Constitutional attempts to resolve armed conflict in Sri Lanka

Since 1987, there have been several attempts to initiate a constitutional accommodation between successive Sri Lankan governments and the advocates of Tamil nationalism. These initiatives have often failed to cohere with prevailing political and military realities and a definitive solution to the ethnic problem remains elusive. Nevertheless, when the fury of the present war abates, fundamental constitutional reform including devolution of power should remain a key component of a resurrected negotiations process. If the successes and failures of past initiatives are widely appreciated, the chances of a satisfactory settlement can only be enhanced.

The 13th amendment to the constitution

The 13th amendment to the Sri Lankan constitution gave effect to the devolution provisions of the controversial Indo-Lanka Accord, signed in July 1987 by President J.R. Jayewardene and the Indian Prime Minister, Rajiv Gandhi.

For the Indian government, the accord was the culmination of four years' diplomatic manoeuvring in which a range of strategies were deployed to help secure a satisfactory solution to Sri Lanka's armed conflict. It is clear that the Sri Lankan government was pressured by India into signing the accord. Once it had signed, however, the government rammed the 13th amendment through Parliament despite strong opposition from inside and outside the ruling United National Party (UNP).

The 13th amendment sought to devolve power to newly instituted provincial councils throughout Sri Lanka. It contained three lists detailing respectively the areas of government devolved to the provinces (List I), the powers retained at the centre (the Reserved List — List II) and a Concurrent List (List III) of shared functions which were ultimately controlled by Parliament. The
provincial councils were elected in November 1988, but a number of clauses in the amended constitution allowed for the blocking of substantive devolution.

Continued centralisation was strikingly symbolised by the conspicuous strength of the executive presidency, although in some areas, such as health and education, devolved powers could be reclaimed by simple ministerial directive. Perhaps the greatest obstacle to practical devolution was the first phrase of the Reserved List which provided for 'National Policy on all Subjects and Functions' to be determined by Parliament. This phrase completely undermined powers apparently devolved to the provinces. Since the inauguration of the 13th amendment, Parliament has used this rubric often to encroach into the provincial sphere.

In identifying the reasons why the 13th amendment did not bring about a sustainable solution to the ethnic conflict, many commentators have faulted the lack of political will at the centre. However, it also seems clear that the constitutional provisions themselves were fundamentally flawed. Because of its significant shortcomings, it is not surprising that Tamil political parties rejected the 13th amendment and demanded more substantive devolution of power.

The Premadasa/LTTE talks

Ranasinghe Premadasa became president after a controversial election on 19 December 1988. In the north and east, the election was disrupted by the war between the Liberation Tigers of Tamil Eelam (LTTE) and the Indian Peace Keeping Force (IPKF) deployed in the region to guarantee the implementation of the Indo-Lanka Accord. In the south, fears of Indian expansionism had helped spark a bloody insurrection, led by the Janatha Vimukti Peramuna (People's Liberation Front – JVP), which resulted in extremely low voter turnout in a number of areas traditionally loyal to the opposition Sri Lanka Freedom Party (SLFP).
The 13th amendment and Provincial Councils Act

Key Provisions

- In addition to Sinhala, Tamil shall also be an official language of Sri Lanka, with English as a link language.
- The north and east to be merged into one province, subject to a referendum.
- Provincial councils to be elected every five years.
- A governor with executive powers to be appointed by the president in each province.
- Provincial high courts to be established.
- "Reserved" and "Provincial" lists to delimit powers of the centre and the provinces, respectively. A "Concurrent" list outlines shared powers, though ultimate authority for these issues remains with Parliament.
- Financial provision for the provinces to be directed by Parliament.
- Provincial councils can be overridden by regulations promulgated by the president under the Public Security Ordinance.

The Problems

- The exact division of power between the centre and the provinces is not much clear.
- The powers of provincial councils can be controlled, reduced or abolished by the central government acting unilaterally.
- There is no subject over which a provincial council can claim to exercise exclusive competence or jurisdiction.

Premadasa, who himself had vigorously opposed the accord, was intent on ending the JVP insurrection. To this end, he launched a number of initiatives to force the withdrawal of the IPKF. Key among these was a series of talks held in the Colombo Hilton Hotel between the Sri Lankan government and the LTTE. These talks resulted in a covert supply of government arms and money to the LTTE and the welcoming of the Tigers' political wing, the People's Front of Liberation Tigers (PFLT), as observers at an all party conference on the ethnic/national question.

The talks between the government and the LTTE commenced in May 1989 but lasted only so long as President Premadasa and the LTTE shared the immediate political objective of forcing the IPKF withdrawal. In March 1990, the IPKF left the island. In June, the talks broke down and the vicious Eelam War II immediately commenced throughout the north and east.

One unfortunate consequence of the Premadasa/LTTE talks was that they frustrated attempts to implement the 13th amendment in the Northeast Province, for which its provisions had primarily been designed. Premadasa was essentially a centralist anyway, but his efforts to continue dialogue with the LTTE made him unwilling to support the North East Provincial Council (NEPC) which was dominated by the elected representatives of the LTTE's Indian-backed rival, the Eelam People's Revolutionary Liberation Front (EPLRF). From its inauguration, the NEPC had been unable to exercise any meaningful power. As the Indian Forces departed and the LTTE established military control in the north, the provincial council's chief minister Varadarajah Perumal and other EPLRF leaders fled to India, where many were later assassinated by the LTTE.
The Mangala Moonesinghe parliamentary select committee

In August 1991, over a year on from the collapse of the Premadasa-LTTE talks, a parliamentary select committee was established to explore ways of achieving peace and political stability in Sri Lanka. SLFP MP Mangala Moonesinghe, who had proposed the motion establishing the committee, was duly appointed its chair.

The 45-member committee was the largest in the history of the Sri Lankan Parliament. It met 49 times and was well supported by minority parties, individual MPs and civic groups, who between them submitted 253 memoranda for consideration. The two main political parties did not submit proposals, however, and neither did the LTTE. After some time, the committee struggled to remain quorate.

Although the select committee ultimately failed to forge a credible political consensus, there were some positive developments arising from its deliberations. The Tamil parties, other than the LTTE, presented a joint memorandum to the committee. They also negotiated with the Sri Lanka Muslim Congress (SLMC) on methods to safeguard the identity and security of Muslims in the north and east, who had recently fallen prey to LTTE attacks. Due to cross-party co-operation and chairman Moonesinghe’s perseverance, various ideas were also developed to deal with the complex and sensitive issue of the (de)merger of the north and eastern provinces.

The so-called ‘Option Paper’ presented to the committee by Mr. Moonesinghe proposed the creation of a Northeast Regional Council with specified powers and a single governor. The regional council was to consist of all members of separate Northern and Eastern Provincial Councils which would sit independently to consider other areas of government. The chief ministers of the respective provinces would alternate as chief minister of the region. While the Option Paper was rejected by the Tamil parties, it was, at least by Sri Lankan standards, a creative attempt to bridge the gap between the various parliamentary parties.

The northeast or the north and the east?

In the northern districts of Sri Lanka, Colombo Tamils constitute a clear majority of the population. The east is much more ethnically mixed, with large numbers of both Muslims and Sinhalese. Both the north and east are claimed by Tamil nationalists as Pothana, their historic homeland. This claim is hotly contested, however, and continues to excite furious debate, not least due to the strategic importance of Trincomalee, the largest natural harbour in the Indian Ocean. Recent claims for a self-governing Muslim territory in southeastern Ampara are at further complicate the debate on the governance of the east.

The 18th amendment to the Provincial Councils Act of 1977 established the north and east as one province, subject to ratification by referendum when circumstances permitted. As this referendum has not yet taken place, the constitutional status of the east remains obscure. While successive parliametary committees since 1987 have sought to clean up the confusion, the only clarity thus far achieved is that no Tamil party, not even the LTTE, are totally opposed to any northeast council.

The interim report of the Moonesinghe select committee

In the interim report of its findings, the select committee concluded that the Tamil and Muslim communities have a right to self-government. However, the Tamil and Muslim parties are at loggerheads over the scope and role of the council, as well as its relationship with the national government. The interim report called for a referendum on the issue, but this has yet to be held. The committee also recommended the establishment of a North-East Council, with the ability to make laws in certain areas. However, the Tamil parties have rejected this proposal, while the Muslim parties are divided on the issue.

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The initiatives of the People's Alliance government

Negotiations

The parliamentary election of 16 August 1994 was narrowly won by the People's Alliance (PA), a coalition of centre-left, left and minority-based parties dominated by the SLFP. Having campaigned on a peace platform, the new government took immediate steps to initiate dialogue with the LTTE. The first of four rounds of talks took place at Chundikuli in Jaffna on 13-14 October 1994, amidst considerable public euphoria, particularly in the north. Such was the PA's commitment to its peace initiative, that it did not allow the assassination of the UNP presidential candidate to unduly disrupt its progress. On 9th November, Prime Minister Chandrika Bandaranaike Kumaranatunge won an impressive victory in the presidential election with record turnouts in Tamil districts and unprecedented support throughout the south. Her mandate for peace seemed unshakeable.

After an exchange of correspondence with the LTTE leadership, second and third rounds of talks were held on 2 and 14 January 1995. The differences between the government and the LTTE began to emerge at this time.

The crucial difference was that the government, in contrast to the LTTE, took a multi-track approach to negotiations. While it was willing to discuss confidence-building measures such as the lifting of embargoes, the rehabilitation of the north and the restoration of electricity supplies, the government was also keen to move forward on the framework of a political solution. The LTTE, on the other hand, wanted evidence that confidence-building measures would be implemented before they proceeded with further negotiations. The LTTE was also jealous of its perceived status as the sole legitimate voice of Ceylon Tamil nationalism. As such, it warned the government not to release political proposals without its input and approval.

Relations between the government and the LTTE began to sour in the next few months. Elements within the government began to doubt the good faith of the LTTE while the LTTE accused the government of failing to fulfil its promises to relieve socio-economic hardship in the north. By 19 April 1995, all goodwill had lapsed and Eelam War III, as it came to be called, had begun.

Devolution proposals

Having failed in its attempts at negotiation, the government embarked on a new strategy for resolving the armed conflict which was at once highly ambitious and deeply controversial. On the one hand, a full-scale military assault was launched with the purpose of eliminating LTTE control of the north and east. On the other, the government sought to devise a devolution package behind which all constitutional political parties could unite. Seeking to engineer peace while continuing hostilities with a powerful and determined adversary was a novel and high-risk strategy. The PA government pressed ahead, however, and published the first of three versions of its devolution proposals on 3 August 1995.

Seeking to redefine 'the constitutional foundation of a plural society within a united and sovereign ... Sri Lanka', the proposals set out a basic framework for the structure of devolution, for government finance, for law and order, land, education, the administration of justice and the civil service. They also suggested a specific government commission on devolution and a division of powers based on just two lists of functions; one Regional, one 'Reserved'.

Unprecedented in their recognition of Tamil grievances and aspirations, the 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 August 1995 proposals.

The legal draft

The legal draft of January 1996 contained not only detailed provisions on devolution, but also a revised preamble to the constitution and provisions dealing with the status of Buddhism.

There were several constructive dimensions to the legal draft. While various clauses were included to allay fears of secession, the deletion of Articles 2 and 76 of the constitution, 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. These included the clarification of the role of provincial governors and the awarding of greater revenue raising powers to the regional councils.

There were also glaring omissions however. The failure of the provincial council system established through the 13th amendment had clearly demonstrated the need for a second chamber, a senate or a council of regions which could represent regional interests at the centre. The absence of such mechanisms in the legal draft was a crucial flaw. It was particularly inexplicable, moreover, considering the original devolution proposals had suggested a devolution commission to mediate disputes between the centre and the regions.

Another weakness was the removal of safeguards to prevent provincial councils from arbitrary dissolution in emergency situations. While provincial powers could be reclaimed by the centre under the 13th amendment, the president had no power to dissolve a provincial council, under any circumstances. With the legal draft, this constraint on presidential power was effectively removed.

The PA approach

In his address to the nation on 8 August 1995, President Kumaratunga declared:

The aspirations of the entire Sri Lankan population is that the current national crisis centred around the north and east be brought to a peaceful, just and honourable settlement... that this has to be... a new approach predicated on an 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 premises:

❖ 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 different communities and create conditions for the promotion of that identity, including the right to enjoy their own culture, profess and practice their own religion, and nurture and promote their own language, and to transfer business with the state in the national language of their choice.
Perhaps the most regressive feature of the legal draft, however, was that it fortified Sinhala Buddhist majoritarianism. Apart from retaining the constitutional provision giving Buddhism the ‘foremost place’ in the spiritual life of Sri Lanka, it proposed a specific institution, the Supreme Council, which would represent the interests of the Buddhist clergy at the highest level and could not be abolished without a two-thirds parliamentary majority and public referendum. All governments would be obliged to consult this council on an ill-defined and potentially broad range of issues.

The draft constitution

The legal draft was discussed in parliamentary committee for nearly two years, with little prospect of consensus. In October 1997, the government took a unilateral decision to republish its provisions, amended and incorporated in a completely revised draft constitution. Within this new format, the ‘foremost place’ accorded Buddhism was retained, while the privileged status of the unelected Supreme Council was reduced but not eliminated. Several changes were also made to the legal draft, however. Some of these changes were 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. Others were potentially positive, or at least well-intentioned.

One constructive feature of the draft constitution is its proposal that the powers of an inter-regional chief ministers’ conference be expanded to mediate disputes not only within regional administrations, but also between the regions and central government. In an attempt to address concerns about the possible abuse of the president’s powers to dissolve regional councils, the draft constitution also proposed a specially convened tribunal to adjudicate on the legitimacy of any dissolutions. Such a tribunal would comprise a presidential nominee, a nominee of the regional chief minister concerned and a third member, jointly selected by the two nominees.

In a dramatic swing away from majoritarian centralism, the draft constitution granted 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. While the veto and the tribunal are possible steps towards more accountable relations between the centre and the regions, however, both have proved controversial. Many commentators feel that more orthodox checking mechanisms would be more effective, such as judicial review or a requirement that all constitutional amendments be approved by special majorities of both central and regional authorities.

Its unusual and ad hoc collection of provisions suggests the absence of an overarching vision or philosophy behind the draft constitution. Regardless of its internal coherence, however, it seems unlikely that the government package will form the basis of a lasting and durable peace. Its framers have failed to respond to the larger issues fuelling the ongoing war with the LTTE; issues of self-determination and nationhood; of redefining the Sri Lankan nation state and identity. Furthermore, the UNP, whose support is vital for the adoption of the new constitution, has not committed itself to the draft, despite participating in the deliberations preceding its release. Instead, it has published its own widely derided counter-proposals.

The PA government proposals and the LTTE

Although the PA government has come some way towards an accommodation of Tamil nationalist aspirations, there remains a large gap between its proposals and those of persons connected to the LTTE. In January 1997, a constitutional model developed by a firm of British solicitors under instruction from a group of interested Tamils proposed a confederation of the Union of Ceylon consisting of the Sinhala and Tamil nations represented through two autonomous states. The Sri Lankan government is clearly a long way from accepting
such radical formulations and refused even to consider the model. While the LTTE remains an unbowed and formidable armed force, it has also rejected the government devolution package out of hand. This mutual refusal to engage with the others’ proposals and aspirations does not bode well for a medium-term constitutional settlement.

A possible basis for compromise, however, which might address Tamil nationalist concerns within the framework of a united Sri Lanka, would be a modified version of the so-called Thimpu Principles. These principals were placed before the Sri Lankan government by the six Tamil organisations, including the LTTE, who attended the 1985 Indian-sponsored peace talks in Bhutan. A compromise based on the Thimpu principles would:

(i) recognise Sri Lankan Tamils as a distinct nation;
(ii) recognise an identified Tamil homeland and guarantee its territorial integrity;
(iii) recognise the inalienable right of self-determination of the Tamil nation within its homeland;
(iv) recognise the right to full citizenship and other fundamental democratic rights of all Tamils who look upon the island as their country.

The first three principles were rejected at Thimpu on the grounds that they necessarily implied the destruction of a united Sri Lanka. This is not so. Many of the terms have no fixed legal meaning and may be defined in such a way that the essence of the concept is retained within the framework of a united country. It is also vital, however, that other basic principles which affirm the plural, democratic character of a united Sri Lanka are incorporated, partly to allay doubts as to the LTTE’s commitment to these principles. The South African constitution of 1996 has proposed a formula by which the right to self-determination of peoples within South Africa can be accommodated within the framework of the right to self-determination of the South African people as a whole. It also contains a chapter on ‘Founding

The UNP counter-proposals

At the end of 1997, the government challenged the opposition United National Party (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 the 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 counter-proposals within the next few months. Their proposals, released to date, however, contain only marginal improvements on the existing constitutional arrangements. The main positive features are the in-principle acceptance of the idea of a second chamber (with ‘adequate’ representation for minorities), and the principle of the supremacy of the constitution.

“The draft constitution has failed to respond to the larger issues fuelling the ongoing war with the LTTE: issues of self-determination and nationhood; of redefining the Sri Lankan nation-state and identity”
Provisions' which includes basic constitutional values and principles. This demonstrates that a principled accommodation of disparate ethnic/national claims within a single state is possible, at least in principle. The challenge for Sri Lankans is how, politically, to achieve it.

Epilogue

A major obstacle to negotiated peace in Sri Lanka is the inability of government and opposition parties to work together on conflict resolution. Over the years of Sri Lankan independence, opposition parties have almost always mobilised populist sentiment against government peace initiatives, scuttling any chance of substantial political reform. A further problem is that the government, the average Sinhalese, and indeed many Tamils and Muslims, have a very different view of the conflict than the LTTE, and that the gulf between these views is not sufficiently appreciated. To the former parties, the problem is one of addressing minority grievances with, at most, substantial devolution of power and actual parity of status between the Sinhala and Tamil languages. The LTTE, however, views the war as a confrontation between two nations; the struggle of an oppressed people to assert its right to self-determination. It views itself, therefore, as a national liberation movement, not a political party or militant group, and desires to be acknowledged as such.

A final difficulty is the nature of the LTTE itself. Most Sinhalese, and several Tamils and Muslims, entertain serious doubts as to whether the LTTE will ever compromise on its stated goal; a sovereign, independent nation-state of Eelam. Many sceptics see the LTTE as a ruthless, fascist organisation which is maximalist in outlook. To back up this view, they point to the LTTE's assassination of Sri Lankan and Indian political leaders, its acts of violence against Muslims in the north and east, and its disregard for pluralism within the Tamil community itself.

Given the failures of the past decade or so, the gulf between the main parties and the distrust and bitterness on all sides, it seems clear that any future attempt at reconciliation will require a skilled, professional approach to conflict resolution. Third party mediation or facilitation must be a component of such a new initiative. Sri Lanka cannot afford to repeat the mistakes of the past ten years. ■