

Constituting a constitution

By Srilal Perera

In the early 1960s, while a student at Trinity College, Kandy, a particular issue arose regarding a proposal to change the constitution of one of the three boarding houses. A brave lad from Napier House approached the House Master, Theodore ("Toughie") Silva, and informed him that the membership wanted to change the Napier House constitution. Mr. Silva, a tough disciplinarian, by reputation, responded, "I zay, I am the constitution. First, change me." There the matter ended.

Sri Lanka is again following the processes of adopting a new constitution. What are the fundamental elements of a democratic constitution which will ensure that the rule of law will prevail, preserve fundamental rights and establish the integrity of the unitary state? What are the fundamental issues with the 1978 Constitution? Are the proper procedures for change being followed? Is it time to change the Constitution?

The unitary state and the structure of Government

A peripheral reading of democratic constitution making, from the first ever known in Sparta, authored by Lycurgus, and of modern democratic constitutions reveals some fundamental elements. One such element relates to the territorial integrity of the State. Indeed, both for external and internal stability, the entrenching of the "unitary state" concept with recognised boundaries is the foundation for and sacrosanct in any constitution. The second element concerns the structure of democratic government, in the form of the executive, legislature and the judiciary. These three equal elements constitute the governmental structures which are built on the foundation of the unitary state. They are legitimised by the democratic constitution. It was from these fundamental elements that all laws and regulations of governance emanate and further legitimised or rejected, if challenged. The stronger the "checks and balances" of power between the executive, legislature and the judiciary, and lesser the overwhelming power of one over the other, the more stable the democratic government would be and the continued integrity of the constitution.

For Sri Lanka, one other characteristic of democratic constitutions is deemed relevant. This distinction is between the centralised democratic form and the federal democratic form. In the centralised democratic form all power is centralised within the central government through elected representatives from the various territorial units which constitute the state. In the

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conducting all foreign relations and the defence of the State is reserved for the central or federal government.

The American Civil War from 1861-1865 is instructive as an example of preserving the unitary state as a function of the federal state. The secession of seven southern states, dedicated to the preservation of an economic system centered on slavery, and the federal government's characterisation of that secession as an illegality, finds an interesting parallel in Sri Lanka's own protracted internal war from 1983 to 2009. Overtly, the American Civil War was commonly recognised as a war engaged in to dismantle what was a morally unsustainable system of slavery, mostly prevailing in the southern states of the United States. Seven of these states declared secession in 1861 and formed a confederation in the South with its own President, Jefferson Davis. Abraham Lincoln who was elected as President of the United States in 1861 argued that the US Constitution was a binding and legal contract and alleged that the seceding states were in breach of the US Constitution. A court addressing this issue in a rather contemporaneous law suit -- Texas v. White (74 US 1869) -- found that the US Constitution did not permit unilateral secession and that any ordinances to that effect arising from the Texas legislature was "absolutely null". The federal government successfully preserved the union.

The dominance and the importance of a constitution as the primary and only legal instrument preserving the territorial integrity of the unitary state, and the structure and legitimacy of government, therefore, is serious and extremely important to note.

The people's approval for constitution making

If the original concept was that a democratic constitution was framed with the will of the people, it followed then that such a constitution, as it was in Sparta, demonstrated that the people be at all times be consulted during the democratic constitution making process.

The importance of a constitution as emanating from the will of the people is important to note, not merely as a theory but as characteristic of the dedication to a fundamental democratic principle. It is, therefore, relevant to note in context this principle enshrined in the single paragraph preamble to the US Constitution:

America."

The emphasis on the concept of the unitary state and its defence is clearly evident.

The strong link between the people and the constitution was not altogether lost in Sri Lanka. With regard to the constitutionality of the subject matter of the then proposed 19th Amendment to the Constitution of Sri Lanka, the Supreme Court opined recently:

"The people in whom sovereignty is reposed having made the President as the Head of the Executive in terms of Article 30 of the Constitution entrusted the President the exercise of the executive power, being the custodian of such power... [I]f there is no link between the President and the person exercising the Executive power, it may amount to a violation of the mandate given by the people to the President."

The 19th Amendment was significantly changed in conformity with the Supreme Court's opinion to avoid the need for a referendum, which the Supreme Court recommended in the circumstances.

It is acknowledged then that a democratic constitution making procedure requires, at all times, a deep comprehension of and respect for the will of the people. A referendum, therefore, is one instrument which must be utilised for receiving the approval of the people for the purpose. Constituent assemblies representing the people's will are the subsequent institutional mechanisms which can be established to follow through.

Sri Lanka: Threshold issues for a constitutional change

Do the current and politically stated threshold issues in Sri Lanka warrant a constitutional replacement at the present time? The stated objectives for constitutional change appear to be generally three fold. First, the abolition of the executive presidency and its replacement with an alternate executive structure. Second, consideration of more extensive devolution of power to the provinces; and third, as reflected in the proposed 20th Amendment, creation of a more effective electoral process for representation in Parliament.

A proposal to replace the executive presidency is such a fundamental change that replacing the existing 1978 Constitution may be warranted on that basis alone. Similarly, wide-scale changes to the elec-

Devolution of power to the territorial subdivisions is deemed necessary to eliminate the perceived discrimination of a minority in the Northern and Eastern provinces of the nation.

Whether by constitutionally devolving powers to the territorial units, the underlying issue of discrimination against minorities could be resolved or eliminated is extremely difficult to determine. In the United States, the history of civil rights legislation is quite informative about this issue. With maximum devolution extended to the federal states under the 10th Amendment to the US Constitution, it still took nearly 100 years after the passage of the 13th Amendment in 1865, for Congress to pass the Civil Rights Act in 1964 that banned all forms of discrimination prevailing in the United States. Despite this historic legislation, to date, racial discrimination and stereotyping persists in the United States.

The solution, therefore, may not be in extensive devolution of power but inclusion in a prospective constitution, fully enforceable provisions for the protection and preservation of fundamental rights of all citizens against discrimination in any form or manner.

Sri Lanka is, however, currently facing a far more critical problem with its present Constitution. It is that the 1978 Constitution can be deemed dysfunctional and weakened to such an extent, its continued utility or effectiveness has been seriously eroded. The 18th Amendment is an example of contributing to that erosion. In fact, the 18th Amendment not only extended the term of the executive presidency beyond the two terms originally envisaged in the Constitution but also asymmetrically extended presidential powers. One of the gravest consequences of the 18th amendment was the verifiable intrusion by the President into the judiciary thereby seriously distorting its independence.

Similarly, representatives of the legislature have been allegedly accused of misconduct and corruption for which accountability has been sorely lacking over the years. Also, the contemplated 20th Amendment would fundamentally change representation in the legislature.

The 19th Amendment to the Constitution was the bold effort spearheaded by the new President and the Government elected on January 8, 2015 to rein in the excessive powers of the executive presidency exercised through the 18th Amendment. Whether the 19th Amendment has assuaged such concerns is yet to be proven. In fact, the 19th Amendment may have added to the confusion in interpretation of the 1978 Constitution and its amendments. They

Again, the 19th Amendment states in its Section 4:

"Article 31 of the Constitution is hereby amended as follows:

(1) By the insertion immediately after paragraph (1) of the Article, of the following new paragraph:

"(2) No person who has been twice elected to the office of President by the People shall be qualified thereafter to be elected to such office by the People";

The fundamental interpretational issues are startling. The obvious intent of the 19th Amendment, in this specific regard, was to repeal the 18th Amendment. But nowhere in the 19th Amendment is it stated that the 18th Amendment has been repealed. First, it sought to amend the Constitution by replacing the original language of Article 31(2) with exactly the same original language! (The above highlighted language already exists in Article 31 (2) of the Constitution). Second, and as a consequence, the reinserted original language would effectively have no impact on the 18th Amendment since it has not been explicitly repealed.

There are more serious issues in the 19th Amendment. Chapter VIII of the Constitution is substituted by an entirely new chapter. A new Article 46(1)(a) is a stand-alone provision which states, without exceptions, that the total number of Ministers of the Cabinet of Ministers shall not exceed thirty. Now, in reality, there are forty Cabinet Ministers. What are the consequences? Are the President and the Prime Minister in breach of Article 43 of the Constitution? Is the President in breach of Section 5 of the 19th Amendment, specifically Article 33(1)(a) of the Constitution, which requires the President to ensure that the Constitution is "respected and upheld"? Is non-adherence to the obligatory set limits, *ultra vires* Article 82 of the Constitution, more specifically, Article 82(6) and 82(7) of the Constitution?

Thus, the substantive changes through the various amendments to the executive, legislature and the judiciary, are so extensive, contradictory and confusing that it has rendered the original 1978 Constitution to now have little meaning, coherence or effect.

The strength is in the foundation, the devil in the details

There is, in context, clear relevance in the earlier cited Supreme Court's opinion on the 19th Amendment. If its recommendation that certain powers of the executive cannot be transferred, without a referendum from the people is to be respected, then the very replacement of the 1978 Constitution must be consented to by the

democratic form. In the centralised democratic form all power is centralised within the central government through elected representatives from the various territorial units which constitute the state. In the federal form, some of the powers of the territorial units such as, states, provinces and municipalities (often referred to as "sub-sovereigns") are ceded to the federal government and vice versa. In any event, there are inherent restrictions to devolution of unlimited autonomy to the sub-sovereign territorial units. For example,

but as characterised by the dedication to a fundamental democratic principle. It is, therefore, relevant to note in context this principle enshrined in the single paragraph preamble to the US Constitution: "We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of

A proposal to replace the executive presidency is such a fundamental change that replacing the existing 1978 Constitution may be warranted on that basis alone. Similarly, wide-scale changes to the electoral system as contemplated in the 20th Amendment would certainly affect the legislature to consider replacement of the Constitution. Among all three factors, the critical and sensitive question of devolution of powers to the provinces as contemplated for a new constitution is a vital consideration.

Amendment has assuaged such concerns is yet to be proven. In fact, the 19th Amendment may have added to the confusion in interpretation of the 1978 Constitution and its amendments. They are replete with provisions which are bold expressions of intent but disregard the consequential legal implications. For example, the reinstated Article 33(2)(h) in the 19th Amendment regarding presidential powers, has serious international legal implications and may undermine the very sovereignty of the State.

On the 19th Amendment, it is recommended that certain powers of the executive cannot be transferred, without a referendum from the people is to be respected, then the very replacement of the 1978 Constitution must be consented to by the people. A referendum is the instrument by which the people's consent can be obtained.

That apart, the objective should be the laying of a solid foundation for a new constitution primarily grounded on an undertaking that the government shall respect, protect and defend, both internally and externally, the unitary state and its territorial integrity at all times. It is upon this foundation that the three pillars of government, the executive, judiciary and the legislature needs to be constructed. The challenge is to properly calibrate the division of powers - more specifically, through introduction of effective checks and balances. Most importantly, the constitution must establish in no uncertain terms the independence of the judiciary.

Beyond devolution to the provinces, protection of fundamental rights of all people in the nation must also be incorporated into the constitution. Ideally, the Constitution must be one which not only represents foresight, but also establishes sanctions for a breach of its provisions. Caution must be exercised in avoiding unnecessary details for they tend to often result in unintended legal consequences.

With its interpretational issues, internal contradictions and conflicts, highly skewed division of powers, the 1978 Constitution has been seriously undermined. In such circumstances, its retention can only be a harbinger of a continued dysfunctional governing system with very little respect for law, regulation and good governance.

The factors that warrant the replacement of the 1978 Constitution are more than adequately demonstrated. If the processes and procedures for replacement of a new constitution are not undertaken with the proper seriousness which it deserves, another crucial opportunity will be lost. And in the words of one of this writer's most erudite friends: "Sri Lanka never misses the opportunity to miss an opportunity."

(A longer version of this article appears on our website www.sundaytimes.lk)
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