

## SARENDIB'S SORROW: SRI LANKA'S CONTINUING CONFLICT

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*In this article, the author studies the conflict in Sri Lanka, and identifies and describes two sources of its intractability: fractured fronts and maximalist goals. The article seeks to reveal that while the Sri Lankan government's recent military onslaught against the LTTE has been surprisingly successful, history is clear that a meaningful solution to the conflict in Sri Lanka will be found not on the battlefield but in the hearts and minds of the Sri Lankan people. The causes of the conflict are several – an analysis of these sources of intractability involves both a backward looking appreciation of the events, perspectives and trends that fractured a nation as well as a forward looking transformative outlook towards a shared deliberative reality. The author believes that while the current military success against the LTTE coincides with a wave of collective Sri Lankan anguish at the country's grim predicament. For several reasons, the present represents a potential moment of critical realignment in Sri Lanka. An analysis of the institutional, historical and ideological bases of the conflict indicates different channels that the public sphere will have to simultaneously destroy and create if such a critical realignment is to be serendipitously realised.*

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Serendib and Taprobane—  
Words as argent-chimed as rain,  
Words like little golden beads,  
Apple and pomegranate seeds,  
Strung upon a silver thread,  
Little drops of lacquer-red,  
Tintinnabular and sweet,  
Little words with crystal feet  
Running lightly through my mind.  
If my lazy wit could find  
Gilded phrases to express  
Their perfected loveliness,  
I would make a cage of words  
Where, like bright heraldic birds,  
They should strut and flaunt and preen,  
Scarlet, silver, gold and green,  
Elegantly strange and vain —  
Serendip and Taprobane.

— Anne Atwood Dodge, “Serendip and Taprobane”, *Harper's* (August 1927), p. 272.

## Introduction

Horace Walpole, the 4<sup>th</sup> Earl of Orford (24 September 1717 – 2 March 1797) coined the word ‘serendipity’ in one of his numerous letters, and credited the derivation to a ‘silly fairy tale’ that he had read – *The Travels and Adventures of Three Princes of Sarendip*.<sup>1</sup> The three princes of the title are the sons of Jaffer, the philosopher-king of Sarendip (or Serendib or Serendippo – which, along with Taprobane and Ceylon – was an ancient name for what is today known as Sri Lanka).<sup>2</sup> The word serendipity connotes a quality, discovery or turn of events that is good, unexpected and the result of a particular combination of sagacity and luck. Given the devastating conflict that has been raging across Sri Lanka for a quarter century now, ‘serendipity’ seems to be particularly inappropriate to describe the condition of the country from which the word originates.<sup>3</sup>

The intractability and complexity of the conflict has lead Rajasingham-Senanayake to call Sri Lanka, at the close of a century of decolonisation, as

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<sup>1</sup> Letter from Horace Walpole to Horace Mann (28 Jan. 1754), in 4 THE YALE EDITION OF HORACE WALPOLE’S CORRESPONDENCE 407 (W.S. Lewis et al. eds., 1960).

Robert K Merton points out that this fairy tale first appeared in sixteenth-century Venice under the title *Peregrinaggio di tre giovani, figliuoli del re di Serendippo, tradatto dalla lingua persiana in lingua italiana de M. Christoforo Armeno*, which was translated into English (via a French intermediary) only in 1722 under the title *Travels and Adventures of Three Princes of Serendip*. See Robert K Merton, *Preface*, in ROBERT K. MERTON & ELINOR BARBER, *THE TRAVELS AND ADVENTURES OF SERENDIPITY* (2004).

<sup>2</sup> MERTON & BARBER, *id.* at 2.

<sup>3</sup> Lee Kuan Yew (widely acclaimed as the architect of modern Singapore) represents a much respected figure in the Sri Lankan political milieu, and his memoir impressions on Sri Lanka are worth excerpting from here: ‘*It is sad that the country whose ancient name Serendip has given the English language the word “serendipity” is now the epitome of conflict, pain, sorrow and hopelessness.*’ See LEE KUAN YEW, *FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY: 1965-2000* (2000), *quoted in* Rajeev Amarasuriya, *Lee Kuan Yew’s impressions of Sri Lanka*, SUNDAY OBSERVER, Aug. 31, 2003, *available at* <http://www.sundayobserver.lk/2003/08/31/fea14.html>.

South Asia's 'most dramatic failure at modern nation-building'.<sup>4</sup> The bestial metaphors of the war – lion versus tiger – are particularly illustrative of the ferocity of the conflict.<sup>5</sup> The apotheosis of the idea of a failed and conflict-torn Sri Lanka/Serendib is, however, *a failure of the imagination*.<sup>6</sup> My emphasis upon 'Serendib' and 'serendipity' throughout this paper reflects both a deliberate historical dredging up of the word's connexion with Sri Lanka's glorious past,<sup>7</sup>

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<sup>4</sup> Darini Rajasingham-Senanayake, *Democracy and the Problem of Representation: The Making of Bi-polar Ethnic Identity in Post/Colonial Sri Lanka*, in *ETHNIC FUTURES – THE STATE AND IDENTITY POLITICS IN ASIA* 99 (Joanna Pfaff-Czarnecka et al. eds., 1999).

<sup>5</sup> Jeyaraj points out: Mythological history traces Sinhalese origins to Prince Vijaya who in turn is believed to have had a leonine ancestor. Sinhaya is the Sinhala word for "lion" and the Sinhalese themselves are called "People of the Lion" or the "Lion Race". The Sri Lankan national flag bears a sword-bearing lion, which is a replica of the one used by Kandy, the last Sinhalese kingdom to fall to the British colonialists.....When Tamil nationalism reached warring proportions it had an appropriate counter symbol—the roaring tiger, which was used by the most martial Tamil dynasty in India, the Cholas. Today, the Sri Lankan army has regiments called Sinha, or lion, and its adversary, the Liberation Tigers of Tamil Eelam (LTTE), popularly known as Tamil Tigers, have leopards, panthers and cheetahs in their ranks. See D.B.S. Jeyaraj, *Lions and Tigers*, *HIMAL SOUTHASIAN*, Apr. 1999, available at [http://www.himalmag.com/99Apr/lions\\_tigers1.htm](http://www.himalmag.com/99Apr/lions_tigers1.htm).

<sup>6</sup> I am particularly fond of the usage of this phrase by Arundhati Roy in one of her speeches, and I quote from her writing here:

To call someone anti-American, indeed, to be anti-American, is not just racist, it's a failure of the imagination. An inability to see the world in terms other than those that the establishment has set out for you: If you don't love us, you hate us. If you're not good, you're evil. If you're not with us, you're with the terrorists.

See Arundhati Roy, *Not Again*, *THE GUARDIAN*, Sept. 30, 2002, available at <http://www.guardian.co.uk/world/2002/sep/30/usa.iraq>.

<sup>7</sup> The answer to this and other mysteries concerning Sindbad's adventures in Serendib may never be known. What is significant is that the island figures prominently in the Sindbad tales, and that it is portrayed as a storybook kingdom governed by a wise ruler, a place where the magical and the miraculous are commonplace. For Serendib was regarded as not only a centre of early trade, but also as an enchanted island abounding in wisdom and majesty.

See Richard Boyle, *Sindbad in Serendib*, 17 *SERENDIB MAGAZINE*, available at <http://koslanda.com/sindbad.htm> (last visited May 13 2008).

as well as a hopeful characterisation of lasting solutions to Sri Lanka's seemingly intractable conflict.<sup>8</sup> What eludes serendipity and serendipitous opportunities in Sri Lanka?

An analysis of Sri Lanka's past attempts to end the ethnic conflict is not encouraging at all.<sup>9</sup> Brown and Ganguly have convincingly argued that it is "important to understand the dynamics of ethnic relations, the causes of ethnic conflicts, the processes by which ethnic conflicts become violent, and what well-meaning leaders and governments can do about these problems."<sup>10</sup> If a settlement is to be found to Sri Lanka's conflict, it is important that the causes of the conflict and the sources of its intractability be clearly ascertained, understood, and responded to. This is one of the central aims of this paper.

Ganguly describes David Carment's comparative perspective on secessionist ethnic conflict in South and South East Asia as a "near exhaustive review of the state-of-the-art scholarly literature on the aetiology of ethno-national

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<sup>8</sup> The essence of this characterisation has perhaps been most elegantly described by John Ziman, who states:

The key point is that serendipity does not, of itself, produce discoveries: it produces opportunities for making discoveries.....Even then, the perception of an anomaly is fruitless unless it can be made the subject of deliberate research. In other words, we are really talking about discoveries made by the exploitation of *serendipitous opportunities* by persons already primed to appreciate their significance.

See JOHN ZIMAN, *REAL SCIENCE: WHAT IT IS AND WHAT IT MEANS* 217 (2000).

<sup>9</sup> A detailed discussion of Sri Lanka's pre-2000 attempts at peace and negotiation may be found in *NEGOTIATING PEACE IN SRI LANKA: EFFORTS, FAILURES AND LESSONS* (K. Rupesinghe ed., 1998); *CREATING PEACE IN SRI LANKA: CIVIL WAR AND RECONCILIATION* (Robert Rotberg ed., 1999). Uyangoda has convincingly argued that the shadow of that negative past is bound to be cast over new attempts at peace. See Jayadeva Uyangoda, *Civil War and the Peace Process in Sri Lanka*, 18 *ASIAN EXCHANGE* 56 (2002).

<sup>10</sup> Micheal E. Brown & Sumit Ganguly, *Introduction*, in *GOVERNMENT POLICIES AND ETHNIC RELATIONS IN ASIA AND THE PACIFIC* 9 (Micheal E. Brown & Sumit Ganguly eds., 1997).

mobilisation and ethnic secession in order to identify key structural, instrumental, and normative factors that converge to create violent secessionist ethnic conflicts.”<sup>11</sup> Carment has dealt exhaustively with the four primary perspectives used for explaining ethnic conflict: the primordial perspective, the instrumental perspective, the political economy perspective, and a hybrid perspective involving a combination of insights from these three viewpoints.<sup>12</sup> I have briefly described the central features of each of these perspectives before detailing the perspective and overall methodology employed by this paper.

Primordialists argue that peoples’ ethnic and religious identities have deep social, historical, and genetic foundations, and that the motivation for ethnic and kinship affiliation comes from these subjective, psychological forces internal to the individual and related to basic human needs for security and, more importantly, survival. Therefore, individuals are bound to an ethnic group by virtue of some ‘absolute import attributed to the tie itself.’<sup>13</sup> In other words, primordialists consider ethnic identity and ethnic affinity as unchanging givens, while asserting that “because of primordial affinities derived from race, skin colour, tribe, caste, language, religion and other such factors each ethnic group has a different historical experience and consequently its position in society is likewise determined.”<sup>14</sup>

The instrumentalist perspective argues that ethnic identity is manufactured or maintained in a particular scenario as a basis for collective action. Tambiah,

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<sup>11</sup> Rajat Ganguly, *Introduction: The Challenge of Ethnic Insurgency and Secession in South and Southeast Asia*, in *ETHNIC CONFLICT AND SECESSIONISM IN SOUTH AND SOUTHEAST ASIA 20* (Rajat Ganguly & Ian Macduff eds., 2003).

<sup>12</sup> David Carment, *Secessionist Ethnic Conflict in South and Southeast Asia: A Comparative Perspective*, in *ETHNIC CONFLICT AND SECESSIONISM IN SOUTH AND SOUTHEAST ASIA*, *id.* at 29-37.

<sup>13</sup> Clifford Geertz, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, in *THE INTERPRETATION OF CULTURE: SELECTED ESSAYS 255* (1973).

<sup>14</sup> See ISHTIAQ AHMED, *STATE, NATION AND ETHNICITY IN CONTEMPORARY SOUTH ASIA 20* (1996).

for example, identifies a form of collective behaviour that can be related to the wider cultural practices –and political norms and traditions of public assemblies and protest – as one of the possible perspectives on collective violence in situations of ethnic conflict.<sup>15</sup> An instrumental perspective would, therefore, emphasise the political dimensions of ethnic group behaviour as a method of protecting or furthering the interests of that ethnic group.<sup>16</sup> Ishtiaq Ahmed, for example, takes the view that ethnic identity

needs to be conceptualised as multidimensional, comprising ‘objective characteristics’ some or all of which can be employed by a set of individuals to mobilise those who share these characteristics for some societal action. In other words, ethnic identity is situational, contextual and in terms of [a] basis for collective action constructed.<sup>17</sup>

<sup>15</sup> See STANLEY J. TAMBIAH, *LEVELING CROWDS: ETHNO-NATIONALIST CONFLICTS AND COLLECTIVE VIOLENCE IN SOUTH ASIA* 221-223 (1997).

<sup>16</sup> Carment points out that the term ‘ethnopolitical’, which signifies that group demands have shifted from linguistic, cultural or religious interest to political, territorial, or material appeals for self-determination, is used to refer to such group behaviour. See Carment, *supra* note 12, at 31.

Pfaff-Czarnecka and Rajasingham Senanayake highlight the instrumentalist perspective’s conceptual distinction from the primordialist view by arguing that post colonial state building “has often created the very ethnic identities, confrontations and violence that states proclaim as ancient and then purport to control.” See Joanna Pfaff-Czarnecka & Darini Rajasingham-Senanayake, *Introduction, in* ETHNIC FUTURES – THE STATE AND IDENTITY POLITICS IN ASIA, *supra* note 4, at 10.

<sup>17</sup> See AHMED, *supra* note 14, at 22. Varshney, analysing the relationship between ethnic identities and ethnic conflict or ethnic violence, states that “to move from ethnic identities to ethnic conflict or to ethnic violence is to make an inadmissible analytical leap.” See ASHUTOSH VARSHNEY, *ETHNIC CONFLICT AND CIVIL LIFE* 26 (2002). Stokke and Ryntveit argue that “nationalist mobilization cannot be reduced to essentialist notions of primordial nations, territorial nation-states, or internal colonialism, but instead should be understood as the outcome of cultural and political practices by a multitude of actors, operating in time- and place-specific contexts.” See Kristian Stokke & Anne Kirsti Ryntveit, *The Struggle for Tamil Eelam in Sri Lanka*, 31 *GROWTH & CHANGE* 285-304 (Spring 2000).

The political economy perspective explains that ethnic mobilisation results due to structural factors such as the relative size and location of different ethnic groups and ethnic entrepreneurs (the elite who have a vested interest in advancing particular agendas or promoting particular courses of action) along with normative determinants (for example, institutionalised forms of conflict resolution as opposed to coercive measures). This perspective therefore argues that only after these factors have been carefully ascertained, assessed, and balanced, can any conclusions as to the causes or occurrence of ethnic conflict be made.<sup>18</sup> Approaches that combine insights from the three perspectives outlined above may be termed as hybrid perspectives, and these stress on political and economic disparities (and their underlying history and causes) between the ethnic minority and the centre-State.

In terms of methodology and approach, this paper refers to the colonial, historical, economic, legal and international dimensions of the “ethnicisation of politics” and the intractability of the ethnic conflict in Sri Lanka.<sup>19</sup> The overview of the Sri Lankan conflict in Part 1 of this paper places particular emphasis on the chronological reportage of important events following the 2002 ceasefire. Similarly, emphasis is also placed on describing in detail the historical events that have created the present context of the Sri Lankan conflict. Through this paper, I have adopted a hybrid approach towards ethnic conflict – one that seeks to describe the political economy of the conflict, to identify and articulate

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<sup>18</sup> See Carment, *supra* note 12, at 31. An interesting analysis from the political economy perspective is found in Sunil Bastian’s argument that the July 1983 riots in Sri Lanka were closer in character to an anti-Tamil pogrom than to a communal riot, and constituted a socio-political ‘process’ (whereby he traces the linkages between the development process in Sri Lanka and ethnicity). See Sunil Bastian, *Political Economy of Ethnic Violence in Sri Lanka: The July 1983 Riots*, in MIRRORS OF VIOLENCE – COMMUNITIES, RIOTS AND SURVIVORS IN SOUTH ASIA 286-304 (Veena Das ed., 2d ed. 1994).

<sup>19</sup> For a discussion of the phrase ‘ethnicisation of politics’, see Rajasingham-Senanayake, *supra* note 4, at 101-102.

the instrumental and situational attributes thereof, and to relate the continuance of the conflict to certain key historical, economic, legal, attitudinal and cultural factors.

The objective of this enquiry is to identify clearly classifiable phenomenological trends of (and prospects for) the originary complexity (in Derridean terms) of Sri Lanka's conflict, which will be particularly useful for the future project of creating a robust constitutional order in a Sri Lanka of the unfailed imagination. Written initially as an exercise in political science, this paper works in the tradition of humanities pedagogy that, as Spivak eloquently puts it, "attempts an uncoercive rearrangement of desire through the method of its study."<sup>20</sup>

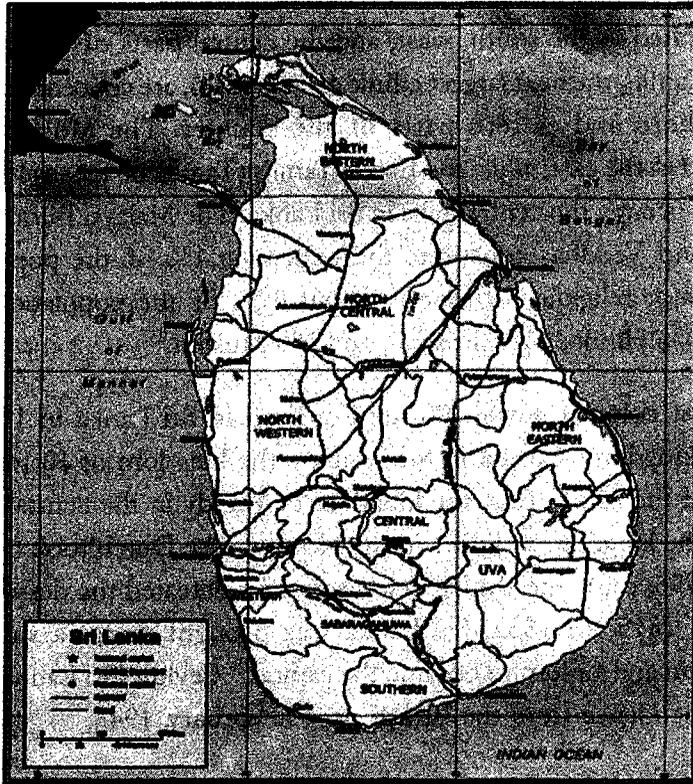
After a brief overview of some recent significant events marking the Sri Lankan conflict (updated until the second week of May 2008), this paper identifies and details two sources of intractability – the existence of fractured fronts leading to the lack of consensus and the articulation of maximalist goals resulting in mutual mistrust. It is argued that any solution to Sri Lanka's ethnic conflict will have to adequately respond to these two sources in order to ensure a lasting peace in the island in the future. Legal reform heralding the development of a true constitutionalism in Sri Lanka must accommodate for these sources of intractability.

Benefiting from insights from communicative theory and the deliberative democracy discourse - articulated through this paper – I sketch the outlines of a constitutional solution to begin surmounting these two identified sources of intractability in the concluding section.

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<sup>20</sup> GAYATRI CHAKRAVORTY SPIVAK, *OTHER ASIAs* 226 (2008).

## Map of Sri Lanka



Sourced from: [http://www.intute.ac.uk/sciences/worldguide/html/1028\\_map.html](http://www.intute.ac.uk/sciences/worldguide/html/1028_map.html)

### I. An Overview of the Conflict

Located a few kilometres off the southern-most Indian state of Tamil Nadu, Sri Lanka is divided into nine provinces and is approximately 65, 525 square kilometres in size.<sup>21</sup> Sri Lanka's pluralistic society of just over 21 million people

<sup>21</sup> The Eight Schedule of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 [Sri Lankan Constitution, 1978] lists out these provinces – Western, Southern, Uva, Eastern, Central, Sabaragamuwa, North Western, North Central, and Northern. These nine provinces are administratively comprised of 25 districts, 256 divisional secretariats, and 160 electorates. *See* Article 5, First Schedule and the Eight Schedule of the Sri Lankan Constitution, 1978. *See also* <http://www.priu.gov.lk/TourCountry/Indexct.html> (last visited May 13, 2008).

is comprised of several ethnic communities with the Sinhalese (74%) constituting the largest ethnic group. Primarily Buddhists by religion, the Sinhalese are concentrated in the south, west, and the central parts of the country. The Sri Lankan Tamils, the next largest ethnic group (12%), are concentrated primarily in the northern and eastern parts of the country. The Muslims (8%) are concentrated in the east, while the Estate Tamils (Tamils of recent Indian origin) (5%) mainly occupy the central hills in Sri Lanka. The Malays, Burghers, Moors, Eurasians, and Veddhas constitute the remaining 1% of the population.<sup>22</sup> In terms of major religious affiliations, about 69% of the population is Sinhala Buddhist, 15% Hindu, 8% Christian, and 7% Muslim.<sup>23</sup>

The first colonial power, Portugal, arrived in Sri Lanka in 1505. At this time, three kingdoms existed in Sri Lanka – the kingdom of Kotte occupying the west and the south-west, the kingdom of Kandy in the central part of the island, and the kingdom of Jaffna in the North.<sup>24</sup> The Dutch took over in 1658. Finally, in 1796, came the British colonisers who defeated the defiant Kandyan kingdom in 1815. In 1832, Sri Lanka was brought under a single unified administration and Colombo became the capital.<sup>25</sup> Ceylon (Sri Lanka) eventually gained independence from the British on 4<sup>th</sup> February, 1948.

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<sup>22</sup> Statistical details obtained from MINISTRY OF FINANCE AND PLANNING, STATISTICAL POCKETBOOK OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA 9-26 (1998). The armed conflict in Sri Lanka has aggravated the paucity of comprehensive population statistics. Statistics from the 2001 census that covered 18 out of the 25 districts of Sri Lanka can be accessed at [http://www.statistics.gov.lk/PopHouSat/Pop\\_Chra.asp](http://www.statistics.gov.lk/PopHouSat/Pop_Chra.asp). (last visited May 13, 2008).

<sup>23</sup> See <http://www.priu.gov.lk/TourCountry/Indextc.html> (last visited May 13, 2008).

<sup>24</sup> The antiquity of these kingdoms has sometimes been traced to the three kingdoms of Ruhunu, Maya and Pihiti mentioned in the *Mahavamsa* (Pali for 'Great Chronicle'), a poem of great religious-historical importance to the Sinhalese in Sri Lanka. See, e.g., Lakshman Kiriella, *Kandyans Urged for Three Federal States in 1928 and 1948*, SUNDAY OBSERVER, Jan. 5, 2003, available at <http://www.sundayobserver.lk/2003/01/05/fea01.html>.

<sup>25</sup> See Jeyaraj, *supra* note 5.

The Sinhalese-Tamil bipolarity, a useful analytical lens for centuries of Sri Lanka's diachronic narratives, was soon firmly cemented in Sri Lanka's post-colonial imagination.<sup>26</sup> In 1972, the country's name was changed from Ceylon to Sri Lanka and Buddhism became the nation's primary religion. With ethnic tensions rising through the Sinhalese nation-building project, the Liberation Tigers of Tamil Eelam (LTTE), under the leadership of Velupillai Prabhakaran, began their separatist campaign for the predominantly Tamil north and east of Sri Lanka. The beginning of the armed conflict, as such, is traceable to the LTTE ambush of an army convoy in 1983 (resulting in the death of thirteen soldiers) and the reactionary anti-Tamil riots across Sri Lanka (claiming over 2500 Tamils lives).

Since 1983, the full-scale war has resulted in more than 70,000 deaths, more than a million people fleeing abroad, and hundreds of thousands of people being displaced internally.<sup>27</sup> The country has witnessed soaring inflation, stunted economic production, and a constant loss of lucrative economic opportunities.<sup>28</sup> Inflation has hit a record high of 29% in 2008, and in May 2008 Standard & Poor's downgraded Sri Lanka's debt rating.<sup>29</sup>

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<sup>26</sup> In a helpful overview of the modern ethnic-religious conflict in Sri Lanka, Carin Zissis points out that "[i]n the years following independence, the Sinhalese, who resented British favoritism toward Tamils during the colonial period, disenfranchised Tamil migrant plantation workers from India and made Sinhala the sole official language." See Carin Zissis, *The Sri Lankan Conflict*, Sept. 11, 2006, available at [http://www.cfr.org/publication/11407/sri\\_lankan\\_conflict.html](http://www.cfr.org/publication/11407/sri_lankan_conflict.html).

<sup>27</sup> See *Sri Lanka: Not Much to Celebrate*, THE ECONOMIST, Feb. 7, 2008, available at [http://www.economist.com/world/asia/displaystory.cfm?story\\_id=10656855](http://www.economist.com/world/asia/displaystory.cfm?story_id=10656855). An evocative depiction of the atmosphere during the war generally is contained in the novel *Anil's Ghost* by Asian-Canadian novelist Micheal Ondaatje. See MICHEAL ONDAATJE, *ANIL'S GHOST* (2000). For an intellectual debate on the approach and perspective of Ondaatje's book, see Qadri Ismail, *A Flippant Gesture Towards Sri Lanka: A Review of Michael Ondaatje's Anil's Ghost*, Radhika Coomaraswamy, *In Defense of Humanistic Ways of Knowing: A Reply to Qadri Ismail*, both in 6.9 PRAVADA (2000).

<sup>28</sup> See *Sri Lanka: Not Much to Celebrate*, *supra* note 27.

<sup>29</sup> Jeremy Kahn, *War is the Answer*, NEWSWEEK, May 19, 2008, available at <http://www.newsweek.com/id/136359>.

India, Sri Lanka's nearest neighbour and an ethnic kin state for the Tamils in Sri Lanka, has played a distinct role in the conflict – prominently, involvement with the training of the Tamil militant forces and the introduction of the Indian Peace Keeping Force (IPKF) into the island in 1987 (followed by its humiliating pull-out in 1991).<sup>30</sup> Rajiv Gandhi, Prime Minister of India at the time of deployment of the peacekeeping force, was killed by an LTTE suicide bomber in 1991. Sri Lankan President Premadasa met a similar fate on 1<sup>st</sup> May 1993. Subsequently, India distanced itself from the Sri Lankan conflict. However, recent news reports seem to indicate an increasing cooperation (particularly with regard to naval surveillance) between the two countries.<sup>31</sup>

Sri Lanka's most recent period of relative peace was formally ushered in on 22<sup>nd</sup> February, 2002, when the two warring sides signed a ceasefire agreement formalising the informal cessation of hostilities that had prevailed since the LTTE's unilateral ceasefire of 25<sup>th</sup> December, 2001.<sup>32</sup> Norway had worked with the Sri Lankan government and the LTTE to set up the Sri Lanka Monitoring mission (SLMM) to supervise the agreement and mediate in negotiations.<sup>33</sup> While some important progress was made between February 2002 and April 2003, the LTTE unilaterally suspended its participation in the peace talks on 21<sup>st</sup> April

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<sup>30</sup> Ganguly has provided a detailed comprehensive study of India's role in the ethnic conflict in Sri Lanka. See RAJAT GANGULY, *KIN STATE INTERVENTION IN ETHNIC CONFLICTS – LESSONS FROM SOUTH ASIA* 193-232 (1998). India's role in the ethnic conflict and a grim documentation of the IPKF atrocities in Sri Lanka is provided in R. HOOLE et al., *THE BROKEN PALMYRA – THE TAMIL CRISIS IN SRI LANKA: AN INSIDE ACCOUNT* (1992).

<sup>31</sup> See, e.g., P.S. Suryanarayana, *India's Naval Surveillance a Big Help to Sri Lanka*, *THE HINDU*, June 4, 2008, available at <http://www.thehindu.com/2008/06/04/stories/2008060461401700.htm>.

<sup>32</sup> See *AGREEMENT ON A CEASEFIRE BETWEEN THE GOVERNMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA AND THE LIBERATION TIGERS OF TAMIL EELAM*, available at <http://www.peaceinsrilanka.org/insidepages/Agreement/agceasefire.asp> (last visited May 20, 2008).

<sup>33</sup> The SLMM was composed of roughly sixty members from five Nordic countries (Norway, Sweden, Denmark, Finland, and Iceland) and headquartered in Colombo with district offices in the North and East. See Zissis, *supra* note 26.

2003.<sup>34</sup> Even as the ceasefire formally remained, both sides repeatedly alleged truce violations, with recurrent reports of skirmishes and killings.<sup>35</sup> In a political power tussle between then President Chandrika Kumaratunga [Sri Lanka Freedom Party (SLFP)] and her bitter rival Prime Minister Ranil Wickremesinghe [United National Party (UNP)], Kumaratunga used her sweeping powers under the Sri Lankan Constitution to impose a state of emergency in late 2003.<sup>36</sup>

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<sup>34</sup> The LTTE also announced that it would not be attending the Tokyo Conference on Reconstruction and Development of Sri Lanka held in June 2003 through this communication. The LTTE has unilaterally rejected attempts at peace several times in the past. Following the Indo-Lanka Accord of July 1987 which the LTTE had rejected, the second attempt at a negotiated solution was initiated by Sri Lanka's President Ranasinghe Premadasa in 1989. In June 1990, the LTTE unilaterally terminated the unofficial ceasefire. In 1994-95, the newly elected People's Alliance (PA) government of Sri Lanka, initiated talks with the LTTE. Following six months of talks, the peace negotiations once again collapsed following the unilateral resumption of hostilities by the LTTE in April 1995. See Uyangoda, *supra* note 9, at 57.

<sup>35</sup> For example, Arjuna Parakrama, in a keynote address entitled *Accounting for Peace as Violence by Another Name: Heretical Thoughts from the Margins of the Sri Lankan Ethnic Conflict* provides a chilling account of the nine-fold increase of child abductions and disappearances relating to LTTE conscription since the signing of the MOU, of threats to civilian populations if they reported ceasefire-related indiscretions to the Sri Lanka Monitoring Mission (SLMM), and of the overall reduction of the peace talks to a dialogue between the two perpetrators (the government and the LTTE). Parakrama's address is discussed in Cynthia Caron, *Sri Lanka – Floundering Peace Process – Need to Widen Participation*, 38 ECON. & POL. WKLY 1029 (2003). The University Teachers for Human Rights, Jaffna while warning against the continued "appeasement policy" towards the LTTE provide detailed documentary evidence of the LTTE's continued abuse of civilians, it's killing of political opponents, violence against Muslims, conscription of children, etc. and the destabilising effects of the same on Sri Lankan society. See UTHR(J), SPECIAL REPORT NO. 17 – REWARDING TYRANNY: UNDERMINING THE DEMOCRATIC POTENTIAL FOR PEACE (2003), available at <http://www.uthr.org/SpecialReports/spreport17.htm> (last visited May 14, 2008).

<sup>36</sup> See *Emergency Declared in Sri Lanka*, CNN, Nov. 5, 2003, available at <http://www.cnn.com/2003/WORLD/asiapcf/south/11/05/slanka.firing/index.html>.

Two unpredicted events in 2004 further accelerated the island's hurtle towards all-out military war. First, in the first week of March 2004, a split within the LTTE high command surfaced. Colonel Karuna Amman, former eastern commander of the LTTE, broke away from the mainstream LTTE while claiming that the interests of the Eastern Tamils were being ignored.<sup>37</sup> Karuna's 'Tamil Makkal Viduthalai Pulikal' (TMVP) faction was thus born. The armed faction of the TMVP began (and continues) to fight the LTTE alongside the Sri Lankan government (though the government has repeatedly denied any direct connection to Karuna).<sup>38</sup> Following Karuna's defection, Sri Lanka's witnessed some intense internal fighting. In April 2004, the LTTE attacked and defeated Karuna's eastern

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<sup>37</sup> In a stunning turn of events, Karuna was arrested in London on November 2, 2007 for carrying an "apparently genuine Sri Lankan diplomatic passport issued under a false name." During the UK court case, Karuna said he had received the false diplomatic passport from the Sri Lankan government – in particular, from the brother of President Mahinda Rajapaksa. In May 2008, Karuna was transferred to an immigration detention centre and it is still unclear as to whether or when he will be deported. See *Renegade Tamil Rebel Jailed in UK*, BBC NEWS, Jan. 25, 2008, available at [http://news.bbc.co.uk/2/hi/south\\_asia/7209415.stm](http://news.bbc.co.uk/2/hi/south_asia/7209415.stm); *UK Transfers Renegade Tamil Tiger*, BBC NEWS, May 9, 2008, available at [http://news.bbc.co.uk/2/hi/south\\_asia/7392107.stm](http://news.bbc.co.uk/2/hi/south_asia/7392107.stm); Human Rights Watch, *UK: Missed Chance to Charge Sri Lankan Rights Abuser*, available at <http://www.hrw.org/english/docs/2008/05/09/slanka18795.htm> (last visited May 14, 2008).

<sup>38</sup> For an analysis of the split within the LTTE from that time-period, see generally Jehan Perera, *Peace Process and the LTTE Split*, HIMAL SOUTHASIAN, Mar.-Apr. 2004, available at [http://www.himalmag.com/2004/march\\_april/commentary\\_1.htm](http://www.himalmag.com/2004/march_april/commentary_1.htm).

Like all armed groups operating in Sri Lanka, the Karuna faction has also been repeatedly accused of human rights violations (often with claims of state complicity). "Despite ongoing international scrutiny and criticism, including from the United Nations, the Karuna group has continued to abduct and forcibly recruit children and young men for use as soldiers, with state complicity." See HUMAN RIGHTS WATCH, REPORT VOLUME 19, NO. 11(C), RETURN TO WAR: HUMAN RIGHTS UNDER SIEGE (2007). See also UTHR(J), SPECIAL REPORT NO. 18 – POLITICAL KILLINGS AND SRI LANKA'S STALLED PEACE (2005), available at <http://www.uthr.org/SpecialReports/spreport18.htm> (last visited May 14, 2008).

forces in a fierce battle at the Veragul River near Batticaloa and Trincomalee districts.<sup>39</sup> While Karuna went into hiding following the defeat of his forces, most observers agree that the split had profoundly altered the political and military situation in the east.<sup>40</sup> More violence soon followed. On 7<sup>th</sup> July 2004, a suicide bomber killed herself and four policemen in Kollupitiya police station in the heart of Colombo in an attack almost certainly targeted at Douglas Devananda (leader of the Eelam Peoples Democratic Party (EPDP), which has fought alongside the army against the LTTE). It was the first such distinctively LTTE style suicide bombing since October 2001. The 2002 ceasefire was still in force on paper, but clearly, the momentum towards war was building.

Second, Sri Lanka was battered by a massive tsunami on 26<sup>th</sup> December 2004, leaving close to 40,000 people dead and many more homeless. Post-tsunami reconstruction resulted in renewed and increased hostilities between the Sri Lankan government and the LTTE.<sup>41</sup> On 12<sup>th</sup> August 2005, Lakshman Kadirgamar, Sri Lanka's Jaffna-born, Tamil Christian, Oxford-educated Foreign Minister, was shot to death by one or more unidentified gunmen in Colombo. The LTTE, which had come in for harsh criticism throughout Kadirgamar's

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<sup>39</sup> See HUMAN RIGHTS WATCH, REPORT VOL. 16, NO. 13(C), LIVING IN FEAR: CHILD SOLDIERS AND THE TAMIL TIGERS IN SRI LANKA (2004).

<sup>40</sup> See HUMAN RIGHTS WATCH, *supra* note 37.

<sup>41</sup> Rodd McGibbon provides for an interesting account of how the tsunami had different effects on the long-running disputes in Aceh and Sri Lanka. He points out that by the end of 2005, Aceh had witnessed a successful process of arms decommissioning, the withdrawal of non-local security forces, and the promulgation of a new law allowing for self-government in Aceh. See Rodd McGibbon, *Transforming Separatist Conflict*, 7 GEO. J. INT'L AFF. 121 (2006). Michael Renner points out that the post-tsunami reconstruction in Sri Lanka has been highly uneven (and often terribly inadequate) even as of January 2008 and links this diagnosis with the exacerbation of the conflict. See Michael Renner, *Conflict in Sri Lanka Slows Tsunami Rebuilding*, available at <http://www.worldwatch.org/node/5576> (last visited May 14, 2008)

distinguished international career, is widely believed to have been behind the assassination.<sup>42</sup> A state of emergency was, once again, declared in Sri Lanka soon after. During 2005, the government enacted emergency regulations three times: twice following the December 2004 tsunami, and once following the killing of Lakshman Kadirgamar.<sup>43</sup> These emergency regulations *inter alia* permitted arrests without warrant as well as non-accountable detentions for up to 12 months.

In the close November 2005 presidential poll that marked the end of Kumaratunga's tenure, Mahinda Rajapakse (SLFP) prevailed over his main rival Ranil Wickremesinghe (UNP). As part of his campaign, Rajapakse had forged electoral pacts with the hardline Sinhalese Janatha Vimukthi Peramuna (JVP) and Jathika Hela Urumaya (JHU).<sup>44</sup> Zissis points out that "[i]n a move some experts regard as part of an LTTE plan to restart the war, the Tigers had prevented voting by Tamils, who would most likely have cast ballots for the moderate Wickremesinghe, in the north and east areas under LTTE control."<sup>45</sup> In the immediate aftermath of Rajapaksa's victory, more than 200 people (including military personnel, LTTE cadre and civilians) were killed in a series of bombings and clashes that 'had all the hallmarks of an undeclared war.'<sup>46</sup> The level of

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<sup>42</sup> "Kadirgamar had been instrumental in getting the Tigers outlawed as a terrorist organisation by the US and Britain and had known he was a target for a long time. He was protected by more than a hundred soldiers all the time." See Jason Burke & Santush Fernando, *Assassination Leads to State of Emergency in Sri Lanka*, THE OBSERVER, Aug. 14, 2005, available at <http://www.guardian.co.uk/world/2005/aug/14/srilanka>.

<sup>43</sup> U.S. DEPARTMENT OF STATE, SRI LANKA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2005, Mar. 8, 2006, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61711.htm>.

<sup>44</sup> Sanjana Hattotuwa states that this "draconian government with scant regard for human rights uses the continuing intransigence of the Liberation Tigers of Tamil Eelam as an excuse to clamp down on civil society, NGOs and the media." See Sanjana Hattotuwa, *Denial and Polarization*, HIMAL SOUTHASIAN, Feb. 2007, available at <http://www.himalmag.com/2007/february/opinion.htm>.

<sup>45</sup> See Zissis, *supra* note 26.

<sup>46</sup> Wije Dias, *Despite Peace Talks, Sri Lanka Drifts Towards Civil War*, available at <http://www.wsws.org/articles/2006/apr2006/sril-a01.shtml> (last visited May 13, 2008).

violence declined only in February 2006 when the Sri Lankan government and the LTTE met in Geneva (under Norwegian facilitation) and reaffirmed their commitment to respect and uphold the ceasefire agreement.<sup>47</sup> The sincerity of the commitment was belied in the coming months however: even as the LTTE postponed the second round of talks in Geneva - bombings, killings and combat on land and in the seas regularly continued in March and April of 2006.

April marks a particularly significant month in our analysis of the return to all-out war in Sri Lanka. On April 11<sup>th</sup>, a claymore anti-personnel mine attack (attributed to the LTTE) killed 10 Sri Lankan navy sailors. The next day, a cycle of largely anti-Tamil violence in Trincomalee (called Thrikanaamale in Sinhala and Thirukonamalai in Tamil) began, eventually resulting in more than 35 deaths and 60 injuries. Jeyaraj points out that “[t]he seriousness of the situation saw Indian Prime Minister Manmohan Singh expressing concern to Sri Lankan President Mahinda Rajapakse over the telephone, and evoked stark memories of the July 1983 anti-Tamil violence on the island.”<sup>48</sup>

On April 20, 2006, the LTTE officially pulled out of peace talks indefinitely. A few days later, on April 25, 2006, the LTTE carried out a truly daring attack in the heart of Colombo – a female suicide bomber (who might have been pregnant) blew herself up in the army hospital inside the heavily guarded army headquarters. The main target of the attack – Lieutenant General Sarath Fonseka – survived despite suffering serious injuries.<sup>49</sup> Soon after the suicide bombing, the Sri Lankan army launched aerial attacks on LTTE positions in the North-East for the first time since the 2002 ceasefire. In effect, the full-scale war had begun once again.

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<sup>47</sup> See *The Government of Sri Lanka and the Liberation Tigers Issue Statement*, available at <http://www.norway.org.uk/policy/news/srilankatalks.htm> (last visited May 13, 2008).

<sup>48</sup> D.B.S. Jeyaraj, *Again, in Trincomalee*, HIMAL SOUTHASIAN, May 2006, available at [http://www.himalmag.com/2006/may/analysis\\_1.html](http://www.himalmag.com/2006/may/analysis_1.html).

<sup>49</sup> See *Bomb Targets Sri Lanka Army Chief*, BBC NEWS, available at [http://news.bbc.co.uk/2/hi/south\\_asia/4941744.stm](http://news.bbc.co.uk/2/hi/south_asia/4941744.stm) (last visited May 13, 2008).

Near the end of May 2006, the European Union listed the LTTE as a banned organisation.<sup>50</sup> The last few days of April, and the months of May and June 2006 also saw extremely intensive fighting and unprecedented levels of violence.<sup>51</sup> The situation reached a critical point in July, when the army launched an offensive to gain access to a waterway (Mavil Aru) in disputed territory around the eastern town of Muttur in Trincomalee district.<sup>52</sup> The fighting over the water reservoir ended with the Sri Lankan army obtaining control of the area in mid August 2006. This military victory, it is suggested, would set the tone for much of what was to follow in the military arena over the next twenty months of a full-scale war.<sup>53</sup>

On May 11, 2008, Sri Lankan president Rajapaksa hailed his party's controversial election victory in the country's tense Eastern Province (in alliance with Karuna's political party) as a mandate to push ahead with his war against

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<sup>50</sup> Amit Baruah, *European Union Bans LTTE*, THE HINDU, May 31, 2006, available at <http://www.thehindu.com/2006/05/31/stories/2006053117200100.htm>.

<sup>51</sup> See *Sri Lanka General Killed in Blast*, BBC NEWS, available at [http://news.bbc.co.uk/2/hi/south\\_asia/5115968.stm](http://news.bbc.co.uk/2/hi/south_asia/5115968.stm) (last visited May 13, 2008); Shimali Senanayake, *Sri Lanka Jets Bomb Tamil Rebels' Airstrip*, INTERNATIONAL HERALD TRIBUNE, June 16, 2006, available at <http://www.ihf.com/articles/2006/06/16/news/srilanka.php>; *Sri Lankan Combatants Rape Women to Terrorize*, THE SOUTHASIAN, June 18, 2006, available at [http://www.thesouthasian.org/archives/2006/sri\\_lankan\\_combatants\\_rape\\_wom.html](http://www.thesouthasian.org/archives/2006/sri_lankan_combatants_rape_wom.html).

<sup>52</sup> See generally UTHR(J), SPECIAL REPORT NO. 22 – HUBRIS AND HUMANITARIAN CATASTROPHE (2006), available at <http://www.uthr.org/SpecialReports/spreport22.htm> (last visited May 13, 2008). On 5 August 2006, 17 aid workers belonging to French NGO, *Action Contre la Faim* (Action Against Hunger, ACF) were massacred at Muttur in an incident that shocked the international community. The SLMM has attributed responsibility for these deaths to the Sri Lankan government. See B. Muralidhar Reddy, *Army Behind Aid Workers' Massacre: SLMM*, THE HINDU, Aug. 31, 2006, available at <http://www.hindu.com/2006/08/31/stories/2006083107821400.htm>.

<sup>53</sup> On January 2, 2008, the Sri Lankan government officially pulled out of the ceasefire agreement. The Norwegian mediators are no longer involved in peace negotiations in Sri Lanka.

Tamil Tiger rebels in the north.<sup>54</sup> Rajapaksa has promised to destroy the LTTE by the end of 2008 – he has already doubled the defense budget to \$1.5 billion (about 5.8 percent of the Sri Lankan GDP) and he has clearly given his military commanders a free hand.<sup>55</sup> In sharp contrast to the military stalemate that has characterised most of the history of the ethnic-religious conflict, the Sri Lankan military appears to be clearly winning (in terms of territorial gains and losses inflicted) this time around.<sup>56</sup> Also in mid-May 2008, the Government of India extended its ban on the LTTE as an unlawful association for two more years.<sup>57</sup> The signals are clear: if the standard assumptions remain unchanged over the coming days – the intense war looks set to go on, at the very least, until the end of 2008.

As the war goes on, the citizens of Sri Lanka will have to indefinitely continue to live in conditions of abject non-democracy, caught between an

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<sup>54</sup> “I note that the people of the east have given a clear mandate for peace through the defeat of terrorism, the strengthening of democracy and the development of the country.” See N. Manoharan, *Eastern Provincial Council Elections: A First Step Towards Final Settlement?*, available at [http://www.ipcs.org/South\\_Asia\\_articles2.jsp?action=showView&kValue=2586&country=1016&status=article&mod=a](http://www.ipcs.org/South_Asia_articles2.jsp?action=showView&kValue=2586&country=1016&status=article&mod=a) (last visited May 20, 2008).

<sup>55</sup> See Kahn, *supra* note 29.

<sup>56</sup> Kahn’s (May 2008) analysis of the Sri Lankan government’s military strategy is worth quoting at length here:

The Army’s accomplishments over the past 18 months certainly are impressive. It has managed to wrest control of seven of the island’s districts from the Tigers, leaving the guerrillas with just two [in the North]. The Sri Lankan Navy has bested the LTTE’s Sea Tiger light attack-boats in several critical engagements and has sunk a number of their floating offshore arms depots. Sri Lanka’s Air Force has killed two high-ranking Tiger leaders [SP Thamilselvam and Colonel Charles] in the past six months. And the government says it only narrowly missed killing Velupillai Prabhakaran, the Tigers’ elusive commander and founder, in a December air raid. Meanwhile, crackdowns on the LTTE’s financing and arms networks by the United States, the European Union, India and Australia have hampered the Tigers’ ability to raise funds and smuggle in weapons.

*See id.*

<sup>57</sup> *LTTE Still Uses Tamil Nadu as Supply Base*, THE HINDU, May 16, 2008, available at <http://www.thehindu.com/2008/05/16/stories/2008051661321200.htm>.

authoritarian government in military overdrive and a deadly terrorist force without remorse. One is then forced to ask - what could dramatically alter our assumptions in this scenario? Three immediate possibilities come to mind: the assassination of Rajapaksa, the assassination or capture of Prabhakaran, and finally, a visionary commitment to peace expressed through a serendipitous trust-generative mechanism. If this third possibility is to emerge, it is crucial that the sources of intractability of the ethnic conflict are identified and responded to. It is to this aspect that we turn next.

## II. Sources of Intractability

### A. *Fractured Fronts: A Deficit of Consensus*

The first major source of the intractability of the Sri Lankan conflict is the deficit of a genuine consensus regarding trust-generative mechanisms and processes for peace, which is largely due to the multiple fractured fronts along the political spectrum as exacerbated by the ideologies and positions adopted by the Sri Lankan military, the LTTE, and the Buddhist clergy. The apparent inability to reach a consensus on Sri Lanka's future contributes to an increasing sense of apathy and frustration amongst the Sri Lankan citizenry as the conflict continues interminably.

The history of consensus in Sri Lanka's sharply competitive and multi-party political system is not at all encouraging.<sup>58</sup> In the past, even when the

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<sup>58</sup> Schaffer provides an interesting account of the tragic-comical political events from a few years back when then President Kumaratunga belonged to one party while Prime Minister Wickremasinghe belonged to the opposing 'other' and accurately predicted that "their clashing personalities and political agendas will make it very difficult for them to work together." See Teresita C. Schaffer, *Sri Lanka: "Cohabitation" – Opportunity or Paralysis*, 41 SOUTH ASIA MONITOR, Jan. 1, 2002, available at <http://www.csis.org/media/csis/pubs/sam41.pdf>. See also V.S. Sambandan, *A Political Spat*, 20 FRONTLINE, May 24 – June 06, 2003, available at <http://www.hinduonnet.com/fline/fl2011/stories/20030606006613200.htm>; *Chandrika Warns Ranil Against Flirting with LTTE*, THE TIMES OF INDIA, Oct. 9, 2003, available at [http://timesofindia.indiatimes.com/cms.dll/articleshow?art\\_id=7203234](http://timesofindia.indiatimes.com/cms.dll/articleshow?art_id=7203234).

British government brokered an agreement between the SLFP and the UNP to work together to resolve the country's ethnic conflict, no joint work between these two parties resulted.<sup>59</sup> Weisberg and Hicks point out that the SLFP and the UNP have doggedly scored political points off each other in the context of ethnic tensions and nationalist sentiment for several decades now.<sup>60</sup> The UNP, which was at the fore-front of the formalisation of the 2002 ceasefire, has a dismal record of torpedoing all pro-peace political settlements during the SLFP government's reign.<sup>61</sup> The withdrawal of the SLFP-led government from the 'UNP's 2002 ceasefire' in early January 2008 marks yet another bittersweet cyclical reversal involving actors who seem to thwart each other's peace-brokering legacies to the fullest extent.

Government-Opposition cooperation in the context of peace processes remains of vital importance, quite simply, because any genuine political settlement will need far-reaching constitutional amendments that require a political consensus to be effectuated. Further, any changes that emerge from a successful negotiated settlement to the ethnic conflict will have to receive political legitimacy through the support of the major political parties.

There is often no consensus on power-sharing measures even within the same party. For example, the Senanayake-Chelvanayakam Pact, which contained moderate proposals on decentralisation of power and concessions on the language

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<sup>59</sup> See William Weisberg & Donna Hicks, *Overcoming Obstacles to Peace: An Examination of Third-Party Processes*, in *CREATING PEACE IN SRI LANKA: CIVIL WAR AND RECONCILIATION*, *supra* note 9, at 144.

<sup>60</sup> Two further impediments to a negotiated settlement are identified as a lack of attention to underlying needs/fears and psychological barriers. *See id.* at 143-156.

<sup>61</sup> Uyangoda points out that Ranil Wickremasinghe, then the Leader of the Opposition, ensured the ultimate collapse of the SLFP government's peace project by not supporting Kumaratunga's constitutional reform initiative. *See Uyangoda, supra* note 9, at 60.

policy, was according to then Prime Minister Dudley Senanayake due to strong internal divisions within the ruling party.<sup>62</sup>

Significantly, the political theatre also showcases several other smaller but highly influential political parties.<sup>63</sup> These parties further fracture the political fronts and make it even more difficult to reach a consensus on crucial issues. The Jathika Hela Urumaya (JHU), for example, represents strongly pro-Sinhalese nationalist interests. Nationalist political parties have repeatedly denounced the Norwegian led mediation process in the past. They remain particularly well placed to foment extremist nationalist sentiment in the rural parts of the country where they retain most of their support.<sup>64</sup> The visibility and influence of the Sri Lanka Muslim Congress (SLMC) has also been steadily increasing over the past decade.<sup>65</sup>

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<sup>62</sup> See DUDLEY SENANAYAKE - CHELVANAYAKAM PACT OF 1965, available at <http://www.peaceinsrilanka.com/insidepages/Agreement/Dudley.asp> (last visited May 20, 2008)

See also K. LOGANATHAN, SRI LANKA: LOST OPPORTUNITIES – PAST ATTEMPTS AT RESOLVING ETHNIC CONFLICT 31-42 (1996). See also A.J. WILSON, S.J.V. CHELVANAYAKAM AND THE CRISIS OF SRI LANKAN TAMIL NATIONALISM, 1947-1977: A POLITICAL BIOGRAPHY 105 (1994).

<sup>63</sup> It is reported that 1,342 candidates belonging to 18 political parties and 56 independent groups contested the May 2008 elections in the Eastern Province. See *Overall 55%-60% Voter Turnout in Violence-free Eastern PC Poll*, available at [http://www.defence.lk/new.asp?fname=20080511\\_01](http://www.defence.lk/new.asp?fname=20080511_01) (last visited May 13, 2008).

<sup>64</sup> The JVP's hardline stance, its continuous campaign for non-negotiation with the LTTE, and its rejection of the 2002 peace process and the Norwegian mediation have had a significant effect on how public money has been spent in Sri Lanka since 2004 (going into 2009) and on the current strategy of all out military engagement with the LTTE. See generally Peter Chalk, *The Liberation Tigers of Tamil Eelam Insurgency in Sri Lanka*, in ETHNIC CONFLICT AND SECESSIONISM IN SOUTH AND SOUTHEAST ASIA, *supra* note 11, at 155.

<sup>65</sup> See also Uvais Ahmed, *A Muslim Perspective*, in NEGOTIATING PEACE IN SRI LANKA: EFFORTS, FAILURES AND LESSONS, *supra* note 9.

The LTTE has been extremely successful in systematically winning over, cajoling, coercing, or exterminating its political opponents within the Tamil community to be the *de facto* 'sole representative' of the Tamil people in the past.<sup>66</sup> As a result, political parties representing the LTTE have usually been the only political representatives that Sri Lanka's Tamils have had access to. Sri Lanka's 'bi-polar ethnic imagination' has, for long, had the LTTE appropriate the 'Tamil' signifier in the political and negotiation realms.<sup>67</sup> Karuna's TMVP party, which experienced recent electoral success in the Eastern province, claims to espouse the cause of the eastern Tamils. In effect, Karuna's TMVP represents the creation of a second front within the Tamil political spectrum. It is extremely unlikely that the TMVP and the LTTE-backed political parties will agree to cooperate on any political measures – this again illustrates the difficulties with obtaining consensus in the Sri Lankan context.

Perera points out that the lack of party consensus (embodied in the subtle manner of constitutional foot-dragging that has thwarted many an attempt at peace in Sri Lanka) illustrates that the competitive rivalry of the political system often jettisons the imperatives of peace.<sup>68</sup> Trust, sadly enough, is and has been

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<sup>66</sup> The aspirations of many of Sri Lanka's Tamil people do not coincide with the views and objectives of the LTTE. The LTTE's predominant role in political negotiations over the years owes largely to the fact that the LTTE has successfully taken on the Sri Lankan government militarily for over two decades while silencing all (or almost all) other political voices within the Tamil community. It must be pointed out that some small paramilitary Tamil political parties (like the EPDP) have continued to operate over the years despite the silencing brutality of LTTE violence.

<sup>67</sup> A bi-polar ethnic imagination refers to the configuration of ethnic identity politics in Sri Lanka that constructs Sinhalese and Tamils as mutually exclusive and collectively exhaustive of the island's diverse and hybrid communities. See Rajasingham-Senanayake, *supra* note 4, at 101.

<sup>68</sup> Jehan Perera, *The Inevitability of Violence: The Centralised State in a Plural Society, in SRI LANKA AT CROSSROADS – DILEMMAS AND PROSPECTS AFTER 50 YEARS OF INDEPENDENCE* 86 (S.T. Hettige & Markus Mayer eds., 2000).

in serious short supply in Sri Lanka's public and political climate.<sup>69</sup> In an interesting recent piece aimed at applying insights from communicative theory and deliberative democracy frameworks to nations of linguistic multiculturalism, Professor Addis comments on trust thus:

For a deliberative process to function properly and effectively there has to be trust among citizens. The notion of trust here refers to the confidence that citizens or groups of citizens have that other citizens or groups of citizens will treat them reasonably well, that they "will not waylay or cheat" them, that they will be forthcoming in exchanges with them, and that they will consider them as partners in a common enterprise of building a community.<sup>70</sup>

The strongly nationalist influence of Sri Lanka's powerful Buddhist clergy represents another serious impediment to consensus. Hattotuwa, while commenting on the powerful influence of the Buddhist clergy on Sri Lankan political life, points out that in 1951 the resolutions of the All Ceylon Buddhist Congress to the Prime Minister included a statement that "the...government is legally and morally bound to protect and maintain Buddhism and Buddhist institutions." The same resolution also demanded the restoration of Buddhism to "the paramount position of prestige which rightfully belongs to it."<sup>71</sup>

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<sup>69</sup> Philip Pettit is right in describing trust as "a precious if fragile commodity in social and political life [that] institutional policy makers and designers ignore...at their peril." See Philip Pettit, *The Cunning of Trust*, 24 PHIL. & PUB. AFF. 204 (1995).

<sup>70</sup> Adeno Addis, *Constitutionalizing Deliberative Democracy in Multilingual Societies*, 25 BERKELEY J. INT'L L. 117 (2007). On the framework of deliberative democracy, Cohen and Sabel have pointed out: "At the heart of the deliberative conception of democracy is the view that collective decision-making is to proceed deliberatively – by citizens advancing proposals and defending them with considerations that others, who are themselves free and equal, can acknowledge as reasons." See Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 327 (1997).

<sup>71</sup> Sanjana Hattotuwa, *Overview of the Peace Process in Sri Lanka: 2002 – 2003*, available at [http://www.cpalanka.org/research\\_papers/overview\\_peace\\_process\\_2002\\_2003.pdf](http://www.cpalanka.org/research_papers/overview_peace_process_2002_2003.pdf) (last visited May 15, 2008).

Reiterating that all governments in Sri Lanka have jockeyed to favour Sinhala Buddhists following independence, Hattotuwa concludes that the parochial, hegemonic Sinhala-Buddhist mentality, which has significantly influenced post-independence politics in Sri Lanka, has indeed “engendered intolerance in polity and society and carries a large burden of responsibility for the current ethno-politic conflict.”<sup>72</sup> One striking illustration is the scuttling of one of the first attempts at decentralisation of power in Sri Lanka, the Bandaranaike-Chelvanayakam Pact of 1957, which gave substantial autonomy to the Tamil areas through the establishment of Regional Councils of limited power, by the powerful Buddhist clergy working with the opposition parties.<sup>73</sup>

Chandra R. de Silva points out that until early 2002 the Buddhist clergy in Sri Lanka were firm that there should not be any talks with the LTTE (which they viewed as a terrorist organisation) and that the solution to the civil conflict was simply the eradication of terrorism. However, by mid 2002, the UNP “seemed to have succeeded in persuading the [Buddhist] mahanayakas that its negotiations with the LTTE were on the basis of a single country and therefore, the mahanayakas have remained united in support of the peace process.”<sup>74</sup> The Schmittian framework of single nation/single sovereignty has for long been non-negotiable for the Buddhist clergy. The breakdown of the 2002 ceasefire agreement and the present situation of all-out war against the LTTE, therefore, sit comfortably with what has been the strategy of choice for the Buddhist clergy in Sri Lanka.

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<sup>72</sup> *Id.* On the attitude of the Buddhist clergy towards the civil conflict in Sri Lanka and their influence in peace processes, see generally H.L. SENEVIRATNE, *THE WORK OF KINGS: THE NEW BUDDHISM IN SRI LANKA* (1999); STANLEY TAMBIAH, *BUDDHISM BETRAYED? RELIGION, POLITICS AND VIOLENCE IN SRI LANKA* (1992).

<sup>73</sup> See BANDARANAIKE-CHELVANAYAKAM PACT OF 1957, available at <http://www.peaceinsrilanka.com/insidepages/Agreement/Ban.asp> (last visited May 20, 2008). See also LOGANATHAN, *supra* note 62, at 16-31, 86.

<sup>74</sup> Chandra R. de Silva also explains why the Buddhist clergy in Sri Lanka has historically reacted to devolution with caution and fear. See Chandra R. de Silva, *Categories, Identity and Difference: Buddhist Monks (bhikkus) and Peace in Sri Lanka*, available at [http://www.lines-magazine.org/Art\\_May03/desilva.htm#\\_ednref17](http://www.lines-magazine.org/Art_May03/desilva.htm#_ednref17) (last visited May 20, 2008).

The Sri Lankan military has also often been responsible for fracturing pro-peace consensus in the Sri Lankan “state” front. Uyangoda asserts that the military process has assumed a considerable measure of autonomy from the political process, and can often exert considerable influence on the political process.<sup>75</sup> The existence of a massively influential military-industrial complex for which the continuation of the conflict is essential in terms of ideology, survival, and profit is a strong influence that detracts from consensus.<sup>76</sup>

The conflicting aims of the different political parties, the anti-concession and anti-compromise stance of the Sinhala Buddhist clergy, the posturing of the military in Sri Lanka – these factors sustain truly fractured fronts and thereby undermine the viability of attempts at peace in Sri Lanka. Perera suggests that a bipartisan or multi-partisan consensus within the government and the opposition (in effect, the political spectrum) on the core principles on which a political solution to the ethnic conflict could be negotiated should initially be obtained to ensure that the search for a political solution is freed from the imperatives of petty party politics.<sup>77</sup> If we may dwell on Perera’s useful suggestion, communicative theory discourse provides some important insights into the manner in which consensus may be facilitated in Sri Lanka.

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<sup>75</sup> Jayadeva Uyangoda, *A Political Culture of Conflict*, in *CREATING PEACE IN SRI LANKA: CIVIL WAR AND RECONCILIATION*, *supra* note 9, at 160.

<sup>76</sup> Weisberg and Hicks point out that the military is a strong influence promoting continued armed conflict since military leaders have an obligation to their constituents that requires them to be able to justify to soldiers and their families that blood was not spilled in vain. *See* Weisberg & Hicks, *supra* note 59, at 144. What will soldiers, arms manufacturers, terrorists, and the vultures do in a situation of peace? Solutions are not inconceivable – soldier rehabilitation (along with victim rehabilitation) in post-war Mozambique, for example, represents one such concrete vision of a post-war unfailed imagination. I am grateful to my colleague Rodrigo Pagani D’Souza for bringing this to my attention.

<sup>77</sup> *See* Perera, *supra* note 68, at 86-87.

A truly genuine consensus requires that voices be heard – it requires dialogue.<sup>78</sup> Habermas' sage injunction of *dialogue, or discourse, being central to the process of deliberative democracy* rings true stridently for Sri Lanka.<sup>79</sup> Only, if subaltern voices are indeed voiced and heard – and their influence felt through dialogue – will it be possible to generate consensus in Sri Lanka to make possible, to use Spivak's words, “the promise of a conversation, on other Africas, on the way to the globe othered, again and again, from capital to social, through a pedagogy of genealogical deconstruction reterritorialising the abstractions of an anti-ethnicist regionalism” of the unfailed imagination.

One of the main challenges for reformative enquiry in the Sri Lankan context, therefore, will be in designing an institutional, legal and public sphere where the President and the Prime Minister, and all the major political parties, will find it possible (and based on reason) to agree to cooperate in the effective pursuit of a sustained peace. Given the rather restrained natural proclivity for such cooperation in the past, the creation of such a public sphere should be the task/burden of a constitutional framework of the unfailed imagination.

The public sphere as such is “a theatre ... in which political participation is enacted through the medium of talk. It is the space in which citizens deliberate about their common affairs ... an institutionalised arena of discursive interaction.”<sup>80</sup> Constitutions are particularly suited to limit/define the range of

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<sup>78</sup> “There has been an important shift in contemporary democratic theory from ‘vote-centric’ to ‘talk-centric’ theories of democracy.” See Alan Patten & Will Kymlicka, *Introduction: Language Rights and Political Theory: Context, Issues and Approaches*, in LANGUAGE RIGHTS AND POLITICAL THEORY 16 (Will Kymlicka & Alan Patten eds., 2003).

<sup>79</sup> See generally JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996). Seyla Benhabib points out: “Legitimacy in complex democratic societies must be thought to result from the free and unconstrained public deliberation of all about matters of common concern.” See Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 68 (Seyla Benhabib ed., 1996).

<sup>80</sup> NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 70 (1997).

options and actions available to players in a given scenario and one finds a paradigm example in the post-war German Constitution. The forms available to Sri Lanka's future constitutional frameworks are multifaceted – it is only within the public sphere of a deliberative democratic framework that these constitutional contours can (and indeed will) be precisely articulated.<sup>81</sup>

An institutional design fostering trust, promoting dialogue, and changing the subalternising modes of production of voice is critical for a vibrant serendipitous Sri Lanka. Constitutions provide normative charters for such consensus-generating enterprises. Modern technologies such as radio, television, and the Internet provide the enabling tools. Given the small territorial size of Sri Lanka, it is almost absurd to note the absence of a robust semiotic democracy of radio-generated voices of political opinion. Serendipitous activity, however, as Merton and Barber remind us, requires both 'deliberate' action and persons capable of appreciating serendipitous opportunities.<sup>82</sup> Sri Lanka, it seems, has long been waiting for the princes of Sarendib.

Facilitating the continued opening up of political spaces, of the public sphere, in the North (and indeed in all of Sri Lanka) is vital. Ensuring that the multitude of voices (a true polyphony in Bakhtinian terms) *critical of the status quo in Sri Lanka's constitutional milieu* – indeed critical of claims of the inevitability for Sarendib's continuing sorrow – are voiced, heard, considered, and acted upon, is absolutely crucial.<sup>83</sup> The grotesque narrative of fractured fronts that

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<sup>81</sup> The idea of deliberative democracy rests on the foundation of Habermas' notion of a "public sphere." See generally JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger & Frederick Lawrence trans., 1989); JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: LIFE WORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy trans., 1987).

<sup>82</sup> See generally MERTON & BARBER, *supra* note 1.

<sup>83</sup> "[A] sort of transnational literacy, an intuition of the dynamic geopolitical configurations of the globalising present, may be achieved, again and again, providing a changeful and moving base for the recording of the ceaseless movement of data as such." See SPIVAK, *supra* note 20, at 227.

obscures the path to the eternal 'carnival' of Sarendib/Sri Lanka needs to be transformed and consensus must be pursued and generated.<sup>84</sup>

### ***B. Maximalist Goals: A Surplus of Mistrust***

The core of the ethnic conflict in Sri Lanka may be simplistically reduced to the desire of the Sinhalese Buddhist majority that Sri Lankan state sovereignty is not compromised pitted against the Tamils' desire to ensure that their right to nationhood is respected. The vocabulary of this exquisite conflict results in two architectonic (as distinguished from compositional or teleological) consequences:

First, the articulation of objectives/goals in maximalist terms of one undivided sovereign country (the statist goal) or complete liberation/independence from an oppressor (separatist goal).

Second, mistrust for any strategic moves at variance with claimed, or attributed, ideological maximalist goals.

### **A battle of great antiquity**

...antiquity itself did not know the antiquity that we know now. There used to be a school joke: the ancient Greeks did not know the main thing about themselves, that they were ancient Greeks...But in fact the temporal distance that transformed the Greeks into ancient Greeks...was filled with increasing discoveries of new semantic values

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<sup>84</sup> “[A]ll were considered equal during carnival. Here, in the town square, a special form of free and familiar contact reigned among people who were usually divided by the barriers of caste, property, profession, and age...” Bakhtin illuminatingly developed the concept of ‘carnival’ to describe Dostoevsky’s polyphonic style of writing. In Bakhtin’s theory, the carnival creates the “threshold” situations where regular conventions are altered or broken, and genuine dialogue becomes possible. *See generally* M.M. BAKHTIN, PROBLEMS OF DOSTOEVSKY’S POETICS (Caryl Emerson trans. & ed., 1984).

in antiquity, values of which the Greeks were in fact unaware, although they themselves created them.

– Mikhail Bakhtin<sup>85</sup>

Ahmed points out that the Theravada form of Hinayana Buddhism prevalent in Sri Lanka and the cultural heritage of the Sri Lankan Tamils have historically played a central role in the cultural and the ethnic identity formation of the Sinhalese and the Tamils.<sup>86</sup> Several scholarly studies have concluded that the *Mahavamsa* does contain some elements of collective sentiment that helped foster a 'self-other' distinction between Buddhists and Tamils in historical times.<sup>87</sup> The existence of such historical material is often used to justify conflict, to promote separation, and to manufacture mistrust. In Sinhalese and Tamil mythology, and in the consciousness of many Sri Lankans, an unresolved controversy of fact breathes malignantly: which people were the first to inhabit Sri Lanka?

Many Sinhalese claim that they arrived on the island from northern India as early as 500 BC under the leadership of Prince Vijaya. In response, many Sri Lankan Tamils claim they inhabited the island long before the arrival of Vijaya. A similar debate ensues over the superior antiquity of the respective languages of the two groups.<sup>88</sup>

<sup>85</sup> Quoted from GARY SAUL MORSON & CARYL EMERSON, *MIKHAIL BAKHTIN: CREATION OF A PROSAICS* 290 (1991).

<sup>86</sup> See AHMED, *supra* note 14, at 239. Rajasingham-Senanayake, through a brief review of the scholarship on this issue, points out how such ethnocentric histories are a vital part of the popular culture in Sri Lanka, and how both Tamil nationalism and Sinhala nationalism echo the 'homeland myth.' See Rajasingham-Senanayake, *supra* note 4, at 107-108.

<sup>87</sup> See, e.g., Gananath Obeyesekere, *Sinhala Buddhist Identity in Ceylon*, in *ETHNIC IDENTITY: CULTURAL CONTINUITIES AND CHANGE* 395 (George De Vos & Lola Ramanucci-Ross eds., 1975); STANLEY TAMBIAH, *SRI LANKA: ETHNIC FRATRICIDE AND THE DISMANTLING OF DEMOCRACY* (1986).

<sup>88</sup> See generally AHMED, *supra* note 14, at 239. Rajasingham-Senanayake has pointed out that the primordialist interpretation of ethnicity emphasises the existence of a perennial conflict between the Sinhalese and the Tamils for control of the island. This conflict

Tambiah has cogently argued for the urgent and strong need for “imaginative and liberated non-sectarian historians” who can debunk “the idea of an age-old and permanent confrontation between two ethnic blocks, the Sinhala and the Tamils.”<sup>89</sup> The dialogue of a strong and vibrant public sphere, promoted and enriched by such imaginative pedagogies, would influence a shift away from maximalist goals. It would also engender greater trust. Most crucially, it would allow for the serendipitous discovery of “unfinalisability” of the modern Sri Lankan soul – one that accommodates, perhaps even demands, peace.<sup>90</sup>

### Colonial Legacies

Jayawardhana, in a historical summary of the ethnic conflict, points out that social and economic developments during the early colonial period under the Portuguese and the Dutch, primarily in the form of the commercialisation of agriculture, the registration of title to land, registration of births and deaths, proselytisation, etc. contributed towards a freezing of ethnic boundaries between the Sinhalese and the Tamils.<sup>91</sup>

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is exemplified by the story of the primordial feud between the two groups when the Sinhala king Duttu Gamini fought the Tamil king Elara in the 2<sup>nd</sup> century BC. See Rajasingham-Senanayake, *supra* note 4, at 106.

<sup>89</sup> See STANLEY TAMBIAH, *SRI LANKA: ETHNIC FRATRICIDE AND THE DISMANTLING OF DEMOCRACY* 6-7 (1986).

<sup>90</sup> Here, as in so many other contexts, I find it useful to quote Bakhtin:

In order to understand, it is immensely important for the person who understands to be located outside the object of his or her creative understanding — in time, in space, in culture. For one cannot even really see one's own exterior and comprehend it as a whole, and no mirrors or photographs can help; our real exterior can be seen and understood only by other people, because they are located outside us in space, and because they are others.

*Quoted from* MORSON AND EMERSON, *supra* note 85, at 289.

<sup>91</sup> Kumari Jayawardhana, *Ethnic Conflict in Sri Lanka and Regional Security*, Oct. 1987, available at <http://www.infolanka.com/org/srilanka/issues/kumari.html>.

Additionally, the entry into Sri Lanka of over one million Tamil workers from South India, as plantation labor, for the coffee plantations established by the British and the establishment and growth of educational facilities in English in the Tamil areas, which led to large-scale employment of the Tamils in 'the state services, the private sector and...the learned professions contributed to the souring of the relationship between the two communities.'<sup>92</sup> In time, the Sinhalese bourgeoisie felt the loss of employment to the educated Tamils and the Burghers. The Sinhalese working class also had to grapple with the fact that the South Indian Tamils had also established control over a large segment of the employment market. This manufactured comparative advantage of employment, and the reactions thereto, strengthened the simmering ethnic antagonism and mutual mistrust.

Simultaneously, British colonial administrators and scholars also played an important role in cementing Sinhala Buddhists and Tamils into separate and insular ethnic groups. The colonial census in Sri Lanka played an important role in the eventual consolidation of linguistic and religious categories along an ethno-racial fault line.<sup>93</sup> Rajasingham-Senanayake explains that beginning with the processes of translation and transformation in the colonial period, "race has served as the root metaphor which congeals linguistic, religious and cultural markers in the formation of the modern Sinhala-Buddhist and Tamil (ethnic) identities."<sup>94</sup>

In the sphere of government, racial or ethnic schemes of political representation were pursued when including Sri Lankan natives in the governance machinery. This phenomenon is clearly evidenced in the representations at the

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<sup>92</sup> *Id.*

<sup>93</sup> See Rajasingham-Senanayake, *supra* note 4, at 109-114. See also C.Y. Thangarajah, *The Genealogy of Tamil Nationalism in Post-Independent Sri Lanka*, in *SRI LANKA AT CROSSROADS – DILEMMAS AND PROSPECTS AFTER 50 YEARS OF INDEPENDENCE*, *supra* note 68, at 120-122.

<sup>94</sup> See Darini Rajasingham-Senanayake, *Identity on the Borderline: the Colonial Census, New Ethnicities and the Unmaking of Multiculturalism in Ethnic Violence*, 3 *IDENTITY, CULTURE & POL.* 39 (Dec. 2002).

Ceylon Legislative Council in the late nineteenth century and the early twentieth century, and the Manning reforms of 1920.<sup>95</sup> The Donoughmore Commission (1927 – 28) which sought to suggest changes to the existing system of communal representation, recommended universal adult franchise, which was accordingly instituted in 1931.<sup>96</sup> The Donoughmore reforms were vociferously opposed by the Tamils, who in an atmosphere of increasing Sinhalese hostility, perceived the communal representation system as a safety net against the possible tyranny of the majority Sinhalese.<sup>97</sup> The Donoughmore reforms have been called by historians as a “political re-conquest” – resulting in the re-creation of a national Sri Lankan identity based on a Sinhala-Buddhist heritage, in majority Sinhalese victories in the political arena, and in rejection of representation systems for the Tamils and other minorities.<sup>98</sup> In the last two decades of Sri Lanka’s colonised history, the balance of power shifted dramatically in favour of the Sinhalese thereby bringing along with it the high likelihood of the tyranny of the vengeful majority and the accompanying sentiment of mistrust.

Ahmed has pointed out that the parting gift of the British, the Soulbury Constitution, which was adopted in 1948, contained two fatal weaknesses.<sup>99</sup>

<sup>95</sup> See Rajasingham-Senanayake, *supra* note 4, at 114-115.

<sup>96</sup> See AHMED, *supra* note 14, at 243.

<sup>97</sup> Selvadurai brilliantly articulates the fears and anxieties in Sri Lanka’s Tamil community during this historical period in his brilliant fictionalised account. See SHYAM SELVADURAI, CINAMMON GARDENS (1999). Thangarajah points out that the Donoughmore reforms also resulted in increased “elite” hostility towards the Estate Tamils – “when the question of voting was taken up, the question of the ‘labourers’ who had been brought by the British became acute.” See Thangarajah, *supra* note 93, at 124.

<sup>98</sup> For detailed studies of this period, see Thangarajah, *supra* note 93; WILSON, *supra* note 62.

<sup>99</sup> Lord Soulbury was the head of the Commission that drafted a new Constitution for Sri Lanka. The Soulbury Commission arrived in Sri Lanka in 1944. The Tamils had pleaded before the Commission for a system of 50-50 representation, but this proposal was not supported by the Muslims who instead sought to align themselves with the Sinhalese in national politics. Finally, the Soulbury Commission recommended a constitution which was based essentially on a liberal notion of a multiracial secular democracy. See AHMED, *supra* note 14, at 243.

Firstly, it prescribed a unitary form of government based on the Westminster model, which vested sovereignty in one centralised Parliament and effectively precluded any meaningful devolution or decentralisation of power.<sup>100</sup> Second, though the 1948 Constitution forbade discrimination against minorities, a clear bill of rights defining the rights of minorities and individuals was not included.<sup>101</sup> It is these trust-depleting failings of the 1948 Soulbury Constitution that Marasinghe bemoans as historical blunders to be avoided, while also asserting that they had “planted the seeds of discord, which by 1984 had grown into a massive communal conflagration and has enveloped the nation in its entirety into one enormous fire ball.”<sup>102</sup>

Familiarity with the English language (or lack thereof) served as a foundational identifier for many of the British policies that hardened Sri Lanka’s bipolar ethnic imagination - those who spoke English were included in the governance structures while those who didn’t were denied such opportunities. When universal suffrage was introduced, everyone, irrespective of their command over language(s) had equal access to the reins of governance and political power. Soon after independence, one language – Sinhala – was given a predominant position through the contrivances of the majority-driven political system while Tamil and all the other non-Sinhala languages were abandoned at the wayside. The metaphor of language, therefore, is inextricably connected with the consolidation of bipolar ethnic identities and the perpetuation of the ethnic conflict in Sri Lanka.

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<sup>100</sup> Uyangoda has pointed out that the Westminster model of parliamentary democracy introduced the Sinhalese nationalist elite to one of its existential assumptions: “Democracy is the rule of the majority, the arithmetic or numerical majority, in this case the collective and general will of the ethnic-religious majority.” See Jayadeva Uyangoda, *A State of Desire? Some Reflections on the Unreformability of Sri Lanka’s Post-Colonial Polity*, in *SRI LANKA AT CROSSROADS – DILEMMAS AND PROSPECTS AFTER 50 YEARS OF INDEPENDENCE*, *supra* note 68, at 106.

<sup>101</sup> See AHMED, *supra* note 14, at 243. See also Bastian, *supra* note 18, at 291, for a discussion of the ineffectiveness and inadequacy of the minority safeguards in the 1948 Constitution.

<sup>102</sup> LAKSHMAN MARASINGHE, *AN OUTLINE FOR A CONSTITUTIONAL SETTLEMENT IN SRI LANKA* 24 (2003).

## Nationalism and Nationalisms

But it isn't necessary to be "anti-national" to be deeply suspicious of all nationalism, to be anti-nationalism. Nationalism of one kind or another was the cause of most of the genocide of the 20th century. Flags are bits of coloured cloth that governments use first to shrink-wrap people's minds and then as ceremonial shrouds to bury the dead.

- Arundhati Roy<sup>103</sup>

The decades after independence in Sri Lanka saw a massive attempt at state-building and modernisation where the Sinhala majority sought to increase their domination over a centralised 'welfare state': the language policy of 1956, the minority-discriminatory university admissions policies of 1970-71, land colonisation policies, etc are examples.<sup>104</sup> Further, under the prevalent electoral system with its guiding logic of power in numbers – the Sinhala vote was pre-eminent. The two largest Sinhala parties, the UNP and the SLFP, regularly wooed the Sinhala electorate by pursuing policies that discriminated against the minorities.

Rajasingham-Senanayake points out that this trajectory of Sinhala nationalism finally resulted in the unbearable political and cultural tyranny of the Sinhala majority – with the consequent breakdown of the social contract between the ethnic minorities and the majoritarian Sinhala state.<sup>105</sup> She highlights four significant moments that "mark the rise of Sinhala-Buddhist nationalism, the marginalisation of minorities and the concomitant politicisation and militarisation of the Tamils" in this period of democratic tyranny.<sup>106</sup> First, the

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<sup>103</sup> See Roy, *supra* note 6.

<sup>104</sup> K.M. de Silva, *To Restore Peace to Sri Lanka's Fractured Polity*, available at <http://www.peaceinsrilanka.com/insidepages/background/background.asp> (last visited May 15, 2008).

<sup>105</sup> See Rajasingham-Senanayake, *supra* note 4, at 117.

<sup>106</sup> *Id.*

passage of the 'Sinhala Only' Act in 1956 made the majority community's language the only official language of the country. Challenge to the constitutionality of the Act by the Federal Party resulted in Sinhala mob violence against the Tamil populace continuing at sporadic intervals for over two years.<sup>107</sup> Second, the Ceylon Citizenship Act of 1948, and the Indian and Pakistani Residents (Citizenship) Act, 1949, effectively disenfranchised a majority of the Indian Tamil plantation labourers. Third, the enactment of the first republican constitution of 1972, which while ending the dominion status of Sri Lanka entrenched the notion of a strongly unitary state. This constitutional document also gave a pre-eminent status to the primary religion of the majority Sinhalese – Buddhism.<sup>108</sup> Finally, the widespread anti-Tamil riots of 1983 resulting in the escalation of Tamil youth resistance to the Sri Lankan Army (especially in the North-East of Sri Lanka). In effect, these four moments constitute the foundations of the mutual mistrust that spawned the Sri Lankan war.

The present configuration of the majoritarian Sinhalese Sri Lankan state owes greatly to the aggressive nation-building measures taken post-independence. Sinhalese nationalism seems to be grounded in certain basic premises and it is these that will mark the extreme end of Sri Lanka's future dialogic imagination in the public sphere.

First, the notion of 'our country' or *Sinhaladipa*, premised on the logic that Sri Lanka is the only land in the world that the Sinhalese people, as an undistilled collective, can genuinely call home. The existence of this attitude has a strong instrumental connexion to the existence of the state of Tamil Nadu in southern India – a land that the 'other', i.e., the Tamils, can call home without any significant moral, emotive or theoretical objections.

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<sup>107</sup> See AHMED, *supra* note 14, at 251.

<sup>108</sup> Significantly, the Federal Party, which was by then the primary representative of the Tamil people, did not participate in the framing of the 1972 Constitution.

Second, the notion of *rata bedeema* (division of the country) which posits that any negotiated (or compromise-based) settlement, will inevitably be a milestone on the road to the eventual disintegration of Sri Lanka into two nations, the Sinhala nation and the Tamil nation. Whenever representatives of the Tamils have urged for power-sharing in federalist terms, Sinhala nationalism responded by equating power-sharing to national separation or to a sequential move towards eventual separation.<sup>109</sup> This characterisation grew in part due to fears and anxieties of a pan-Tamil nation comprising the territorial areas of Tamil Nadu and Eelam. The suggestions for territory-based autonomy for areas with concentrations of Tamil speaking people were constantly denounced (and, of course, unilaterally rejected) as efforts to divide the country.<sup>110</sup>

Third, the 'minority complex' of the numerically dominant Sinhalese community, when the Tamils of Sri Lanka and the Tamil populace of neighbouring India are considered together as one ethnic group.<sup>111</sup> This minority

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<sup>109</sup> My references to the Tamil aspirations for federal solutions and power-sharing are to the Tamil parliamentarians in Sri Lanka that dominated Tamil politics from the mid-1950s until almost 1980. This elite led nation-building endeavour that originated from the Colombo Tamils must be distinguished from the militant Tamil separatist nationalism that emerged in the late 1970s and has since dominated (and currently seeks to hegemonise) Tamil politics. This latter nationalism had at its helm middle-class and dissatisfied Tamil youth. It is submitted that the needs and aspirations of both of these Tamil nationalisms have always been viewed upon with suspicion (and have been branded as attempts to divide Sri Lanka) by the Sinhalese nationalists. *See* Stokke & Ryntveit, *supra* note 17, at 294-298.

<sup>110</sup> Uyangoda points out that the development of a discursive exclusivity separating the Tamil nationalism from the Sinhala nationalism was so pronounced post-independence that the nationalist political reasoning among Sinhalese and Tamil ethnic ideologies occurred at two different domains, thereby negating the political space for any possibility of the two projects to negotiate and come to an accommodation. *See* Uyangoda, *supra* note 75, at 109.

<sup>111</sup> The topsy-turvy phenomenon of numerically dominant ethnic communities manifesting minority-like anxieties about technically minority groups is considered as one of the paradoxes of state-building in South Asia and is also evident in the rise of the Hindutva movement in India and Bhumiputraism in Malaysia. *See* Pfaff-Czarnecka & Rajasingham-Senanayake, *supra* note 16, at 13.

complex must be analysed in the context of nationalist Sinhalese realisation of the strong likelihood that the Tamils of Sri Lanka would bear a grudge for decades of step-sisterly treatment, *in their own country*, at the hands of the majority Sinhalese.<sup>112</sup>

Finally, the strong desire/weakness to experience 'Sri Lanka in its entirety' before any irremediable measure that precludes this possibility manifests itself.<sup>113</sup>

These arguments are strongly constitutive of Sinhala nationalism – arguments which a reason-valuing dialogic public sphere of a Sri Lanka of the unfailed imagination will encounter, must reason against, and should eventually debunk, dispel, or accommodate for.<sup>114</sup> The acknowledgement of these features as facets of Sinhalese nationalism has sometimes been used as a perverse legitimisation of the LTTE's terrorist activities. The rationale underlying such desperate assertions being that if it were not for the LTTE's actions (violent or otherwise), the Sinhala majority would never treat the Tamils as fellow citizens worthy of respect, solidarity and dignity. This, once again, highlights the critical need to integrate trust as a compositional value into the intellectual, moral, legal and political discourses of Sri Lanka.

Radhika Coomaraswamy points out that in response to the rise of Sinhala chauvinism, the process of negative dialectic resulted in the emergence of Tamil chauvinism and extreme forms of mythmaking (including assertions that Tamils

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<sup>112</sup> Additionally, there exists the constant worry that India's Tamil population also bears a grudge against the Sinhalese for the 'shabby' treatment of their ethnic kin in Sri Lanka.

<sup>113</sup> I refer to the desire of experiencing Sri Lanka as a country free of colonial overlordship and separatist conflict. Of course, such a desire does not acknowledge the existence of the needs, values and aspirations of minorities who have been historically marginalised and have had their voices silenced for decades.

<sup>114</sup> For example, H.L. de Silva, considered to be one of Sri Lanka's constitutional experts, compares a federal power sharing solution to a 'beguiling serpent' that would bring about the 'death of the Republic.' See H.L. de Silva, *Federalism is a Beguiling Serpent*, July 28, 2003, available at <http://www.tamilnet.com/art.html?artid=9514&catid=79>.

are pure Dravidian by race, that they are the true heirs to the grand Mohenjadaró and Harappa civilisations of India, that they are the original inhabitants of Sri Lanka, that Tamil in its purest forms is spoken only in Sri Lanka and that the "Saiva Siddhanta" form of Hinduism has 'a special homeland' in Sri Lanka.).<sup>115</sup>

The extreme dialogic view offered by the current configuration of Tamil nationalism needs to be contextualised by a wariness, and in some cases an absolute unwillingness, to return to scenarios of actual, potential or perceived 'weakness' or vulnerability. A deliberative democracy with a robust public sphere easily dispels such anxieties by prioritising the value of reason (the dignity or equality or humanity of all people of Sri Lanka being examples of such reason-based assertions) and by generating and justifying trust.

Finally, Tamil nationalism, coming from the 'paradigm of outsider politics,' has been historically victim to well-documented unilateral rejections of its power-sharing aspirations.<sup>116</sup> Tamil nationalism is therefore highly influenced by the idea that the Tamils have a 'legitimate' or at least 'fair' right/justification/entitlement to unilaterally reject peace-generative schemes of the Sinhalese majority state. Such an attitude promotes mistrust and serves as an impediment to all genuine and meaningful attempts at resolving the ethnic crisis. The deliberative democracy model of the public sphere – with its emphasis on dialogue and on the reasons that propagate viewpoints – effectively negates the negative consequences of such 'legitimate' grievances while simultaneously fostering trust in the possibility of a genuine legitimate solution.

The nationalism based temporal-normative attitudes toward responsibility and entitlement for the events of Sri Lanka's violent past (which share the constitutive form of Bakhtin's notion of 'chronotope') are likely to raise some

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<sup>115</sup> Radhika Coomaraswamy, *Myths Without Conscience: Tamil and Sinhalese Nationalist Writings of 1980's*, in FACETS OF ETHNICITY IN SRI LANKA 79 (C. Abeysekere & N. Gunasinghe eds., 1987).

<sup>116</sup> See Uyangoda, *supra* note 75, at 110.

truly difficult normative questions on Sri Lanka's path to peace. While this aspect cannot be addressed in much detail here, I raise some questions as worthy of future projects of enquiry. Will the (future) public sphere of Sri Lanka throw out a sequential path to justice with abatement of violence as the first (and/or only) prerogative? What notion of responsibility, of accountability, and of justice, will guide the new peaceful polity's treatment of past wrongs? What will history contribute to the sense of self and morality of the newly equal citizens of a post-conflict Sri Lanka of the unfailed imagination?

### Concluding Remarks

“However sympathetic the intention, to rob the mother-tongue of the subaltern by way of an ignorant authoritative definition that is already becoming part of the accepted benevolent lexicography is a most profound silencing.”

– Gayatri Chakravorty Spivak<sup>117</sup>

Clearly, there is a long way to go before Sri Lanka's ethnic conflict is successfully resolved. The existence of multiply fractured fronts impedes any consensus towards peace while mutual mistrust doggedly prevails on account of the maximalist goals usually articulated in the political and ideological spheres. The combination of a transformative outlook with a critical self-analysis will prove to be particularly useful, especially so during this current phase of all-out war.<sup>118</sup> This paper adopts the trope of a “Sri Lanka of the unfailed imagination” to renew again the possibilities of serendipity and peace in Sri Lanka. After all, serendipity was/is an “attribute” of Sri Lanka, was/is it not?<sup>119</sup>

<sup>117</sup> See SPIVAK, *supra* note 20, at 96.

<sup>118</sup> See Thushara Hewage & Ahilan Kadirgamar, *Critical Thinking in Wartime*, HIMAL SOUTHASIAN, June 2008, available at [http://www.himalmag.com/2008/june/analysis\\_2.html](http://www.himalmag.com/2008/june/analysis_2.html).

<sup>119</sup> “Per attributum intelligo id, quod intellectus de substantia percipit, tanquam ejusdem essentiam constituens,” translated as, ‘by attribute I understand what the intellect perceives of a substance, as constituting its essence.’ See SPINOZA, *Ethics*, in THE COLLECTED WORKS OF SPINOZA 408 (Edwin Curley trans. & ed., 1985).

In many ways, a deliberative democracy framework (benefitting from insights from communicative theory) offers great hope and great opportunity for Sri Lanka. The contours of this deliberative democracy model will, indeed must, be enshrined in reformatory enquiry and the future constitutional texts of Sri Lanka. Deliberative democracy would also require – in the fashion of iteration of South Africa's most recent constitution – a genuine commitment to, and a highly effective institutional design for, public-participation in the constitution-making process. The medium of radio communication (buttressed by direct consultations, television, and Internet) could provide for a particularly effective means to fashion a robust public sphere for reasoned dialogue in Sri Lanka. Deliberative democracy in Sri Lanka will also have to fashion for itself a new brand of trust – involving each individual's trust in her or his fellow citizens, and peoples' trust in the values of ethics and reasoned moral and philosophical viewpoints.<sup>120</sup>

While most Sri Lanka analysts seem content to predict that the war will go on in the coming months, the methodology of this paper is geared towards a different conclusion – the coming months in Sri Lanka offer more, much more, than merely the possibility of military success against the LTTE or the inevitability of the LTTE's retaliatory terror-strikes. The current juncture, more than any other in Sri Lanka's troubled past over the past 50 years, seems poised for what Bruce Ackerman would describe as a genuine *constitutional moment*.<sup>121</sup> Political scientists would describe such a moment in terms of a notable juncture

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<sup>120</sup> Some virtuous flavours characterised by writers in the tradition of philosophical, theological and spiritual enquiry include – for example – care [Heidegger], good will [Kant], truth [Plato, Gandhi], justice [Aristotle], reason and tolerance [Locke, Buddha], piety [Spinoza], humility [Buddha], restraint [Tolstoy, Gandhi], gratitude [Spinoza], intergenerational equity [Weber, Burke], equal concern [Dworkin], fairness [Rawls] etc.

<sup>121</sup> See BRUCE ACKERMAN, *WE THE PEOPLE* (1991). See generally Bruce Ackerman, *The Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737 (2007). See also BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006).

for critical realignment theory. Bakhtin, I imagine, would say that the ‘carnival’ is coming to Sarendib. Horace/Kant’s injunction of *sapere aude* notwithstanding, I venture no comments on the exact timing or contours of this imminent constitutional moment. What I will comment upon is that Sri Lanka’s move (gradual or revolutionary) to serendipity will require dialogue, which in turn, will require communication. Language – the most vibrant and common medium of communication – therefore, may well be the destined arena for the invocation of critical realignment in Sri Lanka.

I mentioned earlier in this paper that my approach belongs to a perspective of the pedagogy of the humanities and adopts Spivak’s approach towards an *uncoercive rearrangement of desires*. Before I end, however, I take up cudgels as a lawyer, if ever so briefly. We return to the metaphor of language and its symbolism for the ethnic conflict in Sri Lanka.

Article 18 of the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978 begins:

18. Official Language.

(1) *The Official Language of Sri Lanka shall be Sinhala.*

(2) Tamil shall also be an official language..... [emphasis mine]

Significantly, Article 9 of the Constitution states:

9. Buddhism.

*The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14(1)(e).”* [emphasis mine]

Article 18 read with Article 9 of the Sri Lankan Constitution effectively create a hierarchy of language (apart from religion) in Sri Lanka’s constitutional milieu. Robert Cover has pointed out that the state (usually through courts but also through constitutions) imposes a singularity of ‘unified meaning’ on the multiplicity of lawmaking that occurs when individuals live within self-conscious

paideic communities that are inevitably 'jurisgenerative.' Cover argues that when the state acts in an imperialist and 'jurispathic' fashion, it should do so only because of a profound imperative:

However, the Sri Lankan state (and this is reflected in the LTTE's 'Tamil-only' policy in areas under its de facto command in the North) cannot claim any such profound imperative for the discriminatory language policy enshrined in the 1978 Constitution.<sup>122</sup>

The symbolic and jurispathic inferences of Article 18 read with Article 9 of the Sri Lankan Constitution are self-evident. In light of the bitter history of Sri Lanka's conflict as outlined in this paper (reflected historically through the bipolar metaphors of the Sinhala and Tamil languages in Sri Lanka's past), I submit that a constitutional language policy enshrining such a hierarchy is unjust, unconstitutional, and simply not permissible. This argument and conclusion hold true, I believe, whether we apply constitutional notions of fairness, equality, justice, humanity, dignity, etc. or whether we meaningfully consider the commitments that Sri Lanka is obligated to discharge by virtue of belonging to the international community of civilised nations. Recognising the obscene nature and undertones of such a constitutional language policy (particularly in light of the long history of discriminatory language policies in Sri Lanka) represents the first move towards overcoming Sarendib's continuing sorrow and creating a peaceful Sri Lanka of the unfailed imagination.

The deliberative democracy framework provides useful conceptual solutions, and we quote Addis in conclusion:

Thus, if deliberative democracy is to work, it has to do so in the context of multiple publics and multiple public spheres.<sup>123</sup>

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<sup>122</sup> See Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). See also Judith Resnik, *Paideic Communities, Courts, and Robert Cover (An Essay on Racial Segregation at Bob Jones University, Patrilineal Membership Rules, Veiling, and Jurisgenerative Practices)*, 17 YALE J.L. & HUMAN. 17 (2005).

<sup>123</sup> See Addis, *supra* note 70, at 117.