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OBJECTIVES

The Law and Society Trust Fortnightly Review keeps the wider Law and Society community informed about the activities of the Trust, and about important events and legal personalities associated with the Trust. Our publication is aimed at raising public awareness on all issues concerning the legal rights of citizens, and at gaining wider recognition of law as society's instrument for peaceful change.

Federalism has figured prominently in Sri Lanka's political discourse. In this issue we publish two perspectives on this subject. The first is a paper by Rohan Edrisinha and P Saravanamuttu arguing for a federal Sri Lanka. The authors examine federalism against the backdrop of the North-East conflict and other recent political developments. They also offer a critique of the Thirteenth Amendment. This issue also includes excerpts from the late Opposition Leader Gamini Dissanayake's vision for Sri Lanka. In this he argues for enhanced devolution to the Provincial Councils and offers detailed proposals as an appendix.

TOWARDS FEDERALISM

IN THIS ISSUE

THE CASE FOR A FEDERAL SRI LANKA

Rohan Edrisinha & P Saravanamuttu

DEVOLUTION AND THE RESOLUTION OF THE NORTH-EAST CONFLICT

Gamini Dissanayake

THE CASE FOR A FEDERAL SRI LANKA

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Introduction

In presenting the case for a federal Sri Lanka, this paper begins with a statement of the national crisis. It argues that underpinning the crisis are the twin questions of nation and state, which in turn focus attention on the issues of democracy, conflict resolution and good governance. We conclude by arguing that although federalism is no panacea, it provides the best framework for an over-arching national unity with durable mechanisms for genuine, democratic power-sharing. Indeed, we add that federalism is gaining more adherents in Sri Lanka.

The Crisis

The manifestation of violent ethnic conflict in the prolonged and tortuous nation and state building process, has drawn attention to Sri Lanka as a country that has proceeded from enviable political stability and parliamentary democracy to seemingly intractable crisis. Consensual elite politics have progressively given way to populism and chauvinism in the face of rising and unfulfilled political and socio-economic expectations. At issue is the composition of the nation and the structure of the state, suggesting that the crisis is about political legitimacy and the concentration of power.

This is a question that is pertinent to the politics of both the majority Sinhalese community and the Tamils, the largest minority community. In both cases, the espousal of ethnic identity is in itself an unsatisfactory, though convenient, vehicle for the fulfillment of basic demands for political power and access to socio-economic advancement. Underlying the issue of ethnicity therefore, is the crucial question of power distribution which ethnicity itself can forcefully highlight, but cannot satisfactorily resolve. Indeed, inter-ethnic and intra-ethnic relations are conditioned by this, either by acts of commission or omission, as has been illustrated by recent developments.

The question of devising a satisfactory distribution of power consonant with the centralising and unitary orientation of the political culture, finds its intellectual antecedents in the colonial legacy of the nation-state as the principal form of collective political organisation and the reality at independence of a state-nation, rather than a nation-state. In contrast to the European experience upon which the idea was founded, nation and state have not developed symbiotically in Sri Lanka. State has preceded nation and taken upon itself the task of creating a nation in

fulfillment of the established norm. The evolution of democracy and power-sharing must, therefore, be seen in the context of this nation and state building process.

Political Evolution: The Parliamentary Phase

Tensions between the Sinhalese and the Tamils regarding their respective positions in an independent Sri Lanka were discernible in 1931 when the island was granted universal adult franchise. The enduring Tamil fear was that their positions of relative advantage in the bureaucracy, gained through educational attainments and colonial policy would be irretrievably jeopardised, by majority Sinhalese rule. The Sinhalese, in turn, have been eager to redress this imbalance to reflect their majority status and claim for cultural distinctiveness to Sri Lanka, in contrast with Tamil links to south India.

In the prelude to independence in 1948, Tamil anxieties were expressed in their demands for parliamentary constituencies to be drawn up on a communal basis and for there to be a 50/50 even split between majority and minority representation in the legislature. Even though communal representation was not granted, population distribution ensured that the 'first-past-the-post' Westminster style electoral system would lead to political polarisation along ethnic lines, with the majority Sinhalese parties dominating in the south and their Tamil minority counterparts doing likewise in the north.

Tamil fears of marginalisation at the centre were sustained by the certainty of Sinhalese preponderance in government. Government sponsored colonisation schemes perceived by Tamils to be aimed at altering the demographic balance and language and education policy, cumulatively reinforced fears and a sense of grievance.

Tamil leaders, nevertheless, committed themselves along with the Sinhalese elite to the parliamentary process. The Tamil strategy was to exchange support and participation in government for measures safeguarding minority interests and it attested to the strength of the inter-communal elite consensus on parliamentary democracy and the constitutional ethos of the island's independence movement. However, political accommodation though subscribed to in principle, was not fully reflected in practice by government. Not solely based on ethnic considerations, but rather, more reflecting the conservative bias of the establishment and its desire to contain leftist politics, the disenfranchisement of the plantation workers of Indian origin which led to the creation of the Federal Party among the Tamils, was an early indication of this.

Despite setbacks, however, this consensus survived until it was finally eroded in the 1970s.

The acceptance of political accommodation and parliamentary democracy as the framework for managing societal tensions, was undermined by intra-elite competition. This exploited ethnic populism for partisan advantage. Explicit identification with ethnic populism came to be regarded as crucial to electoral success, thus legitimising the older and more divisive bases of

identity as the ultimate sources of political power. This exposed the inability of the elite consensus to fuse the older forms of identity into a durable and over-arching national identity.

Herein lies the significance of the 1956 election, which was won in the south by the centre-left coalition of Sinhalese populist forces headed by Mr. S.W.R.D. Bandaranaike, founder of the Sri Lanka Freedom Party (SLFP) and by the Federal Party in the north.

Once in government, Bandaranaike fulfilled his election pledge to make Sinhala the official language, striking at the heart of Tamil fears regarding education and employment. More damaging, his inability to control the Sinhalese Buddhist coalition that propelled him to power forced him into positions that were further inimical to ethnic harmony. Consequently, his efforts in 1957 to ameliorate the impact of the official language policy on the Tamils, with special provisions for the use of the Tamil language and the devolution of power to regional councils, in a pact with the Federal Party leader Chelvanayakam, was obstructed by the innate chauvinism of the Sinhalese electorate and the political opportunism of the United National Party (UNP) opposition. Violent Sinhalese-Tamil riots, the first of their kind in independent Sri Lanka, ensued.

Throughout the next decade, the deterioration in ethnic relations was tempered by the residual vitality of the parliamentary consensus. The Tamil leadership continued the practice of parliamentary accommodation, even though the first government of Mrs. Bandaranaike (1960-64), vigorously implemented the official language policy and reneged on promises to reintroduce the devolution proposals envisaged in the Bandaranaike - Chelvanayakam Pact. With assurances on this score contained in a pact with the UNP, the Federal Party joined a UNP dominated national government in 1965. Whilst legislation for the use of Tamil was passed, that relating to the devolution of power was not and the Federal Party withdrew from government in mid 1969.

Therefore, seen from the perspective of nation and state building, the 1956 election was a milestone in Sri Lankan politics. In the south, it amounted to the triumph of ethnic identity, exemplified by the capture of the state by the majority community for the purpose of political consolidation and the control of economic power through nationalisation; in the north it represented the beginnings of a serious challenge to the unitary status of that state.

The Politics of Authoritarianism

The pattern of political activity initiated in the 1970s, signalled the collapse of the parliamentary consensus and institutionalised the recourse to violence in the resolution of political conflict.

Disenchantment with the elite leadership among both the Sinhalese and Tamil youth, coalesced into the conviction that their grievances could only be met through armed insurgency against the established centre.

In the south, the basis for grievance was the demand for greater access to socio-economic and political power. Originally, exemplified by the ultra-leftist 1971 Janatha Vimukthi Peramuna (JVP) insurgency, it was revitalised in 1987 as an extreme Sinhalese nationalist rebellion against the state, by Indian intervention to resolve the ethnic conflict. In the north, youth dissent was founded on frustration with the failure of the strategy of political accommodation to prevent discrimination, notably, Mrs. Bandaranaike's second government's university admissions policy. By the mid-1970s, the accruing bitterness had heightened militant ethnic consciousness and spawned numerous guerilla groups, including the Liberation Tigers of Tamil Eelam (LTTE).

Established political parties, in turn, deepened this alienation and anomie by seeking to extend and consolidate their monopoly of state power at the expense of the parliamentary framework. This reinforced the trend towards violent opposition and heightened ethnic consciousness. Both the left-wing United Front government of Mrs. Bandaranaike (1970-77) and its right-wing successor, the regime of Mr. J.R. Jayewardene (1977-89), were guilty of this.

Both were swept into power with unprecedented majorities in the legislature which they used for partisan advantage. They both changed the constitution - the first in 1972, making Sri Lanka a republic in which the primacy of the majority language and religion, Sinhala and Buddhism respectively, were assured, and the second in 1978, replacing the parliamentary system with an executive presidency on the grounds that such a system was the best suited for accelerated economic development. Most ominously, the UNP introduced the dubious precedent of a referendum in December 1982 to postpone elections for a full 11 years, thereby compounding the unrepresentative character of the legislature and sealing it off from radical opinion.

The common strand in the establishment's response to what in the JVP's case was a threat to the character of the state and in the case of Tamil militancy a threat to its territorial composition, was the attempt to de-legitimise both challenges by defining them as essentially terrorist by nature. In the south, however, given an armed insurgency from within its own ethnic constituency, the government's sense of danger was more acute and consequently its response, more political. Sinhalese dominated governments, regardless of ideological orientation, defended the political establishment with brutal determination, whilst simultaneously moving to placate the radical elements within their ethnic group. This carrot and stick approach was adopted towards the JVP by Mrs. Bandaranaike in 1971 and by Jayewardene's UNP successor, Premadasa, in 1989.

Alternatively, when confronted with Tamil secession, the response was uncompromising and militarist: the search for a political solution was necessitated only by military stalemate, impending bankruptcy and external intervention in the Jayewardene era.

The corresponding response of the Tamil leadership in the 1970s was conditioned by the need to preserve political credibility in the new era of militancy. Interpreting the chauvinistic bias of its proceedings as the effective abandonment of minority rights by the United Front government, the Federal Party walked out of the Constituent Assembly in 1971 and closed ranks

with other Tamil parties to form the Tamil United Front, a year later. In 1976, they adopted the Vaddukoddai resolution calling for a separate state of Tamil Eelam and transformed themselves into the Tamil United Liberation Front (TULF).

However, when the TULF won a popular mandate for the separatist platform in the 1977 general election, it returned to the legislature as the single largest party in opposition and its leader, Mr A. Amirthalingam, accepted the official title of Leader of the Opposition. Nevertheless, the limited hope generated by this and the Jayewardene regime's promise of an all-party conference to address Tamil grievances, soon evaporated in the midst of violence and accusations of bad faith. The all-party conference was not convened and a district development council scheme was eventually rejected as inadequate by the TULF. In addition, a host of other factors bedeviled ethnic harmony. These included the malpractices of the ruling party and the destruction of the Public Library in the northern capital of Jaffna during the development council elections; the excesses of the Sri Lankan security forces, empowered with a draconian Prevention of Terrorism Act and terrorist action by Tamil militants. Inflammatory rhetoric from within the Cabinet as well ensured that the vicious cycle of ambush, atrocity and invective, destroyed any prospect of ethnic reconciliation.

Ethnic Conflict

The horrific events of July 1983 are well known. Most damning is the reported acquiescence and participation of sections of the security forces in the terror and allegations that elements within the ruling party were responsible for the organised carnage.

The government belatedly responded by effectively blaming the victims. In a move openly designed to placate Sinhalese chauvinism, it passed the Sixth Amendment to the constitution, which effectively outlawed the advocacy of secession. To counter adverse international publicity, it blamed ultra-leftist groups for the slaughter as a necessary part of their determined conspiracy to destroy democracy in Sri Lanka. Jayewardene who had lifted the original ban on the JVP, now proscribed them along with other radical left-wing parties. The cumulative impact of these measures was to conclude the parliamentary phase to nation building with the exclusion of the Tamil and anti-establishment parties from the legislature. This also enabled the government to project itself as the embattled champion of the democratic political establishment, against the forces of extremism and terror.

As full-scale ethnic conflict followed, the external dimensions of the conflict were highlighted. Given its domestic Tamil Nadu constituency and the influx of refugees from Sri Lanka, India offered to mediate. However, a series of proposals failed to bridge the gulf between the two sides and Indian mediatory efforts were compromised by New Delhi's assistance to the Tamil militants. Ultimately, in 1987, it was Indian intervention in the form of the Indo-Sri Lankan Accord that produced a package identifying a measure of provincial devolution, as the basis for the resolution of minority grievance.

As is well known, the Accord and the introduction of the Indian Peacekeeping Forces (IPKF) to facilitate it, sparked off another round of vicious nation and state building conflict. India was pitted against the LTTE, who emerged as the principal Tamil militant group, and the Sri Lankan establishment took on the JVP, who posed as the standard bearers of true national liberation.

Via the Thirteenth Amendment, a system of island-wide provincial councils was established in 1988 and Tamil made an official language along with English as a 'link' language.

In the subsequent years, the provincial councils have functioned in the rest of the island, but not in the north-east, the area for which they were originally intended. Continued conflict between the LTTE and the IPKF, between the LTTE and the pro-Indian Eelam People's Revolutionary Liberation Front (EPRLF) which constituted the first North-East Provincial Council, and the tactical alliance between the Premadasa regime and the LTTE to evict the IPKF, combined to abort the devolutionary experiment in the north-east. By the time of the IPKF withdrawal in 1990, the JVP insurgency in the south had been crushed. And in the absence of a continuing common strategic interest, by June, the government and the Tigers were at war once more. The government for its part, declared the war to be against Tiger terrorism and not a war against the Tamil people.

As a consequence of his insecurities within the ruling UNP, President Premadasa was eager to construct a national unity centred on his anti-Indian and populist credentials. Also, given the electoral requirements of the executive presidential system, the crucial importance of the minority vote for his presidency, was reinforced. Indeed, from the All Party Conference (APC) convened at the outset of his presidency to the variety of proposals that were floated within and outside the Mangala Moonesinghe Select Committee to find a resolution to the ethnic conflict, the imminence of a political package that went beyond the provisions of the Thirteenth Amendment to satisfy minority grievances was skillfully cultivated.

It soon became apparent that the self-perceptions of political insecurity and electoral disaster, precluded bold initiatives from either the government or opposition on this score. It was also evident that the Premadasa favoured formula of consultation, consensus and compromise, could not break the stranglehold of ingrained prejudices to produce anything beyond a Sinhalese consensus on de-linking the northern and eastern provinces, that had been merged under the Accord and a Tamil insistence on greater devolution and the permanent merger of the two provinces. Accordingly, the initial promise too of the Select Committee was dissipated.

Post Premadasa Politics

The period from the assassination of President Premadasa to the People's Alliance (PA) victory at the August 1994 general election, was one in which the ethnic conflict was redefined as a terrorist war by the government of President Wijetunga. By his myopic and chauvinistic line on this conflict, inspired by a desire to break from the perceived Premadasa policy of being soft on this issue and on the LTTE especially, President Wijetunga fast undid the electoral coalition

President Premadasa had so assiduously put together for himself and the UNP. The PA leader, Chandrika Kumaratunga, was thus able to present herself, with little challenge from the UNP, as the genuine peace candidate and as the Sinhalese national leader committed to peace with the protection of minority rights.

Her election, first as Prime Minister and then overwhelmingly a month ago as President, marks a significant shift in majority opinion about conflict resolution. That she has projected herself successfully as a truly national leader with an electoral base that spans both the majority and minority communities and stood firmly behind a continuation of the peace process, even in the aftermath of the Dissanayake assassination which is widely held to be another LTTE crime, attests to the force of the hope for change and peace amongst the electorate at large.

Most importantly, the ascendancy of President Kumaratunga has opened up the debate on conflict resolution and shifted the language of this debate, at least, from a discussion of devolution to one of power-sharing. Consequently, there is a recognition by the government, through the Select Committee process, that the questions of nation and state have to be answered simultaneously and that a constitutional settlement is an ineluctable part of power-sharing, in response to the erosion of liberal democracy and ethnic harmony.

The government's and the President's good intentions notwithstanding, there is still residual prejudice that has to be combatted before genuine power-sharing can be accepted. The traditional attitude towards Federalism, as an obvious mechanism for power-sharing in Sri Lanka, stands as telling testimony to the depth of these feelings. Federalism has attracted such opprobrium from the dominant centrist political culture of Sri Lanka, that it has been used almost as the sole criterion for ruling out constitutional mechanisms, as a way out of our current travails. It is worth, therefore, analysing the Indo-Sri Lanka Accord to demonstrate the range of misconceptions and prejudices that have inhibited the utility of constitutional reform for conflict resolution and democracy.

Devolution in Sri Lanka: A Critique

The Thirteenth Amendment to the Constitution which was enacted in November 1987 introduced a system of devolution of power based on a system of Provincial Councils. The Amendment and the Provincial Councils Act No.42 of 1987, constituted part of the Indo-Sri Lanka Accord, signed by Prime Minister Rajiv Gandhi and President J.R. Jayewardene in July 1987.¹

It now seems clear that the Thirteenth Amendment to the Constitution has failed to introduce substantial devolution of power and that the widespread apprehension that the unitary character of the Constitution had been violated is completely unfounded.

Constitutional theorists generally agree that there is a wide spectrum of federal constitutions

¹ The Indo-Lanka Agreement to Restore Peace and Normalcy in Sri Lanka, July 29, 1987.

which contain different degrees of power for the central governments vis-a-vis the devolved units or states.

However unitary and federal constitutions contain certain essential features which make it possible to distinguish between the two. In a unitary state all legislative and executive authority is vested in a single legislature and a single executive. While certain powers can be devolved or delegated to smaller authorities such as municipal councils or other local authorities, since there is ultimately one source from which these smaller institutions derive their authority, powers delegated can either be withdrawn, or the subsidiary institutions even abolished, at the whim of the central legislative source of authority.

Under a federal constitution, on the other hand, an essential feature is that there is a clearly defined division of legislative and executive authority. Power is divided between the centre and the states or provinces so that they constitute co-ordinate sovereignties with regard to powers and subjects assigned to them. Furthermore, since federal constitutions are deemed to have been drawn up as a compact, with the consent of both the central and state/provincial governments, amendment of a federal constitution can only be made with the consent of both the central and state/provincial governments.

In Sri Lanka however, there is no clear cut division of power under the Thirteenth Amendment, between the central government and the provincial councils. The Thirteenth Amendment contains three lists spelling out the subjects devolved to the Provincial Councils (List I), the subjects retained by the centre in the Reserved List (List II) and also a Concurrent List (List III). Article 154G (5)(a) provides that Parliament may make laws with respect to the subjects specified in the Concurrent List "after such consultation with all Provincial Councils as Parliament may consider appropriate in the circumstances of each case". Article 154G (5)(b) provides that Provincial Councils may also make statutes on subjects in the Concurrent List after consultation with Parliament. The mechanism for such consultation was not provided for in the Constitution. It was only on 22nd December 1989, over two years after the enactment of the Thirteenth Amendment, that Parliament decided to amend its Standing Orders to set out a somewhat inadequate "process of consultation".²

Article 154G (6) however, provides that with regard to subjects on the Concurrent List, if any provision of any statute made by a Provincial Council is inconsistent with the provisions of any law passed by Parliament in accordance with Article 154G, the provisions of the law shall prevail and the provisions of the Provincial Council statute shall to the extent of its inconsistency with the law, be void. The effect of the provision is therefore to ensure that ultimately all the subjects specified in the Concurrent List, are under the control of Parliament.

Another major flaw in the Thirteenth Amendment to the Constitution is that the first phrase in the Reserved List completely undermines the devolution of power apparently devolved under the Provincial Councils List: "National Policy on all subjects". Thus the policy even on those

See Standing Order No. 46A, *Bills and Proposed Statutes Dealing with Matters in the Concurrent List*.

subjects in the Provincial and Concurrent Lists can be determined by the central Parliament.

A clear example of how devolution of power can be undermined by this provision is the National Transport Commission Act of 1991.³ The preamble to the Act begins with the words,

Whereas as it is the policy of the Government of Sri Lanka...

thereby seeking to justify all the provisions contained therein. Apart from prohibiting a provincial council or local authority from having any interest in the ownership or operation of omnibus services, the Bill established a National Transport Commission consisting wholly of central government bureaucrats or nominees, which was empowered *inter alia*, to specify conditions for the issue or renewal of route licenses, monitor conditions of passenger service, prescribe the form in which passenger service permits may be issued, determine the rates to be charged for the issue of route permits, to issue such permits, to ensure the provision of omnibus services on unremunerative routes, determine the fares that may be charged on such routes and to arrange for carriage of goods on omnibuses. This is in spite of the fact that Provincial Council List of Powers included the regulation of road passenger carriage services and the carriage of goods by motor vehicles within the Province and the provision of intra-provincial transport services.

The power of the Central Government over Provincial Councils can be seen in several other provisions in the Thirteenth Amendment. Article 154G (2) provides that Parliament can legislate on Provincial Council subjects if such legislation is passed with a two thirds majority. Article 154G (11) provides that Parliament can, with a simple majority, make laws in respect of any matter set out in the Provincial Council List, if such law is necessary for implementing any treaty, agreement or convention with any other country, or even "any decision made at an international conference, association or other body". Furthermore Article 155 3(A) provides that emergency regulations made under the Public Security Ordinance can override, amend or suspend the operation of Provincial Council statutes. Since the past twenty years have demonstrated that emergency rule is more the rule rather than the exception, and since the previous government passed legislation by emergency regulations on a number of issues which are really outside the ambit of the Public Security Ordinance, there is a real likelihood that this Article could be used to substantially undermine the autonomy of Provincial Councils.

Article 154Q is another provision which, by virtue of certain sections which seem overbroad and vague, has the potential to permit excessive intrusion of Parliament into Provincial Council autonomy. While Parliament has the power to determine how members of Provincial Councils are elected, their qualifications, the procedure for transaction of Provincial Council business and the salaries and allowances of members of Provincial Councils, it can also legislate on:

any other matter necessary for the purpose of giving effect to the principles of provisions of this chapter, and for any matters connected with, or incidental to, the provisions of

See the Hansard of 20 August 1991.

this chapter.⁴

Given the lack of political will at the centre to really devolve power, and the tendency of central government institutions to retain power, the broad and ambiguous provisions of this section could be used to undermine the devolution of power.

The Provincial Councils Act No. 42 of 1987 is an example of legislation passed by Parliament under powers vested in it by Article 154Q. The Act clearly establishes that the financial powers of Provincial Councils are vested in the Governor who, in fact, functions like the Minister of Finance of the Province. Apart from his/her powers over finance, the general position of the Governor under the 13th Amendment is a major impediment to substantial devolution.

The ambiguities in the Thirteenth Amendment were highlighted in a recent Supreme Court decision⁵ where the court, rather unusually, rejected both the submissions of the petitioner and the respondents and adopted a position that had not been canvassed by either of the parties to the dispute. The question for determination by the court was under which list did the provisions of the Agrarian Services (Amendment) Bill fall.

The Provincial List (List I) contained the following entry:

- 9. Agriculture and Agrarian Services -
 - 9.1 Agriculture, including agricultural extension, promotion and education for provincial purposes and agricultural services (other than in inter-provincial irrigation and land settlement schemes, State land and plantation agriculture)...

The Concurrent List (List II) contains the following entry:

- 8. Agricultural and Agrarian Services -
 - 8.1 Establishment and promotion of agro-linked industries, the establishment and maintenance of farms and supervision of private nurseries;

The Supreme Court after examining the subject matter of the proposed Amendment concluded that it did not come within either section and held that since it dealt with rights of appeal of tenant cultivators, the determination of disputes, the payment of loans etc. the Amendment came under the Reserved List (List II). The decision of the Court revealed the difficulties faced by the judges in interpreting the confusing paragraphs which deal with the division of power.

Article 154Q (d).

⁵ In re a petition filed by Somaweera Chandrasiri re a Bill to Amend the Agrarian Services Act No. 58 of 1979, S.C. 2/91.

While there are some provisions which create the impression that the Governor is meant to be a nominal head of the province, similar to the position of the Governor General and the President under the Soulbury and First Republican Constitutions respectively, there are provisions which indicate that s/he is far more than a nominal head of the province. For example, the Governor is appointed by the President and holds office at the pleasure of the President in accordance with Article 4(b) of the Constitution. The Provincial Council cannot remove the Governor from office but only advise the President to remove him/her. With regard to the summoning, proroguing and dissolution of Provincial Councils, the Governor is required to act on the advice of the Chief Minister, but only,

So long as the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the Provincial Council.⁶

Article 154F (1) provides that the Governor is to act on the advice of the Chief Minister and Board of Ministers, "except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion". There are several provisions with regard to the Governor's assent to Provincial statutes, the Governor's power to report to the President that the administration of a Province cannot be carried on in accordance with the provisions of the Constitution, inter alia, which authorise the Governor to act in his discretion. Article 154F (2) and (3) provides that:

If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of any thing done by the Governor shall not be called in question in any Court on the ground that he ought or ought not to have acted on his discretion. The exercise of the Governor's discretion shall be on the President's directions.

The question whether any, and if so what, advice was tendered by the Ministers to the Governor shall not be inquired into by any Court.

Furthermore, the fact that the Governor holds office during the pleasure of the President in accordance with Article 4(b) which vests the executive power of the Republic in the President, demonstrates that while the Governor is required to act on the advice of the Chief Minister with regard to the more formal or ceremonial aspects of his functions, substantive executive power remains with the President and his agent, the Governor of the Province.

An analysis of the provisions of the Thirteenth Amendment and the Provincial Councils Act reveal therefore,

- a) that the Central Parliament and Provincial Councils are not "co-ordinate sovereignties";
- b) that there is no clear cut division of power between the centre and the provinces;

⁶ See Article 154B (8)(d).

- c) that the powers of Provincial Councils can be abolished by the central government acting unilaterally;
- d) that there is no subject over which a Provincial Council can claim to exercise exclusive competence or jurisdiction;
- e) that central government institutions either directly or indirectly exercise considerable control over Provincial Councils.

These aspects of the legislation and the fact that the discretion exercised by the President or the Governor are couched in subjective terms and are invariably insulated from judicial surveillance, suggest that on the face of the legislation in question, Sri Lanka's unitary character, enshrined in Article 2 of the Constitution, has not been violated.

It is therefore not surprising that Tamil political parties now clamour for "substantial devolution" totally rejecting the existing constitutional framework, and the views of several of the dissenting judges in the Thirteenth Amendment case that the unitary character of the Constitution had been violated, today seems completely untenable.

Representatives of the major parties have sometimes argued in favour of "full implementation" of the Thirteenth Amendment and the Provincial Councils Act. While there have been major impediments to the implementation of the existing package of devolution, mainly in the form of central government politicians, officials and legal advisors clinging on to power at the centre, it is clear that the constitutional provisions are themselves fundamentally flawed as excessive power remains with the centre or its agents, within a wider constitutional framework which is itself highly centralised in character. Tinkering with the Thirteenth Amendment is doomed to fail. Fundamental constitutional reform, including the introduction of a federal constitution, may be the last chance to preserve a united Sri Lanka.

Federalism: A Panacea?

The case for a federal Sri Lanka has, therefore, gained momentum in recent years as attempts to devolve power within the unitary framework of the Constitution have demonstrably failed to address the demand for autonomy for the Tamil speaking people in the north and east of the country. The increasing awareness among all communities that a political and not a military option is the only realistic basis for a solution to the ethnic conflict has also highlighted the need to consider imaginative and new models.

There are, however, several challenges faced by advocates of federalism. Due to historical reasons, federalism has been identified as an essentially Tamil demand. There are also popular misconceptions about federalism; that the terms united and unitary mean the same, and that federalism necessarily includes recognition of the right of secession. Constitutional obstacles also exist. Since the Article that declares that Sri Lanka is a unitary state is specially entrenched, the introduction of a federal constitution will require the support of both two thirds

of the majority of Members of Parliament, and the People at a Referendum.⁷

Furthermore, even within the federalist constituency, there is disagreement on the vexed question that surfaces in all federal jurisdictions; what subjects should be devolved and what should be retained by the centre? A.E. Dick Howard has observed that:

Ensuring a fair measure of local choice about important questions of policy and government tends to promote experimentation, diversity and pluralism. There must, of course, be devices by which local and state governments are not allowed to frustrate legitimate national interests or to infringe individual liberties.⁸

The tension between uniformity and diversity is a dilemma for Sri Lankan federalists committed to human rights and devolution of power. If the principle of subsidiarity is applied, should subjects like criminal procedure and secondary education, for example, be devolved? The trend towards the internationalisation of human rights norms would favour the pro-uniformity school but the danger is that ultimately, the devolved units might be left with little autonomy if every subject with a human rights perspective is assigned to the centre. This dilemma becomes particularly acute when dealing with issues involving language, gender, race, education, the environment and customary laws of the country.

The case for uniformity in these areas is supported by several considerations. Uniformity and consistency conform with the notion of justice. Rawls has concluded that: "citizens of a just society ought to have the same basic rights".⁹

This accords with lay perceptions of what rights mean. Uniform or common notions also help to establish a sense of nationhood. It makes it easier, for the legal community in particular, to protect and monitor human rights. It also tends to be advantageous to minorities within devolved units, a factor of particular relevance to the Sri Lankan context.

On the other hand, the case for diversity would stress the fact that constitutions are not only meant to protect rights but also to create structures and institutions which respect and foster pluralism and diversity, and that this too is a human rights imperative. Local choices encourage civic participation, participatory democracy and ultimately, civic education. Diversity allows different systems to flourish, creating a healthy dialogue at different levels of government. Diversity enhances choice and the freedom to choose is the essence of political freedom. Diversity also promotes experimentation with the states/provinces functioning as laboratories grappling with human rights issues.

⁷ See Article 53 of the Constitution.

⁸ A.E. Dick Howard, *Protecting Human Rights in a Federal System*, p. 115 in *Comparative Constitutional Federalism*, ed. Dick Howard.

⁹ John Rawls, *A Theory of Justice*, p. 211.

If Sri Lanka opts for a federal constitution, these issues are bound to surface. For the past 150 years our constitutional evolution and political culture have encouraged centralisation and a centralised mindset among our political leadership. The tensions are bound, therefore, to be great.

Conclusions

Despite these inevitable challenges when the details of a federal constitution are spelled out, the concept of federalism is not as unacceptable as it once was. The stumbling block for a political solution to the ethnic conflict will be the issue of the unit of devolution, or the issue of merger as it is popularly known. The question whether the northern and eastern provinces should constitute one unit of devolution perplexed the Mangala Moonesinghe Parliamentary Select Committee. Here a series of imaginative proposals including re-demarcation of boundaries, substantial decentralisation within the province/s, or even the notion of an Apex Council, where the separate provinces meet separately for certain purposes but together for others, might have to be considered.

The experience of the Thirteenth Amendment has demonstrated the urgent need for provincial representation at the centre. A Senate consisting primarily of elected representatives of the provinces will be a vital check on the inevitable tendency of the central government to undermine devolution of power. The Sri Lankan situation also requires power-sharing in various areas. The management of ports and harbours, land and environment are sensitive subjects where Boards and Committees consisting of nominees both from the centre and the provinces might have to be created. Regular meetings of political leaders of the centre and the provinces, similar to the First Ministers' Conferences held in Canada and Australia might have to be expressly provided for in the constitution to facilitate the concept of co-operative federalism.

As identified at the outset, there has been the beginnings of a paradigm shift on constitutional reform with the recognition that federalism constitutes the best constitutional framework for national unity because it is a partnership in government between the peoples of this island. Moreover, it facilitates conflict resolution and democracy through genuine empowerment and the acceptance of diversity as strength. The key question is as to whether all the actors involved have come to this conclusion: if they have not, then the people will lead them to it, in the way that only the people can.

Devolution and the Resolution of the North-East Conflict*

Gamini Dissanayake

I have always believed that every ethnic and religious group living in Sri Lanka should have its identity respected and secured. It is also my firm conviction that the sharing of power between diverse political, ethnic and religious groups is the true mark of a democratic society. Such beliefs and convictions prompted me to give my fullest support to the Indo-Sri Lanka Accord and also to the 13th Amendment to the Constitution which was the first serious attempt to share political power with minorities. Unfortunately, lack of political will and an inadequacy of the powers under the 13th Amendment have frustrated the people of the North-East - Tamils, Muslims and Sinhalese - who are now dissatisfied with the Provincial Councils system.

Some countries are now realising that one of the best ways of reducing and preventing internal conflict is to get their people to participate more in government and to give them more input into the important decisions that affect their lives. These can be achieved by decentralising or devolving more power to local government and by giving more freedom to people's organisations. In some undesirable instances, however, devolution may unwittingly empower the elite and not the local people whom it is intended to benefit. If devolution is to reduce conflict and promote human development, it must therefore be accompanied by *genuine democracy at local level*.

The devolution of power from government capitals to villages and provinces is one of the most effective ways of empowering local people, promoting local harmony and public participation, and increasing efficiency.

It is in this context that I am proposing that a devolution of power to the Provincial Councils in Sri Lanka will give this country the best chance of ending the long and costly ethnic conflict that has torn it apart and also its best chance of establishing national unity. To increase efficiency in those Provincial Councils, we must ensure that there is genuine democracy operating at the local level and we must also allocate more financial resources to them. It is interesting to note that industrialised countries allocate 25% of local government spending to the local level, while developing countries delegate a meagre 10%.

I do not believe that mere gestures of goodwill to the minorities or general discussions by the PA about peace making, particularly by representatives who do not possess the expertise or the experience in negotiating and resolving conflicts will significantly change the current situation in Sri Lanka. That is why, if I am elected President, I shall include detailed provisions for the devolution of power to the Provincial Councils in the constitutional proposals I will place before Parliament. Until the precise form of the new units is agreed upon with representative political forces of the North-East, I will conduct elections to the Provincial Councils in the North-East and ensure that an elected Provincial Government runs the affairs of that troubled province.

Excerpts from "Gamini's Vision for the 21st Century", *The Island*, 2 November 1994, pp 15-17.

The Tamils of Sri Lanka understandably feel that they have been deceived by some political leaders who unfortunately never placed any details of their proposals for devolution of power before the Tamils. At the same time the majority of Sri Lankans are equally justified in feeling upset about any proposed devolution of power to the Tamils if negotiations are conducted secretly and the details of devolution are not publicly discussed. Accordingly, I have set out as an appendix to my programme, the scheme for devolution which I intend to implement as President. I will welcome discussion on these issues with political representatives of both the minority and majority interests.

APPENDIX

Scheme of Devolution

- (1) The legislature [sic] power of the people shall be executed by a Parliament consisting of members of the Senate and the House of Representatives, by Provincial Councils and by the people at a Referendum.
- (2) The Executive power of the people shall be exercised by the President, the Cabinet of Ministers and by the Governors of the Provinces acting on the advice of their respective Chief Ministers.
- (3) There shall be an independent Central Public Service and Provincial Public Services which shall be responsible to the Central Government and Provincial Governments respectively.
- (4) Judges of the Provincial High Courts shall be appointed by the Governor in consultation with the President of the High Court. The new constitutional proposals will strengthen devolution and liberal democracy in the following ways:
 - (a) There will be a clear-cut division of powers between the centre and the provinces. Under the Thirteenth Amendment to the Constitution, the division of powers is not clear. Several subjects have been placed in the Concurrent List, but the method by which the concurrence of the Central Government and the Provinces is ascertained has not been clearly spelled out. In effect this has resulted in the Central Government wielding power over concurrent subjects.
 - (b) There will exist co-ordinate powers of the centre and provinces where powers devolved to provinces cannot be exercised by the Central Government. Under the Thirteenth Amendment to the Constitution, Provincial Councils do not exercise complete authority over subjects assigned to them.
 - (c) Powers conferred will not be able to be reduced or withdrawn without the consent of the provinces. Under the Thirteenth Amendment, Provincial Councils

can be abolished, or their powers curtailed by Parliament acting unilaterally.

- (d) The excessive powers presently vested in the Executive Presidency will be curtailed. Under the Thirteenth Amendment to the Constitution, the powers of the Executive President have been enhanced by virtue of the powers he exercises through the Governor of the Province.
- (e) Since this proposed package of devolution entails a division of powers and the introduction of checks and balances, other institutional reforms will have to be introduced in a new constitution. These include a comprehensive package of checks and balances which include a bi-cameral national legislature, judicial review of legislation and the recognition of the supremacy of the constitution.

THE CENTRAL GOVERNMENT

(1) The Governor

- (1) There shall be a Governor appointed by the President of the Republic for each province. The President of the Republic shall appoint a Governor with the concurrence of the Chief Minister. The term of office of the Governor shall be five years.
- (2) The Governor of the provinces may vacate his office by,
 - (a) resigning or
 - (b) by a two thirds majority of the Provincial Council passing a vote of no-confidence.
- (3) The Governor shall not hold any other office or place of profit.
- (4) The Governor shall appoint the Member of the Provincial Council who commands the majority in the Council as the Chief Minister, who in turn will form a Provincial Government.
- (5) The Governor will appoint a person eligible to be a Judge of the High Court to be the Provincial Attorney General.
- (6) The Governor may summon, dissolve and prorogue the Provincial Council in consultation with the Chief Minister.
- (7) In the absence of the Governor, the President of the High Court of the Province

shall assume his duties.

(II) The Provincial Council

- (1) The Provincial Council will consist of as many members as may be determined by the delimitation laws.
- (2) The term of office of the Provincial Council shall be five years.
- (3) The Provincial Council shall elect a Chairperson, and a Deputy Chairperson to oversee the affairs of the Council.

(III) The Chief Minister and the Board of Ministers

- (1) Executive power in the province shall be vested in the Board of Ministers.
- (2) The Board of Ministers shall be appointed by the Governor from among the Members of the Provincial Council on the recommendation of the Chief Minister.
- (3) The Board of Ministers and the Chief Minister will be collectively answerable to the Provincial Council.

(IV) The Separation of Powers

- (1) Every province may make statutes applicable to the province with respect to any subject set out in the 'Provincial List'. From the commencement of the new Constitutional arrangements Parliament shall not enact legislation on subjects on the Provincial List.
- (2) The Provincial Council cannot exercise authority over the subjects set out in the 'Reserved List'.
- (3) If conflicts arise with respect to the division of power between the Central Government and the Provinces, the matter shall be referred to the Devolution Commission which shall resolve such conflict. If the Devolution Commission is unable to do so, the matter shall be referred to the Supreme Court for adjudication.
- (4) The Devolution Commission shall be responsible for all matters which require consultation and co-ordination between the Central Government and the Province.

- (5) The Devolution Commission shall consist of ten (10) Senators, five (5) of whom shall be Senators elected from the Provinces.

(V) Finance

- (1) A constitutionally guaranteed amount of financial resources including a sum of foreign exchange will be transferred by the Central Government from the Consolidated Fund to the funds of the Provincial Governments. This amount may be calculated as a percentage of the GNP of the Annual Budget. In addition, financial resources will accrue to Provincial Governments from grants, taxes, financial institutions and foreign aid.
- (2) A Finance Commission shall allocate the funds referred to in (1) above as a block grant to each Province taking account of the needs of and disparities between the provinces.

The Finance Commission shall consist of:

- a) The Finance Minister
- b) The Finance Ministers of the Province
- c) The Minister of Trade
- d) The Minister of Agriculture
- e) Two (2) other Cabinet Ministers nominated by the President
- f) The Governor, Central Bank
- g) The Chairperson - Foreign Investment Advisory Committee
- h) Two (2) persons nominated by the President from among the academic community and the private sector distinguished in the areas of banking and/or finance
- i) A Member of Parliament nominated by the Prime Minister
- j) A Member of Parliament nominated by the Leader of the Opposition
- k) A Senator nominated by the Leader of the Senate
- l) A Senator nominated by the Leader of the Opposition in the Senate

- (3) The detailed expenditure of the block grant to each province shall be determined by its Provincial Government and Parliament.
- (4) Provincial Governments shall have the authority to establish financial institutions and to negotiate foreign assistance in consultation with the Central Government.

(VI) Law and Order

- (1) A Provincial Police Force shall be constituted in each province. The Provincial Police Force shall be headed by an officer of the rank of DIG and appointed by the Governor on the recommendation of the IGP. The DIG shall be responsible to and under the control of the Chief Minister. Training of the Provincial Police Force shall be the responsibility of the Central Force.
- (2) The appointed transfer, dismissal and disciplinary control of police officers shall be the responsibility of the Provincial Government acting in consultation with the IGP.
- (3) All police officers serving in the provinces, unless otherwise specified, shall function under the direction and control of the DIG of the province.
- (4) Unless approved by the Provincial Police Force, the Central Police may only investigate offences against the State and offences relating to elections, in the territory of the Provincial Police Force. In all instances, officers of the Central Police Force shall function under the ultimate direction and control of the Central Police Force.
- (5) A State of Emergency in a province must be declared by the Governor of the province and approved by two thirds majority of the Provincial Council of the province. Individual liberty may not be circumscribed by a Provincial State of Emergency so as to violate international norms of human rights.

(VII) The Judiciary

- 1) There shall be a High Court for each province. The Governor of the province in consultation with the President of the High Court of each province shall nominate the Judges of the High Court.
- (2) The High Court shall exercise appellate, revisionary and writ jurisdiction within the province.
- (3) Appeals from decisions of the High Court shall be taken up in the Court of

Appeal. The Supreme Court shall be the highest court of Sri Lanka and shall exercise constitutional jurisdiction.

(VIII) Language

- (1) Sinhala, Tamil and English shall be the official languages and shall have equal status for all purposes.

(IX) Land

- (1) Land shall be vested in the State.
- (2) There shall be a Land Commission which shall allocate land to the Central Government for Central Government purposes. All remaining land may be allocated by the Provincial Councils.
- (3) The Land Commission shall consist of an equal number of persons nominated by the Minister in charge of the subject of Lands and the Provincial Councils respectively. Each Provincial Council shall have at least one nominee on the Land Commission.

GENERAL PROVISIONS

- (1) The Armed Forces of the country including the police forces, Central as well as Provincial shall be enlisted to reflect the multi-cultural and plural nature of Sri Lanka and its provinces.
- (2) Priority in colonisation schemes shall be given to persons first of the district and then of the province.

LISTS

(I) RESERVED LIST

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|---|--|
| 1. Defence, The Army, Navy and the Air Force | 17. Central Income Tax |
| 2. Foreign Affairs | 18. National Archives |
| 3. National Police Force and its Functions | 19. National Universities |
| 4. Diplomatic and Consular Affairs | 20. Inter-Provincial Irrigation |
| 5. United Nations | 21. National Rivers |
| 6. Immigration and Emigration | 22. Territorial Waters |
| 7. Atomic Energy | 23. Airports, Ports and Harbours which deal with international transportation |
| 8. Posts and Telecommunication | 24. Higher Judiciary |
| 9. Economic and Financial Affairs -
Central Bank, Currency, Foreign Exchange | 25. National Transport, Railway |
| 10. Stock Exchange | 26. Archaeological Sites |
| 11. Elections | 27. Mines and Minerals |
| 12. Central Government Broadcasting and Television | 28. Regulation and development of Oil Fields and Mineral Resources with the concurrence of the relevant Provincial Council |
| 13. National Census and Statistics | 29. National Public Service |
| 14. Trade Marks and Patents | 30. Natural Disaster Relief and Rehabilitation |
| 15. Anti-Monopoly Regulations | 31. Protection of the Environment |
| 16. Drugs and Narcotics | 32. Ownership of private property |

(II) PROVINCIAL LIST

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|------------------------------------|---|
| 1. Provincial Planning and Finance | 6. Provincial Police Force |
| 2. Provincial Highways | 7. Provincial Public Service Commission |
| 3. Broadcasting and Television | 8. Provincial Judicial Service Commission |
| 4. Tourism | 9. State land, with reservations for the Central Government |
| 5. Surveying | 10. Education and Higher Education |

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|---|-----------------------------------|
| 11. Relief and Rehabilitation | 17. Protection of the Environment |
| 12. Transport, Roads and Waterways | 18. Irrigation |
| 13. Minor Ports and Harbours | 19. Energy |
| 14. Industries, Industrial Research and Development | 20. Urban Planning |
| 15. Animal Husbandry | 21. Labour Regulation |
| 16. Forestry and Agriculture | 22. Social Security |

Territorial units of devolution pertaining to the North-East shall be determined by negotiation with representative political forces of the North-East.

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