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Constitutional Reform

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Constitutional Reform in Sri Lanka and the Protection of the Rights of National and Regional Minorities **05**

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Editor's Note

July 29th marks two years since Neelan Tiruchelvam was assassinated. In this month's LST Review we focus on two issues that were close to Neelan's heart – Constitutional Reform and Minority Rights. As we grapple with one of the biggest crises of governance and democracy that this country has faced, we need more than ever, to consider some of the ideas that Neelan espoused in his writings. In many of his writings and public speeches Neelan advocated a return to basic constitutional principles: respect for the rule of law, respect for basic human rights and the recognition of diversity.

In this issue we publish the citation by the Law and Society Association, when they awarded Neelan the first LSA International Prize. Our main article is an incisive and challenging piece by a Canadian based Kenyan born lawyer and political scientist who worked with LST in 2000.

Law & Society Association honours Neelan

The Law & Society Association honoured Neelan Tiruchelvam recently by posthumously awarding him the first LSA International Prize. The prize is given to a scholar who has contributed significantly to advancing knowledge in the field of law and society. As the LSA notes in its citation, 'if there is a single unifying theme, it is Neelan's critical yet hopeful inquiry into the capacity of law to constrain violence while giving expression to the interests of diverse communities and social groups'. We publish in this month's issue the citation of the LSA.

Constitutional Reform and Minority Rights

This month's issue of the LST Review is devoted almost exclusively to an article by Ashfaq Khalfan on the question of constitutional reform and minority rights. Kenyan born Khalfan, has a degree in political science and works with the Canadian Human Rights Commission. He is currently completing a law degree at McGill University, Canada.

Last year, Khalfan spent some time in Sri Lanka and was able to look at some aspects of constitutional reform and minority rights. This article is the result of that inquiry.

Khalfan contends that an effective scheme of minority protection would need to consider not just the devolution of power, but also consider arrangements for strengthening fundamental rights protection and developing group-specific mechanisms. He looks at mechanisms for strengthening minority representation and participation in all levels of government – executive, legislative and judicial. He examines the proposals contained in the Draft Constitution and other documents, and considers options for developing an effective regime of minority rights. As he concludes, a new constitution that recognizes minority rights can provide a foundation for a Sri Lanka in which all communities will prosper.

LSA International Prize

for

Neelan Tiruchelvam

This is a new prize, to be "offered biennially to a scholar, normally resident outside the United States, in recognition of scholarship that has contributed significantly to the advancement of knowledge in the field of law and society. It is not a book prize, but is given in recognition of a body of scholarly work....some portion of [which] should have been completed within the past few years."

Our committee spanned 4 continents and 5 countries. The members were: Maria Ines Bergoglio, Roger Cotterrel, Carol Greenhouse, Mavis Maclean, Craig McEwen, Setsuo Miyazawa, and Konstanze Plett.

The committee considered a number of extraordinary international scholars, some of whom will surely receive this prize in future years. But we unanimously concluded that it was most fitting for the first LSA International Prize to be awarded posthumously to our late colleague and friend, Dr. Neelan Tiruchelvam.

Neelan's distinguished scholarship addressed a range of topics from dispute processing to constitutionalism, from ethnic conflict to law and religion, from legal pluralism to community-based social control. If there is a singly unifying theme, it is Neelan's critical yet hopeful inquiry into the capacity of law to constrain violence while giving expression to the interests of diverse communities and social groups in modern states. His early years at Harvard and Yale, resulted in the publication of a widely-cited empirical study of state-sponsored informal justice tribunals in Sri Lanka. While engaged in this work in the 1970s and 1980s, he formed lasting friendships with pioneering members of the Law & Society Association, including Rick Abel, Bill Felstiner, Heleen Ietswaart, Laura Nader, Boaventura de Sousa Santos, and David Trubek. As his scholarship developed, he focused more consistently on the dilemmas of states such as Sri Lanka, gripped by ethnic conflict, and probed the successes and failures of law and legal institutions in attempting to resolve such conflicts while preserving democratic values and human rights. He became an internationally recognised figure, lecturing and

teaching at leading institutions throughout the world and publishing numerous books, articles, and book chapters. His commitment to social-legal studies remained strong, as evidenced by his key role in establishing the Law and Society Trust in Colombo as well as the International Centre for Ethnic Studies. At a LSA Summer Institute in Buffalo several years ago, Neelan spoke enthusiastically about a group of comparative ethnographic studies he helped to coordinate, in which each researcher, while conducting fieldwork in a different country, would study a community in which diverse ethnic groups had devised mechanisms for living together harmoniously. Rather than focusing exclusively on instances in which conflict and violence had erupted, Neelan believed that socio-legal scholarship could make an important contribution by discovering how social pathologies could be – and actually have been – avoided by ordinary people in local communities.

Like number of outstanding Asian law and society scholars, Neelan became involved in national politics and served as a member of parliament in Sri Lanka. As a Tamil MP who sought constitutional solutions to the civil strife between the Sinhalese majority and the Tamil minority, Neelan came to play a key political role. His scholarship became one with his politics and his personal values. Extremist groups threatened his life for many years, but Neelan persisted in his commitments and refused to seek personal safety. On July 29, 1999, Neelan Tiruchelvam was assassinated by a suicide bomber on the streets of Colombo. His death was mourned by world leaders, scholars, activists, and friends.

By awarding the LSA International Prize to Neelan Tiruchelvam, we honour not only his brilliance, his humility, and what Roberto Unger called his saintly life. We also honour a man whose scholarship expressed his deepest commitments and values and guided his public as well as his private expressions.

Constitutional Reform in Sri Lanka and the Protection of the Rights of National and Regional Minorities

Ashfaq Khalfan[1]

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[1] In this paper, I have drawn from the comments of a number of individuals who were involved in civil society initiatives on the draft Constitution. Among others, these people include Rohan Edrisinha, M.C.M. Iqbal, Jehan Perera, Ramani Muttettuwegama and Kishali Pinto-Jayawardena. I am grateful to Andrew Barash, of Tulane University, for extensive editorial suggestions and input on this paper. I would also like to thank the administration and staff of the Law & Society Trust, International Centre for Ethnic Studies (I.C.E.S) and Tiruchelvam Associates for providing essential assistance with this research. The conclusions drawn in this paper do not necessarily represent the views of the above individuals or organisations.

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Introduction: The Need for Minority Protections in the Constitution

Considerations of ethnicity have been central to constitution-making processes in Sri Lanka. Prior to the enactment of each of the three post-independence Constitutions, minority politicians have demanded a document providing increased protection of - and autonomy for - their communities. In each instance these conditions were not accepted. Sri Lankan Constitutions have permitted governments in power a significant amount of discretion with regard to the rights afforded to members of minority communities. The drafters of the 1948 Soulbury Constitution justified this arguing that minority populations were of sufficient size to protect themselves, and that a few limited constitutional mechanisms would be sufficient to guarantee this objective.[2] The 1948 Constitution included protections against discriminatory legislation and extra representation for minorities in the Second Chamber. Unfortunately, these provisions proved insufficient to ensure minority protection and experiences since this period have proved false the assumptions of the Soulbury Commission.

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[2] Radhika Coomaraswamy, *Ideology and the Constitution: Essays in Constitutional Jurisprudence* (Colombo: International Centre for Ethnic Studies, 1997) at 19.

Human rights violations in Sri Lanka, whether related to physical security or equal treatment, have often been founded on ethnic discrimination.[3] Tiruchelvam has argued that Sri Lankan Constitutions have led to the "absurd contradiction of imposing a mono-ethnic state on a multi-ethnic polity. In the context of a divided society, republican concepts of democracy, citizenship and sovereignty have been used to provide legitimacy to majoritarian rule." The Constitution must therefore be reformed so as to provide for minority rights. However, it is primarily where minority protections are concerned that the commitment of states has generally been at its weakest.[4] For this reason, a new constitution cannot merely declare the rights that belong to minorities. It must create government institutions and legislative procedures that will guarantee the implementation of such rights.

Section I of this paper surveys the main minority rights concerns for each of the four major ethnic groups in the country. This essay will consider the rights of groups that are minorities at the national[5] level and those that form minorities at the regional[6] level. Section II introduces three means for addressing minority rights: (i) improvements to fundamental rights protection; (ii) devolution of power; and (iii) group-specific constitutional mechanisms. For the Constitution to be successful, it must incorporate each of these elements. Devolution *alone* will not adequately address all minority rights requirements and may, without effective fundamental rights and group-specific rights, have some counter-productive effects. Nevertheless, devolution is crucial for the realisation of minority rights and to negotiate a settlement to the ethnic conflict.

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[3] This essay relies on a broad definition of the term 'ethnicity.' The definition includes groups whose members are linked by ascriptive ties of language, religion or national or social origin, and whose members demonstrate a prevailing intention to be identified primarily as members of that group. The main groups analysed, and their demographic proportions, are the Sinhalese (74.0%), Sri Lankan Tamils (12.6%), Up-Country Tamils (5.6%) and Muslims (7.1%). The 2000 draft Constitution treats the Up-Country Tamils and Sri Lankan Tamils as members of one group, at least for some purposes. For example, the Finance Commission must be appointed so as to represent the "*three* major communities" (Article 211).

[4] Neelan Tiruchelvam, "Constitutionalism and Diversity" (July 1999) 9:141 *LST Review* 10 at 36.

[5] This essay uses the term 'national minorities' in reference to groups that are minorities from the perspective of Sri Lanka as a whole. This should be distinguished from 'national minorities,' a contextual term used primarily by the Organisation for Security and Cooperation in Europe (OSCE) and the Council of Europe.

[6] The term 'Region' is utilised in this essay to refer to the current provinces. The government's devolution proposals of 1995 and 1996 and the draft Constitutions of 1997 and 2000 use the term 'Regions.'

Section III assesses the government's proposals for constitutional reform with regard to each of the three forms of minority protections, particularly in relation to group-specific rights. The paper examines the August 2000 draft Constitution and recent proposals put forward by the government. Where necessary, this paper refers to the Government's 1995 devolution proposals, the 1997 Draft Constitution, the PA-UNP consensus agreements of May-July 2000, as well as the position papers of a number of political parties and civil society organisations. This section also suggests provisions for the *effective* protection of minority rights. This inquiry requires review of judicial effectiveness and political mechanisms for the protection of minorities. The paper concludes by discussing the realistic prospects for passing a Constitution that effectively addresses minority rights.

Importantly, constitutional protection of minority rights should not be viewed as a concession to Tamil and Muslim communities. These rights apply to all communities that are in minority situations, and rights protection for minorities is in interest of the Sinhalese community and its leadership. The fair treatment of minorities is the best guarantee for a united Sri Lanka and, it must be remembered, the Sinhalese constitute the minority in two provinces in the country. Under the Emergency Procedures of the draft Constitution, any region where serious violations of human rights occur faces the possibility of sanctions from the Central government.[7] Nevertheless, the most reliable and legitimate way to protect the rights of Sinhalese regional minorities is to institute a comprehensive system of minority protection applicable to all areas of the country.

I. Key Minority Rights Issues in Sri Lanka

The state and private armed groups have violated core human rights of national and regional minorities in Sri Lanka. This section will survey these abuses as a prelude to considering the more contested issue of possible constitutional remedies. By reviewing past violations, one may more easily predict future infringements. While certain types of violations have largely ceased, such as mass violence against Tamil civilians in the south,[8] the government's efforts have

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[7] *A Bill to repeal and replace the Constitution of the Democratic Socialist Republic of Sri Lanka,* 3 August 2000. [Hereinafter 2000 *Draft]*. This issue is further developed in Sections 4.2 and 4.3 of this paper. Under Articles 2 and 223 of the draft, the President, upon the advice of the Prime Minister, can dissolve a Regional Council on the grounds that the Regional Council is violating fundamental rights in a manner that constitutes a "clear and present danger to the unity of the Republic.

[8] This must be qualified by noting the attack on October 25, 2000, on a centre for the rehabilitation of former L.T.T.E. guerrillas by a Sinhalese mob, with the alleged complicity of the prison guards. The

stemmed from internal political and external international pressure. Change has not been the consequence of institutional safeguards.

1.1. Socio-Economic Discrimination

The first clear instance of socio-economic discrimination occurred shortly after independence. In 1949, the government framed parental birthplace requirements that stripped the majority of Up-Country Tamils of citizenship. This occurred in spite of Section 29 of the Constitution which expressly stated that no law could make persons of any community liable to restrictions to which persons from other communities or religions were not liable. In *Kodakam Pillai v. Mudanayake*[9] and *Mudanayake* v. *Sivagnanasunderam*[10], the Supreme Court of Ceylon held where legislation is facially neutral the Court could not further review the background for legislative decision-making to determine political motives. The citizenship requirements were held valid. Though the Privy Council did not accept this reasoning, the Council upheld the judgement. It stated that the government, under Section 29, could not discriminate against a community in relation to that community's essential characteristics, such as language or culture. However, the fact that the overwhelming majority of Indian Tamils had recently arrived into the country had nothing to do with them as a community. The government's citizenship laws could therefore exclude persons on the basis of their national origin, even if these laws primarily had an impact on the Indian Tamils.[11]

These decisions are widely viewed as overly narrow and incorrect. H.L. de Silva argues that the Privy Council decision "demoralised minority groups to such an extent that they were discouraged from carrying on any further agitation before any judicial forum for many years thereafter. Had this decision gone the other way, the political history of modern Sri Lanka may have been very different."[12] The two judgements constituted an alarm signalling the paucity of safeguards for minority communities, and a turning point in the development of demands for autonomy by Sri Lankan Tamils. Prior to 1949, the Tamil leadership had lobbied

government has promised an inquiry into this event and arrested some suspects. See "Sri Lankan trainee teachers arrested over massacre" *Reuters* 27 November 2000. It has also appointed a commission of inquiry into the event.

[9] (1952), 54 NLR 350.

[10] (1953), 53 NLR 25.

[11] (1953), 54 NLR 433 at 437 (Privy Council).

[12] H.L. de Silva, " Pluralism and the Judiciary in Sri Lanka" in Neelan Tiruchelvam & Radhika Coomaraswamy, eds. *The Role of the Judiciary in Plural Societies* (London: Frances Pinter, 1987) at 87.

for power sharing at the Centre by advocating 'balanced representation' in the legislature, where the minorities would have a higher representation than their share of the population. The disenfranchisement of Indian Tamils was an impetus for the formation of the Federal Party, which emphasized the Tamil right to regional autonomy on the basis of status as a nation rather than as a minority.[13] This strategy was reinforced in 1972, when the government promulgated a Constitution that eliminated s. 29, thereby eliminating any possibility of judicial challenges to discriminatory legislation.

Only 16.2% of the Up-country Tamil community fulfilled the stringent citizenship requirements.[14] Consequently, the community's political influence and developmental prospects were undermined. Up-country Tamils were denied access to land settlements, jobs in the state sector and private sector, and a considerable number were displaced and rendered unemployed by the nationalisation of plantations.[15] In 1974 and 1988, Sri Lanka and India agreed to confer Sri Lankan or Indian citizenship on most of the Up-Country Tamils. Currently, most Indian Tamils residing in Sri Lanka have citizenship.

From 1921 onwards, the state facilitated the settlement of Sinhalese people in the Eastern Province. Between 1921 and 1981, the proportion of Sinhalese people in Trincomalee rose from 4.5% to 33.6%, and in Amparai from 8.2% to 37.6%.[16] The settlements were seen as an attempt by Sinhalese leaders to reclaim areas claimed to have been inhabited by the early Sinhalese.[17] In 1986, the government agreed to settle persons on the basis of the national ethnic ratio. The Thirteenth Amendment of 1987 suggested that the ethnic proportion of districts would not be altered by such projects. However, the provisions were ambiguous and only

[13] Jayadeva Uyangoda, "Sri Lanka: The Question of Minority Rights" (Minority Rights Workshop, International Centre for Ethnic Studies, Colombo, August 14, 1999) [unpublished: on file with International Centre for Ethnic Studies] at 29.

[14] Gamini Samaranayake, "Ethnic Conflict in Sri Lanka: Reconstituting the Polity through Constitutional Reform" in Iftekharuzzaman, ed. *Ethnicity and Constitutional Reform in South Asia* (Colombo, Regional Centre for Strategic Studies, 1998) at 166.

[15] S.W.R. de Alwis Samarasinghe, "The Indian Tamil Plantation Workers in Sri Lanka: Welfare and Integration" in K. M. Silva, P. Duke, E. Goldberg & N. Katz, eds. *Ethnic Conflict in Buddhist Societies: Sri Lanka, Thailand and Burma* (London: Pinter, 1988) at 165. See also Elizabeth Nissan, *Sri Lanka: A Bitter Harvest* (London, Minority Rights Group, 1996) at 10 & 25-6.

[16] Sunil Bastian, "Control of State Land: The Devolution Debate" in Regie Siriwardena, ed. *Sri Lanka: The Devolution Debate* (Colombo: International Centre for Ethnic Studies, 1996) at 67.

[17] Nissan, *supra* note 15 at 23.

required implementation "as far as possible."[18] Tamil leaders have argued these settlements were an encroachment on their 'traditional homelands' in the North-East. It is not clear whether international law provides for a 'traditional homelands' claim that would justify maintaining the ethnic distribution of an area. The claim would be particularly difficult to support where an action would prevent internal movement by citizens without government aid.[19] However, state-sponsored settlement should not operate in a discriminatory fashion. New settlements denying Tamils equal access to land or intended to dilute their voting strength constituted ethnic discrimination. Settlement policies favouring Sinhalese peasants were discriminatory because Tamils and Muslims in the North-East had similar needs for land, particularly in the arid and high-density Jaffna peninsula where the demand for adequate land was especially high.[20] One can also refer to the policy adopted in the *Framework Convention for the Protection of National Minorities.* This Convention was concluded by the Council of Europe and prohibits states from changing the proportion of the population in areas inhabited by national minorities where such measures are intended to undermine their rights relating, among others, to participation in public life, language rights, etc.[21]

Linked to the land settlement measures are complaints by Tamil leaders that the state's overall developmental programme was discriminatory. Tamil leaders argue that no major developmental work was carried out for the direct benefit of the Tamil population.[22] In addition, Tamil M.P's were excluded from a system whereby each member of Parliament was assigned a number of fixed government jobs for which they could recommend their constituents. The reason given was

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[18] The 1978 Constitution further required that 'demographic patterns' would be maintained 'as far as possible' in the allotment of settlements. The use of the term 'demographic patterns' rather than 'ethnic patterns' made it unclear as to whether the government land settlement would continue to alter the ethnic distributions in the Eastern Province, *Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, 13th Amendment, Appendix II, 2.5-2.7.*

[19] The territorial homeland concept is only properly applied to indigenous peoples. See Laksiri Fernando, "Human Rights Approach to Conflict Resolution." Presentation at a conference on: "Theories and Practice of Conflict Resolution with Relevance to Sri Lanka," (Centre for the Study of Human Rights and Centre for Policy Research and Analysis, Faculty of Law, University of Colombo, 14 July 2000).

[20] A. Jeyaratnam Wilson, "Ethnic Strife in Sri Lanka: The Politics of Space" in John Coakley, ed. *The Territorial Management of Ethnic Conflict* (London: Frank Cass, 1993) at 164.

[21] *Framework Convention for the Protection of National Minorities,* 1 February 1995, 34 ILM 351, *[hereinafter Framework Convention],* Article 16, in conjunction with Articles 12, 15.

[22] Nissan, *supra* note 15 at 24.

that Tamils would be more likely to support separatism and were therefore not suitable for employment.[23]

A significant minority rights issue was the standardization of and district quotas for admissions to universities. These policies were mainly designed to increase the representation of Kandyan Sinhalese and Muslims in universities. Until the late 1960s, Sri Lankan Tamils were over-represented in the university system, particularly in science, medicine and engineering programmes. The high rate was due to superior academic achievement and science education facilities in the Jaffna Peninsula, a legacy from the days of superior missionary education in the Peninsula. Following standardization policies, the proportion of Sri Lankan Tamils entering science-based courses was halved.[24] After 1978, standardization was abolished. Sri Lankan Tamils again occupied a greater proportion of places in science programmes than their percentage of the population.[25] However, the district quota policy was not removed, and continued to operate against the educationally advanced districts primarily Jaffna and Colombo.[26]

The *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)* permits special measures (and even requires them "when the circumstances so warrant") for securing adequate advancement of a group as may be necessary to ensure equal enjoyment of human rights and fundamental freedoms. Some level of affirmative action in favour of Sinhalese and Muslim students was therefore justified, given their educational under-representation following independence. However, the Convention requires that such actions should not lead to special rights for different racial groups nor should the measures be continued after their objectives have been achieved.[27] Education standardization policies arguably went beyond this limitation, as the number of Sinhalese students admitted to universities actually increased above their

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[23] Neelan Tiruchelvam, "Ethnicity and Resource Allocation" R. Goldmann & A.J. Wilson eds. *From Independence to Statehood: Managing Ethnic Conflict in Five African and Asian States* (London: Frances Pinter, 1984) at 187 - 191.

[24] Nissan, *supra* note 15 at 12.

[25] K.M. de Silva, *Managing Ethnic Tensions in Multi-Ethnic Societies: Sri Lanka 1880-1985,* (Boston: University Press of America, 1986) at 309.

[26] The district quota system, which claims to favour districts with lower quality educational facilities, neglects the interests of those students in poorer schools in districts considered educationally privileged, such as Colombo and Jaffna. Quotas should be based upon the quality and availability of science facilities of the school. It should be noted that Jaffna has recently been listed as an underprivileged district and therefore gets a number of places in excess of its district quota.

[27] *International Convention on the Elimination of All Forms of Racial Discrimination,* (1965), 660 U.N.T.S. 195, (Sri Lankan ratification: 18 February 1982) [*hereinafter CERD]*, Articles 1 (4) and 2 (2).

percentage of the population.[28] Also, no measures were taken to protect the interests of the community that was most educationally underprivileged, namely the Up-Country Tamils. To be fair, affirmative action should have been applied not only for university entry, but also in other areas (e.g. government employment) (See Sections I. 3 below). A more equitable approach to affirmative action would have addressed the socio-economic needs of the Tamils who were negatively affected by standardization. Tamils from the north, particularly from Jaffna, had been so heavily dependent on state employment and the professions that affirmative action, even if limited, would have constituted undue hardship to Sri Lankan Tamils.[29] This should have been considered when determining the extent of affirmative action, and such measures should have been taken in conjunction with programmes to improve employment opportunities in the north. Instead, Sri Lankan Tamils were ignored by the government and excluded from its expenditure priorities.[30]

The history of socio-economic discrimination against minorities indicates that the new Constitution must establish political and judicial institutions that will refrain from perpetuating discrimination and will take into account the legitimate interests of the minority communities.

1.2 Political Representation

Inadequate political representation may lead to socio-economic discrimination. This is particularly true where political connections are required for access to public goods such as land, housing, government employment and development expenditure. In Sri Lanka, political patronage plays a crucial role in resource allocation.[31] The two major parties, the Sri Lanka Freedom Party (SLFP) and the United National Party (UNP) rely primarily on Sinhalese support. Muslim leaders have been represented in the Cabinet since 1947, as members of the UNP and SLFP (and its associated coalitions), and often have been elected to office by a majority of Sinhalese voters. From 1994 onwards, Muslim members of the Sri Lanka Muslim Congress (SLMC), and its umbrella grouping, the National Unity Alliance (NUA), have been represented in Parliament in coalition with the

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[28] K.M. de Silva (1986), *supra* note 25 at 266.
[29] *Ibid.* at 262
[30] Committee for Rational Development, *Sri Lanka's Ethnic Problems: Myths and Realities,* November 1983, re-printed in S.J. Tambiah, *Sri Lanka: Ethnic Fratricide and the Dismantling of Democracy* (Chicago: University of Chicago, 1986) at 158-160. See also text accompanying notes 23 and 31.
[31] Nissan, *supra* note 15 at 23, Tiruchelvam (1984), *supra* note 23 at 191.

People's Alliance. Because Muslim leaders have deferred to the majority on many occasions, such as supporting Sinhalese as the national language, they have been granted a variety of concessions, particularly in education. Since the Sinhalese vote is split between the two major parties, the Muslims, who often vote as a bloc, have directly affected a number of local parliamentary elections.[32] Up-country Tamils were excluded from Parliament until the mid-1970s. Since 1977, however, the Ceylon Workers Congress (CWC), which represents Up-Country Tamils, has been represented in the Cabinet. It has used this influence to gain improved social conditions on plantations, and to advocate the granting of citizenship to Up-Country Tamils.[33]

While Sri Lankan politics have not been wholly devoid of minority representation, the majority often manipulates the smaller minorities to achieve majority goals. Sinhalese politicians have at times used Muslims to counterbalance Tamil interests.[34] Furthermore, the ability of Muslims to achieve their priority political goals rested on the compatibility between the interests of Sinhalese and Muslims. The demand for autonomous Muslim schools effectively required separation from the Tamil language-based school system and the exclusion of Tamil teachers from Muslim schools. In addition, the ethnic division of labour favours accommodation between Muslims and Sinhalese. Since a significant proportion of upper and middle class Muslims are involved in trade, Muslim leaders have chosen not to emphasize access to state-sector employment.[35]

Up-Country Tamils, who do not form the majority in any Province, have not generally benefited from the Provincial Council system. Although the representatives of Up-Country Tamils have managed to secure a number of seats in Provincial Councils, they have continually found their interests neglected by the Councils.[36] In part, this reflects the significant amount of tension between Sinhalese and Up-Country Tamils in these areas. Tamils are seen as benefiting

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[32] S.H. Hasbullah, *Muslims and the Ethnic Conflict: Dynamics of Muslim Politics with Special Reference to the Indo-Lanka Accord* (Colombo: International Centre for Ethnic Studies, 1991). See also K.M. de Silva, "Sri Lanka's Muslim Minority" in K. M. Silva, P. Duke, E. Goldberg & N. Katz, eds. *Ethnic Conflict in Buddhist Societies: Sri Lanka, Thailand and Burma* (London: Pinter, 1988) at 208-213.

[33] Samarasinghe, *supra* note 15 at 167.

[34] K.M. de Silva (1988), *supra* note 32 at 213.

[35] Uyangoda, *supra* note 13 at 67, Hasbullah, *supra* note 32 at 10.

[36] See Bertram Bastiampillai, *The Plantation Communities and the Provincial Councils System,* (Colombo: ICES, 1992) for a detailed treatment of this issue.

from stable employment on plantations whose establishment in the colonial period rendered many Sinhalese landless.[37]

Most Sri Lankan Tamils vote for Tamil-based parties, but these groups have not been able to form durable coalitions with the governing parties and therefore were not represented in the Cabinet from 1956 to 2000.[38] Since independence, it has been difficult for Sinhalese and Tamil leaders to cooperate due to competition over university entry and government employment. The growing emphasis of the Tamil leadership on separate ethnic identity has also been an issue. While the Sri Lankan Tamil Federal Party (FP) managed to formulate agreements with different governments (the SLFP in 1957 and the UNP in 1965) on measures of decentralization, language and colonization, such agreements were withdrawn after pressure from the main opposition party and organised pressure groups. In 1983, the Sixth Amendment outlawed the advocacy of separatism resulting in members of Parliament from the Tamil United Liberation Front (TULF) losing their seats in Parliament until 1988.

The reality of Sri Lankan politics is that at any time a minority community could be excluded from the government. Therefore, the new Constitution should reform the institutions of government to ensure that all minorities have adequate influence in the decisions of the state.

1.3 Language Rights

The Sri Lankan government has not engaged in an active policy of cultural assimilation of minority communities. It has refrained from interfering with minority religious practices and the use of the Tamil language. Education at all levels is generally provided in Sinhalese and Tamil. Still, the state's commitment to Tamil language education has not been completely fulfilled in some areas in the south, which has been detrimental to Up-Country Tamils and Muslims.[39]

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[37] Samarashinghe, *supra* note 15 at 162.

[38] The brief exception was the Federal Party Minister; Murugesu Tiruchelvam, from 1965-1968, when his party was in coalition with the UNP. Tiruchelvam resigned due to the failure of the UNP to implement Tamil language legislation. The People's Alliance government elected in 2000 includes Douglas Devananda, of the Eelam People's Democratic Party (EPDP) as Minister of Development, Rehabilitation and Reconstruction of the North and Tamil Affairs (North and East).

[39] Nissan, *supra* note 15 at 25.

However, the state has failed to protect the rights of minorities to use their language in government and this has led to discriminatory outcomes in the recruitment of minorities to government service and in the provision of government services. In 1956 the Sinhala-Only Act was passed. This law required that Sinhala be the sole language used in the civil service. In the case of *Attorney General* v. *Kodeswaran,* the Sinhala-Only Act was challenged in court by a Tamil civil servant who argued that the Act violated Section 29 of the 1948 Constitution. The Supreme Court and Privy Council both took narrow, technical views, bypassing the constitutional issue and stating that Crown servants had no binding employment contracts with the state.[40] The use of Tamil was denied by the state as a means of correcting the demographic over-representation of Tamils in government. In government service, the proportion of Tamils dropped below their representation in the population. For example, the number of Tamils in the General Clerical Service was lowered from 40.7% in 1949 to 5.4% in 1981. Because Tamil was not spoken in government, Tamil-speakers were often denied adequate access to government services.

In response to political pressures from minorities, the state has improved the status of Tamil in government. By 1988 Tamil had been designated in the Constitution as "*also* an Official Language," and the language of administration of the Northern and Eastern Provinces. Where a Sinhala or Tamil linguistic minority exists within a division, the President can allow Sinhala and Tamil to be used.[41] However, deficiencies remain in the use of Tamil. While there are 52 divisions in which the largest community is a provincial linguistic minority, by the time of the last Pradeshiya Sabha elections, only 12 of these divisions, in Badulla and Nuwara Eliya, had been declared bilingual and no new Tamil speaking officers had been appointed.[42] The constitutional provisions for the use of Tamil have been implemented on a limited basis, but are undermined by a lack of Tamil-speaking

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[40] (1967), 70 NLR 121 (Supreme Court) and (1969), 72 NLR 337 (Privy Council). The constitutional issues were referred back to the Supreme Court. However, the case did not proceed as the issues raised had been overtaken by the enactment of the 1972 Constitution.

[41] *Constitution of the Democratic Socialist Republic of Sri Lanka, 1978*, Articles 18 & 22 (as amended by the 13th and 16th Amendments).

[42] M.C.M. Iqbal, "The Beginning of the Ethnic Problem in Sri Lanka: Violation of Language Rights" *Weekend Express,* Saturday-Sunday, August 12-13, 2000. In 1995, only 37 out of 947 public employees in Badulla were proficient in Tamil. In this district, 31% of the population is Tamil-speaking. See Dinusha Pandiratene, "Equality of Opportunity" in Elizabeth Nissan, ed. *Sri Lanka: State of Human Rights Report – 1998* (Colombo: Law and Society Trust, 1998, s. 6.5.

officers and Tamil-language typewriters.[43] Presently, each of the three minority groups remains under-represented within the public sector.[44] In 2000, only 2% of the police force was Tamil, and of 140 new employees in the Sri Lanka Administrative Services, there was only one Tamil and only two Muslims.[45]

A possible institution that could increase the use of Tamil in government services is the Official Languages Commission, set up by the state in 1990. The Commission has powers to investigate complaints of non-compliance with the state's language policies and to make recommendations for remedial measures to the appropriate government body. When such recommendations are not implemented, the Commission should refer matters to the High Court or Supreme Court. However, this duty has never been fulfilled.[46] The new Constitution should strengthen Tamil language rights and create institutions with the political will to implement such rights.

1.4 Physical Integrity

Ethnic conflict in Sri Lanka has affected each of the four major ethnic groups. In the riots of 1958, 1977, 1981 and 1983 Sinhalese civilians targeted and killed hundreds of Sri Lankan and Up-Country Tamils. Following the 1983 riots successive governments have managed to prevent such attacks from escalating to the widespread nature of previous riots.

Human rights infringements by security forces and allied militias, including extra-judicial killings and torture, have occurred during the civil war. In the south, it is commonplace for security forces to arrest Tamils arbitrarily and place them in

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[43] Catherine Wood, "Language Rights: Rhetoric and Reality. Sri Lankan law and International Law" (November 1999) 10: 145 *LST Review* 1. See also Nissan, *supra* note 15 at 25.

[44] Nissan, *supra* note 15 at 24. According to the Ministry of Finance in Planning, in 1997, Sri Lankan Tamils, who formed 12.6% of the population, constituted 5.2% of the employees of the state sector, 10.4% of the provincial public sector and 7.7 of the semi-government sector. Muslims, who form 7.1% of the population, constituted 2.7% of the employees of the state sector, 4.9% of the provincial public sector and 2.0% of the semi-government sector. Up-Country Tamils, forming 5.6% of the population, are the least represented community in the government, forming 0.2% of the employees of the state sector, 0.8% of the provincial public sector and 1.1% of the semi-government sector. These statistics are reported in Pandiratne, *supra* note 42, s. 6.4.

[45] Jehan Perera, "Postponement offers New Opportunity" *The Island,* Wednesday, 16th August, 2000.

[46] Ambika Satkunanathan, "Official Languages Commission" in Elizabeth Nissan, ed. *Sri Lanka: State of Human Rights Report 2000* (Law and Society Trust, Colombo, 2000), Section 18.3.

remand prisons where conditions are both unsafe and unhealthy.[47] Since the late 1980s, the judiciary has played a role in restraining human rights abuses by the state, such as by requiring the release of arbitrarily detained prisoners.[48] In the late 1990s, the government began to charge security forces accused of civil rights violations[49] and engaged in human rights training of armed forces.[50] In addition, several Presidential Commissions of Inquiry were established in 1995 under the PA government to investigate disappearances that occurred between 1988 and 1994. However, no Commission has a mandate to investigate disappearances carried out after 1995, when the current government came to power.

Violations of the rights of Tamil civilians are facilitated by public security legislation and regulations that allow the state an extensive amount of discretion. For example, the Prevention of Terrorism Act allows for detention without trial for up to 18 months. Persons arrested under the PTA are not permitted bail, even if the offence under the Act is minor, such as defacing a street sign. Denial of bail leads to extensive plea-bargaining;[51] and prolonged detention facilitates the abuse of prisoners and enforced disappearances.[52] The Supreme Court has occasionally struck down State regulations that are arbitrary and unreasonable. However, it has refused to rule on Proclamations of Emergency that are promulgated solely for the purpose of passing such regulations.[53]

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[47] See Sumudu Atapattu, "Integrity of the Person" in Elizabeth Nissan, ed., *Sri Lanka: State of Human Rights Report 2000* (Colombo: Law and Society Trust, 2000), Section 2.5. There has been some progress on since the government set up an Anti-Harassment Committee to protect Tamil civilians against abuses by the police. This Committee has had some impact in preventing torture and forced labour imposed by security forces. See Atapattu, Section 2.12.

[48] Deepika Udagama, "Taming of the Beast: Judicial Responses to State Violence in Sri Lanka" (1999) 9:137 *LST Review* 1 at 24 -33. While the Supreme Court has occasionally struck down State regulations, on the grounds that they are arbitrary and unreasonable, it has refused to rule on Proclamations of Emergency that are promulgated solely for the purpose of passing such regulations.

[49] From 1995 to 1999, the government had charged 489 security personnel with human rights violations. See Sumudu Atapattu, "Integrity of the Person" in Elizabeth Nissan, ed., *Sri Lanka: State of Human Rights Report 1998* (Colombo: Law and Society Trust, 1998), Section 2.8.

[50] "Training of military officers on Human Rights and International Humanitarian Law," *Sunday Island,* 19 November, 2000.

[51] Lord William Goodhart, Justice P.N. Bhagwati, & Phineas Mojapelo, *Judicial Independence in Sri Lanka: Report of a Mission, 14-23 September 1997* (Geneva: Centre for the Independence of Judges and Lawyers, 1997) at 31-32 [hereinafter *CIJL Mission].*

[52] Amnesty International, "Sri Lanka: Torture in Custody," AI Index: ASA 37/10/99 (June 1999). This report states that torture is facilitated by the non-conformity of national security legislation, the Torture Act and other such laws with international standards.

[53] Udagama, *supra* note 48 at 32.

Significant human rights violations have been carried out by non-state actors. Tamil militant groups have been responsible for numerous attacks on Sinhalese and Muslims communities. In reprisal, Muslim homeguards have been responsible for killing Tamil villagers. In 1990, the LTTE carried out several large-scale massacres of Muslims in the east and ordered all Muslims to leave the north, forcing 120,000 people to flee to the south.[54] The history of violations of civil and political rights on ethnic grounds indicates the need for the Constitution to enact stronger fundamental rights protections. It further demonstrates that the institutions of government should fairly represent all ethnic groups, including minority groups.

II. Analytical Framework: Three Categories of Minority Protections: Universal Rights, Devolution of Power and Group-Specific Rights

A new Constitution must provide for universal rights, devolution and group-specific rights. These three categories of minority protections are complementary, and should not be seen as alternatives to each other. This section explains the need for each of these three categories. The August 2000 draft offers limited universal rights protection and devolution of power, and only partial attention to group rights.

Universal Rights

Universal rights are fundamental freedoms to which all persons are entitled regardless of ethnicity. These rights are included in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). They include the right to life and liberty, the right to equal treatment and the rights to the necessities of life, among others. In order for such rights to be implemented, they must be buttressed by effective monitoring institutions such as Human Rights Commissions and Ombudsman bodies. As indicated in Section 3, the 2000 draft Constitution improves the protection of universal rights, but requires several changes in order to operate effectively.

Universal rights are the primary tools for ensuring the right of minorities. However, on their own, they are normally insufficient in a plural society. For

[54] Nissan, *supra* note 15 at 21.

example, a court may provide relief to an applicant whose rights have been violated but it would be difficult for a judge to review situations affecting an entire community. One must also take account of the previous failures of Sri Lanka's judicial system relative to minority rights protection, including a number of ethnically biased judgements (See Section 5.7). In addition, universal rights may become merely theoretical when political decisions on minority issues are made primarily by the members of the majority community. For this reason, devolution of power and group-specific rights must be included in the new Constitution.

Devolution of Power

Devolution of power to regions in which minorities are territorially concentrated serves to protect minority rights in three ways. First, devolution is a political mechanism to ensure a significant amount of decision-making power lies within regions in which a minority is numerically dominant. In a democratic system, devolution should guarantee that such minorities are free from ethnic discrimination. Second, devolution would also mean Sinhalese and Sri Lankan Tamils will form political majorities in some regions and political minorities in others. Allowing minority groups majority power in certain regions creates incentives for ethnic groups to agree on the country-wide protection of minority rights. Finally, one cannot neglect the argument that devolution would help provide a political solution to the military conflict, thereby reducing the incidences of human rights violations.

Devolution also will provide for the right to self-determination. Self-determination is the right of a people to determine their political status and freely pursue their economic, social and cultural development.[55] However, what groups form a 'people' for the purposes of self-determination is debatable, and whether ethnic minorities within a state qualify is not certain.[56] A significant number of international lawyers often hold that the right to self-determination is limited to post-colonial contexts.[57] However, the granting of devolution should not depend only on the right to self-determination. Devolution of power is better understood

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[55] As set out in the *International Covenant on Civil Political Rights,* 19 December 1966, 999 U.N.T.S 171 at 173, Art.1(1) and the *International Covenant on Economic, Social and Cultural Rights*, 16 December, 993 U.N.T.S. 3 at 5, Art.1(1). Both treaties have been ratified by Sri Lanka.

[56] Christian Tomuschat, "Self-Determination in a Post-Colonial World" in Christian Tomuschat, ed. *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993) at 16.

[57] Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia, University of Pennsylvania, 1996).

and more compelling as a *means* of achieving the equality of minority peoples with the majority.

A common argument against devolution is that it redraws boundaries on an ethnic basis. The majority ethnic group within the boundary then considers itself the owner of the area. While in theory this appears sound, the argument ignores the fact that whatever boundaries exist in an ethnically divided society affect divisions of power on ethnic lines.[58] To many in Sri Lanka, a centralized and unitary state implies the country belongs to the Sinhalese community.[59] Those opposed to devolution but cognizant of the grievances suffered by minority communities feel the best approach for solving the conflict is to advocate equality within a unitary state.[60] However, in a country where government institutions are controlled by one ethnic group, there is little to guarantee that equal rights will be promoted.

The primary concern of many Sinhalese is that devolving power to the regions would promote secession. A unified North-Eastern Region, with defined frontiers and a police force would strengthen Tamil identity and make it easier for the Regional Administration to declare independence.[61] While this is a legitimate concern, the 2000 draft Constitution incorporates mechanisms for the central government to prevent a region from seceding. For example, Article 223 states the advocacy of separatism by a Regional Council would allow the President to dissolve the Council. The Centre would also be able to limit the amount of armaments used by the Regional Police, monitor the coast through control of

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[58] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon, 1995) at 112.

[59] Donald Horowitz, " Self-Determination: Politics, Philosophy and Law" in Ian Shapiro & Will Kymlicka eds. *Ethnicity and Group Rights* (New York: New York University, 1997) at 439, Jayadeva Uyangoda, "The State and the Process of Devolution in Sri Lanka" in Sunil Bastian, ed. *Devolution and Development in Sri Lanka* (Dehli: Konark, 1994) at 95.

[60] This is the official position taken by the JVP. H.L. de Silva takes a similar position on this issue, advocating, as an alternative to devolution, constitutional remedies against unfair discrimination, and 'if need be' to provide for the safeguarding of group rights. See H.L. de Silva, "A Reply to Amita Shastri" in *Law & Society Trust Fortnightly Review* (1 May 1992) 11.

[61] This fear is reflected in an opinion poll published in the Sunday Times. More respondents (45%) disagreed with the decentralization of police powers to regional councils than with other elements of devolution. 28% supported this proposal while 27% said that they did not have enough knowledge to answer. In taking account of this information, however, one should note that the poll only included districts outside the North-Eastern Province and that information on sampling methods was not provided in the article. See "Opinion Poll: Issue-based Voting Comes a Cropper," *Sunday Times,* 24 September, 2000.

major harbours, notably Trincomalee, and retain land in the regions required for military functions.[62]

In addition, Sri Lankan Tamils actually have a structural incentive against secession, if their rights are protected. They constitute an educationally advanced group originating from an economically underdeveloped region. For this reason Tamil leaders were late to demand secession, waiting almost 30 years after independence to do so and then primarily because it was felt no reasonable alternative to safeguard their interests was available.[63]

Secession should not be considered a viable means for advancing minority rights. Secession may be justified under international customary law where a state is not providing for equal rights and self-determination within a state. However, it is generally considered a measure of last resort and should only be granted where there is permanent and gross abuse by a state of its powers and where there are no other remedies available.[64]

As a policy of conflict resolution, secession is problematic. Secession assumes ethnic differences are immutable and have such significant effects that multi-cultural states are not viable. Interestingly, the irony of secession is that the supposedly homogenous post-secession states quickly discover significant internal ethnic and sub-ethnic divisions.[65] The failure of East and West Pakistan to remain united is a particularly good example. Furthermore, when an ethnic group secedes to form its own state, members of this group that remain in the original state will face pressures to leave on the grounds that they now have their own state. Such events occurred after the partition of India and Pakistan and the secession of Eritrea from Ethiopia.

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[62] 2000 *Draft*, Articles 215 (3) on armaments, 143 (3) on state land and Second Schedule, Reserve List, s. 27 on control of ports and harbours.

[63] Donald Horowitz, *Ethnic Groups in Conflict,* (Berkeley, University of California, 1985) at 626. Arguably this demand was made as a bargaining chip for further decentralisation.

[64] Tomushat, *supra* note 56 at 10. Tomuschat justifies this position on the grounds that states are reluctant to accept rules that would threaten their survival. It is unlikely that they hold the *opinio juris* that there is a right to secession in the absence of extreme circumstances.

[65] Within an independent Tamil state in the North-East, probably the most important difference that would immediately emerge would be the cleavage between Jaffna and Batticaloa Tamils. See Tambiah, *supra* note 30 at 123. Comparable situations have existed regions aiming for secession such as Katanga, Iraqi Kurdistan, South-Eastern Nigeria ("Biafra") and Southern Sudan. See Horowitz (1997), *supra* note 59 at 444.

Four considerations support devolution as *prevention* against secession. First, devolution will protect the rights of the majority of Sri Lankan Tamils, thereby reducing their incentive to secede. While devolution may make secession easier, this concern is not justified where there already is a full-blown secessionist movement and where ethnic conflict cannot be justly resolved through alternate means within a unitary state.[66] In some countries, ethnic groups concentrated in border areas have not opted for secession. Examples include the Luo of Kenya who rely on economic opportunities outside their region, and the Pathans of Pakistan who benefit from reserve offices and state spending.[67] Second, devolution will make it more difficult for a separate state to be established in the northeast. The international community has shown a preference for decentralisation of power for the accommodation of minorities as an alternative to secession. Therefore, where devolution of power exists, foreign states are unlikely to recognise any attempted secession. Third, divisions between different ethnic communities are shaped by political boundaries. Where one ethnic group has been given autonomy, sub-ethnic divisions within that group become more important and render divisions between national ethnic communities less significant. Because intra-ethnic conflict is usually less likely to lead to violence than inter-ethnic disputes, devolution is the preferred option.[68] Finally, the devolution of power will strengthen the hands of moderate minority leaders who will then be able to demonstrate that their community's interests can be safeguarded within a united state.[69]

The best approach to combat separatism is to make remaining within Sri Lanka an attractive option for minority communities. To do this requires safeguarding the rights of minority communities. In addition, an Upper House of Parliament should be created to represent the Regions so as to give minorities an incentive to remain within Sri Lanka.[70] Finally, the state should promote a sense of solidarity among

[66] John McGarry & Brendan O'Leary, "Introduction: The Macro-political Regulation of Ethnic Conflict" in *The Politics of Ethic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts* (London: Routledge, 1993) at 35.
[67] Horowitz (1985), *supra* note 63 at 626.
[68] Horowitz (1985), *ibid.* at 598.
[69] Yash Ghai, "Ethnicity and Autonomy: A Framework for Analysis" in *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (2000) [unpublished: forthcoming from Cambridge University Press] at 23.
[70] See *Civil Society Joint Statement*, *infra* note 85 at 46 for an examination of possible structures for such representation. See also Neelan Tiruchelvam, "The Politics of Federalism and Diversity in Sri Lanka" (1998) [unpublished: on file with Tiruchelvam Associates] at 19.

Sri Lankans by accommodating, rather than subordinating, the identities and cultures of minorities.

Group-Specific Rights

Group-specific rights apply to communities rather than individuals. Examples of these rights include affirmative action, a proportionate share of government development spending and reserved representation for members of minority groups in political and judicial institutions. According to the UN General Assembly's *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,* persons belonging to minority communities have the right "to participate *effectively* in decisions on the national level and, where appropriate, on the regional level, concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation."[71] The Declaration further states that national programmes should be planned and implemented with due regard to the legitimate interests of minorities.[72] While the Declaration is neither legally binding nor prescribes specific rules, the document establishes principles that should be accepted by Sri Lanka, particularly since Sri Lanka was one of the sponsors of this resolution.[73] In the Sri Lankan context, there is a real danger of majoritarian rule at national and regional levels, in spite of a universal human rights protection system. Therefore, group-specific rights are required for achieving effective participation in society by minorities.

Group rights are often opposed on the basis that they are superfluous when the rights of individuals are protected, or even that group-specific rights derogate from individual rights. In reality, however, individual rights protections are insufficient in a deeply divided society. When making decisions on language or education, a state will normally be influenced by the cultural propensities of the majority. Minority communities may be excluded because their needs are not considered, rather than due to overt discrimination.[74] Although some group rights can undermine individual rights, this is not inevitable. Group-rights can be formulated

[71] G.A. Res. 47/135, 18 December 1992 [hereinafter *Declaration on Minorities*], Article 2 (3).
[72] *Ibid.*, Article 5 (1).
[73] Patrick Thornberry, " The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations" in Alan Phillips and Alan Rosas, eds. *The United Nations Minority Rights Declaration* (Abo: Abo Academi University Institute for Human Rights, 1993) at 41.
[74] Kymlicka, *supra* note 58 at 108-9.

in such a manner as to complement, rather than derogate from individual rights (See Section V).[75]

Group rights are required to complement devolution. Although devolution will improve the representation of Sri Lankan Tamils in the Northern and Eastern Regional Administrations, it will not ensure fair representation of minorities in the Central government. Under the 2000 draft Constitution the Central government will continue to have power over crucial areas such as taxation, land use, international lending to the regions, national education policy and labour laws. Minorities must be represented in the Central government to create a class of leaders within each community that believe there are merits to remaining within a unified state. It should be noted that one of the most common catalysts for secessionist demands within federated multi-ethnic societies is the under-representation of minorities within the Central government.[76]

Furthermore, group-specific rights are required to ensure that the national and regional minorities are not neglected. This task cannot be completely achieved by devolution of power. A substantial proportion of Sri Lankan Tamils live outside the North-Eastern Province.[77] Muslims in the Eastern Province would benefit from devolution since they form a third of the population there. It is unlikely that they would face political exclusion in the administration of the Region, given that no one community constitutes the majority in the Province. However, Muslims would form only 20% of the total population within a united North-Eastern Region, which would be dominated by a Tamil majority. In addition, more than 80% of Sri Lankan Muslims are minorities outside the northeast. There are significant Sinhalese minorities in the North-Eastern Province, particularly in Amparai (37.6%) and Trincomalee (33.8%).

Up-Country Tamils form a minority within each province in the country. It is assumed they would benefit from devolution because they represent significant proportions of the population in certain provinces. However, the Provincial Councils established in the central regions of the country have tended to neglect the interests of the Up-Country Tamils. As noted in Section I.3, provincial Sinhalese leaders in the central regions of the county consider the interests of their

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[75] *Ibid*, at 7.
[76] McGarry & O' Leary, *supra* note 66 at 34.
[77] The proportion of Tamils outside the North-East is estimated at 27.4% by Wilson, *supra* note 20 at 145. However, there is a lack of statistical data on this subject after 1981.

communities to be diametrically opposed to those of the Up-Country Tamils.[78] In contrast, national Sinhalese leaders have shown greater willingness to cooperate with Up-Country Tamil representatives and to form political coalitions with them.

Finally, group-specific rights will play a critical role in ensuring that devolution operates in a fashion that upholds the rights of minorities and peaceful relations between communities, rather than in an adversarial manner. Devolving power on the basis of ethnic demographics can be dangerous since this "reproduces the logic of ethnic chauvinists, and turns the idea of regional self-determination into an ethnic enclave. Devolution must guarantee the safety and security of local communities and entail a positive commitment to multiculturalism."[79] This is particularly true with regard to Muslims and Up-Country Tamils who will not constitute a majority in any region. Devolution of power may have the indirect effect of providing for the rights of Sinhalese and Tamil regional minorities. If regional leaders act in the interest of their ethnic communities, they will safeguard the rights of minorities as a *quid pro quo* for fair treatment of their own group members living in other regions. At various points, Tamil parties have voiced a willingness to provide adequate arrangements for Sinhalese in the North-Eastern Province in return for reciprocal treatment of Tamils in the south.[80] This formula could form the basis for concrete arrangements for minority protection. Nevertheless, a framework for the protection of group rights must be formulated prior to or during the early stages of devolution. Were this not to occur, any discriminatory actions by one group could spark counter-reactions in other regions and lead to the development of ethnic enclaves.

In conclusion, although universal rights and the devolution of power will bolster the ability of minorities to claim their rights, there are foreseeable situations in which they will not provide a remedy in instances of discrimination and neglect of minority interests. Group rights therefore have a critical role to play in the

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[78] Bastiampillai, *supra* note 36.

[79] Darini Rajasingham-Senanayake, "After Devolution: Protecting Local Minorities and Mixed Settlements," (1998) 5: (4 &5) *Pravada* 12 at 15.

[80] Ketheshwaran Loganathan, *Sri Lanka: Lost Opportunities.* (Colombo: CEPRA, 1996) at 67. This position was taken in the 1976 Vaddukodai Resolution of most Tamil parties, which called for an independent state, and in the Four-Point Formula presented by seven Tamil political parties at the Mangala Moonesinghe Select Committee hearings in 1992. These parties also stated their acceptance of institutional arrangements, within the framework of an unbifurcated North-Eastern Province, for the Muslim people to ensure their cultural identity and security. Loganathan at 173.

minority rights protection system in Sri Lanka. Section 5 discusses the nature of group-specific rights that are appropriate for Sri Lanka.

Assessment of the 2000 Draft Constitution and Recommended Changes

III. Universal Rights

In comparison to the 1978 Constitution, the 2000 draft includes a number of important new rights. The 2000 draft Constitution includes Sri Lanka's first provision for the right to life. An arrested person must be informed of the reasons for the arrest and of their rights.[81] No restrictions on the right to life and the freedom from torture are permitted.[82] As in the 1978 Constitution, other rights may be restricted by the state for reasons of public security and public order. In contrast, the 2000 draft allows the state less discretion as it only permits restrictions if they are "necessary in a democratic society." In addition, the draft Constitution finally resolves the issue of disenfranchisement by granting citizenship to all Up-Country Tamils still resident in Sri Lanka who remain stateless.[83] Finally, the 2000 draft introduces social rights such as the right to adequate housing and health. The latter rights are of interest to minorities as they will make the courts more willing to address discrimination in government spending. Although social rights are to be realised progressively, they require the government to concentrate on the most vulnerable groups in society. Minorities often fall into this category

The 2000 draft unfortunately removes two important rights that had been provided for in the 1997 draft. These are the rights to written reasons for arrest after a reasonable time and protection from excessive bail.[84] The right to written reasons would be very useful, as it would create a disincentive against the routine police practise of arbitrarily rounding up and detaining Tamil civilians (See Section 1.4). The fundamental rights provisions in the 2000 draft have been extensively critiqued by a number of civil society organisations.[85] Some of the most important

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[81] *2000 Draft,* Articles 8, 10 (3), 10 (4).

[82] However, all fundamental rights can be derogated from via the exclusion of existing laws from review in Article 28. See Section 3.2. below.

[83] 2000 *Draft*, Article 52 (6).

[84] *The Government's Proposals for Constitutional Reform,* October 1997, Article 127 (3) [hereinafter *1997 Draft Constitution*], Articles 3 (b) & 7 (b).

[85] See *Joint Statement on Priority Areas of Concern Regarding the Draft Constitution and Fundamental Rights,* published in (July 2000) 10:153 LST Review 31. This document lists the most serious issues, and proposed amendments, by 11 human rights organisations in reaction to the PA-UNP consensus agreement

concerns for minorities are the appointment of the judiciary, judicial review of legislation and affirmative action.

3.1. Judicial Review of Legislation

According to the 2000 draft, the Constitution will not be supreme over all legislation. Article 28 states that all laws and regulations existing prior to the enactment of the Constitution will remain valid even if inconsistent with the Fundamental Rights Chapter of the Constitution.[86] This language makes many of the newly protected freedoms illusory.[87] In particular, the phrasing insulates the Prevention of Terrorism Act (PTA), discussed in Section 1.4, from review. In addition, Article 28 could undermine other existing protections. Currently, the Supreme Court may rule on the constitutionality of subordinate legislation, such as Emergency Regulations under the Public Security Ordinance. However, once the new Constitution is enacted, these regulations would be covered by Article 28 and insulated from judicial review.[88] Finally, because the public will not have a clear notion of how their fundamental rights are limited by Article 28, their ability to demand their rights may be thwarted.

The 2000 draft Constitution increases the time available to challenge legislative bills that are contrary to the Constitution. The new draft changes the time requirement from one week to two years. While this is an improvement, it is still inadequate. Persons who are affected by discriminatory legislation two years after its enactment will not have any opportunity to demand a remedy in court.[89]

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released in July 2000. See also a compilation of viewpoints on fundamental rights by Deepika Udagama, Rohan Edirisinha and the Report on Women and the Draft Constitution in Dinusha Pandiratne and Pradeep Ratnam, eds. *The Draft Constitution of Sri Lanka: Critical Aspects* (Colombo: Law & Society Trust, 1998). The latter publication deals with the 1997 draft Constitution. However, virtually all the concerns raised remain in relation to the 2000 draft.

[86] Article 28 (2) provides for a Commission to examine all laws for compliance with the Fundamental Rights chapter within three years of the passage of the Constitution. However, there is no requirement for Parliament to follow the Commission's recommendations.

[87] See the report by Patricia Hyndman, "Consultation on the Draft Constitution of Sri Lanka" (July 2000) 10:153 LST Review 1 at 6-9, for the emphasis on this issue by a number of international legal experts.

[88] *CIJL Mission, supra* note 51 at 96-98.

[89] See, for more detail, *Civil Society Joint Statement, supra* note 85 at 42 & 48. This statement proposes an amendment whereby there will be no time limitations on judicial review. However, a court may only invalidate a law in a 'prospective' manner, that is, the court's decision will not unwarrantedly affect actions justified by this law before the matter was brought before the court.

The 2000 draft goes beyond the 1997 draft in limiting judicial review of legislation. Article 168 (4) states that where the Supreme Court has decided on the constitutionality of a provision before it is enacted, the same provision cannot be challenged on the same ground. However, experience from other jurisdictions such as Canada shows that courts reverse their decisions in light of new information as to the impact of a law. Therefore, the above limitations on judicial review must be removed. [90]

3.2. Appointment of the Judiciary

It is questionable whether the 2000 draft Constitution adequately guarantees judicial independence.[91] The President alone will appoint the Chief Justice, and will select the other judges of the Supreme Court and Court of Appeal after 'ascertaining the views of the Chief Justice.'[92] There is little to prevent arbitrary appointments, and it has been proposed that the Constitutional Council have a role in this procedure to ensure wider consultation in the appointment process. However, a less political method would be to create an independent Judicial Services Commission to appoint the senior judiciary. The South African Constitution includes a provision for this style of judicial selection. The South African Judicial Services Commission provides a list of nominees from whom the President selects the judiciary. If the President considers nominees unacceptable, he or she must give reasons and the Commission is to provide new nominees.[93] The Sri Lankan Constitution should incorporate such a system of judicial appointment.

3.3. Affirmative Action

Article 11(4) of the 2000 draft Constitution provides an exemption from the principle of equality for special measures "where necessary for sole purpose of the protection or advancement of disadvantaged or underprivileged groups including those that are disadvantaged or underprivileged because of ethnicity."[94] While this derogation is necessary, it should incorporate the proportionality limitation on

[90] Comments by Stephen Toope at the Consultation on the Draft Constitution, *supra* note 87 at 8.

[91] Judicial independence is undermined in other ways. A judge can be required by the President to perform other legal duties, and cannot appear in Court as a practitioner or work for the state after retirement, except with the President's written permission (Article 154).

[92] 2000 *Draft*, Article 151.

[93] *Constitution of the Republic of South Africa Act 108 (1996 Constitution)*, Article 178.

[94] See Section 5.6 on the question of which groups should qualify for such special measures.

affirmative action contained in the *International Convention on the Elimination of All Forms of Racial Discrimination.* This limit requires that affirmative action not lead to the maintenance of separate rights; and that special measures shall not be maintained once their objectives have been achieved.[95]

Article 11 (4) of the 2000 draft permits such derogations to be carried out by executive action or subordinate legislation. Such derogation should only be permitted by legislative action. It is important that the overall effects of affirmative action be considered by a legislative body prior to enactment. This type of review would make decision-making on this subject more informed and accessible to the public.

The revised Fundamental Rights Chapter could play an important role in protecting minority rights. Apart from improvements to the Chapter, success will depend on the state's willingness and ability to implement the rights in the Chapter. This is closely related to the institutional effectiveness and independence of the Human Rights Commission and the Ombudsman.[96] It is unfortunate that there have been few attempts by minorities to use the courts to resolve complaints of discrimination contrary to the equality provisions of the 1978 Constitution. This suggests that minorities do not have confidence in the legal process. Such a factor may be remedied by the introduction of group-specific rights in relation to the judiciary (See Section 5.7. Another explanation is the lack of a tradition of 'social action litigation' whereby social movements use the courts as an instrument of social change. Notably, the Constitution has been similarly neglected as a tool to counter gender discrimination.[97] Equality challenges have mostly come from civil servants complaining about arbitrary or irrational discrimination. Improvement to the Fundamental Rights Chapter of the Constitution will not, in itself, alter this state of affairs. However, it is an important prerequisite for social action litigation to defend minority rights.

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[95] *Convention against Racial Discrimination, supra* note 27, Art. 1 (4).

[96] The Ombudsman currently has a staff of less than 25 and a large backlog of complaints. M.C.M. Iqbal, "A Powerful Ombudsman Needed," *The Island,* Friday 18th August 2000, Rohan Edrisinha, "A Critique of the Office of the Ombudsman in Sri Lanka" (February 2000) 10:148 *LST Review* 16 at 18, 20. Many of these problems equally beset the Human Rights Commission, including inadequate criteria for the appointment of Commissioners and a lack of sufficient full-time Commissioners. See Ambika Satkunanathan, " The Human Rights Commission" in Elizabeth Nissan, ed., *Sri Lanka: State of Human Rights Report 2000* (Colombo: Law and Society Trust, 2000).

[97] The first fundamental rights case on gender discrimination was brought to the Supreme Court in 1999, 21 years after the passage of the current Constitution.

IV. Devolution of Power

Compared to the Thirteenth Amendment, devolution provisions in the 2000 draft Constitution ensure Regional Administrations will have a significant amount of power. The 2000 draft abolishes the concurrent list of powers and transfers most of these powers to the Regions. This will lead to a clearer division of powers between the Centre and the Regions. In addition, the term 'unitary state' has been dropped from the draft Constitution. The term 'unitary state', contained in the 1978 Constitution, had been understood by the Courts as implying that the Centre should be allowed the broadest possible interpretation of its listed powers in the Constitution.[98] Importantly, amendments by Parliament to the devolution provisions of the new Constitution will apply only to Regions that accept them.[99] Finally, in relation to land settlement, the term 'national ethnic ratio' has been removed. Priority in land settlement is to be given first to landless persons within the sub-division in question, then to people within the district and finally to people in that region.[100] If applied strictly, this provision will ensure ethnic distributions within a region are not altered by government-sponsored settlements.

There are still a number of areas where the Centre can undermine regional autonomy. Because this issue has been intensively analysed by a number of commentators,[101] only the most important concerns will be addressed, with greater attention paid to those appearing for the first time in the August 2000 draft.

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[98] Tiruchelvam, 'Federalism and Diversity' (1998), *supra* note 70 at 17.

[99] 2000 *Draft*, Article 101 (2). In the long run, this provision may allow for asymmetrical devolution, through which Sinhala-dominated Regions may permit some of their powers to be transferred to the Centre. This is possible where the majority party or coalition in Parliament also controls the Region in question. As opposed to explicit provision for asymmetry in the Constitution, this form of asymmetry may be seen by Sinhala opinion as fair since all Regions are given the same opportunity to gain equivalent levels of autonomy. However, one must note Ghai's argument that asymmetry will normally lead to demands that the representatives of the region concerned be excluded from national decisions on subjects in which it has autonomy. Such a system would undermine the ability of the representatives of the region to count towards a Parliamentary majority, and could lead the region to look inwards and reduce its integration with the state. See Ghai, *supra* note 69 at 14.

[100] *2000 Draft*, Article 143 (7). Unfortunately, Article 144 (3) of the August 2000 draft added an exception for programmes begun prior to the commencement of the Constitution. Such programes would continue to be governed by the criteria that applied prior to the Constitution's commencement (See Section 1.1).

[101] See Sunil Bastian, "The Mechanics of Devolution" and Rohan Edrisinha, " Critical Overview" in Dinusha Pandiratne and Pradeep Ratnam, eds. *The Draft Constitution of Sri Lanka: Critical Aspects* (Colombo: Law & Society Trust, 1998) on the position of the Governor, the Proclamation of Emergency and Regional Representation at the Centre. Virtually all these concerns remain outstanding with regard to the August 2000 draft. However, under the 1997 draft, the appointment of the Governor was by the President on the advice of the Chief Minister. In contrast, the 2000 draft states that the President appoints

4.1. Characterisation of the State

Several Central Government powers, such as inter-regional transport, inter-regional irrigation schemes and national policy on education could be interpreted by the Centre and the judiciary broadly and therefore frustrate devolution. It is important that the first Chapter in the Constitution recognises the Central government will share *substantial* power with the Regions. Article 1 of the October 1997 draft Constitution was written in this manner. The article stated Sri Lanka is an 'indissoluble union of regions.' However, Article 1 of the August 2000 draft states Sri Lanka is a "State consisting of the institutions of the Centre and of the Regions which shall exercise power as laid down in the Constitution." It is therefore necessary the term 'indissoluble union of regions' or an equivalent term be retained in the draft Constitution.

4.2. Dispute Resolution Institutions between the Centre and Regions

The 2000 draft Constitution establishes non-judicial mechanisms to address certain disputes and interactions between the Centre and Regions. The critical institution in the appointment process is the Constitutional Council. The Council will have only one regional representative, the Chairman of the Chief Ministers Conference. There will also be at least two or three minority representatives. These representatives may support devolution, but this is not guaranteed since the Centre will play a significant role in their selection.[102]

The four institutions dealt with below are the Finance Commission, the National Land Use Council, the ad hoc tribunal on land disputes (the 'Land Dispute Tribunal') and the ad hoc tribunal on the Proclamation of the Emergency (the 'Emergency Tribunal'). Decisions by these institutions may not be challenged in any court, and there is no requirement that members have judicial expertise.[103]

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the Governor in consultation with the Prime Minister and with the concurrence of the Chief Minister. If they disagree, the Constitutional Council chooses the Governor. This process may undermine the effective functioning of the Region. However, there is a safeguard. The Governor can be removed by a majority of the Regional Council on grounds, *inter alia,* of intentional violation of the Constitution. *2000 Draft,* Articles 129 (2) & (3).

[102] See below at Section 5.4 for the Constitutional Council and Section 5.3 on the election of the Vice-Presidents

[103] *2000 Draft,* Articles 223 (6) and 224 [Emergency Tribunal], 143 (6.c) [Land Dispute Tribunal], 145 (5) [National Land Use Commission] and 211(8) [Finance Commission].

The first institution is the Finance Commission, which is appointed by the President upon recommendations from the Constitutional Council. The Commission has the power to recommend levels of state funds to be distributed to each Region. The Regions have no representation. However, there must be at least one Tamil and one Muslim member on the five-member Commission. These two persons *may* represent regional interests, especially in the case of the North-Eastern Region, but this is not guaranteed.[104] The composition of this Commission will make it possible for the Centre to discriminate against minority-dominated Regions in the distribution of funds.

The second institution, the National Land Use Council, has the power to formulate policies on the use of land throughout the country. If this Council considers that a Region is deliberately not complying with these policies, the Council may order Regional state land to be transferred to the Centre. The Council is comprised in equal parts of central and regional representatives.[105] This arrangement will make it possible for the Centre to take land away from the Regions if it can co-opt at least one Regional representative. This is a foreseeable eventuality if the dispute centres on land in a minority-dominated Region.

The third institution, the Land Dispute Tribunal, is formed when the Centre requires state land from the Region and the Region refuses to transfer such land. The Region and the Centre each pick one representative to sit on the tribunal. The third representative is selected by the first two or, in the absence of agreement, by the Constitutional Council.[106] Since the Constitutional Council is dominated by representatives from the Centre, the Land Dispute Tribunal could be used to undermine devolution by allowing the Centre to seize control of regional land.

The fourth institution, the Emergency Tribunal, is constituted in a similar manner as the Land Dispute Tribunal. The Emergency Tribunal is established when the President, upon the advice of the Prime Minister, issues a Proclamation of Emergency within a Region under Article 223. This Article permits the President to take over the functions of the Regional Administration and, if necessary for this purpose, to dissolve the Regional Administration. This action may be taken on the grounds that the Region is advocating armed insurrection or intentionally violating specified key articles of the Constitution and that this constitutes a clear and

[104] 2000 *Draft,* Article 211.
[105] *Ibid.,* Article 145.
[106] *2000 Draft,* Article 143 (6).

present danger to the unity and sovereignty of the Republic.[107] The Tribunal has to report within 60 days of the Proclamation of Emergency and may require the President to revoke the Proclamation if it finds the Proclamation unjustified.[108] However, in such a dispute, the Centre will select the majority of the Tribunal. The Centre can therefore undermine devolution even if a Region is not actually threatening the unity and sovereignty of Sri Lanka.

The above four mechanisms will allow the Centre to undermine the independence of a minority-dominated Region. However, these methods may be preferable to decision-making by the senior judiciary. First, the above bodies (save the Finance Commission) are not appointed exclusively by the Centre. Second, each of these institutions (other than the National Land Use Council) is likely to be more ethnically balanced than the judiciary, which would normally be predominantly Sinhalese.[109] Although some recent Supreme Court opinions have upheld Regional powers, the Supreme Court's decisions in relation to the North-Eastern Province from 1987-1990 permitted the Centre to limit the reach of regional jurisdiction.[110] Nevertheless, the draft constitutional provisions on the above four institutions should be adapted as follows:

- There should be greater representation of the Regions on the Constitutional Council.
- The Constitution should require that members of the tribunals and a significant number of members of the National Land Use Commission have judicial expertise.
- The National Land Use Council's mandate should be clearly limited to environmental standards.[111] The Council should enforce its

[107] These provisions include Articles, 1, 2,3 and the articles in Chapter XV (Devolution) and Chapter XXII (defence, security and law and order). Article 3 prevents a Regional Administration from advocating secession. A Region may make representations to the Centre on the change in the boundaries or name of any Region, but may not otherwise advocate or promote such changes.
[108] *Ibid.*, Article 223 (4).
[109] See Section 5.7 on the judiciary and ethnicity. Furthermore, Coomaraswamy argues that in a plural society, the judiciary may not be the ideal forum for the resolution of ethnic conflict, particularly those relating to fundamental structural questions. Radhika Coomaraswamy, "Devolution, the Law and Judicial Construction" in Sunil Bastian, ed. *Devolution and Development in Sri Lanka* (Colombo: International Centre for Ethnic Studies, 1994) at 121-142.
[110] Tiruchelvam, *Constitutionalism and Diversity, supra* note 4 at 26-28.
[111] Article 145 (2) (a) of the draft is too open-ended. This Article states that the Council is charged with: "the formulation of *national land use policy,* taking into account international standards relating to the appropriate amount of forest cover, exploitation of natural resources, the quality of the environment *and other relevant matters"* [italics mine].

recommendations by requiring specific performance rather than transfers of regional land to the Centre.

These reforms would increase the likelihood that these institutions will come to fair decisions in disputes between the Region and the Centre and will respect the Constitution's devolution provisions.

4.3. Proclamation of Emergency

Under the 2000 draft Constitution, the Proclamation of Emergency within a Region can occur in three ways. The first is by the President on the advice of the Prime Minister under Article 223. This provision has been critiqued above in Section 4.2. The second manner to declare an Emergency is by the President at the request of the Governor of the Region, acting upon the advice of the Chief Minister.[112] Since this Emergency is initiated by the Chief Minister, it does not have any negative implications for the devolution of powers. The third route to an Emergency is a Proclamation by the President, on the advice of the Prime Minister. This Proclamation must be approved by Parliament after 14 days and the Regional Council after 90 days.[113] The 90-day delay for Regional ratification could allow the President to undermine the functioning of this Council. This delay is excessive, particularly given the separate Article 223 remedy that may be used when a Region is intentionally violating the Constitution. There is no prohibition against the renewal of the Proclamation and no Court is permitted to review its validity. In order for there to be some accountability in the Proclamation of Emergency, the Supreme Court should be able to review whether such a declaration is based on a rational belief that a state of emergency exists or is imminent.[114] One formulation that might be acceptable to the government would be for the Constitution to allow the Supreme Court to review the reasonableness of the proclamation of emergency, rather than its correctness, thus allowing it to intervene only where a proclamation is arbitrarily declared.

This Section has primarily dealt with the extent to which Regional Administrations are secure from any unjustified incursions or discrimination by the Centre. It should be noted, however, that the level of devolution in the 2000 draft is unduly limited in a number of areas including education, the maintenance of law and order

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[112] *Ibid., Article 221 (1) (a).*
[113] *Ibid.,* Articles 220, 222 (3) & (7).
[114] *CIJL Mission, supra* note 51 at 21.

and state land. The Centre has control over the 'National Policy on Education.' In addition, in the 2000 draft, the Centre is given control over curriculum and syllabi.[115] Instead of such an ambiguously wide power, the Centre should be limited to setting national standards for education. Relative to the police force, three of the five members on each Regional Police Commission (responsible for all regional police personnel decisions) are nominated by the Constitutional Council acting in consultation with the Regional Executive. This level of Central control is unnecessary. The National Police Commission will have jurisdiction over offences against the Republic and threats to national security, and full power to regulate the use and control of weapons.[116] Regional control of state land, as provided in the 1997 draft, has been significantly reduced. The Centre will now succeed to all land currently being used for Central government functions, regardless of whether the amount is reasonable in relation to the needs of the Centre.

V. Group-Specific Rights

The 2000 draft Constitution addresses group-specific rights by providing for cabinet power-sharing at the regional level and recommending the representation of minorities in the Central government Cabinet. However, these provisions are relatively conservative and ignore the need for the state to recognize and protect group rights at all political and judicial levels.

The emphasis placed on federalism by Sri Lankan Tamil leaders has contributed to the neglect of group-specific rights. Since 1949 Sri Lankan Tamil leaders have argued for a federal system because they feel the prospect of power sharing at the Centre is unattainable.[117] In part, this strategy is bolstered by the nature of their electoral base, which is exclusively in the North-Eastern Province. There are a significant number of Sri Lankan Tamil voters outside this area, but in the absence of strong alliances with the major parties, their votes are too dispersed to translate into seats in Parliament.

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[115] 2000 *Draft,* Second Schedule, Reserve List, s. 45.

[116] *Ibid.,* Articles 216 2 (a) & (g) & Second Schedule, List I: Reserved List, s.3.

[117] According to A. Jeyaratnam Wilson, "[the Tamils] are aware that there are no ideal constitutional devices to counter discrimination *supra* note 20 at 165. However, the following analysis will show that such constitutional devices are indeed available.

Group rights on the consociational model were brought into the constitutional reform project due to concerns of Muslims from the Eastern Province. Muslims felt that Tamils would dominate a merged North-Eastern Region. Discussions in 1997 between the SLMC and the TULF provided for a South Eastern Regional Council for the Muslims. The two parties agreed on further measures to safeguard the rights of Muslims in the Tamil-majority unit and Tamils in the Muslim-majority unit. These measures included the re-drawing of electoral boundaries to ensure sufficient Muslim/Tamil representation in the provincial legislature; further devolution of power to and guaranteed financing for Muslim/Tamil majority Pradeshiya Sabhas; guaranteed Muslim/Tamil representation in the Executive; a Deputy Chief Minister from a different community than that of the Chief Minister; parallel consent provisions; separate Muslim educational facilities; and proportionality in land distribution and public sector employment.[118]

In 1995, the reformers of the Constitution sought to resolve these concerns by stating that the final outcome on the Eastern Province question would reconcile the interests of the three major communities.[119] The 1997 draft Constitution envisaged that a Referendum would be held in Batticaloa and Trincomalee to determine whether these two districts would merge with the Northern Province. If this merger did occur, a Muslim majority Region would be set up in part of Amparai District comprising the Polling Divisions of Kalmunai, Sammanthurai and Pottuvil. A Referendum would be held in the Amparai Polling Division to decide its status as a separate Region or its merger with Uva.[120] However, the above proposal to redraw provincial boundaries was criticised as subscribing to an ethnic enclave mentality.[121] Interestingly, the 1997 draft did not provide for any of the group rights discussed by the TULF and SLMC. It only required power-sharing between the political parties in the Regional Councils. This arrangement, however, would not apply to Parliament.

The proposal for the re-demarcation of the Eastern Province was dropped in the 2000 draft. The draft provided for a Referendum in the Eastern Province to determine whether it should be merged with the Northern Province. This may appear unfair to the Muslims and Sinhalese because their interests would be subsumed to those of the Tamils in the event of a successful Referendum.

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[118] See Memoranda between the SLMC and TULF on Power-sharing, 1997.

[119] Government's Devolution Proposals, August 3, 1995, Article 1.1.

[120] *1997 Draft Constitution*, *supra* note 84, Article 127 (3).

[121] Rajasingham-Senanayake, *supra* note 79 at 14.

However, the re-demarcation of the Eastern Province under the 1997 draft could only have been a partial solution for Muslim and Sinhala communities. The proposed Muslim Region would only have included a third of the Muslim population from the current North-Eastern Province and 10% of the total Muslim population in the country. It also would have comprised non-contiguous areas. The excising of part of Amparai from the east would have left a large Sinhalese community (33.8%) in Trincomalee and significant numbers in Mannar (8.1%) and Vavuniya (16.6%).[122] It seems the best solution is to maintain separate Northern and Eastern Regions but to allow regions to cooperate on a specified range of areas. Nevertheless, any decision made on this issue will be seen as prejudicial either to the Tamil community or to the Muslims and Sinhalese. Group-specific rights must be provided to mitigate the impact of this decision.

The SLMC played a significant role in the March-July 2000 PA-UNP discussions. After its first choice of a Muslim South-Eastern Region was rejected,[123] discussions moved to means to safeguard the rights of Muslims and Sinhalese in the merged Northern and Eastern regions (prior to a referendum on their permanent merger). This referendum will occur ten years after the passage of the Constitution.[124] A full range of consociational measures were enacted for the Interim Council for the Northern and Eastern Regions. Articles 244 to 252 of the 2000 draft list the following:

- There will be two positions of Deputy Chief Minister for the leaders of the Muslim and Sinhalese communities. Several important ministries will be reserved for these two leaders. These include health, rehabilitation, social services and Islamic culture for the Muslim Deputy Chief Minister; and archaeology and museums, Buddhist culture, housing, and transport for the Sinhalese Deputy Chief Minister.

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[122] These figures, based on the 1981 census, are taken from Nissan, *supra* note 15 at 9 and Hasbullah, *supra* note 32 at 4. The proportion of Muslims and Sinhalese in the North, will have decreased considerably since the war began. However, the Constitution should be designed on the basis that internally displaced people have the right to return to their previous residences.

[123] *Decisions arrived at the Discussions between the People's Alliance (PA) and the United National Party (UNP) on Constitutional Reform,* 14 June 2000 *[hereinafter PA-UNP Discussions].*

[124] *Ibid.* 21 June, 2000. However, the SLMC leader at the time, Mr. Ashraff, expressed the fear that the proposed Referendum would never be held.

- The Governor, Board of Minister and the Interim Council are required by Article 245 (2) to exercise their powers in a rigorously impartial manner. This clause appears to be justiciable (See Section 5.9 below)

- There will be provision for parallel consent by the majority of members of each community in the legislature. Parallel consent will be required for the election of the Speaker and where 30% of the Interim Council members state that a draft statute will have a vital bearing on religious practise, security or economic opportunities.

- Recruitment to the Public Service will "as far as practicable" reflect the ethnic composition of the region (for regional appointments) and the district (for district appointments).

- There will be Cultural Committees for each community to promote its culture, composed of its representatives in the Regional Council.

- An Equality Commission, comprising one member of each of the three communities, will be formed to monitor the Interim Council and Board of Ministers. The Commission will examine whether these institutions promote "parity of esteem" and equality of opportunity ("in matter such as employment and access to public services") amongst all communities.

- The Interim Council must ensure funds are not applied in a manner discriminatory against "minority communities living in concentrations." The Interim Council shall follow Finance Commission guidelines requiring it to reduce disparities in development in local authority areas.

The Good Friday Agreement in Northern Ireland inspired a number of these clauses. The Interim Council provisions would introduce a consociational framework utilised in a number of ethnically divided states. This involves a 'Grand Coalition' representing the major segments within the society; proportionality of expenditure on and representation of ethnic groups; community autonomy in relation to cultural matters; and mutual vetoes for each minority group.[125] The Interim Council's only significant variation from the consociational

[125] Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University, 1977) at 25 ff. Consociational arrangements are found primarily in European states, including

model is that strict proportionality will not be followed in the composition of the government service. Rather, there will be rigorous non-discrimination and a balancing of merit and representation. As such, these provisions follow the Good Friday Agreement and demonstrate a new form of consociationalism; a form that relies on human rights language of non-discrimination and equal opportunity rather than fixed quotas.[126]

The Interim Council protections will lapse after ten years. This will increase the impact of the Eastern Region Referendum since the community that 'loses' the Referendum will face a political system that does not constrain majority rule. The Interim Council provisions should be extended so as to remain in place for a significant period of time *after* the Referendum. This action will help build confidence between the ethnic communities in the Northern and Eastern Regions. In addition, most of the Interim Council provisions should be incorporated into the Constitution on a permanent basis, governing the Centre and each of the Regions. If limited to the Northern and Eastern Regions, the Interim Council provisions may be interpreted as being motivated by political advantage rather than as a means of achieving justice. It is difficult to justify protections for minorities only in the Northern and Eastern Regions, but not for minorities in the other Regions.

It is argued that consociationalism requires a set of pre-conditions such as motivations for compromise between political elites. Such motivation of often lacking because the long-term gains from power-sharing with other ethnic groups are often not calculated in the short-term decisions of political leaders.[127] Furthermore, consociationalism requires political autonomy among the leaders of each ethnic group. This allows leaders to make compromises without being 'outflanked' by politicians within the same community opposed to compromise.[128] Consociationalism was attempted with the Sinhalese-Tamil political agreements (the Pacts of 1957 and 1965) but failed to take root precisely due to the outflanking phenomenon.[129]

Belgium, Italy (the South Tyrol), and in Bosnia–Herzegovina after the 1995 Dayton peace agreement. Consociational governments also exist in Lebanon and Malaysia.

[126] See on this issue, P. Magean and M. O'Brien, " From the Margins to the Mainstream: Human Rights and the Good Friday Agreement" (1999) Fordham Int'l L.J. 1499 at 1520-1529.

[127] Horowitz (1985), *supra* note 63 at 541.

[128] McGarry & O'Leary, *supra* note 66 at 37.

[129] Wilson, *supra* note 20 at 151-155.

Though consociationalism as a political practise might not emerge organically, two points must be considered. First, consociational principles can be incorporated into the Constitution to prescribe minimum standards for the treatment of minorities. In this manner, many contentious majority-minority issues can be resolved on the basis of constitutional principles rather than on the basis of political power. Second, there have been instances where consociationalism was part of an explicit and temporal political bargain and given legal effect. This was seen in South Tyrol, Italy where consociational arrangements for German speakers have remained in force for almost thirty years and are seen as one of the most successful examples of consociationalism. In contrast, consociational practise Canada has been maintained by convention rather than by legal principles. As a result, at key points in Canada's history, such as the debate over conscription and the enactment of the 1982 Constitution, Canadian governments have been able to make unilateral decisions over the strong opposition of Quebec.[130]

Leadership in Sinhala and Tamil communities has historically been splintered and this has hampered past political agreements between these two communities. There is a strong possibility that ethnic harmony based solely on negotiations and goodwill cannot always be relied upon. Instead, institutional arrangements that mandate the protection of minority rights are required. These arrangements would help insulate the Central government and Regional Administrations from popular demands for ethnic supremacy. In addition, executive power-sharing mandated by the Constitution could help develop a culture of power-sharing. Such a Constitution for Sri Lanka may be achieved as part of a political bargain to resolve the ethnic conflict.

There have been doubts as to whether consociational arrangements can work in Sri Lanka given that social cleavages are intense and cumulative. At the same time, an ethnically divided society with a combative political culture cannot afford the luxury of having winners and losers.[131] However, concerns about consociationalism are understandable. In some of its forms, consociationalism can undermine democracy by limiting the ability of the electorate to vote leaders out of

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[130] Noel, S.J.R., 'Canadian responses to ethnic conflict: consociationalism, federalism and control' in John McGarry and Brendan O'Leary eds. *The Politics of Ethnic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts* (Routledge, New York, 1993) at 50 & 58-60.

[131] Tiruchelvam, *Constitutionalism and Diversity*, *supra* note 4 at 21-22. Lijphart notes that in Northern Ireland, conditions for consociationalism are extremely unfavourable. However, consociationalism remains the only logical solution to the ethnic conflict, Arend Lijphart, "The Framework Document in Northern Ireland and the Theory of Power-Sharing" (1996) 21 *Government and Politics* 267 at 268.

office. The system of proportionality can undermine the principles of merit and equal competition. Parallel consent can allow any community to hold extreme positions and bring the political process to a halt. Consociationalism also may strengthen ethnic divisions and create incentives for political leaders to perpetuate ethnic differences.

Those proposing consociational measures in Sri Lanka need to be aware of these concerns and adapt their proposals accordingly. It is necessary to design consociational institutions in a manner that reduces any negative impacts on the imperatives of merit, democracy, accountability and institutional effectiveness. In some situations, it will be necessary to weigh the negative and positive impacts of each consociational structure. Only some of the Interim Council provisions can be applied to the state on a permanent or long-term basis. For example, reserving special cabinet portfolios for specific ethnic groups is appropriate as a temporary confidence-building measure.[132] Over the long-term however, this may reduce the accountability of the office-holder.

Consociationalism does not always perpetuate ethnic differences. The experience in the Netherlands was that consociational arrangements for Catholic and Protestant parties, established in 1917, led to the resolution of inter-sectarian issues and their eventual depoliticisation. After 1967, parties began to form on non-sectarian basis.[133] In addition, if there are clearly reserved positions for the representatives of an ethnic group, there will be incentives for the development of sub-ethnic competition for such positions. Polarisation between the larger ethnic groups will be reduced. In fact, the more important concern in designing a consociational system is that it avoid neglecting new ethnic differences. Adopting a fixed and rigid approach can be counter-productive because ethnic consciousness shifts with the balance of power.[134] It is preferable to have minority protections that allow ethnic groups to define themselves on a continual basis, rather than have their identities pre-determined when the Constitution is enacted.[135] This is possible with proposed arrangements such as Executive power-sharing and the

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[132] This point was made by Rohan Edrisinha in the context of civil society discussions on Constitutional Reform.

[133] K. Aarts, S. Macdonald and G. Rabinowitz, "Issues and Party Competition in the Netherlands" (1999) 32:1 *Comparative Political Studies* 63 at 71-72.

[134] Tiruchelvam, *Federalism and Diversity, supra* note 70 at 25.

[135] Such a policy is supported by Lijphart in "Self-Determination verses Pre-Determination of Ethnic Minorities in Power-Sharing Systems" in Will Kymlicka, ed. *The Rights of Minority Cultures* (Oxford: Oxford, 1995) at 21.

Equality Commission. However, as discussed below, some important aspects of group-specific rights cannot be provided for in the Constitution without demarcating the communities involved.

5.1. Legislative Representation

With the exception of the Up-country Tamils during the period of disenfranchisement, minorities have managed to gain representation in Parliament that broadly reflects their demographic weight. The current electoral system, based on proportional representation within multi-member constituencies, facilitates this situation. Under this system, it is more likely minority candidates will be elected from areas where they are significantly concentrated, yet do not form a majority. In such areas, minorities would be less likely to be elected under a first past the post electoral system.

The proportional representation electoral system also affects the position that the majority will take towards the minority. Proportional representation creates a strong incentive for the leaders of political parties to try to gain votes of minority communities. Under the first past the post system, Sinhalese-based parties in many constituencies and Tamil-based parties in parts of the Northern and Eastern Provinces could campaign on an ethnically exclusive platform and attract a plurality of the votes. However, under proportional representation, every vote counts. A strategy of alienating minority groups is less likely to yield electoral success. Finally, proportional representation reduces the gap between the share of votes and seats in the legislature. It thereby allows smaller political parties a greater opportunity to influence the political process.[136]

Recent government proposals to amend this electoral system should only be accepted if they provide incentives for moderation by majority parties and retain the ability of minority parties to play an affective role in Parliament and the Regional Councils. An 'alternate vote' (also known as 'single transferable vote') system, as currently used for the election of the President will generally induce moderate behaviour by politicians since minorities may vote for moderate candidates from the majority as their second preference. This system, however, may artificially enhance the number of seats gained by the party that gains the

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[136] Horowitz (1985), *supra* note 63 at 642. However, Horowitz notes that this incentive structure does not *guarantee* moderation and, in Sri Lanka's case, may have come too late. Proportional representation did not come into operation until 1988.

plurality of the vote, thereby reducing the impact of minority parties. A first past the post system will reduce the incentive for moderation and the number of minority candidates elected.

It has been argued that Tamils may be underrepresented in Parliament by up to ten seats.[137] However, even if this were remedied, it would be unlikely to make a great difference to legislative outcomes where Sinhalese and Tamil interests are seen to be diametrically opposed. There have been suggestions that there should be guaranteed representation of minorities in an Upper House, at a 50:50 or 60:40 ratio.[138] However, this would be unfair to the majority community and contrary to democratic principles. One could refer to the negative reaction to the Tamil Congress's demand for such representation prior to independence.[139] As an alternative, the goal could be achieved without over-representing any community by establishing parallel consent provisions (See Section 5.2).

The 2000 draft Constitution does not specify the electoral system for Regional Councils and states that Parliament will decide this matter.[140] Unfortunately, leaving this decision to Parliament could allow for legislation that undermines the capacity of regional minorities to enter Regional Councils. Previous laws stated that a party required 12.5% of the vote in a constituency to enter a Provincial Council. If this had been enforced it would have barred many Ceylon Workers Congress representatives from entering the Council.[141] The draft Constitution must specify electoral rules for Regional Councils similar to those that are currently in place for election to Parliament.

According to the UN *Declaration on Minorities,* persons belonging to minority groups have the right to participate in decisions affecting them in a manner not incompatible with national legislation.[142] The first step towards fulfilling this obligation in Sri Lanka is for the Constitution to guarantee that minorities will be consulted in all government decisions affecting their communities. A model for

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[137] *Memorandum on Franchise and Elections by the Eelam People's Democratic Party,* 13th June 1997, Section 1. This can be explained mainly by the continuing disenfranchisement of some Up-Country Tamils, and the larger number of Sri Lankan Tamil parties, which fragments the vote of their community.

[138] Sumanasiri Liyanage, "Towards a Compromise Solution" in Regie Siriwardena, ed. "Sri Lanka: The Devolution Debate" (Colombo: International Centre for Ethnic Studies, 1996) at 51.

[139] A full account of these demands is provided in Jane Russell, *Communal Politics under the Donoughmore Constitution 1931-1947* (Dehiwala: Tisara Prakasakayo, 1982) particularly pp. 189-193.

[140] 2000 *Draft,* Article 132.

[141] Bastiampillai, *supra* note 36.

[142] UN *Declaration on Minorities, supra* note 71, Article 2 (3).

this may be the Swedish Constitution, which requires consultation of all stakeholders prior to the presentation of a Bill in Parliament.[143]

5.2. Parallel Consent

Parallel consent may be the most effective political tool to protect minority rights. This measure can prevent a majority in Parliament or a Regional Council from passing new laws that undermine the rights of minority communities. This is important where political pressure forces members of the majority to take positions detrimental to minority interests. Sri Lanka's parliamentary history shows several instances of the 'outflanking' phenomenon where two competing parties represent one ethnic group. When either the SLFP or the UNP accommodated Tamil demands, the other party would accuse the other of betraying Sinhalese interests, and was able to gain a significant amount of votes from the other on this basis.[144]

Parallel consent provisions in consociational legislatures may be surveyed for their possible application to Sri Lanka. In Belgium, there is an 'alarm bell' procedure where three-quarters of any linguistic group may declare that provisions of a draft law endanger relations between communities. Such contentious legislation is referred to the Council of Ministers.[145] In the South Tyrol region of Italy, the adverse vote of two–thirds of either the German or Italian representatives in the council would allow an Appeal to the Constitutional Court.[146] The Good Friday Agreement does not specify recourse to any third body, but indicates that a majority of each community (or a weighted majority [60%] with 40% of each community voting in favour of the provision) is necessary to pass a contested statute.[147]

In Sri Lanka, recourse to the Supreme Court is already available through procedures to petition the Court the week before a bill is passed. Such complaints must prove that the bill violates the Fundamental Rights Chapter. A system for a group of Parliamentary or Regional Council representatives to petition the

[143] This was suggested by Rohan Edirisinha, "Discussion on the PA-UNP Consensus," (Centre for Policy Alternatives and Friedrich Ebert Stiftung, BMICH, Colombo, 29 July 2000).

[144] Horowitz (1985), *supra* note 63 at 255.

[145] *Constitution of Belgium,* (1987), Article 38b. The Council is equally composed of French and Flemish speakers.

[146] Autonomy Statute for the South Tyrol, 1 *Raccolto Ufficiale delle Leggi* 3136 (1972), No. 670, Article 55.

[147] *The Northern Ireland Agreement,* 10 April (Good Friday) 1998, Strand One, Article 5.

Supreme Court would be useful. However, given the history of judicial decision-making in Sri Lanka, recourse to the judiciary is not an adequate alternative to mechanisms that require compromise between communities (See Sections 1.1 and 5.7)

If parallel consent provisions do not have a mechanism to resolve deadlocks, they should be designed to avoid potentially unreasonable demands by the minority leadership. Parallel consent is fundamental to consociational systems where the integrity of the system depends on inter-elite bargaining. However, reliance on this type of approach may not always be appropriate in Sri Lanka given the combative nature of Sri Lankan politics.[148] In addition, given the small proportions of the minorities relative to the Sinhalese majority, a fully consociational system could appear to give disproportionate bargaining power to minority representatives. Parallel consent mechanisms therefore should serve only as a last resort or as a safeguard in discrete situations where a government decision will particularly affect the interests of a minority.

The best alternative is to limit the parallel consent requirement to statutes that clearly hinder the rights of an ethnic community. The proportion of the legislature required to invoke parallel consent could be fixed at a level that would prevent gridlock. A potential example would be to require that 30% of the representatives in Parliament must support the proposal that a specific government decision require the consent of the representatives of an affected minority. In order to gain this support in Parliament, a minority community would always require the support of a small number of Sinhalese representatives. Since a minority party would need to win the support of moderate Sinhalese and other minority communities before each use of the parallel consent procedure, it would have to be responsible in its use of the procedure.[149] Therefore, this form of parallel consent would adequately balance the need for minority protection and the effective functioning of national and regional legislatures.

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[148] Tiruchelvam, *Constitutionalism and Diversity, supra* note 4 at 22.

[149] However, this mechanism can only operate successfully if members have full freedom of conscience. It is important that members of the majority community will not be open to the charge of being traitors to their community, nor are subject to the direction of the party leaderships. Therefore, the vote on whether the special procedure is justified must be carried out by secret ballot. Furthermore, freedom of conscience could be achieved by stipulating that members of Parliament who are expelled from their parties should not thereby lose their seats in Parliament. Instead, they should be allowed to sit as independent M.P.'s (but with no opportunity to join other parties). The latter suggestion is drawn from the proposals of a civil society effort initiated by the Centre for Policy Alternatives, "Civil Society Initiative on New Constitution" published in *Peace Monitor* 2:1 (January-March 2000).

5. 3. Representation on the Executive

The 2000 draft Constitution establishes mechanisms to ensure power-sharing within the Regions.[150] After each election, each political party will be given a number of Ministries in proportion to its share of the vote.[151] This should ensure minority representation in the Regional Executive.[152] In addition, there will be an Executive Committee attached to each Ministry. The Executive Committee would be comprised of members of the Regional Council. Members will have input into the governance process and be able to submit proposals to the Board of Ministers.

At the national level the President, upon the advice of the Prime Minister, selects the Cabinet of Ministers. In March, 2000, the PA and UNP agreed to *compulsory* representation of minorities.[153] Article 67 (1) of the 2000 draft Constitution requires the Prime Minister to give his advice to the President on Cabinet selection "having regard to the need" to ensure the representation of all the major communities. Unfortunately, this phrase does not imply compulsory representation. In addition, in the absence of a coalition with minority parties, a government may have to rely on minority members from the national list of Parliamentarians nominated by the leader of the governing party. These minority members would not necessarily represent the predominant opinions within the minority community. An appropriate remedy would be to have a Board of Ministers at the national level that apportions ministries according to the proportion of the vote. If there were at least 20 positions, then a party that has at least 5% of the national vote would be represented on the Board of Ministers. However, given the small sizes of the Sri Lankan minority communities, it would be necessary to allow parties falling short of this threshold to combine their votes and to jointly appoint a Minister. In addition, given that minorities would only gain a small number of Cabinet positions, the Executive Committee system should

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[150] Tiruchelvam has noted that there is a trade-off between representation and effectiveness under Executive power-sharing. Power-sharing may weaken the effectiveness of devolved institutions, particularly when they interact with the Centre, whose executive will be controlled by one party or coalition. If the commitment to consociational principles was serious, power-sharing structures would have been extended to the national level, *Constitutionalism and Diversity, supra* note 4 at 22.

[151] *2000 Draft,* Article 134.

[152] There is some scepticism about this process, given the formation of an exclusively Sinhala Board of Ministers in 1936, under the 1931 Donoughmore Constitution. However, this exclusion of minority leaders occurred because Ministers were selected by the Executive Committee. Under the 2000 draft Constitution, in contrast, Ministries will be allotted to parties according to their percentage of the popular vote. See *2000 Draft,* Article 134 (3).

[153] *PA-UNP Discussions, supra* note 123, 21 March 2000.

be introduced so as to ensure minority representation in a variety of national ministries.

Under the draft Constitution, the Executive Presidency is to be abolished once the current President ends her term (in 2005) or resigns. Given that the Sinhalese vote is often split between the SLFP and UNP, minority votes, particularly with an alternate vote system, create an incentive for presidential candidates to adopt moderate positions during election periods. For this reason, some minority parties have opposed the abolition of the Executive Presidency.[154] However, the incentive for moderation will remain and, in some instances, will be enhanced under the new system because minority parties will play an important part in determining parliamentary majorities. The minority parties can then hold the Prime Minister accountable on a continual basis, and not just affect positions during elections. This is particularly true under proportional representation where the governing party does not normally have a majority of seats in Parliament.

The above argument assumes that after 2005, the President will be accountable to the Prime Minister. The President is required to follow the advice of the Prime Minister, except when otherwise specified in the Constitution. However, failure to follow this advice is non-justiciable. The President can only be removed by a two-thirds vote of Parliament or by agreement between the Prime Minister, the Leader of the Opposition and the Speaker.[155] It is therefore necessary to allow the President to be removed by a majority vote in Parliament or to require that a significant portion (such as 40%) of the representatives of each community accept the nomination of a candidate for President.

The 2000 draft Constitution incorporates a UNP proposal to provide for two Vice-

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[154] This position was put forward by the former SLMC leader, Mr. Ashraff. However, the Executive Presidency did not serve the interests of the Tamil communities in the North-East. Under the Executive Presidency, power tended to gravitate towards the Centre. See Neelan Tiruchelvam, "Devolution of Power: The Problems and Challenges" in Regie Siriwardena, ed. *Sri Lanka: The Devolution Debate* (Colombo: International Centre for Ethnic Studies, 1996) at 36.

[155] 2000 *Draft*, Articles 63 and 62 (3). This judicial immunity essentially allows the President to violate the Constitution with impunity, and should be revised.

Presidents to represent the Tamil[156] and Muslim communities respectively.[157] These two persons alternate as acting President when the President is out of the country or otherwise unable to perform his/her duties. The vice presidents play a significant role by constituting minority representation on the Constitutional Council (See Section 5.4). The Vice-Presidency proposal has come under heavy criticism.[158] Some writers opposed to minority rights have tried to scare the public into believing LTTE leader Vellupillai Prabhakaran could become Vice-President and then acting President. Such claims fail to mention that the Tamil President is elected by parallel consent – requiring the majority vote of the members of the Parliament who are Tamil and the majority of Parliament.[159] Nevertheless, granting the Vice-Presidents temporary executive authority does not significantly advance the rights of minorities, and exposes the constitutional reforms to unnecessary opposition. Executive authority when the President is incapacitated or out of the country should rest with the Prime Minister or the Speaker of Parliament.

From the perspective of minority rights, the Vice-Presidency proposal may not be practical. There is a limit to the number of possible advances in minority representation in the current political climate. The political effort required to establish the Vice-Presidencies would be better spent on more substantial minority protections such as a Board of Ministers at the national level and parallel consent in Parliament and Regional Councils. In the absence of the Vice-Presidents, minority representation on the Constitutional Council could be achieved by requiring each community's Parliamentary group to elect one or more representatives to the Council. Since these representatives would not hold

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[156] Where government institutions have a small number of members, it is not feasible to have representatives of both Up-country Tamils and Sri Lankan Tamils. These two groups have historically cooperated politically. However, on a number of issues, their interests have diverged, such as the CWC's coalition with the UNP from 1977-1994 and on the Sri Lankan Tamil parties' demand in 1976 for secession. Therefore, it is important that the Constitution explicitly provides that Tamil representation in Central government institutions (such as the Independent Commissions, the Vice-Presidency and the judiciary) fairly represent both Tamil groups, either on a rotational or proportional basis. This may be specified in the Interpretation Section of the Constitution.

[157] *Proposals to the Parliamentary Select Committee on Constitutional Reform by the United National Party,* 29th January 1998, published in Dinusha Pandiratne & Pradeep Ratnam, eds. *Consultation on the Draft Constitution* (Colombo: Law & Society Trust, 1998), Schedule III at 352-353

[158] See Opinion Poll printed in *Sunday Times, supra* note 61.

[159] In the highly unlikely scenario that all minority representatives, including Muslims, vote for a single Tamil candidate, that candidate would always require the support of at least a third of all Sinhalese representatives, who normally constitute at least 75% of the legislature. It is this specific point that often seems to convince Sinhalese sceptics that the Tamil Vice-President need not be a threat.

executive authority, parallel consent of Parliament would not be required for their appointment. However, while the Vice-Presidencies would not significantly improve the rights of minorities, they would benefit national unity by symbolically reflecting the acceptance of minorities within the political elite. They should be established at a later stage in the constitutional reform process.

5.4. Constitutional Council

The Constitutional Council is intended to ensure non-partisan appointments to government posts at the Central and Regional levels. In the PA-UNP consensus agreements, it was decided the Council would be composed of seven members: the Prime Minister, the two Vice-Presidents, the Leader of the Opposition in Parliament, the Chairperson of the Chief Minister's Conference and two retired judges of the Supreme Court or Court of Appeal. The judges would be appointed by the President after he/she has ascertained the views of the Chief Justice and would serve for three years. A convention would be established whereby one retired judge would always be from a minority community.[160] This structure would have been favourable to minority representation. Constitutional Council decisions generally are to be made by consensus, but if there is a vote, at least three of the seven members would be from a minority group and the vice presidents would alternate in holding the deciding vote in case of a tie. While Sinhalese representatives could, in theory, use their normal majority in the Council to marginalize minorities, this possibility is reduced given that each of the representatives who would normally be Sinhalese - the Leader of the Opposition, the retired judge, the Prime Minister and the Chairperson of the Chief Minister's Conference - have diverse political backgrounds and are less likely to act in concert. It is also less likely that all of them would take a discriminatory stance towards minorities.

The 2000 draft, however, is less favourable towards minority representation. This draft adds the Leader of the House in Parliament and the Minister of Constitutional Affairs to the list.[161] These additions reduce the guaranteed number of minority representatives from three out of seven to three out of nine members.

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[160] *PA-UNP Discussions, supra* note 123, 7 July 2000. It would be preferable, however, if this arrangement was formalised within the Constitution.

[161] 2000 *Draft,* Article 122 (1).

5.5. Independent Commissions

Under the 2000 draft, the Constitutional Council will recommend to the President appointments to a number of Independent Commissions. These institutions include the Finance Commission, the National Public Service Commission, the National Police Commission, the Official Languages Commission, the University Grants Commission and the Human Rights Commission of Sri Lanka. These commissions are intended to depoliticise important government institutions. The commissions would be comprised of members serving for a fixed period.

Independent Commissions may reduce appointments based on political patronage that often exclude minority communities. However, given that the members of this Commission are not elected, there is no mechanism to ensure minority representation. The Constitution must therefore guarantee the adequate representation of minorities. Article 123 (3) requires that appointments to all these commissions reflect "as far as practicable the various ethnic and interest groups." This language is too vague to guarantee representation. However, specific rules apply to the Finance Commission. Article 211 requires that each major community is represented on the Finance Commission, thereby ensuring that at least 2 of the 5 members are from minority groups. The formula for appointment to the Finance Commission formulation should therefore be applied to all Commissions.

At the regional level, there are better provisions for minority representation. For the Regional Public Service Commission, appointments are to be made by the Governor of the Region in consultation with the Board of Ministers of the Region, "having regard to the ethnic composition of the Region."[162] Three of the five members of the Regional Police Commissions, each to represent a major community, are nominated by the Constitutional Council in consultation with the Board of Ministers of the Region in question.[163]

5.6. Government Employment

There is a need to address the under-representation of minorities in government service. The state should have a constitutional obligation to ensure equal

[162] *Ibid.,* Art. 200 (1).
[163] *Ibid.* , Art. 217 (b) (i).

opportunity in recruitment to and promotion within public service.[164] Under the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD),* when circumstances warrant, a state is required to take special measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. These actions should guarantee ethnic communities full and equal enjoyment of human rights and fundamental freedoms. However, such measures must not lead to the maintenance of separate rights for different groups after their objectives have been fulfilled.[165]

The *CERD* requires the Sri Lankan government to address the exclusion of Tamils and Muslims from government service. This exclusion occurred as a result of Sinhala-Only language legislation passed in 1956, and the limited ability of minorities to lobby for government jobs. In addition, the fair representation of minorities is also required so as to ensure that minorities are not excluded in the provision of government services.

Implementation of the 2000 draft Constitution's language provisions would require that more Tamil-speaking officers be hired.[166] However, it is unlikely that these provisions will be implemented unless minorities can apply political pressure and effectively use the courts to demand their implementation. In addition, affirmative action based solely on language could lead to the neglect of any the three distinct Tamil-speaking groups.

Under Article 247 (3) of the Interim Council Chapter in the 2000 draft Constitution, the Interim Council Public Service Commission is required to ensure that, in accordance with merit and eligibility criteria and "as far as practicable," appointments at the regional and district levels reflect the ethnic composition of these units. This clause balances merit and ethnic representation. As a temporary confidence-building measure, this clause would probably not conflict with the *CERD*. However, if one were to incorporate Article 247 (3) into the Constitution

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[164] Within the private sector, there should at least be legally binding laws on non-discrimination. It was proposed by a civil society coalition that the equality clause in Article 11 explicitly apply to non-state actors. See the proposed amendment in the *Civil Society Joint Statement, supra* note 81at 43-44.

[165] *CERD, supra* note 27, Article 2 (2). The UN committee charged with monitoring the *CERD* has stated that Article 2.2 requires that persons belonging to minority groups have the right "to share equitably in the fruits of national growth and to play their part in the government of which they are citizens." Committee on Racial Discrimination, *General Recommendation XXI on Self-Determination,* (48th Session, 1996), A/5118, para. 5.

[166] Article 48 of the 2000 draft requires the State to provide adequate facilities for the use of languages as provided in Chapter IV (Language) of the Constitution.

on a permanent basis applying to the Centre and all Regions, some adaptation would be required. It would be inappropriate for the state to increase the representation of a community solely on the grounds that its representation in the public service is lower than its percentage in the population. The over-representation or under-representation of a community in public service may occur for legitimate reasons that are not related to discrimination. For example, a community may have few economic opportunities in its region and therefore makes additional efforts to secure government employment; or conversely, where the prevailing preference of the community is to work in the private sector. Therefore, affirmative action should be solely aimed at redressing past and current discrimination to support equal opportunity.

Guidance on appropriate limits to affirmative action are found in the majority decision by Judge Fernando in the case of *Ramupillai* v. *Perera.*[167] Judge Fernando held that government measures to ensure recruitment and promotion according to ethnic quotas are illegal. Some affirmative action could be justified within government service, but quotas could not be imposed to correct a racial imbalance. An exception to this rule is possible where there is serious, chronic and pervasive under-representation sufficient to raise a presumption of past discrimination. Preferential considerations are more acceptable than quotas, and would be justified if they were temporary and had appropriate review mechanisms. Affirmative action would be more thoroughly scrutinized in cases of promotion than in cases of recruitment.

Ramupillai is not contradicted by Article 11 (4) of the 2000 draft. Article 11(4) allows special measures "where necessary for sole purpose of the protection or advancement of disadvantaged or underprivileged groups including those that are disadvantaged or underprivileged because of ethnicity." Of the explicitly permitted categories for special measures, only 'ethnicity' may apply to Muslims and Up-Country Tamils. However, Judge Fernando's decision in *Ramupillai* utilised a restrictive interpretation of 'ethnicity' by refusing to recognise Muslims and Up-Country Tamils as ethnic groups. Other courts could follow this decision and therefore nullify special measures unless they referred applied to all Tamil-speakers. Article 11 (4) uses the term 'including' prior to listing the permitted categories for affirmative action. Therefore, this article should be understood as

[167] *Ramupillai* v. *Festus Perera* [1991] 1 Sri L R 11. Judge Fernando's decision was endorsed by three of the other judges on the bench.

applying to all disadvantaged groups. However, to be more explicit Article 11 (4) should expressly refer to 'national and social origin' and 'religion' as grounds to permit affirmative action for disadvantaged groups.

5.7. Representation on the Judiciary

The 2000 draft Constitution does not address ethnic discrimination by the judiciary. This is a critical issue given the past failure of the judiciary to use its powers to protect minorities. In addition, in the *Thirteenth Amendment Case*, which assessed the need for a popular referendum for the enactment of that amendment to the Constitution, the decisions of four of the nine Supreme Court judges were from a biased, Sinhalese perspective. Justice Wanasundera, whose reasons were supported by three other judges, stated that the Sinhala-Only official language policy had been a major plank in the manifestos of the "leading Sinhala political parties in the country." Therefore including Tamil as an official language required the consultation of the people.[168] This assumes the long-standing Tamil demand for a change in language policy was of less constitutional significance. Justice Wanasundera argued Buddhist relics in the North-Eastern Province would be at the mercy of a Tamil-controlled Provincial Council. He noted the argument of some of the petitioners that "the joinder of the Northern and Eastern Provinces and the recognition of the traditional homelands of the Tamils will toll the death knell of the Sinhala people in the provinces."[169] Although some of Justice Wanasundera's fears were not unreasonable, they only addressed the concerns of the Sinhalese community. This judgement delegitimised the Supreme Court in the eyes of minorities.

An appropriate amendment formula would require that all major communities be represented on each high court. The Chief Justice and the President of the Court of Appeal must follow this formula when constituting a bench for a case that raises issues of minority rights and interests. Such a formula would at least ensure a minimum level of minority representation. Although this remedy would not guarantee non-biased judgements, minority judges on a bench could provide insights drawn from their experience of minority situations, and could be significant in cases where there is a split court. However, the value of such a

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[168] *In Re The Thirteenth Amendment to the Constitution and the Provincial Councils Bill* [1987] 2 SLR 312 at 382.

[169] *Ibid.*, at 364-366, 377.

provision would be heightened if minority leaders had some influence in selecting the judges of the high courts, as recommended above in section 3.2.

5.8. Equality Commission

The Interim Council Equality Commission specified in the 2000 draft is a useful innovation that should be extended to all Regions and the Centre on a permanent basis. National and Regional Equality Commissions could play a role in preventing discrimination in government employment and ensuring equal access to government services. While the judiciary is limited to hearing the cases that are brought before it, the Commissions can be pro-active, assess the government's actions in a systematic and holistic manner and develop specialized expertise in the area of minority rights. The Commission would be able to make recommendations on appropriate policy changes. The Commissions should be able to investigate the government's treatment of minorities on its own initiative, or in response to informal complaints.

There are a few areas where the Interim Council provisions on the Equality Commission could be improved. The Equality Commission is appointed by the President. The Commission should be appointed based on recommendations of the Constitutional Council. In the 2000 draft, the Equality Commission may only make recommendations to the President. The Commission should also have the power to take government agencies to court if it discovers that they are systematically not complying with equal opportunity laws.

5.9. The Duty of Rigorous Impartiality

The 'rigorous impartiality' clause in Article 245 (2) of the Interim Council Chapter of the 2000 draft is a welcome development. This clause sets out clear principles that bind the state in its interactions with minorities. The clause requires that in exercising its powers, the Governor, Board of Ministers and Interim Council recognize the diverse traditions and identities of the people in the two Regions. It also requires that the exercise of state power be founded on the principles of (1) full respect for the equality of the civil, political, social, religious and cultural rights of the people, (2) freedom from discrimination of all citizens and (3) "parity of esteem" and equal treatment for the identity, ethos and the aspirations of all communities in the two Regions.

In contrast to s. 29 of the Soulbury Constitution, a negative injunction barring privileges given to one community over others, the 'rigorous impartiality' clause requires the government actively address the effects of its measures on minority rights, rather than just avoiding discriminatory actions. The clause could require the government to apply affirmative action in a consistent manner, rather than selectively on the basis of political pressure. However, given that minority protection is a key requirement throughout the island, the clause is unjustifiably restricted to the Interim Council and should be incorporated within Article 1 of the draft Constitution.[170]

Conclusion: Prospects for the Constitutional Protection of Minority Rights

The August 2000 draft Constitution provides a number of improvements for minority protections. It forms a good basis under which majority and minority parties can agree on the structure of the state. The failure of the UNP to support or even discuss the draft in August 2000 was unfortunate, particularly since the party had previously agreed to most of its provisions. However, the draft Constitution was presented in Parliament when Parliamentary elections were in the backdrop, which was hardly the best period in which to form a multi-party consensus on constitutional reform. While the government's attempt to re-invigorate the Constitutional debate in July 2001 was welcome, this initiative occurred soon after it lost its majority in Parliament. The government therefore laid itself open to the charge that it was using the draft constitution as a political bargaining chip and thereby undermining the development of a multi-party consensus on constitutional reform.

The government's reaction to the events of August 2000 was to claim that it would be legitimate to carry out a 'constitutional revolution.' It could convert Parliament into a Constituent Assembly and enact a new Constitution with a simple majority in Parliament, in violation of the 1978 Constitution's amendment process. This process may be legitimate if the opposition parties consistently oppose the constitutional protection of minorities. The government argues passage of a Constitution in Sri Lanka has never received the agreement of the two major parties. It has also been noted that the 1978 Constitution enacted conditions for constitutional amendments that were unattainable by instituting

[170] An amendment to this effect was proposed by the CWC when the Constitution was presented in Parliament in August 2000.

elections by proportional representation and requiring a two-thirds majority in order to amend the Constitution. Since the first election under proportional representation in 1988, there have been no amendments to the Constitution.[171] Extra-legal means could also be justified by necessity, given the extreme circumstances of a seventeen-year-old civil war. In spite of the above arguments, however, a constitutional revolution could be self-defeating. Passing a Constitution in violation of a previous Constitution would create a bad precedent for the supremacy of the Constitution. Minority communities would not be able to rely on the rights granted under the Constitution since future governments could easily enact a Constitution that did not recognise these rights.

The option of a constitutional revolution is drastic and should not be considered while the possibility of legally enacting a new Constitution is open. Both parties have committed to reforms designed to improve minority protection. At the end of the March-July 2000 meetings, the UNP and PA were in disagreement over a few issues, but none could be considered 'deal-breakers.'[172] Although the PA-UNP consensus agreement is inadequate with regard to minority protection, that the two parties agreed to such significant advances indicates a will to resolve the issue. Consequently, the gap in positions between the PA, the UNP and the minority parties is sufficiently small that a wide-ranging agreement is feasible

The failure to enact a new Constitution in August 2000 may be seen as an opportunity to improve both the contents of the Constitution and the process of constitutional reform. Under the terms of the 2000 draft Constitution, there remains room for a government acting in bad faith to undermine the rights of regional or national minorities. It is necessary that appropriate institutions, such as an effective judiciary and group-specific political institutions, are in place to make such action difficult. Both major parties are at fault for failing to provide a comprehensive scheme of fundamental rights and a wide-ranging level of devolution. In coming to agreement with the UNP, the level of devolution in the government's proposals of October 1997 was significantly reduced. It is

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[171] This argument is noted in Tiruchelvam, *Constitutionalism and Diversity, supra* note 4 at 16-17.

[172] These were: the extension of the Executive Presidency until 2005, the addition of the Minister for Constitutional Affairs and the Leader of the House to the Constitutional Council, the UNP proposal that members of Parliament from the North-East (rather than the Regional Council) have a veto on further Constitutional amendments relating to devolution and the government's proposal to extend the Interim Council period to 10 years from the 5 years agreed upon at an earlier stage of discussions. This account was provided by Jayampathy Wickremeratne, a Senior Constitutional Drafter, at a public forum at the Colombo YMCA in August 2000.

unfortunate that the provisions of the 2000 draft Constitution were not fully negotiated by the two major parties together with the Tamil parties. With regard to group-specific rights, however, the Interim Council provisions represent a positive shift. These measures need to comprehensively applied by the two main parties.

The August 2000 draft Constitution was also undermined by the lack of popular consultation prior to its presentation in Parliament. The government avoided such a process due to a fear that public consultation would be taken over by Sinhalese extremists. However, the experience of July and August 2000 showed this strategy was futile, and served only to distance the average Sri Lankan from the process. It also allowed anti-devolution forces to dominate the public debate. In addition, the minority protections contained in the Constitution will have trouble surviving if the public does not understand them or do not feel that they are legitimate. It has been argued that the time for the people to exercise their voice would be at the referendum. However, a referendum will only offer a yes or no option, and it is unlikely that the deliberative element of a consultation would be available in a referendum campaign.

The government's statements in July 2001 that it will allow for popular consultation on the Constitution is a positive development.[173] However, such consultation should not be limited to political parties and urban non-governmental organisations, but should extend to the grassroots. An appropriate model is the Constitutional consultations that preceded the enactment of the South Africa Constitution. This process had two aspects; it informed the South Africa Constituent Assembly of the needs and opinions of the people, and educated the people as to the contents and importance of the Constitution.[174]

Given the opposition to devolution from a significant proportion of the Sinhala community, it may be difficult to provide for all necessary group-specific rights in the current draft Constitution. Fundamental to resolving the ethnic conflict is ensuring no side is seen as gaining too much.[175] This is especially true since the 2000 draft Constitution removes the term 'unitary state' from the Constitution.

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[173] "New Constitution: People will be Consulted at Every Stage – PM" *Daily News,* 27 July 2001. President Kumaratunga made a similar commitment; "People will be Consulted on Constitutional Reforms" *Daily News,* 19 July 2001.

[174] See Presentation by Hassan Ebrahim, former Chief Executive Officer of the South Africa Constituent Assembly at the Consultation on the Draft Constitution, *supra* note 87 at 21-25.

[175] This was key lesson of the Northern Ireland peace process. Presentation by Professor Thomas Fraser at the Consultation on the Draft Constitution, *supra* note 87 at 16.

Under the terms of the 1978 Constitution, it will therefore have to be approved in a Referendum. However, in a Referendum campaign, group-specific rights can be 'sold' to the Sinhalese electorate by emphasizing that they will act as an incentive against secession and will benefit Sinhalese communities in the North-Eastern Province. If it becomes inexpedient to risk the hard-won provisions on devolution by proposing a comprehensive regimen of group-specific rights, the best alternative would be to amend the new Constitution after it comes into force. This is also true of the Vice-Presidencies, whose ultimate significance is symbolic rather than substantive. Virtually all the group-specific rights in this paper would not require a referendum.[176] While this may seem undemocratic, most laws for the protection of minorities in deeply divided societies would probably not have been passed had they been subject to a referendum.[177] Relations among ethnic groups require a process of discussions and compromise. This is possible within a Parliament or Constituent Assembly. It would be virtually impossible for such issues to be adequately discussed in the context of a referendum campaign.

No system of minority protection can ever be complete, particularly if a government is prepared to ignore the provisions of the Constitution (as with the non-implementation of various elements of the Thirteenth Amendment). However, context is important. The Thirteenth Amendment's legitimacy was undermined due to its association with the Indian military intervention. In contrast, the process leading up to the presentation of the August 2000 draft is a primarily domestic effort and followed intensive discussions between the two major parties that have, in principle, agreed to otherwise contentious provisions.

The viability of minority protections will undoubtedly be affected by long-term changes in the relations between the various groups, especially between Tamils and Sinhalese. However, a Constitution that strengthens the rights of minorities is the first step in ending the current ethnic conflict. The proposals in this essay have examined possible reforms to all levels of government – executive, legislative and judicial. These reforms would ensure that minorities are represented in key government bodies and would provide for safeguard mechanisms, such as parallel consent and Equality Commissions. These changes would create incentives for the

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[176] According to Article 101 (1) of the 2000 draft, only an enumerated list of Articles require a Referendum for amendments. All amendments would require a two-thirds majority in Parliament. Amendments to the devolution Chapter only require a two-thirds majority vote in Parliament and acceptance by the affected Region.

[177] Coomaraswamy, *supra* note 2 at 75-77.

respect of minority rights and create concrete obstacles for a government that wished to discriminate against minority communities. The proposed constitutional reforms would require shared decision-making by leaders of the different ethnic communities, thereby helping to develop a political culture of compromise. A new Constitution can therefore form the foundation for a united Sri Lanka in which all communities may prosper.

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