution.

Sri Lanka being a multi-ethnic, multi-religious, multi-cultural country had despite the highly centralized Unitary State, fairly stable democratic governments and a political system that respected democratic values during the period of the Soulbury constitution till 1972.

During this period the demand for Federalism came up as a serious challenge to the then existed unitary form of government from the Tamil speaking people of the North and East. But due to the relative stability that prevailed and adherence to values of Parliamentary democracy, the demand for federalism went unheeded.

The democratic system of government under the Soulbury constitution worked very well as seen from the fact that during this period five governments were defeated at free and fair elections.

The government of Sirimavo Bandaranaike that came to power in the Parliamentary election of 1970 promised to draft a home grown constitution and to make Sri Lanka a Republic, that is, to bring about a complete break from the British Crown. The Parliament elected 1970 claiming to act under the mandate received from the people at the Parliamentary election, constituted themselves as a Constituent Assembly and commenced the process of drafting the first home grown constitution for Sri Lanka.

Legislative power was vested in Parliament under Section 29 (2) of the Soulbury constitution of 1947. This Section read as follows:
29(1) Subject to the provision of this order Parliament shall have power to make laws for peace, order and good government of the island.

(2) No such law shall –

(a) prohibit or restrict the free exercise of any religion; or

(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or

(d) alter the constitution of any religions body except with the consent of the governing authority of that body:

Provided that, in any case where a religious body is incorporated by law, no such alterations shall be made except at the request of the governing authority of that body.

(3) Any law made in contravention of sub section (2) of this section shall, to the extent of such contravention, be void.

(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of His Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the provisions of the Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present).

Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law.

The Supreme Court and the Privy Council in some cases that came up before these courts in their judgments in obiter dicta posed the question as to whether Section 29 of the Soulbury Constitution being the Section that vested legislative power in Parliament, which will mean that the legislative power in Parliament was drived under this Section, can be amended and/or repealed. It was said that Section 29 of the Soulbury Constitution is the ‘fountain of legislative power’ and therefore, can Parliament by itself repeal or amend this Section. All laws have to fall within the frame work of Section 29.

The rationale behind Section 29 was said to be the protection of the rights of minorities both religious and ethnic.

Though experiences shows that this Section has not in anyway helped the minorities in protecting their rights, as was seen from the fact that when Tamils of Indian Origin was deprived of their franchise by the Indian and Pakistani Citizenship Act of 1949 and by the
amendment brought to Parliamentary elections Act this group was deprived or right to vote at electionS to Parliament.

When this blatantly discriminatory legislation was challenged in the Supreme Court, the Supreme Court held that Section 29 of the Soulbury Constitution did not bar Parliament in bringing in legislation to define who a citizen is.

Similarly, when the Parliament of Sri Lanka enacted the Official Languages Act of 1956, making Sinhala language the only official language of Sri Lanka, which was again blatantly discriminatory to Tamil speaking people of the North and East of Sri Lanka in particular and all Tamil speaking people in general, the Tamil speaking people failed in their attempt in challenge the validity of the Act of Parliament in the Supreme Court.

Still the minorities continued to claim that Section 29 is the Section that protects minority rights, perhaps due to the fact it was the only provision to which they could hang on to for relief.

It is to be noted that the failure to get relief from the Supreme Court in these actions, strengthened the demand for federalism that emanated from the Tamil speaking people from the North and East.

Due to the emergence of the discriminatory provisions at the General Election of 1956, the Federal Party that had only 3 members in a Parliament of 101 members increased its strength to 14 members. What was important was that they won almost all seats in the North and East of Sri Lanka where the Tamil speaking people were in majority.

Therefore, the demand for federalism emerged as a serious demand by the Tamil speaking people of the North and East.

The government of Sirimavo Bandaranike in 1970 that was committed to drafting a home made constitution, in anticipation of a legal challenge based on the limitation on legislative power under Section 29, decided to enact the new constitution not under existing Soulbury constitution but completely independent of it, without any link to the Soulbury constitution by deriving its right to proclaim a new constitution by the mandate of the people received at the General Election. In fact, proclaiming that the making of the constitution was based on the sovereignty of the people.

The constituent Assembly, though was comprised of the Members of Parliament elected at the Parliamentary election in 1970, did not function as Members of Parliament in drafting the constitution but as Members of the Constituent Assembly, mandated by the people through their sovereignty to draft a constitution for a Republic of Sri Lanka. In fact, the Constituent Assembly did not even sit in Parliament building to show symbolically that the Constituent Assembly had no link to Parliament and/or to the Soulbury constitution.

The 1972 constitution declared Sri Lanka to be a free, sovereign and independent Republic. Thus breaking away from the British Crown.

Section 2 declared Sri Lanka to be a Unitary State. Though under the Soulbury constitution Sri Lanka was in fact a Unitary State it was not constitutionally declared as a Unitary State. The Republican Constitution of 1972 specifically declared Sri Lanka to be a Unitary State, thus
shutting the door for any compromise on devolution of power with the Tamil speaking people in the Northern and Eastern provinces, who were demanding federalism. It is in fact, significant that the Federal Party did not take part in the proceedings of the Constituent Assembly after the Assembly declined to discuss their demand for federalism.

Therefore, the first Republican Constitution turned out to be highly centralized form of Parliamentary system of government on the Westminster model. The important difference was that while Sri Lanka under the Soulbury constitution was subject to the supremacy of the constitution under Section 29, the Republican Constitution declared that the sovereignty was in the people and that the sovereignty is inalienable. Section 2 of the Republic Constitution declared that peoples’ sovereignty is expressed through National State Assembly (the legislature was named as such) elected by the people. Section 5 of the constitution declared that the legislative power of the people will be exercised by the National State Assembly directly and that the executive power of the people will be exercised by the President and the Cabinet of Ministers, while the judicial power of the people will be exercised by Courts and other institutions created by the National State Assembly.

This in no uncertain terms sets out the supremacy of the National State Assembly.

Therefore, devolution of power was not even mentioned in the constitution which was declared to be a unitary constitution. Therefore, this constitution cut right across the demand of the Tamil speaking people for federalism or even for some form of devolution/sharing of power.

This constitution lasted only till 1978. In 1978 J.R.Jayawardene came to power defeating the Sirimavo Bandaranaike government by a massive 5/6 majority. J.R. Jayawardene promised a presidential system of government and hence the 2nd Republican Constitution of 1978 was enacted. The 1978 constitution was brought in without any form of consultation with the people and in fact was introduced to the National State Assembly as an Urgent Bill. By declaring it as an Urgent Bill the pre enactment Judicial Review which was limited for seven days was made use of and the people were deprived of the right to express their views on the constitution or challenge the Bill in the Supreme Court. Perhaps, this may be the first time in the history constitution making where a new constitution repealing an existing constitution was enacted by way of an Urgent Bill.

In the Executive Presidential form of government introduced by the 2nd Republic Constitution of 1978, Executive power was vested on an elected President. The President was declared to be the Head of State, the Commanding Chief of Armed Forces, the Head of Government and the Head of the Cabinet.

Therefore, it is seen that what was envisaged was a powerful Executive President who was above the Parliament and the Cabinet.

The Section on the unitary nature of the constitution was retained and hence there was no room for any form of devolution of power. As a result, parallel to this constitutional development to bring about a highly centralized unitary state with a strong President, the struggle for federalism was shifted from Parliament to direct struggle against the constitution in the Northern and Eastern parts of Sri Lanka. The Tamil youth took to arms and this development of the arms
struggle was a matter that occupied the politics and constitutional making in Sri Lanka during the next 30 years.

Due to the armed struggle and demand for a separate state by the political parties representing Tamil speaking people of the North and East, in 1987 India directly intervened to bring about a settlement by devolution of power within a undivided country and hence the constitutional reforms in 1987 was introduced through the 13th amendment to the constitution. The main reform was the devolution of legislative and executive power on 9 provinces of Sri Lanka on subjects set out in the 13th amendment. The attempt was to satisfy even to a certain extent the aspirations of the Tamil speaking people of the North and East who were fighting for autonomy.

The Constitutional Reforms of 1987 was the creation of 9 Provincial Councils vested with legislative and executive power on subjects set out in the 13th amendment within a constitution which was a unitary constitution. Attempt to devolve power within a Unitary State was not accepted with any enthusiasm by the Tamil speaking people. This architecture was doomed to failure as the Provincial Councils with legislative and executive powers vested in the Provincial Councils under a Unitary State was self contradictory. When the 13th amendment Bill was challenged in the Supreme Court, the Supreme Court Bench of 9 judges were divided five to four in declaring that the 13th amendment did not violate the provisions in the constitution in respect of a Unitary State. The basis of the judgment was the view of the majority of judges that Parliament is supreme and that the 13th amendment does not violate the right of Parliament to legislate if necessary on all subjects, though legislative and executive powers regarding those subjects set out in the 13th Amendment was vested with Provincial Councils.

Hence, the Provincial Council system did not go to satisfy the aspirations of the Tamil speaking people.

The devolution of power was not only to the Northern and Eastern provinces but to all 9 provinces of Sri Lanka. Therefore, for the first time in the history of constitution making in Sri Lanka legislative and executive power was devolved into sub units (provinces).

While the 1978 constitution by conferring immense power on Executive President violated most of the norms of representative democracy, it completely shifted the center of power from Parliament to the President, who was outside Parliament. Therefore, there was no possibility of any form of power sharing at the center as well.

After end of the war in 2009, the necessity arose to look at the constitutional framework to see if it is possible even to a certain extent to satisfy the aspirations of the Tamil speaking people to enable a process on national reconciliation to be set in motion. This was neglected during the period of the end of war up to 2015. In the meantime, the 7 Provincial Councils which were dominated by Sinhala community became mere implementation agencies of the government due to the Executive Presidency been strengthened to create an all powerful Executive President.

On January 8th, 2015 President Maithripala Sirisena was elected to power supported by the United National Party of Prime Minister Ranil Wickramasinghe on an agreed programme. The essence of which was the democratization of the state by the repeal of the Executive Presidential
system and reintroduction of Parliamentary democracy, where executive power resides on the
Cabinet of Ministers responsible to Parliament, as it was before 1978.

The powerful Presidential system that was introduced in 1978 was further strengthened by the
Rajapaksha regime in 2010 by adopting the now infamous 18th amendment to the constitution,
whereby the President assumed more powers by doing away with Independent Commissions and
taking it upon himself the power to make appointments to Supreme Court, Court of Appeal and
all high officers. These powers were vested under the 17th amendment to the constitution in 2001
(where an attempt was made to reform the Executive Presidential system by depriving the
President of some of that highly controversial power). The power of appointment to Judges,
Superior Courts and to Independent Commissions was vested under the 17th amendment in a
Constitutional Council. The Constitutional Council was established to depoliticize the
institutions of the state. The Speaker of Parliament was the Chairman of the Constitutional
Council, with the Prime Minister and Leader of the Opposition been two other members. The
Prime Minister and the Leader of the Opposition was to nominate by consensus five non political
eminent persons to the Constitutional Council and the President was entitle nominate one person
while the other person was to be nominated by the smaller parties in Parliament.

This Constitutional Council went into crisis within a short period due to certain inherent defects
in the 17th amendment itself and hence, Mahinda Rajapakse took upon himself the appointment
of the Judges of Superior Courts and all other Independence Commission violating the
provisions of the constitution.

After the January 8th verdict of the people the government of President Maithripala Sirisena with
Ranil Wickramasinghe as Prime Minister brought in the 19th amendment to the constitution
whereby as promised at the election. The powers of the President was curtailed to a large extend
by taking away from the President the power of appointment of Judges of Superior Courts and
Independent Commissions and officials to of high posts.

Though the 19th amendment has pruned down the powers of the President, what we have in Sri
Lanka is still a Presidential system of government. The attempt by the new government to
completely abolish the Presidential system failed due to the Parliament being, dominated at the
time, of the introduction of the 19th amendment by Rajapakse loyalists. But the Parliamentary
Election of August 2015 has changed this balance of power in favour of the present government
of President Maithripala Sirisen and Prime Minister Ranil Wickramasinghe and they command a
two third majority in Parliament.

Therefore, the present attempt is to make a constitution that will satisfy all sections of the
population by democratization of the state and bring about national reconciliation by finding a
way out to satisfy the aspirations of minorities. It is now almost agreed that the widening of the
chapter on Fundamental and Human Right and full implementation of the provisions of the 13th
Amendment which will vest with the Provincial Councils legislative and executive power on
subjects that can be dealt with at the provincial level will go a long way to find solution.

Sri Lanka is at present engaged in this endeavor to bring about a new constitution.