



Occasional Paper Series

Number 38

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Asanga Welikala

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© Forum of Federations, 2019
ISSN: 1922-558X (online ISSN 1922-5598)

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By Asanga Welikala

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Forum of Federations
75 Albert Street, Suite 411
Ottawa, Ontario (Canada) K1P 5E7
Tel: (613) 244-3360
Fax: (613) 244-3372
forum@forumfed.org

Overview

Despite an auspicious start to independent statehood following British decolonisation in 1948, Sri Lanka soon dissipated its early promise in a quagmire of ethnonationalism, institutional decay, authoritarianism, and civil war.¹ Compared to the complexity of many other Asian and African post-colonial states contending with ethno-territorial pluralism, including notably India, the Sri Lankan situation seems at first straightforward. Its ethno-territorial conflict stems from the Sinhala-Buddhist majority's dominance over the island's politics and government, and in response, the minority Tamils' desire for self-government in the northeast. The ethnic division between Sinhalese and Tamils is thus replicated in a territorial cleavage between the 'south' and the 'northeast', so that fairly conventional constitutional strategies of nation-building and power-sharing would seem adequate to accommodate these competing claims.² Yet the conundrum is that the Sri Lankan state has consistently failed to devise a constitutional order in congruence with its societal pluralism, and, despite over half a century of reform attempts, this seemingly easy problem has so far defied resolution.

This chapter focuses on one of the most concerted attempts made to find a constitutional resolution of the conflict: the Norwegian-facilitated peace process between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), roughly from 2001 to 2005. This process was marked in significant ways by methods associated with the liberal peace-building model, while simultaneously reflecting the closed and elitist character of Sri Lankan constitutional politics.³ Its failure led to a final phase of military conflict in which the government comprehensively defeated the LTTE in May 2009 and then, as victor, was hostile to any concessions to Tamil aspirations to regional autonomy—something which has changed only recently with a change of government. The chapter highlights various weaknesses of this model of conflict transformation and constitutional transition, in a context of limited constitutional imagination on both sides, hyper-competitive southern electoral politics, the breakdown of cohabitation at the centre, the failure to mitigate the effects of ethnonationalist antagonisms, and the critical absence of public participation. The failure to inform and engage sceptical constituencies in particular led to a significant democratic deficit in the process.

Constantly harried by day-to-day challenges of political crisis management, the peace process never matured sufficiently for constitutional negotiations of any depth to take place, although the parties did manage on one occasion to articulate the fundamental principles of a constitutional settlement, embodied in the Oslo Communiqué of December 2002, that may well be of relevance for the future. The election of a more moderate government in January 2015, the successful enactment of several democratic and governance reforms in May, the election of a new Parliament in August in which moderate parties across the ethnic divide have emerged victorious, and the commencement in March 2016 of a constitutional reform process through Parliament sitting as a Constitutional Assembly, give

¹ Harshan Kumarasingham, *A Political Legacy of the British Empire: Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (IB Tauris 2013) ch 7.

² John McGarry, Brendan O'Leary & Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation' in Sujit Choudhry (ed), *Constitutional Design in Divided Societies: Integration or Accommodation?* (Oxford University Press 2008) ch 2, 85-87.

³ Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) ch 2, ch 5; Jonathan Goodhand, Jonathan Spencer & Benedikt Korf (eds), *Conflict and Peacebuilding in Sri Lanka: Caught in the Peace Trap?* (Routledge Contemporary South Asia Series Book 38, Routledge 2011); Kristian Stokke & Jayadeva Uyangoda (eds), *Liberal Peace in Question: Politics of State and Market Reform in Sri Lanka* (Anthem Press 2011).

rise to cautious optimism that devolution reforms will follow.⁴ But it remains so far the story of a failure, from which, nonetheless, lessons can hopefully be drawn as Sri Lanka embarks on a new era of constitutional reform.

Background

The Sri Lankan polity is characterised by rich ethnic and religious pluralism, albeit with an overwhelming Sinhala-Buddhist majority of almost 75 per cent of the population, which sees itself as the historic national community of the island.⁵ In the Sinhala-Buddhist nationalist worldview, the island is the only homeland of the Sinhalese people, who are, moreover, the inheritors of a sacred duty to preserve and protect Theravada Buddhism. This is the heritage of race and religion that the Sinhala-Buddhists have defended with much sacrifice and resilience against South Indian Tamil-Hindu and European-Christian invaders from time immemorial. These central elements of Sinhala-Buddhist nationalism are elaborated and reproduced in a powerful tradition of historiography, which continues to inform contemporary political and cultural discourse, in particular in relation to a specific view of the form and foundations of the Sri Lankan state.⁶ In this view, there is no distinction between the collective identity of the ethnic majority and the Sri Lankan nation-state.⁷

It follows from this that ethnic and religious (and indeed, ideological) minorities are expected to acknowledge the primacy of the majority's political and cultural dominance over the historical and territorial space of the state. Sinhala-Buddhist nationalism is therefore unequivocally hegemonic, but it is not assimilationist; minorities enjoy tolerance of their distinctiveness to the extent commensurate with the dominant nation's view of its primacy, meaning that constitutionally the Sri Lankan state must be unitary in form, foster Buddhism, and privilege the Sinhala language and culture. The commitment to the unitary state is important both symbolically and substantively. Symbolically, it is the modern continuation of the ancient Sinhala-Buddhist state tradition, in which an encompassing monarchy was the synecdoche of a hierarchical social order and state⁸ (this justification is also strongly implied in modern arguments in favour of centralising presidentialism⁹). Most importantly, it registers a clear constitutional rejection of Tamil territorial claims to federal autonomy. Thus substantively, the

⁴ Asanga Welikala, 'Sri Lanka's Long Constitutional Moment' (2015) 104 (5) *The Round Table* 551; for frequently updated research on the ongoing constitutional reform process, see: 'Constitutional Reforms in Sri Lanka: Books & other material related to constitutional reform in Sri Lanka' (*Centre for Policy Alternatives*) <<http://constitutionalreforms.org>>.

⁵ According to the latest (and first post-war) 2012 census, the total population of Sri Lanka is 20,359,439, of which Sinhalese are 15,250,081 (74.9%), the Sri Lankan Tamils 2,269,266 (11.15%), Sri Lankan Moors (Muslims) 1,892,638 (9.3%), and the Indian Tamils 839,504 (4.12%): Department of Census and Statistics, *Census of Population and Housing of Sri Lanka 2012* (Government of Sri Lanka 2012) Table A3, <www.statistics.gov.lk/PopHouSat/CPH2011/Pages/Activities/Reports/FinalReport/Population/FinalPopulation.pdf> accessed 4 April 2017.

⁶ Stanley Jeyaraja Tambiah, *Sri Lanka: Ethnic Fratricide and the Dismantling of Democracy* (University of Chicago Press 1991) 93-102.

⁷ Michael Roberts, 'Ethnic Conflict in Sri Lanka and Sinhalese Perspectives: Barriers to Accommodation' (1978) 12 (3) *Modern Asian Studies* 353.

⁸ Roshan de Silva Wijeyeratne, *Nation, Constitutionalism and Buddhism in Sri Lanka* (Routledge Contemporary South Asia Series, Routledge 2014) ch 4.

⁹ Asanga Welikala, 'Nation, State, Sovereignty and Kingship: The Pre-Modern Antecedents of the Presidential State' in Asanga Welikala (ed), *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (Centre for Policy Alternatives 2015) ch 13, <<http://srilankanpresidentialism.org/wp-content/uploads/2015/01/21-Welikala.pdf>> accessed 4 April 2017.

centralisation of power and authority in the unitary state ensures that executive and legislative institutions are permanently under majoritarian control.¹⁰

This forceful nationalism has been politically ascendant ever since independence, shaping and defining the character of the Sri Lankan nation-state at every significant constitutional moment, and permeating the discourse and practice of ordinary electoral politics. Thus, soon after independence, legislation was enacted to deprive citizenship rights from large sections of the Indian Tamil population.¹¹ In 1956, the 'Sinhala Only Act' sought to make Sinhala the sole official language.¹² During the late 1950s and mid-1960s, attempts at introducing a bilingual official language policy and devolution to Tamil-majority areas were derailed by processes of ethnic outbidding among the major political parties within the south. The non-discrimination and minority protections of the independence constitution had proved ineffective in the hands of a deferential judiciary, and when the country became a republic in 1972, the unitary state, a 'foremost place' for Buddhism, and the primacy of Sinhalese, were all constitutionally enshrined.¹³ The Constituent Assembly, which drafted and enacted the first republican constitution, completely rejected Tamil demands for equal treatment, secularism, and especially federal autonomy.¹⁴

The Sri Lankan Tamils, distinct from the Indian Tamils and the largely Tamil-speaking Muslims, see themselves as the other historic national community within the island.¹⁵ There is little doubt about their historic presence in the island and the legitimacy of their constitutional claims on this basis. But this is not to say that Tamil nationalist ideology always presents convincing arguments about its claims, illustrated, for example, by Tamil nationalism's attempts to encompass the Muslims of the north and east within the Tamil nation under the rubric of 'Tamil-speaking people.' Muslims however have resisted this attempt at assimilation and insisted on their separate religion-based identity.¹⁶

Sri Lankan Tamil claims to constitutional accommodation are based on three principles: that they are a distinct nation, with a traditional homeland in the northeast of the island, and entitled on these grounds to the right to self-determination.¹⁷ On this basis, they have asserted an entitlement to self-government, whether in the form of autonomy within a federal Sri Lankan state, or, if not, as a separate state. Under

¹⁰ Asanga Welikala, 'The Sri Lankan Conception of the Unitary State: Theory, Practice and History' in Amaranth Amarasingham & Daniel Bass (eds), *Sri Lanka: The Struggle for Peace in the Aftermath of War* (Hurst & Co 2016).

¹¹ The Indian Tamils, also sometimes known as Upcountry Tamils or Estate Tamils, are Tamils brought down from Southern India as indentured labour for tea, rubber and coffee plantations during the British colonial era. While a large number were repatriated to India in stages after independence, they are still the dominant ethnicity in plantation labour in the central hill country. They are distinct from the indigenous Sri Lankan Tamils who originate in the northern and eastern regions of the island, and they make no territorial claims.

¹² Neil DeVotta, *Blowback: Linguistic Nationalism, Institutional Decay, and Ethnic Conflict in Sri Lanka* (Stanford University Press 2004) ch 4.

¹³ Rohan Edrisinha, 'Sri Lanka: Constitutions without Constitutionalism: A Tale of Three and a Half Constitutions' in Rohan Edrisinha & Asanga Welikala (eds), *Essays on Federalism in Sri Lanka* (Centre for Policy Alternatives 2008).

¹⁴ Nihal Jayawickrama, 'Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective' in Asanga Welikala (ed), *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Centre for Policy Alternatives 2012) ch 1, available at <<http://republicat40.org/wp-content/uploads/2013/01/Reflections-on-the-Making-and-Content-of-the-1972-Constitution1.pdf>> accessed 4 April 2017.

¹⁵ Tambiah (n 6) 102-13.

¹⁶ Farzana Haniffa, 'Conflicted Solidarities? Muslims and the Constitution-making Process of 1970-72' in Asanga Welikala (ed), *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Centre for Policy Alternatives 2012) 228-38; Zarin Ahmad, 'Contours of Muslim Nationalism in Sri Lanka' (2012) 3 (2) *South Asian History and Culture* 269, 269.

¹⁷ Rohan Edrisinha, Mario Gomez, VT Thamilmaran & Asanga Welikala (eds), *Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Centre for Policy Alternatives 2008) ch 15.

the British, the Tamils had been content to regard themselves as a minority (albeit historically coeval with the Sinhala majority), and to seek representation in the colonial state on that basis.¹⁸ Industrious and educated, the Tamils, or at least a prominent Tamil elite, gained disproportionate social advancement under British colonialism compared to the Sinhalese, although the land-owning Sinhalese colonial elite was always the dominant faction. Nevertheless, Sinhala-Buddhist nationalists fed upon, and contributed to, the perception that Tamils were colonial lackeys whose social and economic successes were at the cost of poor Sinhalese in their own land.

As the prospect and potential of Sinhala-Buddhist domination became more apparent after independence, the Tamils rearticulated their collective identity as a distinct nationality, with a demand for federal autonomy. The Federal Party, the main vehicle of parliamentary Tamil nationalism even today, was established in 1949 for this purpose.¹⁹ Deteriorating ethnic relations and the Tamils' sense of beleaguerment, especially after the Sinhala Only Act, have ensured that parties committed to the Tamil national, territorial, and self-determination claims have won majorities in every election in the north and east since 1956. The Tamils' consistent commitment to these principles was even affirmed in the several rounds of post-war elections after 2009, notwithstanding the devastating military defeat of the LTTE.

In the first two decades after independence, the Federal Party's various attempts to negotiate official bilingualism, devolution (short of federalism), and equitable solutions to discriminatory measures (such as affirmative action favouring rural Sinhala youth for university entry) had been unsuccessful. Recourse to courts and constitutional safeguards also proved largely unfruitful. Particularly notable, in anticipating the pattern of failure of future agreements, was the government's unilateral abrogation—under pressure from its Sinhala-Buddhist constituency—of the Bandaranaike-Chelvanayakam Pact of 1958, signed between the prime minister and the leader of the Federal Party,²⁰ which would have provided for bilingualism and some territorial autonomy for the northeast. When the Constituent Assembly of 1970-72 preemptorily rejected the Federal Party's rather conservative scheme for a federal constitution, militant groups overtook the parliamentary Tamil nationalists. The militants were Tamil youth radicalised by discrimination as well as revolutionary doctrines of the era. They demanded a separate state and advocated armed struggle to achieve it.²¹ The humiliation inflicted by the first republican constitution in 1972 united the parliamentary and militant nationalists in a 1976 convention, which passed the 'Vaddukoddai Resolution' calling for a separate, independent state of 'Tamil Eelam' for the first time.²²

A low-intensity insurgency commenced during this period with a proliferation of armed youth groups fighting Sri Lankan armed forces, and, indeed, each other in vying for dominance of Tamil nationalist politics. This transformed into a full-scale civil war between these groups and the Sri Lankan government after the anti-Tamil pogrom of July 1983.²³ Following the killing of an army patrol in the Jaffna peninsula by Tamil terrorists, the Sri Lankan government aided and abetted a riot against Tamil civilians in the south, especially Colombo, with massive loss of life, destruction of property, and

¹⁸ A Jeyaratnam Wilson, *Sri Lankan Tamil Nationalism: Its Origins and Development in the 19th and 20th Centuries* (Penguin 2000) ch 4.

¹⁹ *ibid* ch 6.

²⁰ Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) ch 9.

²¹ Wilson (n 18) ch 7.

²² Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) ch 12.

²³ Ketheshwaran Loganathan, *Sri Lanka: Lost Opportunities: Past Attempts at Resolving Ethnic Conflict* (Centre for Policy Research and Analysis 1996) ch 4.

displacement.²⁴ The Indian government was now drawn into the conflict because of widespread support among Tamils in the Indian state of Tamil Nadu for their co-ethnics in Sri Lanka. Indian mediation led to the Indo-Lanka Accord of 1987, by which the Sri Lankan government undertook to establish provincial councils for all nine provinces—though the main objective was the devolution of power to the new North-Eastern Provincial Council (NEPC). These changes were introduced by the Thirteenth Amendment to the 1978 Constitution and other consequential legislation. The settlement included the ‘merger’ of the existing Northern and Eastern Provinces into one administrative unit, so as to encapsulate the region of historical Tamil habitation.²⁵

India undertook to disarm the rebels and ensure their compliance with the settlement. It succeeded except for the LTTE, which rejected the Accord and began a military campaign against the Indian Peace Keeping Force (IPKF) of approximately a hundred thousand troops at peak. The militant groups who had accepted the Accord and assumed control of the NEPC soon encountered an uncooperative central government that obstructed meaningful implementation of devolution. Frustrated, the NEPC attempted a unilateral declaration of independence in 1991. The central government responded by dissolving the NEPC and suspending devolution in the province. After the departure of the IPKF, hostilities between the LTTE and the government continued, interspersed with brief ceasefires and half-hearted attempts at negotiation.²⁶

This period also saw the LTTE's consolidation of its hold on Tamil politics, which would end only with its battlefield defeat in 2009. The LTTE proved ruthless in its use of terror against opponents. Its leader Velupillai Prabhakaran's single-minded pursuit of an independent Tamil Eelam became invested with a sense of nationalist purity and authenticity; other militant groups and political parties were seen as too willing to cut deals, or in hock with Indian interests if not with the Sri Lankan state. Prabhakaran's campaign of unrestrained violence against more moderate Tamil politicians, intellectuals, and other militant groups bore fruit in 2001, when just ahead of the parliamentary elections of that year, nearly all the remaining mainstream politicians and ex-militants, including the venerable Federal Party, formed the Tamil National Alliance (TNA). While ostensibly an attempt to ensure a single Tamil voice in future negotiations, it was in reality the subordinate electoral arm of the LTTE, founded on the principle that the LTTE was the ‘sole and authentic’ representative of the Tamil people. It is testament to how far the Sri Lankan state had radically alienated the Tamil people that such a violently anti-pluralistic and autocratic force as the LTTE was able to capture, barring a few courageous individuals, the imagination of an entire community as the only plausible agent of its liberation from oppression.²⁷ Yet it is also true that the LTTE's dominance was as much due to its unparalleled capacity to crush dissenting voices within the Tamil community.

In 1994, the People's Alliance (PA) government assumed power with a commitment to a negotiated settlement and a broadly liberal attitude to devolution and power-sharing. Its preliminary talks with the LTTE however soon collapsed, whereupon the PA adopted its ‘War for Peace’ policy. This involved waging war on the LTTE while inviting all other parties to deliberate on constitutional reforms within

²⁴ While no wholly reliable figures exist, a widely cited estimate is that some 150,000 Tamils were displaced as a result of the pogrom, and well over 1000 and up to 3000 killed. See Nancy Murray, ‘The State against the Tamils’ (1984) 26 (1) *Race & Class* 97, 106.

²⁵ Loganathan (n 23) ch 5; Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) chs 16-17.

²⁶ Loganathan (n 23) ch 5.

²⁷ See also Joanne Richards, ‘An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)’ (2014) The Centre on Conflict, Development and Peacebuilding Working Paper No10 <<http://repository.graduateinstitute.ch/record/292651/files/CCDP-Working-Paper-10-LTTE-1.pdf>>.

a parliamentary select committee, which included the Federal Party and other Tamil parliamentary parties. The government published a series of proposals in 1995, 1996, 1997, and, in 2000, it presented a draft Constitution Bill to Parliament.²⁸ None of the PA proposals won sufficient support in Parliament to be enacted. Sinhala-Buddhist nationalists were in uproar about the government's conciliatory approach, and the war with the LTTE showed no signs of a rapid conclusion. Following a series of military setbacks for the government, including debilitating terrorist attacks in the south, the parliamentary election in December 2001 was won by the opposition United National Front (UNF) on a clear promise to call a ceasefire and enter into negotiations with the LTTE. In the northeast, the newly formed TNA swept all the seats, reflecting its role in bringing all major Tamil groups and parties together as well as the LTTE's control of large parts of the area.

The election resulted in control of parliament and the presidency being divided between the two main parties, which was the first occurrence of 'cohabitation' within the semi-presidential constitution adopted in 1978. The independently elected executive president from the PA, Chandrika Kumaratunga, was compelled to appoint a prime minister, Ranil Wickremesinghe, and a cabinet from the new UNF parliamentary majority. The 'dual-mandate' of cohabitation seemed promising at first. While there was little disagreement between Kumaratunga and Wickremesinghe on the fundamentals of a political solution – both were committed to some form of federal-type devolution – the question was whether they could transcend the highly competitive nature of Sri Lankan party politics, build a southern consensus in negotiating with the LTTE, and share credit in achievements. It was in this context of cohabitation in the south, as well as the LTTE's strong military position and substantial control of territory in the north and east, that the Norwegian government was invited to facilitate a ceasefire with a view to commencing negotiations. Prior to discussing this peace process, it is necessary to examine the territorial dimension of the Sri Lankan conflict more closely.

Among all the claims associated with the Tamil challenge, none has caused greater controversy or resistance than the claim to a 'Tamil traditional homeland' in the northeast of the island. Opponents dispute both the historical rationale and the purported physical boundaries, and they include not only Sinhala-Buddhist nationalists but also those who fear such an ethnic enclave would pose an anti-modern threat to building a civic culture for the Sri Lankan nation-state.²⁹

Intertwined with the territorial claim is a disputatious debate about the demography of the north and especially the east. The Federal Party's original political programme opposed Sinhalese 'colonisation' of the east through state-aided programmes of agricultural resettlement because it altered the area's demographic balance. Tamil nationalists have seen colonisation as insidious demographic engineering designed to consolidate Sinhala-Buddhist hegemony over the whole island and render Tamils a minority even in Tamil areas. Considerable credence can be attached to this especially once colonisation became a Sinhala-Buddhist nationalist ideological issue after the watershed election of 1956. However, earlier colonisation policy by the British colonial administration, and later by Ceylonese politicians and civil servants under the Donoughmore dispensation,³⁰ were technocratic, not ideological, attempts to

²⁸ Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) chs 21-26; Sunil Bastian (ed), *Sri Lanka: The Devolution Debate* (5th edn, International Centre for Ethnic Studies 2006).

²⁹ HL de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace* (Visidunu Prakashakayo 2008); Dayan Jayatilleka, *Long War, Cold Peace: Sri Lanka's North-South Crisis* (rev edn, Vijitha Yapa 2014).

³⁰ Michael Roberts, 'Narrating Tamil Nationalism: Subjectivities and Issues' (2004) 17 (1) *South Asia: Journal of South Asian Studies* 87, 106-08; Dagmar Hellmann-Rajanayagam, 'The Concept of a 'Tamil Homeland' in Sri Lanka – Its Meaning and Development' (1990) 13 (2) *South Asia* 79, 95.

develop sparsely populated agricultural lands by resettling Sinhala peasants in them, thus easing pressure on agricultural land in the island's southwest and centre.³¹

Thus, those who stress the economic imperatives of resettlement as the basis of the colonisation policy, see the homeland argument as historically spurious Tamil nationalist myth-making.³² There are two facets to how the Tamil nationalist territorial claim was articulated (and contested) in the post-independence period that require consideration: namely, what Tamil nationalists have meant by the concept of a 'Tamil traditional homeland', and what they have seen as its physical boundaries.

Hellmann-Rajayanagam, who notes that the term 'homeland' is "used loosely and is nowhere defined in the literature",³³ dates its occurrence in English language discourse in Ceylon to legislative debates and memoranda of the 1930s. She suggests that it is an English "translation of a term widely used in the Tamil writings" which literally means "Regions where Tamil-speaking people have traditionally (or from generation to generation) lived."³⁴ From the evidence she and others have offered, it seems that the idea of a traditional homeland, even though its exact boundaries were amorphous, was a politically resonant and commonly accepted notion among Tamils. Critically, it preceded the Federal Party's presentation of Tamil politico-constitutional claims in terms of a distinct nation from 1949 onwards.³⁵

Moreover, Sinhalese opposition to a Tamil traditional homeland appears to have intensified only once it was asserted as part of a Tamil *national* claim. As Hellmann-Rajanayagam has argued, in the debates over territorial and communal representation in the early twentieth century, the notion that the north and east were not merely Tamil-speaking majority areas, but were 'Tamil *homelands*,' seems to have been assumed by Tamils and Sinhalese alike. Indeed, as she further argues, in the run-up to independence, Sinhalese leaders met Tamil demands for special constitutional protections against Sinhalese dominance with the argument that Tamils would obtain sufficient territorial representation under democracy because of their preponderance in the northeast.³⁶ During the period between the late 1930s and independence in 1948, the dominant Tamil demand was for a proto-consociational scheme of representation at the centre known as '50-50', which envisaged, not federalism as after the Federal Party's emergence in 1949, but legislative representation on the basis of 50 per cent of seats for the Sinhalese and 50 per cent for the minorities. The scheme's rationale was to offset the dominance of the Sinhalese and guarantee minority representation, but it was rejected by the Soulbury Commission which recommended the independence constitution.³⁷

The absence of precisely demarcated boundaries to the homeland has created difficulties for the Tamil territorial claim as a legal and constitutional proposition. This is evidenced in the shifting nature of the territorial claim. The Federal Party's founding manifesto in 1949 merely stated, "The Eelam Tamils are a nation of their own, they have a homeland of their own."³⁸ Resolution No. 1 at its First National

³¹ Hellmann-Rajanayagam (n 30) 93-95, 103-06.

³² KM de Silva *The 'Traditional Homelands' of the Tamils: Separatist Ideology in Sri Lanka: A Historical Appraisal* (3rd rev edn, International Centre for Ethnic Studies 2013); Gerald H Peiris, 'An Appraisal of the Concept of a Traditional Homeland in Sri Lanka' (1991) 9 (1) *Ethnic Studies Report* 13.

³³ Hellmann-Rajanayagam (n 30) 81.

³⁴ *ibid* 82.

³⁵ Arular R Arudpragasam, *The Traditional Homeland of the Tamils* (Kanal Publications 1996).

³⁶ Hellmann-Rajanayagam (n 30) 83; see also Sir Ivor Jennings, *The Constitution of Ceylon* (3rd edn, Oxford University Press 1953) 6-8.

³⁷ Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) ch 6.

³⁸ Hellmann-Rajanayagam (n 30) 82.

Convention in 1951 asserted Tamils' "territorial habitation of definite areas which constitute over one-third of this Island," but nevertheless called for "a plebiscite to determine the boundaries of the linguistic states" of the future federation.³⁹ It was more specific in the Memorandum and Model Constitution submitted to the Constituent Assembly in 1971, which set out a federal scheme for the future republican constitution. This proposed that, "The Northern Province and the Trincomalee and Batticaloa Districts of the Eastern Province will form one Unit. This will be a Tamil majority State. The Amparai District [in the southwest end of the Eastern Province] will form a Muslim majority State."⁴⁰ In the Vaddukoddai Resolution of 1976, which registered Tamil nationalism's paradigm shift from federalism to secessionism, the Tamil United Liberation Front (TULF) identified the Northern and Eastern Provinces as the territory of the future state of Tamil Eelam. Since then, Tamil nationalists have generally put forward the Northern and Eastern Provinces as the territorial extent of the Tamil homeland, although more maximalist claims have been made.⁴¹

While it is generally conceded by all except the most recalcitrant Sinhala-Buddhist nationalists that the Jaffna Peninsula and most of the Northern Province are areas of historic Tamil habitation, the Tamil claim to historic habitation in the rest of the area comprising the Northern and Eastern Provinces has been constantly challenged.⁴² These territorial disputes have concentrated on the areas to the interior of the Eastern littoral and the interior areas between the North-Central Province and the southern end of the Northern Province. This vast area, the whole of which was once known as the Vanni, was until the 1930s universally regarded as a "wild country ... covered in jungle, full of wild animals ... and malaria-infested swamps."⁴³ Notwithstanding this, it was the transition from communal to territorial representation in the late colonial period that made the Tamils realise that, rather than being one of the two founding nations in the island as they had hitherto regarded themselves, they too were now a minority in a Sinhala-majority polity. From the Colebrooke-Cameron reforms of 1829-1833 to the Donoughmore Constitution of 1931, the model of (limited) native representation in the colonial state was on a communal basis. The various reforms in-between adjusted the number of representatives allocated to the Sinhalese, Tamils, Moors, and Burghers in legislative and executive councils. However, in 1931 the Donoughmore Constitution introduced universal franchise, bringing with it the radical innovation of territorial democracy. This new model of territorial democracy – idealistically but perhaps naively – sought to encourage Ceylon's people to shed their communal identities and build a civic 'Ceylonese' identity in moving towards fully responsible government.⁴⁴

The expectation that universal franchise would promote modern political parties and reframe political competition along ideological or policy programmatic lines turned out to be misplaced. Instead, political mobilisation not only continued along communal lines but also gave Sinhalese politicians the awareness that they were now transformed into a governing class with a perpetual majority. This strengthened the Tamils' resolve to protect their identity and preserve its homeland. Thus, even before peasant colonisation in the northeast became invested with a Sinhala-Buddhist ideological mission to negate Tamil claims to the territory, Tamils strongly resisted it. This is why the spatial possession of a homeland assumed such fundamental significance to the Tamil identity and sense of dignity, even if large parts of the area claimed as a homeland were sparsely populated and undeveloped.⁴⁵

³⁹ Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) 212.

⁴⁰ *ibid* 140.

⁴¹ Peiris (n 32) 14; Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) chs 16-17, ch 27.

⁴² Hellmann-Rajanayagam (n 30) 82.

⁴³ *ibid* 93, 95; Roberts 'Narrating Tamil Nationalism' (n 30) 102-08.

⁴⁴ Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) ch 2.

⁴⁵ Hellmann-Rajanayagam (n 30) 97.

The Period of Constitutional Engagement

By the time we come to the specific period of constitutional engagement on the ethno-territorial question that is the focus of this chapter, Sri Lanka's conflict had reached a 'mutually hurting stalemate'⁴⁶ with neither side in the armed conflict able to deliver a knockout blow (although in retrospect, not so mutually hurting as to convince either side that war was no more an option).⁴⁷ The exploration of a third party facilitator had begun much earlier than the election of the UNF-led cohabitation government in December 2001, when President Kumaratunga's government approached the Norwegian government in 1997.⁴⁸ Norway was chosen as a small power with no strategic interests in the region, its long record of peace diplomacy, and because it was acceptable to both the government and the LTTE as well as India.⁴⁹ The main objective in the early stages appears to have been ceasing hostilities and beginning a process of talks, with no clear commitment on either side to a 'constitutional' engagement.

The Norwegian-facilitated peace process between the UNF government and the LTTE began with the Ceasefire Agreement (CFA), signed between the two parties on 22nd February 2002. It formally ended on 16th January 2008, but it had effectively been dead months if not years before that.⁵⁰ In fact, there had been no meaningful engagement between the two parties after 2005, when the attempt to jointly deal with the aftermath of the Asian tsunami proved unsuccessful. Fighting had progressively escalated from early 2006 onwards, so much so that from May 2007 onwards the Sri Lanka Monitoring Mission (SLMM), set up under the CFA, ceased making determinations over the increasingly widespread violations of the CFA by both parties.

Two key factors are generally adduced to explain why the two parties agreed to a ceasefire.⁵¹ For the government, it had become clear that President Kumaratunga's 'War for Peace' strategy had failed to make the expected military gains let alone defeat the LTTE. The LTTE had a series of battleground gains, which secured control over substantial territory and cut off the Sri Lankan forces' supply lines to the north, and its terrorist attacks in the south, notably on the country's only international airport in July 2001, proved devastating. In 2001, the economy went into contraction (1.4% negative growth) for the first time since independence and the Central Bank warned that "the country cannot continue to bear the cost of prolonged war, and hence, a speedy resolution of the conflict is essential."⁵² Morale of the armed forces was low, and the country at large was war weary. These factors led to Wickremesinghe's victory in the December 2001 election on the promise to enter into a ceasefire with the LTTE, to commence negotiations on a political settlement, and to rebuild the economy.

⁴⁶ I William Zartman, 'Ripeness: The Hurting Stalemate and Beyond' in Paul C Stern & Daniel Druckman (eds), *International Conflict Resolution after the Cold War* (The National Academies Press 2000) ch 6.

⁴⁷ Gunnar Sørbo and others, *Pawns of Peace: Evaluation of Norwegian Peace Efforts in Sri Lanka, 1997-2009* (Evaluation Department Norad 2011).

⁴⁸ Jayadeva Uyangoda, 'Government-LTTE Negotiation Attempt of 2000 through Norwegian Facilitation: Context, Complexities and Lessons' in Kumar Rupesinghe (ed), *Negotiating Peace in Sri Lanka: Efforts, Failures and Lessons*, vol1 (2nd edn, Foundation for Co-Existence 2006) ch 12.

⁴⁹ Kumar Rupesinghe, 'Interview with Erik Solheim: Minister of International Development' in Rupesinghe (ed), *Negotiating Peace in Sri Lanka: Efforts, Failures and Lessons*, vol 2 (Foundation for Co-Existence 2006) ch 13; see also Mark Salter, *To End a Civil War: Norway's Peace Engagement with Sri Lanka* (Hurst & Co 2015).

⁵⁰ International Crisis Group, 'Sri Lanka: The Failure of the Peace Process' (Asia Report No 124, International Crisis Group 28 November 2006).

⁵¹ Charan Rainford & Ambika Satkunanathan *Mistaking Politics for Governance: The Politics of Interim Arrangements in Sri Lanka 2002-2005* (International Centre for Ethnic Studies 2009) 18-20.

⁵² As cited in *ibid* 18.

The LTTE for its part was pushed towards a ceasefire by domestic and international factors. By December 2001, it had made sufficient territorial and military gains to feel that it had strategic parity with the government, and could enter a process of negotiations from a position of strength. But it was also coming under considerable international pressure in the post-9/11 environment against terrorism, with several proscriptions against it in major countries and other international measures aimed at curtailing its funding and arms procurement networks. There was now little tolerance and no legitimacy accorded to those who practiced terrorism.⁵³

When the CFA was signed, President Kumaratunga protested vehemently that she had been not been consulted. While it was perhaps understandable that the UNF government, desirous of rapid progress in the aftermath of the election, had excluded her, this was an ominous portent of how the government's two power centres would be unable to work together on the peace process in the future. The first round of talks took place in September 2002 in Thailand, with five further rounds at regular intervals until the last in March 2003 in Japan. The third round, in December 2002 in Oslo, is especially significant for the present discussion.

As direct engagement got underway, the LTTE was keen to address urgent issues directly impacting on the daily lives of people of the northeast initially, for which it demanded a formalised interim administration, and only then deal with matters concerning constitutional change. The government and the international community, while initially sympathetic to this, would perhaps have preferred to work on substantive matters much earlier. But in hoping to keep the LTTE on-board, the issue of an interim administrative structure for the northeast under LTTE control came to dominate the agenda. While a Joint Task Force was mooted in the first round, it was clear this would possibly be open to legal challenges as well as opposition from a hostile president; consequently, in the second round in October 2002, more informal joint committees were established. These were: the Subcommittee on Immediate Humanitarian and Rehabilitation Needs (SIHRN), the Subcommittee on De-escalation and Normalisation, and the Subcommittee on Political Matters, which was chaired by the heads of the two delegations, Professor G.L. Peiris MP for the government, and Anton Balasingham, the LTTE's senior theoretician.⁵⁴

As noted, the talks were between the government of Sri Lanka (or more precisely, its UNF component) and the LTTE, which claimed to be the sole authentic representative of the Tamil people. While the Muslims would ideally have liked separate representation, the LTTE would not agree. The leader of the Sri Lanka Muslim Congress (SLMC), which was part of the UNF, served in the government delegation.

The most significant development in these talks for the purposes of the present discussion was the agreement reached on 5th December 2002 in Oslo with regard to the outlines of a constitutional settlement. This was to form the basis for further discussions within the Subcommittee on Political Matters. The official communiqué issued by the Norwegian government recorded the agreement as follows:

“The parties agreed on a working outline defining the objective as well as a number of substantive political issues for negotiation ... Responding to a proposal by the leadership of the LTTE, the parties agreed to explore a solution founded on the principle of internal self-

⁵³ *ibid* 20.

⁵⁴ *ibid* 23-25.

determination in areas of historical habitation of the Tamil-speaking peoples, based on a federal structure within a united Sri Lanka. The parties acknowledged that the solution has to be acceptable to all communities ... Guided by this objective, the parties agreed to initiate discussions on substantive political issues such as, but not limited to: Power-sharing between the centre and the region, as well as within the centre; Geographical region; Human Rights protection; Political and administrative mechanisms; Public finance; Law and order.”⁵⁵

While lacking in detail and precision, this brief statement was, at this stage, both appropriate and realistic in outlining only broad principles. But it did reflect symbolically some significant concessions from both sides. In ethno-national conflicts, symbols are often as salient as policies and institutions; seemingly positive constitutional concepts like ‘federalism’ or ‘unitary state’ or ‘self-determination’ may be highly charged ethno-national symbols for both sides. Thus, the use of such terms often denotes a kinesic significance outside any more rationalist frame of analysis. Nevertheless, certain specific issues in the final sentence, especially ‘geographical region’, related to long-standing and central issues in the conflict, but because the discussions on these issues never progressed into any detailed constitutional negotiations, it is impossible to determine what the Oslo principles, subject to further, difficult negotiation, might have produced as a concrete institutional design.

That said, a joint statement of intent seemed to portend a promising start to future constitutional negotiations. The two striking concessions were: first, the LTTE’s agreeing to explore a solution based on a united Sri Lankan state, breaking from their commitment to a separate state; and secondly, the Sri Lankan government agreeing to contemplate federalism despite being constitutionally wedded to a unitary state. The federal but single Sri Lankan state would also be asymmetric, in recognising the right to ‘internal self-determination’ of Tamil-speaking peoples in their areas of historical habitation – a right not recognised for any other province – even though secession was implicitly ruled out by limiting this right to its internal aspect. Recognition that the territorial unit in the northeast was based on a Tamil right to internal self-determination may well have translated into greater powers for it than the other provinces, resulting in an asymmetrical federation. But as noted, no further discussion on these matters took place.

While avoiding inflammatory rhetoric, the communiqué nonetheless addressed the spirit of Tamil claims to autonomy, recognition, and representation. On the other hand, the avoidance of terms like ‘Tamil nation’ and ‘traditional homeland’, the principle that any solution must be acceptable to all communities, and the putative safeguard against secession and the disintegration of the state, were all meant to assuage Sinhala and Muslim fears. This was therefore a distillation of the essence of a constitutional settlement that could meet the competing ethnic demands within an institutional balance that took account of the requirements of both unity and diversity.⁵⁶

The strength of the Oslo statement arguably was that it provided a good basis, however skeletal, for the Subcommittee on Political Matters to build upon by fleshing out the principles and exploring institutional options for a new constitution. Optimism was also stimulated by the position of the two co-chairs, Peiris and Balasingham, as moderates within their respective parties who seemed to have a reasonable working relationship. In the event, however, this subcommittee was never properly

⁵⁵ Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) ch 27.

⁵⁶ Rohan Edrisinha & Asanga Welikala, ‘The Interim Self Governing Authority Proposals: A Federalist Critique’ in Edrisinha & Welikala (eds), *Essays on Federalism in Sri Lanka* (Centre for Policy Alternatives 2008) ch 12.

constituted and never met, so the hopes generated by Oslo were soon scattered.⁵⁷ In the single meeting Peiris and Balasingham held after Oslo, they decided that the subcommittee would commence discussion on fiscal and financial issues first. It is unclear how this decision was reached, and it would have been difficult to discuss such issues without knowing the overall federal scheme, including the allocation of competences. It seems likely that they regarded fiscal matters as technical and less politically charged than, for example, the territorial re-demarcation of the northeast, human rights, or police powers.

The government was attacked by Sinhala nationalists in the south for agreeing to federalism and self-determination, which they saw as synonymous with separatist demands. The LTTE too began to backtrack on the Oslo principles almost immediately, emphasising that the intention was merely to 'explore' the matters mentioned in the statement, and that the parties had not reached a final agreement. It stated that if the government did not or could not deliver the promised autonomy in an acceptable manner, then Tamils would reserve their right to external self-determination. It has sometimes been speculated that Balasingham exceeded his brief in agreeing to federalism, to which Prabhakaran would never agree, which would explain the LTTE's backsliding on Oslo immediately after they agreed to it. While certainly a likely scenario, there is no evidence with which to prove this. What is however clearer is that by this time the LTTE was becoming concerned that it was being led into a 'peace trap' by the Sri Lankan government and international community, whereby it would be locked into a constitutional process which, while offering some amorphous prospect of autonomy, would progressively limit its political options, especially with regard to secession. Moreover, given the precarious power balance of cohabitation within the Sri Lankan government, it was also (quite justifiably) sceptical about the UNF government's capacity to deliver the radical constitutional changes promised. Rather than building upon the positive gains of Oslo, therefore, both parties increasingly put constitutional issues aside, while the lack of progress on normalisation and reconstruction took centre-stage.

By mid 2003, the LTTE withdrew from the talks claiming that the internationalisation of the peace process favoured only the Sri Lankan government, with no concomitant benefits of international legitimacy for itself. It insisted again that a suitable interim administration for the northeast under its sole control be set up, so that it could deliver reconstruction and have an institutional basis as the representative of the Tamil people. The government agreed in principle and during mid-2003 made three different proposals for an interim administration, all of which the LTTE rejected. The government's proposals reflected both legal constraints of the constitution and the severe opposition in the south to an interim administration for the LTTE, but they went to the utmost limit in trying to accommodate the latter's demands.⁵⁸ After the last of these was rejected, the government invited the LTTE to propose its own framework, and the LTTE made its proposals for an Interim Self-Governing Authority (ISGA) in November 2003. The ISGA, which was to be in sole control of the LTTE, was to be vested with 'plenary powers' to administer the northeast as if it were a constitutionally established government.⁵⁹

While ostensibly a proposal for an interim administration, it was clear that the ISGA was much more. It was an attempt not only to institutionalise the political and military power in LTTE-controlled areas, but also to reinforce the LTTE's dominance over both government and civil society in those areas. In centralising authority in the unelected LTTE, the proposal paradoxically imitated the centralising

⁵⁷ *ibid* 78.

⁵⁸ Rainford & Satkunathan (n 51) 87-90.

⁵⁹ *ibid* 91-117.

pathology of the Sri Lankan state, and worse, given the LTTE's record of violent intolerance of dissent and political pluralism within the Tamil community, the ISGA proposal caused serious concern from the perspective of democracy and human rights. It effectively sought to reframe negotiations on a final constitutional settlement from the federalisation contemplated at Oslo to more of a confederal model.⁶⁰ In short, it was clear to its many critics that the LTTE had not abandoned its goal of a separate state and that anything less would merely be treated as a stepping-stone to that goal at some future point. This serious doubt regarding the LTTE's commitment to the federalist Oslo principles fatally undermined advocates of federalism and power-sharing in the south. Both, legitimate concerns and political opportunism, therefore ensured a storm of protest in the south when the LTTE's proposal was published, and President Kumaratunga used the occasion to take over three key ministries including defence by dismissing their UNF ministers without consulting Prime Minister Wickremesinghe.

Attempts to resolve or mitigate the crisis within the government proved unsuccessful. The president dissolved parliament in January for fresh elections in April 2004, at which the UNF was defeated. For this election, President Kumaratunga created an electoral alliance, the United Peoples Freedom Front (UPFA), made up of southern parties opposed to the peace process and federal-type power-sharing, even though her views about both were more in line with her vanquished rival Wickremesinghe. Ironically, she tried to resurrect the peace process after the election, but her insistence that any interim administration must be part of a final constitutional settlement found no favour with the LTTE, for whom an interim administration was a condition precedent to negotiations on a final settlement. In this way, opposition from both the LTTE and the president's new parliamentary allies prevented any resumption of the peace process.

During this period of fruitless engagement between the new government and the LTTE, the Asian tsunami struck Sri Lanka on Boxing Day 2004, with some of the worst devastation occurring along the north-eastern coastline. This created an opportunity for the government and LTTE to jointly respond to the disaster, and perhaps build on that co-operation to restart some form of constitutional negotiations. Given the mutual recognition of the need for joint action, as well as international pressure for some shared institutional basis for the disbursement of relief funds, the two parties fairly expeditiously agreed an institutional structure called the Post-Tsunami Operational Management Structure (P-TOMS).⁶¹ However, the Janatha Vimukthi Peramuna (JVP), the hard-line party of Sinhala nationalists with whom President Kumaratunga had gone into coalition before the 2004 general election, challenged the constitutionality of this. In a highly controversial determination in July 2005, the Supreme Court found that some aspects of the P-TOMS arrangement violated the constitution, in particular that its spending powers would infringe parliament's exclusive control over public finance.⁶² That signalled the end of the P-TOMS, as well as any prospect of further co-operation between the two parties. Moreover, the LTTE was widely suspected in August 2005 of assassinating Kumaratunga's highly respected Foreign Minister Lakshman Kadirgamar, an ethnic Tamil, and the government reintroduced the proscription on the LTTE.⁶³

⁶⁰ A 'coming together' as opposed to a 'holding together' dynamic, A Stepan, *Arguing Comparative Politics* (Oxford University Press 2001) ch 15.

⁶¹ *ibid* 48-54.

⁶² Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) 724; *Wimal Weerawansa and Others v. The Attorney General and the Minister for Relief and Rehabilitation* (2005) SCFR App Nos 228/05, 229/05 & 230/05, SCM 15.07.2005.

⁶³ Sinha Ratnatunga, 'Lakshman Kadirgamar: The Lawyer Turned Politician' in Adam Roberts (ed) *Democracy, Sovereignty and Terror: Lakshman Kadirgamar on the Foundations of International Order* (IB Tauris 2012) ch 3, 57.

President Kumaratunga's two terms in office came to an end in 2005, and in the ensuing presidential election, her prime minister and successor Mahinda Rajapaksa narrowly defeated Ranil Wickremesinghe by a majority of 50.29% to 48.43%.⁶⁴ While Rajapaksa initially adopted a conciliatory stance with regard to the LTTE and the peace process, his ideological orientation was clearly Sinhala-Buddhist nationalist and committed to the unitary state.⁶⁵ Especially after the Kadirgamar assassination, he also tapped into hardening attitudes in the south towards the LTTE, with the Wickremesinghe government now widely seen as having appeased a terrorist organisation that was irredeemably separatist. Controversially, the LTTE had enforced a boycott of the presidential election in the areas under its control and this decisively benefitted Rajapaksa in the presidential election, given that this Tamil vote would have gone to the more conciliatory Wickremesinghe otherwise. Had Wickremesinghe won, the subsequent course of history could have been dramatically different. Unsubstantiated allegations suggest there may have been some secret understanding on the boycott between Rajapaksa and the LTTE, but it seems clear that the LTTE had by 2005 concluded that a resumed peace process with Wickremesinghe in full control of the government and enjoying considerable international standing, especially in the west, would not be in its interests. It had consolidated its military strength and territorial presence during the previous few years of the ceasefire, and seems to have calculated that it could hold its own against a hostile government led by Rajapaksa.

The parties did meet for talks in 2006, but neither was interested in negotiations and the CFA was effectively dead with daily violations and significant military clashes between the two sides. The Supreme Court made its own unhelpful contribution by declaring unlawful the merger of the Northern and Eastern Provinces effected under the terms of the Indo-Lanka Accord, on an application made by members of the JVP.⁶⁶ Although the NEPC had not been operational since 1991, it was highly significant that the new Rajapaksa regime was increasingly willing to undo past commitments with regard to the Tamil territorial claim. From mid 2006 onwards, the military conflict escalated, and by 2007, it was unambiguously a situation of war, with the government clearing the Eastern Province of the LTTE. The government formally abrogated the CFA in January 2008 and the final phase of the Sri Lankan war commenced in the north, to conclude in May 2009 with the total defeat of the LTTE amidst allegations of serious violations of international human rights and humanitarian law from both sides.

The Outcomes of the Process

The Norwegian-facilitated peace process failed in its central purpose: to find a constitutional settlement for Sri Lanka's ethno-territorial cleavage. This legitimised critics of the peace process and a negotiated settlement, and enthroned a government hostile to the accommodation of Tamil grievances. President Rajapaksa's war victory against the LTTE won him political capital – beyond what any other post-independence Sri Lankan leader had had – with which he could have pursued reconciliation and reforms. But any expectation of Rajapaksa's capacity for magnanimity and statesmanship was soon extinguished. Instead, a crude form of unadulterated Sinhala-Buddhist triumphalism became the leitmotif of the post-war state. Rather than offering devolution and democracy, in September 2010, the

⁶⁴ Department of Elections, Government of Sri Lanka, 'Results of the Presidential Election 2005' <[www.slelections.gov.lk/web/images/pdf/past-presidential-election-results/result-of-presidential-election-2005\(summary\).pdf](http://www.slelections.gov.lk/web/images/pdf/past-presidential-election-results/result-of-presidential-election-2005(summary).pdf)> accessed 4 April 2017.

⁶⁵ International Crisis Group (n 50).

⁶⁶ Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) ch 35.

regime enacted the Eighteenth Amendment to the Constitution,⁶⁷ which abolished the presidential two-term limit, and significantly weakened other constitutional restraints on presidential power. This form of 'abusive constitutionalism'⁶⁸ was further extended with the impeachment of the Chief Justice in 2013 when the Supreme Court tried to ensure the procedural validity of government legislation.⁶⁹

The country's constitutional framework was thus altered to reflect the political dominance of the Rajapaksa regime: propounding a highly chauvinist reinterpretation of Sinhala-Buddhist nationalism; rampantly using patronage, populism, and corruption as means of mobilising its political majority; and deploying legal authoritarianism and extra-legal violence to ensure control. The military victory against the LTTE was repetitively portrayed as the triumph of the Sinhala-Buddhist owners of the state against the impertinent Tamil minority. The use of ancient Sinhala-Buddhist chronicles, the inflammatory invocation of their myths and symbols, and their hegemonic tropes of state, territory, race and religion, became the dominant political and cultural discourse of the south, propagated not merely by the state but also by a triumphalist media and intelligentsia. Like the heroic warrior-kings of folklore, Rajapaksa had reunified the island and restored the primacy of the Sinhala-Buddhist nation, overcoming the depredations of a powerful Tamil rebellion.⁷⁰

Such regimes find validation and electoral sustenance by invoking a permanent enemy, so in the absence of the LTTE, not only Tamils but also the Muslim minority became demonised 'others' within, while the UN and international community more broadly were demonised for insisting on accountability for alleged atrocity crimes of the Rajapaksa regime. Useful and moderate policy recommendations made by bodies appointed by Rajapaksa himself, such as the All Party Representative Committee (APRC)⁷¹ on devolution reforms, and the Lessons Learnt and Reconciliation Commission (LLRC) on reconciliation policies, were ignored. At the height of the Rajapaksa administration's popularity, the new control regime seemed capable of permanently destroying Sri Lanka's – brittle but long-held – democratic traditions, and altering forever the nature of the Sri Lankan state itself. The pervasive undermining of the rule of law endangered the state's institutional capacity to check the regime's excesses, including the unprecedented nepotism and kleptocratic corruption. However, these excesses and especially the extravagant corruption in turn ensured a major decline in its popularity within its own core constituency among the Sinhalese, so that Rajapaksa was defeated in the presidential election of January 2015 by the common opposition promising major constitutional and governance reforms.

While the new government of President Maithripala Sirisena is markedly more moderate and conciliatory, the parties behind his victory were careful to avoid any reference to Tamil and other minority demands in building its coalition of political and civic forces against Rajapaksa, focussing initially instead on presidential and governance reforms. The new government's first reform act, the Nineteenth Amendment to the Constitution passed in May 2015, focussed entirely on reducing and

⁶⁷ Rohan Edrisinha & Aruni Jayakody (eds), *The Eighteenth Amendment to the Constitution: Substance and Process* (Centre for Policy Alternatives 2011).

⁶⁸ David Landau, 'Abusive Constitutionalism' (2013) 47 *University of California Davis Law Review* 189.

⁶⁹ Niran Anketell & Asanga Welikala, 'A Systemic Crisis in Context: The Impeachment of the Chief Justice, the Independence of the Judiciary, and the Rule of Law in Sri Lanka' (Centre for Policy Alternatives 2013) <www.cpalanka.org/the-impeachment-of-the-chief-justice-the-independence-of-the-judiciary-and-the-rule-of-law-in-sri-lanka/> accessed 4 April 2017.

⁷⁰ Nira Wickramasinghe, 'Producing the Present: History as Heritage in Post-War Patriotic Sri Lanka' (Research Paper No 2, International Centre for Ethnic Studies 2012).

⁷¹ Edrisinha and others, *Power-Sharing in Sri Lanka* (n 17) ch 37.

restructuring presidential powers.⁷² While the TNA and other minority parties supported Sirisena's candidacy unconditionally, given that he could not have prevailed without the support of the minorities, there is an implicit but strong expectation that devolution and power-sharing reforms building upon the existing framework of the Thirteenth Amendment will be addressed in the new constitution currently being discussed in the Constitutional Assembly process. The manifesto of Prime Minister Wickremesinghe's winning coalition, the United National Front for Good Governance, in the August 2015 parliamentary election promised 'maximum devolution within the unitary state.' The shape and form of this however is yet to be seen.

Lessons Learned

The Sri Lankan peace process from 2002 to about 2005 is disappointing overall, adding to the countless failed attempts since independence at constitutionally accommodating the country's ethno-territorial cleavage. However, its unintended outcomes changed the nature and circumstances of the conflict radically. The breakdown in the process led to the resumption of military conflict with the eventual defeat of a credible armed adversary to the state. Since 2015, the absence of the LTTE and the Rajapaksas has removed the distracting spectre of both terrorism and authoritarianism, which should improve the prospects for a negotiated settlement (although of course unlike the LTTE, a Rajapaksa revival in the politics of the south is not outside the realm of the possible). So while the new context is very different and more promising, some lessons can be drawn from the peace process, which could have relevance in renewed attempts at constitutional reforms to address the territorial issue.

With the defeat of the LTTE and its ideological commitment to secession, the Tamil political claim to territory has reverted to the more traditional demand for federal-type autonomy, though some Tamil groups still insist that their nationality claim be recognised within a federal framework.⁷³ It is now uncontested that any settlement will be within a united Sri Lankan state. This therefore revives the salience of the principles enunciated in Oslo in 2003, and even if provocative terms like 'nation', 'self-determination' and 'federalism' are avoided for practical political reasons, it is clear their conceptual substance will have to inform the next round of constitutional reforms.

The Sinhala-Buddhist chauvinism that opposed the peace process and its federalist direction, and which saw a massive upsurge in the aftermath of the war, may have receded somewhat, but it would be a cardinal error to discount the continuing political force of Sinhala-Buddhist nationalism in the south. Even in the great reformist moment of early 2015, more expansively liberal plans to abolish the executive presidency were thwarted by parties and individuals who wished to retain a strong presidency, which comports with deeper Sinhala-Buddhist nationalist perspectives on the nature and form of the Sri Lankan state.⁷⁴

Two features of Sri Lanka's political culture were highlighted in the failure of the peace process: the hyper-competitive nature of party politics, and the elitism of constitutional politics. These both constrict the space for public participation and deliberation in constitutional choices, with fatal

⁷² Asanga Welikala (ed), *The Nineteenth Amendment to the Constitution: Content and Context* (Centre for Policy Alternatives 2016) <<http://constitutionalreforms.org/the-nineteenth-amendment-to-the-constitution-content-and-context/>> last accessed 4th April 2017.

⁷³ Tamil People's Council, 'Report of the Sub-Committee on Finding a Political Solution to the National Question' (Tamil People's Council 31 January 2016) <<http://www.tamilguardian.com/files/File/TPC/Highlevelframework.pdf>> accessed 4 April 2017.

⁷⁴ Asanga Welikala, 'Sri Lanka's Long Constitutional Moment' (2015) 104 (5) *The Round Table* 551.

consequences for building public consensus around a negotiated constitutional settlement. The presidential and governance reforms of 2015 enjoyed a clear mandate and very broad public consensus but the process was closed, opaque, and almost derailed by partisan politicking. In bringing the two main parties (and others) together in the current government of national unity, President Sirisena and Prime Minister Wickremesinghe, seem therefore to be addressing the first of these problems. But it appears that the Constitutional Assembly process, after a period of engagement with civil society and the public, has again retreated into the traditional secretive habits of Sri Lankan political culture.

Although Sri Lankan politics reflects a proliferation of both ideology and ethnicity based parties, governments are always formed with either the United National Party (UNP) or the Sri Lanka Freedom Party (SLFP) as their core and main element. This was the case with Wickremesinghe's UNF and with Kumaratunga's PA and UPFA during the peace process. Despite the substantial underlying consensus between Kumaratunga and Wickremesinghe with regard to the process and the substance of a constitutional settlement, neither was able to resist the pressures and temptations of partisan advantage. In this, they were demonstrating not only the traditionally poor quality of political leadership shown by their predecessors but also their inability to transcend the established trajectory of Sri Lankan party politics, characterised by ethnic outbidding between the two major parties and their allies, and the zero-sum nature of electoral competition. Normal politics might be conducted on such a basis, which may even be seen as healthy democratic competitiveness offering greater choice to the citizen. But in addressing the constitutional challenge of uniting an ethnically and territorially divided polity and providing a stable basis for the conduct of pluralistic constitutional politics, such a political culture has proved disastrous. The failed peace process in this sense is only one instance in a longer history of a systemic failing in the structure of politics.

Once the exclusive preserve of a wealthy and anglicised elite, Sri Lankan politics has hugely democratised since the 1950s in opening the vocation of politics to all classes. This however has not meant the democratisation and modernisation of the culture of politics. The otherwise politically literate population only really plays a part in the democratic process during elections, whereas in-between the institutions of government function without much transparency and public involvement. This culture was replicated in the peace process, and was exacerbated by the LTTE's primitive hostility to political pluralism, even within its own community. As the ICG piquantly noted, "For the most part, the [...] peace process consisted of discussions in hotels abroad between small groups of men from only two of the parties to the conflict."⁷⁵

As noted, this lesson goes unheeded today. Opinion polls over the period of the current constitutional reform process consistently demonstrate very low levels of public awareness and engagement.⁷⁶ As a recent statement of civil society groups observed, the government's failures of political communication, generate "public apathy and allow anti-reform forces to control the political narrative." Noting the regrouping of Rajapaksa-led anti-reform forces, which "would hold back the social, political, economic, and constitutional progress of our country for decades", the statement urged the government to "act

⁷⁵ International Crisis Group (n 50).

⁷⁶ See Centre for Policy Alternatives (CPA) polling data from February and October 2016 and March 2017, CPA, 'Constitutional Reforms in Sri Lanka' (*Centre for Policy Alternatives*) <<http://constitutionalreforms.org>> accessed 4 April 2017.

fast to regain the initiative...and ensure conducive conditions for the constitutional referendum to come.”⁷⁷

Even though both the government and the LTTE established official Peace Secretariats, there was no credible programme by either party to engage the public, share information, encourage debate and discussion, promote inter-communal dialogue, and in these ways build public support for the process. While civil society organisations attempted such outreach, they were a poor substitute for political parties or government. In this context, gratuitous opportunities were provided for spoilers in southern politics to exploit Sinhala fears through misinformation and distortion, such as the way in which the federal idea was transmogrified into a synonym for appeasement and separatism without any meaningful counter-response from the government. In the north and east, the LTTE merely used the opportunity to eliminate dissent, promote the personality cult of its leader, and orchestrate political events aimed at whipping up an infantile form of nationalist hysteria amongst Tamils. These approaches to public involvement had the predictable consequences of eroding southern support and hardening northern attitudes, and thereby undercut the crucial element of public support for the process.

A brief word on the international role in the process is also necessary, an aspect that has been extensively discussed elsewhere.⁷⁸ The Norwegian Government was invited by both parties to serve as facilitators and not mediators, which determined a relatively non-interventionary role from the outset. This meant that beyond facilitation of other international expertise, for example through the Forum of Federations advising the parties on federalism at Oslo, the Norwegians had little substantive input. While this was appropriate for political and constitutional matters due to issues of ownership and credit, some commentators have pointed out that the facilitator’s minimalist role especially in the form and content of the CFA weakened the process. In particular, the CFA included neither human rights guarantees nor enforcement mechanisms. This allowed the parties to act with impunity, especially the LTTE, which as reported by the SLMM was responsible for the vast majority of violations of both the CFA and human rights. This validated the spoilers and critics of the peace process, and seriously if not fatally undermined the legitimacy and public confidence in it.

An issue related to the last point is the extreme desire of the drivers of the current constitutional reform process to be seen to be conducting a nationally-owned process, a sensitivity directly derived from the experience of the peace process. However, in this pursuit of national ownership and authenticity, it has also meant that the political elite sees a need not merely to do without international expertise but also to exclude local civil society groups from the process. This would have consequences for the quality of the technical deliberations and the ultimate design choices to be made.

A deeper question in any retrospective review of the peace process is whether it was doomed to failure from the start. The absence of a southern consensus, the uncompromising attitude of Sinhala-Buddhist chauvinism, and not least, the recalcitrant nature of the LTTE and in particular the obdurate commitment of Prabhakaran to both separatism and violence, have all fostered the view in some quarters that, notwithstanding the considerable social and economic costs of military conflict, the adversaries had not yet reached the stage where negotiations were the only political option open to them. There is considerable credence that can be attached to such a view. However, the circumstances

⁷⁷ See Centre for Policy Alternatives, ‘Rebooting the Constitutional Reform Process: A Civil Society Statement’ (*Centre for Policy Alternatives* 20 March 2017) <www.cpalanka.org/rebooting-the-constitutional-reform-process-a-civil-society-statement/> last accessed 4 April 2017.

⁷⁸ Goodhand, Spencer, and Korf (n 3); Stokke & Uyangoda (n 3); Sørbo and others (n 47).

of late 2001 in which the peace process began, outlined above, reminds us that there were many incentives for both the state and the LTTE to enter into a facilitated ceasefire and negotiations. Motives might be questioned, but without both the state and LTTE agreeing, the peace process would not even have begun. Once underway, however, its many weaknesses were unable to withstand the major pressures put on it, and these might be summarised in the following terms.

Elite-led processes of constitutional transition are untenable without public acceptance, which in turn necessitates sustained efforts to inform and involve the polity at large, and engage and contain antagonistic constituencies within it. The design of the peace process reflected the elitist nature of Sri Lankan politics, but without transcending its extreme partisan dynamics. The negotiations and their content were barely understood by people at large, and the lack of public awareness and information about efforts to resolve the conflict reinforced suspicion and mistrust among ethnic communities. The process never matured enough for the difficult negotiations on concrete details of a constitutional settlement to begin. But the process did not even begin to create the pre-constitutional political consensus involving the key stakeholders (including potential spoilers) about the need for peace and justice, and the rationale for a negotiated settlement.

To ensure the legitimacy of the process and to allay mutual suspicions among the antagonistic communities, there has to be some sort of shared normative framework that determines the bounds of acceptable behaviour. A joint commitment to shared and expressly articulated human rights norms may have been one such basis in the Sri Lankan context, but such an agreement proved impossible due to the reluctance of the parties, and especially the LTTE, and the inability of the facilitators to compel the parties.

A minimum consensus on the overarching importance of peace through a constitutional transition assumes crucial significance among parties who are otherwise in electoral competition with each other. As Paikiasothy Saravanamuttu noted, "Political competition can continue to be possible on the basis of differing approaches, emphases and tactics, rather than on the strategic objective of a peace settlement through talks."⁷⁹ Without this crucial requirement, the constitutional transition itself falls victim to the vagaries of electoral competition and ethnic outbidding.

Sri Lanka has been an uninterrupted procedural democracy since 1931, but the substantive content of its democracy has been unable to transcend the problem of ethnicised majoritarianism to accommodate minority claims in a plural polity, rendering it a deeply divided society. The dominance of ethnicity and sectional nationalisms in democratic politics, and their competing historical, cultural and political claims, often make even routine policy decisions the subject of fundamental disagreement. This has entailed the constitutional evolution of the Sri Lankan state in ways that have hardened the majority's tendency to control the state, and the principal minority's resolve to resist that hegemony. Overcoming this deep ethno-national and territorial division through normative and institutional alternatives constitutes the central challenge if Sri Lanka is to build a stable and just constitutional order. The peace process commencing with the ceasefire of 2002 was aimed at addressing this challenge but was itself unable to surmount the structural and systemic problems of the Sri Lankan polity.

⁷⁹ Paikiasothy Saravanamuttu, 'Democratization of the Peace Process: Sri Lanka' in Judith Large & Timothy D Sisk (eds), *Democracy, Conflict and Human Security: Further Readings* vol 2 (International IDEA 2006) 218.

AUTHOR

Asanga Welikala is a Lecturer in Public Law and the Director of the Edinburgh Centre for Constitutional Law at the University of Edinburgh. He is a Research Associate at the Institute of Commonwealth Studies, University of London, a Research Fellow at the Centre for Policy Alternatives (CPA), Sri Lanka, and a member of the Inclusive Transitions Practice Group of the Institute for Inclusive Transitions (IFIIT), Spain. His research and teaching interests include comparative constitutional law, applied constitutional theory, and Commonwealth constitutional history. He co-convenes the Arthur Berriedale Keith Forum on Commonwealth Constitutionalism, an interdisciplinary research network of law, politics, and history at Edinburgh.

CONTRIBUTING ORGANIZATIONS

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Cover design by Olakunle Adeniran

ISSN: 1922-558X (online ISSN 1922-5598)



Forum of Federations
75 Albert Street, Suite 411 Ottawa, Ontario
Canada K1P 5E7

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The Occasional Paper Series is financed in part by the following countries: Brazil, Canada, Ethiopia, Germany, India, and Switzerland