

# Pravāda

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*Pravada* in contemporary usage  
has a range of meanings which includes  
theses, concepts and propositions.

## THE NEED FOR A NEW CONSTITUTION

**A** New Constitution undoubtedly is the need of the hour. It has proved again and again that the present constitution has become an absolute fetter and obstacle to the development of this country both politically and economically. Drafted with scant respect for democracy and constitutional principles, the present constitution was amended sixteen times during its first ten years (1978-1988). The amendments not only exposed but also exacerbated the intrinsic inconsistencies of the constitution detrimental to the smooth functioning of the political system. The rate of amendment in fact was 1.6 per year until 1988! Then it came to a grinding halt.

At the time of the 13<sup>th</sup> Amendment, even the Supreme Court was perplexed whether the proposed amendment was consistent or not with the constitution. The constitution had become completely deformed and distorted by that time, with extraneous amendments added to the already paradoxical legal conundrum. This was one major reason why the intentions of the 13<sup>th</sup> Amendment, a commendable effort to resolve the ethnic conflict through the devolution of power, could not be achieved. The result was the continuation of the ethnic conflict and the war, devastating the economy and the country. The constitution consists of 117 pages, but the amendments 102 pages, nearly 87 percent of the main document. This is another example of the distorted legal character of the constitution.

### Human Rights

**A** constitution of a country is the foundation of its political and governmental system. A constitution, therefore, should be based on sound democratic principles and should safeguard fundamental rights of the citizens in no uncertain terms. Although some fundamental rights are incorporated in the present constitution, that incorporation is limited to five articles and few principles of civil and political rights, a mere fraction of human rights that Sri Lanka has ratified under the international human rights law. The right to life, the most sacred of all rights, is not recognized. No recognition of economic, social or cultural rights, or the most important rights of women and children are accorded at all.

Sri Lanka is obliged under Article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR) to ensure "effective remedies" for those persons whose rights or freedoms are violated. There is a checkered procedure under the present constitution to file fundamental rights cases before the Supreme Court. However, these cases should be filed within one month's time of the violation and the procedure is so entangled in legal intricacies, that the ordinary people, the rural folk or the poor of this country are kept largely out of the system. There is no procedure for public interest litigation where a third party could request for "effective remedies" on behalf of those who are unable to take legal action due to economic or other difficulties.

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## Democracy

The present constitution is a complete aberration in terms of democracy. Unfortunately it was drafted to suit certain "whims and fancies" of particular political personalities, namely J. R. Jayewardene and R. Premadasa. When political personalities changed, the constitution proved difficult to operate. This uneasiness was seen even under D. B. Wijetunga, in fact a UNP President (1993-94), and became insurmountable after Chandrika Kumaratunga came to office in 1994. However, the constitution had become so rigid and legally intricate, it was not possible to change even after so many efforts.

The idea of the drafters of the constitution was to create a weak and chaotic Parliament and a strong Executive President. The constitution was created on a philosophy of autocracy, despotism and authoritarian

rule. It was argued that this sort of authoritarian rule was necessary in a developing country where its people could not afford or understand full democracy. The philosophy behind the constitution was akin to the regimes of Ne Win in Burma, Suharto in Indonesia and Ferdinand Marcos in the Philippines. The fruits of the full operation of this constitution were explicit during the period between 1983 and 1993 when many thousands of people were killed, disappeared or their human rights were brutally suppressed.

## Fundamental Law

A constitution in a country is the fundamental law. The fundamental law should stay above the ordinary law and should give structure and framework to the country's diverse institutions. The fundamental law or the constitution should be impartial and should reflect aspirations and desires of all communities in society. It should be a true reflection of the balance of relations between various communities. The rigid unitary character of the constitution, although slightly adjusted by the 13<sup>th</sup> Amendment, does not reflect adequately the aspirations of different communities, other than the majority Sinhalese. When ambiguities are vast in all directions, even the majority community can be apprehensive about their rights and aspirations.

It is almost a universal constitutional principle today to devolve power and create autonomous regions or provinces when there are cultural communities living in contiguous areas. Although the 13<sup>th</sup> Amendment intended to do this in an ambiguous manner under the pressure of the international community, the amount of power devolved to the provinces and the mechanisms set up as safeguards have not been to the genuine satisfaction of the minorities.

The constitution does not recognize cultural rights of the minorities. No safeguards are afforded under the chapter on language rights. The chapter itself is ambiguous and partial to the majority community. Although the last or the sixteenth amendment to the

constitution had tried to remedy the situation in respect of the language of administration and official record in the country, different formulations have rendered ambiguity and confusion. Without a new constitution these ambiguities will not be remedied to resolve the language issue, a major facet of the ethnic conflict.

## Simplicity

A constitution, as a country's fundamental law, should be neat and clear cut. All the legal details and procedures should not be incorporated in a constitution. Those can be detailed out in subordinate laws. For example, if only the main electoral principles are incorporated in the constitution and if the subordinate electoral law governs the details, any ambiguity of the electoral system can be remedied through a simple majority in Parliament. At the same time, through interpreting the changes in the subordinate law within the framework of the fundamental principles in the constitution, the judiciary can easily check any abuse of the fundamental law and that means the constitution. It appears that many constitutional drafters find it difficult to decide on what is fundamental and what is not? Why should the "words and music" of the national anthem be incorporated in the constitution?

A constitution of a country should be a readable document even for the ordinary folk. It is not only a legal document but also a (consensual) political manifesto that should charter the country for a future period of time. It should give flesh and blood to the institutional structures of the political system, so agreed by the people, and should clearly demarcate the powers and functions, checks and balances of those various institutions.

## Stability

A constitution of a country should ensure political stability in the system and the country at large. This stability is important particularly in a developing country like Sri Lanka where

the economy and the well being of the people will depend largely on the stability of the system. In respect of the executive presidency and the electoral system, and also in many other aspects, it has been proved that the incorporation of principles completely alien to the local soil is superfluous. Sri Lanka should not risk large experimentations in the future but should base on recent and past experiences, simple and clear.

The rigidity and inflexibility are the most outrageous in the present constitution in terms of its amendment. The constitution was promulgated with four fifths in Parliament in 1978 obtained under the previous "first-past-the post" electoral system. The promulgated constitution introduced a system of proportional representation with no possibility of a party or a coalition of parties obtaining a two-thirds majority in order to change the constitution. Having realized this problem during his own tenure, President Jayewardene extended the life of Parliament in 1982, with his four fifths of majority intact until 1988. It was under this undemocratic measure that thirteen amendments to the constitution were possible between 1982 and 1988. After the holding of elections under the present proportional representation system there was no possibility of

changing or even amending the constitution. The constitution has become rigidified and monolithic.

A constitution of a country like Sri Lanka should be flexible apart from being stable. To ensure continuity and stability, a special majority is always required to change a constitution. However, this special majority should be politically feasible within the electoral system. Sri Lanka is a country with rapid changes. Especially given the complexities of the ethnic conflict, new constitutional arrangements may always be necessary to adjust and readjust the interests and aspirations of all communities. A party or coalition of parties with the people's mandate should be able to ensure this constitutional flexibility apart from governing the country in a stable manner. What the electoral system at present has created is not only the rigidity in the constitution but also the hazardous instability in the government. The clear sufferers are the people, as the power seekers obstruct the smooth functioning of the system under the circumstances. While preserving the good elements of proportional principles to allow small party representation in Parliament, the electoral system needs to be changed to ensure stability of government and the flexibility of the constitution.

Laksiri Fernando

## Hector Abhayavardhana Selected Writings

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