**We publish below three comments on 17 chapters of the draft constitution now being discussed in a Parliamentary Select Committee. These were released for public discussion by Dr. Pieris, Minister of Constitutional Affairs at the end of March 1997.**

**The chapters released do not cover devolution of powers to regional councils or the units of devolution. These are at the heart of constitutional reform, which is really being undertaken as a means of resolving the ethnic conflict. Their absence is due to the fact that these issues have not yet been seriously discussed at the Select Committee. However, since these matters too need to be open for public discussion, we also publish a note on the devolution proposals that were released earlier.**

# THE DRAFT CONSTITUTIONAL REFORMS

## THE MAKING OF THE CONSTITUTION

**Rohan Edrisinha** (Lecturer in Law, University of Colombo)

"Wherein the sovereignty of the people is assured and the exercise of authority by their freely chosen representatives is in the nature of a sacred trust.."(The new Draft Preamble to the Constitution). It looks as if the Parliamentary Select Committee has violated the noble sentiments expressed in the draft preamble even before completing its work on the other chapters of the Constitution. The comedy of errors with regard to the release of the 18 chapters of the Constitution certainly does not suggest that the Select Committee of Parliament has engaged in conduct consistent with such an overwhelming responsibility.

Consider the ludicrous spectacle that was unfolded in late March, when the Chairperson of the Select Committee of Parliament constituted to prepare a draft Constitution released more than 75% of a draft Constitution "on the direction" of the President, claiming that

> the version now being published incorporates the changes made by the Parliamentary Select Committee on Constitutional Reform after comprehensive discussion at 68 meetings held over a period of 15 months.

Thereafter, the main opposition party, which has several of its senior MPs as members of the committee, denies that it had agreed to the provisions of the draft as released.

This fiasco hardly inspires confidence in the competence, sincerity and professionalism of the framers of Sri Lanka's Third Republican Constitution. Are these chapters modified government proposals or decisions of the Select Committee? Who authorized the release of the chapters-President Kumaratunga, Professor Peiris or the Select Committee ? Do the Standing Orders permit the release of "decisions" of Parliamentary Select Committees to the public before they are submitted to Parliament?

When the parties represented in the Select Committee cannot reach a consensus on such a mundane issue as the nature or maternity of the 18 chapters, how can we expect them to draft a consensus document which will be the Supreme Law of the land!

### Defects in the Process

When a constitution is drafted, it is "we the people" framing a document for ourselves. The fundamental principle of a constitutional democracy, i.e. the supremacy of the Constitution, is based on the fact that the Constitution ultimately derives its authority from the people. Critics of the concept of judicial review of legislation often fail to recognize that when judges engage in review, for example, the "conflict" in such review is not people (legislature) vs. unelected elite (judiciary), but people (legislation) vs. People (Constitution). For a Constitution to reflect the will of the people, it is vital that the people must participate in the constitution drafting process.

The confusion regarding the eighteen draft chapters underscores the defects in the constitution making process adopted in Sri Lanka. A Constituent Assembly rather than a Select Committee of Parliament should have been appointed to draft the Constitution. Like the Constituent Assembly of 1972, the proceedings should have been transparent and open to public scrutiny.

Friedreich Hayek in his book, *The Constitution of Liberty,* highlights the importance of the Constitution reflecting the will of the People.

> The formula that all power derives from the people referred not so much to the recurrent election of representatives as to the fact that the people, organized as a constitution making body, had the exclusive right to determine the powers of the representative legislature. The constitution was thus conceived as a protection of the people against all arbitrary action, on the part of the legislative as well as the other branches of government.

Hayek points out that when "We the People" promulgate a constitution, the people lay down general rules of conduct or broad values which the people wish to sanctify in the supreme law of the land and by which they wish to be bound. Constitutionalism does not entail an absolute curtailment of the will of the people, but rather, the subordination of immediate objectives to long term ones.

The UNP's opposition to the release of the draft chapters is, therefore, unjustified. The people have a right to know, to participate, to critique. The UNP must accept part of the blame for adopting the Select Committee process for drafting the new Constitution. That mistake, after all, is the cause of the current comedy of errors. The UNP's position is rather rich, considering the fact that while disclaiming responsibility for the draft after labouring on it in a Select Committee for two years, it has not yet told the people its position on constitutional reform or any of the important issues raised in the reform debate. A responsible opposition party should have produced its own alternative draft document for public scrutiny.

## Defects in the Substance

While the draft taken as a whole is undoubtedly an improvement on the 1978 Constitution, it must be remembered that the 1978 Constitution was so deficient in many respects that marginal improvements are just not enough. A radical departure was promised and is necessary.

The several shortcomings in the eighteen chapters released so far are summarized below:

1. The cornerstone of constitutional democracy, the principle that the Constitution is supreme, has been rejected. One chapter of the Constitution (Fundamental Rights) is supreme, only vis-a vis a particular piece of legislation, for a period of two years after its enactment.

2. There is insufficient emphasis on values and principle in Chapter 1 of the Constitution and indeed in the whole document.

3. Detail which should have no place in the Supreme Law of the land has been reproduced from the Constitution of 1978 - eg.-Chapter XIII of the Draft with its obnoxious provisions on civil disability and the expulsion of MPs from Parliament.

4. There are several internal contradictions and inconsistencies in the document:

(a) There is an improved chapter on Fundamental Rights, but at the end of the chapter are two articles which declare that all existing laws (which constitute most of the laws that affect our daily lives) and any form of punishment meted out under "any written law" shall be valid even though these laws and punishments may violate the fundamental rights enshrined in the chapter! This is probably a world record as most constitutions contain provisions which declare precisely the opposite!

(b) Equality, tolerance and the dignity of the individual are referred to in the Preamble, but the religion of the majority is further exalted in the chapter on Buddhism, by the introduction of a provision requiring the Government to consult a Supreme Council on, potentially, a wide array of matters.

(c) While there is a welcome return to the concept of an independent Public Service, Article 73 (4) of the draft states that the President may transfer a Secretary to a Ministry to any other post in the Public Service.

5. The provisions on the Independence of the Judiciary contain only marginal improvements. Serious defects which could enable the Executive to apply unjustifiable pressure on the judiciary remain. The provision requiring the President to merely ascertain the views of the Chief Justice before appointing judges of the appellate court is woefully inadequate and falls short of the standards laid down in most modern constitutions.

6. One of the few promises which was made by both the PA and the UNP at the 1994 general Election is broken. Both parties promised in their manifestos to incorporate the positive aspects of the system of proportional representation and the simple plurality system by introducing the mixed German system of representation. The draft reproduces almost verbatim the present chapter on proportional representation.

7. The invidious provision which transformed Sri Lanka from a representative democracy to a "party democracy" and the Parliament from a deliberative assembly to a docile congress of party ambassadors is reproduced despite vocal opposition to it by the PA before the election. Article III (13) of the draft rejects the principle of the freedom of conscience of the MP and permits MPs who dissent to be expelled from Parliament.

8. In the context of greater devolution of power, it is totally unnecessary to have a uni-cameral Parliament consisting of 225 MPs. (One wonders whether any member of the Select Committee even suggested this!) A parliament consisting of 120 members in a House of Representatives and a Second Chamber consisting of 60 members elected primarily from the regions, will promote both constitutionalism and devolution of power and also national unity.

These are the main glaring defects in the draft chapters released so far.

## Conclusion

Constitution making, like the manufacture of cars, evolves and progresses. New doctrines and techniques emerge as constitutional and human rights jurisprudence advances; new mechanisms to concretise constitutional values and principles are developed. When a car is produced in 1997, a consumer expects it to incorporate modern developments and the latest innovations in technology and design. She will compare the car with other models produced recently. She will not use a car made twenty years before as the basis for a comparison or assessment of the merits of the car.

The eighteen chapters released recently and the views of the "design team", led by the People's Alliance and the United National Party, make it abundantly clear that when compared with recent constitutional developments in South Africa, Namibia, Nepal and several Central and Eastern European countries, the Third Republican

Constitution of Sri Lanka will not be a model of the nineties, but rather a reconditioned 1978 model. We need an alternative design team. We need an alternative Constitution.

## THE FUNDAMENTAL RIGHTS CHAPTER

### Dr Deepika Udagama (Director, Centre for the Study of Human Rights, University of Colombo)

Undoubtedly we all do agree that the chapter on Fundamental Rights is one of the most crucial elements of any Constitution. The sacred trust that is eloquently incorporated into the first part of the Constitution can only be protected if fundamental rights are protected in a very effective manner. Given the very positivist legal tradition in Sri Lanka, certainly the written law has to be very strong. We do not have a tradition as in India where the judiciary has progressively incorporated and recognized new rights into the Constitutional Bill of Rights. When you compare the third draft with the 1978 Constitution, you do see certain improvements. But the point is, can we be satisfied with only that?

I also see this draft as a reconditioned model of the 1978 Constitution rather than a bold and brave attempt to really forge ahead in a very progressive and futuristic manner. Since 1978, there has been much discussion and debate on the entire Constitution, especially on the protection of fundamental rights, and the PA was elected to government mainly with a mandate to improve human rights in the country. Certainly now the Opposition parties would also say that they do completely believe in improving the human rights situation in the country. So with this consensus, I cannot understand why they are so hesitant to forge ahead with new ideas such as the South African experience has clearly demonstrated.

I will divide my comments to certain key factors, and give my observations on those. First, in terms of assessing the Fundamental Rights Chapter, I would say that most of us civil society actors have evaluated these provisions in the draft chapters against the international human rights obligations of Sri Lanka, and we have maintained consistently, that as a minimum, Sri Lanka's Constitution should reflect these international human rights obligations. The provisions of the International Bill of Human Rights, which consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights represent Sri Lanka's basic human rights obligations. Secondly, when you look at the scope of substantive rights in the third draft, we do see certain marginal improvements. For example, we are very privileged that the right to life has been recognized. So have the right to privacy, right to property (which goes with the times). Freedom from arbitrary arrest and detention has been expanded to provide more protection to those who are arrested and detained. Even freedom of expression has been expanded.

However, those are all mainly civil and political rights. And one of the key criticisms of this traditional model is that it merely incorporates civil and political rights in the US constitutional mould. But the more modern constitutions, as for example the 1996 Constitution of South Africa, and other African countries like Ghana, incorporate not only civil and political rights but also economic, social and cultural rights. At the 1993 Vienna World Conference on Human Rights, all countries which participated, including Sri Lanka, recognized the fact that human rights are not divisible; that they are in fact indivisible; that the human person not only has a civil and political existence but also an economic, social and cultural existence, and that therefore human rights will have to be protected in a holistic manner. But we find here in Sri Lanka, unfortunately, a perpetuation of the same old model, one that recognizes constitutionally guaranteed fundamental rights as only civil and political rights, and one which relegates economic and social rights to the back-burner by including them merely in the directive principles of state policy.

If people are nationalistic and insular and say why we should look at these international norms, then you should look at what is happening in India. Progressive judicial interpretation of the Constitution of India has looked at the reality of the Indian context. The Supreme Court has incorporated a whole lot of rights including environmental rights, economic and social rights, via the existing rights. Now this was a golden opportunity for us in Sri Lanka to expressly write down these additional rights in the Constitution and enshrine them in the supreme law of the land. And we may have missed that opportunity.

When the first draft of the Fundamental Rights Chapter came to us, (certain NGOs which have consistently reviewed these drafts on Fundamental Rights and made suggestions to the Parliamentary Select Committee), some of us pointed out that as a minimum, certain economic and social rights such as that all persons are entitled to just and favourable conditions of work, that no one shall be subjected to servitude, had to be guaranteed. But these representations were completely ignored; there was no response whatsoever. But I think there's a problem beyond the Parliamentary Select Committee. The general human rights discourse in Sri Lanka, it seems to me, not only in the state sector, but even in civil society organs, is somewhat restricted to civil and political rights; we still focus mainly on arrests, detention, torture and so on.

I am not for a minute saying that those rights are not important. They are absolutely important. But this is a unique opportunity to look at human rights in a very holistic manner and to have a progressive vision about the whole subject of human rights. And without this, I do not think that whatever the other provisions in the Constitution are-however solid they are-that we can build a plural and democratic society.

Thirdly, aside from the major weaknesses of only limiting substantive rights to civil and political rights, there are certain very obnoxious features which have been retained. For example, the death penalty has been retained. Most countries in the world have done away with the death penalty, including South Africa, though as we know, South Africa has one of the highest crime rates in the world. But the death penalty is not the solution. NGOs have repeatedly made representations to the Select Committee to do

away with the death penalty. The retention of the death penalty indeed is a very populist position.

There still is no separate liberty clause. The 1978 Constitution has been criticized over and over again for not including either a right to life clause or a right to liberty clause. We now have the "concession" of a right to life clause in the third draft, but there is no separate right to a liberty clause. In contrast, most economic and social rights and a whole lot of other rights pertaining to detainees have been recognized via the right to life and liberty clause of the Indian Constitution (Article 21).

And the non-discrimination clause-the ground on which discrimination is not constitutionally permitted, or constitutionally prohibited-still remains very limited. We pointed out that the ground be open-ended as in the International Covenant on Civil and Political Rights which the state of Sri Lanka is bound by. But the non-discrimination clause in the third draft still remains close-ended and narrow. When you compare this with the South African non-discrimination clause, its narrowness is alarming. In other words, the South African Constitution, like a sponge, has absorbed all the positive developments that have taken place in the past so many decades on human rights protection.We have not been able to do that yet.

And most of the provisions in the draft chapter say that if the law prescribes certain things, they are constitutional. It doesn't say that the law has to be just in order to be constitutional. There is a great degree of reluctance to incorporate concepts such as due process of law. Economic and social rights are concepts which could have easily been incorporated into the substantive rights.

One of the improvements is that most rights now are guaranteed to persons, earlier most of the rights were guaranteed only to citizens.

And to get to the next point pertaining to limitations, the previous Bill of Rights in the 1978 Constitution was known as a Bill of Limitations rather than a Bill of Rights. because most of the rights that were guaranteed were very severely limited on various grounds.

Almost all rights, except for a few such as freedom of thought, consciousness and religion, and freedom from torture, could be limited on various grounds. Freedom of expression, for example, could be limited on 10 grounds under the 1978 Constitution. And it merely said the limitations had to be prescribed by law, and they should be in the interests of any one of the prescribed grounds.

One of the fundamental improvements I find in that respect is the inclusion of the phrase that each limitation, in order to be constitutional, "has to be necessary in a democratic society". In other words, the onus is on the government to show that they imposed a limitation on a right in a manner which is necessary in a democratic society. And that phrase is to be found in most of the limitation clauses. I find that to be generally very positive.

But the grounds of limitation are still very extensive. For example, freedom of expression is limited on the basis of contempt of court, and we don't even have a clear-cut law on what contempt of court is. The PA manifesto categorically declares that the law relating to Parliamentary Privilege will be revised, and I would have thought that it would have meant that when constitutional changes are taking place, constitutional provisions should also reflect such assurances.

Why shouldn't we have the right to criticize our own political representatives? After all, they say that sovereignty lies in us, the people. Why should freedom of expression be limited in the interest of parliamentary privilege and contempt of court? And the danger here is that we are unaware of the parameters of the doctrine.

Then there's another provision in the draft regarding servicemen and women in the armed forces, which pertains to limitation. This was also a feature in the 1978 Constitution. These men and women have most rights limited over and above other people. For example, freedom from arbitrary arrests and detention, right to a fair trial, freedom form retroactive penal legislation, the right to equality, freedom of movement, privacy, the right to manifest one's region, freedom of expression, assembly and association are all further limited where servicemen and women are concerned. This is one very rare instance where you find human rights activists getting into this unholy (or holy) alliance, with service personnel and the police to champion the latter. I don't know what the rationale is. Why should the right to equality, the right to a fair trial, the right to freedom from arbitrary arrest be further diminished for those categories of persons? That is certainly unjustified.

Then the next feature pertains to the protection of fundamental rights/human rights during times of emergency. This is very important because we have lived under emergency for the past quarter of a century; and it has become the norm than the exception. Most of the constitutionally guaranteed rights can be suspended or derogated from during times of emergency. Earlier, in the 1978 Constitution, other than saying that emergency regulation ought to conform with the provisions of the Constitution, including the Chapter on Fundamental Rights, there were no guidelines or rules pertaining to derogating from fundamental rights during times of emergency. As a result the normal limitation clause was used.

When you look at international obligations of Sri Lanka, specially under the International Covenant on Civil and Political Rights, there is a very detailed and very commonsensical clause on the responsibility of a government to protect human rights during times of emergency. For example, a state of emergency cannot be declared unless there is a threat to the life of the nation. In other words, the Executive cannot, on a flimsy ground, declare a state of emergency. Similarly, the extent to which certain rights can be derogated from has to be proportionate to the exigencies of the situation. In other words, there has to be proportionality between the extent of derogation and the threat to the security of the nation, public order and so on. And further, International Law recognizes certain rights as non-derogable even in times of emergency, in other words, they cannot be further limited or suspended during times of emergency. For example, right to life, freedom from torture, freedom of conscience and religion and freedom from slavery were specified as non-derogable rights. Now we do have this in the third draft on

derogations during emergency. Certainly, this new draft is very welcome. But it falls far short in many respects when you compare with it the international obligations of Sri Lanka.

The fact is that these rights which are internationally recognized are very real. The state of Sri Lanka is bound to give effect to them and we as people living in this country are entitled to those rights. They are not some unknown, vague concept floating in the air. They are very concrete and we are entitled to them by law. When you compare this new draft derogation provision with International Law, there are various shortcomings. For example, as in international law, it does not specify when exactly a state of emergency can be declared. Under the existing law, the Executive has enormous discretionary powers to declare a state of emergency, and the judiciary has been very reluctant to review the grounds on which a state of emergency has been declared. In other words, there is no review of it. The only review is by Parliament; each month. Parliament has to extend a state of emergency.

Furthermore, certain non-derogable rights have not been incorporated as non-derogable rights. For example, a very important right, specially during times of emergency-freedom from retroactive penal legislation - is not recognized as a non-derogable right. It means that during a time of emergency, as it is right now, the government can say tomorrow "what you did yesterday was an offence, and you can be punished for it". Under International Law, freedom from retroactive penal legislation is strictly non-derogable.

But of course I must say in fairness , that certain other rights, which are not even recognized by International Law as being non-derogable, have been recognized as non-derogable; for example, the right to a fair trial, freedom from arbitrary arrest and detention have been recognized as non-derogable. This is indeed salutary.

A further safeguard has been added to this which I think is very welcome; it says that there shall be no derogation from the rights declared and recognized by Article 10.6, (that of the need to produce a detainee before a magistrate), unless at the same time legal provision is made requiring the magistrate having jurisdiction to be promptly informed of the arrest, and the person arrested be produced before the magistrate within such a time that is reasonable in all the circumstances of the case.

This additional provision is very important because we know that, during what we call the period of terror when we witnessed about 60,000 disappearances, most of those horrendous offences were committed due to arbitrary arrests and detention, and also because indefinite preventive detention was possible. That means a person who was taken into preventive detention need not be produced before a magistrate at all, and the person could be detained indefinitely under the emergency regulations which existed then.

Then also, under the 1978 Constitution, a claim could be made only against violations by administrative and executive actions. Now it has been expanded to cover state action. It is expressly specified in the third draft that any judicial action of courts of the first instance will be covered so that a person could file a Fundamental Rights petition against such judicial action. This is very important, because for example, we find that on any given day, 50-60% of the detainees of our normal prisons are not convicts, but are remand prisoners, mainly because of bail and judicial policies relating to bail. Now those are actionable under fundamental rights jurisdiction. This is a very positive feature.

However, there's a problem with regard to who can petition the Supreme Court. Under the 1978 Constitution, only the aggrieved person, or a lawyer on that person's behalf, could petition the Supreme Court. There is at least one instance where the Court declared that not even a wife could petition on behalf of a husband. Therefore there was a demand that public interest litigation be permitted; anybody should be able to petition the Supreme Court in the public interest whether you are directly aggrieved or not. That feature has not been incorporated. A person may be represented by another party, an organization, but you will have to find an aggrieved person. And this is a problem human rights lawyers come across so frequently because you have to look for an aggrieved person who is willing to come before the court. For example, how can you challenge an emergency regulation before there is an aggrieved party? In India, it is possible.

And then I have a specific criticism about the forum before which your rights could be vindicated. Still, the sole and exclusive jurisdiction pertaining to fundamental rights is given to the Supreme Court of the country. We are in an era of devolution of power, where power will be given to the regions and people will have the right to participate in decision-making processes. Still, however, the sole and exclusive fundamental rights jurisdiction is given to the Supreme Court. In other words, the centralization of redress mechanisms is tantamount to perpetuating central jurisdiction.

There was a proposal earlier that the Provincial High Courts be conferred jurisdiction to hear fundamental rights cases and perhaps an Appeal Court could be preferred to the Supreme Court. Obviously, many people whose rights are violated do not come before the Courts today because they simply cannot travel to Colombo, and there is a one-month limitation as well.

I must point out that the Human Rights Commission is very important in this regard because the Human Rights Commission has been established recently, and there is a provision in that law to establish regional committees of the Human Rights Commission. I would suggest that the existence of the Human Rights Commission be included in the Constitution, as in South Africa. And that a guarantee will be made that there will be regional units of the Human Rights Commission, so that people will have access to these mechanisms. In effect , as in the case of the Ombudsman's office redress mechanisms become very centralized. What's the point of devolution of power then?

The other point that I would like to make is on judicial review of legislation. Without review of legislation, protection of human rights in a holistic manner is really illusory. Now, under the draft, judicial review of legislation is possible, but only within two years of the adoption of the law. Most of the time, we don't even know the

impact of the laws until perhaps 5-10 years have passed, because we are not only looking at legislation that is *prima facie* in violation of fundamental rights. Such draft laws will be caught up anyway in the review at bill stage, but we have to look at the impact of a law as well. For example, if a particular law results in discrimination, we should be able to challenge it. The Torture Law came into effect in 1994 and there isn't a single prosecution yet. How do we know how that law is going to function? This is to say that the Constitution is supreme for two years, and after that, you can do whatever you want.

There should also, I would suggest, be a separate clause in the Constitution declaring that all units of devolution are bound by the fundamental rights chapter. It is taken for granted, but it should be specifically mentioned. All provincial laws, executive action and so on should be reviewed under the Fundamental Rights Chapter.

There are, obviously, certain improvements as I pointed out, but overall I see this as a fundamental rights chapter which, to a great extent, is devoid of a futuristic vision. It has not taken into account most of the developments that have taken place internationally and comparatively in other jurisdictions. I personally feel very sad about the retrogressive thinking in Sri Lanka. We gained independence in 1948. In South Africa, apartheid was entrenched that year. Where is our political discourse 49 years from that point? Looking at the South African Constitution of 1996, personally I find it to be an ideal. Theirs is a radical departure from the old order. We can't blame the people of South Africa for wanting a radical change. We also have an opportunity to put things right in a meaningful manner. This is the fourth Constitution since independence, the third Republican Constitution of Sri Lanka, and I think we should have made good use of this opportunity.

There is resistance, for example, to incorporate environmental rights in our Constitution. When are we going to incorporate those rights? We believe that we could get new constitutions every 20-25 years. So perhaps we are waiting till the year 2025 to incorporate those rights!

The limitations and the deep-seated weaknesses have perhaps come about because of the inadequacies of the Constitution-making process in Sri Lanka, because incumbents and would-be incumbents sit together in the Parliamentary Select Committee. They have vested interests.

The Constitution should have been drafted by persons who are not holding office, like in South Africa. There should have been a Constitutional Assembly representing the people in a true sense, not in a theoretical sense.

# DEVOLUTION

## Rohan Edrisinha

In January 1996, the government released a set of constitutional proposals entitled "Draft Provisions of the Constitution Containing the Proposals of the Government of Sri Lanka Relating to Devolution of Power". As indicated in the title, most of the draft provisions dealt with devolution of power. These proposals seek to flesh out the earlier concepts formulated by the Government in August 1995 and add to the various working drafts of constitutional proposals that were released by the Government earlier in 1995. However, it is important to note that in addition to the detailed provisions on devolution of power, contained in Chapter III, the Legal Draft also contains a Preamble, the important Chapter I which deals with the basic features of the Constitution, and Chapter II which deals with Buddhism. A critique of the "Legal Draft" of January 1996 must deal with these constitutional provisions as well.

## Positive Features of the Proposal

## The United vs. Unitary Debate

There are several positive provisions in the new package. The deletion of Articles 2 and 76 of the Constitution, which entrench the unitary character of the state, removes an unnecessary obstacle to substantial devolution of power. The proposals, however, fall far short of introducing a federal constitution. The proposals indeed contain some imaginative clauses designed to allay the fears of those who consider devolution of power a stepping stone to secession.

The proposal of the Government to repeal Article 2 and to replace the "unitary" nature of the Constitution with a quasi-federal character (ie "indissoluble union of regions) has come under considerable criticism. It must be remembered, however, that the power devolved to Provincial Councils under the 13th Amendment of the Constitution and the Provincial Councils Act, which are today accepted as inadequate, survived the constitutional scrutiny of the Supreme Court by the narrowest of margins. The Supreme Court by a majority of just five to four, held that the scheme of devolution introduced by the 13th Amendment did not undermine the unitary character of the Constitution. Four judges led by Justice Wanasundera held that it did. If the Provincial Councils had been given more powers under the 13th Amendment, it is certain that the Supreme Court would have declared that provisions violated the constitution. This would suggest that further devolution within the framework of a unitary constitution is impossible. Political parties and groups which advocate substantial devolution within the framework of a unitary constitution seem to have forgotten this fact.

The argument against the deletion of the unitary postulate in the Constitution ranges from historicism (ie "Sri Lanka had always been unitary") to phobia (i.e. "the replacement of the unitary constitution will lead to secession').

As regards the historical interpretation of the unbroken legacy of a "unitary state", suffice it to say that there is a compelling body of opinion that the "unitary" Constitution was a recent creation following the advent of British rule and had nothing to do with any innate, inherent and traditional characteristic of the Sri Lankan State.

A more serious argument against the dismantling of the unitary constitution is the perceived fear that any loosening of the unitary structure would strengthen the tendency towards secession. Part of the attraction of the concept of a unitary state is based on the following misconceptions:

(a) that merely because the commitment to a unitary state has been deleted, a federal constitution has been introduced. The proposals in the legal draft fall short of federalism as they do not contain some key elements of a federal constitution.

(b) that a federal constitution *ipso facto*, includes a right to secession. This is incorrect. Some federal constitutions do contain the right to secession; many do not. The legal draft, a part from falling short of a federal constitution, rules out even the peaceful advocacy of secession.

## Powers of the Central Government

In addition, the legal draft contains several provisions which will enable the central government to deal decisively with any secessionist threat.

One indisputable feature of the "legal draft" is the heavy reliance on central government control over strategic subjects, that have a bearing on the unity, territorial integrity and sovereignty of Sri Lanka. These are reinforced by several constitutional safeguards. The following amply demonstrates the above:

Section 2 (2) prohibits the Regional Administration from attempting, by direct or indirect means, to promote or otherwise advocate an initiative towards the separation or secession of any Region from the Union of Regions.

Section 26 deals with State of Emergency within a Region which enables the President to bring into effect the provisions of the law relating to public security and the power to dissolve a Regional Council where "the President is of opinion that the security of or public order in a region is threatened by armed insurrection, or grave internal disturbances, or by any action or omission of the Regional administration which presents a clear and present danger to the unity and sovereignty of the Republic".

In addition to the above, the following subjects in the Reserved List, over which the Central Government has exclusive powers, are clearly of strategic importance in ensuring the unity, integrity and the sovereignty of the Republic:

* Defence, national security, national police and the security forces
* Immigration, Emigration and Citizenship
* Foreign Affairs
* Currency and Foreign Exchange, international economic relations, monetary policy
* Airports, Harbours, Ports etc
* Shipping and Navigation, Maritime Zones including historical waters and territorial waters (exclu sive economic zone and continental shelf)

It is clear from the above that the Republic has at its full command all the powers necessary for any Nation-State to assert and defend its territorial integrity and sovereignty.

## Regional Autonomy

Let us now turn to the provisions in the legal draft that ensure regional autonomy.

These are contained, inter alia, in:

Section 15 (2): "The Regional Council of a Region has exclusive power to make statutes for such Region or any part thereof with respect to any of the matters in List II of the Second Schedule (referred to as the Regional List).

Section 1: "The executive power of the Region which shall extend to the matters with respect to which a Regional Council has power to make statutes, shall be vested in the Governor acting on the advice of the Chief Minister and the Board of Ministers and shall be exercised by the Board of Ministers either directly or through the Chief Minister and the Ministers of the Board of Ministers or through subordinate offices, in accordance with this Chapter".

The abolition of the Concurrent List and the attempt to remove any ambiguity shrouding the division of powers must also be welcomed.

The provisions relating to finance are also a significant improvement on those in the Thirteenth Amendment. The Regional Councils are given greater revenue raising powers. A major weakness in the Thirteenth Amendment and the Provincial Councils Act is the ambiguous role of the Governor in the area of finance. The new proposals are not only clearer but also remove the Governor from this area altogether.

In principle, therefore, there appears to be a commitment to balance a strong Centre with Regions which would have the powers to manage their own affairs. This we feel is the surest way of ensuring that the Country does remain united with the resolution of the ethnic crisis through a power-sharing scheme.

However, the provisions in the "legal draft" contain numerous inconsistencies and ambiguities which are liable to be abused, in the event of the centre being committed neither to the letter nor the spirit of devolution and power sharing. Some of these will be highlighted in our critique.

## Omissions

A cardinal defect is the absence of mechanisms to represent regional interests at the centre. The polarization between the centre and the provinces is one of the main reasons for the failure of the present Provincial Councils system. An elected Senate, consisting primarily of Senators elected from the regions, would serve as a check on the central government's intrusion into the regions' legitimate sphere of authority and help prevent the comedy of errors which culminated in the enactment of the unconstitutional National Transport Commission Act. When this Bill was introduced in Parliament, hardly any concern was expressed as to whether its provisions violated the scheme of devolution spelled out in the Constitution. A House of Parliament whose *raison d'etre* is to represent regional interests at the centre will certainly be more vigilant than Parliament has been in the past eight years.

It must be recognized that the failure of the Provincial Council system and the widespread conviction that all it has done is create another tier of politicians with "perks" without responsibility, will understandably cause skepticism about the creation of a Senate. The proposals must respond to this skepticism. Substantial devolution of power must entail a change in the role and therefore the composition of Parliament. Parliament must be the deliberative assembly where national policy, larger political and ideological questions are debated; politicians who are more at home engaging in grassroots politics should move to the Regional Councils. Ideally there should be a difference in the type of politician attracted to Parliament and the Regional Council. Since Regional Councils would be vested with the responsibility of dealing with local issues, the citizen should view the Member of the Regional Council as the person s/he meets to deal with day to day problems, not the Member of Parliament.

Thus the number of Members of Parliament can be drastically reduced. Parliament can consist of a bi-cameral legislature consisting of a 120 member House of Representatives and a 60 member senate. (The present Parliament consists of 225 MPs.) Each region should elect an equal number of Senators with the entire region constituting the electorate so as to enhance the chances of persons of regional stature.

## Devolution Commission

For some inexplicable reason, the idea of a Devolution Commission contained in the August 1995 proposals has been dropped. The rationale for such a Commission must surely be to provide for a high-powered body consisting of the main political actors in the country, both at the central and regional level, which could meet to deal with disputes between the centre and the regions and between regions through dialogue and mediation. The Commission could also provide a forum for coordination and liaison between the centre and the regions and between regions. Its composition could be political or non-political. If political, it could be chaired by the President and include the Prime Minister, the Leader of the Opposition, the Minister of Finance, and the Chief Ministers of the Regions. If non-political, it could consist of independent persons of eminence, including nominees of both the centre and the regions.

The January 1996 proposals provide for a Chief Ministers' Conference to settle disputes between regions. What about disputes between the centre and the regions? Even with regard to disputes between regions, the presence of political clout from the centre will facilitate the resolution of such disputes. The Chief Ministers Conference is an inadequate substitute for a powerful Devolution Commission.

## Supremacy of the Constitution.

Another fear expressed by the opponents of devolution is that Regional Councils will be able to pass any statutes on the subjects assigned to the regions, even statutes which discriminate against minorities within the region. In federal states and states with substantial devolution of power, the supremacy of the Constitution and the mechanism which facilitates such supremacy, judicial review of legislation, is a basic feature of the Constitution.

The Government, while making no reference to the principle of the supremacy of the Constitution in the legal draft itself, has rejected the principle in the constitutional proposals released so far.

The principle of the Supremacy of the Constitution must be unequivocally recognized in the Constitution. In order to ensure this, comprehensive judicial review of legislation must be recognized. A citizen must be able to challenge the constitutionality of a law passed either by Parliament or a Regional Council at any time when it impacts on him/her.

## Power Sharing Institutions

While the abolition of the Concurrent List is welcome, it is important that in certain areas the Central and Regional Governments should work together. Such cooperation should be facilitated by the creation of mechanisms consisting of nominees from both the centre and the regions. One of the weaknesses of institutions constituted under the 13th Amendment to the Constitution is that they consist entirely of central government nominees and therefore do not inspire the confidence of provincial governments.

In the important area of the environment, there is a need for an institution like a National Environmental Authority to be in overall charge of national and inter-regional environmental issues. In order to ensure that the Authority is independent and has the confidence of both the centre and the regions, it should consist of nominees of both.

This type of power-sharing institution can serve as a model for other subjects as well. It can also be extended to revenue and profit sharing. For example, if the Galle harbour is considered a "port with international transportation" and therefore comes within the purview of the Reserved List, it is only but fair that the Southern Region be able to nominate some members to its Management Authority, even though the Central Government will have overall control.

## DEFICIENCIES

### Entrenchment of Majoritarianism

It is dangerous and indeed simplistic to view the possible political solution to the ethnic conflict in this country as simply one of devolution of power. There are equally important issues of the nature of the Sri Lankan state and of national identity. Since independence, the gradual entrenchment of majoritarian democracy, where the language and religion of the majority community have been given priority, has exacerbated ethnic tensions and undermined the concept of a truly multi-ethnic, multi-religious, plural society.

The Sinhala Only Act, the introduction of the First Republican Constitution of 1972 where the Sinhala Language and Buddhism were given an exalted status in the Constitution, were landmarks in the slide to the vivisection of the country.

The most retrogressive feature of the legal draft which is supposed to address the grievances of minorities in the country, is that while addressing one aspect, namely the need for autonomy, it further fortifies majoritarianism as well. Apart from retaining the provision which gives Buddhism the foremost place, it goes much further by establishing a constitutionally sanctioned institution, which cannot be abolished by Parliament and which all Governments well have to consult. This Supreme Council of the Sangha will not only foster the "religisation" of politics, but also the politicisation of religion. The Government will presumably appoint monks to this Council. On what basis? The Council must be consulted "in all matters pertaining to the protection and fostering of the Buddha Sasana". Who defines the scope of this phrase ? Does this include tourism, liquor licenses, inland fisheries, abortion, ethnic relations, the rights of adherents of other religions ?

Whether it is the Roman Catholic church in Poland, or the Islamic clergy in Pakistan, or the Buddhist Sangha in Sri Lanka, the separation of religious and political institutions is essential for a modern liberal democracy.

### Power of Dissolution

Another weakness in the legal draft is that there are inadequate checks on the possible abuse of the central government's power to intervene in a region in a situation of emergency. No one would argue that the central government should not be permitted to intervene in a situation where the unity and sovereignty of the country are in jeopardy. The central government must be able to respond swiftly, decisively and effectively. But since this power of intervention has been abused so much in India and in Sri Lanka, the potential for abuse must be addressed in the proposals.

The provisions in the legal draft fall short of the safeguards even in the Thirteenth Amendment. Article 26 (4) of the draft proposals permits the President in a situation where there is a clear and present danger to the unity and the sovereignty of the country, by proclamation to assume to herself/himself the functions and powers of the Governor, Board of Ministers, the Regional Council and any other authority. Does any other authority include courts of law? The President is also given the power to dissolve a Regional Council in such a situation. If a Proclamation is to continue to be in effect for more than fourteen days, it must be approved by a resolution of Parliament.

The main shortcoming of this section is that the President can dissolve a Regional Council within the 14 day period and thus even if Parliament were to withhold its ratification of the proclamation, the dissolution will remain in effect. Quite naturally, this provision has caused consternation among minority parties, particularly in view of the dissolution of the two Provincial Councils earlier. Furthermore, the fact that Article 26 (4) (f) makes it impossible for judicial review of the Proclamation, renders negatory the requirement that such a Proclamation should be made only in situations where there is a clear and present danger to the unity and sovereignty of the country.

The provisions on dissolution should be radically revised. While it may be necessary for the President to be able to take over the administration of a Region in an emergency situation almost immediately, it is certainly not essential that s/he be in a position to dissolve the Council immediately. The ratification of judicial review will also provide for checks and balances on a power which has the potential for abuse.

### Constitutional Council

The Constitutional Council is expected to play an important role in the new Constitution even with regard to institutions which have an impact on devolution of power. The idea, which was borrowed from the Constitution of Nepal, seeks to ensure that a non partisan, independent approach is taken in appointing people to key positions and various bodies. A small committee of persons of stature hold office in the Constitutional Council ex officio. In the Sri Lankan context, it would make sense for the Council to include representation from the regions in order to ensure that the Council is not perceived as a central government institution, but rather as a national institution.

It is proposed that the Constitutional Council should consist of the President (the nominal Head of State elected by a bi-cameral Parliament), who in the exercise of this function would be free to act in his/her own discretion, the Prime Minister, the Leader of the Opposition, the Speaker, the President of the Senate, a Chief Minister nominated by the Chief Ministers Conference and a retired

appellate court judge nominated by the Chief Justice. Unfortunately the Government's draft proposals on the Constitutional Council provides for five MPs to be nominated to the Council, thus undermining the principle that the politicians on the Council hold office ex officio, that partisan considerations should ideally not play a part in their decision making and that the Council be national as opposed to central or regional in character.

■

## WHAT WE LOST

The interior love poem
the deeper levels of the self

dates when the abandonment
of certain principles occurred

The role of courtesy-how to enter
a forest, how to touch
a master's feet before lesson or performance

The art of the drum. The art of eye-painting.
How to cut an arrow. Gestures between lovers.
The pattern of teeth marks on skin
drawn by a monk from memory

The limits of betrayal. The five ways
a lover could mock an ex-lover

The skill in tentative messages
which included yes and no
but never the direct maybe

Nine finger and eye gestures
to signal key emotions

The small boats of solitude

Lyrics that rose
from love
back into air

naked with guile
and praise

Our works and days

We knew how monsoons
(south-west, north-east)
would govern behavior

and when to discover
the knowledge of the dead

hidden in clouds
in rivers, in unbroken rock

All this was burnt

or traded for power and wealth
from the eight compass points of vengeance

from the two levels of envy

**Michael Ondaatje**