

FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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Sri Lanka

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What changes to the form of government of Sri Lanka have been under consideration as part of the current Constitution building exercise?

Key changes under consideration are the abolition of the Executive Presidency; reformulation of Article 2 – the unitary state provision – of the current Constitution; allowing for greater devolution of power to the provinces including the abolition of the concurrent list; and a new electoral system combining the first past the post and proportional representation systems (MMP: mixed member proportional representation).

What are the rationales for change?

Abolition of the executive presidency: Executive Presidency facilitates populist authoritarianism through the consolidation of power in a single office and accordingly, vitiates the devolution of power as well as weakening the role of the national legislature. In summation, the rationale for change is rooted in arguments of democratic governance.

Greater devolution of power: The existing system of devolution of power to the provinces was introduced through the Thirteenth Amendment to the Constitution in 1987 following the Indo-Sri Lanka Accord of that year. It has been seen to be unsatisfactory with the balance of powers weighted heavily in favour of the Centre and the Concurrent List used by the latter to stymie devolution. The Supreme Court of Sri Lanka declared the Thirteenth Amendment to be consistent with Article 2, the unitary state provision. However provincial devolution has not been implemented to the extent provided in the Constitution. The land and police powers contained in the Thirteenth Amendment have not been devolved to the provinces. All attempts at using constitutional reform as an instrument of conflict transformation since 1987 have assumed that a political and constitutional settlement of the ethnic conflict required going beyond the Thirteenth Amendment. The extent of this has yet to be agreed upon. The principal Tamil political party – the Tamil National Alliance – has consistently advocated a federal solution.

Electoral System: The current system employs the district as the basic electoral unit. Voters have to vote for a party contesting the district and mark three preferences for the candidates of their choice from that party. The argument has consistently been made that the district is too big an unit necessitating in turn greater resources, that the preference system encourages intra-party as well as inter-party competition thereby exacerbating violence, and that both of these factors severely deter women from pro-active participation in elections, especially as candidates.

What are the principal impediments to change?

The procedure for constitutional amendment of entrenched clauses of the existing constitution and for the repeal and promulgation of a new Constitution entails a two-third majority in the national legislature and a simple majority in an island-wide referendum. Accordingly, this applies for any meaningful constitutional reform. Achieving the two-third majority in the national legislature, in respect of any amendment of the current Constitution or its repeal and the promulgation of a new Constitution, has always been the concern. This is on account of political parties voting along partisan lines. No such concerns have existed or do exist in relation to winning an island-wide referendum since arguments against the executive presidency in particular have built up over the last four decades since the current Constitution was promulgated in 1978. Currently the situation though is of confidence with regard to the parliamentary majority, but concern with regard to the referendum. This is because in respect of the former the two main parties, or at least part of one and the entirety of the other, are voluntarily in government together for the first time and the latter, because the opposition forces headed by the former president are opposed to a new Constitution. The failure of the current government, notwithstanding its unprecedented and historic composition, to communicate effectively to the public at large a new vision for Sri Lanka and the rationale for a new Constitution has allowed the former president and his allies to define the public discourse on constitutional reform in terms of a new Constitution jettisoning the unitary state, abandoning the primacy of Buddhism and ushering in federalism and eventually even secession. Popular disappointment with the current government also contributes, within its own ranks, towards reluctance regarding a referendum.

What seems the likely outcome, at this point?

Parliament has been turned into a Constitutional Assembly and in turn divided into six thematic Sub-Committees with an overarching Steering Committee chaired by the Prime Minister to look at the key questions identified above. The Sub-Committees have concluded their work and submitted reports. (There was also a Public Representation Commission that collected public submissions on constitutional reform throughout the island.) The Steering Committee is yet to submit its report. An Interim Report of the Steering Committee, promised at the end of 2016, is to be released by the end of September 2017. The delay is on account of the Sri Lanka Freedom Party (SLFP), divided between supporters of the current President and his predecessor, submitting proposals. This has now happened. If the current deadline is met, this report will be discussed in the Assembly, which will decide on whether a draft Constitution can be drawn up on the basis of these reports. Were the constitutional reform process to continue, it will go into 2018. This begs the question of as to whether the 'historic moment' for constitutional reform has passed and as to whether there will be any meaningful constitutional reform or a new constitution.

What insights can be drawn from the current Sri Lankan debate on changes to the form of government for others contemplating movement to a more parliamentary form of government?

The key insight is that of outreach and communication, particularly of capitalizing on the unique feature of the current National Unity coalition government. The rationale for a new Constitution and its proposed provisions have to be communicated to the electorate as well as the developments within the Constitutional Assembly. The failure to do so cedes the space to the opposition to set the agenda for debate with deliberate distortion and misinformation. Outreach and communication needs to point out that the key rationale for an executive presidency – that it is necessary for economic development and national unity – has not been demonstrated over the last four decades and that parliamentary government underpinned by the proposed multi-member proportional representation electoral system (MMP) will be more inclusive, participatory and facilitative of national unity. In addition, incorporation of civil society representation in the constitution-making process in a more pro-active role would help considerably in obtaining greater public buy-in and in correcting distortion and misinformation about the process in the public realm.

What comparative models (if any) have been influential in the current debate on change? Have comparative models been influential in the past?

Comparative models have been cited with regard to the MMP electoral system. The inspiration of the German system has been a hallmark of the debate over electoral reform for decades. Likewise the Gaullist constitution of the Fifth French Republic has been cited, erroneously though in a number of respects, as the inspiration for the Executive Presidency in 1978. The existing provisions regarding the devolution of power follow from the Indo-Sri Lanka Accord of 1987.

If changes to the form of government take place in Sri Lanka on this occasion, what challenges for constitutional implementation are likely to arise?

Problems could arise with regard to the devolution of powers to the provinces – for example the existing provisions dealing with land and police powers have not been implemented since 1988. The abolition of the concurrent list too could give rise to issues. Were there to be reform of the executive presidency rather than abolition and if the president were to be directly elected in a national election, there could be issues as well.

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