

Chapter III

THE DEVOLUTION PROJECT IN SRI LANKA: TOWARDS TWO NATIONS IN ONE STATE?¹

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Birth of a 'State-Nation':

The Politics of Ethnicity and the Crisis of Constitutionalism

The modern Sri Lankan state came into juridical existence in 1948 when the British administration of the Crown Colony of Ceylon transferred power under a granted constitution to a democratically mandated Ceylonese Dominion government. It was in effect, however, a transfer of power to a seemingly constitutionalist and cosmopolitanist local elite. The constitutional form of the new Dominion was a unitary Westminster-style parliamentary executive arrangement underpinned, it was hoped, by permissive British constitutional conventions and liberal democratic values. In addition, a specific minority protection clause was inserted in Section 29 wherein the Ceylon Parliament was precluded from discriminatory legislation on the basis of race, religion, caste etc. Although the smooth transition of power in Ceylon was considered to be a model exercise in de-colonisation at the time, the entire enterprise was based on some tragically erroneous assumptions, both with regard to the substance of the new constitutional arrangements as well as to the mode of transfer.

Although universal franchise and democratic institutions had been in existence in Sri Lanka since as far back as 1931 under the Donoughmore Constitution, an interest-based party political system that is such a fundamental feature of successful parliamentary government did not develop until the promulgation of the Soulbury Constitution just prior to independence in 1947. This particular

¹ A version of this paper was first presented by the author at the Institute of Federalism, University of Fribourg, Switzerland, on 21st September 2002.

framework for democracy reinforced pre-colonial social conceptions of the conduct of government where politics is a bundle of patron-client relationships between elites and subordinate classes. It provided a context in which the early development of the relationship between rulers (new political elite) and the ruled (the electorate) in novel democratic conditions was heavily influenced by primordial and ultimately divisive notions of proximity such as race, religion, caste and region².

There was also an absence of a popular mobilisation around a freedom struggle against imperial oppression. Independence was mediated through negotiated constitutional devices between the departing colonial power and a local elite who were expected to, and ostensibly did, subscribe to a set of rules of the political game that were neutral in terms of sub-national identities. This not only deprived an opportunity for pre-independence nation building with inclusive popular participation, but it also ignored the intra-elite tensions that were divided along, and fuelled by, much the same ethno-religious fault-lines as the broader polity. What was thought to be a consociational grand coalition of ethnic elites united on common grounds of liberal values and class affiliations was in fact, a fiction.

These contributory factors created a new centralised constitutional state wholly bereft of the type of national identity that could give it political legitimacy from within, given the manifest multiplicity of identities by which various groups in the Sri Lankan polity distinguished themselves from each other³.

Against this constitutional backdrop of centralised unitarism, post-colonial nation building efforts also were not informed by enlightened values that would construct a modern democratic polity reflecting the pluralistic ethno-political foundations of the wider Sri Lankan society. On the contrary, the structures entrenched Sinhala

² See Michael Roberts (1994) *Exploring Confrontation* (Harwood Academic Publishers): Ch. 5

³ See A. J. Wilson (1988) *The Break-up of Sri Lanka: The Sinhalese-Tamil Conflict* (Hurst); and S. J. Tambiah (1986) *Sri Lanka, Ethnic Fratricide and the Dismantling of Democracy* (Chicago UP).

nationalism's majoritarian political ideology⁴, idiomatic reification of the centralised state, and its equation of sovereignty with unitarism. Moreover, the majority community's very language of societal and inter-ethnic negotiation was shaped by the institutional form of the state it dominated, and led to the exclusion of any other identity from the ethnic relations and social foundations of the state.

This brings to focus the central limitation of a unitary model in relation to multicultural polities; even one replete with all the distinctive features of a modern democratic political order, such as universal franchise based representative democracy, the rule of law and the independence of the judiciary, and constitutional minority safeguards. Unitary state structures are fundamentally anomalous to the ethnically, religiously and class segmented nature of the Sri Lankan polity⁵. This anomaly reflects the embryonic contradiction in the notion that Sri Lanka constituted a 'nation-state' at independence, if the 'nation' element of the nation-state concept is meant to convey viable political legitimacy. From the perspective of nationality in the classical liberal sense, it is also an empirical affirmation of the fundamental limitations of conventional institutional mechanisms and superficial pre-constitutional commitments to liberal democratic 'universal' values - a justiciable bill of rights was deliberately excluded from the Soulbury constitutional design - when confronted with the fissiparous dynamics of multiculturalism and subjectively constructed ethno-nationalisms.

The immediate and inevitable consequence of the Sinhala claim to ownership of the state was a post-colonial re-formulation of the Tamil identity in oppositional terms to the numerically larger Sinhalese one, and a corresponding demand for federal autonomy on the basis of Tamil nationhood. When the federalist project failed in the face of total rejection by the politically dominant Sinhala nationalism, registered most tellingly by the first attempt at

⁴ Neelan Tiruchelvam (2000) *Federalism and Diversity in Sri Lanka* in Yash Ghai (Ed.) (2000) *Autonomy and Ethnicity* (CUP): pp.198 - 200.

⁵ Jayadeva Uyangoda (1994) *The State and the Process of Devolution in Sri Lanka* in S. Bastian (Ed.) (1994) *Devolution and Development in Sri Lanka* (ICES, Colombo): p.59.

autochthonous constitution making and the establishment of the First Republic in 1972, the process of de-legitimation of the state in the eyes of non-Sinhala groups was complete. This and other acts of majoritarian arrogance such as the Sinhalisation of administration⁶ resulted in the English-speaking minorities of European mixed descent emigrating *en masse*. In the case of the Tamils, the Sinhala Only language policy, state-sponsored Sinhala settlements in predominantly Tamil areas, and discrimination in the sphere of education that excluded Tamil youth from higher education, led to the crystallisation of a militant separatist agenda by the mid-1970s. Militant separatism spawned a welter of youth guerrilla groups, whose notions of nationhood and the means of achieving it were unhampered by the niceties of the international rights discourse, parliamentary methods of dissent and the widely subscribed non-violence principles of their federalist predecessors. They relocated Tamil aspirations in the discourse of the political left, and reformulated the polemic as the Tamil National Question in line with the Stalinist settlement of the right to national self-determination. With the significant exception of some groups such as the Eelam People's Revolutionary Liberation Front (EPRLF) and Eelam Revolutionary Organisation of Students (EROS), however, ideology has not been an undue preoccupation of militant groups, especially in the later stages of existence. One of these organisations, the Liberation Tigers of Tamil Eelam (LTTE), hegemonised the Tamil armed struggle against the state more with unparalleled violence, ruthlessness and determined intolerance of dissent, than by ideological triumph. What remains is an untested representation of the Tamil identity as a type of *volksgeist*, which at a conceptual level poses some considerable threat to individual civil and political rights of members of the Tamil nation.

On the other hand, the state's response to separatism was one of brutal suppression that included state-sponsored anti-Tamil pogroms. The Sri Lankan state was wholly unable to envision its own reformulation so as to accommodate diversity and to absorb

⁶ See for example James Manor (1989) *The Expedient Utopian: Bandaranaike and Ceylon* (CUP)

centrifugal political forces because the contemporary constitutional discourse was too narrow to contemplate a re-conceptualisation of sovereign unitarism.

The centralised unitary state was a British legacy, and the administrative structures built by them did not obviously reflect the exigencies of political freedom and nation building, but rather the objects of a colonialist agenda. These inherited structures were buttressed in the immediate post-colonial era by not only a legal community and political intelligentsia whose jurisprudential assumptions and constitutional interpretations were staunchly positivistic and fashionably Austinian, but also by the less sophisticated predispositions of popular Sinhala nationalism.

As observed earlier, Sinhala-Buddhist nationalism employed a powerful idiom of centralisation of state power. That is to say, it interpolated the glorious historical paradigm of the ancient Sinhalese monarchy, patron of the people and protector of the faith, onto the new institutions of political independence. The greatest characteristic of a truly heroic occupier of the Sinhala monarchical paradigm was the overthrow of foreign domination (usually Dravidian invasions but subsequently Western powers as well) and subsequent 'unification of the country' under a single, central authority. This is the imperative pre-condition of the good life: peace, stability, economic progress and cultural renaissance, and is the subject matter of popular historical myth. On the other hand, dilution of central authority, often derisively attributed to vapid leadership in Sinhala historiography, was seen to produce anarchy, pestilence, moral decadence and cultural degradation. Therefore centralised unity related to territorial integrity is axiomatic in the traditional Sinhala ontology of the state and exercise of sovereignty, and explains its resonance in the modern nationalist hostility to any sort of political decentralisation⁷. Decentralisation, devolution, federalism, power sharing and autonomy, in the Sinhala nationalist view, are mere precursors of an unthinkable certainty: the territorial division of the island.

⁷ Uyangoda, *op. cit.*, pp. 69 – 70.

A church and state symbiosis between the state and the monkhood was another pillar of this evocative popular ideology, and a new class of radical monks had come into existence who claimed for themselves an activist role in political life⁸. The genesis of this phenomenon is perhaps to be found in the religio-cultural revivalist movements, significantly divided along ethnic and religious lines, of the late 19th century in direct reaction to the evangelical proselytisation techniques of Christian missionaries⁹. The result of this stridently advanced thesis was a concept of exclusive motherland belonging to 'us', the Sinhala race and cosmic legatees of the purest Buddha *dharma*. It follows that this worldview did not permit an existential equality to anyone identified as 'them'. With regard to Tamils, the reluctance to extend the hand of partnership in the task of nation building was even more pronounced due to historical Sinhalese fears of Dravidian invasions and of being overwhelmed by hordes of sub-continental Tamils from India¹⁰. All these are strands of the Sinhala collective consciousness, and a fairly coherent if simplistically subjective internal value system, that was, and continues to be, sustained by the *Mahavamsa* (Great Chronicle of the Sinhala people) tradition of historiography.

Accordingly, the post-colonial nation building enterprise proceeded on the presumption that the Sinhalese were the only legitimate holders of grievances against colonialism, which correlated to the perception that minorities were actual beneficiaries of the colonial regime. Thus the Sinhalese had a justified entitlement to preferential treatment by the independent state to the exclusion if need be, of the minorities. This gives at least a partial explanation of the causes of well-documented acts of blatant minority discrimination that followed: the disenfranchisement of plantation Tamils¹¹, the language and education policies of successive governments, and

⁸ See esp. H. L. Seneviratne (1999) *Work of Kings: The New Buddhism in Sri Lanka* (Chicago UP)

⁹ Roberts, *op. cit.*, fn.1

¹⁰ Uyangoda, *op. cit.*, pp.57 – 61, 69 – 70.

¹¹ C. Manogaran (1987) *Ethnic Conflict and Reconciliation in Sri Lanka* (Univ. of Hawaii Press).

developmental and agricultural strategies involving internal colonisation that altered territorial demographic patterns, as well as the intermittent outbreaks of savage racial riots. But more importantly, this frames the context of the mainstream Sinhala attitude towards a dilution of the unitary state, which has been until recently, one of absolute antipathy.

The Devolution Experience:

An Incomplete Project and the Onset of Civil War

The various attempts at decentralisation of power as an instrument of conflict management in a multicultural context have been pathetically unsuccessful in Sri Lanka. The first attempt was in 1957 when the leader of the (Tamil) Federal Party and the then Prime Minister and leader of a polyglot governing coalition of Sinhala nationalists and left-of-centre parties, entered into an agreement known as the Bandaranaike-Chelvanayakam Pact that proposed the establishment of Regional Councils with a limited range of decentralised competences. This agreement was unilaterally abrogated by the Prime Minister, Mr. Bandaranaike, in the face of concerted opposition from political parties and the Buddhist monkhood in the Sinhalese South¹². In 1965 another agreement, known as the Senanayake-Chelvanayakam Pact, containing less ambitious proposals for decentralisation and some concessions on language policy was reached between the leader of the Federal Party and the leader of the main Southern right-of-centre party as a post-electoral alliance. Once a national government was established with the support of the Federal Party however, the Prime Minister, Mr. Senanayake, was unable to implement his obligations under the agreement due to pressure from his own parliamentary party¹³. This experience, needless to say, reinforced Tamil apprehensions about the sincerity of the Sinhala community's commitment to deliver justice.

¹² Ketheshwaran Loganathan (1996) *Sri Lanka: Lost Opportunities* (CEPRA): pp.16 – 31.

¹³ Ibid, pp.31 – 42.

The final attempt in this phase at influencing Southern political processes, and indeed the concrete proof of Sinhala *mala fides* in the perception of the Tamils, came with the constitutional reform exercise in 1970-2. A broad left wing coalition had assumed power promising a new republican constitution. The Federal Party's attempts at influencing the deliberations of the Constituent Assembly towards devolution and power sharing mechanisms came to naught¹⁴, whereupon it staged a walkout, and a cross party Southern political consensus approved a highly centralised, and even authoritarian, unitary parliamentary republic. The Constitution of 1972 discontinued the special protection accorded to minorities by Section 29 of the previous Constitution of 1947, expressly entrenched the unitary nature of republic, and impinged not only on the secular principle, but also trampled upon multicultural sensitivities by giving constitutional recognition to Buddhism as having a 'foremost' status in the state, entitling it to the latter's protection. It whittled down the principle of horizontal separation of powers at the centre and strengthened majoritarianism. In this way, Sri Lanka's first autochthonous constitution only served to aggravate ethno-political tensions by replicating and reinforcing the very constitutional anomalies at the heart of minority concerns. From the viewpoint of multicultural legitimacy of the constitutional state, the Constitution of 1972 then, was a comprehensive failure. This paved the way for militancy to commence during the 1970s. In 1976, the Federal Party (having become the Tamil United Front earlier) reconstituted itself as the Tamil United Liberation Front (TULF) and formally adopted the Vaddukoddai Resolution, which called for a separate state of Tamil Eelam in the North-eastern part of the island that was claimed as the territory contiguous to the traditional Tamil homeland.

The constitution making process that led to the Second Republican Constitution of 1978 yet again demonstrated the lack of understanding on the part of the majority community, of the very real nature of Tamil aspirations and concerns¹⁵. The Constitution of 1978 radically altered the institutional form of the Sri Lankan state in what

¹⁴ Ibid, pp.45 – 60.

¹⁵ Ibid. pp.60 – 80.

came to be, somewhat inaccurately, called the de Gaullist experimentation in Asia. It created a powerful executive presidency elected independently of Parliament by the entire country as a single electorate, on the twin rationales of accelerated development and political stability. As a second thought, the executive presidency was advanced as a more responsive institution in respect of minority concerns by virtue of its election by the entire country. The Constitution of 1978 also however, introduced a significant counter-majoritarian principle in the form of proportional representation. The particular system obtaining in Sri Lanka, while flawed in many respects, does provide for wider minority representation, and by virtually foreclosing the possibility of landslide parliamentary majorities, also forced a degree of power sharing with ethnic minority parties. A positive feature of the Constitution of 1978 was the inclusion of a bill, albeit limited in scope but which includes the equality principle, of civil and political rights that was directly enforceable against the state and its instrumentalities. On the other hand, the new Constitution retained the unitary principle and the foremost place of Buddhism. By creating a repository of executive power so vast, the new dispensation opened the door to authoritarianism and rejected the democratic dividend of power diffusion offered by federal-type arrangements. In doing so it betrayed the unreconstructed constitutional philosophy of its framers, as heavily influenced by the majoritarian ontology of the state as before.

By the late 1970s a low intensity but earnest Naxalite-style campaign by several armed Tamil groups had commenced. The government gave the army a wide and arbitrary mandate to clear the North-eastern areas of guerrillas and passed a draconian new Prevention of Terrorism Act, whilst at the same time launching a consultation process with a view to decentralising administration. The subsequently established and short-lived District Development Council system was largely dismissed by the Tamils as pitifully inadequate¹⁶, but it also suffered from a new type of political

¹⁶ Wilson, *op. cit.*

illegitimacy in Sri Lanka: the increasingly common phenomenon of electoral violence.

In 1983 Tamil militants ambushed and killed an Army patrol unit in the Jaffna peninsular in the North, which unleashed a horrific retaliation by Sinhalese mobs on innocent Tamil civilians living in the South. The Anti-Tamil Pogrom of 1983, unprecedented in its ferocity and barbarism, was if not directly organised, then at least tacitly encouraged by the government of the day¹⁷. Adding salt to the wounds as it were, the government moved within weeks to outlaw even the peaceful advocacy of secession by passing the Sixth Amendment to the Constitution¹⁸. The battle-lines had now been well and truly drawn, and full-scale civil war erupted in the North-eastern areas of the island.

The intensification of the conflict had regional and geopolitical significance to the extent that India had become an active participant in it. In 1985, the government of Sri Lanka and representatives of Tamil militant groups met in Thimpu, Bhutan on an Indian mediated effort at resolving the conflict¹⁹. While the talks collapsed inconclusively, an important development was the articulation by the Tamil delegation of a set of 'four cardinal principles' as minimum standards for any settlement of the Tamil National Question. The Thimpu Principles, which continue to retain their relevance and validity for conflict resolution in Sri Lanka, are as follows:

1. Recognition of the Tamils of Sri Lanka as a distinct nationality
2. Recognition of an identified Tamil homeland and the guarantee of its territorial integrity
3. Based on the above, recognition of the inalienable right of self-determination of the Tamil nation

¹⁷ J. Spencer (1990) *Introduction to the Power of the Past* in J. Spencer (Ed) (1990) *Sri Lanka: History and Roots of Conflict* (Routledge).

¹⁸ R. Edrisinha & P. Saravanamuttu (1993) *The Case for a Federal Sri Lanka* in R. Edrisinha & J. Uyangoda (Eds.) (1993) *Essays on Constitutional Reform* (CEPRA): p.77.

¹⁹ Loganathan, op. cit: Ch.4.

4. Recognition of the right to full citizenship and other fundamental democratic rights of all Tamils, who look upon the island as their country.

The government rejected all but the last of these principles. The relevant extract from its statement bears reproduction as an illustration of the normative issues raised in the discussion of the previous section:

"...if the first three principles are to be taken at their face value and given their accepted legal meaning, they are wholly unacceptable to the Government. They must be rejected for the reason that they constitute a negation of the sovereignty and territorial integrity of Sri Lanka, they are detrimental to a united Sri Lanka and are inimical to the interests of the several communities, ethnic and religious in our country."²⁰

Thus firstly, the government assumed that the principles, which are more political than legal in nature, had a precise legal meaning acceptable from a positivist viewpoint. They did not appreciate the flexibility afforded by the vagueness of the language in which the principles were framed. Secondly, the statement is an indication of the government's predisposition to equate sovereignty to centralisation and territorial integrity to unitarism. Thirdly, the invocation of the interests of all communities in the language of the traditional individualist rights discourse reveals the government's incapacity to envisage creative constitutional structures beyond the conventional wisdom. In sum, this response by the state to a clearly disillusioned section of its citizens displayed either dangerous naïveté or disingenuous cynicism. Either way, such a response in the prevailing context was inadequate and irrelevant.

Following the further escalation of the conflict, the Indo-Lanka Accord was signed between the governments of India and Sri Lanka

²⁰ Ibid, p.105.

in 1987²¹. The accord, a result of Indian intervention and not domestic resolve, sought to do what the Sri Lankan polity had been demonstrably unable to do; that is, the reformulation of the state in order to accommodate multi-ethnic identities and to diffuse inter-ethnic tensions as part of its constitutionally immanent function. The objects of the accord were:

1. The preservation of the unity, sovereignty and territorial integrity of Sri Lanka
2. The nurturing of the distinct cultural and linguistic identity of each ethnic group, within the framework of a multi-ethnic and a multi-lingual plural society, where all citizens can live in equality, safety and harmony, and prosper and fulfil their aspirations
3. The recognition of the Northern and Eastern Provinces as areas of historical habitation of Sri Lankan Tamil speaking peoples

The Accord proposed an institutional framework closely modelled on the Indian scheme of quasi-federalism, to be incorporated by constitutional amendment, that would implement its objectives. This resulted in the Thirteenth Amendment to the Constitution, which established a scheme of devolution through Provincial Councils. The political and constitutional circumstances of the passage of the Thirteenth Amendment were not propitious and served to undermine and constrict their functioning thereafter²².

Devolution through Provincial Councils was dismissed out of hand as too little too late by the LTTE, who were then on the ascendancy. They subsequently militarily engaged the Indian Peacekeeping Force that was sent as guarantors of the Accord. In the South, the Janatha Vimukthi Peramuna (JVP), a Sinhala nationalist organisation

²¹ Ibid, Ch.5.

²² See esp. Tiruchelvam, op. cit., pp. 200 – 205; Edrisinha & Saravanamuttu, op. cit.

professing Marxist-Leninism²³, with a substantial following among educated, unemployed Southern Sinhala youth, vehemently opposed any concessions to Tamils. This was a re-enactment of the previously manifest Sinhala opposition to devolution as an aspect of ethnic antagonism. The JVP launched a bloody insurgency against the state in the South, in which large numbers died violently at the hands of the JVP as well as the special counter-insurgency units of the state²⁴. Thus the violent opposition of two armed and mobilised groups in the North and South and across the ethnic divide to the first experience in relatively substantial devolution undermined the new system. The main Southern opposition party also boycotted the first elections to the Provincial Councils.

The constitutional framework also was highly restrictive and served to undermine meaningful devolution. In the view of the majority of *In re the Thirteenth Amendment* case²⁵, Provincial Councils were subordinate bodies to the central Parliament and the President. The judges in the majority felt that this was the only way of reconciling the Thirteenth Amendment Bill with the entrenched Article 2 of the Constitution declaring Sri Lanka to be a unitary state. The various statutory regimes enacted for purposes of giving effect to the Thirteenth Amendment have been similarly and consistently restrictive and further watered down devolution. These events clearly reflect the bureaucratic and judicial mindset of extreme reluctance towards devolution arising out of the lack of a genuine consensus on the real need for devolution.

Legislative and executive power was devolved to eight Provincial Councils, elected on proportional representation. The executive

²³ Formative ideological influences of the JVP included Guevaraist revolutionary internationalism, and Maoism, the latter influence explaining the strong and consistent Sinhala nationalist flavour of both, the JVP's rhetoric and praxis: Sunanda Deshapriya, member of the JVP politburo during the first insurgency of 1971, personal interview with author, 15th November 2002.

²⁴ Rohan Guneratne (1992) *Sri Lanka: A Lost Revolution?* (IFS)

²⁵ *In re the Thirteenth Amendment to the Constitution* (1987) 2 SLR 312; see also, R. Coomaraswamy (1994) *Devolution, the Law, and Judicial Construction* in S. Bastian (Ed.) (1994) *Devolution and Development in Sri Lanka* (ICES, Colombo), and (1996) *Ideology and the Constitution* (ICES, Colombo): Ch. 5

powers of a Provincial Council are vested in its Governor, appointed by the President, but the Governor is obliged to exercise those powers in accordance with the advice of the Chief Minister, except in certain specific circumstances. The Governor appoints as Chief Minister, the leader of the party with the largest representation in the Provincial Council. Provincial financial powers are also vested in the Governor. As they appear at face value, all these features are impediments to devolution.

The question of competence / subject allocation was also heavily weighted in favour of the centre. There are three lists of subjects: the Provincial Council List, the Reserve List of exclusive central competence, and a Concurrent List. Central legislation has prevalence over provincial legislation on any matter in the Concurrent List, and the Reserve List empowers the centre to severely undermine devolution by the provision enabling it to formulate 'national policy' on all subjects including those devolved. Residual powers were vested in the centre.

The Thirteenth Amendment established a High Court for each Province exercising original, appellate and revisionary jurisdiction in criminal matters. It also has power to issue prerogative writs in respect of any matter under the Provincial Council List.

Since the establishment of Provincial Councils, they have been hampered by legitimacy problems, inadequate financing, an extremely ungenerous central bureaucracy that does not share the spirit of devolution, and a culture of legislative and executive interference from the centre. Except in the case of a few individuals and administrations, the Provincial Council system itself has not generated regional leaderships capable of protecting devolution. Thus the erosion of the Thirteenth Amendment has been frequent and flagrant.

The People's Alliance (PA) administration of 1994-2001 made a short-lived attempt at direct negotiations with the LTTE, but for a variety of reasons these talks collapsed in 1995. The government then embarked on a ludicrous policy where a high-intensity military

onslaught was launched against the LTTE, while at the same time it produced various constitutional drafts aimed at conflict resolution and meeting Tamil aspirations in 1995, 1996, 1997²⁶ and 2000. While the content of these proposals were relatively progressive compared to the past, the LTTE, who by then had emerged as the *de facto* and sole representatives of the Tamil people by killing most moderate Tamil opinion-formers, were not interested.

Since then however, there is space for more optimism for conflict resolution and constitutional reform in Sri Lanka. An effective cease-fire has held since late 2001, and a meaningful peace process has begun. According to the stated wishes of the government and the LTTE, both parties see the realistic way to peace as one step at a time. Thus the present concentration is, ostensibly, on reconstruction, resettlement and rehabilitation of areas and people devastated by war.

However, it is increasingly becoming clear that when core issues of the conflict are placed on the negotiating table with a view to finding constitutional options for resolution, both parties would be looking at dynamic federal-type arrangements for realising the unity of the peaceful future Sri Lankan state in a form that guarantees the optimum diversity. The devolution project in Sri Lanka, therefore, may now be entering its most exciting phase, especially since the setting up of the sub-committee on core political issues during the Rose Garden session of the peace talks²⁷.

Sri Lanka's Peace Process: **An Atypical Window of Opportunity**

There are several important issues arising from the current political landscape as framed by the constitutional context, that have a direct bearing on the peace process, out of which the most obvious one is

²⁶ See International Centre for Ethnic Studies, Colombo (1998) *Sri Lanka: The Devolution Debate*

²⁷ See Statement of the Royal Norwegian Government at the conclusion of the second session of the first round of talks, the Rose Garden, Nakhorn Pathom, Thailand, 3rd November 2002

the fact of political cohabitation at the centre between the presidency and the parliamentary majority. From an abstract viewpoint, the sharing of power between the two main political parties, and therefore of the vast majority of the Southern electorate, would seem to be an ideal scenario with regard to negotiations with the LTTE, because almost the entire spectrum of Southern political opinion would in this way be inclusively represented in negotiating towards peace. Sadly, however, the spirit of co-operation and goodwill between the PA and the United National Front (UNF) that is essential to working a cohabitational arrangement has been sorely lacking. In such a context, the UNF government has proceeded alone on the mandate it received from the people at the last general election to negotiate peace with the LTTE. While the President's behaviour with regard to the peace process generally has been largely unconstructive, it must be stated that she has been more conciliatory since of late. The government must find a participatory role for the President with which she will be comfortable. If co-operation can be achieved, it is a better way to go forward with negotiating peace, both for the durability of the end result as well as the process itself. If, on the other hand, the present tension between the President and the Cabinet continues after 5th December 2002, then the crucial power to dissolve Parliament lies with the President in terms of Article 70(1) of the Constitution. The government, susceptible to democratic political impulses as it is then faces a real danger of losing the political initiative. There is no doubt that that would fatally affect the peace process.

The peace process as it has developed so far has produced in two sessions of talks, various institutions for supporting progress towards a constitutional settlement to the ethnic conflict. The parties were agreed at a very early stage that progress must be on a step by step basis. However, it is vital for any peace process that popular opinion remains behind it. One of the most important ways of achieving this is to bring immediate relief to those who have undergone severe suffering and hardship in wartime conditions. To this end, the parties have set up during the Rose Garden session, two sub-committees to deal with immediate humanitarian and rehabilitation needs of the North and East and for de-escalation and normalisation. A sub-

committee to deal with the core political issues of the conflict was also set up, as stated earlier.

Essential as these support institutions are for the success of maintaining public support and legitimacy for peace through negotiations, the structure and modalities of their establishment may be the cause of some legitimate concern²⁸. While the difficulties that the government faces in choosing a route that conforms more to legal procedures and constitutional means must be appreciated, it must be firmly stated that such institutions must have a credible basis beyond a mere agreement between the parties from behind closed doors. The political conditions do not permit even piecemeal constitutional amendments to allow for interim arrangements, and to establish a statutory interim body under the 13th Amendment would encounter some obstacles. On the other hand, the LTTE might not probably want to operate through mechanisms of the State at this point of time. So the government and the LTTE would most probably want to set up institutions for interim or transitional administration by only an agreement between them. The problem with this approach is that such institutions would not have any legal or constitutional standing. Thus institutions performing every function of public administration in the North-East will not be legally accountable. This accountability gap is compounded by the fact that these bodies will not be elected by the people of the North-East, since it is clear that the LTTE does not want elections at the present stage. The better way to think of transitional administration, however, is by making plural democracy and international human rights the first postulate in politico-administrative reform.

The Thirteenth Amendment does not allow expressly for asymmetrical devolution, but it is arguable that it in fact contemplates the possibility of different arrangements for different

²⁸ For a more comprehensive treatment of the questions of interim administration, see K. Loganathan & A. Welikala (2002) *"Interim Politico-Administrative and Constitutional Arrangements in Sri Lanka's Peace Process: Some Issues and Scenarios"*, Discussion Paper for Conference on The Role and Relevance of Transitional Arrangements in Negotiating a Political Settlement in Sri Lanka, Murten, Switzerland, 15th – 17th April, 2002 (Centre for Policy Alternatives, Colombo, and Institute of Federalism, University of Fribourg, Switzerland)

provincial administrations, for example by Article 154G (4), where it states that a provincial council can request Parliament directly to exercise any devolved provincial legislative power. Therefore an interim administrative institution can be grounded within the devolution scheme of the Thirteenth Amendment, and set up by statute. Admittedly, this approach will require an element of creativity, but it would be the best option from a normative standpoint.

While further discussion on the nature of the future state is to anticipate the work of the sub-committee on political issues, it is possible to identify some strands of the type of matters they will have to consider. They will have to think of ways of giving institutional expression to the shared destiny of the people of Sri Lanka. The sub-committee will have to deal with the questions of maximum autonomy and internal self-determination, as well as power-sharing at the centre. It is important however that the entire process and the constitutional form it produces is informed by plural democratic values, norms of international human rights and respects constitutionalism and the rule of law. Only then is it possible to dream of a just and honourable and durable peace that truly facilitates the pursuit of every Sri Lankan's good life.