

SRI LANKA'S NEW CONSTITUTION

On July 21, 1977, the people of Sri Lanka entrusted to their elected representatives the task of drafting and adopting a new republican constitution in order to achieve the goal of a democratic socialist republic. The proposed constitution was also to ensure to all people freedom, equality, justice, fundamental human rights and independence of the judiciary and ratify the immutable republican principles of representative democracy. In pursuance of this mandate, the representatives adopted and enacted the new Constitution for Sri Lanka in 1978. The purpose of this brief article is to take note of the salient characteristics of the new Constitution.

The Constitution has been declared to be the supreme law of the Democratic Socialist Republic of Sri Lanka. Sri Lanka has been declared to be a free, sovereign, independent and democratic socialist republic, and is to be known as the Democratic Socialist Republic of Sri Lanka.¹ Sri Lanka is to be a unitary state.² In Sri Lanka, the sovereignty is vested in the people.³ Sri Lanka gives the 'foremost' place to Buddhism and, accordingly, it is the duty of the State to protect and foster the 'Buddha Sasana'.⁴ But, religious freedom is guaranteed to all persons by Article 10 which declares that every person is entitled to freedom of thought, conscience and religion and freedom to adopt a religion or belief of his choice. This freedom is further strengthened by Article 14(1)(e) according to which every citizen is entitled to the freedom, either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

¹ Article 1.

² Article 2.

³ Article 3.

⁴ Article 9.

The Constitution guarantees fundamental rights to the people on a liberal basis.⁵ In addition to the freedom of religion as mentioned above, the Constitution guarantees inter alia: the freedom from torture, cruel, inhuman or degrading treatment or punishment;⁶ equality before the law and equal protection of law;⁷ the freedom of speech, peaceable assembly and association;⁸ the freedom to form and join a trade union;⁹ the freedom to enjoy and promote one's own culture and to use his own language;¹⁰ the freedom to engage in lawful profession, trade, etc.;¹¹ the freedom of movement and residence within Sri Lanka.¹² Article 13 guarantees freedom of the person. No one is to be arrested except according to procedure established by law. An arrested person is to be informed of the reason for his arrest and is to be brought before a judge. A person charged with an offence is to be entitled to a right of being heard; making of retrospective criminal laws is prohibited. Every person is presumed to be innocent until proved guilty.

As no right can be absolute, so the fundamental rights can also be restricted on such grounds as national security, racial and religious harmony, national economy, etc. The freedom to join a trade union, to manifest religion or promote culture and use his language are not subject to any such restrictions. A person whose fundamental right is infringed by executive or administrative action is entitled to apply to the Supreme Court under Article 126.¹³

Because of the linguistic problem in Sri Lanka, extensive provisions have been made in the Constitution concerning lan-

⁵ Articles 10-17.

⁶ Article 11.

⁷ Article 12.

⁸ Articles 14(1)(a), (b), (c).

⁹ Article 14(1)(d).

¹⁰ Article 14(1)(f).

¹¹ Article 14(1)(g).

¹² Article 14(1)(h).

¹³ Article 17.

guage.¹⁴ Sri Lanka's official language is Sinhala.¹⁵ Sinhala and Tamil are recognised as the National Languages.¹⁶ A person is entitled to be educated through the medium of either of the national languages.¹⁷ The official language is to be the language of administration and courts throughout Sri Lanka, but Tamil can also be used for these purposes in the Northern and Eastern Provinces.¹⁸ A member of Parliament can act in any national language.¹⁹ A person can communicate and transact business with any official in any national language.²⁰ All laws and subordinate legislation are to be enacted and published in both national languages.²¹ All pre-Constitution laws and subordinate legislation are to be published in the official gazette in both national languages.²² The State is obligated to provide adequate facilities for use of the national languages.²³

The Constitution has a Chapter (VI) on Directive Principles to guide Parliament and the Executive in the enactment of the laws and governance of Sri Lanka for the establishment of a 'just and free' society. Some of the significant directive principles are as follows: the state is to secure and protect as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life;²⁴ an adequate standard of living for all citizens is to be realized;²⁵ material resources of the community are to be distributed equitably among all citizens so as best to subserve

¹⁴ Articles 18–25.

¹⁵ Article 18.

¹⁶ Article 19.

¹⁷ Article 21.

¹⁸ Articles 22 and 24.

¹⁹ Article 20.

²⁰ Article 22(2)(a).

²¹ Article 23.

²² Article 23(2).

²³ Article 25.

²⁴ Article 27(2)(b).

²⁵ Article 27(2)(c).

the common good;²⁶ a just social order is to be established in which the means of production, distribution and exchange are not concentrated either in private or public hands.²⁷ That the economy of Sri Lanka is going to be a controlled economy is made clear by Article 27(2)(d) which envisages rapid development of the country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and coordinating such public and private economic activity towards social objectives and the public weal. The state is to strengthen national unity among all sections of the people, ensure equality of opportunity to citizens, eliminate economic and social privilege and disparity and exploitation of man by man or by the State, ensure social security and welfare, and protect the family as the basic unit of society.²⁸ The state is to ensure that the economic system does not operate so as to result in the concentration of wealth and means of production to the common detriment.²⁹ The state is: (i) to assist the development of the cultures and the languages of the people; and (ii) create the necessary economic and social environment to enable people of all religious faiths to make a reality of their religious principles.³⁰ The state is obligated to protect the environment for the benefit of the community and also promote international peace, security and co-operation.³¹ Article 28 imposes certain duties on the people, e.g., to uphold and defend the Constitution and the law; to further the national interest and foster national unity; to preserve and protect public property and to respect the rights and freedoms of others, etc. Article 29 declares that the provisions in Chapter VI do not confer or impose legal rights or obligations, and are not enforceable in any court and no question of inconsistency with these provisions shall be raised in any court.

²⁶ Article 27(2)(e).

²⁷ Article 27(2)(f).

²⁸ Article 27(5), (6), (7), (9), (12).

²⁹ Article 27(8).

³⁰ Article 27(10) & (11).

³¹ Article 27(14) & (15).

The executive power of the State is to be exercised by the President³² who is to be the Head of the State, head of the executive and of the government, and the commander-in-chief of the Armed forces.³³ He is to be elected by the people for a term of six years and none can be elected more than twice as the President. He is to be elected by the system of single transferable vote as laid down in Art. 94. The validity of the Presidential election is to be determined by the Supreme Court.^{33a} In addition to the powers and functions expressly assigned to him by the Constitution, or by any written law, the President also has the power to declare war and peace, state government policy in Parliament at the commencement of each session of Parliament, to preside at ceremonial sittings of Parliament, etc.^{33b} The President can be removed from office in the following circumstances: mental or physical infirmity resulting in his permanent incapacity for discharging the functions of his office; intentional violation of the Constitution; treason; bribery; misconduct or corruption involving the abuse of the powers of his office, or commission of any offence under any law involving moral turpitude.³⁴ Removal of the President takes place when a resolution to that effect is passed by Parliament by affirmative votes of not less than two-thirds of the whole number of members (including those not present). But before such a resolution can be passed, Parliament is to refer the allegations against the President to the Supreme Court for inquiry and report. Even this reference is to be made by a resolution passed by not less than two-thirds of the whole number of members of the House.³⁵ The President has a right of being heard before the Supreme Court while it is making an inquiry against him.³⁶ If the court reports against the President, Par-

³² Article 4(b).

³³ Article 30(1).

^{33a} Article 130.

^{33b} Art. 33.

³⁴ Article 38(2)(a).

³⁵ Article 38(2)(c).

³⁶ Article 38(2)(d).

liament may proceed to pass the resolution for his removal as stated above.³⁷

The President is to be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions.³⁸ It is not however clear as to how this responsibility is to be enforced by the Parliament for the President enjoys a fixed term of six years and is practically irremovable from office except as mentioned above. One of the ways open to Parliament to express its dissent from the President is to pass a vote of no confidence against the Cabinet as stated below. The President is a member as well as the head of the Cabinet of Ministers which is collectively responsible to Parliament. The Cabinet is charged with the direction and control of the government of the Republic.³⁹ The President is to appoint a Prime Minister. He is to be a member of Parliament and one who, in the President's opinion, is most likely to command the confidence of Parliament.⁴⁰ Though called the Prime Minister, his position is very different from the position of the Prime Minister in a parliamentary democracy such as in Britain or India or Malaysia. Some of the crucial functions discharged in these countries by the Prime Minister are vested in the President in Sri Lanka. The position of the Prime Minister in Ceylon is that of the first among the Ministers and not better than that. Being directly elected by the people, the President occupies the central position in the governance of the country. The President determines the number of Ministers and the Ministries and the assignment of subjects and functions to such Ministers. He appoints the Ministers from amongst the members of Parliament.⁴¹ The President can assign to himself any subject or function.⁴² Non Cabinet Ministers and deputy Ministers can also be appointed by the President. A Minister or the Prime

³⁷ Article 38(2)(c).

³⁸ Article 42.

³⁹ Article 43.

⁴⁰ Article 43(3).

⁴¹ Article 44(1).

⁴² Article 44(2).

Minister can be removed from office by the President.⁴³ When the Prime Minister ceases to hold office, the Cabinet of Ministers shall stand dissolved (except when Parliament has been dissolved).⁴⁴ If Parliament rejects the statement of government policy or the appropriation bill or passes a vote of no-confidence in the government, the Cabinet of Ministers stands dissolved.⁴⁵ The President would then either appoint a new Prime Minister and other Ministers, or in the alternative, dissolve the Parliament.⁴⁶ These constitutional provisions constitute an attempt to create a system of government seeking to combine the features of the parliamentary as well as the presidential systems. The provisions in Sri Lanka's Constitution are so designed as not to constitute the President merely into a constitutional head as is the case in India. At the same time, the Prime Minister in Sri Lanka does not have much control over the Ministers unlike the Prime Minister in India or Malaysia. Effective control over the Ministers vests in the President. He is not even bound to consult the Prime Minister in the matter of appointment of a Minister or his continuance in office or allocation of functions to Ministers for in all the relevant constitutional provisions the words used are: "in consultation with the Prime Minister, where he (President) considers such consultation to be necessary". Thus, the President may or may not consult the Prime Minister in appointing the Ministers. It may however be hoped that conventions would grow to make consultation with the Prime Minister necessary otherwise it may be difficult to maintain Cabinet's collective responsibility. On the whole, the Cabinet appears to be a tool in the hands of the President to further his policies. An anomaly in the system however is that if Parliament disapproves of any government policy, or shows lack of confidence in the Cabinet, the Cabinet goes but it does not affect the position of the President. The President has two options open to him in such an eventuality.

⁴³ Article 47(a).

⁴⁴ Article 49(1).

⁴⁵ Article 49(2).

⁴⁶ Articles 49(2) & 70.

One, he can appoint a new Prime Minister and Ministers who can command the confidence of Parliament. In such a case, the President will himself have to change the controversial policy and bring it in accord with Parliament's views so as to enable the new Cabinet to function. In the alternative, the President may dissolve the Parliament and seek vindication of his policy from the electorate. What happens if his policy is not thus vindicated? He does not have to resign; he may remain in office for his full term. There will then be either a kind of a stalemate between him and the new Parliament, or the President will have to change his policy. Once Parliament is dissolved and general election held as a consequence, President cannot dissolve the Parliament again for one year unless Parliament itself seeks its dissolution through a resolution.⁴⁷

The system envisaged in Sri Lanka differs from the American system in a fundamental manner. While the U.S. system is based on the principle of separation of powers, the Sri Lankan system is not based on that principle, for all Ministers have to be members of Parliament and the Cabinet is collectively responsible to Parliament. According to Sri Lankan Constitution, the Cabinet shall have a dual responsibility: to the Parliament and to the President. It will be interesting to watch how the system functions in practice in the context of Sri Lanka. The envisaged system of government is an innovation and has no functional precedent to fall back upon. There are three possibilities in respect of the future development of the system as a result of conventions which are bound to grow to make the system viable: (i) the Prime Minister's office may become a non-entity and effective power may flow to the President; (ii) effective power may come to vest in the Prime Minister and the President may come to occupy a position which may not be very different from constitutional headship; or, (iii) a functional balance is established between the two main offices in which case the President will consult the Prime Minister as a matter of course in exercising most of his functions.

Sri Lanka is to have a unicameral Parliament consisting of 196 elected members.⁴⁸ Its term is to be six years but it can be

⁴⁷ Article 70(1)(a).

⁴⁸ Article 62(1).

dissolved earlier by the President.⁴⁹ In addition to the normal provisions which can be found in any constitution concerning Parliament, the Constitution of Sri Lanka makes a few innovative provisions which may be underlined here. Article 76 prohibits Parliament from abdicating or alienating its legislative power or from setting up any authority with any legislative power, but this is not to bar: (i) empowering the President, under a law relating to public security, to make emergency regulations; and (ii) empowering a body to make subordinate legislation. This provision may create difficulties of interpretation as the question may arise: what is subordinate legislation and what is abdication of legislative power? The courts in Sri Lanka may be called upon to distinguish between delegation of legislative power (which is prohibited) and making of subordinate legislation (which is permissible). Here, perhaps, the distinction drawn by the Supreme Court of India between delegated legislation and delegation of policy-making function may be relevant. The latter cannot be delegated.⁵⁰

A Bill becomes law when passed by Parliament.⁵¹ Presidential assent is not necessary for the purpose. Thus, unlike India or the U.S.A., the President has no veto power over legislation. But, in Sri Lanka, parliamentary legislation is subjected to the direct democratic control of Referendum. The Cabinet can certify that either the whole of a bill, or any provision thereof, is to be submitted to the people for approval at a referendum.⁵² The President may also submit a Bill rejected by the Parliament to a referendum (other than a constitutional amendment bill).⁵³ The bill is deemed approved by the people if it is approved by an absolute majority of the valid votes cast at the Referendum. However, if the total number of votes cast at a referendum is not more than two-thirds of the whole number of electors, a bill is to be deemed approved only if approved by not less than one-third of the whole number of

⁴⁹ Article 62(2).

⁵⁰ Jain, *Indian Constitutional Law*, 72-76 (1978).

⁵¹ Article 80(1).

⁵² Articles 80(2) & 85(1).

⁵³ Article 85(2).

such electors.⁵⁴ The President can also submit to the referendum any matter which in his opinion is of national importance.⁵⁵ These provisions ensure direct democracy of the people and may be regarded as vindicating the assertion made in the Constitution that sovereignty vests in the people.

Every citizen of Sri Lanka, who is of sound mind and who has attained the age of 18 years, is entitled to vote at an election for the President or the Parliament or at the Referendum.⁵⁶ Elections to Parliament are held on the basis of proportional representation. This is an innovation in the system of parliamentary democracy and may result in a fragmented house with no party enjoying an absolute majority. The President is to appoint a Commissioner of Elections who has to hold office up to the age of 60 years during good behaviour. He can be removed from office by the President on account of ill health, or physical or mental infirmity, or on an address passed by the Parliament.⁵⁷ The functions of the Commissioner of Elections relate to elections and are to be specified by a parliamentary law.⁵⁸ The delimitation of electoral districts is to be done by a Delimitation Commission appointed by the President and consisting of three persons who are not actively engaged in politics.⁵⁹

A very interesting provision made by the Constitution is Art. 81, according to which Parliament may impose by a resolution passed by not less than two-thirds of the whole House 'civil disability' on a person for a period up to seven years and expel a member of Parliament from Parliament. Such a resolution can be passed after a special presidential commission of inquiry, and consisting of a Judge, recommends that any person ought to be subjected to 'civic disability' by reason of any act done or omitted to be done by him. A person under 'civic disability is

⁵⁴ Article 85(3).

⁵⁵ Article 86.

⁵⁶ Articles 88 & 89

⁵⁷ Article 103.

⁵⁸ Article 104.

⁵⁹ Article 95.

not entitled to vote at any election or referendum or contest an election for membership of Parliament or the Office of the President'.⁶⁰ Reference may also be made to the anti-defection clauses in the Constitution. Article 99(13)(a) provides that where a member of Parliament ceases to be a member (by resignation, expulsion or otherwise) of a recognized political party or independent group on whose nomination paper his name appeared for election to Parliament, his seat becomes vacant after a month of his ceasing to be the party member. However, in case of expulsion by the party, the member concerned may challenge the same in the Supreme Court. This ensures a watertight party control over its members.

The judicial power of the Republic is vested in the Supreme Court, Court of Appeal, the High Court and other courts of first instance.⁶¹ Adequate provisions are made in the Constitution to ensure independence of the judiciary. Thus, the age of retirement of the Judges of the Supreme Court (65) and Court of Appeal (63) has been fixed.⁶² A Judge of these two courts holds office during good behaviour. He can be removed by the President on an address passed by the Parliament on ground of proved misbehaviour or incapacity by a majority of the total number of members of Parliament.⁶³ The Supreme Court has the 'sole and exclusive' jurisdiction to determine whether any bill is inconsistent with the Constitution.⁶⁴ Such a question is to be raised and determined before the bill is passed by Parliament.⁶⁵ If the court holds a bill to be inconsistent with the Constitution, then it can either be passed by Parliament with necessary amendments so as to remove its inconsistency with the Constitution, or with special majority under Article 84(2), or with special majority under Article 84(2) and approved by

⁶⁰ Articles 89(h), 91(a), 92.

⁶¹ Articles 105-147.

⁶² Article 107(5).

⁶³ Article 107(2) & (3).

⁶⁴ Article 120.

⁶⁵ Article 121.

the people at a referendum under Article 83.⁶⁶ Article 83 refers to an amendment of the Constitution and is noted below. Article 84 is a special provision which enables Parliament to enact a bill inconsistent with the Constitution by votes not less than two-thirds of the whole number of members of Parliament. Once a Bill is duly enacted and becomes law, its validity cannot then be questioned in any court on any ground whatsoever.⁶⁷ It is clear that the system of judicial review envisaged in the Sri Lankan Constitution is very different from that prevailing in India. Unlike Sri Lanka, in India, a bill cannot be challenged in a court, only an Act can be so challenged. Also, the Indian Constitution does not envisage any procedure by which an unconstitutional measure can be enacted and made non-challengeable. The Indian Constitution permits only constitutional laws to be made. Any law which is inconsistent with the Constitution is void and non-existent.

The Supreme Court is to exercise the 'sole and exclusive' jurisdiction to determine any question relating to the interpretation of the Constitution, or infringement of fundamental rights by executive or administrative action.⁶⁸ The court also exercises a consultative jurisdiction on a reference made to it by the President.⁶⁹ Article 131 authorises the Supreme Court to punish any person for the breach of the privileges of Parliament. This is different from India where it is for the House itself to punish a person for a breach of its privilege.

A bill to amend a provision of the Constitution becomes effective when it is passed by Parliament by not less than two-thirds of the whole number of members of Parliament.⁷⁰ However, to amend a few specified provisions of the Constitution, in addition to the special parliamentary vote, approval by the people at a referendum is also necessary.⁷¹

⁶⁶Article 123.

⁶⁷Article 80(3).

⁶⁸Articles 125 and 126.

⁶⁹Article 129.

⁷⁰Article 82.

⁷¹Article 83.

Special provisions are made for public security.⁷² Parliament can enact a law empowering the President to make emergency regulations which can override any law except the Constitution. Provisions have been made for the immediate summoning of Parliament for approval of the Proclamation made under a law relating to national security. A proclamation once made may remain in force for one month but a further proclamation can be made if necessary.

Finally, there is Article 156 which makes provisions for the creation of Parliamentary Commissioner for Administration (Ombudsman). Parliament has to pass the necessary legislation for the purpose. The ombudsman is to investigate and report upon complaints of infringement of fundamental rights or other injustices by public officers. He is to be appointed by the President and is to hold office during good behaviour.

Sri Lanka's new Constitution is saturated with the noblest of sentiments for democracy, good government, protection of an individual and of linguistic or religious groups. The constitution-makers have more than adequately fulfilled the task assigned to them, viz., to make a constitution for a democratic socialist republic. The Constitution while making several provisions on traditional lines also makes several innovations as noted above. The experiment to develop a new form of executive needs to be watched with interest and expectation. Much would however depend on the spirit with which the Constitution is implemented in practice, for even the best of the paper constitutions may break down if not worked in the right spirit, and even a bad constitution may result in good government if worked in the right spirit. Human failure and not inherent defects in the constitutions pose the greatest danger facing the young democracies in Asia.

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⁷² Article 155.

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MUSLIM WILLS IN PENANG

In *Ong Cheng Neo v. Yeap Cheah Neoh and others*¹ Sir Montague Smith in giving the opinion of the Judicial Committee of the Privy Council said that in considering what was the law applicable to the bequests dealt with in that case in the Straits Settlements it was necessary to refer shortly to their history. He said —

“The first Charter relating to Penang was granted by George III in 1807 to the East India Company. It cited that the Company had “obtained by cession from a native prince “Prince of Wales Island and a tract of the country in the Peninsular of Malacca, opposite that island”, that when the cession was made, the island was wholly uninhabited but the Company built a Fort and Town, and that many of our subjects and many Chinese, Malays, Indians and other persons professing different religions and using and having different manners, habits, customs and persuasions had settled there”. The Charter made provision for the government of the Island and the administration of justice there. It established a Court of Judicature which was to exercise all the jurisdiction of the English courts of law and chancery, as far as the circumstances will admit. The court was also to exercise jurisdiction as an Ecclesiastical Court, so far as the several religions, manners and customs of the inhabitants will admit.

A new Charter was granted by George IV in 1826 when the Island of Singapore and the town and fort of Malacca were annexed to Prince of Wales' Island which conferred in substance the same jurisdiction on the Court of Judicature as the former Charter had done.

The last Charter granted to the East India Company in the year 1855, again conferred the like powers on the Court; and this jurisdiction was not altered in its fundamental conditions by the Act of the 29th and 30th Vict. C.99 and the Order of the Queen in Council made in pursuance of it, by which the

¹(1872). 1 Ky. 326.