

INTRODUCTION

The attempts at constitutional reform are but efforts to solve what is described as the "National question" or the "Ethnic conflict" that has plagued the country at least since independence.

THE HISTORY OF THE CONFLICT

Prior to the arrival of the western powers in the 16th century, there were three kingdoms in Ceylon, one of which belonged to the Tamils in the North. The Kandyan kingdom in the central hills was the last to fall to the British and from then on Ceylon became one territory from early 19th century. At the time of independence from colonial rule in 1948, although the Tamils clamoured for parity of status, neither that nor a federal system was considered necessary. A unitary type constitution with simple majoritarian rule was enacted with prohibition on the passage of legislation making persons of any community or religion liable to any disabilities or restrictions to which persons of other communities or religions are not made liable or from conferring on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions¹.

However, in 1949 a sizeable number of Tamils of Recent Indian Origin were disenfranchised² and in 1956 Sinhala was made the official language of the country³, although such was what the prohibition in Section 29(2) sought to avoid. In April 1951 the main Tamil political party, the Ilankai Thamil Arasu Katchi (ITAK), which separated from the All Ceylon Tamil Congress on the issue of the disenfranchisement of the Indian Tamils, articulated its claim that the Tamil People in Ceylon were a distinct nation and were therefore entitled to self-determination. As a necessary corollary to the exercise of this right, they demanded a federal arrangement in the North and the East, where the Tamils are a predominant majority. Various peaceful agitations were organized between this time and the late 1960s by the ITAK to win back the right to equality that was lost through their inferior numbers in the legislature. Pacts were also entered into at different times to settle these issues through political negotiations.

¹ Section 29(2) (b) and (c) of the *Ceylon (Constitution) Order in Council*

² *Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949*

³ *The Official Language Act, 1956*

After the passage of the *Official Language Act*, an Agreement was entered into between the then Prime Minister of Ceylon, S W R D Bandaranaike and S J V Chelvanayagam, the leader of the ITAK. This Agreement envisaged the creation of regional councils by which governmental power was to be devolved. This however was not implemented by Bandaranaike, ostensibly for the reason that there was opposition to it from the majority community. J R Jayawardena, who was to later become the first Executive President of the country, led a foot march from Colombo to Kandy opposing the implementation of this Pact. Later in 1965 another similar Agreement for autonomy was signed between Chelvanayagam and Dudley Senanayake, who became the Prime Minister. The ITAK joined the government in 1965 upon this agreement but three years later resigned due to the fact that no progress was shown in the implementation of the Pact.

The Tamils also allege that systematic state-sponsored colonization was carried out since independence in 1948 with a view to changing the demographic pattern of the Northern and Eastern provinces, which territory they claim as their "traditional homeland" and in which they have a right to exercise self-determination. Colonization schemes in Ampara in 1947 to Mahaweli diversion scheme in the 1980s were used along with State Land alienation policies, which changed the Sinhala population from 9% in the Eastern Province at the time of independence to 29% in 1981.

In 1972 Sri Lanka became a Republic. A Constituent Assembly was formed to enact an autochthonous constitution. Tamil parties also participated in this exercise and asked for certain principles to be agreed upon. That proposal was defeated by a majority vote and the Members of the ITAK left the Constituent Assembly and since then Tamils have claimed not to be bound by the Constitution that was enacted on the basis that it did not have their participation or consent. The first republican constitution of 1972 and the second republican constitution, enacted in 1978, both affirmed Sinhala as the only official language and gave Buddhism the foremost place. They also left out the Section 29(2) prohibition found in the Soulbury Constitution. This naturally resulted in opportunities being denied to the Tamils to join the government service.

The State also introduced a standardization scheme for University admissions, resulting in Sinhala students with much lesser marks entering Universities, while Tamil students with higher marks were being left out. This effectively ended the hopes of higher education for the

Tamils and served to exacerbate the frustration of their youth. This was when Tamil youth resorted to violence as a means of protest against oppression and discrimination. In the 1970s 42 Tamil youth who participated in peaceful protests were arrested and detained for over 4 years without trial using the emergency powers. Eventually they were released only when they fasted to death just prior to the Non-Aligned Summit Conference in Colombo in 1976. The Tamil parties by this time had come together under a banner called Tamil United Liberation Front, and in 1976 passed a resolution calling for a separate State. This was the Election manifesto of the TULF at the General Elections held in August 1977 and they were returned to Parliament 100% from the North and around 60% from the East. Tamils claim that there was an over-whelming mandate given by the people to create a separate State in 1977.

In addition to the acts of discrimination, organized violence was periodically unleashed against the Tamils living outside the north and the east, in 1958, 1977 and 1983. In every one of those occasions, affected Tamils from other parts of the country were transported to the north and the east. The Tamils cite this fact as the official recognition of their 'traditional homeland' in those two provinces.

Soon after the anti-Tamil violence in 1983, several attempts were made to solve this issue, by means of an alternate political arrangement in which greater autonomy would be granted to the Tamils. All efforts at a political solution thus far have been in the direction of a federal state. However, the word 'federal' is studiously avoided due to the past misunderstandings and suspicions. Therefore even when a near-federal arrangement was introduced in 1987⁴, the nature of the state was still described as 'unitary'⁵. These reforms paved the way for the setting up of Provincial Councils with devolution of power to the provinces. The Tamil people maintain that this does not meet the legitimate aspirations of the Tamils who are entitled to the right to self-determination in International Law. In August 1995 the Government of Sri Lanka put forward a set of proposals for constitutional reforms that recognized Sri Lanka as 'a plural society within a united and sovereign republic'⁶ and the

⁴ The Thirteenth Amendment to the Constitution of 1987.

⁵ The Thirteenth Amendment did not alter the nature of the state as described in the second Republican Constitution of 1978.

⁶ *Sri Lanka: The Devolution Debate*, (International Centre for Ethnic Studies, Sri Lanka, 1996), Appendix B.

draft constitution that followed in January 1996 describes the nature of the state as 'an indissoluble union of regions'⁷.

The UNESCO meeting of Experts on further study of the Rights of Peoples (Paris 1990) proposed that the following criteria be used to determine "a people"⁸:

- (a) cultural homogeneity;
- (b) linguistic unity;
- (c) religious ideological affinity;
- (d) common historical tradition;
- (e) racial and ethnic identity;
- (f) territorial connection;
- (g) common economic existence or life.

If this test is applied to the Tamils in Sri Lanka, even the ardent objector to the granting of autonomy must admit that they would qualify as a 'people' in International Law and thus be entitled to at least the right to internal self-determination. But the claim of the Tamils to self-determination is also based on the fact that prior to colonization they were a nation, exercising sovereignty over a defined and separate territory. Consequently they claim that the right to independence from colonial rule was a separate right that vested with the Tamil people. However, it must be remembered that the Tamils in Sri Lanka did not demand a separate sovereign state at the time of independence from colonial rule. Within ten years of independence, the demand for a federal state intensified. It was only after a series of repressive measures by successive governments and broken agreements that the demand for a separate state as an expression of their right to self-determination emerged. But another quarter century later, still the majority of the Tamils are ready to exercise their right to self-determination internally if only that right is recognized and meaningful autonomy is granted.

Customary International Law recognizes a sovereign state to possess (1) a territory, (2) a people, (3) an effective government and (4) the capacity to enter into foreign relations. Early jurists considered sovereignty as being the authority of the monarch or of one centralized government. This meant that federations were suspected to be weak forms of governments as

⁷ *Ibid*, Appendix C.

far state sovereignty was concerned⁹. However one could not reconcile such an idea with the form of government in the American federal system. Today sovereignty is classified into universal sovereignty, popular sovereignty and state sovereignty¹⁰. According to Elazar¹¹, "popular sovereignty...makes it possible for two or more governments to share the attributes of sovereignty without altering the indivisibility of sovereignty". In fact, in a democratic system, sovereignty actually rests with the people and thus can be described as popular sovereignty. In an extended sense, even a monarchy can be described as popular sovereignty if the people choose the king and he rules them with their consent. Therefore, although state sovereignty in the past meant an absolute right that vested in a central authority to do whatever it willed in relation to the people and territory, such a notion is a fallacy in the context of modern nation-states. State sovereignty can also be divided into internal and external. Internal refers to the governmental authority and power over the people and territory governed, while external concerns its existence as a free entity in the world of nations.

The possible exercise of self-determination by various peoples within a sovereign state has demanded great imagination over the last fifty years all over the world. If sovereignty is the direct result of the right to self-determination of peoples, then it naturally follows that sovereignty be left in the hands of the peoples. And since in democratic governments sovereignty anyway rests with the people, the puzzle has been easier to resolve. Today there are several models of shared sovereignty in Europe, America, Asia and even in Australia. Models of federation as seen in Australia and the USA today are not necessarily linked to the right of self-determination of peoples, although the debate over the right to self-determination and to sovereignty of indigenous peoples have gained momentum. In Europe, the movement towards European Union has raised a whole host of issues with regard to the state sovereignty of participating states. The decision of the French Constitutional Court on the compatibility of the Maastricht and Amsterdam Treaties relating to the European Union with the constitutional provisions on sovereignty, necessitated amendments to the French Constitution¹². In the UK, devolution of power to Scotland and its effect on state sovereignty,

⁹ Ibid, 115 n 7.

¹⁰ Christine Fletcher, 'Altered States?' *Federalism, Sovereignty and Self-Government*, (Federalism Research Centre, Discussion Paper No 22, October 1992) Part II p 7, in which she quotes Bodin, Austin, Laski and Dicey.

¹¹ For a fuller discussion on this, see I. Ali Khan, *The Extinction of Nation-States*, (Kluwer Law International, The Netherlands, 1996) Ch 2.

¹² Quoted by Christine Fletcher, *op cit*.

¹³ Solange Mouthan, *France: Amending the Amended Constitution*, (European Law Review, 1998, 23(6), 592-597).

among other issues, are constantly being debated¹³. The recent decision of the Canadian Supreme Court holding that Quebec did not possess the right to unilaterally secede from Canada discusses the principles of International Law in relation to the right of 'peoples' to self-determination and sovereignty¹⁴.

The opinions expressed by the International Court of Justice in *Portugal v. Australia*¹⁵ in the case concerning East Timor does not deal with the issue as to the right of the people of East Timor to self-determination since both contestant countries conceded that right. This leaves the Canadian decision on Quebec¹⁶, *albeit* by a court exercising domestic jurisdiction, as the recent pronouncement on the International Law principles of the right to self-determination. The court lays down the exceptional circumstances in which a right to unilateral secession will be permitted in International law in the exercise of the right to self-determination. These are, (1) when "a people" is governed as part of a colonial empire, (2) where "a people" is subject to alien subjugation, domination or exploitation and (3) possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. The court went on to hold,

"in other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on the basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law... Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic cultural and social development."¹⁷

In other words, the court recognizes that in International Law even if "a people" fall outside the category of colonial people, they are entitled to secession as an expression of their right to self-determination, if they are an oppressed people or if no meaningful access to government

¹⁵ See Lord Hope of Craighead, *Devolution and Human Rights*, (European Human Rights Law Review, 1998)

¹⁶ Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, 161 DLR (4th) 384.

¹⁷ ICJ, 1995, 30 June General List No 85.

¹⁸ *Op cit*.

¹⁹ *Op cit*, 448.

has been permitted to them in order to exercise their right to self-determination within the bounds of a sovereign state.

The Tamil people in Sri Lanka have been subjected to discrimination within the model of a unitary state where majoritarianism reigns. They have been denied the right to express their right to self-determination within an internal arrangement, such as a federal government. In such a situation the denial of the existence of the right to self-determination itself will give rise to the right to unilateral secession as an expression of that right. Therefore the recognition of the right to self-determination of the Tamil people will in no way erode state sovereignty. In point of fact, if the territorial integrity of Sri Lanka is to be preserved from claims to the right of secession, it is a *sine qua non* that the right to self-determination of the Tamils is recognized and the nature of the state is restructured to enable meaningful exercise of internal self-determination.