

ESSAYS ON FEDERALISM IN SRI LANKA

Edited by

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&
Asanga Welikala



CENTRE FOR POLICY ALTERNATIVES
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INTRODUCTION

The Centre for Policy Alternatives (CPA) has since its inception been at the forefront of the advocacy of federalism as a political and constitutional idea for addressing many of the constitutional problems and anomalies that characterise the Sri Lankan State. Sri Lanka's constitutional dispensation has been critiqued for its centralisation of political power that impedes greater democratisation and citizen participation on the one hand, and on the other, prevents diversity and pluralism from being fully expressed within the constitutional architecture of the State. Consequently, the State is perceived to be authoritarian at the same time as its majoritarianism and lack of inclusivity encourages claims of ethnic discrimination which for the last three decades or so have found expression in an armed secessionist movement on the part of Tamils in the North and East of the island.

In response to the diversity and ethnic, cultural and religious pluralism of the Sri Lankan polity, federalism as a principle of constitutional power-sharing is in fact a very old idea. It surfaced in political and constitutional reform debates well before independence, and has been a feature of such debates ever since. However, the resistance to federalism has an equally long pedigree, and Sri Lanka at present finds itself in a political environment in which federalism's prospects seem bleaker than ever before. Majoritarian nationalists view it as an insidious tool of separatism, while secessionists on the other side of the ethnic divide see it as an equally sinister means of thwarting the realisation of their ambitions for a separate State.

Federalism therefore finds itself in need of a robust defence, if only to reiterate the many arguments federalists have made on its behalf in response to the constitutional challenges facing Sri Lanka throughout the years. The present collection of essays on federalism is such an initiative. It brings together some of the research and conference papers, speeches, newspaper articles and opinion pieces written in support of the federal idea and federal-type constitutional options for and in Sri Lanka in the recent past. The collection has the modest aim of serving as a convenient reference for arguments already

made, but which are in need of reiteration; it does not seek to present new developments in theoretical or policy research on the role and relevance of federalism in the constitutional reform debate in Sri Lanka.

Chapter I, by Rohan Edrisinha, is a lecture originally delivered in New Delhi in 2000 as '*Sri Lanka: Constitutions without Constitutionalism – A Tale of Three and a Half Constitutions*', as the 5th Lecture in the Lectures on Comparative Constitutionalism in South Asia Series of the Law & Society Trust (LST). It provides a basic conceptual framework informed by liberal constitutionalism for critique and analysis of constitutions, and offers on that basis an analytical review of the three post-colonial Sri Lankan constitutions, as well as the constitutional reform efforts between 1995 and 2000.

Chapter II, by Paikiasothy Saravanamuttu, is the 2002 Gandhi Memorial Oration entitled '*A Peace with Democracy, A Peace with Dignity*' delivered in Colombo. The Oration contains an articulation of the principles that should guide a process of negotiations towards a durable peace in Sri Lanka, as well as a sustained case as to why a constitutional settlement that secures peace would have to be federal in nature whether explicitly so described or not.

Chapter III, by Asanga Welikala, is a paper first presented at the Institute of Federalism, Fribourg, Switzerland, in 2002 as '*The Devolution Project in Sri Lanka: Towards Two Nations in One State?*' and subsequently updated to include early events in the peace process that commenced in 2002. While the optimism of the paper in respect of negotiations and constitutional reform was in retrospect misplaced, it nevertheless contains a restatement of the political and constitutional issues of conflict formation and resolution of continuing relevance.

Chapter IV, by Rohan Edrisinha, discusses the myths and realities concerning federalism that have characterised the public discourse on the idea in the Sri Lankan context. The paper has a broad historical sweep in its discussion of the way in which at various times of Sri Lanka's modern political history, federalism has been both proposed

and repudiated, and deals with the way in which certain conceptual misconceptions, and indeed, distortions, have underpinned political opposition to federalism in these debates.

In 2001-02, CPA in collaboration with the Institute of Federalism, Fribourg, Switzerland, organised two international conferences (with Track 1.5 and 2 participation) to explore and deliberate on the issues of process and substance relating to a constitutional settlement of Sri Lanka's ethnic conflict. The first conference was held in Locarno, Switzerland, in 2001, and was resourced by two papers from CPA: the first discussing substantive constitutional issues by Rohan Edrisinha (it should be noted that there is an element of repetition between this paper and the discussion in Chapter I with respect to the constitutional reform efforts of 1994 - 2000, but it was decided to reproduce the paper in full for the sake of completeness); and the second dealing with the process considerations of a settlement by Ketheshwaran Loganathan. These are reproduced here as Chapters V and VI respectively. The second conference in 2002 of what became known informally as the 'Locarno Process' dealt with interim and transitional arrangements of the peace process then commencing in Sri Lanka. The CPA background paper prepared by Ketheshwaran Loganathan and Asanga Welikala for this event is reproduced here in Chapter VII.

At the conclusion of the third round of peace talks between the government of Sri Lanka and the LTTE on 5th December, 2002, at Oslo, the parties agreed to explore a constitutional settlement that was federal in nature and which would seek to recognise the right to internal self-determination of Tamil speaking people in their areas of historical habitation in the North and East. The precise scope of self-determination as a principle of international law is a matter of continuing academic and policy debate, and Chapter VIII, by Asanga Welikala, seeks to identify the present scope and nature of the internal dimension of self-determination at international law.

At the conclusion of the fifth round of peace talks between the government of Sri Lanka and the LTTE on 8th February, 2003, at Berlin, the parties announced *inter alia* that they intended to

commence discussions on the fiscal aspects of a federal structure. In Chapter IX, Asanga Welikala outlines the constitutional and technical design dimensions of a fiscal and financial framework in a federal-type constitutional setting.

In Chapters X and XI, Kelley J. Bryan presents the lessons for Sri Lanka from the federalisation experience in Belgium, and from forms of non-territorial federalism in other countries in which this type of federal arrangement has been experimented with. Both papers provide valuable comparative lessons and possible avenues for constitutional reform in Sri Lanka.

In November, 2003, the LTTE made public for the first time a set of constitutional proposals articulating its vision for the North and East, and the establishment of an Interim Self-Governing Authority (ISGA) for that region. While direct talks had collapsed by this time, principally on the question of the establishment of an interim administration controlled by the LTTE for the North and East, the LTTE's ISGA proposals were in response to several proposals by the government in mid-2003 on such an interim administration. The ISGA proposal was predictably condemned and rejected by groups and parties in the South opposed to power-sharing. It was also, however, critiqued by federalists, whose concerns were that the ISGA proposal went substantially beyond the normative and conceptual dictates of federalism, and further, that it departed significantly from the asymmetrical federal model articulated in outline jointly by the parties following the third round of talks at Oslo on 5th December 2002. Chapter XII, by Rohan Edrisinha and Asanga Welikala, is such a federalist critique of the ISGA proposal.

An All Party Representative Committee (APRC) along with a Panel of Experts was established in 2006 by President Rajapakse with a view to forging a Southern consensus on constitutional reform. In April 2007, the Sri Lanka Freedom Party (SLFP), to which the President himself belongs, submitted the party's proposals to the APRC. These proposals were widely seen as regressive and lacking in understanding of the dynamics of Sri Lanka's ethnic conflict, in particular in respect of a settlement to the conflict through power-

sharing. In Chapter XIII, Rohan Edrisinha advances a detailed critique of the SLFP proposals, arguing that it regresses even from the extent of devolution envisaged by the Provincial Council system established by the Thirteenth Amendment to the Constitution in 1987.

Chapter XIV, by Pradeep Peiris, is an exploration of public attitudes and perceptions about the federal idea. Based on the Knowledge, Attitudes and Perceptions (KAPS) opinion survey conducted by the Social Indicator, CPA's opinion research unit, the paper discusses the social cleavages in relation to attitudes and perceptions about federalism, and argues that the weaknesses in the strategies and programmes of advocacy of federalism have contributed to rather than facilitated its broader public acceptance.

Chapters XV and XVI, by Asanga Welikala, are two of the author's Publius columns on www.groundviews.org, CPA's citizen journalism initiative. Chapter XV, entitled '*Beyond Federalism? Liberalism's Challenges in Sri Lanka*' is a discussion of traditional liberalism's limitations in dealing with ethno-political conflicts such as found in Sri Lanka, through the insistence on a federal polity that is nonetheless premised on a unitary conception of modern nation-statehood and citizenship. Chapter XVI, entitled '*Ethnos or Demos? Questioning Tamil Nationalism*' is a discussion about the political and normative challenges facing Tamil nationalism in Sri Lanka.

We have finally included a set of documents as appendices, which we consider to be generally important in the federalism debate, or because some of them have been extensively cited in the substantive chapters. These are (a) the LTTE's ISGA proposal; (b) the official communiqué issued by the Royal Norwegian Government at the conclusion of the third round of peace talks between the government of the Sri Lanka and the LTTE on 5th December 2002 at Oslo; (c) the statement by the LTTE issued on the occasion of the fifth anniversary of the signing of the ceasefire agreement in February 2007; (d) the special statement of the United National Party in September 2007 on a negotiated political solution based on a system of credible power-sharing acceptable to all communities; (e) extracts

from the judgment of the Supreme Court of Canada on the secession of Quebec from Canada; and (f) the consensus document produced by Minister Tissa Vitharana, the Chair of the All Party Representative Committee (APRC), in January 2007 with a view to bridging the differences between the majority and minority reports and individual dissents of the Experts Panel of the APRC.

We hope that the collection of essays proves to be a useful resource for those interested in the federalism debate in Sri Lanka. We would like to thank Anita Nathan, intern at the Legal & Constitutional Unit of CPA, for her diligent assistance in the preparation of the collection for publication.

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