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Lessons from the Northern Ireland Peace Agreement

Jehan Perera

The conflict in Northern Ireland is one that has had a longer history than many other conflicts in the world. The partitioning and separation of Ireland from Great Britain in 1920 gave birth to Northern Ireland, with its Protestant majority and Catholic minority. The two communities were bitterly polarized and they failed to work together. Violence was seen as the way to change. But, instead of generating change that was constructive, violence led to stalemate and to immense suffering. The parallels to the Sri Lankan situation are clear.

Not so long ago, it seemed that there was no way out of the violent conflict in Northern Ireland. The Protestant majority wanted to remain within the United Kingdom. The Catholic minority wanted to join with Ireland. The British wanted to defeat and disarm the guerillas on both sides, especially the Irish Republican Army (IRA), and so they had sent their army in, but to no avail. That is, until both the British and the IRA were prepared to openly admit that they could not solve the problem and achieve their aspirations through warfare.

On the British side, there was a public acknowledgement that the army could only limit but not suppress IRA guerilla action. In turn, the IRA admitted that while they could fight on for another decade if need be, at the end of the decade they would be nowhere near pushing the British army out of Northern Ireland. In the meantime, the people on whose behalf they were fighting became the losers.

Unfortunately, we in Sri Lanka have still to come to this stage of realization. For sure, the government has on many occasions said that a political solution is necessary to end the conflict. But it seems that in their heart of hearts, many government leaders continue to believe that a military victory is possible. Instead, on and off we hear stories that the LTTE is on their last legs. These stories may firm up the determination of the government decision makers to hang tough, to wait another six months, for the tide to turn decisively in the army's favor. So far, it never has.

The constant feature of the war in Sri Lanka is that the LTTE is around and remains able to hit targets, especially in the north-east. As for the LTTE, they have never conceded that they might not be able to achieve Tamil Eelam by force of arms. On the contrary, they keep alive the myth of invincibility of themselves and of their leadership, to keep on going the way they are. The LTTE war machine may be well- oiled, but the people always pay the price.

Prerequisites

The Northern Ireland agreement shows that human ingenuity can solve virtually any political problem. A problem that seemed impossible to resolve, is now in the process of resolution. But *solving long drawn and major civil wars requires several prerequisites.* The first prerequisite is that the two warring sides should *acknowledge,* both publicly and to themselves, *that the war cannot be won*. In Northern Ireland there was an acknowledgement. In Sri Lanka, such acknowledgment has yet to come, which is why we are still faraway from a peace agreement.

The second prerequisite for a peace agreement is that there should be a *bi-partisan consensus among the major political forces* that represent the state. In the United Kingdom there was this bi-partisan consensus. Much of the spade work that led to the Northern Ireland peace agreement had been done by the Conservative government of Prime Minister John Major. But when the man who succeeded him from the opposing political party clinched

the deal, John Major did not try to undermine the efforts of his successor, Prime Minister Tony Blair. Instead, he went along with him, and stood on the same platform and supported the agreement that had been arrived at.

Needless to say, we in Sri Lanka are still far from seeing such a bi-partisan agreement being honored by our two largest political parties. It is very unfortunate that to this day, years after the President and Leader of the Opposition signed a bi-partisan agreement, the leading members of the government and opposition should be publicly squabbling about who let down the other. The lack of consensus among the two major parties would indicate to the LTTE their lack of seriousness in seeking an end to the ethnic conflict. By way of contrast, in the case of Northern Ireland, the bipartisan consensus in the United Kingdom reassured them that the talks were for real objectives of conflict resolution and not mere election gimmicks.

In addition to these two prerequisites of a recognition of military stalemate and the existence of a bi-partisan consensus, the Northern Ireland experience demonstrates that there are at least three other prerequisites for a peace agreement that are needed. The first among them is the *existence of a framework document for constitutional reform* on which there is *basic agreement*. In Northern Ireland a big challenge to be overcome was to devise a procedure by which democracy and majority rule would prevail, but not simply rule by the ethnic majority.

Majority Rule

A weakness of the Westminster system in general, which relies upon the unitary form of government, is that in ethnically divided societies, it permits the largest ethnic community to obtain the largest number of seats in parliament, and then take unilateral decisions that affect the smaller ethnic communities. In Northern Ireland this system enabled the Protestants to rule over the Catholics, and to discriminate against them. In Sri Lanka, the results of the Westminster system are well known to us.

The peace agreement in Northern Ireland specifies that there will be *stringent protections of human rights that will prevent a majority riding rough shod over a minority*. The agreement provides for "arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the European Convention on Human Rights and any Bill of Rights for Northern Ireland." It includes setting up of an "Equality Commission" to monitor the legal obligation to promote equality of opportunities and parity of esteem between the two main communities, and to investigate individual complaints against public bodies.

The framework document that led to the Northern Ireland peace agreement also has several novel mechanisms to ensure that *both Protestants and Catholics share equitably in the power to make decisions* that will bind both communities. This operates through the mechanism of "Parallel Consent" and "Weighted Majorities."

Certain key decisions requiring "cross-community" support (that is, both Protestant and Catholic support) have been designated in advance, to include the election of the Chairman of the Assembly, the First Minister, the Deputy First Minister, standing orders and budgetary allocations. In other cases, such decisions could be triggered by a petition of concern brought by a significant minority (30 out of 108) members of the Assembly.

In the Northern Ireland context, the principle of parallel consent means that certain key decisions can only be taken if a majority of both unionists (Protestants) and nationalists (Catholics) vote for the decision. The principle of weighted majority means that at least 60 percent of the assembly must vote in favor of the decision, together with at least 40 percent of each of the unionist and nationalist members voting for the decision.

A further protection against the "winner takes all" mentality that plagues Sri Lanka, and which drives the opposition to despair and even revolution, has been developed in the Northern

Ireland peace agreement. It is to share ministerial positions on the proportional basis of the number of seats won by each party in the Assembly. Not only does this permit the smaller communities to share executive authority, it also enables rival political parties to share power.

Open-ended Possibilities

The fourth prerequisite that had to be satisfied for the peace agreement to work was the tacit agreement of the British government that the IRA would not disarm at the outset of the peace agreement itself. After many years of fighting and breakdown of talks, the parties to the conflict simply do not trust each other.

A guerilla group will not wish to lay down its arms, even if it is genuine about seeking peace, until it is reasonably assured that the government will deal with it, and implement the agreement, in an honorable way. The Northern Ireland peace agreement has given the IRA and other paramilitary groups two years to disarm "following endorsement in referendums North and South of the agreement and in the context of the implementation of the overall settlement."

Equally important is that a peace agreement must take care not to shut the door entirely to the ultimate goal for which a guerilla organization has taken to arms. *The guerilla leadership has to be able to convince its rank and file that all the sacrifices of the past have not been in vain.*

The Northern Ireland peace agreement leaves the door open to the IRA's goal of achieving the reunion of Northern Ireland with the Irish Republic. It recognizes that at this time the majority of people of Northern Ireland desire to live as a part of Britain. But it also provides that when a majority of the people of Northern Ireland freely give their consent to a united Ireland at a referendum, Northern Ireland may leave Britain.

On the other hand, a similar solution may not be possible in Sri Lanka because the unit that should conduct such a referendum, whether it is the north-east, or the north and east separately, or the whole island, is a matter of dispute. In the case of Northern Ireland, there was no dispute that the unit in question was that of Northern Ireland, which had been artificially partitioned by the British in 1920.

In Sri Lanka, a "viable alternative to Tamil Eelam" which accords with the four principles articulated at the Thimpu peace talks in 1985 may still be able to satisfy the LTTE's ultimate goal as it is a phrase that they have coined themselves.

Role of Mediation

The fifth prerequisite for a successful peace agreement in Northern Ireland was *the skilful mediation done* by Senator Mitchell from the United States. Senator Mitchell and his team of mediators did much more than facilitate the discussions between the British government, the IRA, the Northern Irish political parties and the other paramilitary parties. They did not merely carry messages, arrange the tables and the place to meet. In addition, they prepared documents, suggested alternatives and counseled the different parties. *This mediation work was necessary because of the*
mistrust that existed between the parties, and also because of the lack of negotiation skills of many of them.

By way of contrast in Sri Lanka, both the government and opposition have balked at foreign mediation. The rather bad example of Indian mediation may account for this reluctance to accept foreign mediation. But it was plain to see that India was not an impartial mediator during its period of involvement. On the contrary, it was a very involved one, being a neighbor that had many interests in Sri Lanka, not least of which was actively supporting some of the guerilla organizations. At present in Sri Lanka, there appears to be a consensus

that is building up that third-party facilitation is acceptable. This is an improvement on the attitudes prevalent some time ago.

As much as the government needs to be rethinking its strategy on how to end the war, and the sufferings of the people, so must the LTTE also engage in rethinking its strategy, so that both parties can move away from war and killing to achieve political ends through political means.

Summary

Following lessons from the experience of Northern Ireland are relevant to Sri Lanka:

- Human dignity can solve seemingly intractable political problems.
- Solving long-drawn civil wars require certain prerequisites:

  - The warring sides should acknowledge that the war cannot be won.

  - There should be consensus among major political parties.
- In Northern Ireland, parties first negotiated a Framework Document setting out principles for constitutional reform.
- The Framework Document introduced novel constitutional features to enable Protestants and Catholics to share power on the basis of equality.
- Steps are taken to prevent majority rule with provisions for stringent protection of human rights.
- The settlement is not a closed one. It leaves room for open-ended possibilities.
- The skilful mediation by a third-party mediator was a major reason for the success of Northern Ireland negotiations.

The Philippines is of interest to Sri Lanka due to the peace agreement arrived at on the island of Mindanao, and its relevance to Sri Lanka. The breakthrough to peace on Mindanao came after a quarter century of guerilla warfare that pitted the original Muslim majority on the island against the government. The peace accord which was signed in 1996, now appears to be breaking down. There are lessons in both peace making and peace losing that are of great relevance to Sri Lanka.

Mindanao had been for many centuries a Muslim majority area. But successive waves of Christian colonization, some of which was state sponsored, led to a change in the demographic composition. The new Christian settlers came to be seen as the new elite, upsetting old social relations. They became the owners of large tracts of land. Along with these changes came a transformation in the nature of the institutions serving the public. They too tended to serve the Christian population first, with the result that the Muslim population on Mindanao felt that they were being sidelined and had become second class citizens in the land of their birth. Thus, a clear parallel can be seen to the grievances of Tamils in Sri Lanka's formerly Tamil majority Eastern province in relation to state-sponsored settlement of Sinhalese.

The guerilla war begun by organizations such as the Moro National Liberation Front (MNLF) became a protracted one with neither the government nor the rebels able to defeat the other. Foreign support from several Muslim countries, most notably Libya, led to a situation of stalemate. By the time of the peace agreement in 1996, an estimated 125,000 people are believed to have died as a result of the conflict. Therefore, the peace settlement in the Philippines, the problems that were overcome and those that remain offer many lessons for peace makers whether in Sri Lanka or in
other countries facing ethnic conflicts, such as Bangladesh.

The success of peace making in the Philippines came after several failures. The most dramatic breakdown occurred in February 1987 when the newly-elected president, Corazon Aquino, who was elected to power as the "peace" and "democracy" candidate, declared an all out campaign to militarily eradicate the rebels. The parallel to Sri Lanka and to the election of its own "peace" and "democracy" candidate, President Chandrika Kumaratunga, is striking. Both presidents, who were widows of slain political leaders in whose shadows they had lived, had not had experience of administering political office. They both went into the peace talks with good intentions, but without having done the requisite hard work in planning.

Adequate Preparations

According to Professor Ed Garcia, "While the sincerity of the new (Aquino) government to talk was widely acknowledged, it has been recognized even by members of the peace panel that the government was unprepared when it went into negotiations." The relevance of his observation becomes clearer when he further pointed out that. "What made the talks possible was the popular clamor for it, effectively overriding the military's objections to peace talks. It was this support from a peace constituency, consisting principally of religious leaders and non-governmental organizations, that provided the impetus for the peace talks, but it was no substitute for the adequate preparations necessary to ensure a significant breakthrough into negotiations."

In 1993 the newly elected president, Fidel Ramos, adopted a more sophisticated policy towards negotiations. He appointed a three-member National Unification Commission with wide ranging powers and with Cabinet status, so that they would not be subjected to any form of political interference. Backed by a team of researchers and assistants, the Commissioners did their own investigations and made their recommendations directly to the President. This

led to the much acclaimed peace settlement between the Philippine government and the MNLF, which is the largest of the Muslim rebel organizations.

Disillusionment

However, the situation today in Mindanao is growing precarious. There are two major reasons for this. The first problem is that the Philippino government is not delivering on all that it promised to the MNLF when it obtained their acquiescence in the peace settlement. After President Ramos, President Estrada, who succeeded him, is not very sympathetic to the aspirations of the Muslim people of Mindanao for self-government. The second problem is that the MNLF leader, Nur Misuari, who became the Governor of Mindanao, has shown himself to be a poor administrator. He has not been able to show results in terms of eradicating corruption and promoting economic development. The more extremist Moro Islamic Liberation Front (MILF), which did not sign the peace accord, has gained ground. In this growing disillusionment with the peace agreement, there is a parallel to be seen with what happened in Sri Lanka after the breakdown of the peace talks in April 1995.

With the ending of the cease-fire and the outbreak of renewed war, the Sri Lankan government came out with a draft peace package of political proposals in August 1995 that won near unanimous acclaim from both Tamil opinion within the country and the international community. But there was also severe criticism leveled against the draft reform proposals by powerful groups in the rest of the country. Thus, when the revised "legal text" of the devolution proposals made their appearance in February 1996 the package had been substantially diluted.

Likewise, in the Philippines the first agreement signed by the Ramos government and the MNLF rebels on a "transitional implementing structure and mechanism" in June 1996 met with severe opposition and public uproar in the country. This led to to the watering down of the peace agreement by the time it was finalized and signed into law in October 1996. In other words, the MNLF ended up getting quite a bit less than it had been promised at the outset. But by entering into a watered down agreement, the MNLF is now in danger of losing ground to the much smaller and more extreme MILF, which has now become the main rebel organization. The MILF is making much of the "sell out" of Muslim interests by its rival which, it claims, wanted to get some small share of governmental power.

Important Lessons

An important lesson from the Philippines is that, unless both the government and the rebel organization with which it has signed the peace agreement cooperate with each other, *extremists on either side can gain in strength*. They will try to undermine the peace agreement. This is what can also be seen in the case of the Palestinian-Israeli peace agreement. The hardline stance taken by the new Israeli government has weakened President Arafat and also the moderates among the Israelis. But the structures of power are such that a weakening of the moderates after peace may affect the rebel organization more than it does the government. While the war rages the guerillas are strong, because they can always hope to rely on their weapons to get what they want. But after peace comes they are not expected to resort to their weapons, but only to political negotiations. This is the realm of political intrigue and double talk where the advantage will tend to lie with established politicians rather than with guerillas in the bush.

Further, it is governments, and not the rebels, who have access to massive resources, both local and international, available to legitimate states and to the diplomatic power that being a legitimate state confers. In turn, the international community feels much more comfortable with democratically elected politicians than with rebels who have just left the jungles. Therefore, it is natural that the rebels will feel that the cards are stacked against them once peace returns. This is why *making peace with a guerilla organization calls for special*

mechanisms to build trust and confidence. Or else the guerillas will not be prepared to come out of the jungles to negotiate but will prefer to fight it out from the jungles, despite the misery that the war brings to everyone, including their own people.

Thus, for peace making to be successful there are three important lessons from the Philippines. First is *the need to have careful preparations made prior to negotiations*. Second, is to ensure that *the rebels do not feel cheated after the peace agreement has been signed* because of any watering down of the agreement. This can lead to a defection from the ranks of those who signed the peace accord, who will cross over and join more extreme rebel groups. Third, is to keep in mind that a basic principle of conflict resolution by peaceful means is that *both parties to a conflict should contribute towards the envisaged solution*.

For instance, if only one side develops the solution, the chances are that the benefits of the solution would accrue primarily to that side. Further, the other side would not feel a sense of ownership of the solution. On the contrary they would probably feel that the solution belongs to the other side alone, and not to them also. Joint participation in the formulation of the solution to a problem is key to mutual acceptance of that solution.

The basic requirement in any negotiated political solution is *that the two sides should jointly come up with the answers and thereby feel that they own the solution*. For instance, the peace accord signed in the Philippines between the government and the Muslim rebels, was based on the 1976 Tripoli agreement. On that occasion, the Philippine government, the rebel MNLF and the Organization of Islamic States jointly came up with a mutually agreed framework of a political solution. Twenty years later, after several failures, this framework was fleshed out and given content as a result of a successful negotiation.

In Sri Lanka, on the other hand, there has been no commonly agreed framework on which a solution may be reached. In 1985 the Tamil parties, including the LTTE, met with the Sri Lankan government and came out with the Thimpu declaration and affirmed four principles on which they wished the solution to be based. But the Sri Lankan government did not agree to this framework which was unilaterally decided on by the Tamil parties. The Indo-Lanka Accord of 1987 brought together the Sri Lankan and Indian governments, and all the Tamil parties, but not the LTTE. Both of these negotiations failed because they did not accommodate both parties to the conflict but sought to be unilateral impositions. Now in a continuation with past trends, there is the devolution package that excludes the LTTE. It too seeks to be a unilateral imposition on one party to the conflict.

Devolution Package

Despite the best efforts of the government to obtain broad and non-partisan support for the devolution package, this has not been readily forthcoming either from the rebel LTTE, the opposition UNP, or civic organizations. The reason seems to have less to do with the content of the package (for example, the "unitary state" versus "union of regions" issue) than it has to do with the non-participation problem. The fact is the devolution package is one that was crafted by the government acting more or less on its own, and only thereafter presented to the larger society for their observations and amendments.

But whatever the shortcomings may be in the present set of government proposals, they do continue to deal directly with the greatest obstacle to the genuine devolution of powers. This is Article 2 of the constitution which asserts that "Sri Lanka shall be a unitary state." In terms of constitutional law while Article 2 remains the autonomy that can be granted is necessarily limited. Article 2 perpetuates centralization and restricts devolution. It means that the central government can always, by itself, either override or dissolve a regional body. Such a power is bound to be abused, if not for ethnic reasons, then for party political reasons.

What is most noteworthy about the government's devolution proposals is that they seek to remove Article 2 from the constitution. This is certainly a courageous decision on the part of

the government because it is the removal of Article 2 that necessitates a referendum. In its willingness to go to the people with the most far-reaching devolution proposals ever made by a Sri Lankan government, the government has given an indication of its sincerity to pursue a negotiated political settlement. But for them to be really worthwhile, these proposals, as we shall see, should be part of a strategy to bring the LTTE back to negotiations. The unfortunate fact is, that even if the devolution package more or less meets Tamil aspirations, in its present formulation it will fail to be acceptable to the LTTE. The devolution package is an endeavor to squeeze the LTTE into a solution framed by others. This is a strategy that is unlikely to work if peace now is the goal.

Summary

In this lesson, you learned:

- A breakthrough for peace in the Philippines came after a quarter century of guerilla warfare and conflict.
- Peace talks between the government and the rebels were made possible when there was popular clamor for it. A peace constituency is crucial to create conditions for peace talks.
- If the government and the rebels that sign the peace agreement do not cooperate to implement the settlement extremists of either side can gain in strength.
- Making peace with a guerilla organization calls for special mechanisms.
- Careful preparations for talk made before the talks can make peace talks successful.
- It is important that the rebels do not feel cheated after the peace agreement is signed.
- One key principle in conflict resolution by peaceful means is that both parties should contribute to the envisaged solution.

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Constitution-Making in a Plural Society: Conflict Prevention/Resolution

N. Selvakkumaran

Introduction

In countries where internal conflicts have defined the nature of political relations among communities, constitution-making is usually a complex and difficult exercise. Sri Lanka's

experience during the past two decades provides a lot of lessons concerning constitutional reforms in a society in conflict. However, constitution-making can also be approached from a conflict resolution perspective. Constitutions may generate conflicts when they do not provide political structures and institutions suitable for the plural nature of society. Sri Lanka provides a good case in point. At the same time, constitutions can also be imagined as initiatives for conflict resolution. In this chapter, we will discuss some salient aspects of constitution-making for conflict resolution.

Aims of a Constitution

It is hardly imaginable that any country or state calling itself a democracy can be without a constitution. Every state needs a constitution. It has been said that a constitution is a necessity and every state must and does in fact possess one. A constitution is necessary even in the case of despotism. A state without a constitution is not a state but a regime of anarchy. (Jellinek)

Why is a constitution essential for a state? A constitution of a state serves many a purpose. To name a few, it serves to enumerate the powers and functions of different organs of government; it describes the relationship between the different organs of government; it enunciates the norms which underpin the exercise of powers by these organs; it defines the relationship between the organs of government and the people of a country; it describes the relationship of a state with the rest of the world; it curbs the government on behalf of the individuals and groups; it also limits the vagaries of present and future generations. Due to a variety of these reasons, it may be observed that many writers have given different definitions to a constitution.

In the words of Woolsey, a constitution is “the collection of principles according to which the powers of the government, rights of the governed and the relations between the two are adjusted.” Dr. Wheare, on the other hand, defines a constitution as “that body of rules which regulates the ends for which and the organs through which governmental power is exercised.” Similarly, Gilchrist states that a constitution consists of “that body of rules or laws, written or unwritten, which determine the organization of government, the distribution of powers to the various organs of government and the general principles on which these powers are to be exercised.” Jellinek also sees a constitution in the same light. To him a constitution is the body of “juridical rules which determine the supreme organs of the state, which prescribes their mode of creation, their mutual relation, their sphere of action and finally the fundamental place of each of them in their relation to the state.” There are others who give importance to some other aspects. For example, Charles Borgeaud envisions a constitution as “the fundamental law according to which the relations of individuals or moral persons to the community are determined.” Lord Bryce states as one of the definitions that a constitution is “the complex totality of laws embodying the principles and rules whereby the community is organized, governed and held together.”

It is evident that the constitution of a state serves a variety of purposes. When making a constitution, different degrees of importance may be attached to different purposes depending on the experience a state has undergone or on the basis of emphasis placed by its people on certain matters. This may vary from country to country though some of the core values and norms may, of necessity, find a place in all the constitutions. One of the objectives

of the constitution in a democratic state must be to maintain law and order and *create an environment where people can live happily and peacefully, enjoy their freedoms and rights, and develop themselves and the country without causing any harm to others or infringing the freedoms and rights of others*.

One cannot but agree that these concerns should, if not will, come uppermost in the people who are concerned with making a satisfactory and workable constitution which ensures peace and harmony amongst the different peoples of the country. *If the basic organic law of a country which is plural in nature fails to provide the necessary environment and space for diverse communities to coexist with amity and mutual respect, it will not take very long for the country to disintegrate and go down the lane of destruction and distrust*. No country can ever be capable of developing itself if there is mistrust, hatred and disunity among its various communities. Lack of unity, among goodwill and trust amongst a country's different communities is a sure recipe for disintegration and disaster.

It is noteworthy that the fundamental law of any land should *neither constitutionalize nor institutionalize disunity, suspicion and mistrust amongst the various communities* inhabiting the country. Sri Lanka is not an exception to this general notion. Therefore, it is essential to know the constitutional structures and mechanisms that should be in place if a plural society can exist and let its different peoples live peacefully and amicably for the good of themselves as well as that of their country.

Constitution in a Plural Society

There are three main concerns, amongst others, which a pluralistic country should pay attention to when it embarks upon the task of making a new constitution for itself. These relate to (i) mechanics and manner of preventing conflicts from arising between different communities, (ii) early warning signals of any potential conflicts, and (iii) if conflicts do arise, mechanisms for resolving or dealing with them in a manner that will engender harmony and peace as opposed to acrimony and divisiveness.

Conflict prevention

It is essential that the constitution of a country should not be the very source of creating conflicts amongst the various communities of a plural state. The structure of government formulated in the constitution can be a fertile ground generating disharmony and discord amongst various peoples of a country. For example, a country, composed of multi-ethnic or multi-religious societies needs a system of government which will not allow one ethnic community or religious majority to trample over the rights and freedoms of other communities. The system should not facilitate and foster hegemony of one community over and above the other communities. These concerns could be addressed by incorporating different mechanisms in the fundamental law of a country.

The constitutional structure of the government should be designed in such a way that it provides opportunity and space for each and every community to manage their affairs without any interference from the other communities. In other words, the different communities must enjoy relative autonomy when it comes to internal affairs of their respective communities,

without allowing such autonomy to adversely impact on the general welfare and good of the country. Overcentralization of powers does not facilitate or provide such space or opportunity. A system of effective devolution of powers becomes handy in this respect. Devolution of powers provides opportunities for different groups or regions to look after and develop themselves with regard to matters which pertain to them exclusively without any impact or adverse effect on other people.

This will in other words permit different groups to mind their own matters without being minded by others. They will get a feeling that they are not subjected to the whims and fancies of people who do not share their sense and sensibilities. This facilitates the enjoyment of autonomy of individuals and groups. One may go to the extent of arguing that this should be a fundamental human right of every person and group. A system which permits or perpetuates a person being dominated or ruled by another, or a group being dominated or ruled by another, where the matter over which this happens is exclusively within the first person or group, is oppressive in nature. Such a system will be a sure recipe for generating conflicts and dissension. History shows that in many a state, the unitary system of government has failed to provide the necessary space and autonomy to different groups to live in amity and harmony.

Having said that, one should also ensure that devolution of powers does not become the vehicle for disintegration of states or countries. This lurking fear, that when powers are devolved it provides the stepping stone for disintegration, bothers the minds of constitution makers. It is imperative that adequate and effective safeguards are incorporated in the constitutional structure against such eventualities. This could be ensured in different ways. The centre should enjoy swift and decisive powers to deal with any potential attempt by periphery to break away or endanger the integrity of the country. On the other hand, the constitution should also ensure that the periphery is not alienated with regard to matters which are handled by the centre. There should be effective power-sharing in the centre as well. This will be operative as an interlocking mechanism to ensure the active participation and involvement of the periphery in the national matters as well. Constitutional mechanisms providing for interdependency are welcome features to foster unity, as against divisiveness amongst diverse groups.

Where constitutional structures do not permit space and opportunity for peripheries to share and involve in the national affairs, it becomes a difficult exercise, naturally, to hold them together. As such, the fundamental law of the country should provide for mechanisms which will truly require the active and necessary participation and contribution to the decision-making as well as implementation process of national matters. When these opportunities are availed of, the system becomes interlocking as well as interdependent, which will ensure and engender togetherness rather than separateness.

It is also necessary that fundamental human rights of people, in particular the right to life and integrity of a person, as well as the right to equality, are well and meaningfully fortified in the constitution. The promotion, protection and enjoyment of these rights by every person go a long way in reducing conflicts amongst themselves. Effective mechanisms against any violation of these rights by legislative, executive or judicial action, as well as by any private sector action, are essential if these rights are to have any practical meaning. Efficient and easily accessible means of redress and enforcement provide these rights effectiveness, and thus serve towards the prevention of conflicts. It is hardly necessary to stress the importance of an independent and impartial judiciary, as well as other quasi-judicial fora, for upholding

and safeguarding these rights. Therefore, the basic law of the land should contain provisions which establish and ensure such a set of bodies.

Constitutions and Conflict Prevention

Early Warning Signals and Conflicts: It is impossible to provide systems which will fully prevent conflicts from arising. What has been discussed in the earlier section of this chapter is ways and means to prevent conflict from arising; however, that does not, and surely will not, ensure a society free from all conflict. It is an attempt at reducing the sources of conflicts. Conflicts can be said to be as old as mankind. Perhaps life will not be as good if there were to be no conflicts!

Having said that, one needs to look for signals or indicators which forewarn of a potential conflict. The constitutional fabric should include within itself mechanics which will facilitate such early signals being given. People who have the facility of being forewarned of any disaster are better prepared to face them or could take prudent and proper steps to avert such disaster beforehand. In this section, let us consider how the fundamental law of the land can provide early warnings about potential conflicts.

One of the important instruments which should be strengthened in the fundamental law, is the right to freedom of speech, expression and information. If this right is protected and promoted in its varied forms, individuals and groups will be able to voice their concerns about matters which provide fertile sources of potential conflicts. When there is a fear of persecution or oppression, if one were to express himself or herself, it leads to the suppression of information which may be vital to conflict prevention. Lack of freedom of speech and expression contributes in a great way to the bottling up of dissatisfaction and dissension until it becomes unbearable and bursts as a conflict. Free flow of thought and ideas, viewpoints and counter-arguments are essential tools for harmonious coexistence. If these are not permitted or space is not provided for democratic dissent, conflicts cannot be identified well in time.

Therefore, the fundamental human rights of people to enjoy the freedom of speech, expression and information, coupled with the freedom of association and assembly, are to be protected and promoted in a meaningful way in the constitution. As stated earlier, *an independent and impartial judiciary which is sensitive to the plural character of a society is a sine qua non for the protection and promotion of this right as well*. It is the responsibility of the constitution makers to enshrine in the constitution such provisions which will ensure, safeguard and promote such a judiciary.

Apart from this mechanism, *there should be a constitutional device to periodically assess and report on the existing relations between various communities in a plural society*. Such a system should be institutionalized so that it meets regularly, and representatives bring to the fore the problems, or what they perceive as problems, and find early solutions before they take the form of conflicts. This institution or forum must be constitutionally provided for and mandated to meet regularly. This will provide a meaningful and effective space for people to air their concerns and fears which will act as a forewarning signal.

Constitutions and Conflict Resolution/Management

Early warning systems or indicators of potential conflicts do go a long way to nib them in the bud. However, there are circumstances where conflicts do flare up for one reason or other amongst various communities. In such a situation, the constitutional mechanism, to deal with such conflicts in order to resolve them or manage them, becomes very important. There have been many non-constitutional and informal methods adopted to deal with such situations. However, they mainly depend on the goodwill and temperament of the people involved. Similarly, success or otherwise too depends on personalities and not on structures.

However, the constitutions provide a judicial system to deal with conflicts and disputes. Inter-personal conflicts are brought before such judicial bodies or quasi- judicial tribunals. Similarly, disputes between persons and governmental institutions are also brought before such bodies. The adversarial nature of the procedures adopted in the adjudication of these causes of action is not conducive in all cases to bring about harmonious future relations amongst the contesting parties. It has been found quite often, that the judicial system works in a manner which favors the 'winner takes all' system. Such a system does not help in many cases to bring about a tranquil and harmonious atmosphere which facilitates reconciliation between parties. The prevailing system divides the parties, rather than bringing them together, in a majority of cases. Such a system is not at all suitable and advisable when dealing with issues of conflicts between communities in a plural society, though in certain situations adversarial systems with penal sanctions are not ruled out as inappropriate.

It is a challenging task for constitution makers to create and establish institutional structures and systems which will provide for negotiation, mediation and resolution of disputes instead of adjudication on them. In this way, the chances are more for the resolution of conflicts by a process which facilitates 'give and take' rather than 'winner takes all.' Therefore, *the constitution of a country with plural society should provide for high-level instruments for negotiation and mediation of disputes between communities*. This will go a long way in keeping the relations between communities in a favorable way.

Conclusion

Constitution makers in a plural society have to be mindful that inter-community conflicts are inevitable and that the constitution they make should cater for this concern. They should draft the constitution in a manner which will try to reduce the possibilities of conflict arising, which will contain indicators and signals which forewarn potential conflicts, and which will provide effective and beneficial mechanisms to resolve such conflicts. Failure to address these issues when making a constitution, will provide ample opportunities for conflicts to arise and bedevil the country.

Summary

In this chapter, you learnt:

- Constitutions can provide mechanisms and structures for conflict management and resolution.

- Constitutions in plural societies should reflect the diversity of society.
- The constitutional fabric should include within itself mechanisms to facilitate early warning signals about possible conflicts.
- Constitutional devices can periodically assess the nature of inter-group relations in plural society to prevent conflicts.
- A strong fundamental rights chapter in the constitution and an independent judiciary are effective mechanisms to prevent conflicts.
- Constitutions can provide for institutions and mechanisms for conflict resolution and management.

Works referred to:

Jellinek, *Recht des modernen Staates*, cited in J.W. Garner, *Political Science and Government*

Wheare, K.C., *Modern Constitutions*

Gilchrist, R.N., *Principles of Political Science*

Charles Borgeaud, *Adoption and Amendment of Constitutions*

Lord Bryce, J., *Studies in History and Jurisprudence*

Mahajan, V.D., *Political Theory*

12

The South African Constitution of 1996
Lessons for Sri Lanka
Rohan Edrisinha

Introduction

The South African Constitution of 1996 is considered one of the most progressive constitutions in the modern world. Not only does the constitution provide for the protection of human rights and impose effective restraints on the wielders of political power, but it also helped heal the wounds of the nation's bitter apartheid legacy.

The conflict between the white supremacist minority and the black majority had been violent for several years. The African National Congress(ANC) and its allies had been involved in a long armed struggle for liberation. The apartheid rulers stubbornly refused to countenance democratic reforms even in the wake of international sanctions and isolation. However, in the early 1990s, a dramatic shift took place which led eventually to a peaceful and negotiated settlement to the conflict. A peaceful transfer of power to the black majority with a restoration of democracy and basic human rights was the culmination of this unique process of conflict resolution in South Africa.

In this chapter we focus on the process of constitution making in South Africa. One cardinal lesson we can learn from South Africa is that constitution making is not merely drafting and adopting a constitution. More importantly it can be an integral component of a conflict resolution and peace-building initiative. In deeply divided societies like South Africa and Sri Lanka, a new constitution should mean a qualitatively new phase in the political life of the state and its people. A new constitution should embody the consensus of all those who constitute the nation. It should give expression to the democratic aspirations of the people. It should be an instrument for national reconciliation and the healing of old wounds in the body politic. It should be a covenant that binds people with people and people with the state. As Nelson Mandela has observed about the new South Africa: "*We enter into a covenant that we will build a society in which all South Africans, both black and white, will be able to walk, talk without any fear in their hearts, assured of their inalienable right to human dignity, a rainbow nation at peace with itself and the world."*

Beginnings

The adoption of the final constitution in South Africa was the culmination of a remarkable process of change or transformation which began in February, 1990 when then President F. W. de Klerk in a famous speech took the whole of South Africa by surprise by launching the process of democratization. Since then, there had been ups and downs and serious set backs, but, over the years there has been progress. South Africa is an example of a success story of reconciliation and hope.

Before we focus on the details of the constitution, we need to mention the fact that the drafting of the final constitution took place within the political context of the amazing statesmanship of President Nelson Mandela, who personified the reconciliation and generosity of spirit which the new constitution sought to enshrine. President Mandela played a crucial role and that spirit of reconciliation and generosity of spirit trickled down to the political leadership of the country and also to the main actors in the Constitution-drafting process. The relationship between the President of the Constitutional Assembly, Cyril Ramaphosa, and the Minister of Constitutional Affairs, Rolf Meyer, and also the Deputy Chairman of the Assembly, Leon Wessels, both of whom were leaders of the National Party, was crucial in bringing about the adoption of the final constitution. The entire process gives us a lesson in constitution making. The non-partisan approach, the people's participation in the constitution-making process, the professionalism and competence displayed in drafting the constitution, attempts to address the aspirations of the different communities, to forge compromise and consensus, and the emphasis on values and principles which has permeated the whole constitution-drafting process, are significant lessons for Sri Lanka. Unfortunately, in Sri Lanka we appear to lack some of these important values and principles in drafting a new constitution and these values were sadly lacking even when the 1972 and 1978 Constitutions were drafted.

Political Context

The road to change in South Africa began in February, 1990 and until December, 1993 there were a series of negotiations between the ANC and the National Party Government. Various issues had to be resolved - the unbanning of the ANC, the Communist Party and the Pan African Congress (PAC), the curbing of violence and the release of political prisoners, notably President Mandela himself. The complex process of political negotiations and constitutional reform was a key element in this project of achieving political liberation. There were different attitudes among the main political actors towards the drafting of a constitution. The National Party, which was about to give up power was very concerned that many of the traditional constitutional safeguards be incorporated in the constitution. There was a fear of change. They perceived the ANC as an undemocratic, communist and terrorist movement. There was a fear to let go of power and to hand over power to the ANC before adequate safeguards were in place. The ANC, however, was steadfast in its commitment to the issue of legitimacy. They wanted a constitution which was to be drafted by the people or at least by the elected representatives of the people. There was a problem of how to bridge this gap, this difference of attitude.

A compromise was reached whereby an interim constitution was adopted. This was to be followed by a general election held under the interim constitution, and then the newly- elected representatives of the people were to convene as a constituent assembly to draft the final constitution. The National Party and other white parties wanted even more safeguards. They were concerned that certain core principles of governance and human rights be accepted and entrenched as a condition for the transfer of power. They therefore wanted as much detail as possible, as many safeguards for minorities as possible, in the interim constitution itself. In contrast, the ANC wanted as few details as possible in that interim constitution, because to them it was a transitional document which was not meant to last very long. There was, therefore, a difference of minds. Because of this, the interim constitution contained some unique features. The first was two very impressive sections in the interim constitution. They were the preamble at the beginning and the postamble. There was a postamble which referred to reconciliation right at the end of the constitution. These were remarkable provisions in terms of their substance. The postamble stressed *that the interim constitution was to be a bridge, a bridge between the past and the future.*

Secondly, the interim constitution contained thirty four constitutional principles. They were seen as a mechanism to address the concerns of the white community, in particular, that the final constitution might promote majoritarian democracy at the expense of the rights of the whites and other minorities. They insisted that the interim constitution contained some basic principles which the final constitution could not depart from. This was their security that there wouldn't be total or radical change in the final constitution. Thirty four basic values or principles which the final constitution had to conform to were entrenched in the interim constitution. For example, the first constitutional principle read as follows:

> The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

The Constituent Assembly elected under the Interim Constitution had the mandate to draft and adopt a final constitution for South Africa. However, it had to fit within the framework of a set of comprehensive *principles agreed upon through a process of political negotiations* and incorporated in the interim constitution itself. The Constituent Assembly adopted the constitution on 8 May 1996. It was then reviewed by the Constitutional Court to ascertain whether it was consistent with the thirty four principles. Public hearings were held for this purpose at which submissions were heard by the court. The court ordered that certain provisions be amended as they were inconsistent with several principles and finally, at the end of the year, the Constitutional Court gave its imprimatur to the final document.

The Constitution-Making Process

Sri Lanka can learn a lot from the Constituent Assembly process that commenced in 1994. The first democratic election in South Africa was held in April, 1994 and a National Assembly or Parliament consisting of 400 MPs and the Senate consisting of 90 members were elected. These 490 elected representatives together constituted the Constituent Assembly, and the interim constitution required that they *draft and adopt the final constitution within two years* of the first sitting of the Constituent Assembly. Now, the way in which this final Constitution was drafted was quite remarkable. In August, 1994, the Secretariat was established by the Constituent Assembly to coordinate the whole process. A full-time Executive Director and several full-time members of staff were appointed. The Constituent Assembly then divided itself into six, thirty-member theme committees to deal with some of the main features of the constitution. The six theme committees were: a committee dealing with the character of the state, the structure of government, the relationship between the different levels of government, fundamental rights, the judiciary and legal systems and specialized structure of government. Each of these six theme committees was assisted by a team of technical experts consisting of lawyers, legal academics, and drafting experts. In fact, they brought down a plain language expert from Canada to go through the entire document at the end of the process to ensure that the language used was as simple and as easily comprehensible by the ordinary person as possible. To give an example, the fundamental rights team committee was probably the most complicated. They had technical experts on each fundamental right.

The report on the right to property, which was one of the most controversial rights incorporated in the final constitution, is like a text book. In a comprehensive survey, all the positions of the various parties are recorded, the right to property provisions in all constitutions in the world are tabulated, evaluated and critically analyzed. So you can imagine the documentation that went into this whole process. At the end of the process the Constituent Assembly appointed a 46 member Constitutional Committee consisting of representatives from all the parties in parliament, which functioned like an Executive Committee. They had to put everything together, resolve the disputes and come up with the final document. While this process unfolded, there was another parallel process that went on simultaneously, a *massive public participation and awareness raising* campaign.

There was *a concerted effort to involve the people in the constitution-making process*. The Constituent Assembly was very conscious that ultimately it was the people who were drafting a constitution for themselves. A media campaign which called for responses from the people on specific issues - freedom of expression, what should the flag look like, what should the national anthem be - was designed; every submission sent by every organization or individual was acknowledged by the Secretariat of the Constituent Assembly. There were over two million signatories to the submissions and petitions that went before the Constituent Assembly. An official newsletter of the Constituent Assembly was published and distributed free to all citizens of South Africa. It was published in eleven official languages. Every week there was a television discussion program on specific aspects of the constitution. The moderator was a Professor at the University of the Witwatersrand. Representatives from all the political parties were invited. Each representative had to come out with his or her party's respective position and be subject to hostile questions, criticism from the moderator and also from the representatives of other political parties. They had to explain, justify and defend. There was thus a concerted attempt at *making the whole constitutional drafting process open, transparent and participatory.*

Basic Features

Concerning the basic features of the constitution, we may first focus on the first two articles of the South African Constitution. They show vividly the difference between the South African and Sri Lankan approaches. The first chapter is titled "Founding Provisions," or the basic principles. Article 1 states that the Republic of South Africa is one sovereign democratic state founded on the following values: human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, the supremacy of the constitution and the

rule of law, universal adult suffrage, regular elections, a multi-party system of democratic government and to ensure accountability, responsiveness and openness.

Article 2 unequivocally incorporates the principle of supremacy of the Constitution: *This constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.*

The emphasis in the first few articles of the constitution is therefore on principles that bind the South African nation. The concept of equality is stressed which is understandable, given South Africa's particular political context. The supremacy of the constitution, the cornerstone of constitutionalism, is doubly emphasized both in Article(1) and Article (2). It is not only law that has to be consistent with the constitution, but conduct too, which is broader in scope than the phrase `executive action' which is found in the Sri Lankan constitution. The South African constitution is absolutely clear. Parliamentary sovereignty was the cornerstone of the apartheid era. Parliament could do anything under apartheid. There were no norms in the constitution. There was no value laden constitution. The judiciary was weak. As a result of that, this new South African constitution is categorical in its total rejection of parliamentary sovereignty and its incorporation of the principle, the alternative principle, of the supremacy of the constitution.

Human Rights

The Bill of Rights is the Second Chapter in the constitution, after the founding provisions. The constitution recognizes the important link between the Bill of Rights and democracy. The constitution declares that the Bill of Rights applies to all law. No law is immune from the scrutiny of the Bill of Rights which binds the legislature, executive and judicial branches of government and all organs of the state. There is also a liberal *locus standi* provision in the new South African Constitution. Any person, not necessarily only a citizen, has the right to petition the courts for constitutional protection with respect to most matters.

Thirdly, with regard to interpretation, the *courts are required, when interpreting fundamental rights provisions, to give an interpretation which promotes the values that underline and open a democratic society based on human dignity, equality and freedom*. The court must also consider international law, may consider foreign law, and must also adopt an interpretation which promotes the spirit, purport and objects of the Bill of Rights. Given the legalism and technical approach to interpretation of many judges schooled in the British tradition of parliamentary supremacy and the fidelity to the letter of the law, such an interpretation clause is significant.

A word must be said about the substance of the rights because this is also very significant. The South African Bill of Rights does not only recognize civil and political rights. It also recognizes the so-called second and third generation rights - social, economic and cultural rights are recognized in the constitution and are made justiciable. Secondly, it is perhaps one of the first constitutions to bar discrimination on the grounds of sexual orientation. Thirdly, the state is secular. All religions are treated equally, given equality. That is basically what a secular state stands for. All religions are treated equally. It is significant that the campaign for a secular state was led by the Christian Church in a country where over two thirds of its population is Christian. Anglican Archbishop Tutu was at the forefront of insisting that Christianity should not be made the state religion, and that South Africa should be a secular state. The constitution provides that religious observances may be conducted at state functions provided the attendance is voluntary and that religious activities are conducted on an equitable basis.

The way in which economic, social and cultural rights have been made justiciable addresses the concerns of more traditional legal scholars and human rights activists who fear giving the judiciary power to determine matters involving complex questions of public and economic policy. There is a powerful argument that if a constitution enunciates rights and thereby claims, which cannot be provided by the state, all rights, including civil and political rights, will be diluted overall. There was considerable debate about this among the legal scholars. The approach finally adopted was that while the state would be given a wide margin of appreciation when

dealing with economic issues, the state would be required to justify its economic decisions if a citizen felt that the economic policy or the amount of money given for particular subjects was unjust. Etienne Mureinik, one of the leading constitutional academics in South Africa, used the example of the legislature deciding to spend vast amounts of money on building a nuclear submarine or on constructing a replica of St. Peter's Church. He argued that it would then be possible for an aggrieved person to challenge that before the courts and for the courts to ask the government to justify its decision to spend vast amounts of money on activities like that, rather than on progressively realizing the attainment of economic, social and cultural rights recognized in the constitution.

The right to property was one of the most controversial provisions in the new South African Constitution and again a very satisfactory compromise was worked out. The African National Congress was very suspicious of the right to property as they thought it could obstruct initiatives to redistribute land, provide land to the landless and try to shift resources from the white elite to the black majority. On the other hand, the white community which feared large scale nationalization and expropriation of their land, wanted a safeguard for private property. A compromise was reached. The right to property is recognized in the Bill of Rights. There is a bar to arbitrary declaration of property, but property can be taken over by the state for public purposes. On the vexed question of compensation, the compensation payable to a person would take into account how the property was acquired, how it was used, and the court would have power to review the quantum of compensation determined upon, depending on the circumstances of the case and the type of land in question.

The right to property provision also included a sub-section which mandated the state to take reasonable legislative and other measures to enable citizens to have access to land on an equitable basis. Thus, the right to property was not merely a negative right but also contained elements of a positive right as well.
Another important feature of the Bill of Rights was the limitation clause. The South African Constitution adopted a mechanism similar to the Canadian approach. *Rights can only be restricted by law of general application.* The limitation must be only to the extent as is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and the court can consider the limitation, scrutinize it to ascertain the nature of the right and the nature of the restriction, the purpose of the limitation, the relationship between the objective that the state wants to achieve and the restriction. The court can also suggest less restrictive means to achieve the same purpose that the state might want to achieve. There is, therefore, comprehensive judicial scrutiny on any attempts to curtail human rights which is quite a contrast with the position in Sri Lanka.

Devolution of Power

Another area which has posed enormous challenges to Sri Lanka's constitution makers and promoters of conflict resolution is the regional autonomy and the devolution of power. The concept of federalism is very controversial in South Africa as it is in Sri Lanka, but for different reasons. In South Africa, the ANC and the parties of the left felt that the central government should have power to transform South African society and they see federalism as a limitation on the power of the central government to effect such transformation. The Inkatha Freedom Party (IFP), the far right Freedom Front and even the National Party are avowed federalists because they see it as a way of imposing limits on the power of the national government.

Even though the new *South African Constitution does not declare expressly that it is a federal state* (it does not have a unitary label either), *it contains many quasi-federal features*. There is substantial devolution of power to provinces, a division of powers between the centre and the provinces, provincial representation at the centre, the constitution is supreme in South Africa. South Africa is divided up into nine provinces which have several powers which the provinces in Sri Lanka and even the regions under the proposed legal draft do not have. Secondly, the South African provincial legislatures have exclusive power over certain subjects. A provincial legislature can draft its own constitution which our provinces and our regions cannot; a provincial

legislature cannot be dissolved by the President of South Africa. Under the draft constitution of Sri Lanka, the President can dissolve a Provincial Council in certain circumstances. Both devolution of power and local government are constitutionally recognized.

Cooperative Government

Chapter 3 of the constitution describes the *principle of Cooperative Government* which declares that the government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. In Sri Lanka, you cannot even refer to a provincial government as a provincial government. In South Africa, it is absolutely clear that there are provincial governments and there are local governments. *All three tiers of government have constitutional status*, their powers are recognized and the other branches of government, the other organs of governments have to respect the constitutional status of the other spheres of government. In Sri Lanka, the central government has taken back powers which were given to Provincial Councils under the 13th Amendment to the Constitution. This would be clearly unconstitutional, and therefore, void in South Africa. There is a concurrent list, like under our 13th Amendment. But the concurrent list mechanism is drafted in a way which ensures that the provinces have far greater say over concurrent list subjects than under the Sri Lankan Constitution.

If the central Parliament introduces legislation on a concurrent subject, the National Council of Provinces has also to approve it. If it rejects it, the matter is sent to a Mediation Committee consisting of nine people from the centre and nine people from the provinces. These eighteen people have to meet together and hammer out a compromise. If a compromise is reached it is enacted into law. If all attempts at compromise fail, the central Parliament will have to pass that particular item of legislation with a two-thirds majority. It is clear, therefore, that provincial interests with regard to concurrent list subjects are far better protected than under the Sri Lankan Constitution. With respect to ordinary legislation, the Council of Provinces has a right to participate in the law-making process. If they reject a Bill it is sent back to the National Assembly for re-consideration. *The South African Constitution is, therefore, in certain respects more federal* than either the Draft Constitution of Sri Lanka or the Thirteenth Amendment to the present Constitution of Sri Lanka.

In federal or quasi-federal states it is vital to have the devolved units or entities represented at the centre. The South African Constitution has come up with an unusual way of protecting provincial autonomy. They have decided to do away with the traditional notion of a Senate, and they have introduced instead, an institution called the National Council of Provinces. It functions very much like a Senate. Each of the nine provinces can send a ten-member delegation led by the Provincial Prime Minister, equivalent to our Chief Minister, to this National Council of Provinces. Each province would have a ten-member delegation. Out of ten members, six are permanent delegates of the provinces, nominated by the political parties in the Provincial Council, four are floating delegates. Thus, depending on the subject matter of the legislation that is coming up in parliament, the four members of the delegation can be changed so that they can contribute to the deliberations of parliament.

The second interesting feature is that each province has only one vote. This compels the ten-member delegation from each province to work together, to cooperate, to cross party lines and decide on a common provincial position with respect to voting in the council. This promotes a culture of consensus and compromise and encourages a provincial rather than a partisan outlook on matters discussed in the national parliament. This is a further example of the notion of *cooperative government* which the new South African Constitution stresses.

There is a separate chapter on Local Government in the constitution. Local Government authorities derive their powers from the constitution, not from the provincial legislature nor from the central parliament. These powers are guaranteed by the constitution. *Local Government is, therefore, better protected under the South African Constitution.*

An example of the imaginative and creative constitutional provisions that may be necessary to bridge the gap between opposing viewpoints, is Article 235 of the South African Constitution*. It addresses the sensitive and difficult issue of self-determination in a plural society.* In Sri Lanka several Tamil parties and political groups have advocated the Thimpu Principles as the basis of a political solution to the island's ethnic conflict. The Thimpu Principles generally evoke a hostile response from the majority Sinhalese community and the main political parties in Sri Lanka. A compromise may have to be worked out, and the South African constitutional provision on self- determination may prove a useful reference point.

The right of the South African people as a whole to self-determination, as manifested in this constitution, does not preclude, within the framework of this right, recognition of the notion of the right to self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

The Judiciary

The South African constitution provides that the *judicial authority is vested in the constitution*. Parliament does not enter the scene at all. In our constitution, we have judicial power exercised by parliament through courts. The Constitutional Court, the most important court in South Africa, consists of eleven persons, and if one examines the composition of the present court, it consists of judges, human rights activists, academics and practitioners and as required by the constitution, it broadly reflects the gender and racial composition of South Africa. The South African Constitutional Court is an amazing mix of eleven people from very different backgrounds and experiences. Any qualified man or woman can be a member of the South African judiciary. Judges of the Constitutional Court and the Supreme Court, the most important courts in South Africa, are appointed by the President on the recommendations of the Judicial Services Commission. The Judicial Services Commission is a large representative body consisting of the main stakeholders in an independent judiciary. It includes the Chief Justice, President of the Constitutional Court, the Minister of Justice, two advocates elected by the advocates, two attorneys elected by practicing attorneys, one teacher elected by all legal academics in South Africa, six MPs, three of whom have got to be Opposition MPs, four permanent delegates from the National Council of Provinces, so that the provinces are also represented, four nominees of the President appointed after consulting all the political parties in parliament. Judges can be removed only when this body, the Judicial Services Commission, finds that they have been either grossly incompetent or have engaged in gross misconduct. It is only when they have been found guilty that the National Assembly can remove them with a two-thirds majority.

The provisions on the judiciary are better than the corresponding provisions in the Sri Lankan constitution, which permit too much legislative and executive interference in the judicial branch of government. The Rule of Law and the independence of the judiciary are vital elements in a constitutional scheme for good governance, human rights and conflict resolution. Constitutional arrangements often play a pivotal role in political solutions for complex national problems involving ethnicity or religion. These arrangements need to be secure and guaranteed. The judiciary is the institution charged with such a responsibility. If it is not independent then it will be unable to perform its function effectively. In addition to independence, it must also display sensitivity to the concerns of pluralism, devolution and the rights of minorities. This is a particular problem in Sri Lanka.

Diversity and Language Rights

Recognition of diversity is one of the most important aspects of the South African Constitution. The linguistic diversity is a very good case in point. There are eleven official languages in South Africa. There is a language board which has to promote not only these official languages but also other languages, including Tamil even though it is spoken by a very small minority, and even sign language. On the issue of language, the approach of the ANC and most political parties was refreshing: get the principle right, worry about the practical implications later. Sri

Lankans think they have an enormous problem with just two or three national languages. Customary international law is automatically a part of the legal regime of South Africa and there is a provision that whenever a court interprets a law or a provision of the constitution, an interpretation which is inconsistent with international law is to be preferred over any other possible interpretation.

Conclusion

The South African Constitution of 1996 is an amazing document for many reasons. The process, the way in which it was drafted and adopted, the participation of so many people and constituencies, the substance, the commitment and professionalism displayed by all the main political parties, were truly remarkable. The constitution became a consensus document that helped to bring the different communities together, heal the wounds of a bitter and violent past and establish a new order of government which conformed to basic human rights norms and standards. Sri Lanka would do well to seek to emulate the process, substance and the generosity of spirit that permeated the process in South Africa. Perhaps then, constitution making for conflict resolution will be more successful in Sri Lanka.

Summary

In this lesson, we learnt the following from the South African experience:

- Constitution making in a deeply divided society should be an exercise in conflict resolution.
- Constitution making for conflict resolution requires imaginative and fresh approaches to rebuild the political system and structures.
- The best approach to making a new constitution is through consensus. Consensus provides legitimacy as well as general political acceptance to the new constitution.
- Political leadership can play a constructive role in conflict resolution and constitution making.
- The process of making the constitution is as important as the substance.
- In consensus building for conflict resolution, it is better to start with an agreement on general principles and then proceed for details.

Appendix

A. 1. Bibliography

Mediation

Bercovich, Jacob and Rubin, Jeffrey (Eds.) (1992), *Mediation In International Relations*, St. Martins Press Inc.:London

Folberg, Jay and Taylor, Alison (1984), *Mediation, A Comprehensive Guide to Resolving Conflicts Without Litigation*, Jossey - Bass Publishers:USA

Kegal, Sam and Kelly, Kathy (1989), *The Anatomy of Mediation, What Makes it Work*, The Bureau of National Affairs Inc.:Washington

Mitchell, C. R. (1981), *Peacemaking and the Consultant's Role*, Nicholas Publishing Company:New York

Mitchell, C. R and Webb K. (Eds.) (1988), *New Approaches To International Mediation*, Greenwood Press Inc:USA

Moore, Christopher W. (1986), *The Mediation Process*, Jossey-Bass Publishers:San Francisco

Princen, Thomas (1992), *Intermediaries in International Conflic*t, Princeton University Press:USA

Yarrow, Mike CH (1978), *Quaker Experiences in International Conciliation*, Murray Printing Corporation:USA

Negotiations

Dutch Center for Conflict Prevention, (Ed.) (1996), *Prevention and Management of Conflicts*, Dutch Center for Conflict Prevention:The Netherlands

Faure, G.O. and Rubin, J. Z. (Eds.) (1993), *Culture and Negotiation*, SAGE Publications Inc.:USA

Fisher, Roger and Ury, William (1991), *Getting to Yes, Negotiating Agreement Without Giving In*, Penguin Books:USA

Fisher, Roger and Brown, Scott (1988*), Getting Together, Building Relationships as we Negotiate,* Penguin Books:USA

Korzenny, Felipe and Toomey, Stella (Eds.) (1990), *Communicating for Peace, Diplomacy and Negotiation*, SAGE Publications:USA

Kremenyuk, V. A. (Ed.) (1991), *International Negotiation*, Jossey-Bass Publishers: Oxford

Lax, A. David and Sebenius, James (1986), *The Manager as Negotiator*, The Free Press:USA

Manikkalingam, Ram (1994), *Prudently Negotiating a Moral Peace*, Social Scientists' Association: Sri Lanka

Pillar, Paul R. *Negotiating Peace, War Termination as Bargaining Process*, Princeton University Press:USA

Pruitt, Dean G. and Carnevale, Peter J. (1993), *Negotiation in Social Conflict*, Open University Press:Buckingham

Raiffa, Howard (1982), *The Art and Science of Negotiation*, The Belknap Press of Harvard University Press:USA

Stein, Janice Gross (Ed.) (1989), *Getting to the Table*, John Hopkins University Press:Baltimore

Ury, William (1993), *Getting Past No, Negotiating Your Way From Confrontation to Cooperation*, Bantom Books:USA

William J. and Rubin, Jeffrey Z. (1993), *Negotiation Theory and Practice,* Cambridge, Massachusette:The Program on Negotiation at Harvard Law School

Zartman, W. and Berman,. MR (1982), *The Practical Negotiator*, Yale University Press:USA

Peace Processes

Azar, Edward E. (1990), *The Management of Protracted Social Conflict*, Dartmouth Publishing House:England

Bailey, Sydney D. (1993), *Peace is a Process*, Swarthmore Lecture Committee: London

Berridge, G. R. (1991), *Return to the UN,UN Diplomacy in Regional Conflicts*, Macmillan Academic and Professional Ltd:London

Brown ,Sheryl, J. and Schraub, Kimber M. (Eds.) (1992), *Resolving Third World Conflict, Challenges for a New Era*, United States Institute of Peace:USA

Boulding, Else (1990), *Building a Global Civic Culture*, Syracuse University Press: USA

Carnegie Cooperation (1997), *Preventing Deadly Conflict*, Carnegie Cooperation: New York

Carter, April (1992), *Peace Movements* , Longman Group U.K.Ltd:London

Chatfield and Llukhina (1994), *Peace/ Mir: An Anthology of Historic Alternatives to War*, Syracuse University Press:New York

Curle, Adam (1987), *True Justice, Peace makers and Peace making*, Quaker Home Service:London

Doucest, Ian (Ed), *Resource pack for Conflict Transformation*, London:International Alert

Fernea, Elizabeth,Wamock and Hoching, Mary, Evelyn (Eds.) (1992), *The Struggle for Peace*, Austin:University of Texas Press

Foster, Le Corn Mary and Rubinstein, A. Robert (Eds) (1986), *Peace and War, Cross Cultural Perspectives*, Transaction Inc.:New Jersey

Folger, Joseph P., Poole, Marshall Scott and Stutman , Randall K. (Eds.) (1993*), Working Through Conflict*, Harper Collins College Publishers:New York

Holsti, J, Kalevi (1995), *Peace and War: Armed Conflicts and International Order 1648 - 1989,*Cambridge University Press: Cambridge

Hollins, Harry, Powers, Averill and Sommer, Mark (1989), *The Conquest of War, Alternative Strategies for Global Security*, Westview Press:USA

Isard, Walter (1992), *Understanding Conflict & the Science of Peace*, Blackwell Publishers:USA

Jones, Dorathy V. (1991), *Code of Peace, Ethics and Security in the World of the Warlord States*, University of Chicago Press:USA

Klare, Michael T. (Ed.) (1994), *Peace & World Security Studies, A Curriculum Guide*, Lynne Reinners Publishers Inc.:USA

Kodama K and Vesa U. (Eds.),(1990), *Towards a Comparative Analysis of Peace Movements,* Billing & Sons Ltd:Great Britain

Kriesberg , Louis and Thorson, Stuart (Eds.) (1991), *Timing the De-escalation of International Conflicts*, Syracuse University Press:New York

Kriesberg, L., Northrup, T. A. and Thorson, S. J. (Eds.) (1989), *Intractable Conflicts and their Transformation*, Syracuse University Press: USA

Marullo, Sam and Lofland, John. (Eds.) (1990), *Peace Action in the Eighties*, Rutgers University Press:New Brunswick

Miall, Hugh (1992), *The Peacemaker,* Macmillan Press:UK

Mitchell, C.R. (1981), *The Structure of International Conflict*, Macmillan Press Ltd: London

PIOOM and the Berghof Research Institute for Constructive Conflict Management, (1998), *Prevention and Management of Violent Conflicts*, European Platform for Conflict Prevention and Transformation:Netherlands

Rao, Bhaskara, D.(Ed.) (1996),*Global Perception on Peace Education*, Discovery Publishing House:New Delhi

Rothman, Jay (1992), *From Confrontation to Cooperation*, Sage Publications Inc.: USA

Rupesinghe, Kumar and Kuroda Michiko (Eds.) (1992), *Early Warnings and Conflict Resolution*, St.Martins Press,Inc.:New York

Shellenberg, James A. (1982), *The Science of Conflict*, Oxford University Press: Oxford

Ury, W. L, Brett, Jeanne M. and Goldberg S.B. (Eds.),(1988),*Getting Disputes Resolved*, Harvard Law School:Cambridge

Middle East

Aburish, Saaid K. (1993), *Cry Palestine, Inside the West Bank*, Westview Press:USA

Corbin Jane (1994), *Gaza First, The Secret Norway Channel to Peace between Israel and the PLO*, Bloomssburry Publishing Ltd:London

Fisk.Robert (1992), *Pity the Nation, Lebanon at War*, Oxford University Press:USA

Kustick, Ian S. (1982), *Arab - Israeli Relations:A Collection of Contending Perspectives and Recent Research*, New York and London:Garlan Publications

Kellerman B. and Rubin J., eds., (1988), *Leadership and Negotiation in the Middle East,* Praeger Publishers:USA

Quandt, William B. (1986), *Camp David; Peace Making and Politics*, The Brookings Institution:Washington

Quandt, William B. (1993), *Peace Process: American Diplomacy and the Arab-Israeli Conflict since 1967*, University of California Press:California

Sharoni, Simona (1995), *Gender and the Israeli-Palestinian Conflict*, Syracuse University press:USA

Saunders, Harold H. (1985*), The Other Walls: The Arab -Israeli Peace Process in a Global Perspective*, Princeton University Press:New Jersey

Saunders, HaroldH., and Kipper, Judith (Eds.) (1991), *The Middle East in Global Perspective,* Westview Press:USA

Speigel L. Steven,ed. (1992), *Conflict Management in the Middle East*, Westview Press:USA

Smith D, Charles (1988), *Palestine and the Arab-Israeli Conflict*, S t. Martin's Press: New York

Africa

Davidow, Jeffrey (1990), *A Peace in Southern Africa: The Lancaster House Conference on Rhodesia 1979*, Programme on Negotiation Books:Massachusetts

Deng, Francis M. and Zartman, William (Eds.) (1991), *Conflict Resolution in Africa*, The Brookings Institution:Washington

Jabri, William (1990), *Mediating conflict; Decision -making and Western Intervention in Namibia*, Biddles Ltd:Great Britain

Stedman, Stephen John (1991)*, Peace Making in Civil War, International Mediation in Zimbabwe 1974-1980*, Boulder: Lynne Reiner Publishers

Zartman, William I. (1989), *Ripe for Resolution:Conflict and Intervention in Africa*, New York and Oxford University Press

Ethnic Conflict Resolution

Gurr, Ted Robert and Harft, Babara (1994), *Ethnic Conflict in World Politics*, Boulder: Westview Press

Hassall, Graham (1992), *Nationalism and Ethnic Conflict in the Pacific Islands*, Research Institute for the Study of Conflict and Terrorism

Horowitz, Donald (1985), *Ethnic Groups in Conflict*, California University Press

McGarry, John and O'Leary, Brendan (1995), *The Politics of Ethnic Conflict Regulation*, London and New York:Routledge

Tambiah, Stanley J. (1995)*, Leveling Crowds*, University of California Press.

Europe

Graubard, Stephen R. (Ed.) (1991), *Eastern Europe, Central Europe, Europe*, Westview Press:USA

Nelson, Sarah (1984), *Ulster's Uncertain Defenders, Loyalists and the Nothern Ireland Conflict*, Appletree Press:Northern Ireland

Paterson, Thomas G. (Ed.), *The Origins of the Cold War,* Heath and Company:USA

Silber, Laura and Little Allan (1995), *The Death of Yugoslavia,* Penguin Books:USA

Conflict Resolution

Barash, David, *Introduction to Peace Studies*, Wadsworth Publishing Company: California

Bose, Anima (Ed.) (1991), *Peace and Conflict Resolution in the World Community*, Vikas Publishing House Ltd.:New Delhi

Boulding, Else (Ed.) (1992), *New Agenda for Peace Research*, Lynne Reinner Publishers ,Inc.:USA

Burton, John and Dukes, Frank (Eds.) (1990*), Conflict; Readings in Management and Resolution*, The MacMillan Press Ltd.:USA

Cornelius H. and Faire Shoshana (1992), *Everyone can Win, How to Resolve Conflict*, Simon Schuster:Australia

Elsthain, Jean B. (1995), *Women and War*, University of Chicago Press: Chicago

Fisher J, Ronald (1990) *The Social Psychology of Intergroup and International Conflict Resolution*, Springer-Verlag Inc:New Jersey

Gallie, W. B. (1978), *Philosophers of Peace and War*, Cambridge University Press: USA

Goldberg, Stephen .B., Green Eric D and Sander Frank EA (Eds.) (1985), *Dispute Resolution*, Little, Brown and Company: Boston

Klare, Micheal T and Thomas, Daniel C. (1994), *World Security, Challenges for a new Century,* St.Martins Press:New York

Kriesberg, Louis (1992), *International Conflict Resolution*, Edward Brothers:USA

Larsen, Knud S.(Ed) (1993), *Conflict and Social Psychology*, Sage Publications: London
Lederach, John Paul (1995), *Preparing for Peace*, Syracuse University Press:New York

Rahim, Afzalur M. (Ed.) (1990), *Theory and Research in Conflict Management*, Praeger Publishers:USA

Rao,P. C. and Shedfield, William (Eds.) (1997), *Alternative Dispute Resolution*, Universal Law Publishing Co.Pvt.Ltd.:New Delhi

Rappopart, Anatol (1994), *Fights, Games, and Debates*, The University of Michigan Press:USA

Rieber, Robert. W. (1991), *The Psychology of War and Peace: The Image of the Enemy*, Plenum Press:New York

Rubin, Jeffrey, Pruitt ,Dean and Kim,Sung Hee (1994), *Social Conflict, Escalation, Stalemate and Settlement*, Mc.Graw-Hill, Inc.:USA

Sandole, Dennis and Merwe, Hugo (Ed.), *Conflict Resolution Theory and Practice*, Manchester University Press: Manchester

Siegel, D. David (1982),*Conflicts*, West Publishing:USA

Smoker, P. & Davies, Ruth & Munske, Barbara (1990*), A Reader in Peace studies*, Pergamon Press:Exeter

Susskind, Lawrance and Cruikshank, Jeffrey (1987), *Breaking the Impasse*, Basic Books:USA

Vayrynen Raimo (Ed.) (1991), *New Directions in Conflict Theory:Conflict Resolution and Conflict Transformation*, International Social Science Council

Vayrynen, Raimo (Ed.) (1987), *The Quest for Peace*, SAGE Publications: London

Williams, Colin and Kofman, Eleonore (Eds.) (1989), *Community Conflict, Partition and Nationalism*, Routlegde: London

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A. 2. Internet Addresses

Some Internet Addresses of important institutions involved in conflict resolution and peace- building activities

Berghof Research Center for Constructive Conflict Management (Berlin, Germany)
www.berghof-center.org

Center for Conflict Resolution University of Bradford (Bradford, U.K.)
www.brad.ac.uk/acad/confres/dislearn/dislearn.html

Conflict Research Unit, Clingendael- Institute (The Netherlands)
www.clingendael.nl

European Platform for Conflict Prevention and Transformation (Utrecht, The Netherlands)
www.euconflict.org

Institute for Multi-Track Diplomacy (Washington, U.S.A.)
www.igc.apc.org

International Alert (London, U.K.)
www.international-alert.org

International Christian Service for Peace- EIRENE (Neuwied, Germany)
www.eirene.org

International Fellowship of Reconciliation- IFOR (Alkmar, The Netherlands)
www.ifor.org

International Peace Research Association (Copenhagen, Denmark)

www.copri.dk/

International Peace Research Institute Oslo (Oslo, Norway)
www.prio.no

National Peace Foundation (Washington, U.S.A.)
www.nationalpeace.org

Oxfam (Oxford, U.K.)
www.oxfam.org.uk

Stiftung Entwicklung und Frieden (Bonn, Germany)
www.sef-bonn.org

Schweizerische Friedensstiftung (Bern,Switzerland)
www.swisspeace.ch

Stockholm International Peace Research Institute (Stockholm, Sweden)
www.sipri.se

Transnational Foundation for Peace and Future Research (Lund, Sweden)
www.transnational.org

UNESCO Culture of Peace Project
www.unesco.org/cpp

Note:
The Internet addresses which are given above represent only a small selection out of hundreds of organizations and institutions specialized in the subject of conflict resolution which can be “visited” in the Internet. Most of the recommended addresses provide further links so that organizations and institutions not mentioned here can be easily found.

We especially recommend to visit the pages of the “Berghof Research Center for Constructive Conflict Management” (Berlin/ Germany) and of the “Center for Conflict Resolution” of the University of Bradford (West Yorkshire/ U.K.).
Both Institutes have produced their own Handbooks on Conflict Transformation which are presented in the Internet. These publications would allow the interested reader to complement the information given in our Handbook.

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