
CASE STUDY*

Sri Lanka

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To what extent was the conflict in Sri Lanka generated by lack of inclusion of a group or groups in the state's political and legal structures? Was there a lack of human rights protection for the excluded group?

The conflict was generated by the inability of the Sri Lankan state to accommodate the demands for linguistic parity and territorial autonomy by the minority Sri Lankan Tamils. From the mid-nineteenth century, the British colonial state had provided representation to local communities on a near-equal, rather than on a proportional, basis. This provided over-representation for minorities and under-representation for the majority Sinhala-Buddhists, creating a major grievance among the latter, especially as they saw themselves as the historic people of the island. The independence constitution of 1948 provided for a fairly orthodox model of parliamentary unitary state, which allowed the Sinhala-Buddhists to dominate the post-colonial state and to devise state policies to redress the colonial injustices against this majority. Although it eschewed a fully-fledged bill of rights, in anticipation of majoritarian excesses, the constitution did provide for a “manner and form” anti-discrimination clause, which prohibited discriminatory legislation against any ethnic community or religion. However,

in the formative stages of the new state, the courts were unable to make full use of this provision to strike down discriminatory legislation. This included depriving Indian Tamils of citizenship and adopting Sinhala as the sole official language. This led to a loss of confidence in the constitution by the minorities, and a demand for security and recognition through federal autonomy.

When Sri Lanka became a republic in 1972, Tamil views on the constitutional future were rejected entirely. The first republican constitution entrenched the unitary state, gave Buddhism a “foremost place” and primacy to Sinhala. This radicalised Tamil nationalism, and federalists were superseded by militants committed to an armed struggle for a separate state of Tamil Eelam. Even though a justiciable Bill of Fundamental Rights was introduced by the second republican constitution in 1978, it did not permit devolution. In fact, it further centralised power through the introduction of an Executive President. In any case, active conflict had started by then with all strands of Tamil political opinion coming together on the platform for a separate state in the Vaddukoddai Resolution of 1976.

The post-independence nation-building exercise did not take an inclusive and civic character, with the guarantee of fundamental rights including Tamil language rights, and devolved power for a measure of self-

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government to the Tamil-majority north and east. If it had, the Sri Lankan conflict may never have happened. Instead, an ethnocentric form of Sinhala-Buddhist nationalism became the dominant discourse of majoritarian democracy and party competition. The republic's constitution-making became an exercise in entrenching the majority's cultural identity and political dominance in the Sri Lankan state. This alienated the minorities from the state in what is a richly plural polity, although only the Sri Lankan Tamils had the numbers and sense of territorial and historic communal identity to mount an armed challenge to the state.

How did the various peace processes try to address this? What other reform initiatives were there?

As the armed conflict escalated in the 1980s, the regional power India attempted to broker a settlement between the Sri Lankan

state and Tamil nationalists, culminating in the Indo-Lanka Accord of 1987. Under this agreement, the Sri Lankan government agreed to introduce Sinhala and Tamil language parity and devolution through a system of Provincial Councils, while India undertook to disarm the Tamil militants. The Sri Lankan government did enact the Thirteenth Amendment to the Constitution in 1987 to establish Provincial Councils, but it did not implement devolution in the necessary spirit, which discredited the whole system. The constitutional amendment was also forced through by the government despite violent opposition in the south. This, coupled with the Indian role, has placed a question mark over the legitimacy of devolution, although over the years there has been gradual acceptance of the Provincial Councils among most Sinhalese.

India succeeded in persuading all but one militant group to return to the mainstream peace process. This group, the Liberation



A protest against President Mahinda Rajapaksa / © asianews

Tigers of Tamil Eelam (LTTE), was the most powerful and most recalcitrant in terms of a commitment to separatism, and it continued its war against the Indian and subsequently Sri Lankan military forces until its comprehensive defeat by the Sri Lankan state in 2009. Successive Sri Lankan governments attempted negotiations with the LTTE from 1994 to 2006. This included a Norwegian-facilitated peace process between 2001 and 2006. All of these initiatives were aimed at a negotiated political settlement, which would pave the way for a new constitution embodying some form of federal autonomy within the framework of a united Sri Lanka. Some of these proposals were complex, asymmetric, and innovative power-sharing arrangements. They could have provided extensive autonomy for the north and the east, together with rights guarantees for minorities throughout the island. While there were many shortcomings on the part of reformist and moderate Sri Lankan governments, it can be fairly said that many of these attempts ultimately failed because of the LTTE's lack of interest in autonomy within a united Sri Lanka and its unwavering commitment to a separate state. This was also a futile ambition, with major human costs: at no stage was the Sri Lankan state so weak as to permit separation, and India, with its own separatist movements, had consistently made clear that it would not allow the precedent of territorial disintegration of states within the region.

The failure of the Norwegian-facilitated peace process, and public perception of the LTTE's intransigence, enabled the election of a stridently Sinhala-Buddhist nationalist government in 2005, which adopted a military solution. With massive loss of life, displacement, and significant violations of international human rights and humanitarian law, which the state and the LTTE were both responsible for,

the war came to an end in May 2009 with the defeat of the LTTE and the annihilation of its leadership. For the triumphalist government, which had framed the conflict as one of patriotic heroism against Tiger terrorism, that ended matters, and no serious attempt was made to address the root causes of the conflict through a political settlement.

In 2015, a new reformist government was elected. It is now drafting a new constitution that will include a new devolution settlement (albeit within the unitary state), a new bill of rights (possibly also including socio-economic rights), a new multi-member proportional (MMP) electoral system, a new territorial second chamber, and various other governance reforms. The Tamil National Alliance (TNA), the dominant parliamentary group of Tamil nationalist parties, holds the leadership of the opposition in the new Parliament and is playing a central role within the current process.

How did inclusion and protection of rights feature in the agreements or institutional reform approaches?

The Thirteenth Amendment included Tamil language rights. The various reform proposals of the 2000s included proposals for extensive new Bills of Rights. The current constitutional process envisages a major expansion of the bill of rights, to deepen the scope of existing civil and political rights, to introduce socio-economic rights, and to extend group rights protections to cultural, religious, and sexual minorities. The Public Representation Committee, which reported on public expectations of constitutional reform in 2016, has stated that there is widespread demand across the country and across communities for greater rights protections in the new constitution. In parallel, there is also a transitional justice process taking place. The Consultation Task Force on

Reconciliation Mechanisms reported in 2016 to the government on measures for truth, justice, reconciliation, reparations, and non-recurrence. Significantly, it included the establishment of a judicial mechanism (that is, a special court and special prosecutor) with international participation to deal with allegations of atrocity crimes during the war and to ensure criminal accountability. A major source of rights violations in the past, the Prevention of Terrorism Act (PTA), is also to be repealed and replaced, although progress in drafting new legislation has been patchy due to resistance from the defence establishment.

In the Norwegian-facilitated peace process, the ceasefire agreement did not contain any rights provisions. As the process continued and violations of human rights grew (the majority of which were committed by the LTTE against political opponents, according to the independent Scandinavian monitoring mission), there were civil society calls for the infusion of international human rights norms into the negotiations, including the retention of an international human rights advisor. However, the LTTE resisted these attempts, seeing in them a trap to delegitimise their status as the “sole representative” of the Tamils.

How did the peace or reform process approach inclusivity: did it focus just on the dominant groups at the heart of the conflict? To what extent did it also attempt broader inclusion of other groups and interests?

The Sri Lankan polity is richly plural, but the conflict has been between the Sinhala-Buddhist dominated Sri Lankan state and the largest minority, the Sri Lankan Tamils. Other dispersed minorities, such as the Indian Tamils and the Muslims also seek various forms of accommodation, but these have generally been managed within the mainstream

political process, including through vote bloc clientelism. However, a major factor was and is the question of the Tamil-speaking Muslims concentrated in the east. Tamil nationalists have used the rubric of “Tamil-speaking peoples” to encompass the eastern Muslims within the Tamil nationalist claim, and thereby also to expand their territorial claim to the Muslim-majority areas of the east. Especially during the years of LTTE dominance, relations between the two communities deteriorated severely, with Muslims suffering violent reprisals and even ethnic cleansing in the north. However, during the Norwegian-facilitated peace process the LTTE made some attempts to atone for these acts by coming to an agreement with the Muslim leadership about a sub-unit for the Muslims in the east. Despite some initial sympathy for Tamil nationalism within the Muslim leadership, a separate Muslim identity has crystallised over the years, making its own claims to a devolved territorial unit. It is likely that this would be the basis on which the territorial arrangements for the north and the east would be negotiated in the current constitution-making process.

What were the critical moments when attempts at inclusion could have succeeded (and did not) or failed (and did not)? What factors – in country leadership, civil society mobilisation, and international intervention – determined whether they succeeded or failed?

As noted earlier, there were a number of moments from independence onwards where inclusion may have succeeded, but where, instead, exclusion was the preferred, deliberate, majoritarian option. Ideologically, the dominance of ethnocentric Sinhala-Buddhist nationalism gave a powerful legitimating discourse and culture for the

practice of political majoritarianism. It went beyond claims of primacy for Sinhala-Buddhists to active anti-Tamil sentiments as the historic “other”. In fact, in Sinhala-Buddhist nationalist historiography, their very collective identity and claims to the ownership of the island are defined by conflict with and opposition to the Tamils. No politician of the post-colonial era felt able to rise above these ethnic loyalties and give leadership to a more plural and inclusive conception of “Sri Lankan-ness”, either through liberal ideological convictions or through electoral incentives. Perhaps the most obvious practical reason for the rejection of inclusion in the early post-independence years was the fact that majoritarian nationalists felt minority demands were a plea for the illegitimate continuation of colonial-era privileges. Conversely, it was felt that the disproportionate representation of the minorities in the colonial administration and the private sector had to be redressed through affirmative action for the disadvantaged majority.

It was only after the onset of civil war that it became apparent to many that a more inclusive approach was needed. Starting with small elite-based attempts, pro-peace civil society groups grew in tandem with the intensification of conflict, and while by the 1990s they had gained an independent voice in political life and debates, the fact remained that they could exert little impact in a democratic culture that was fundamentally based on party political (and ethnic) loyalties.

Sri Lanka is a country that demonstrates the limitations of both *realpolitik* and norm-based international intervention. Due to the democratic legitimacy that the Sri Lankan state enjoys from its deep Sinhala-Buddhist majoritarian support, intervention on the grounds of injustice towards minorities is much more difficult than elsewhere. The current attempt at constitutional reform is therefore

projected very self-consciously as a purely and exclusively domestic exercise in constitution-making, especially because moderates and reformists do not want to be tarred with the brush of association with the 2001–06 peace process. The current President and Prime Minister, representing the two major southern parties, have formed a “national government” with the express policy of addressing the constitutional challenge of ethnic pluralism and national unity, as well as democratisation. They have included all minorities including the TNA in the constitutional negotiations. This is of course not the first time that all parties are gathered together to discuss a national compact that can form the basis of a pluralist but united constitutional order for the future of Sri Lanka. However, it is the first attempt to do so after the end of the war, and there is a sense of historical purpose to the exercise. While the prospects for an elite deal remain strong, it is less clear how, in the context of little public information and engagement with the elite negotiations, the final constitutional settlement may be received by the Sri Lankan public at large in the forthcoming referendum that is required to enact the new constitution.

How transformative has the process been on the inclusion front? If not transformative now, were there transformative moments, or is there further transformative potential?

In the case of Sri Lanka, the role and usefulness of terms such as “transformative transitions” or “transformative constitutionalism” require a nuanced answer. On the one hand, the manifest injustices of minority discrimination and disempowerment seem clearly to point to the need for transformative initiatives of inclusion. On the other hand, it also seems that overzealous attempts at transformational

change are not only ineffective but also counterproductive. Thus, the Indian intervention and the Norwegian-facilitated peace process failed, in large part, because of their perceived illegitimacy among the majority ethnic community, without whose buy-in no settlement appears possible. The Oslo Declaration of 2002, for example, which signified an agreement between the government and the LTTE to explore a federal solution, was rightly seen at the time as groundbreaking from a transformative point of view. But it also virtually ensured the delegitimation of the entire process from the perspective of the Sinhala-Buddhists. And although the Indian intervention left the legacy of the Provincial Councils system as the only enduring instance of devolution, the perceived illegitimacy of the international intervention also created in part the perception of an imposition of liberalism on an ancient polity. The absence of any attempt to contextualise the values of peace, pluralism, and tolerance, through emic arguments re-articulating the history and culture of the Sinhala-Buddhists themselves, has only exacerbated this problem.

Thus, the rejection of the nationalist-populist dispensation that defeated the LTTE, and the election instead of a reformist government in 2015, bodes well

for constitutional reform because the new government's reform mandate stems from an organic shift of opinion. But at the same time, the terms of that change – or more precisely, the limits of change – are determined by the organic character of the mandate as well. It would be possible in the current phase of reforms to improve upon the Thirteenth Amendment structure of devolution, including power-sharing at the centre through a second chamber and a strengthened rights framework. However, it would be fundamentally limited by the requirement that the unitary state is retained as well as the primacy for Buddhism. Provided that the narrative of continuity and incrementalism is maintained, it seems that the new constitution could embody quite emphatic and perhaps even radical changes.

Sri Lanka, therefore, provides an interesting example of the *incremental* as opposed to the *transformative* theory of constitutional change in divided societies, recently expounded for example by Hanna Lerner. The regime change and mandate for reform in 2015 was dramatic, but it is not a political revolution in any sense. While there is a political and civic consensus about the more damaging consequences of the Rajapaksa regime and the necessary remedial reforms to address them, at a deeper level Sri Lankans do not yet have a social consensus



Key political figures in Sri Lanka / © pmdnews

about a common vision for the Sri Lankan state in terms of collective identity. This is evinced in the Sinhala–Tamil divide over the federal versus unitary debate. Consequently, perhaps the best way to view and conceive the current exercise in constitution-making is as an incrementalist change towards improving democratic conditions, so that the country may continue the constitutional conversation about matters that currently divide it, and commit to a process of continuous constitutional change and adjustment. Seen in its best possible light, the current exercise is only one further notch in a broader narrative and agenda of continuous constitutional development into the future.

This is not merely to make a virtue out of necessity, but as Lerner and others have shown, incrementalism can be both a more

realistic strategy as well as a normatively attractive theory of constitutional change in a divided society where to attempt too much too suddenly – like the attempt to introduce federalism during the Norwegian peace process – is almost to ensure the dissipation of the limited prospects for a politico-constitutional settlement. Provided there is a commitment to continuous constitutional development, and with appropriate safeguards against backsliding, incremental changes to the legal constitution within the limits of what is politically possible at a given moment in time permit both the legal and political constitutions to be gradually developed, so that, over time, the structure and form of the Sri Lankan state can be made more congruent with the polity's plural social foundations.

Resources

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For frequently updated research relating to the ongoing Sri Lankan constitutional reforms process, see: constitutionalreforms.org

For frequently updated research relating to the ongoing Sri Lankan transitional justice process, see: tjsrilanka.org

