



Managing the risks of inclusion and participation: Sri Lanka as a case study

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The Government that was elected in Sri Lanka in 2015 promised in its manifesto to introduce a new constitution through the setting up of a constitutional assembly. The Constitutional Assembly was set up in March 2016. A Public Representations Committee on Constitutional Reforms was appointed in January 2016 which submitted its report in May 2016. In November 2016 the reports of the six sub-committees of the Constitutional Assembly were tabled in the Assembly. In September 2017 the interim report of the Steering Committee was tabled.

The process stalled from that point onwards. The incumbent Government lost the local government elections in January 2018 from which point onwards there was no real further progress. Following the interim report (not envisaged by the motion constituting the Constitutional Assembly) a report to the Constitutional Assembly that 'may be accompanied by a Draft Constitutional Proposal' was required to be presented to the Constitutional Assembly.¹ Following this the question that 'the Steering Committee be required to submit a final report and a Resolution on a Draft Constitutional Proposal' was required to be put to the Constitutional Assembly by the Chair (the Speaker of Parliament). The Steering Committee, after considering the amendments – if any – proposed during the debate, was required to submit a Final Report and a Resolution containing a Draft Constitutional Proposal for the consideration of the Constitutional Assembly. If the Assembly passed the draft proposal by a simple majority it was to be sent to Parliament for a two-thirds majority approval and then to Cabinet to initiate a formal process to submit a Bill for the repeal and replacement of the current Constitution. Alternatively, if the Assembly passed the draft proposal with a two-thirds majority, it was to be directly sent to Cabinet to initiate the process for enacting a new constitution.

None of this was to be. The Constitutional Assembly discussed another expert report in January 2019 wherein the Prime Minister acknowledged that they did not have the two-thirds support to go ahead with the proposals and asked the Parliament to decide the fate of the Constitutional Assembly. No decision was taken.² The current Parliament's term ends in August 2020 with the possibility of early elections any time after February 2020 (Sri Lanka has a fixed term parliament of four and a half years). Presidential elections are scheduled to take place on 16 November 2019 which is expected to return a President who will have no real concern for real constitutional reforms be from either major party.

¹ The procedure laid out in the motion establishing the Constitutional Assembly is available at https://www.parliament.lk/files/documents_news/ca-motion/motion-en.pdf.

² Sandun A Jayasekera, 'Constitution-making comes to a grinding halt', *Daily Mirror*, 24 June 2019 http://www.dailymirror.lk/breaking_news/Constitution-making-comes-to-a-grinding-halt/108-169937.

The approach taken to inclusion in the constitution building process

The conversion of the entire Parliament into a Constitutional Assembly and the appointment of a Public Representations Committee were early indications that the promoters of the constitutional process were interested only in ticking the boxes for wider participation.

Inclusion in setting the agenda

An earlier draft of the preamble to the motion referred to ‘resolving the national question’ as one of the purposes of the Constitution, the long standing demand of the numerically smaller Tamil community and the reason why the principal party of the Tamils (the TNA: Tamil National Alliance) extended support to the Government (sometimes to the extent of agreeing to go soft on their demands for international accountability for crimes committed during the war). But from pressure from the Sri Lanka Freedom Party (SLFP: President Sirisena’s party and a constituent party in the current Government) and the ‘Joint Opposition’ (led by war time ex-president Mahinda Rajapaksa) this wording was deleted from the preamble to the disappointment of the Tamil National Alliance. The United National Party (UNP: the main party in Government) seemed more concerned with appeasing the Sinhalese parties (fearing that they might derail the process) than trying to accommodate the parties of the sub-state nations.

During the deliberation

The TNA was allotted the chair of the sub-committee on centre-periphery relations in the constitutional assembly. The committee produced a fairly progressive report and as a result faced the wrath of the hard line ultra nationalist groups. The Prime Minister, to pacify these groups, appointed an unannounced seventh committee made up of only Sinhala parties which countered the report of the centre-periphery relations committee.

Who was included in the constitution-building process? Were there demands for inclusion of specific groups on the grounds of religion, ethnicity, sex, geographic location, or other factors?

On paper, all parties found representation in the Constitutional Assembly, its steering committee and the different sub committees. Hence the Constitutional Assembly provided for very broad representation. But the actual drafting process was limited to a group of experts appointed by the steering committee who were largely drawn from a background sympathetic to the UNP and the TNA. The panel of experts was directed by two Members of Parliament who headed a management committee of the steering committee representing the UNP and the TNA. The entire drafting process was ‘expert driven’ from this point onwards to the point that the interim report was drafted in the end by two young lawyers known for their allegiances with the UNP and TNA. This “expertisation” of the constitution-drafting process at this stage shifted the debate to technicalities. It is not clear whether the political actors in the steering committee gave sufficient political direction to the experts to draft the interim report. Even if they did it is possible that the lawyers among the politicians dominated this discussion. One of the major excluding factors of the process, then, was the dominance of experts and over-lawyering of the constitutional process.

Women’s inclusion in the constitutional drafting process was not taken seriously at all throughout the process. In terms of geographic location, the drafting process was restricted to closed-door discussions in the committees sitting in Colombo. As will be explained later there is no evidence that the work of the Public Representations Committee had any significant impact on the actual drafting process.

Were any groups excluded and if so, what were the implications of such exclusion?

There was no serious effort at all to include women, the indigenous people and other marginalised sections of society. Unfortunately, there was no organised movement clamouring for their inclusion either. There was some debate over whether socio-economic rights should be included in the Bill of Rights

and whether the Bill of Rights should be allowed to override provisions in customary personal laws that were discriminative against women, but these were not regarded as serious matters for the Constitutional Assembly or its committees.

Was there public participation? If so, what were the benefits and were there any downsides?

A Public Representations Committee was set up by the Cabinet in January 2019 and submitted its report in May 2019.³ The composition of the committee largely reflected sections of civil society who supported the regime change that brought into government the SLFP-UNP alliance. The selection of the committee members showed a cautious approach seeking to leave out critical sections of the Tamil and Muslim civil societies who sought fundamental state reform. (Also excluded were civil society activists who were anti-devolution and who stood for the status quo.)

The committee travelled to all districts within a very short period of time, held public consultations and came up with a report in May 2019. Following the media coverage of the public hearings it was very clear that the committee was hearing very different views in terms of how to restructure the state. The committee's report does not reflect this deep division and shows a desperate effort to project a very thin consensus among the divided populous of Sri Lanka. The report also seemed more like a reflection of what members of the expert committee thought was necessary in a new constitution or what they seemed to prefer from they heard in the public hearings, rather than an attempt to represent the very wide variety of opinions that they had heard in the public hearings. In fact, the methodology by which the committee processed the information that it received from the public hearings and how that was reflected in the final report was very unclear. There was no statement in the report on how this was done.

Were there any tensions among the political elite, between the political elite and the public, and amongst the public participants?

The political elite represented in the government and other parties supporting it seemed to regard anyone opposed to their view of constitutional reform as spoilers – both on the Sinhala nationalist spectrum of politics and the Tamil nationalist spectrum of politics. While it is possible that there were groups and individuals on both sides who did want to spoil the reform process it also seemed that the government and the forces aligned to it wanted to paint the spoiler brush more broadly to stifle criticism directed at the process.

The larger strategy adopted by the leaders of the constitutional reform process to manage tensions was to adopt secrecy of proceedings. Actors associated closely with the process in fact claimed that the entire drafting process could not be live streamed.

The only way in which tensions can be managed in the process of drafting a constitutional process in a deeply divided state like Sri Lanka is for the political actors taking the lead in the constitutional process to take full ownership of the process and to engage in a publicly spirited manner in attracting public opinion in favour of their positions. But the problem in Sri Lanka was that the main actors – the UNP and TNA – were afraid to engage publicly because it might derail the process. But the most important lesson from the 2016-2019 constitutional process in Sri Lanka is that there is no real alternative to being upfront with engaging the public in the constitutional process. Secrecy, it was found, breeds tensions. Transparency may help manage tensions better.

³ Public Representations Committee on Constitutional Reform, *Report on Public Representations on Constitutional Reform* (May 2016) http://constitutionnet.org/sites/default/files/sri_lanka_prc_report-english-final.pdf.

Were any constitutional issues taken off the reform agenda or specifically introduced to the agenda due to anticipated or actual demands of the public?

The removal of the objective of resolving the national question from the preamble and the appointment by PM Wickremesinghe of an ad hoc committee to counter the centre-periphery relations report were early examples of issues being either watered down or taken out as a result of pressure from powerful lobby groups and political parties from within the Sinhala Buddhist Nationalist ideological spectrum.

The interim report itself dealt with the main issues of contention (such as the nature of the state as unitary, federal or otherwise) in a deliberately ambiguous manner. The ambiguity it was hoped would allow the UNP to market the report to the majority that the unitary character of the state was not compromised while allowing TNA to tell its electorate that the interim report had gone beyond a unitary state structure. President Sirisena's SLFP and Mahinda Rajapaksa's Joint Opposition rejected the report, the latter saying that the proposals would create a 'Catalonia type of situation'⁴ which sent cold shivers up the UNP which publicly distanced itself from the interim report calling it merely a 'discussion paper'.⁵

What lessons might be drawn from this experience for other countries approaching inclusion and participation in constitution building processes?

Public consultation cannot be just a tick-box exercise – it cannot be a parallel process (to the process dominated by representative institutions) that really does not feed at all into the constitution-drafting exercise. Without over-romanticising the real reach and impact of public consultations, the strategy and design of public participation and the place it holds vis-à-vis other institutions engaged in the process of constitution making must be clearly defined.

The issue of spoilers must not be used as a sleight for overlooking difficult problems and questions that other actors who may not own the constitutional process put forth.

Prior to the exercise of constitution drafting there must be a pre-constitutional political consensus on the new State⁶ which is being envisaged through the new constitution. The public consultation process and political actors must work out a set of principles that should guide the new constitution. Without a pre-constitutional political process, setting up a constitutional assembly and committees of political representatives assisted by experts can be a futile exercise.

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⁴ Yusuf Ariff, 'Proposed constitutional reforms could lead to Catalonia-style split: MR' *Ada Derana*, 16 October 2017 <http://www.adaderana.lk/news.php?id=43611>.

⁵ Manjula Fernando, 'New Constitution: Interim report only a discussion paper says Dr Jayampathy' *Sunday Observer*, 1 October 2017 <http://www.sundayobserver.lk/2017/10/01/news/new-constitution-interim-report-only-discussion-paper-says-dr-jayampathy>.

⁶ See for more details on this: 'Proposal For New Constitution: Tamil Civil Society Forum's Submission' *Colombo Telegraph*, 2 March 2016 <https://www.colombotelegraph.com/index.php/proposal-for-new-constitution-tamil-civil-society-forums-submission/> (particularly the second point; disclosure: drafted by the author).