

# ISAS Insights

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## Political Challenges in Post-War Sri Lanka

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The centralisation of political power, and failure to devolve power to the ethnic minorities, accentuated the ethnic conflict in Sri Lanka that led to three decades of internal war. Although the war ended in May 2009, more than three and a half years ago, Sri Lanka has yet to make the transition to ethnic reconciliation and to a political solution. As it has been pointed out by scholars in the field, political stability in pluralistic societies is difficult to maintain without internal power-sharing mechanisms or systems of governance which are responsive to the aspirations of ethnic minorities. The monopoly of political power by representatives of the ethnic Sinhalese majority amounting to over 75 per cent of the country's population was a major contributory factor to the internal war that pitted the government against the Liberation Tigers of Tamil Eelam (LTTE).

If Sri Lanka had been provided with a federal constitution at the time of independence from the British in 1948, the Sinhalese and Tamil-speaking leaders might have been able to politically bargain with each other from their power bases at the centre and north-east region respectively. Instead Sri Lanka was provided with a unitary form of government that vested all power at the centre and therefore in the hands of the Sinhalese. But while the Sinhalese are a majority in the

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country taken as a whole, the Tamils are a majority in the north and Muslims are a majority in parts of the east of the country. Several serious efforts made by government leaders to work out a solution with the Tamil and Muslim political leaderships failed owing to the inability of the government leadership to obtain the backing of their own party let alone the opposition.

After the end of the war and the government's military victory over the LTTE, the ethnic minorities remain deeply disenchanted. Political negotiations between the government and elected Tamil representatives are at a standstill. The minorities feel more vulnerable to ethnic majority nationalism and the concentration of power in the hands of political leaders who are from the ethnic majority.

At the present time there are two key challenges that Sri Lanka faces. The first is the old challenge of addressing the ethnic conflict. The Lessons Learnt and Reconciliation Commission appointed by the government after the war has stated that the main cause of violence in Sri Lanka was the failure of successive governments to find a solution to the ethnic conflict. The second challenge is to safeguard and strengthen the system of checks and balances. It is not good governance or democracy when the government, however popular, dismantles the system of checks and balances. At present the government is seeking to impeach the Chief Justice and it is no coincidence that the Supreme Court has been acting as a check and balance on the government.

### **Present Issue**

The main political issue in Sri Lanka at the present moment is the governmental effort to impeach Chief Justice Shirani Bandaranayake on the grounds of alleged misbehavior. It is also the latest manifestation of governmental desire to exercise undisputed power in the country. President Mahinda Rajapaksa and other top leaders of the government appear to be convinced that centralized decision making that will accelerate economic development is of the greatest importance in implementing their vision for Sri Lanka. They also publicly state that there is a conspiracy to subvert the government in which the main protagonists are the Tamil separatists and a section of the international community which champions human rights causes. Now it also seems that they see the Chief Justice as also being a part of this cabal.

The government's conflict with the Supreme Court arose after it ruled against the constitutionality of a proposed government law, the Divineguma (Uplifting Lives) bill that sought to vest devolved economic and financial power in relation to community-level development with the central government. But on this occasion, unlike on previous occasions, the Supreme Court stepped in to put a brake. Several parties had filed action before the Supreme

Court opposing the legislation on various grounds, including its undermining of devolution of powers to the provincial councils. A Supreme Court bench headed by the Chief Justice decided that the Divineguma bill was not in conformity with the constitution. The draft law has therefore to be passed by a 2/3 majority in Parliament and also has to obtain the approval of the people at a referendum.

The legal objection to the Divineguma Bill came primarily from its potential to erode the powers given to the Provincial Councils in terms of the 13<sup>th</sup> Amendment. From the time they were established by the 13<sup>th</sup> Amendment in 1987, the Provincial Councils have been an arena of contested power. The system was set up as an outcome of the Indo-Lanka Peace Accord which was in the nature of an unequal treaty signed by the governments of India and Sri Lanka. The Indian promise was to disarm the LTTE and end the ethnic insurgency, while the Sri Lankan promise was to implement the devolution of powers on the Indian model. But neither side was prepared to keep its side of the bargain. Due to the nature of its origins, the Provincial Council system has never been fully empowered by successive governments.

The proposed Divineguma law intrudes into areas that have been reserved for the Provincial Councils. On the one hand, many of the powers vested in the provincial councils by the 13<sup>th</sup> Amendment have been non-functional due to the lack of economic resources and non-devolution of those powers to the provincial councils. Examples would be the central government taking back powers over local level business taxation and the continuing non-devolution of even limited police and land powers. The concern of the government is that the 13<sup>th</sup> Amendment potentially vests these powers with the Provincial Councils, and an effective provincial administration can indeed demand them in a manner detrimental to the supremacy of the central government.

### **Centralising Ethos**

On many occasions, government leaders have proclaimed their admiration for a so-called Asian model of development with specific reference to countries such as China and others in Asia. The first legal step in fulfilling this vision in the post-war period was the passage in 2010 of the 18th Amendment to the Constitution with the Supreme Court giving its assent on the grounds that it did not require a referendum. This restored to the President the full and untrammled powers of appointment to the highest positions of the state that the 17th Amendment had taken away from the Presidency a decade earlier. It also strengthened the Presidency by doing away with the two-term limit on office and giving the incumbent President, and those who succeed him, the right to contest presidential elections any number of times.

The 18<sup>th</sup> Amendment has helped to centralize control over the state machinery by ensuring that all top officers of the state are beholden to the President for having appointed them. The Divineguma bill, on the other hand, deals with the second and third tiers of government. It seeks to take away the powers of the provincial council especially in respect of economic development and vest them with the Economic Development ministry. These two pieces of legislation would give to the government a very powerful hold on political power and economic resources from the top to the bottom of Sri Lankan society. It is therefore not surprising that the government would be very much concerned about the setback to its plans and wish to get rid of the obstacle to them.

The Supreme Court ruling on the Divineguma bill presents a major obstacle to the realization of the government's vision of centralized development in which it has the final decision making power. The character of the government leadership is not to accept a situation in which there is countervailing power that can stand in its path as an equal. Although equality of the executive, legislative and judicial branches of government is a widely accepted principle of constitutional governance in developed democracies, this is not presently the case in Sri Lanka. The government does not appear to be ready to accept the judiciary as a co-equal branch of government that could negate or block initiatives of the executive and legislature, both of which are under the full control of the ruling party.

By ruling against the constitutionality of the Divineguma bill the Supreme Court has denied the government the opportunity to further strengthen itself and weaken the 13<sup>th</sup> Amendment and provincial council system in the indirect manner it has sought. It has forced the government to deal with these matters in a transparent and direct manner, instead of subtly and indirectly. The government's apprehension is that this type of supervision by the Supreme Court will undermine its grand vision for the development of the country as it sees fit. This may explain why the government feels constrained to impeach the Chief Justice who has been trying to give leadership to principles of governance that is according to the rule of law as laid down in the Constitution.

### **Unforeseen Problem**

However, the government's plan to impeach Chief Justice Shirani Bandaranayake appears to be running into unforeseen problems. The indications are now that the government's charge sheet against the Chief Justice is not as watertight as the proponents of the impeachment motion had believed. In addition, opposition to the impeachment has come from an unexpected quarter. The influential chief priests of the Buddhist Sangha have expressed their displeasure in a written statement. This has been followed by the Bar Association's call to the government to reconsider

the impeachment coupled with strike action by lawyers. Apart from die-hard government supporters there appears to be little or no public support for the impeachment amongst the intelligentsia.

In these circumstances, the government would be concerned about the loss of popular sympathy and the possible fragmentation of its voter base. There is an increasingly widespread feeling within the country that the Chief Justice is being victimized for political reasons. There has been an unprecedented campaign by lawyers against the impeachment which has led to the disruption of the legal system. As a result President Mahinda Rajapaksa, who is renowned for his political pragmatism, appears to be distancing himself from the impeachment process launched by his government. He has indicated that the impeachment was not his idea and he was responding to the petition from Parliament.

The President has also stated his intention to appoint an independent committee to advise him on the findings made so far in respect of the charges leveled against the Chief Justice. The President's acceptance of the need for an independent committee to review the decision of the Parliamentary Select Committee gives substance to the belief that it failed to arrive at a sound and unbiased conclusion. The government may be able to convince itself and the majority of people that what it is doing is right. But in terms of constitutional government, in which checks and balances take a foremost place, and the judiciary's independence is guaranteed, the country's democratic system is at risk.

### **Opposition Failure**

Despite the pressures on it the Supreme Court appears to be standing firm in upholding its constitutional position. It is hearing petitions against the legality of the impeachment filed by the Bar Association and other petitioners. The Chief Justice herself has filed a petition in the Court of Appeal against the findings of the Parliamentary Select Committee. However, the political position of the government appears to be unassailably strong. It has a 2/3 majority in Parliament and a popular President heading the executive branch of government. The even greater strength of the government is its ability to get a substantial majority of people to agree on its course of action. In terms of using the state and private media, the government voice is much more powerful than any other. Government leaders, exemplified by President Mahinda Rajapaksa, also have an exceptional ability to put across the government's point of view in a manner that is comprehensible to the masses of people.

So far, the political opposition has not mobilized a mass movement of protest against the impeachment. The religious leaders have issued statements critical of the impeachment. But the

religious communities have not mobilized themselves for any action. The only group that has taken a public stand against the government's actions are members of the legal profession. They have come out protesting. They have gone on strike. But the public protests have not gone beyond that.

Whether in Pakistan or Egypt, where powerful governments also took on the judiciary, it was not civic or legal action by themselves that halted those governments. Those powerful governments were forced to step back by mass movements in which tens of thousands of people participated. Those mass movements were led by opposition political parties, which had both leaders and party machineries that were equal to the task. In Sri Lanka, on the other hand, the opposition political leadership has still not taken to the streets. The opposition is not prepared to challenge the government outside of Parliament.

### **Mobilising Nationalism**

It is also likely that sometime in the future the government will also take up the issue of the 13<sup>th</sup> Amendment to the Constitution. So far the government has been able to forestall the threat of any provincial council making demands for itself as it has succeeded in forming the administration of all eight provincial councils to which elections have been held. However, there is one provincial council that comes across as a possible threat to the government's domination. This is the Northern Provincial Council, to which elections have yet to be held. The government has been under severe international pressure to hold those elections, as a concrete demonstration of its sincerity in restoring normalcy to the former war zones of the country. Under pressure from the international community, in particular India, President Rajapaksa has promised that these elections will be held by September.

As there has been no progress towards a political solution to the ethnic conflict, there is continued polarization between the government and the Tamil ethnic minority. The root causes of the war, the sense of discrimination and deprivation of the Tamils, have not been dealt with the result that the Tamil people in those areas in which they are a majority consistently vote against the government. They are unhappy as there is no political solution after the war that enables them to have even limited powers of self-government. There continues to be a large military presence in the North and East, and the military intrudes into civilian life more than is necessary now that there is no more war or terrorist activity.

Given the current levels of estrangement of the Tamil polity from the government it is most unlikely that the government will be able to win an election in the Northern Province. The likely scenario is that the Northern Provincial Council election will be won by the main Tamil

opposition party, the Tamil National Alliance (TNA) which has been firm in refusing to enter into any sort of accommodation with the government. In these circumstances, the government's concern would be that a TNA victory will invariably lead to a demand for the full powers laid out in the 13<sup>th</sup> Amendment to be devolved to the Northern Provincial Council. This could spark off similar demands from other provincial councils and would deal a fatal blow to the government's plans to keep its centralized powers within its control as at present.

In the aftermath of the impeachment debacle the government will surely need another cause that will rally popular support. The strategy it has consistently used to regain lost ground is an appeal to ethnic majority Sinhalese nationalism. The government has shown itself to be sophisticated in offering different sections of the polity what would like to have, so as to keep them quiet on other issues. This may account for the floating of the idea of a 19<sup>th</sup> Amendment to the constitution that will abolish the scheme of devolution of power contained in the 13<sup>th</sup> Amendment and in the provincial councils and put in place an alternative structure to ensure a solution to the ethnic problem.

The government also has a further reason for pressing on with scrapping or downgrading the provincial council system as soon as an opportunity presents itself. The devolution of power to the Tamil-majority areas feeds into the insecurities of the Sinhalese majority. The desire of the Sinhalese majority to protect the unity of the country will override all other considerations, even those of economics or concerns about systems of checks and balances. The evidence being given by the government that foreign powers and the Tamil Diaspora are plotting to revive the LTTE and divide the country will sustain political support for the government. After the impeachment of the Chief Justice, it will make political sense to the government to reinvigorate the forces of nationalism to sustain its electoral base with the Sinhalese majority.

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