

# Issues Of New Constitution Making In Sri Lanka: Towards Ethnic Reconciliation

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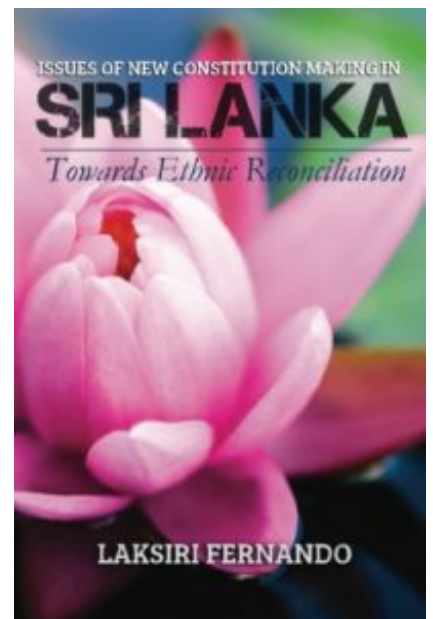
By **Laksiri Fernando** –

This is a collection of essays and articles written and mostly published from time to time covering various issues of constitution making in Sri Lanka. The focus of all of them is ethnic reconciliation. The timing of this publication is the ongoing efforts in Parliament in consultation with the public and various stakeholders in drafting a new constitution and adopting it in Parliament subsequently endorsed by a referendum, according to the constitutional provisions of the present Constitution (1978). Referendum for a new constitution is an important constitutional requirement. Therefore, it should be said at the outset that no 'constitutional revolution' is anticipated in this effort like in 1972. The rationale or the felt need for a new constitution is long standing although this is going to be the fourth constitution of Sri Lanka, if it is successful, since independence in 1948. Admittedly, therefore, there has been some continuous disequilibrium in constitutional matters in the country.

The first constitution or popularly called the Soulbury constitution was primarily a document drafted by the colonial state makers, Lord Soulbury and Sir Ivor Jennings, of course in consultation with the elected representatives of the country. However this constitution lasted for 25 years from 1947 to 1972 without much upheaval. In contrast, the first indigenous and the first republican constitution of 1972 survived only for six years. The second republican constitution of 1978 is still in operation for 38 years but largely due to its rigidity than any inherent quality of popular acceptance. Since 1994, there have been several fervent efforts to overhaul it but without any success. In August 2000, the effort to inaugurate a new constitution came very close, but failed, the opposition members of parliament burning the draft agreed by the leaders during by-partisan negotiations.

One advantage of constitution making process today is the existence of a 'national unity' government of the two main political parties, the UNP and the SLFP, also with the connivance of the official opposition, the TNA, representing the Northern Tamil constituency. Therefore, at least on appearance, there seems to be some broad consensus for the need for a new constitution. This could however be illusory, considering the rifts within the 'national unity government' itself on some of the key constitutional issues, and the stance of the almost breakaway Joint Opposition (JO) from the SLFP/UPFA led by the former president, Mahinda Rajapaksa, among other factors. In a recently held 'foot-march' (*Pada Yathra*) of the JO (28 July – 1 August), one of the main slogans was the claim that 'a new constitution is a death trap.' In addition, on the issue of passing the Office on Missing Persons (OMP) Bill, the behavior of the Joint Opposition has heralded what they might do during the inauguration of a new constitution.

This is a Create Space publication of an Amazon subsidiary (Charleston, Southern Carolina, USA) of 206 pages with necessary empirical data and tables. There is no single theme or discourse underlying the present publication, except the need for a new constitution reforming many of the institutional and legal anomalies of the present constitutional system, and creating a balance between divergent political views in order that a workable 'constitutional equilibrium' is created for a foreseeable future. This is by no means an easy task. There is no apparent readymade agreement between the main political parties, the UNP, the SLFP, the TNA or the JVP, except the need for a new constitution. What elements could create a sustainable 'constitutional equilibrium' is also not a



self-evident matter.

There can be different understandings of what people mean by 'constitutional equilibrium' but here it is mainly used to mean necessary 'political consensus' for its long term sustainability. A major necessary component this equilibrium is people's trust in the system. As a US Supreme Court Judge, Anthony Kennedy, has declared, "The Constitution doesn't belong to a bunch of judges and lawyers. It belongs to you." There can be another meaning, not very distant from the above, to mean 'equilibrium between various institutions and power centers.' This is the most traditional interpretation of constitutional equilibrium/disequilibrium. This is about 'checks and balances' not only between the three main branches of government – the legislative, executive and judicial – but also between the provincial governments and the central government. As Sri Lanka is and going to be a devolved system of government, the latter equilibrium is much more important and desired. It could be assumed that if an equilibrium could be achieved in the institutional context, then it would be easy to achieve equilibrium or consensus for sustainability of the constitution system as a whole. Then what about the trust of the people over the constitutional system? Unless there is a necessary trust, there cannot be a sustainable constitutional equilibrium in the country. This is also called 'constitutional legitimacy.' Wasn't this a reason for two insurrections in the country in the South (1971) and in the North (1983-1987)?

There are three major areas where constitutional consensus or equilibrium is necessary. First or most popular is the question of 'presidential versus a cabinet system.' There has been a long debate on that theme beginning from the initial works of N. M. Perera and A. Jeyaratnam Wilson. Their relevant publications are given in the Bibliography. This may appear the most settled issue particularly after the 19th Amendment, nevertheless there are several leftover matters, whether all the executive powers should be scrapped from the presidency, and how even a ceremonial president should be elected or selected.

The second is the question of 'proportional representation (PR) versus first-past-the post system (FPP).' This has also been discussed for a long period although not that systematically like the first issue. One reason seems to be the technical matters involved in any electoral discussion and it is not so much of the FPP that is advocated but having a constituency system where the electors having a clear representative to represent them in parliament. Although one objective to advocate initially a quasi FPP system was to have governmental stability through clear majorities, the concerns seem to settle down today as the new thinking accepts the merits of consensual governments instead of one party dominance. The remaining issues seem to point out the necessary balance rather than one against the other.

The third and most controversial today emerges out of the 'unitary versus federal' debate. This has been a never ending dispute in the country linked to the ethnic conflict. Although there is a system of devolution with provincial councils today still there are 'pull factors' wanting to re-establish the old unitary system. On the other hand, there are strong 'push factors' asking for federalism or even beyond, or failing which to properly implement the Thirteenth Amendment or 13A+. What balance of power could be drawn between the central government and the provincial councils would be a key issue. Much of the efforts of the present constitution makers, if not the whole constituent assembly, might be devoted to this issue, given the sensitivity of the matters involved.

There are of course several other polarized issues such as 'secular-state versus foremost place for Buddhism' and the merits and demerits of 'unicameral versus bicameral' legislative system. In most of the above underlined controversial issues, there can be a middle ground which could be achieved, if the parties are willing. However, 'unicameral-bicameral' issue is something a middle position cannot be achieved by the nature of the issue. It has to be either unicameral or bicameral. If a proper and meaningful devolved system is agreed upon, it is most likely that the constitution might go for a bicameral system. Then the issues would be about the weightage given for the center and the periphery for electing such a second chamber or a senate.

The main premise of the constitutional system in Sri Lanka like in many other democratic countries is the concept of people's sovereignty. What does it mean? Is it only a 'cake decoration' or just a popular slogan to deceive people, while the political elite holding the actual sovereignty? This is not a well debated issue in the country while there

have been few attempts. There are of course several devices, apart from the system of elections, which gives the impression that the people are sovereign. One is the provisions for referenda. The other is the constitutional provision for the people to go before the Supreme Court on fundamental rights or to mitigate legislation or executive action which goes against the constitution or its provisions on people's sovereignty through similar legal procedures. Nevertheless, there are limits. The full range of constitutional review is not within the present constitution. Therefore, one can argue that the reinstatement of full judicial review could go a long way in establishing people's sovereignty.

However, the gap between the constitutional system and the people are considerable. The National Youth Survey conducted in 2009 (only survey of this kind) amply revealed that the alienation is quite high in respect of the political, constitutional and the state (institutional) system, particularly among the youth. There have been no direct surveys conducted to gather the opinions of the people on various constitutional questions in the country. The partial observations or studies reveal that the knowledge or opinions of the people are quite low and shrouded in misconceptions. For example, as one constitutional expert has opined, when many people say a 'unitary state' what they mean is a 'united country.' Whether this may be the case or not, the fact remains that the general knowledge on constitutional matters is abysmally low. This is one reason for the continuous imbalance between the constitutional system and the people's aspirations, while the unscrupulous political leaders utilizing the situation for their political ends.

What path the constitution making process should take? What might be the best? The short answer is the Middle Path. The transformation of the present constitutional disequilibrium (and also ambiguities) into sustainable equilibrium is not an easy task. It requires truly a bi-partisan approach. As discussed before, almost all the issues appear to be 'bipolar' due to historical, theoretical, international and political circumstances. At the same time, that nature of the controversies signify the possibility of achieving a middle ground on all or most of the issues, if there is 'political will.' The present national unity government, President Maithripala Sirisena as the head, is in a better position to achieve such a middle ground, compared to the previous historical occasions of 1972, 1978 or the year 2000.

For the first time, a constitutional making effort has taken some great pains through what termed as the Public Representation Committee (PRC) during January and May 2016 to gather the opinions of the people and their organizations at various levels on a multitude of constitutional issues that needs to be harmonized. Its Report is now published. Whatever the weaknesses of this report or the Committee's inability to harmonize their own views, this effort is laudable. Be as it may, the report itself shows considerable imbalances prevailing on various questions and issues in constitution making. Therefore the task is marathon in harmonizing and balancing them. This is one reason why the constitution making process should be transparent and should not be confined to the Committee Rooms of the Parliament. There should be more open discussions on the media (printed, electronic and social) and there is a pressing need for weekly briefings by the Constituent Assembly spokespersons on the day to day progress. Most important is to win the 'trust of the people' and the outcome/s of the process should be people's friendly in its true sense. After all, unlike in the past occasions, the matter has to be finally decided by the people at a referendum.

This book is composed in three parts. Part I covers the 'general concerns on constitutional issues' ranging from 'why do we need a new constitution' to 'questions and answers on devolution,' and 'a suitable electoral system.' Part II consists of proposals made by the author to the Public Representation Committee (PRC) on Constitutional Reform running into twenty topics and a draft chapter on 'fundamental human rights and freedoms' and a proposed chapter on the 'local government system.' Part III places the process of the new constitution making within a broader political perspective, analyzing the 'democratic political change in 2015' and emphasizing the importance of 'ethnic reconciliation' among other topics. The 'building of inter-ethnic social capital for reconciliation' is much emphasized. The Selected Bibliography at the end includes only the sources cited in the text, nevertheless gives a wide ranging theoretical and empirical studies relevant to the subject of new constitution making in Sri Lanka. It should be understood that while some of the articles are of popular/educational nature, the others are more of academic disposition. The substance in all of them, however, is based on independent research or observations without any

partisan bias or personal/group interest.

You may order the book through the following link: <https://www.createspace.com/6645051>

## **ABOUT THE AUTHOR**

Laksiri Fernando (BA, Ceylon; MA, New Brunswick; and Ph. D, Sydney) is a published author with a long standing experience internationally and in Sri Lanka. He has held the positions of Senior Professor in Political Science and Public Policy, University of Colombo; Dean of the Faculty of Graduate Studies (FGS), University of Colombo; Director of the Centre for the Study of Human Rights (CSHR), University of Colombo; Chairperson and Director, Sri Lanka National Centre for Advanced Studies (NCAS); Director of the Sri Lanka Foundation Institute (SLFI); Secretary for Asia/Pacific of the World University Service (WUS Geneva); and Executive Director, Diplomacy Training Program (DTP), University of New South Wales, Australia, among others. He has been a Japan Foundation Scholar and has served as Visiting Scholar/Professor at the University of New South Wales, Australia; University of Heidelberg, Germany; Ryukoku University, Japan; and the University of Sydney, Australia. He has published many scholarly reviewed articles in journals, nationally and internationally. He now lives in Sydney, Australia, on retirement. He contributes regularly to printed and electronic newspapers and journals nationally and internationally that includes the *Sri Lanka Guardian*, *The Island* newspaper and the *Colombo Telegraph* among others.

## **OTHER BOOKS BY THE AUTHOR**

[Thomas More's Socialist Utopia and Ceylon \(Sri Lanka\)](#); Sri Lanka: Challenges of a Society in Transition (Edited); Sri Lanka's Ethnic Conflict in the Global Context (Edited); Political Science Approach to Human Rights; A New Electoral System for Sri Lanka (Edited); Police-Civil Relations for Good Governance; Human Rights, Politics and States: Burma, Cambodia and Sri Lanka; Academic Freedom 1990: A Human Rights Report (Edited); and *Jathika Viyaparaya, Viyawastha Wardanaya and Vamansika Viyaparaye Upatha*.