

## Chapter XIII

### THE SRI LANKA FREEDOM PARTY'S BREATH-taking PROPOSALS ON CONSTITUTIONAL REFORM

*Rohan Edrisinha*

The Sri Lanka Freedom Party (SLFP) has a new approach to a negotiated settlement. It goes like this: in a hypothetical negotiation regarding a salary dispute between employer and employee. Employees ABC earn a salary of Rs. 10,000 per month and go on strike demanding a higher pay. Employer X states that he is committed to a negotiated settlement, appeals to Employees ABC to return to work, and offers them an all inclusive salary of Rs. 5,000 per month, less than even their previous salary raise which gave them Rs. 7,500 per month.

The SLFP proposals to the All Party Conference announced on 30<sup>th</sup> April 2007 are as outrageous as the offer of the employer in the example cited above. Yet it claims that the proposals are those 'through which a lasting and honourable solution to the ethnic issue [sic] is to be realised.' Such a astounding claim for a set of proposals which are Thirteenth Amendment Minus, Minus, with respect to the ethnic conflict and which are potentially dangerous for democracy, good governance and the existence of independent institutions, demonstrates that those responsible for the proposals are completely out of touch with the realities of constitutional reform for conflict resolution, and also unaware or simply oblivious to the slow but gradual progress that has been made in the constitutional discourse of the country relating to the need to create mechanisms that are independent and effective in the promotion of principles of good governance.

## The Unit of Devolution

The unit of devolution is THE most difficult issue to deal with in any negotiated settlement. This is because since the 1970s, nearly all Tamil political parties have called for the merger of the Northern and Eastern Provinces. People may disagree on the historical justification for a Tamil homeland or the reasons for the change in the demographic composition in the East in the past hundred odd years, but whether we like it or not THE first 'article of faith' of the Tamil political parties is the merger of the two provinces. A solution that can have a chance of success must address this issue and not avoid it, as the SLFP proposals have done. The merger was probably the most discussed aspect of both the Indo-Lanka Accord and the Thirteenth Amendment to the Constitution. The Thimpu Principles of 1985, subscribed to by all Tamil parties, referred to a merger as did the Oslo Declaration of 2002. The founder of the SLMC, M. H. M. Ashraff recognised that the merger was the pith and substance of Tamil aspirations during the Premadasa All Party Conference in the early 1990s and worked closely with Tamil parties represented at the conference to devise mechanisms to protect the rights of the Muslim people within a merged North and East. Mangala Moonesinghe realised the complexities involved as he spearheaded his Select Committee in 1992, when he asked a group of academics to devise a structure for the North East that 'recognised and did not recognise the merger at the same time.' The merger was confronted and addressed by those responsible for the draft Constitution Bill 2000.

Since a joined North and East is so vital to Tamil aspirations, Tamil political leaders have favoured a larger unit of devolution. The district based District Development Councils of the early 1980s never really got off the ground. The focus of the unit then moved to provinces in the mid 1980s and later to regions in the mid 1990s. There was therefore a consistent trend towards a larger unit of devolution for the past 25 years. It, of course, must not be forgotten that some of the more creative constitutional proposals of earlier years proposed a larger unit of devolution. The Kandyan Sinhalese in their constitutional proposals to the Donoughmore Commission in 1927 proposed a federal system of government based on 3 regions –

a merged North and East, the Kandyan Provinces and a region comprising the joined Western and Southern Provinces. The Bandaranaike-Chelvanayakam Pact of 1957 referred to regional areas, provided that the Northern Province would form one regional area, while the East would be divided into one or more regional areas with provision for two or more regions to amalgamate beyond provincial limits.

Even the members of the All Party Experts Committee who did not constitute part of the majority group accepted the province as the unit of devolution. The minority report of H. L. de Silva, Gerald Peiris, Gomin Dayasiri and Manohara de Silva, and the separate opinion of M. D. D. Peiris and K. H. J. Wijedasa, though unequivocally opposed to the merger of the Northern and Eastern Provinces accepted the province as the basic unit of devolution.

Since the introduction of devolution based on provinces in 1987, all the main national leaders have accepted the provinces as the basic unit of devolution: Presidents Jayewardene and Premadasa, Sirimavo Bandaranaike in her DPA presidential manifesto of 1988, President Kumaratunga and the SLFP she led in the mid 1990s and until last year. The debate has been on whether constitutional reform should accept a larger unit of devolution than the province for the North and East of the country. The SLFP led by President Mahinda Rajapakse has in its proposals of 2007, proposed devolution to the districts and the conversion of the present 25 districts into 30 smaller districts! It has, therefore gone backwards, undermined a twenty five year trend and raised serious questions about its capacity and understanding of the nature of the ethnic conflict, its history and evolution, and therefore, the SLFP's competence to lead the country to a negotiated settlement.

### **Other Proposals Which Impact Upon the Ethnic Conflict**

The SLFP proposals are retrogressive in a number of other respects too. There is a vague, ambiguous statement that 'the supremacy of Parliament and the Executive powers [sic] should be safeguarded.' Does this mean that Parliament can legislate on subjects assigned to

the districts? Does this mean that the Chief Ministers of the Districts and the District Executive Committees exercise no executive powers? To further confuse the issue of the distribution of powers, the proposed Grama Sabhas (the fourth tier of government?) will exercise executive powers. The provision that the Chief Minister shall be appointed by the President with the concurrence of the District Council is also weaker than the provisions presently in place with regard to the Chief Minister of the Province in that it appears to grant more power to the President.

The President is also granted power to take over District Councils if HE IS SATISFIED that there is a failure of administration. Here too the SLFP's constitutional advisors seem oblivious to the consensus reached both in India and Sri Lanka during the constitutional reform debate 1995-2000, that granting such subjective powers to the President is fraught with danger and is open to abuse.

The proposals on language are a step backwards. Under the present Constitution, Sinhala is the official language and Tamil an official language, while English is the link language. The SLFP proposals, by stating that Sinhala and Tamil shall be the national languages and 'the direct link between the two communities,' presumably repudiates the constitutional status given to English as the link language. The proposals are also silent on the issue of an official language / official languages raising concerns about the parity of status of Sinhala and Tamil.

### **The Second Chamber**

The proposals for a second chamber demonstrate an appalling lack of appreciation of the rationale for a second chamber in constitutions which provide for devolution of power. The rationale is to provide for regional representation at the centre to protect devolution of power and national unity. The SLFP proposals do not achieve this objective, are extremely old-fashioned in that the second chamber has limited powers and has a large number of nominated members, similar to the ineffective Senate that existed in Ceylon under the Soulbury Constitution, and will not facilitate power-sharing at the centre as claimed by the proposals.

The proposals provide for a 75 member Senate consisting of (a) 25 members appointed after a parliamentary election based on the votes polled by political parties, with a cut off point, presumably to favour the bigger parties; (b) the 30 District Chief Ministers; and (c) 20 persons appointed by the President.

The composition of the Senate will most likely result in weak representation for minority ethnic groups, not facilitate the appointment of articulate and capable Senators who can contribute to the deliberative functions of a national legislature, and most dangerous of all, provide another forum for presidential patronage. To provide for more than a quarter of members to be nominated by the country's main political actor is, in a twenty first century second chamber, mind-boggling!

The proposals are not even clear with respect to the law-making powers of the Senate. The proposals limit the power of the Senate in relation to not only money Bills, but also 'matters' affecting national security and emergency powers. It is not clear whether other Bills have to be passed by the Senate before they are enacted into law as the proposals merely require 'scrutiny and consideration' of Bills by the Senate, not approval. The proposals on the Senate clearly have an antiquated 1940/50 Soulbury ethos about them.

### Forms of Government

The proposals under the heading, 'Forms of Government,' are again vague and suggest that the promise of *Mahinda Chinthanaya*, to abolish the executive presidency, may be conveniently forgotten. The proposals affirm a belief in the restoration of a parliamentary form of government. But then they propose an 'indigenous' parliamentary executive 'having given thought to the experiences and traditions of the past'!! Furthermore if a consensus to abolish the executive presidency cannot be found, the executive presidency will continue!!! (*Contra Mahinda Chinthanaya*)□We await a more detailed description of the most creative part of the SLFP proposals – an indigenous cabinet system based on the experiences and traditions of the past!



The proposals on local government reform are detailed and confusing. Instead of strengthening the third tier of government, they split the third tier into two, hardly refer to the crucial questions of empowerment, revenue-raising powers, accountability and checks on increasing central government encroachment on local government powers, and seem more interested in nomenclature – *grama sabhas*, *grama seva wasam* and *grama rajaya*.

### Good Governance

The SLFP proposals seem to accept the permanent emasculation of the Seventeenth Amendment to the Constitution. The Seventeenth Amendment was introduced to ensure that important institutions are independent, depoliticised and not constituted by governments in power. Appointments to the judiciary, police, public service, the Human Rights Commission, Elections Commission and other institutions required to act in a non-partisan manner were to be made under the terms of the Seventeenth Amendment. Since 2006, the Seventeenth Amendment has been flagrantly violated and persons appointed to these responsible positions in direct violation of both the letter and spirit of the Constitution.

It is significant that there is no mention whatsoever of the Seventeenth Amendment or any of its mechanisms in the SLFP proposals. Indeed many of the institutions proposed which one would expect to have some degree of independence do not specify appointment processes to foster independence. For example the SLFP proposes two Commissions on Land and Water. Both Commissions will consist of permanent members to be appointed by the central government with district members 'to be attached where aspects of land and water touches [sic] a district/s,' to be nominated by the relevant District Chief Minister. Such a process of selection, declares the proposal, naively, will enable members of the Commission to act independently and free from political pressures! The proposed District Ethnic Ombudsman will be appointed by the Minister of Justice in consultation with the President.

The existing constitutional mechanisms to promote independence and multiparty consensus are rejected by the SLFP proposals and instead mechanisms which it claims will foster independence but which experiences from our recent past, clearly demonstrate, will promote partisanship and political expediency have been proposed instead.

The proposals on Fundamental Rights and Human Rights contain nothing of substance or significance.

### **Conclusion**

The SLFP proposals for constitutional reform 2007 must surely be the most retrogressive set of proposals made by any political party, organisation or group in the last twenty five years. They fail to address the core issues both in relation to peace and democracy, and in the area of constitutional reform for conflict resolution offer to the Tamil people and their political leadership less than what they already have and less than what was offered in the past twenty five years. It is almost as if the SLFP's constitutional advisors were in a Rip Van Winkle slumber for twenty five years before they drafted the proposals. But what is more distressing is that the Tamil separatists must be chuckling with glee. The proposals will provide them with the ammunition they need to demonstrate to the Tamil people and the international community, that the main political party in the government of Sri Lanka lacks the understanding, capacity, empathy and commitment to accommodate reasonable Tamil aspirations and work towards a negotiated political settlement with justice for all communities within a united Sri Lanka.