

## TAMIL CIVIL SOCIETY FORUM

### **SUBMISSION TO THE PUBLIC REPRESENTATION COMMITTEE ON CONSTITUTIONAL REFORMS**

Jaffna, 16 February 2016

#### **1. Introduction**

TCSF is a network of Tamil civil society activists living and/or working primarily in the North - East of Sri Lanka. The forum has been active since 2010. The aim of the forum is to protect and promote the existential rights of the Tamil people and the exercise of their right to self-determine their social, political, linguistic, cultural and economic future<sup>1</sup>.

This submission before the Public Representation Committee on Constitutional Reforms does not aim to be a comprehensive proposal outlining TCSF's views on what should be included in a new constitution. TCSF as a constituent member of the Tamil People's Council (TPC) contributed to the design of TPC's pre-consultations draft on a framework for a political solution. TPC's proposals should be consulted for a broader view on TCSF's stance on a negotiated constitutional settlement<sup>2</sup>. This submission seeks to put forward TCSF's views on some key subjects of discussion in the current constitutional reform debate.

As a preliminary point we wish to place on record our concern that both the Prime Minister and the President have chosen to unequivocally comment in the past few months that the unitary character of the constitution will be retained in the new constitution. Given that this committee has been established under an order made by the Cabinet of Ministers and that it functions as part of the Prime Minister's secretariat, the Committee should clarify that their work is not bound by the comments of the Prime Minister or the President<sup>3</sup>.

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<sup>1</sup> Our policy document can be found at this link: <https://www.scribd.com/doc/249264183/TCSF-Policy-Document-English-Final-pdf>

<sup>2</sup> Available here [http://tamilpeoplescouncil.org/Press%20Release\(19-12-2015\)/Highlevelframework.pdf](http://tamilpeoplescouncil.org/Press%20Release(19-12-2015)/Highlevelframework.pdf)

<sup>3</sup> It is in this context that we note with concern the remarks of the Chairman of this committee that 'moderate Tamils' are agreeable to a solution within a unitary Sri Lanka. We have very high regard for most of the individuals who serve on this committee including its Chairperson. It will be unbecoming of the PRC to entertain public representations based on a pre-defined framework which may act as a sub-conscious gate-keeper of the kind of public representations would be deemed worthy. We are particularly concerned that the Chairman had referred to the unhelpful binary of 'moderates' and 'extremists' in the said remarks and suggested that it is the latter within the Tamil community who disagree with the unitary framework of the constitution. If rejection of a unitary state is considered to be extremist the PRC in effect would in effect be painting the entirety of the Tamil populous with the brush of extremism. The tag of extremism is a tool

## **2. The unsuitability of a majoritarian democratic decision making process for enacting a new constitution:**

The constitution is a legal instrument that constitutes public power. The constitutive aspect of the constitution makes it a special kind of instrument for which the usual decision making procedure used in democracies i.e majority vote, ill-suited, particularly so for a deeply divided society<sup>4</sup> like Sri Lanka.

The resolution presented by the Prime Minister in relation to the constitution making process on the 09<sup>th</sup> of January 2016<sup>5</sup> provides exclusively for a majoritarian process. Per the resolution submitted by the Prime Minister, the Constitutional Assembly, the Parliament and the Referendum process will adopt a majority/ special majority decision making process<sup>6</sup>. The consultation of the provinces in between the constitutional assembly process and the parliamentary process appears to be tokenistic and its impact on the decision making process appears to be minimal<sup>7</sup>. We hope that the views of the Tamil people as heard through the public consultations facilitated by the Public Representation Committee will be adequately represented in your report and be given serious consideration by those tasked with writing the draft constitution in the constitutional assembly. We hope that this committee will continue to advocate for the results of the public consultation process to be methodically incorporated into the drafting process of the new constitution<sup>8</sup>.

Given that Sinhala Buddhist constituency will have an overbearing influence owing to their numerical strength on all relevant bodies identified in the constitution making process we have concerns as to how the process envisaged will deliver an acceptable solution to the National Question. We thus believe that there has to be a political process

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of exclusion. If the PRC seeks to be an inclusive forum it would be well advised to avoid such counter-productive dichotomisation of Tamil politics.

<sup>4</sup> A deeply divided society is where ethno cultural identity are politically salient, are persistent markers of political identity and the primary basis for political mobilisation, Sujith Choudry, (ed) *Constitutional Design in Deeply Divided Societies* (OUP, 2008)

<sup>5</sup> Available here: <http://www.pmooffice.gov.lk/download/Constitutional%20Reform%20-%20Resolution%20E%2020151117.pdf>

<sup>6</sup> Clause 28 of the said resolution provides that the Constitutional Assembly can enact the draft constitution with a 2/3<sup>rds</sup> majority, Per Clause 33, 34 and 35 the Parliament again requires a 2/3<sup>rd</sup> majority to pass the constitution and the referendum requires a simple majority

<sup>7</sup> Clause 32 of the said resolution provides merely that the views of the Provincial Councils will be solicited.

<sup>8</sup> Clause 23 of the resolution merely provides for consideration of the PRC's report by the Steering Committee of the Constitutional Assembly

prior to the constitutional process tasked with resolving key questions with regard to the issue of the character of the state. As outlined in the pre-consultation draft of the Tamil People's Council<sup>9</sup>, a political process at which the different stakeholder communities of Sri Lanka can take part on an equal footing to define the basis of a new state needs to take place *a priori* to a constitutional process. Otherwise we fear that like all constitutions in the past (1947, 1972 and 1978) that the new constitution enacted will be a constitution of the majority by the majority to the majority. We also believe that the process of constitution making needs to be sufficiently internationalised in light of other constitutional making examples in the aftermath of violent conflict such as Bosnia, Northern Ireland and Aceh to inspire confidence in its sustainability.

### **3. Defining the problem that needs to be addressed through a new constitution: The 'National Question'**

Any constitution making process needs to clearly define its objectives. The preamble to the Prime Minister's January 9, 2016 resolution refers *inter alia* to the objective of the constitution making process being to resolve the 'National Issue'. We understand that sections of the National Unity Government and the so-called 'Joint Opposition' want to remove references to these objectives in the preambular paragraph and that the Prime Minister has agreed to drop these references. If there can be even no public acknowledgment of the issue that needs resolution we wonder how this constitution will resolve them. In what follows we define the problem that needs resolution.

We define the National Question in Sri Lanka as the problem relating to the hierarchical nature of the Sri Lankan state at the helm of which is the Sinhala Buddhist nation. In this hierarchical state structure the other constituent nations and peoples of Sri Lanka are regarded as subservient peoples and nations to the dominant (Sinhala Buddhist) nation. The dominant nation has used the state, its constitutional and legal apparatus to preserve its dominant status. This we contend is the best explanation of the post-colonial constitution making efforts in the country and of constitutional praxis in post-colonial Ceylon/Sri Lanka. A solution to the National Question, will only come about through a radical and fundamental re-envisioning of the state on the basis of equality amongst the constituent nations and peoples of Sri Lanka. We firmly believe that a thin liberal conception of constitutionalism will not help resolve the problem. The National Question cannot be solved merely by guaranteeing individual rights, good governance and the rule of law. The National Question is about the right to self-determination of the different nations that constitute Sri Lanka including the Tamil Nation. By 'Nation' we mean the collective consciousness of a people who share a political identity (based on language/

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<sup>9</sup> Available here: [http://tamilpeoplescouncil.org/Press%20Release\(19-12-2015\)/Highlevelframework.pdf](http://tamilpeoplescouncil.org/Press%20Release(19-12-2015)/Highlevelframework.pdf) See section titled, 'the need for a political agreement prior to a constitutional process' in particular

religion/ shared history etc) and who inhabit a particular territory to self-govern themselves. The constitution making process cannot seek to resolve the National Question by avoiding the issue of self-determination and collective rights of people. We believe that to juxtapose individual rights and collective rights is a mistake. We firmly believe that the right to self-determination of the Tamil Nation is fundamental to Tamils *qua* individuals enjoying their individual rights and freedoms. If the new constitution is to sufficiently respond to the National Question it needs to a) institutionally recognise the self-determination of its distinct nations/ communities and b) provide for a secular state.

#### **4. Devolution within a unitary state is unacceptable.**

Unitary state in Sri Lanka has a very definitive socio- political meaning. It has nothing or very little to do with the idea of a united country. On the contrary it has everything to do with centralising power in the majority Sinhala Buddhist nation. The unitary state structure is that which is used to institutionally enshrine Sinhala Buddhist Nationalism in the exercise of public power. The unitary character of the state hence permits Sinhala Buddhist nationalism to impose a deep hegemony through a composition of bounded unity of territory, state and nation of the island revolving around a majoritarian axis of Sinhala Buddhist religion, language, culture and people<sup>10</sup>.

We hence believe that any devolution of power within the understanding of a unitary state will not resolve the problem. There are two problems associated with devolution within a unitary state:

A) Devolution assumes that the *locus* of power is in the centre and that the centre on its own volition and not as a matter of rights devolves powers that rightfully belongs to it. This approach to public power in the context of Sri Lanka for reasons stated above is unacceptable.

B) When the constitution identifies itself as unitary it provides the legal theoretical framework within which to interpret the devolution arrangements. The experience of the constitutional praxis of the 13<sup>th</sup> amendment is that devolution arrangements will be interpreted by courts within a unitary culture to favour the central government.

For these reasons we submit that devolution within a unitary state will not resolve the National Question.

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<sup>10</sup> David Rampton “‘Deeper hegemony’: The Politics of Sinhala Nationalist Authenticity and the Failures of Power-Sharing in Sri Lanka”, 49 (2) *Commonwealth & Comparative Politics*, pp. 245-273 at p. 255 and 256

## **5. Federalism and the label question**

We submit for those reasons laid out in the preceding sections that a self-determination inspired approach to federalism or as referred to in the constitutional literature ‘a coming-together-federal model’ (as opposed to the devolutionary path to federalism) will best suit Sri Lanka. A possible model for reconfiguring the Sri Lankan state as a plurinational state along federal lines that respects the right to self-determination of its constituent nations is found in the Tamil People Council’s pre-consultation draft proposals for a political solution.

We note that some have argued that the labels ‘unitary’ and ‘federal’ are unnecessary<sup>11</sup>. We feel that the avoidance of labels is an argument in political expediency. Any student of political science and law will readily accept that there are some fundamental characteristics of what a unitary and a federal constitution constitute. To assume that by avoiding the label that we can address fears relating to federalism amongst the majority community is impractical and dishonest. The assumption that federalism will lead to secession is a myth which we submit has been spread and perpetuated by the Sinhala political leadership. Secession is a matter of fact and its eventuality cannot be necessarily facilitated or prevented by a particular constitutional design. If an honest solution to the National Question is to be found it needs an honest and transparent approach and part of such a process is a public communication process that demystifies the federal idea amongst the majority community.

## **6. Incremental solution?**

It has been suggested that a political solution can only be achieved in incremental steps and that the best outcome of the 3<sup>rd</sup> Republican Constitution would be judged by not the whether it provides for the most desirable solution but by comparing it with the 1978 constitution on whether progress has been made on the question of devolution.

We submit that the argument for an incremental solution based on pragmatism is in essence an argument against real change. Firstly, a solution within a unitary state cannot be accepted as part of an incremental solution. Secondly the principled basis of a new state cannot be arrived at incrementally if there is a lack of consensus as to the foundational principles that guide the creation of the new state. Thirdly incrementalism which pushes important decision making from the legal to the political sphere through the provision of ambiguous constitutional schemes, in effect leaves the exercise of political power to majoritarian processes.

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<sup>11</sup> See for example clause 1 of the ‘Singapore Principles’ (2013) available here <https://www.tamilnet.com/art.html?catid=79&artid=37606>, the revised version of the Singapore Principles (April 2015) available here <http://tamildiplomat.com/federal-or-not-singapore-principles-for-a-new-constitution-in-sri-lanka-casts-doubt/>

We submit that the constitution making process should be an exercise in collective soul searching as to the need for the state to be institutionally restructured to be inclusive and plural. This is not a debate we can afford to postpone in the name of the convenience of incrementalism.

## **7. Accountability and Justice and their relation to a political solution**

We submit that the war that took place and the crimes that continue to be committed against the Tamil people are directed against the Tamil people's desire for self-determination and collective existence as a nation. The war and the continuing crimes seek to weaken Tamils as a collective and hence our self-understanding that the totality of the crimes points to a genocidal design. In this sense there is a direct link between the discourse for accountability and justice and the search for a political solution that recognises the Tamil people's aspirations for self-determination. Given the above we reject approaches that suggest that the search for a political solution has to delay the search for accountability and justice. One cannot be sacrificed for the other. An honest approach to accountability and finding a political solution, combined, is key to sustainable peace and justice in Sri Lanka.

## **8. The North-East Merger issue**

The Tamil claim to a traditional homeland in the North-East of Sri Lanka has been ridiculed as a theory of 'dubious historical validity' and as a 'potent and divisive myth' by Prof K.M. de Silva<sup>12</sup> and other historians with a Sinhala Buddhist leaning. KM De Silva argues for an understanding of the whole of the Sri Lankan space as a – uniform national space populated by identical citizens. This assumption of state neutrality is a convenient mask that denies the fact that the Sri Lankan space has already been constitutionally, theologically identified with a particular ethnicity and religion (vide Article 9 of the 1978 constitution).

Without commenting on Prof Silva's historical claims we submit that to interpret the claim to the North-East as a homeland as only a claim in history is a mistake. The Tamil homeland argument we submit is primarily a political claim that grew out of the dialectics of the ethnic conflict and is essentially a counter to the hegemonic claim to the entirety of Sri Lanka being Sinhala-Buddhist. As Prof S.J. Thambiah framed the argument, 'the slogan of 'traditional homelands', whatever its objective truth, is first and foremost a political claim meant to ensure the security of the Tamils [and] ... is integrally connected to Tamil insistence on regional autonomy'<sup>13</sup>

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<sup>12</sup> K.M. De Silva, 'Separatist ideology in Sri Lanka: A historical appraisal of the claim for the "traditional homelands" of the Tamils of Sri Lanka' (ICES: Kandy, 1987).

<sup>13</sup> See: SJ Thambiah, (1986): *Sri Lanka: Ethnic Fratricide and the Dismantling of Democracy*. (London: IB Tauris), p. 8

TCSF's understanding of the homeland notion does not subscribe to it from the point of view of exclusivity. We acknowledge that Muslims and Sinhalese have historically inhabited the North-East and that there can be no hierarchy as to who has a superior claim to land in the North-East. However we are opposed to state sponsored colonisation of the North-East with the view to negate the claim to territorial autonomy and self-determination.

We are also deeply suspicious of the appropriation of liberal arguments of common citizenship and individual rights to justify Sinhala Buddhist colonization in the North East which continues to-date and the rejection of the North-East as the territorial unit for autonomy for the Tamil. Such instrumentalised liberal arguments were for example used in Chief Justice Sarath N Silva's reasoning to justify the de-merger of the North-East<sup>14</sup>.

We hence submit that a merged North-East needs to be recognised as the territorial unit of the Tamil nation. Within such a merged North-East we accept that the Muslims need to be provided autonomous institutional arrangements. We are also very clear that such a merged north-east cannot be hierarchical in its treatment of citizens and has to accord all, the same rights to access and ownership of land and freedom of movement.

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<sup>14</sup> *Wijesekera v Attorney General* 2007 1 SLR 38 (The North-East Merger Case)

"The elements of race, religion and language characterize ethnicity that tends to divide people. Caste, sex, political opinion and place of birth are sub-elements of further divisions between people. In contrast the equal protection of the law unifies people on the basis of the Rule of Law and the peaceful resolution of disputes that characterizes the exercise of judicial power in terms of Article 4(c) read with Article 105(l) of the Constitution. From this perspective the physical identification of a unit of devolution of legislative and executive power, being the bone of contention, diminishes in significance. Whilst ethnic criteria would be relevant to define the territory of a unit of devolution since a homogeneous unit could be better managed and served, the overriding consideration would be current criteria (not historic material or speculative assumptions for the future) that contribute to the functional effectiveness and efficiency of a unit from the perspective of service to the people, being the sole objective of representative Government".

Even Defence Secretary Gotabaya Rajapaksa used individual rights language to justify state sponsored demographic changes in the North-East.

"Sri Lanka's defence secretary has said it is not appropriate to view the north of the country, over which a separatist war was fought, as a predominantly Tamil area. "Why should be that? Why should be that?" Mr Rajapaksa said. "If you are a Sri Lankan citizen you must be able to go and buy the properties from anywhere. I'm not talking about the forced settlements, I'm talking about the freedom for a Sri Lankan to live anywhere in this country." BBC (May 2012): <http://www.bbc.co.uk/news/world-asia-18207198>

## **9. Asymmetrical Federalism**

We support moves aimed at reconstituting Sri Lanka into a multi-unit federal state. However we recognise that the other parts of Sri Lanka (outside the North-East) may not demand the whole breadth of self-governmental powers that the North-East seeks for itself. Hence we suggest that Sri Lanka be constituted as an asymmetrical federal system which allows for choice among the federal units as to the scope of self-governmental powers. A list of subjects that the North-East should have powers over is available in the Tamil People's Council's draft proposals.

## **10. The importance of land and police powers**

It is vital that the constitutional scheme includes land and police powers as powers of the federal unit of the North-East. Land and police are critical powers given that Tamils have been discriminated and marginalised as a collective as a result of these powers being centralised. The exercise of police powers by the North-East Government is important from the perspective of accountability, security sector reform and the issue of non-recurrence. The exercise of land powers over state land is important to allay fears about state sponsored demographic changes in the North-East. Detailed provisions as to how to design these powers are available in the Tamil People's Council's draft proposals.

## **11. Self-Government as an opportunity for intra-Tamil community social reform.**

We believe that self-government will provide the much needed space for intra-community social and economic reform in the Tamil community. A measure of self-government will help create the space to review the *Thesawalamai* in line with current social justice and human rights norms, provide for schemes to enhance the role of Tamil women in the public affairs of the Tamil community (for example through reservation of seats at the legislature, executive, judiciary and local government bodies), devise affirmative action schemes for eliminating caste discrimination, for land ownership reforms *et al.*

## **12. Conclusion**

In conclusion we emphasise that, if this moment, as many have highlighted, is to be perceived as an 'opportunity' to resolve the National Question there has to be an honest and open debate about the nature of the State that will institutionally reflect its plurality. It is a debate that we have avoided for a long time. This is not a debate that we can avoid if the current process of constitution making is to provide us the chance for peace. This is not a debate that this commission can side-step. Let this moment not be wasted because we were afraid to have this all important conversation.