Chapter V

MEETING TAMIL ASPIRATIONS WITHIN A UNITED LANKA: CONSTITUTIONAL OPTIONS

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The primary objective of those pushing Sri Lanka's peace process forward in the past year or so has been to bring the Sri Lankan Government and the LTTE to the negotiating table. While at the moment, fulfilling this first phase of the peace process seems fraught with difficulties, another formidable challenge will emerge when the two sides reach the stage where the framework of a possible political solution will have to be worked out. The positions articulated so far by the two sides suggest that the gulf between them is huge. The bitterness and distrust that exist, mainly due to past unsuccessful attempts at dialogue and negotiations, do not create a conducive atmosphere for compromise, flexibility and the generosity of spirit which are often vital elements of a effective solution to protracted conflicts. Furthermore the rise of militant extremism on both sides of the ethnic divide poses a further obstacle to the creation of such an environment.

This paper sets out what appears to be the positions of the two main protagonists, places them in context, critically evaluates the constitutional models and options that have emerged so far, and, thereafter, offers a set of constitutional principles which, I believe, could form the basis for a constitutional framework for a political solution to Sri Lanka's ethnic conflict.[1]

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The Constitution Reform Project 1994-2000

It is important to place the recent attempts at constitution making for conflict resolution in context. Constitutional reform figured prominently in the Sri Lankan elections of 1994. The People's Alliance sought a mandate from the people to abolish the Executive Presidency and promulgate a new Constitution designed to restore to the people their sovereignty. The People's Alliance also campaigned vigorously on the importance of a political solution to the ethnic conflict. Since it was recognised that constitutional reform would form a major part of such a political solution, there was, by implication, a promise to introduce a new Constitution which would be a radical departure from the highly centralised Second Republican Constitution of 1978. There were thus, two main motivations for a new Third Republican Constitution. It was expected to respond to:

a) Authoritarianism
b) The ethnic conflict

There were several grounds for optimism. The emphasis on the link between authoritarianism and the over-mighty executive Presidency [2] suggested that Sri Lanka's constitution makers would get it right at least the third time round, and design a constitution which imposed adequate restraints on the wielders of political power.[3] Furthermore, the fact that the new Government did not command a two-thirds majority in Parliament meant that the Government would have to reach out to the Opposition and the minority parties, thereby preventing the introduction of a partisan and essentially majoritarian Constitution, like in 1972 and 1978.

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[2] C.R. de Silva (1989), "*The Overmighty Executive? A Liberal Viewpoint*" in Chanaka Amaratunga (Ed.) ***Ideas for Constitutional Reform***, Colombo.

[3] Executive convenience rather than constitutionalism has been the philosophy behind both Sri Lanka's autochthonous republican constitutions of 1972 and 1978. See Rohan Edrisinha (2000), "*Sri Lanka: Constitutions without Constitutionalism – A Tale of Three and a Half Constitutions*", Lectures on Comparative Constitutionalism in South Asia, January 2000, New Delhi, Law and Society Trust.

The constitution making process, however, suffered from serious defects which contributed to the disappointing document which was presented to Parliament in August 2000. The initial mistake, which few people realised at the time, was that a Parliamentary Select Committee, rather than a Constituent Assembly, was assigned the responsibility for drafting the new Constitution. The People's Alliance election manifesto promised that a Constituent Assembly consisting of Members of Parliament would be convened to formulate and adopt the new Constitution. For reasons that were not clear, the Government decided not to convene a Constituent Assembly but opted for a Parliamentary Select Committee instead. Since the deliberations of the Parliamentary Select Committee were closed to the public, there was no public scrutiny of the constitution making process. Whenever a "consensus" was reached, it was announced at a press conference, but the positions of the parties, the views of the individual members of the Select Committee, were not made known to the public. This was unsatisfactory for several reasons.

Apart from the question of legitimacy, the closed process encouraged irresponsibility on the part of several parties represented in the Select Committee, in particular, the United National Party. The United National Party participated in the proceedings without presenting its own proposals or committing itself to any of the decisions reached by the Select Committee. Often its representatives gave tacit approval to some of the less controversial decisions made, but subject to the qualification that the Executive Committee of the party had to confirm the decision at the end of the constitution drafting process. This lack of commitment was extremely unsatisfactory.

Substance

While it is not possible or desirable to engage in a detailed critique of the draft Constitution for purposes of this paper, it is important that some of its more fundamental weaknesses are highlighted. As stated earlier a new Constitution for Sri Lanka must promote not only

peace with justice, but also liberal democracy and constitutionalism. This must surely be in the interests of all communities and often has a bearing on the rights of national minorities, autonomy and power sharing arrangements.

In terms of substance, the draft Constitution of August 2000 was certainly an improvement on the Constitution of 1978. There were improvements in the Chapter on Fundamental Rights, the abolition of the Executive Presidency avoided a concentration of power in a single institution, devolution of power to the provinces/ regions was strengthened, a mechanism to 'depoliticise' the appointment of key offices/positions was proposed and an independent public service restored. There were marginal improvements proposed to the provisions dealing with the independence of the judiciary.

However, when viewed from the perspective of modern Constitutionalism, or as the basis for the introduction of pluralism and liberal democratic values, or as a foundation for conflict resolution and a durable solution to the ethnic conflict, the new draft Constitution was woefully inadequate. The draft Constitution was clearly a reconditioned version of the Constitution of 1978. The basic structure remained the same and indeed vast chunks were reproduced verbatim.[4] The framers of the new Constitution did not focus on the fundamentals of Constitutionalism and ignored modern trends in constitutional jurisprudence.

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[4] The draft Constitution is disappointing in a number of respects. Apart from those highlighted in the paper, provisions on the Independence of the Judiciary, the Constitutional Council, the Ombudsperson and the Electoral system are particularly weak.
Both parties promised in their manifestoes to incorporate the positive aspects of the system of proportional representation and the simple plurality system by introducing the mixed German system of representation. The draft reproduces verbatim the present chapter on proportional representation.
The invidious provision which enables a party to cause the expulsion of dissidents from Parliament and which transformed Sri Lanka from a representative democracy to a "party democracy" and the Parliament from a deliberative assembly to a docile congress of party ambassadors is reproduced despite vocal opposition to it by the People's Alliance before the election.

What was particularly disappointing with the provisions of the draft Constitution was that they did not overcome all the fundamental defects of the previous home-grown Republican constitutions. Comprehensive judicial review of legislation was not introduced[5]. An extremely limited kind of judicial review was proposed instead. The basic rule that flowed conceptually from a constitutional tradition that upholds the pernicious doctrine of parliamentary sovereignty, continued. Once a law was passed by Parliament, it could not be challenged on the ground of unconstitutionality. The farcical one week period for pre-enactment review was extended to two weeks. An exception was made for a law if it was contended that it violated just one chapter of the Constitution; the chapter on Fundamental Rights. The Supreme Court could entertain such a challenge if it was made within a period of two years after the enactment of that particular law. However, even if the law was declared unconstitutional, the new Constitution protected all previous action done pursuant to the impugned Act. Thus conduct which flowed from an unconstitutional law was to remain legally valid. Such a position was unsatisfactory as it is not only conceptually untenable if the principle of the supremacy of the Constitution is upheld, but it also fails to act as a deterrent to the introduction of unconstitutional legislation.

The absence of judicial review of legislation also meant the absence of one of the widely accepted methods for preventing the undermining of devolution of power. It was surprising that Professor G.L. Peiris, the main architect of the draft Constitution, who correctly described the Thirteenth Amendment as a sham, citing the example of the National Transport Commission Act to demonstrate how easy it was for the Central Parliament to undermine devolution of power, steadfastly refused to introduce the mechanism which generally functions as the most effective check on the temptation to reclaim devolved power and concentrate power in the centre.

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[5] Judicial review of legislation was part of Sri Lanka's constitutional tradition from 1948 to 1972, and several landmark constitutional cases including *Liyanage v. The Queen* (1965) 68 NLR 265, involved such review of legislation.

Another shocking example of deviation from the acceptance of the supremacy of the Constitution, which clearly reflects the obsession with executive convenience and disdain for human rights on the part of the architects of the Constitution, was the reproduction of the obnoxious provision that validated all existing laws, both written and unwritten, notwithstanding inconsistency with the provisions in the chapter on Fundamental Rights. [6]

It is significant that a respect for minorities and pluralism rationale was offered as a justification for such an obnoxious constitutional provision when human rights activists and academics lobbied strongly for the repeal of the article. The visiting Commonwealth group of Constitutional experts expressed their surprise at the provision at a seminar on the new constitution in August 1997.[7] Both Minister of Justice and Constitutional Affairs, Professor G.L.Peiris and Mr. Zuhair M.P. of the Sri Lanka Muslim Congress, defended the provision stating that it was necessary to protect the personal laws of the country, the Muslim Law, Thesawalamai and the Kandyan Law. Mr. Zuhair argued that since the proposed Preamble to the Constitution recognised Sri Lanka as a plural society, it would be wrong to seek to impose change on a community. Change should be initiated if at all, he said, from within the community itself.

While the Zuhair argument raises fundamental questions which again, perhaps should have been debated openly during the constitution making process, it is understandable that it may be considered desirable to immunise the personal laws from human rights scrutiny. The draft Article 28, however, protects ALL existing law. If the purpose of the article was to protect the personal laws,

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[6] Article 28 of the new Draft Constitution. Article 16 of the Constitution of 1978.

[7] Consultation on the Draft Constitution was convened by the Commonwealth Human Rights Initiative and the Law and Society Trust on 9 and 10 August 1997. A team of Commonwealth constitutional experts participated in the consultation. Professor G. L. Peiris and the Leader of the Opposition, Ranil Wickremasinghe spoke at the inauguration. The Commonwealth panel of experts included Stephen Toope (Canada), Justice P. N. Bhagwati and Upendra Baxi (India), Cheryl Saunders (Australia), Patricia Hyndman (United Kingdom), Justice Pius Langa (South Africa), Kamal Hossein (Bangladesh) and Lakshman Marasinghe.

then it was clearly overbroad. Though certainly not the ideal, the article could have been replaced with one that merely protects the three bodies of personal laws.[8] Unfortunately, Professor Peiris ignored such a compromise formula (and indeed nearly all the recommendations made by the Commonwealth experts).

The examples outlined above, which demonstrate an almost cavalier attitude to the principle of the supremacy of the Constitution and raise doubts as to whether those responsible for drafting a new Constitution for Sri Lanka are really committed to the values of Constitutionalism. A secure autonomy arrangement must surely be within a framework of a Constitution that is supreme, that imposes restraints on central government institutions, where an independent judiciary resolves disputes between the centre and the regions and where there is effective redress when constitutional commitments and obligations are transgressed. The protection of human rights, their scope, permissible restrictions and enforcement mechanisms impinge on all communities and ethnic groups. Tamil political parties and groups have often not adequately appreciated the linkages between these more traditional or orthodox concerns and Tamil grievances and aspirations. The various drafts of the new Constitution contained many other shortcomings which will not be dealt with in this paper. The draft Constitution's most controversial provisions were however, on devolution of power to regional councils.

Devolution of Power

The People's Alliance Government responded to the demand for substantial devolution of power after it was elected to power. In order to avoid confusion, it is important to note that there were three main sets of proposals on devolution of power released to the public before the Draft Constitution was presented to Parliament in August 2000. They were

[8] When I asked Mr. Zuhair, at the conference, whether he had any objections to such a course of action, he stated that he had none.

a). The Devolution Proposals – 3rd August 1995

b). The Legal Draft on Devolution – 16th January 1996

c). The Provisions on Devolution in The Government's Proposals for Constitutional Reform – October 1997

In her address to the nation on 3rd August 1995, President Kumaratunge declared:

"The aspiration of the entire Sri Lankan populace is that the current national crisis centred around the North and East be brought to a peaceful, just and honourable settlement...The first task is...a new approach predicated on unqualified acceptance of the fact that the Tamil people have genuine grievances for which solutions must be found.

With this objective in view, the government is seeking to rebuild the constitutional foundation of a plural society within a united and sovereign Republic of Sri Lanka. This Republic will be a union of Regions. This exercise is based on the following principles:

- An effective constitutional framework for devolution of power to regions based on credibility, clarity, and an internally consistent and coherent value system, which is capable of effective implementation and includes structures for the just resolution of centre-region disputes;

- To encourage the regions and communities which inhabit them to become constructive partners of a stable and pluralistic democracy

- To ensure that all persons may fully and effectively exercise all their human rights and fundamental freedoms without any discrimination and in full equality before the law

- To give recognition to Sinhala and Tamil as official languages, to accord equality of status to these languages, and to recognise English as a link language

- To protect the identity of distinct communities and create conditions for the promotion of that identity, including the right to enjoy their own culture, profess and practise their own religion, and nurture and promote their own language, and to transact business with the state in the national language of their choice."

Unprecedented, at the time, in their recognition of Tamil grievances and aspirations, the August 1995 proposals were welcomed by many persons and groups committed to substantial devolution. They were fiercely opposed, however, by sections of the Sinhalese majority community. Considering their parliamentary majority of one, the government was nervous of this opposition. It was not surprising, therefore, that when the proposals were spelled out in greater detail, various changes were included to appease majority opinion. Along with the ongoing war against the LTTE, these changes did much to undermine the promise of the 1995 proposals.

The Legal Draft of January 1996 contained not only detailed provisions on devolution, but also a revised Preamble to the Constitution, a chapter which spelled out the basic structure of the Constitution and provisions dealing with the status of Buddhism.

There were several constructive dimensions to the 1996 Legal Draft. While various clauses were included to allay fears of secession, the deletion of Article 2 of the Constitution (1978), which entrenched the unitary character of Sri Lanka, removed an unnecessary obstacle to substantial devolution. The abolition of the Concurrent List was another positive feature, as were other attempts to remove ambiguity in the division of powers.[9] These included the clarification of the role

[9] The abolition of the Concurrent List was strongly opposed by Sri Lanka's leading constitutional lawyer, H. L. de Silva, in a paper, *Constitutional Choices in the Current Context of Sri Lanka* (unpublished), where his central argument was that the

of provincial Governors and the awarding of greater revenue raising powers to the Regional Councils.

There were also glaring omissions, however. Inexplicably, the idea of a Devolution Commission, articulated in the 1995 proposals, was dropped from the 1996 Legal Draft. The failure of the Provincial Council system established through the thirteenth amendment had clearly demonstrated the need for mechanisms, such as a commission or an elected Council of Regions, which could represent regional interests at the centre. The loss of such a mechanism represented a cardinal defect in the legal draft. [10]

Another weakness was the absence of safeguards to prevent Provincial Councils from arbitrary dissolution in emergency situations. While provincial powers could be reclaimed by the centre under the thirteenth amendment, the President had no power to dissolve a Provincial Council, under any circumstances. With the 1996 Legal Draft, the power of dissolution was granted to the President.

Perhaps the most regressive feature of the 1996 Legal Draft, however, was that it fortified Sinhala Buddhist majoritarianism. Apart from retaining the constitutional provision giving Buddhism the 'foremost place', it proposed a specific institution, the Supreme Council, which would represent the interests of the Buddhist clergy at the highest level. All governments would be obliged to consult this council, which could not be abolished without a two thirds parliamentary majority and a referendum.

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abolition suggested the rejection of cooperation between the centre and the regions. This is not so. The Concurrent List did not promote cooperation but rather control by the centre. There should be other mechanisms to promote the important principle of cooperation between the centre and the regions.

[10] The Left Movement in Sri Lanka which led the opposition to the Senate under the Soulbury Constitution continued to be opposed to the principle of a bi-cameral legislature despite the post 1987 attempts to introduce devolution of power. The Tamil political parties and proponents of devolution have unfortunately also not canvassed the issue adequately.

The 1996 Legal Draft was discussed in parliamentary committee for close to two years, with little prospect of consensus. Given the irresponsible conduct of the United National Party which failed to offer a comprehensive set of constitutional proposals of its own, the government took a decision to re-publish its provisions, amended and incorporated in a completely revised Draft Constitution of October 1997. Within this new format, several changes were made to the 1996 Legal Draft. Some of these changes are clearly negative, such as the deletion of several paragraphs on the plural character of the Sri Lankan polity, which left the Preamble vacuous and inane. Many, however, are potentially positive, or at least well-intentioned.

One constructive feature of the 1997 draft constitution was its proposal that the powers of the Chief Ministers' Conference were expanded to mediate disputes not only between regional administrations, but also between the regions and central government. In an attempt to provide for checks on the President's power to either assume all or any of the functions or powers of the Regional Administration or any other Regional body, or to dissolve a Regional Council in emergency situations, the 1997 Draft Constitution added a provision which required a Tribunal consisting of a nominee of the President, a nominee of the Chief Minister of the relevant region and a third member selected by the two nominees, to consider whether the assumption of such powers or functions or whether the dissolution should continue to operate. This proposal which would have been included at the insistence of the Tamil political parties participating in the constitution making process indicates the lack of confidence of these parties in the ability and willingness of the judiciary to protect devolution of power. Notwithstanding such a lack of confidence, it is submitted that such an informal arbitral mechanism is unsuited for the final determination of such sensitive constitutional issues and that permitting judicial review would have been a better option.[11] Not surprisingly, the arbitral tribunal proposal was savagely attacked by opponents of devolution of power.

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[11] Permitting such an arbitral tribunal to deal with the matter initially through mediation is acceptable provided the judiciary has the final word on the matter.

In a dramatic swing away from conventional amendment procedures, the 1997 draft constitution appears to grant the regions veto power over constitutional amendments affecting either the Chapter on devolution or the two Schedules spelling out regional parameters and the division of powers between different tiers of government.[12] A more orthodox constitutional amendment procedure which included approval of a special majority of the regions and the approval of a second chamber, with special weightage to protect minorities, would have provided a more acceptable degree of rigidity and protected devolution of power. The 1997 Draft Constitution while retaining the foremost place given to Buddhism reduced the powers of the proposed Supreme Council.

The UNP Counter Proposals

At the end of 1997, the PA government challenged the UNP to support the draft constitution or else put forward its own devolution proposals. If the UNP did not deliver, the government proposed a referendum on their draft constitution in the hope of mobilising the electorate and isolating the UNP. In late January 1998, the UNP officially announced that it was opposing the government position and would unveil its counterproposals within the next few months. The UNP proposals contained only marginal improvements on the existing constitutional arrangements. The only positive features were the acceptance, in principle, of the idea of a second chamber and the principle of the supremacy of the Constitution. Largely due to the characteristically conservative input of the UNP's main legal advisor, K.N. Choksy, the UNP sought to remove several of the positive features of the 1997 Draft Constitution including the incorporation of economic, social and cultural rights in the chapter on fundamental rights. A concerted campaign by an exasperated group of civil society groups thwarted the Choksy initiative.

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[12] See Article 101 (2) of the October 1997 draft and August 2000 draft. But compare these provisions with Article 99 of the October 1997 and August 2000 drafts which contradicts Article 101. This is yet another example of the lack of a consistent vision behind the new Constitution.

The Draft Constitution Bill which was presented to Parliament in August 2000 diluted several of the gains made by Tamil political parties in the 1997 draft Constitution. While the constitution making process up to 1997 was directed by Minister Peiris and his advisors, who were generally sympathetic to Tamil political party concerns and to devolution of power, and consulted frequently with leaders of the Tamil United Liberation Front, it was easier to create an atmosphere of empathy, accommodate many Tamil demands and introduce significant measures to promote devolution of power. But the situation changed dramatically when President Kumaratunga began to consult leading members of her own party, including Prime Minister Ratnasiri Wickremanayake probably for the first time in the process which had commenced over five years previously.

Wickremanayake and his Cabinet colleagues from the dominant Sri Lanka Freedom Party faction of the People's Alliance government were not renowned either for their expertise in constitutional law or for their sympathy for devolution of power, let alone Tamil concerns and aspirations. Not surprisingly, therefore, also given the absence of the persuasive Neelan Tiruchelvam, who was largely responsible for the positive features of the 1997 draft Constitution and who was tragically assassinated in July 1999, the August 2000 Constitution Bill removed many of the gains won in October 1997.

One of the most significant was the deletion of the reference to Sri Lanka as a union of regions thereby resurrecting a unitary bias into the Constitution. Amazingly, a provision introduced in the First Republican Constitution of 1972 to underline the unitary character of the state which was reproduced in the Second Republican Constitution of 1978, was included in the 2000 Draft Constitution designed, unlike its predecessors, to promote substantial devolution of power. Article 92 (1) of the 2000 Draft Constitution declared that:

'Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any such legislative power.'[13]

The framers of Sri Lanka's constitutions seem to have no qualms about internal contradictions and inconsistencies.[14] The danger is that these ambiguities are often used in favour of the centre or the majority in questions involving devolution and minority rights respectively.

While the 1997 draft provided that the President would appoint Governors of regions on the advice of the Chief Ministers, the 2000 draft provided that they be appointed by the President in consultation with the Prime Minister and with the concurrence of the respective Chief Minister. The much vaunted Regional 'Executive Committee' system was further undermined by elevating the status of the Regional Minister in charge of the subject at the expense of the Executive Committee overlooking the subject. [15]

There was serious encroachment into the powers devolved to the regions under the 1997 draft. On the sensitive and difficult question of land, the 1997 draft provided that state land within the region vested in the Region. If the centre required land in the region for a purpose connected to the exercise of one of the reserve powers, it

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[13] Article 92 (2) and (3) make exception for the promulgation of emergency regulations by the President and for laws empowering any body to make subordinate legislation.

[14] Compare the preamble to the Constitution of 1978 which declares the Constitution as the Supreme Law with Article 16 which validates all existing law inconsistent with the chapter on fundamental rights. See also Article 18 which provides that **the** official language of Sri Lanka shall be Sinhala. Tamil shall also be **an** official language!

[15] The Executive Committee system has been hailed in many quarters as a bold initiative at power sharing at the regional level and a demonstration of the Government's willingness to accommodate proposals of the UNP. A more cynical (realistic?) assessment is that national parties, with little principled commitment to devolution of power were quite willing to experiment with the exercise of executive power at the regional level, perhaps aware that the ultimate beneficiary of a weak, fragmented regional executive, would be the central government.

could after consultation with the regional administration acquire such land. With the UNP's support, the 2000 draft changed the balance of power on the subject by the introduction of a convoluted provision. The provision defined state land as land *vested* in the republic prior to the commencement of the new Constitution and provided that the centre and the regions *succeeded* to such state land as provided in the Constitution though the land shall be held in the name of the republic. The provision contained many other sub-sections, the cumulative effect of which was to give the centre considerable power over all state land. Presumably due to the insistence of Prime Minister Wickremanayake who also retained the Plantations ministry, tea, rubber, coconut, oil palm and teak plantations owned by the state and forests declared reserve or conservation forests were transferred to the Reserved List, and the rubric of 'national policy' exploited so shamelessly by the centre to undermine the limited devolved powers under the Thirteenth Amendment to the 1978 Constitution, was inserted into the Reserved List in a number of areas including land use, the environment, higher education, and the media.

It was, therefore, not surprising that, moderate Tamil parties who were willing to compromise and support the October 1997 draft, had great difficulty in accepting the August 2000 draft. Another point to remember is that the August 2000 draft probably was the most accurate reflection of a broad PA/UNP consensus on the scope and extent of devolution of power the two parties were willing to countenance. Given the passionate opposition of several other groups, parties and powerful elements within the hierarchy of the Buddhist clergy to the diluted August 2000 draft, which might have indeed prevented influential political leaders within the Government from voting in favour of the new Constitution, the challenges faced by any Government committed to radical reform to the nature of the state and substantial devolution of power or federalism are unenviable.

On the other hand, when viewed from a Tamil nationalist perspective, it is unlikely that the kind of proposals contained in the Draft Constitution of August 2000 can form the basis of a lasting and

durable peace. Tamil nationalists will argue with justification that the framers of the draft Constitution failed to respond to the larger issues of self-determination and claims to nationhood and did not address the issue of redefining the Sri Lankan nation state and national identity.

The Tamil Nationalist Response

Let us now look at the Tamil nationalist position on solutions to the conflict. Just as much as there is the intransigent Sinhala position on the imperative of a unitary state with no decentralisation or devolution of power in a Sri Lanka which is the homeland of all communities, there is a corresponding intransigent position advocating a separate independent and sovereign state of Tamil Eelam. Besides this hard Tamil nationalist perspective, however, there is a soft nationalist perspective which is more open to compromise. Several proposals have emerged in the past few years, however, which may be considered as alternatives to a separate Tamil nation state.

Visuvanathan Rudrakumaran, a lawyer based in the United States has often referred to the need for the Tamil people's right to self-determination to be recognised as part of a political solution: [16]

> *"The essence of self-determination is the people's desire to be the active agents of their history. Tamils are endowed with objective characteristics, such as a distinct language, they are united by an intuitive sense of oneness, and they have a historical relationship to a clearly defined territory. Therefore based on an analysis of who are the historical bearers of the right to self-determination, and under relevant UN resolutions and the International Court of Justice's opinion in the Western Sahara case[17], Tamils constitute a*

[16] Presentation at a symposium on the Tamil National Question, organised by the International Tamil Foundation, in London, UK, on 21st July 1996.
[17] *Western Sahara Case* (1975) Advisory Opinion, ICJ Reports 1975: p.12.

'people' and are the legal recipient unit of the right to self-determination."

In some of his earlier writings Rudrakumaran highlighted the distinction between internal and external self-determination and argued strenuously for the recognition of the former as part of a viable political solution. More recently, however, he has argued that the Tamil people's right to self-determination includes the right to an independent sovereign nation state. It is submitted that Rudrakumaran's earlier position which focused on internal self-determination offers a concept which may be possible to accommodate within a united Lanka.

Maximum devolution within a united country seemed to be the philosophy behind a proposal submitted both to President Kumaratunga and V. Prabakharan, Leader of the LTTE on 20th December 1995. The framework document as it was called was prepared by a British firm of solicitors, Bates, Wells and Braithwaite on the request of the Sri Lanka Peace Support Group which consisted of academics, professionals and clergy from the international community.

The proposal basically provided for a confederation, the Union of Ceylon, consisting of two internally autonomous states, one for the primarily Tamil area (the north east of the country) and the other for the mainly Sinhalese areas. Apart from foreign affairs, external defence and security, monetary policy and currency, maintenance of relations between the states and a few other matters, each state would have the power to adopt its own constitution which would have to endorse certain core principles set out in the Preamble to the Constitution and entrenched clauses on human rights, while setting out its own structure of government, have its own Prime Minister and exercise complete autonomy in all other areas. It provided for a Central Council of the Union to exercise power with respect to the reserved subjects and to provide a channel of communication and coordination between the two states consisting of an equal number of representatives from the states. The Council would appoint a President and Deputy President of the Union from amongst its

members for a specified time with 'agreed alternation' between representatives of each state.

The citizens of the union would share a common nationality and have the freedom of movement and the right to reside and work in any part of the union.

The proposal provided for a Constitutional Court consisting of an equal number of judges from each state and a suggestion that one or more non-Ceylonese judges of international repute be included as well. The main function of the Court would be to interpret the Constitution and to ensure state compliance with the provisions of the preamble and the human rights provisions of the Constitution.

The proposal ended with a somewhat naïve and impractical provision titled 'Referendum and Guarantees' which provided for each state to conduct a referendum if it wished 'to modify the powers of the Union affecting that State.' It also declared that the implementation of the Constitution and the maintenance of peace between the States would be guaranteed by the United Nations. The proposal had several ambiguous provisions which suggested that the two states were independent sovereign entities. A provision in the Preamble for instance stated that relations between the States would be governed in accordance with 'generally applicable principles of international law and justice.' The provision on the referendum might have been naïve or an indirect way of including a unilateral right to secession, in which event, as will be argued later, this will make it extremely difficult for the majority of Sinhalese to accept.

A third option may be to attempt to accommodate some of the concerns and aspirations of the Tamil people as expressed in the oft quoted Thimpu Principles. The four cardinal principles placed before the Sri Lanka Government delegation in July 1985 at the Thimpu talks by the six Tamil organisations represented there (the TULF, LTTE, EPRLF, EROS, PLOTE and TELO) were:

(i) Recognition of the Tamils of Sri Lanka as a distinct nationality;

(ii) Recognition of an Identified Tamil Homeland and the guarantee of its territorial integrity;

(iii) Based on the above, recognition of the inalienable right of self-determination of the Tamil nation;

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

Since 1985 nearly all Tamil parties including the LTTE have reiterated their commitment to these principles. The first three principles were rejected by the Government delegation on the grounds that they necessarily implied the destruction of a united Sri Lanka. The leader of the delegation, H.W. Jayewardene said,

> *"...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."*[18]

Mr. Jayewardene assumed that they had an accepted legal meaning and that they would necessarily violate the sovereignty and unity of the country. This need not necessarily be so.

Recognising a Tamil nation, a traditional Tamil homeland, its territorial integrity and its right to self-determination could certainly imply the recognition of an independent Tamil sovereign nation state. However, many of the terms have no fixed legal meaning and may be defined in such a way that the essence of these concepts is retained within the framework of a united country.

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[18] See Ketheshwaran Loganathan (1995), ***Sri Lanka: Lost Opportunities***, *CEPRA (Colombo:* University of Colombo): p. 105

The sceptical explanation for the popularity of these principles among Tamil nationalist groups and parties is that the vagueness inherent in the key terms of the Thimpu Principles gives them a flexibility and manoeuvrability which is both convenient and keeps their options open. However, if the Thimpu Principles are to be considered as part of a constitutional framework for a political solution to the island's ethnic conflict then the emotive terms and concepts in the principles will have to be given more precise definitions.

Several difficult questions arise.

a) Are the Tamils of Sri Lanka a nation, nationality, people or national minority?

b) Is there a traditional Tamil homeland and does it coincide geographically with the present northern and eastern provinces of the country? What is the justification for the merger of the northern and eastern provinces?

c) Depending on the response to (a), do the Tamils of Sri Lanka have the right to self-determination?

d) What does self-determination mean?

e) If the response to (c) is in the affirmative, can self-determination be recognised and exercised within the framework of a united Sri Lanka?

f) What is the relationship between the Muslim community in the North and East and the Tamil nation?

g) Does self-determination include a unilateral right to secession?

h) Does self-determination include a right to secession?

i) What are the rights of minorities within the units/regions within a united Sri Lanka?

Some brief observations on some of the questions outlined above are necessary.

a). While I am prepared to accept that the Tamils constitute a nation, it is possible to argue that they are a national minority and are entitled to all the rights and privileges afforded to minorities under international law.

b). The traditional Tamil homeland claim is one which arouses considerable emotion and is the subject of considerable debate among Sri Lankan historians. Since the scholarship and debate on the subject is inconclusive, I prefer to endorse the wording in the preamble to the Indo-Lanka Accord of July 1987 which recognises the distinct cultural and linguistic identity of *inter alia* the Tamils while also recognising that "*The Northern and Eastern provinces have been areas of historical habitation of Sri Lankan Tamil speaking peoples, who have at all times hitherto lived together in this territory with other ethnic groups*". To this can be added that they have been the majority community in these regions.

Whether one accepts the homeland theory or not, I believe that the notion of a Tamil homeland and a merger of the north and a substantial part of the east must be accepted as a response to the present political reality in the country. Given the violence perpetrated on the Tamil people over the past forty years the Tamils are entitled to a psychological homeland consisting of the north and a large part of the east for their security and dignity. One can, therefore, support the homeland theory for reasons of dignity, security and justice even if one has doubts concerning the justification based on history.

c). The Tamil nation located in the north and east of the country cannot be mono-ethnic in composition. This will require ethnic cleansing which is unacceptable. Muslims from the

north who were expelled by the LTTE in 1990 have the right to return to their homelands and the Eastern province Muslims have at the very least, the rights of national minorities under international law. Constitutional options presented by Tamil nationalist opinion and the Thimpu Principles do not spell out adequately the position of the Muslims and other minorities of the north east.

d). The pivotal set of concerns revolves round the question of secession. Does the acceptance of the Tamil nation's right to self-determination include either the unilateral right to secession or the right to secession? This is probably the most sensitive and difficult issue to resolve. I believe that the average Sinhalese will be open to the idea of maximum devolution beyond that contemplated in the Constitution Bill of 2000, including a comprehensive form of asymmetrical federalism with special Quebec style distinct features, provided the unity and the territorial integrity of the country are constitutionally guaranteed. The advocates of substantial autonomy must be able to effectively counter the mantra that more devolution is but a stepping-stone to secession.

Self-Determination and Secession

While it must be accepted that the concept of self-determination is being reviewed and reassessed in modern international law, it seems clear at present that the right to external self-determination which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent states is not recognised by international law subject possibly to three qualifications. The Canadian Supreme Court considered the issue in the reference on the secession of Quebec in 1998. After a review of several authorities and opinions from international law experts, the Supreme Court concluded that:

"In summary, the international right to self-determination generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination."[19]

A similar position was taken by the report of two special rapporteurs who were invited to examine the question of the self-determination of peoples and secession in 1981 by the United Nations Human Rights Commission. While denying an unlimited right to secession to populations living in the territory of an independent sovereign state it accepted a right of secession in the special case, that of peoples, territories and entities subjugated in violation of international law. The report suggested that peoples subject to violations of international law, alien domination or gross oppression should have a right to secession.

It may be difficult, notwithstanding the excesses of the Sri Lankan armed forces, to establish *gross* oppression. It is, however, important that the belligerent warmongers among the Sinhala nationalists take note that gross oppression or even the consistent denial of internal self-determination may provide legitimacy for a claim to secession.

The position on secession in international law corresponds closely to the 'just cause' theory of secession in political theory. There are broadly two main approaches or theories, the 'just cause theory' and the 'choice theory'[20]. These are typological labels for two categories

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[19] The Supreme Court of Canada: *Reference re Secession of Quebec* (1998) 2 SCR 217.

[20] It has been argued that there can be a third category of philosophical and political theory on this question, i.e., the so-called 'national self-determination theories'. This

of normative theory concerned with the morality of self-determination-based rights to secession. They have been employed by political theorists to organise their discussions, and as such, articulate the various conditions upon which a justified claim can be made for secession.

These two theories are not as different as it may seem, in that both tend to qualify the existence and exercise of the right to secession, albeit upon the basis of different assumptions and arguments. More importantly, both theories apply established liberal arguments and liberal values to the issue of secession, in that while these are normative discussions about the morality of secession, those normative standards are but variations on a broader liberal theme.

While the Choice Theory is the certainly the more permissive, it nevertheless contains conceptual impediments, to prevent the right from being exercised too easily. The Just Cause Theory restricts the right to secede as being available only to those groups who have suffered various forms and degrees of injustice within the existing social and political structures. At a conceptual level, both categories of arguments contain strengths and weaknesses, just as much as at the practical level, they possess advantages and disadvantages over each other.

Choice Theory

Choice theories of secession are based primarily on the understanding of democracy in the classical liberal sense. A decision of a territorially concentrated group to secede is simply a matter of choice as expressed by the majority of that community. No further justification is necessary. The secessionist aspirations of (the majority of) the seceding community as expressed in free referenda, legitimates the claim to secede. Here, the choice theories are distinct from the just-cause theories in that the latter require a demonstration

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paper, at a general level, incorporates aspects of both the 'just cause' and '*internal* self-determination' schools.

by the seceding group of suffering injustice by remaining in the existing state. Typically, a choice theory argument for a right to self-determination leading to a right to secession, is one that is closely associated with rights of political association and the liberal value of autonomy. Here, choice theories of secession are accurately described as extensions, to a group, of liberal democratic notions of individual, voluntary choice.

Herein lies the choice theories' main conceptual weakness. It has been pointed out that they ignore totally the character of most secessionist movements. Most secessionist movements are mobilised on perceptions of nationality or nationhood. Liberal assumptions about political association based on individual autonomy and freedom of choice tend to completely ignore the ascriptive nature of groups demanding secession on bases of common ethnicity or religion. On the other hand, choice theories fail to regard and thereby, to provide criteria for evaluating the territorial claims of these groups; secessionist movements are based on perceptions of self-determination invariably linked to contiguous territories over which they make special claims.

Just Cause Theory

Just-cause theories are primarily distinct from choice theories in that they require further justification over and above the mere 'choice' of a group to legitimate a right to secession. In other words, they place a greater 'burden of proof' on the secessionist group. In this respect, many typical just-cause theories are analogous to Locke's theory of revolution. That is, an act of secession is legitimate only where it is absolutely necessary to remedy an injustice. In other words, this is a right that must be exercised only as a remedial measure in extreme situations where no other course of action is possible. However, there is some measure of variance between different just-cause theorists as to what constitutes a sufficient degree of injustice so as to warrant secession. To some, discriminatory injustice is sufficient, while to others it requires graver degrees of injustice such as genocide or conquest.

Most just-cause theories display a degree of cynicism on the formation of national identities. Many just-cause theorists view national identities as being mobilised by social elites, and as such, they argue there cannot be such a thing as a 'national right to self-determination'. They sharply reject the genuineness of such a right, especially where it has been grounded in the individualist language of choice.

The most significant of the advantages of the just-cause conceptualisation of secession is the emphasis it places on the connection between the right to resist tyranny or oppression and the right to self-determination. Put another way, a just-cause concept of secession has necessarily a basis in, and is located within, a general framework of human rights.

Critics of the just-cause theory point to its reliance on the application of objective criteria to subjective aspirations of secessionist groups in assessing or approximating the relative justice or injustice of their claims. Defenders argue that this is precisely the strength of the theory. Critics counter that if the legitimacy or otherwise of the secessionists' claim can only be judged with reference to a human rights based standard of justice, it ignores the real dynamics and socio-political forces that sustain secessionist movements. The political potency of loyalty ties such as culture, language, ethnicity and religion need hardly be stressed. Therefore while just-cause theory appeals from the liberal standpoint by virtue of its imputation of universal human rights norms to secession, it suffers from the fundamental weakness in its assumption that 'justice' constitutes a realistic legitimating criterion.

Perhaps the most influential proponent of the just cause theory, Allen Buchanan, responding to the view that the choice theory is more compatible with democracy, makes the convincing argument that enabling easy exit from a state undermines democracy as it subverts the conditions for citizens of a state to nurture and practice the virtues of deliberative democracy where they engage in rational

dialogue prior to decision making or to manage or resolve conflict.[21] Easy exit encourages withdrawal and retreat from the confrontation of complex, difficult challenges and a tendency to construct a boundary wall around the individual and like-minded citizens. As Buchanan explains,

> *"In a state in which it is generally believed that a territorially concentrated minority has the right to secede if it votes to do so and that the exercise of this right will not be exposed, it will be less rational for individuals to invest themselves in the practice of principled debate and deliberation. A healthy democracy requires large numbers of citizens who are committed to rational dialogue — who feel obliged to become informed, and who are committed to agree to disagree rationally, to appeal to reasons backed by principles, rather than indulging in strategic behaviour that is designed to achieve their ends without the hard work of achieving principled, rational consensus."*[22]

There are however eminently practical considerations which support the adoption of the just cause approach to secession. Firstly, it is more compatible with international human rights norms and standards and even modern trends which lean more towards support for the representation of sub-national units and groups in international fora, rather than a trend towards the adoption of a choice theory in international law. Secondly, it will make it easier for liberal opinion among all communities in Sri Lanka to marginalise their nationalist counterparts by campaigning for maximum autonomy within a united Sri Lanka. The Sinhalese liberals will be able to allay the fear that autonomy will lead to secession. Tamil liberals will be able to cite both the military and legal impediments to the creation of a separate state in support of internal self-determination based on equality, dignity and justice. Thirdly, the theory will also serve as a check on

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[21] See also Cass Sunstein (1991), "*Constitutionalism and Secession*", in the University of Chicago Law Review Vol. 58; p. 633.

[22] Allen Buchanan (1998), "*Democracy and Secession*" in Margaret Moore (Ed.), ***National Self-Determination and Secession*** Oxford, OUP.

Sinhalese majoritarian excesses that have been the primary cause for the exacerbation of the ethnic conflict and also provide legitimacy for a claim to secession in the event of *mala fides* or a violation of the terms of a political settlement by the majority community in the future. Fourthly, it will prevent the snowball effect of the choice theory with particular reference to the Muslims and the hill country Tamil community.

In short, my position is the less talk of separation the more chance there is of autonomy compatible both with Tamil aspirations and the bottom line for a majority of Sinhalese and probably Sri Lankans, the unity of the country. Maximum autonomy within a united Sri Lanka based on the Thimpu principles will be no easy package to sell to the Sinhalese community who were reluctant even to accept the quasi-federal draft Constitution of 2000. The rise of Sinhala militarism and fascism in recent months will probably mean that Sinhalese 'traitors' who advocate such reforms will be liquidated in the same manner in which Tamil 'traitors' have been.

As such it is submitted, with respect, that the more recent writings of Rudrakumaran and eminent Tamil scholars such as Professor M. Sornarajah in which they argue that devolution and autonomy are stages en route to the final destination of independent, sovereign Tamil Eelam are not only maximalist in outlook but also will seriously undermine efforts to promote the recognition of Tamil internal self-determination among the Sinhalese community. In a recent paper, Sornarajah frankly advocates the acceptance of a confederal political arrangement as a strategic ploy to further the goal of an independent Tamil nation state: [23]

> *"The making of a confederacy recognises the distinctness of the Tamil people and their homelands. It also will lead to the demarcation of the boundaries of the Tamil homelands in a constitutive document. There are gains to be had. It will bring the war to an end and ensure that the confederate arrangement works as there is the threat of the resumption of*

[23] Professor M. Sornarajah, "Tamil Eelam: Right to Self-Determination," Text of Speech to the International Tamil Foundation, London, 25th June 2000.

war...Strategically, confederation may be considered for the reason that it gives the Tamil homelands clearly defined borders and creates a breathing space for some time. Generally, confederations as solutions, have not worked. It was suggested in the Vance-Owen Pact for Yugoslavia but never got off the ground. Confederations have generally not worked as solutions to ethnic crises." [24]

Sornarajah, therefore advocates confederacy because he believes it is doomed to fail. The abortive attempt at confederacy will, however, he argues, facilitate the attainment of independent Tamil Eelam. While Sornarajah's candour is to be admired, his thesis is identical with that developed by the Sinhalese nationalist opponents of devolution, and will seriously undermine the arguments of liberals that more devolution and internal self-determination are the only alternatives to secession.[25]

Is A Political Solution Possible?

It is possible, but unlikely, given the gulf between the two sides. On the one hand one has a Sri Lankan Government which has enormous difficulty defending a quasi-federal draft Constitution in the context of influential political forces, some of which are becoming increasingly militarised, committed to preserving a Sinhala Buddhist majoritarian, unitary state. On the other, one has a Tamil political force which has waged a long and costly struggle, captured a significant amount of territory which it administers and committed to principles that are ambiguous as they could connote an independent nation state of Tamil Eelam. There is also a genuine, not unfounded, fear that any federal or confederal compromise would only be a strategic advance in achieving the goal of Eelam.

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[24] Ibid p 8-9.

[25] It is surprising that ***The Island*** newspaper in Sri Lanka, well known for its hostility to enhanced devolution of power, has not published the Sornarajah speech in full. Perhaps it is because the editor is concerned that if he does he may be violating the obnoxious Sixth Amendment to the Constitution which outlaws even the indirect advocacy of secession!

The bitterness and distrust on both sides and the scepticism of Tamil political groups due to the repeated betrayals of Sri Lankan Governments both with respect to the delivery on constitutional agreements and, in the few instances where this was done, with respect to the actual implementation of these arrangements, in the past forty years, hardly creates an atmosphere conducive to a constitutional compromise which must form a major part of a political solution.

Another important factor is that none of the main political parties in Sri Lanka, including Tamil political parties are committed to basic principles of constitutionalism or the rule of law. This was clearly demonstrated by the constitution-making process of 1994-2000. This must not be forgotten as authoritarianism has an adverse impact not only on human rights but also on governance, devolution of power and autonomy. Furthermore the exclusive focus on group rights can undermine protection for individual rights and liberties which must remain the prime objective of constitutionalism.

There are also widespread misconceptions about the nature of a federal state which create unnecessary difficulties and problems. There is a belief fuelled by many leaders of left parties in the country that a federal state can only be established by two previously independent states agreeing to join together.[26] I suspect that the insistence of some sections of Tamil nationalist opinion that one should refer to a *unified* Sri Lanka, rather than a *united* Sri Lanka, is motivated by similar thinking. Therefore, the myth is created that the advocates of a federal constitution are seeking to divide the country, albeit for a short period of time before unification.

The propagation of this myth is also unfortunate. Constitutional scholars generally recognise that there are TWO methods by which a federal form of government may be established. The more common method known as Integrative Federalism is where previously

[26] The present Minister of Justice, Batty Weerakoon believed this and in fact argued that Sri Lanka could not become a federal state even if it wished to as it lacked the 'precedent facts' of two independent nation states.

independent states integrate to form a new political entity. The second method known as Devolutionary Federalism is where a country with a previously unitary form of government opts to change to a federal system. As Patrick Peeters has explained,

> *"Integrative Federalism refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities. The goal of establishing an effective central government, with direct effect on the people inside its sphere of powers is pursued while respecting the powers of the component entities, at least to the extent that the use by the latter of their powers does not result in divisiveness.*
>
> *Devolutionary Federalism, on the contrary, refers to a constitutional order that redistributes the powers of a previously unitary state among its component entities; these entities obtain an autonomous status within their fields of responsibility. The principal goal is to organise diversity within unity."* [27]

Belgium, Spain, Brazil and Nigeria are examples of countries which have adopted Devolutionary Federalism and moved from unitary to federal forms of government. The South African Constitution of 1996 has moved in that direction too.

Notwithstanding my pessimism I submit a set of constitutional principles which may provide a feasible constitutional compromise for a political solution to the conflict. They include principles based on the Thimpu principles in recognition of their significance to the LTTE and all Tamil political groups. They are reformulated to retain their essence but shed them of emotive and ambiguous terms so as to make them more acceptable to the Sinhalese community. Several other principles that will allay many of the fears of critics of

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[27] See Patrick Peeters, ***Federalism: A Comparative Perspective- Belgium transforms from a Unitary to a Federal State*** in Brutus de Villiers (Ed) 1994 *Evaluating Federal Systems*, Cape Town, Juta.

autonomy and indeed human rights and civil society groups are added. I can see no reason for Tamil nationalist opinion to oppose these additional principles.

Basic Principles – Constitution of Sri Lanka

Modified Thimpu Principles

1. The Tamil community constitutes a people with a distinct language, culture, tradition and identity. The Constitution should recognise the above in order to ensure that the Tamil people live with dignity and self respect.
2. The Tamil people have for centuries lived in the northern and eastern provinces and constituted the majority population in these areas.
3. There must be substantial autonomy in these areas, which is constitutionally guaranteed and secured. The people must have the right to determine their own affairs.
4. There must be complete equality particularly in the areas of race, religion and language.

Other Principles

5. The Constitution of Sri Lanka shall be supreme.
6. The Constitution shall enshrine basic values and principles. These shall include human dignity, equality, the promotion of human rights, non-racialism and non-sexism, the Rule of Law, universal adult suffrage and a multi-party system of democratic government, and a system of government that promotes accountability, responsiveness and openness.
7. The Fundamental Rights provisions of the Constitution shall conform to international human rights norms.
8. There shall be constitutional mechanisms to provide for effective power sharing at the centre.

9. There shall be provided in the Constitution, an autonomous canton/unit in the East to accommodate the aspirations of the people, particularly the Muslims and Sinhalese, for a certain degree of autonomy. *OR,* There shall be separate Northern and Eastern regions with provision for the two regions to deliberate/work together in certain situations. The Apex Council idea developed during the deliberations of the Mangala Moonesinghe Parliamentary Select Committee could facilitate such cooperation.

10. Section 29 of the Soulbury Constitution of 1946[28] which was the main minority safeguard at the time of independence and considered by some to be 'the unalterable solemn balance of rights between the citizens of Ceylon and the fundamental conditions on which inter se they accepted the Constitution'[29] should be reincorporated in the Constitution.

11. A provision similar to Article 235 of the South African Constitution shall be incorporated in the Constitution. "*The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right to self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.*"

Principles 5-9 and 11 will help considerably in making Principles 1-4 acceptable in the rest of the country, respond to many of the arguments put forward against autonomy, in addition to providing guarantees for human rights and devolution of power. Principle 10 it is hoped will be of strong symbolic significance; a revival of the social contract at the granting of independence.

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[28] Section 29 imposed a restriction on the power of Parliament to make laws which discriminated against racial and religious minorities.

[29] *Per* Lord Pearce in *Bribery Commissioner v Ranasinghe* (1964) 2 WLR 1301 at 1307.

Attempts to provide for substantial devolution of power without judicial review of legislation and power-sharing at the centre are unlikely to succeed. One of the reasons why it was so easy under the existing devolution arrangements for the centre to encroach on powers devolved to the provinces was because there was no provincial voice at the centre. In nearly all countries where there is a desire to provide for devolution of power within a united country, there is provincial/regional representation at the centre in the form of a Senate or Council of Provinces. The rationale is the protection of devolution. The representatives of the devolved units act as watchdogs for the interests of the devolved units. There is a second rationale, however, that is relevant for Sri Lanka: the protection of national unity. It is important that the regional politicians and parties/groups are made to feel part of the whole, stakeholders in the nation. A second chamber can facilitate both of these important objectives or rationales. Many constitutional commentators have indeed cited regional representation at the centre as an essential characteristic of a federal constitution.[30] I find it quite amazing that Sri Lanka's constitution-makers are seeking to promote substantial autonomy within a united country without regional representation at the centre.

Conclusion

There is also the vital need given the dominance of ethno-nationalism in the past three decades to forge a supra-ethnic authentic Sri Lankan national identity. This argument is not fashionable in the current Sri Lankan political discourse for a variety of reasons. This argument has recently been appropriated by Sinhalese nationalists as a convenient substitute for the recognition of autonomy and devolution of power. This is unacceptable. The revival of a genuine Sri Lankan national identity must accompany the recognition of substantial autonomy. There is also the understandable scepticism of the Tamil community as to why this

[30] See, for example, Ronald Watts (1999), ***Comparing Federal Systems,*** McGill-Queens University Press, Montreal.

was not done in the immediate post independence era or, at least, when the country's first autochthonous constitution was adopted.

Nevertheless, efforts to revive a kind of rainbow nation Sri Lankan identity must be part of a constitution-making for conflict transformation initiative. Ghia Nodia has remarked that:

> *"Failure to tame the ethnic flesh of nationalism can lead to chauvinism, racism or even fascism. Yet these manifestations of nationalism's ugly side arise not from excessive ethnicity but from the lack of a robust political expression of national feeling. When they have no political or institutional achievements to take pride in, people may boast instead of their inherited racial, linguistic or cultural identities."*[31]

It is only where the understandably dominant ethno-nationalism is at least complemented by civic nationalism, that the principle of unity in diversity may be realised. The existence of multiple or cross cutting identities must be recognised and fostered to act as a countervailing force to ethno-nationalism. Such a balance or juxtaposition of the national and the regional, the overarching civic or political and the ethnic is essential for the success of a constitution for peace and reconciliation. Striking such a balance is not easy. Yash Ghai reminds us how important this task is:

> *"Autonomy, particularly federal autonomy, is built around the notion that the people of a state are best served through a balance between the common and the particular. If the emphasis is too much on the particular, then separation may be the better option, notwithstanding the proliferation of states. The secret of autonomy is the recognition of the common; certainly it seems to be the condition for its success. Perhaps about thirty years ago, too much emphasis was placed on the 'common' and for this reason autonomy was*

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[31] Ghia Nodia (1994), "*Nationalism and Democracy*" in Larry Diamond and Marc F. Plattner (Eds.) ***Nationalism, Ethnic Conflict and Democracy***, John Hopkins University Press; p. 15.

narrow and contingent. Today we may be placing too much emphasis on the particular."[32]

It will be seen from the proposal outlined above that the task of developing a constitutional model that meets the aspirations of the Tamil people within a united Sri Lanka is a daunting one. A new Constitution for conflict resolution must also conform to constitutional first principles and modern trends in constitution-making. There is a need, therefore, for imagination, creativity, commitment and an ethos of compromise and generosity of spirit. At the moment, however, I fear that such an enabling environment does not exist.

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[32] Yash Ghai (2000), "*Ethnicity and Autonomy: A Framework for Analysis*" in ***Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States***, Cambridge University Press; pp. 24 - 25.