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THE PROPOSED NEW CONSTITUTION: SOME SUGGESTIONS AND THOUGHTS

Introduction:

The Executive Presidency instituted through the 1978 Republican constitution and subsequently amended nineteen times (the 20th was on line) has to be faulted for most of the myriad failures in Sri Lanka’s democracy and governance. The Executive Presidency of Sri Lanka is a badly designed institution within a badly designed and subsequently further distorted constitution. It is probably the strongest office in the world! The constitution of 1978 was designed to bestow unbridled power on one man to do everything but change a man into woman and vice versa, and ensure permanent governance by the UNP. It was designed to make the Executive Presidency dictatorial and unprincipled in the hands of the wrong person holding that office.

In the process all other institutions , the parliament, judiciary and public services, were deformed beyond recognition and made subservient to the Executive Presidency. Accountability, rule of law and everything else that define good governance had been comatose by January’1915. The impunity bestowed on the Executive Presidency, had reached and polluted every mound and crevice in Sri Lanka. Democracy had become a sham. Governance was/is no doubt at its poorest

A nation that had universal franchise 85 years (1931) back- much before other British colonies in Asia- and had a vibrant democracy at independence (1948) has since the 1977 constitution, sold the sovereignty of its people to elected tin pot dictators. The [18th amendment](#) dealt a death blow to constitutional norms, principles of governance even as laid down, ethics, political morality and established principles of democracy.

The questions we have to ask are:

1. Is the concept of a Republican Constitution wrong or is OUR republican constitution deliberately designed wrong?
2. Is the concept of an Executive Presidency wrong or is OUR executive presidency deliberately designed wrong?

My answer to both these questions is the same. The constitution and the executive presidency within it have been deliberately designed wrong. They have been designed to elect a monarch, to whom all other institutions and the people are subsidiary and subservient. It also has paved the way to establish a familial monarchy of sorts. It has paved the way for elected Executive Presidents to assume pseudo-democratic legitimacy through various devices that breach moral and ethical principles, rule us with an iron fist, hiding mala-fide intent with smiling faces and what Nilantha Ilangamuwa (Sri Lanka Guardian. August 5, 2014) quoting Walter Lippmann chooses to call 'Manufactured Consent' in an article.

The concept of 'manufacturing consent' is not an innovation of the last government, but has been practiced by all governments before it, though the last government has made it a very sophisticated exercise. Money power, hired muscle power, mob squads led by yellow clad thugs, white vaning, murder, media manipulations, the police and armed forces, the parliament and the judicial system were used as never before to manufacture this 'manufactured consent'. The manner in which Chief Justice [Shirani Bandaranayake](#) was removed from office will forever stand as an example of this 'manufactured consent'! The manner in which the two thirds majority was constructed and the 18th amendment to the constitution passed is another. There is a multitude, more. What was 'manufactured consent' steadily morphed into 'consent by the quiet and silence of a morgue' enforced by blatant use of pressures of various types. We were made into the four monkeys that do not see, hear, speak or show!

The parliament we had elected was controlled by a majority that owes personal allegiance to the Executive President. The first Executive had pre-signed resignation letters of the members of parliament who supported him! It was/ is also mediocre and is designed to make even the most qualified, mediocre. They bear no allegiance to the people who elected them. The higher judiciary had become a kept institution and dared not stand up to the Executive President. The lower judiciary of course had lost its backbone and independence, and is yet quite mediocre. The public service and police service were under the total control of politicians and their mafia. Political patronage extending from recruitment, promotions up to retirement and beyond has rendered our public service mediocre, inefficient and corrupt. Public servants have become self-

servers, time servers and bootlickers of politicians. The police service has been corrupted beyond imagination and is a handmaiden and doormat of politicians. Every other institution including the education sector, have suffered a similar fate.

However, the larger question that concerns me is whether the Soulbury constitution of 1948- the Westminster style constitution under which we attained independence- and the first Republican Constitution of 1972 instituted by the [Sirimavo Bandaranaike](#) headed leftist coalition were ideal and provided us better quality governance. The [Soulbury constitution](#) was stripped of its soul and vision on many an occasion. Towards the end of its life, it was rendered an empty shell for all intents and purposes. Its institutions were also politicized or paralyzed. The [1972 constitution](#) legitimized and institutionalized the damage done to the Soulbury constitution. It was a document designed to satisfy the objectives of the coalition government of the day to have its way, come what may. This was despite retaining the Westminster model at its core. The checks and balances that were on paper to strengthen democracy, were also degraded under this constitution. The 1978 constitution was the natural outcome of a process that empowered politicians at the expense of other institutions and further advanced to the extent that one politician was made a constitutional dictator- an elected monarch, who had the choice to be a benign dictator or a malignant one. What we had until January 2015 is one who became with time the most malignant, but with the immense ability to pretend otherwise.

What our politicians have demonstrated is a singular inability to function within what have been illustrated to be the empty but illusory words enshrined in our constitutions. Those who we elect to govern us do not want to be constrained by the boundaries set by any constitution. We have tolerated this and have permitted constitution making the job of our narrow minded and self-seeking politicians, who had no exalted vision for this country. Constitutions are mere pieces of paper for them. It is a fig leaf to hide their hideousness. The current government has made many improvements in practice and through the moth-eaten 19th amendment. It has shown what is possible and this has made an undeniable positive impact on this country.

We have lived with the Executive Presidency and a full-fledged Republican Constitution for 38 years- for little longer than half the period we have been independent. A whole generation has grown under it and knows no other. We have got used to how it functions and know how it has been abused. If permitted, the informed sections of our citizens have the knowledge and background to contribute to reforming the Executive Presidency and the constitution that it is part of.

There is no doubt; we have to substantially reform our constitutional framework. It should be a brief, visionary and principled document that can withstand the test of time and be capable of being interpreted according to evolving societal values, the future that is unfolding in myriad ways quite fast and a population that has very high expectations. It should be the guiding light as we go forward and capable of having its batteries recharged time to time by interpretations that suit the times by enlightened persons who man our Supreme Court. This process should have no place for nibbling rats and poaching mongooses. It should be a process to evolve persons to lead and serve us, according to a vision formulated in our constitution.

A VISION AND GUIDING PRINCIPLES

To quote the vision for governance enunciated by Barak Obama in his first inaugural address,

“On this day, we come to proclaim an end to petty grievances and false promises, the recriminations and worn out dogmas, that for too long have strangled our politics.”

“We remain a young nation, but in the words of Scripture, the time has come to set aside childish things. The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea, passed from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness.”

“For we know that our patchwork heritage is strength, not a weakness. We are a nation of Christians and Muslims, Jews and Hindus- and non-believers. We are shaped by every language and culture, drawn from every end of this earth; and because we have tasted the bitter swill of civil war and segregation, and emerged from that dark chapter stronger and more united, we cannot help but believe that the old hatreds shall someday pass; that the lines of tribe shall soon dissolve; that as the world grows smaller, our common humanity shall reveal itself; and that America must play its role in ushering in a new era of peace”.

“To the Muslim world, we seek a new way forward, based on mutual interest and mutual respect. To those leaders around the globe who seek conflict, or blame their society’s ills on the West- know that your people will judge you on what you can build, not what you destroy. To those who cling to power through corruption and deceit and the silencing of dissent, know that you are on the wrong side of history; but that we will extend a hand if you are willing to unclench your fist.” -
Excerpts from President Barrack Obama’s inaugural speech (20/01/2009)

The on-going preliminary exercises in constitution making in Sri Lanka, is very welcome. The public has been confused and confounded by decades of misrepresentation, scare mongering and warnings of possible apocalypse if power is devolved within Sri Lanka. Devolution has been deliberately and maliciously confused with political fragmentation of the island. This confusion has to be cleansed from the public perceptions. Obfuscation has become a fine art in Sri Lanka.

The following is an attempt to present in very broad outline the shapes of a possible new constitution for Sri Lanka, taking into account the aspirations of diverse groups of people- divisions based on ethnicity, geographical location and economic circumstances- for greater say

in their own affairs (True democracy!), faster economic and social development, and cleansing of public life.

It is needless to say that I am neither a politician, lawyer nor constitutional expert, but a concerned Sri Lankan who has lived through the post-independence years of Sri Lanka and been part of its sad history. I am in the twilight years of my life and would consider it a blessing to see Sri Lanka on the road to becoming what it is capable of, before I myself become history. It is what I have read, observed and experienced over most of my adult life that have provided me the background to present what I have. I hope what follows will at least provide a focus and an outline for greater public debate, and permit a consensus to develop, even though it is not exhaustive and may not find favor with many.

It should be enshrined in the new constitution that,

1. It shall be the duty of the state to promote the well being, progress, health and welfare of **all** citizens.
2. It shall be the duty of the state to ensure peace and prosperity in the island as a **whole**.
3. The state shall facilitate the diverse peoples in the island to preserve, promote and develop their linguistic, religious and cultural heritage.
4. **All** citizens shall be equal before the state and its laws, and are entitled to equal opportunities, responsibilities and protection.
5. There shall be no discrimination based on sex, language, ethnicity, religion, geographical location, origins, wealth or position.
6. Just laws and due process shall be the foundations on which the state is built.
7. Every citizen shall be provided the opportunities and environment to develop his/ her abilities and maximize his/ her potential.
8. **Merit and excellence** shall be the guiding principles in public life.

9. Every citizen shall be entitled to freedom of _expression and right of dissent, without impinging on the rights and wellbeing of his/ her fellow citizens.

10. Human rights- as defined by the requirements of the 21st century shall be entrenched in our laws and administrative practices, and upgraded as human thoughts and conditions evolve.

11. It shall be the responsibility of the state and society to care for the weak, disabled, sick, old and disadvantaged, and provide them the opportunity to maximize their potentials and have a meaningful life.

12. It shall be the duty of the state to protect and preserve for posterity the our heritage, bio-diversity, forestry, rivers and agricultural lands.

13. It shall be the duty of the state to protect the environment in all its facets .

14. While every citizen will have the right to be proud of his identity and heritage, and choose to cherish and preserve them, any attempt to impinge on the right of others to do so, will be considered a 'Hate Crime' and subject to the highest punishment in the land.

15. It should be the duty of the State to ensure the history of this country and her people is not mischievously distorted or misrepresented.

16.. Economic crimes, such as bribery and corruption, and social crimes such as nepotism, sabotage, treason, armed rebellion and pedaling forbidden substances shall be also subject to the highest punishment in the land. Ill-gotten wealth shall be subject to confiscation by the state.

16. Minimum qualification criteria for those who seek elected office shall be defined and those holding such offices subject to laws of the land, without any exception, what- so-ever.

17. Any law that violates the above principles and disadvantages any citizen or a group of citizens shall be contravening the principles of this constitution.

SOME SUGGESTIONS IN OUTLINE

The problems that need to be corrected/ instituted in our present constitution are:

1. The power of the Executive Presidency should be clearly defined and fenced, without the office being rendered ineffective /impotent. The purpose of this office should be to make the executive branch effective, fast and efficient in carrying out government policies, with accountability held supreme. The presidential incumbency for any person to be limited at maximum to two consecutive terms only.
2. A cabinet that is nominated by the President, but is approved by the legislature and can be questioned by it. The members of the cabinet must be outstanding elements in society or the legislature. However, those in the legislature should leave it to join a cabinet
3. Cabinet size and ministries should be clearly defined.
4. The president while being Commander-in-Chief of the armed forces and the head of government, should not hold cabinet office. He should preside over cabinet meeting and with the advice of the cabinet formulate national policies and initiate budget proposals and legislation.
5. The president should not be the leader of the political party with which he is affiliated.
6. An independent legislature that has specific and defined functions, which would permit its members to function independent of party affiliations and the executive presidency. The legislators should be answerable to the people who elected them, more than to the party they are affiliated with. The question whether parliament should continue to function as the governing and opposition sides should be addressed. Parliament should function as one body under the Speaker and vote on issues, as they arise in an objective manner.
7. A powerful committee system in the legislature to pave the way for the objectives in #6.
8. Qualifications in terms of education, experience in public life and unimpeachable character for those who contest for political office.
9. Ban on crossing over to another political party, once elected from one party.
10. Elections to the legislature of a duration of five years. However, elections for 1/3 rd membership to be elected every two years should be considered. This found serve as referenda on the performance of the government.
11. The absolute independence of the judiciary, with a clear and objective system for impeachment of Supreme Court judges.
12. The impunity that the executive president enjoys has to be removed. He and his cabinet should not be exempt from the demands of law and constitutional dictates. There should be no

room for the executive president to pick and choose the constitutional provisions he will abide by.

13. A clear separation of powers in terms of the executive presidency, legislature and judiciary

14. More straight forward procedures to impeach a president, without this process being misused.

15. The proportional representation system to be combined with a first past the post system (as in Germany)

16. The power of the President to fix the various election dates should be removed. Election dates should be constitutionally pre-determined.

17. Re-institution of the system of by-elections to the legislature, when a position falls vacant.

18. Independence of the public service should be assured and it should be insulated from political inference, while encouraging interactions.

20. Independence of the police service should be absolutely assured, while ensuring stringent discipline. The police force should also be modernized to meet current international norms.

21. Restriction of the armed forces to their only mandate- security of the country.

22. Absolute equality of citizens as individuals and guarantee of their rights to safety; security; linguistic, religious and cultural identity; wherever they live. A Bill Of Rights should be enshrined in the constitution.

23.. Assured minority representation in the cabinet.

24. Creation of an office of vice-president.

25. Clear devolution of political and administrative power to the provinces and a ceremonial and guiding role for the provincial governor, who should be appointed by the president with the consent of the chief minister and approval of the Provincial Council. The Chief Minister should be granted executive powers and the Provincial Council legislative powers in relation to subjects devolved and consonant with the constitution. If the Provincial Council is dismissed by the President, on the recommendations of the Governor, the Governor should assume Executive powers.

26. A bicameral legislature, where every province has equal representation in an equivalent of a Senate, regardless of population size and with powers to vote down any legislature that it deems unacceptable in terms of the constitution and intrudes into the domain of intra-province governance domain. The term of office in the Senate should be limited to five years.

27. Remove the right of the president to dismiss the legislature.

28. Amendments to the constitution to be approved by 2/3rd majority in the legislature, 2/3rd majorities in all provincial councils and finally pronouncement of acceptance/rejection by the Supreme Court.

29. An independent and strong Election Commission.

30. A Constitutional Council as originally proposed in the 19th amendment.
31. Strong anti-corruption objectives.
32. Definitive restrictions against majoritarian governance, in terms of minorities and citizenship.
33. A provision in the constitution that would make hate mongering a major criminal offence.
34. Unalienable provisions to enshrine human rights, people's rights and media freedom.
35. Depoliticize the Central Bank, as a national institution and ensure its independence.
36. Guarantee the right to information
37. Enshrine a definition of hate crimes in the constitution and make them serious crimes.
38. Establish an independent National Finance Commission to ascertain the needs of the provinces and recommend allocations.
39. Establish a Land and Heritage Commission to make policy and guide/supervise implementation.
41. The concurrent list of powers to be shared by the national government and provincial councils should be minimized and there should be no room for the National Government to take over provincial functions under any guise.
41. Do not have a clause in the constitution, requiring a national referendum to make amendments.

I am sure many more issues, problems and solutions can be identified. The process to do so has commenced now. . However, in the new constitution the ability of the Executive President and his cabinet to get the right things done and quickly respond to the issues of an important/ urgent nature, should not be emasculated. He/she should be able to convince the people on the need for what he/she does, without manufacturing 'consent by silence', as was done on a grand scale until recently..

I have come to admire the constitution of the USA, which has stood the test of time and proven capable of responding to the needs of an ever evolving country. It is capable of self-correction, when aberrations occur. It has been also able to secure the rights of all its citizens to a very great extent and create a national identity that transcends the boundaries of its diverse population. It is the most progressive and liberal nation on earth. It is a country where creativity is encouraged and rags to riches stories are aplenty. It is a country where public debate is managed in an atmosphere of liberty, freedom and free expression, within boundaries set by law.

Our present constitution has many features of the US constitution in a half-house way. It is now time to go the full hog and adopt many of its features that are built on eternally valid principles and stood the test of time, into our constitution.

TIERS OF GOVERNANCE;

Tier1 : The National Government

Tier 2: Provincial Councils

Tier 3. Municipal and Urban Councils

Tier 4. Village Committees.

FUNCTIONS ALLOCATED TO TIERS

Tier 1: NATIONAL GOVERNMENT

Executive President, legislators (Parliament and Senate)

1. National policies on education, agriculture, animal husbandry, fisheries, economic planning , resource allocation, environment, water resource management and land use.
2. National defense in all its dimensions
3. Immigration and emigration
4. International agreements and foreign affairs.
5. Elections
6. Seas and airspace
7. Inter-provincial affairs and disputes
8. Inter-provincial waterways and water reservoirs.
9. Central Bank and currency
10. Banking and insurance
11. Stock Exchange
12. National highways
13. Judiciary
14. National Police and inter-provincial crime
15. Prisons
16. Post and communications

17. Media and telecommunications
18. Imports and exports
19. Taxation in specified areas
20. Seaports, airports and railways
21. Electricity and nuclear power
22. National universities and technical institutes
23. National parks
24. National museums
25. Food and drug safety
26. Foreign aid and borrowing
27. Registering births, deaths and marriages
28. Census and statistics
29. Land registry
30. National archives and library
31. Maritime and land oil and mineral resources
32. National disaster management

TIER 2: PROVINCIAL COUNCILS (ELECTED)

1. Primary and secondary education
2. Provincial Universities and technical institutes
3. Vocational training
4. Health services
5. Agriculture and animal husbandry
6. Fisheries
7. Land and land development
8. Industries and industrial development
9. Provincial highways and roads
10. Intra-provincial rivers and reservoirs
11. Flood control
12. Water supply and drainage

13. Environment
14. Taxation in defined areas
15. Disaster response and management
16. Fund allocations to Municipal and Urban Councils
17. Fund allocation to Villages in consultation with Village committees.
18. Provincial Police , civil defense , law and order, and Provincial Police Commission.
19. Tourism
20. Liquor manufacture, licensing of outlets and control
21. Food manufacture-quality, safety and hygiene
22. Provincial public service and provincial public services commission.

Tier 3: MUNICIPAL AND URBAN Councils (elected)

As is at present

Tier 4: VILLAGE COMMITTEES (nominated at a meeting of villagers supervised by an Official of the Elections department)

1. Study village-related requirements in terms of services, agriculture-animal husbandry-fisheries, marketing, value-addition industries, marketing, employment, water supply, flood control, housing, healthcare, transport, industries, law & order, facilities and officials.
2. Submit request to Provincial Council for study, costing, budgeting and execution.
3. Supervise projects and co-ordinate with Provincial Council

CONCLUSION:

A constitution should define a nation, its peoples and their aspirations, and its future. It should be a document crafted by visionaries and drafted by lawyers. It should not be fashioned exclusively by politicians and crafted and drafted by lawyers, as has been the practice hitherto. It should study what the people need and given a visionary form.

The new constitution should be designed to dethrone the politicians and the bureaucracy, while empowering the people. I hope Sri Lanka would take a leap into the future with this constitutional exercise, do what many would think is impossible and promulgate a new constitution attuned to the 21st century, soon.

I quote below quite extensively from the book 'Third wave' authored by Alvin Toffler (also the author of 'Future Shock' and the 'Power Shift'), as it is quite relevant to Sri Lanka at this point in our history and the ideas therein cannot be expressed any better. Alvin Toffler has divided modern world history into three waves.

The '**First Wave**' was the '**Agricultural Civilization**', which lasted for thousands of years and was based largely on the extended family and the village.

This was followed by what he calls, the '**Second Wave**' -the '**Industrial Civilization**' that was dependent on nuclear families and was based in the towns and cities. The Second Wave massified societies and has globalised the world. This wave has lasted a few centuries.

He describes the '**Third Wave**' that has already set in, but is yet to become dominant, as involving a de-massified human society. Alvin Toffler expects the 'Third wave' to be accelerative, sweep across history and complete itself in a few decades.

The 'Third Wave' is expected to tear our families apart, rock our economies, paralyze our political systems, shatter our values and challenge all the old power relationships, and the privileges and prerogatives of the endangered elites of today. Toffler expects the **Third Wave to be highly technological and anti-industrial.**

He predicts the third wave to be genuinely a new way of life based on diversified, renewable energy sources; on methods of production that make most factory assembly lines obsolete; on new non-nuclear families; on a novel institution that might be called the 'Electronic Cottage'; and on radically changed schools and corporations of the future. He also expects it to write a new code of behavior for us and carry us beyond standardization, synchronization, and centralization, and beyond the concentration of energy, money and power.

This new civilization, Alvin Toffler emphasizes will challenge the old, will topple bureaucracies, reduce the role of the nation-state, and give rise to semi-autonomous economies and will require governments that are simpler, more effective, yet more democratic than we know today. It will be a civilization with its own distinctive world outlook, its own ways of dealing with time, space, logic, and causality.

It is expected to heal the historic breach between producer and consumer, giving rise to the 'Prosumer' economics of tomorrow. It is expected to be the first truly humane civilization in recorded history. 'The Third Wave' should be compulsory reading for all men and women dealing in human affairs and especially for those in Sri Lanka who are being entrusted with the onerous task of designing a new constitution.

Alvin Toffler continues to say, "An imaginary letter... Surely in many nations there must be others, who given the opportunity, would express similar sentiments. For the obsolescence of many of today's governments is not some secret I alone have discovered. Nor is it a disease of America alone."

"The first, heretical principle of Third wave government is that of minority power.

It holds that majority rule, the key legitimate principle of the Second wave era, is increasingly obsolete. It is not majorities but minorities that count. And our political systems must increasingly reflect that fact."

"The Third Wave also challenges all of our conventional assumptions about the relationship of majority rule to social justice. Here too, as in so many other matters, we are watching startling historic flip-flop. Throughout the era of Second Wave civilization the fight for majority rule was humane and liberating. In still-industrializing countries, like South Africa today (before the end of Apartheid - writer's remark), it remains so.

In Second Wave societies, majority rule always meant a fairer break for the poor.

For the poor were the majority. Today, however, in countries shaken by the Third Wave, precisely the opposite is often the case. The truly poor no longer necessarily have numbers on their side. In a good many countries they like - everyone else - have become a minority. And barring economic holocaust, they will remain so."

"Not only is majority rule, therefore, no longer adequate as a legitimizing principle, it is no longer necessarily humanizing or democratic in societies moving into the Third Wave."

"It is the lack of appropriate political institutions today that unnecessarily sharpens conflict between minorities to the knife-edge of violence. It is the absence of such institutions that make minorities intransigent. It is the

absence of such institutions that makes the majority harder and harder to find."

Alvin Toffler's thoughts are being proven right in many ways, as the 'Third Wave' continues to unfold and gradually take hold. In a country such as Sri Lanka, the 'First Wave' has yet a significant presence, the 'Second Wave' is yet not well established and the 'Third Wave' is already setting in.

Can our so-called leaders comprehend the complexities and turmoil this situation creates?

This would be a much harder challenge to deal with in a country such as ours, than in the most advanced countries, that are making a gradual transition into the 'Third Wave', with visible, discernible, but relatively minor pains.

If handled with foresight, wisdom, vision and courage, we can leap-frog into the 'Third Wave', rapid-exiting the messy 'Second Wave'. Such leap-fogging may avoid the trauma and turmoil that will inevitably arise from the clash of three co-existing civilizations and value systems.

I recommend the following documents be read:

- H.Ranjith and A.G.T.S. Somarathna. Sri Lanka's Executive Presidency: A critical Analysis of its powers and Functions under the Constitution of 1978 and Subsequent Constitution amendments. Social Sciences and Humanities Review. Vol 01, June 2013.
- Strengthening institutions and organizational capacity- Ensuring an effective Executive. Rajiva Wjisinghe blog site. February 9,2014
- <http://www.citelighter.com/political-science/politics/knowledgecards/presidential-system-of-government>
- <http://www.britannica.com/EBchecked/topic/717803/presidency-of-the-United-States-of-America>
- Basil Fernando. Executive Presidential System- A constitutional Development Based on Distrust. The Sri Lanka Guardian, January 6,2010
- Sachin Parathalingam. Sri Lanka has the strongest Executive Presidency-Jayampathy. Ceylon Today. June18,201

Please acknowledge receipt.

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