7

Sovereignty and the 1972 Constitution

Hallie Ludsin[1]

[1] This chapter derives from two previous research reports written for the Centre for Policy Alternatives (CPA), where the author served as a legal consultant. Parts of this chapter were first published in H. Ludsin, '*Returning Sovereignty to the People*' (2013) ***Vanderbilt Journal of Transnational Law***, January 2013.

Sri Lanka's 1972 Constitution firmly established that sovereignty belongs to the people. Section 3 expressly states: "In the Republic of Sri Lanka sovereignty is in the people and is inalienable." Despite such promise, the 1972 Constitution lost sight of what sovereignty in the people means, instituting instead tyranny of the majority. On this 40th anniversary of the 1972 Constitution and in the wake of the brutal end of its civil war, Sri Lanka needs to return to the fundamentals of sovereignty in the people to begin to heal the bitter divide within the people and to avoid further conflict.

The purpose of this chapter is to argue that sovereignty in the people demands that Sri Lanka revisit the provisions of its 1978 Constitution, the most contentious of which were adopted from the 1972 Constitution, to ensure that it accurately and adequately represents the will and common good of all the Sri Lankan people. First, the chapter briefly describes the roots of the Sri Lankan conflict that are necessary for understanding how the 1972 Constitution entrenched tyranny of the majority and what role it plays in current simmering tensions. To retain brevity, the contextual discussion focuses on the causes of conflict that can be addressed through a constitution. Next, it discusses the specific provisions of the 1972 Constitution that established sovereignty in the majority, rather than the people.

The remainder of the chapter develops the concept of sovereignty in the people to explain that the source of power in Sri Lanka is all of the people, not just the majority. The chapter also explores a right to revolt that is inherent in the concept of sovereignty in the people. Revolt refers to a revolution in the foundation of the government, not an armed conflict. A right to renegotiate the relationship between the people, and the people and the government, forms one of the two rights within the right to revolt and is particularly relevant to the situation in Sri Lanka today. The chapter concludes by advocating for a reconsideration of Sri Lanka's constitution to ensure that it truly represents the will and common good of all the people as promised in the constitutional guarantee of sovereignty in the people (in Section 3 of the 1972 Constitution and Article 3 in the 1978 Constitution), and to prevent further violent conflict.

1. The Context

The seeds of Sri-Lanka's ethnic conflict were planted during its colonial era when British policies favoured Sri Lanka's Tamil population to the detriment of the Sinhalese. British colonial leadership sought to marginalise the Sinhalese who, as the majority, were considered the biggest threat to its hold on Sri Lanka.[2] One major source of ethnic tension was that Sri Lanka's Tamil population benefited from preferential treatment in education and overrepresentation in civil service jobs within the colonial administration.[3] By the time of independence, Sinhalese nationalism had fully developed and was promoting the Sinhala language and Buddhism, which is the religion of the majority Sinhalese, to the near exclusion of the predominantly Hindu Tamil minority.[4]

Following independence, the Sinhalese began to assert their power as the majority. The roots of the civil war are believed to lie in the adoption of the Official Language Act of 1956 that codified the dominance of the Sinhala language and effectively removed many Tamils from their civil service posts.[5] It brought with it the first anti-Tamil riots in which 100 Tamils were killed while protesting the new law.[6] The Sinhalese majority followed up the Official Language Act with government policies over the next several decades to preference the enrolment of the Sinhalese in universities and to create incentives for Sinhalese farmers to move into predominantly Tamil areas, which many Tamils perceived to

---

[2] N. DeVotta (2004) ***Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka*** (Stanford: Stanford UP): p. 9.
[3] A. Bandarage (2008) ***The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity, Political Economy*** (London: Routledge): p.31. But See DeVotta (2004): p. 29, stating that American missionaries were responsible for teaching English to Tamils, although recognising that the colonial government preferred Tamils.
[4] International Crisis Group (ICG) (2007) ***Sri Lanka: Sinhala Nationalism and the Elusive Southern Consensus***, Asia Report No.141: p.3.
[5] N. DeVotta, '*Illiberalism and Ethnic Conflict in Sri Lanka*' (2002) ***Journal of Democracy*** 13: p.84 at p.86.
[6] Ibid; BBC News (2012) *Sri Lanka Profile* (last updated 22nd March 2012), available at: http://www.bbc.co.uk/news/world-south-asia-12004081 (last visited 4th May 2012).

be colonisation of their traditional land.[7] While many of the anti-Tamil policies appear to have been adopted as part of the political manoeuvring of individual politicians seeking election rather than any real political commitment to them,[8] they fed communal violence and the polarisation of the Tamil and Sinhalese populations.[9] Already in 1956, at the time the Official Language Act was adopted, "[t]he center of gravity of the Tamil political agenda had shifted from concern with an equitable share of power in Colombo toward a demand for autonomy for the predominantly Tamil northern and eastern regions of the country."[10]

Following the adoption of the 1972 Constitution, whose salient features are discussed below, the Tamil United Front, which represented a variety of Tamil interest groups, immediately adopted a resolution to amend the constitution, claiming that "with the present distorted electoral pattern, and the denial of elected representation to ten lakhs of Tamil plantation workers, the Assembly was by no means a microcosm of the nation."[11] Many Tamils perceived the 1972 Constitution as having "heaped scorn on legitimate Tamil aspirations."[12] Within a few years of the adoption of the 1972 Constitution, the Tamil demand for autonomy hardened into a demand for secession.[13] The 1972 Constitution was replaced by the 1978 Constitution but did nothing to correct for the provisions that most Tamils found offensive, nor did it address Tamil needs and concerns.

---

[7] US Federal News Service (2007) '*State Department Issues Background Note on Sri Lanka*' 1st May 2007); S. Choudhry, '*Managing Linguistic Nationalism Through Constitutional Design: Lessons From South Asia*' (2009) ***International Journal of Constitutional Law*** 7: p.577 at p.599. See also, A.J. Wilson (2000) ***Sri Lankan Tamil Nationalism: Its Origins and Development in the Nineteenth and Twentieth Centuries*** (New Delhi: Penguin): p.82.

[8] See e.g. ICG (2007): p.6.

[9] US Federal News Service (2007); DeVotta (2002): p.88.

[10] S. Bose, '*State Crises and Nationalities Conflict in Sri Lanka and Yugoslavia*' (1995) ***Comparative Political Studies*** 28: p.87 at p.94.

[11] W.A.W. Warnapala, '*Sri Lanka in 1972: Tension and Change*' (1973) ***Asian Survey*** 13:p 217 at p.223. In 1948, the then Ceylon government revoked the voting rights of the majority of Tamils of recent Indian origin.

[12] Tamil National Alliance (TNA) (2012) '*Broken Promises – TNA Sri Lanka Statement*' 14th March 2012: para. 1.8.

[13] Bose (1995): p.96.

By 1983, the Liberation Tigers of the Tamil Eelam (LTTE), which purported to represent Sri Lanka's Tamil population in the north and east, began its full-scale civil war against the Sri Lankan government.[14] According to the Tamil National Alliance (TNA), the 1972 and 1978 Constitutions played a massive role in the start of the conflict:

> "The consistent democratic verdicts of the Tamil people since 1956, expressing their political aspirations for substantial self-rule in the Northern and Eastern Provinces, were denied under the…two constitutions. This factor, together with the discriminatory policies pursued under these two constitutions, particularly in education, employment and economic opportunities, the state-aided Sinhala settlements in the Northern and Eastern Provinces and the anti-Tamil racial pogroms gave birth to armed resistance by Tamil youth."[15]

Eventually, the LTTE was able to gain control over large parts of the Northern and Eastern Provinces, although it lost control in the east in 2009 when a commander of the LTTE there defected and allied with the government.[16]

There were numerous failed peace processes throughout the conflict, with failures blamed on both sides.[17] The most relevant agreement ended in the adoption of the Thirteenth Amendment to the Constitution to correct the favouritism for the Sinhala language and to permit greater local representation through Provincial Councils.[18] The north and the east joined to form the Northeastern Province, which then established a Provincial

---

[14] S. Abeyratne, '*Economic Roots of Political Conflict: The Case of Sri Lanka*' (2004) ***The World Economy*** 27: p.1295 at p.1298. The Tamil populations in these areas are distinct from Indian Tamils brought by the British to work in tea plantations. DeVotta (2004), supra note 4 at 85.

[15] TNA (2012): para. 1.10.

[16] The Eastern Province was effectively returned to the government of Sri Lanka following the defection of Colonel Karuna, who was the LTTE commander there, and roughly 2000 soldiers. C. Smith, '*The Eelam Endgame?*' (2007) ***International Affairs*** 83: p.69.

[17] Ibid.

[18] The Constitution of Sri Lanka (1978), Thirteenth Amendment (1987): Chapter CVIIA.

Council according to the amendment. Still dissatisfied, shortly thereafter, the Provincial Council declared independence from Sri Lanka and the Sri Lanka government disbanded the Council.[19] The first new Provincial Council in a Tamil-speaking area was elected in 2008 in the Eastern Province, after it was severed from the Northern Province.[20] The Thirteenth Amendment, like so many other negotiated peace agreements in Sri Lanka failed to achieve peace.

Sri Lanka's nearly 30-year civil war with the LTTE ended in 2009 through a military victory and amidst credible allegations of war crimes and crimes against humanity on both sides and deaths of Tamil civilians estimated as high as 40,000 people.[21] The end of the war did little to alleviate tensions between the Sinhalese majority and Tamil minority. The human rights picture for Tamils in the north and east of Sri Lanka is bleak. [22] Tamils complain of serious security fears[23] and that, again, the Sinhalese land policy effectively is colonising Tamil areas.[24] The TNA believes that the purpose of settling Sinhalese throughout the Tamil areas is to dilute "the democratic voice of the Tamil people" as well as to "impos[e] the dominant culture on those areas".[25] A recent poll shows that the majority of Tamils living in former

---

[19] Centre for Policy Alternatives (2010) ***Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010*** (Colombo: CPA): Foreword.
[20] Ibid.
[21] While these allegations were against both sides, the question of sovereign rights relates solely to government behaviour. For this reason, this chapter considers only the violations of duties to the people by the government. Panel of Experts (2011) ***Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*** (New York: United Nations): p.ii. The Panel also accuses the LTTE of these crimes; however, the LTTE's behaviour is not a consideration in determining the sovereign rights of the government.
[22] See e.g. International Crisis Group (ICG) (2011) ***Reconciliation in Sri Lanka: Harder than Ever***, Asia Report No. 209; United States Department of State (2011) ***2010 Human Rights Report: Sri Lanka*** (Washington).
[23] US State Dept. (2011); M.A. Sumanthiran, '*Situation in North-Eastern Sri Lanka: A Series of Serious Concerns*' 21st October 2011, available at: dbsjeyaraj.com/dbsj/archives/2759. See also, B. Fonseka & M. Raheem (2011) ***Land in the Northern Province: Post-War Politics, Policy and Practices*** (Colombo: CPA): p.15.
[24] Fonseka & Raheem (2011): pp.14,140.
[25] TNA (2012): paras. 3.17, 3.19.

conflict areas feels that the government has done nothing or is doing little to address the root causes of the conflict.[26] The ethnic polarisation has not been resolved[27] and there has been no accountability for the war crimes and crimes against humanity committed against the population.[28]

1.1 *The 1972 Constitution and Sovereignty in the Majority*

Sri Lanka's 1972 Constitution was intended to represent Sri Lanka's final break from its colonial heritage.[29] It adopted sovereignty in the people to establish that the people of Sri Lanka were the authority for its government, not its colonial masters.[30] As then Prime Minister Sirimavo Bandaranaike explained:

> "We have adopted this course to underline the fact that both the Constituent Assembly which we have met to establish, and the Constitution which the Constituent Assembly will draft, enact and establish, will derive their authority from the people of Sri Lanka and not from the power and authority assumed and exercised by the British

---

[26] Centre for Policy Alternatives (2011) ***Democracy in Post-War Sri Lanka***, Top Line Report (Colombo: CPA): p.39. At the same time, however, just over half the Tamil population shows some trust in the government. Ibid: pp.42-43. The United Nations Secretary General's Panel of Experts described how "triumphalism on the part of the government, expressed through its discourse on having developed the means and will to defeat 'terrorism'" has effectively "end[ed] Tamil aspirations for political autonomy and recognition." UN Panel of Experts (2011): p.vi. See also, ICG (2011): p.11: "A central pillar of the government's strategy since 2005 has been to recast the civil war as another front in the global 'war on terror' and deny its ethno-political context…it has been an excuse for the government to reject the need for any meaningful power sharing or state reforms designed to address the political marginalization of minorities."

[27] ICG (2011): p.10.

[28] UN Panel of Experts (2011): p.vi.

[29] L. Marasinghe (2007) ***The Evolution of Constitutional Governance in Sri Lanka*** (Colombo: Vijitha Yapa): p.145; V.K. Nanayakkara, '*From Dominion to Republican Status: Dilemmas of Constitution Making in Sri Lanka*' (2006) ***Public Administration and Development*** 26(5): p. 425 at p. 429.

[30] M.J.A Cooray (1982) ***Judicial Role under the Constitutions of Ceylon/Sri Lanka: An Historical and Comparative Study*** (Colombo: Lake House): p.219.

> Crown and Parliament in establishing the present Constitution they gave us." [31]

The preamble declares that the people have spoken through their freely elected representatives when they adopted the constitution. Section 3 formally adopted sovereignty in the people as inalienable. Section 4 established the people as the source of all government power. It expressly states that the National State Assembly (Assembly) represents "the legislative power of the people", the President and Cabinet of Ministers "the executive power of the People" and the courts "the judicial power of the people."

Other provisions of the 1972 Constitution make clear, however, that it intended to adopt sovereignty in the majority rather than sovereignty in all of the people. The 1972 Constitution created parliamentary supremacy by proclaiming the executive branch of government "responsible to" the Assembly" in Sections 91, 92 and the Assembly responsible for the jurisdiction and much of the administration of the judiciary in Chapter 14. The Assembly was elected based on a system of majority rules, with means that parliamentary supremacy and the lack of separation of powers consolidated majority power.

Other provisions more overtly promoted sovereignty in the majority. Section 7, for example, established Sinhala as Sri Lanka's only official language, [32] which perpetuated the discrimination against Tamils created by the Official Language Act. Section 6 created a constitutional preference for Buddhism;[33] further, all minority rights protections that had been granted in the 1947 Constitution were removed.[34] Finally, the constitution

---

[31] Ibid.

[32] The Constitution of Sri Lanka (1972): Section 7: "The Official Language of Sri Lanka shall be Sinhala as provided by the Official Language Act, No. 33 of 1956."

[33] Ibid: Section 6: "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 Buddhism while assuring to all religions the rights granted by section 18(1)(d))."

[34] R. Edrisinha, '*Sri Lanka: Constitutions Without Constitutionalism: A Tale of Three and a Half Constitutions*' in R. Edrisinha & A. Welikala (Eds.) (2008) ***Essays on Federalism in Sri Lanka*** (Colombo: CPA): Ch.I; S. Shankar, '*The*

also identified Sri Lanka as a unitary state,[35] closing out the possibility of the autonomy sought by the Tamil nationalist movement.[36] The essential elements of each of these provisions, along with the guarantee of sovereignty in the people, were repeated in the 1978 Constitution although parliamentary supremacy was replaced with strong executive control.[37]

The Thirteenth Amendment, negotiated as part of a peace agreement in 1987, sought to correct some of the bias favouring the Sinhala majority. It made Tamil an official language and permitted some devolution of power to the provinces through Provincial Councils.[38]. Under the Ninth Schedule to the Thirteenth Amendment, the Provincial Councils could legislate on public order and police (with some limitations), education, economic development, local governance, and numerous other issues.[39] The Amendment has been criticised by many, including much of the Tamil population it was intended to benefit, for favouring the central government.[40] For example, any legislation passed by the Provincial Councils must be approved by the provincial Governor appointed by the President.[41] Further, Parliament maintains the power to legislate in all of these areas, which permits it to override provincial legislation at will, seriously

---

Substance of the Constitution: Engaging With foreign Judgments in India, Sri Lanka, and South Africa' (2010) ***Drexel Law Review*** 2: p. 373 at pp.394-395; Choudhry (2009): p. 599. The Soulbury Constitution contained Section 29 that prohibited legislation that discriminated on the basis of race, religion, and caste. W.D. Lakshman & C.A. Tisdell (2000) ***Sri Lanka's Development since Independence: Socio-Economic Perspectives and Analyses*** (Huntington, NY: Nova Science Publishers): p.101.

[35] The Constitution of Sri Lanka (1972): Section 2.

[36] R. Coomaraswamy & C. de los Reyes, '*Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience*' ***International Journal of Constitutional Law*** 2: p.272 at p.275.

[37] The Constitution of Sri Lanka (1978): Article 2 (Sri Lanka is a unitary state); Article 3 (sovereignty in the people); Article 9 (Buddhism is 'foremost' religion). Article 18 maintained Sinhala as the sole official language until the Thirteenth Amendment added Tamil as an official language.

[38] The Thirteenth Amendment to the Constitution (1987): Chapter CVIIA.

[39] Ibid: Ninth Schedule.

[40] See e.g. A. Shastri, '*Sri Lanka's Provincial Council System: A Solution To The Ethnic Problem?*' (1992) ***Asian Survey*** 32(8): pp.723,726,729.

[41] The Constitution of Sri Lanka (1978): Article 154H (Thirteenth Amendment).

undermining the devolution of power.[42] Perhaps the biggest difficulty, the Provincial Councils depend on the central government for their finances, which gives the central government massive control.

Following the end of the war, the Thirteenth Amendment appeared to have been one of the starting points of government efforts at rebuilding trust and towards reconciliation.[43] At times, Sri Lankan President Mahinda Rajapaksa has offered the idea of the 'Thirteenth Amendment Plus', an elusive concept that appears to be promising additional devolution of power to the Tamil population, as a potential tool to heal the Sinhalese-Tamil divide. In reality, he vacillates on his support for the Thirteenth Amendment even as it is.[44] Many Tamils are critical of whether the Thirteenth Amendment goes far enough to respond to Tamil needs and concerns.[45] The Tamil National Alliance (TNA), an alliance of Tamil political parties, forms the Tamil opposition in Parliament and is considered the representative of the majority of the Tamil population.[46] The TNA is demanding the Thirteenth Amendment be fully implemented but also is requesting reconsideration of the devolution of power to grant Tamils greater autonomy.[47] One of the most striking features of the discussion is that the government is unwilling to follow the rule of law by suggesting that the implementation of the Thirteenth Amendment, which forms part of the constitution, is still negotiable.[48]

---

[42] Ibid: Articles154G(10), 154G(11).
[43] J. Perera, '*The Promise of the 13th Amendment Plus*' ***Sri Lankan Guardian***, 24th January 2012, available at: http://www.srilankaguardian.org/2012/01/promise-of-13th-amendment-plus.html.
[44] The Hindu, '*Rajapaksa Does a U-Turn on 13th Amendment*', 1st February 2012.
[45] Daily Mirror, '*13th Amendment Full of Flaws: TNA*' 6th February 2012.
[46] Immigration and Refugee Board of Canada, '*Sri Lanka: The Tamil National Alliance (TNA), including the Party's Relationship With The Current Government And The 2011 Local Authority Election Results (June 2010-December 2011)*,' 18th January 2012, available at: http://www.unhcr.org/refworld/docid/4f435cce2.html (accessed 9th May 2012).
[47] Daily Mirror, '*TNA Insists On Extensive Devolution Of Powers*' 18th November 2011.
[48] The Sunday Times, '*No Police, Land Powers to PCs*', 12th June 2011.

The 1972 Constitution, its successor, the 1978 Constitution, and the governments that implemented them, clearly misunderstand the meaning of sovereignty in the people. These constitutional provisions and the actions of successive Sri Lankan governments guarantee the representation of the majority alone. Tyranny of the majority, as evidenced in Sri Lanka, can all too easily spark internal conflict. The Sri Lankan government needs to return to the roots of sovereignty in the people as developed by John Locke and Jean Jacques Rousseau to locate what sovereignty in the people means in a multi-ethnic, multi-religious society, where majority rule has proved deadly. The remainder of this chapter will explain the meaning of sovereignty in the people in such a context.

2. The Purpose of Sovereignty

This chapter examines sovereignty as a mechanism for organising domestic and international politics to protect and enhance the security and common good of the individuals who form a political community.[49] The concept of sovereignty was developed to avoid the chaos and violence of individuals asserting their interests at the expense of others.[50] As is discussed more thoroughly below, these individuals united as a political community to create a sovereign representative capable of organising the interests and needs of a population and avoid violence. The international rules of sovereignty developed for much the same reason: to prevent a disorganised international system from permitting leaders or rulers to promote their interests by attacking territory under the control of another authority.[51] Examining sovereignty as a set of organisational rules to achieve the greater good is consistent with its conceptual development.

---

[49] This framework builds on the description of sovereignty provided by Kathleen Claussen and Timothy Nichol who limit sovereignty to the role of organising international politics. See K. Claussen & T. Nichol, '*Reconstructing Sovereignty: The Impact of Norms, Practices and Rhetoric*' (2007) ***Bologna Centre Journal of International Affairs*** 10.

[50] See Part 3 below.

[51] See Part 2 below.

The reason it is so important to identify to whom sovereignty belongs – or who receives the title of sovereign – is that the sovereign enjoys the benefits of sovereignty. Four rights of international law are associated with a claim of sovereignty, which in international politics belongs only to states.[52] The rights grant the sovereign exclusive jurisdiction over domestic policies, actions and activities,[53] including the right to be the supreme legislative authority for the territory.[54] These sovereign rights also prohibit the interference of one state in the domestic affairs of another, as well as threats to the territory or the integrity of another state.[55] Finally, sovereign rights establish sovereign equality between states under which no country can claim supremacy over another.[56]

Under international law, a political community is granted the rights of sovereignty only once it achieves international recognition as a state.[57] It can achieve such recognition only if it meets the four criteria for statehood. Statehood requires: (1) a territory with definable borders; (2) a cohesive political community within the territory;[58] (3) political leadership that has

---

[52] There are a variety of efforts to recast sovereignty outside of the framework of the nation-state. See e.g. *Recent Publications,* (2007) ***Yale Journal of International Law*** 32: p.275 at p.278; B. Zagaris, '*Developments In The Institutional Architecture And Framework Of International Criminal And Enforcement Cooperation In The Western Hemisphere*' (2006) ***University of Miami Inter-American Law Review*** 37: p.421 at pp.514-515; O. Schacter, '*The Decline of the Nation-State and Its Implications for International Law*' (1997) ***Columbia Journal of Transnational Law*** 36: pp.7, 18.

[53] F.G. Sourgens, '*Positivism, Humanism, And Hegemony: Sovereignty And Security For Our Time*' (2006) ***Penn State International Law Review*** 25: pp.433, 438.

[54] D. Held, '*The Changing Structure of International Law: Sovereignty Transformed?*' in D. Held (Ed.) (2003) ***The Global Transformations Reader*** (2nd Ed.) (London: Polity Books): p.162; I. Simonovic, '*State Sovereignty And Globalization: Are Some States More Equal?*' (2000) ***Georgia Journal of International and Comparative Law*** 28: p.381 at p.384; Sourgens (2006): p.448.

[55] K. Mills (1998) ***Human Rights in the Emerging Global Order: A New Sovereignty*** (London: Palgrave Macmillan): p.131.

[56] J.H. Jackson, '*Sovereignty-Modern: A New Approach To An Outdated Concept*' (2003) ***American Journal of International Law*** 97: p.782.

[57] See e.g. D. Raic (2002) ***Statehood and the Law of Self-Determination*** (The Hague: Kluwer): pp.30-33.

[58] J.A. Cohan, '*Sovereignty in A Postsovereign World*' (2006) ***Florida Journal of International Law*** 18: p.907 at pp. 920-921.

control over the territory;[59] and (4) leadership capable of conducting international relations.[60] An additional implicit criterion is that the international community recognises the existence of a state.[61] Once statehood is achieved, only in the rarest of circumstances can it be lost.

These rights of sovereignty are important to understand as it clarifies what is at stake when deciding who is the sovereign within the state: the people or the government. Statements by the Sri Lankan government repeatedly suggest that it is the sovereign entitled to benefit from sovereign rights, not the people.[62] Relying on Section 3 of the 1972 Constitution, Article 3 of the 1978 Constitution and international law, this chapter advocates that sovereignty be placed squarely back in the hands of the Sri Lankan people, but in a manner designed to respond to the needs of the whole of population rather than merely the majority.

3. Sovereignty in the People

The phrase 'sovereignty in the people' captures the true identity of the sovereign in whom the rights of sovereignty are vested. While traditionally the state was treated as the sovereign, or the government acting on its behalf, domestic and international law supports the shift of sovereignty to the people. From the most liberal democracies to the most autocratic of states, most constitutions proclaim that the people are sovereign.[63] The

[59] Jackson (2003): p.786; Cohan (2006): p. 920. One important aspect of that control is that the government must hold a monopoly over the use of force, meaning that the population within the territory recognises that the government is responsible for policing the territory and its borders. Jackson (2003): p.786.
[60] M.N. Bathon, '*The Atypical International Status Of The Holy See*' (20010 ***Vanderbilt Journal of Transnational Law*** 34: p.597 at p.618.
[61] J. Crawford (2006) ***The Creation of States in International Law*** (2nd Ed.) (Oxford: OUP): pp.4-5.
[62] The Sunday Observer, '*Nab Those Aiding and Abetting LTTE*', 6th November 2011; Colombo Page, '*Sri Lanka Will Not Allow Foreign Interferences to Solve Country's Problems*', 14th December 2011; Daily Mirror, '*Lanka Won't Barter Sovereignty for GSP+: Cabraal*', 18th February 2010.
[63] See e.g. Constitution of Afghanistan (2004): Article 4; Constitution of Algeria as amended in 1996 (1989): Article 6; Constitution of Bangladesh (2004): Article 7; Constitution of Belarus as amended in 1996 (1994): Article 3;

concept often appears in the titles of states (such as 'The People's Republic of…') or in provisions expressly stating that sovereignty lies in the people, such as in Sri Lanka.

Sovereignty in the people also likely forms part of customary international law. The Universal Declaration of Human Rights (UDHR) states in Article 21(3): "The will of the people shall be the basis of the authority of government."[64] As a declaration, the UDHR is non-binding; however, many believe its provisions are customary international law.[65] To the extent this assertion is true, all governments then must abide by sovereignty in the people regardless of whether their domestic law or constitutions expressly adopt the concept.

Sovereignty in the people also receives support as a principle of customary international law to the extent sovereignty is treated as synonymous with self-determination,[66] which is an accepted principle of customary international law.[67] At its most basic, self-

---

Constitution of Brazil (1983): Article 1; Constitution of the People's Republic of China as amended through March 2004 (1982): Preamble, Articles 1 and 2; Constitution of France (1958): Article 3; Constitution of Mexico (1917): Article 39; Constitution of Venezuela (1999): Article 5; Constitution of the Russian Federation (1993): Article 3; The 1945 Constitution of the Republic of Indonesia (1945): Article 1; Constitution of the Republic of Mali (1991): Preamble and Article 25; Constitution of Libya (1969): Article 1.

[64] United Nations General Assembly, *Universal Declaration of Human Rights*, 10th December 1948.

[65] Mills (1998): p.39. But see, H. Hannum, '*The Status Of The Universal Declaration Of Human Rights In National And International Law*' (1995/1996) ***Georgia Journal of International and Comparative Law*** 25: p.287 at p.348: "Despite the arguments of some that a 'right to democracy' may be emerging as a norm of international customary law, it is apparent that many states have not accepted article 21's guarantee of the right to participate in the political life of one's country."

[66] M.J. Kelly, '*Pulling At the Threads of Westphalia: "Involuntary Sovereignty Waiver" - Revolutionary International Legal Theory or Return to Rule by The Great Powers?*' (2005) ***UCLA Journal of International Law and Foreign Affairs*** 10: p.361 at p.390; S. Aravamudan, '*Sovereignty: Between Embodiment And Detranscendentalization*' (2006) ***Texas International Law Journal*** 41: p.427 at p.430; J. Hoffman (1998) ***Sovereignty*** (Minneapolis: Univ. of Minnesota Press): p.97.

[67] L.M. Graham, '*Reparations, Self-Determination, And The Seventh Generation*' (2008) ***Harvard Human Rights Journal*** 21: p.47 at p.62.

determination is the right to govern oneself;[68] sovereignty in the people then would grant 'the people' the right to govern themselves. More specifically, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) define self-determination as the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[69]

If the people are sovereign, then the benefits of sovereignty belong to them. The people then can choose how to exercise that sovereignty. In practice, they transfer their rights as sovereign to representatives that serve as the government.[70] The government then conducts the state's domestic and international affairs as the people's representatives and receives the benefits of sovereignty as such.[71] Governments, however, are not inherently deserving of the rights and protections of sovereignty; rather, they receive them only if the people choose to grant them. Governments then must act based on the will and common good of their constituencies. Any government that controls the state against the wishes of the people does not receive sovereign authority. It may have the power to enforce its will against the people, but such an illegitimate government is not entitled to sovereign rights.

---

[68] J.M. Purcell, '*A Right To Leave, But Nowhere To Go: Reconciling An Emigrant's Right To Leave With The Sovereign's Right To Exclude*' (2007) ***University of Miami Inter-American Law Review*** 39: p.177 at p.182.

[69] ICESCR (1966): Article 1; ICCPR (1966): Article 1. These provisions typically spark the debate over who constitutes a people.' There seems to be at least a general assumption that the individuals that form a majority of a particular political community within a state are a 'people' deserving of self-determination. The debates, thus, usually centre on which minority communities are entitled to a degree of political autonomy from the majority group.

[70] This stands in direct contrast to the notion of the state as the sovereign, or of the government as the representative of the state.

[71] W.M. Reisman, '*Sovereignty And Human Rights In Contemporary International Law*' (Editorial Comment), (1990) ***American Journal of International Law*** 84: p.866 at p.867: "Political legitimacy henceforth was to derive from popular support; governmental authority was based on the consent of the people in the territory in which a government purported to exercise power. At first only for those states in the vanguard of modern politics, later for more and more states, the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty."

The theoretical underpinnings of this understanding of 'sovereignty in the people' derive from thinkers such as John Locke and Jean-Jacques Rousseau. Locke theorised sovereignty in the people or 'popular sovereignty' in his *Second Treatise of Civil Government*. He starts by describing the formation of a political community to counter the violence that can occur when individuals pursue their interests without regard for others who have no superior body to protect them.[72] To protect against such chaos, individuals consent to a social contract in which they agree to follow the laws of a government that will act based on the common good of the community.[73] Each person agrees to turn over his/her natural rights as an individual to a government to better protect his/her interests. The majority of the political community determines the common good the government protects.[74]

Locke expected the government, now holding sovereign authority, to regulate relationships between individuals and protect their property rights: that of life, liberty and property.[75] He describes these as natural rights that transcend claims of sovereignty. The government is not permitted to deprive individuals of any of these rights;[76] if it does, the people have a right to revolt against the government or to secede from the territory under its control.[77] Through the social contract, the people give the government the authority to act for their common good; if the government uses its authority to violate natural rights, the authority is revoked.[78]

Rousseau developed the concept of sovereignty in the people along similar lines. [79] Like Locke, Rousseau believed that

---

[72] J. Locke (1689) ***Second Treatise of Civil Government***: Ch.V, available at: www.gutenberg.org/catalog/world/readfile?pageno=10&fk_files=28217
[73] Ibid: para.96.
[74] Ibid: para.95.
[75] H. Stacy, '*Relational Sovereignty*' (2005) ***American Society of International Law Proceedings*** 99: p.396 at p.399. According to Locke, the government is bound by the trust of the people and "the law of god and nature." Locke (1689): Ch.XI, s.142.
[76] Locke (1689): Ch.XI, s.139.
[77] Stacy (2005): p.76.
[78] Locke (1689): Ch.XIII, s.149.
[79] J.D. van der Vyver, '*Sovereignty And Human Rights In Constitutional And International Law*' (1991) ***Emory International Law Review*** 5: p.321 at p.328.

individuals reach a social contract for their self-preservation.[80] They place their natural rights in government hands to protect their interests and the common good; these rights are returned to the people if the government violates the social contract.[81] Rousseau believed that individuals must relinquish some of their natural liberty, which is determined by their individual strength to pursue their own interests, when forming a political community. However, he considered the rights the individuals receive in return, including to justice, to be greater than those surrendered.[82] These greater rights are determined by the will of the people as a collective and are intended to be shared equally.[83] When the government uses its strength to override the will of the people, then according to Rousseau, the government becomes the master, not the sovereign.[84]

Under Rousseau's theory, the people vest their sovereign authority in a legislature that is chosen by the people.[85] As the people's representative, the legislature has the absolute authority of the traditional concept of sovereignty.[86] Rousseau did not foresee any potential conflict of interest between the people and the legislature:

> "The sovereign legislature thus was identified by Rousseau with the general will of the people. As such, the legislature could never enact a law which it could not break, and since the subordinates of state authority are also constituent parts of the volonté générale [general will], those subjects and the general will can never have conflicting interests."[87]

---

[80] J-J. Rousseau (1762) ***The Social Contract***, Bk.1, Ch.6, available at: http://www.constitution.org/jjr/socon_01.htm.
[81] Ibid.
[82] Ibid: Bk.1, Ch.8.
[83] Ibid.
[84] Ibid: Bk. 2, Ch.1.
[85] van der Vyver (1991): p.328.
[86] Rousseau (1762): Bk.1, Ch.7.
[87] Ibid: p.330. See also, Rousseau (1762): Bk.1, Ch.6: "These clauses, properly understood, may be reduced to one – the total alienation of each associate, together with all his rights, to the whole community; for, in the first place, as each gives himself absolutely, the conditions are the same for all; and, this being so, no one has any interest in making them burdensome to others."

Both theorists saw the social contract as a mechanism for organising the domestic affairs of the political community. It is an agreement between individuals to establish a government that must abide by the will of the majority and act on the basis of the common good of that community.[88] Individuals relinquish their rights to the government for their protection and the government receives sovereign authority. Individuals, however, always retain the power to revoke the social contract when the government violates those rights. As with traditional rules of international relations in which states must consent to limit their sovereignty, domestic relations depend on the consent of the sovereign individual to limit his or her sovereignty. The works of Locke and Rousseau greatly influenced the French and American revolutions and are credited with establishing the basis for democracy and human rights.[89] These two philosophers and the movements that followed them began to shift the title of sovereign to the people.[90]

Relying on Locke and Rousseau's concept of a social contract and supported by constitutional and international legal guarantees of sovereignty in the people, governments do not have the power to act independently of their people. They serve as the representatives of the people, not the state, which is merely a territorial unit in which a political community resides. As representatives of the people, the government is tasked with protecting the political community from domestic and

[88] As will be described in Part 4, majority rule can be highly problematic and is no longer considered acceptable as notions of human rights and self-determination have evolved since the times of Locke and Rousseau.
[89] M. Rosenfeld, '*The Rule Of Law And The Legitimacy Of Constitutional Democracy*' (2001) ***Southern California Law Review*** 4: p.1307 at p.1332; J. d'Aspremont, '*Legitimacy Of Governments In The Age Of Democracy*' (2006) ***NYU Journal of International Law and Politics*** 38: p.877 at p.884; C.G. Buys, '*Burying Our Constitution In The Sand? Evaluating The Ostrich Response To The Use Of International And Foreign Law In U.S. Constitutional Interpretation*' (2007) ***BYU Journal of Public Law*** 1: p.1 at p.18; C. Packer & J. Cleary, '*Rediscovering The Public Interest: An Analysis Of The Common Law Governing Post-Employment Non-Compete Contracts For Media Employees*' (2007) ***Cardozo Arts and Entertainment Law Journal***: p.1073 at pp 1114-1115,1117.
[90] d'Aspremont (2006): pp.883-884; Buys (2007): p.18.

international threats to its security and the common good.[91] As the remainder of this section explores, a government only retains sovereign rights as long as it receives internal legitimacy and meets its duties to the people. Its exercise of sovereign powers is contingent on meeting these two requirements. The purpose of the first requirement, which is described more fully below, is to ensure that the people have authorised the government as the sovereign representative. The power of the government to control a population must not be confused with the consent of the people to relinquish its sovereign power to the government.

The second condition, which is also described more fully below, serves multiple purposes. According to the International Commission on Intervention and State Sovereignty, recognising government responsibility to the people has three important impacts:

> "First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community…And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission."[92]

Conditioning entitlement to sovereign rights on the fulfilment of duties to the people ensures governmental accountability to the sovereign people.

---

[91] Mills (1998): pp. 27, 37. This line of thinking also derives from the work of Thomas Hobbes. See R.A. Brand, '*External Sovereignty And International Law*' (1995) ***Fordham International Law Journal*** 18: p.1685 at p.1687.

[92] *Responsibility To Protect*, Report of the International Commission on Intervention and State Sovereignty (2001): 2.15.

3.1 *Legitimacy*

There are two different types of legitimacy relevant to the determination of a government's entitlement to claim sovereign rights: internal and external. Internal legitimacy concerns whether a government receives domestic support as the people's representative and for its actions.[93] External legitimacy describes whether the international community of states recognises a government as legitimate, which in turn determines whether it will respect its sovereignty (or grant its territory statehood).[94] Sovereignty in the people, as argued here, demands that a government maintain internal legitimacy in order to claim sovereign authority. If the government fails to achieve internal legitimacy, the international community should deny external legitimacy and refuse sovereign rights to that government.[95]

The concept of internal legitimacy flows from sovereignty in the people. Since the American and French revolutions when sovereignty in the people was institutionalised, the legitimacy of a government has depended on whether the people have supported it.[96] Determining legitimacy in practice is far more complicated, as there is no accepted formula for measuring popular support. As Jean d'Aspremont observes:

> "The highly controversial character of governments' legitimacy stems from the subjectivity of its evaluation. Indeed, there are no objective criteria to determine governments' legitimacy. That means that each state enjoys a comfortable leeway when asked to recognize the power of an entity that claims to be another state's representative in their bilateral intercourse. Each state

[93] d'Aspremont (2006): pp.882-883.
[94] Ibid: pp.882-883.
[95] Unfortunately, external legitimacy is rarely decided on the basis of a state's behaviour towards its citizenry. Instead, in most cases, once a country attains statehood, it achieves external legitimacy and the full benefits of sovereignty automatically. Ibid: pp.882-883, describing how external legitimacy depends on whether a state meets the four elements necessary for statehood; C.J. Iorns, '*Indigenous Peoples and Self Determination: Challenging State Sovereignty*' (1992) ***Case Western Reserve Journal of International Law*** 24: p.199 at p.275.
[96] Reisman (1990): p.867.

evaluates foreign governments' legitimacy through the criteria that it chooses."[97]

The international community seems to rely most heavily on a test of periodic, free and fair elections to determine a government's legitimacy.[98] The UDHR and the ICCPR treat such elections as a universal right. [99] For many scholars, only democratic governments can achieve legitimacy and therefore benefit from sovereign rights.[100] Testing legitimacy by whether a government is elected raises the issue of what is democracy. Does democracy require nothing more than free and fair elections for a government that can be changed (procedural democracy)? For some, the answer is yes. As one commentator proclaimed: "in circumstances in which free elections are internationally supervised and the results are internationally endorsed as free and fair and the people's choice is clear, the world community does not need to speculate on what constitutes popular sovereignty in

---

[97] d'Aspremont (2006): pp.878-879.

[98] R. Ricker, '*Two (Or Five, Or Ten) Heads Are Better Than One: The Need For An Integrated Effort To International Election Monitoring*' (2006) ***Vanderbilt Journal of Transnational Law*** 9: p.1373 at p.1400; B.S. Brown, '*Intervention, Self-Determination, Democracy And The Residual Responsibilities Of The Occupying Power In Iraq*' (2004) ***University of California at Davis Journal of International Law and Policy*** 11: p.23; A.R. Riley, '*Good (Native) Governance*' (2007) ***Columbia Law Review*** 107: p.1049. According to the European Union Handbook for European Union Election Observation, free and fair elections requires regular elections in which there is: equal opportunity to run for office and to vote without discrimination; a secret ballot; freedom of expression, association and assembly to allow all parties to air their platform; equal access for candidates and parties to state resources; and an independent and accountable election administration. See European Commission (2008) ***Handbook for European Union Election Observation*** (2nd Ed.) (Brussels): pp.14-15.

[99] D'Aspremont (2006): p.889. See also, M. Nettesheim, '*Developing A Theory Of Democracy For The European Union*' (2005) ***Berkeley Journal of International Law*** 23: p.358 at pp.368-369. Article 21(3) of the UDHR requires periodic, free elections to ensure that the people authorise the government. Article 25 of the ICCPR guarantees a right of all people to participate in free, fair and universal elections of their governments.

[100] See e.g. d'Aspremont (2006): pp.884-885,889-890: " the idea that democracy is the only acceptable type of regime has gained broad support, even monopolizing the political discourse (despite a lingering disagreement about its accurate meaning). This evolution has been underpinned by the common belief that democracy bolsters peace and prosperity, and even quells terrorism."

that country."[101] Others argue that democracy requires more. It also requires democracy in the exercise of government functions. This type of democracy, known as substantive democracy, demands a basic respect for human rights and equality as well as tolerance in political decision-making once the elections are complete. [102] Representative governments must make their decisions democratically, formulating the common good to include the interests of all members of the political community, rather than permitting the majority alone to make those decisions. [103] Substantive democracy ensures both that the government is chosen based on the will of the people, which is the procedural aspect, and that it acts in accordance with the will and common good of all the people, which is the substantive aspect.[104]

This chapter adopts substantive democracy as the appropriate litmus test for determining legitimacy as it most broadly reflects the meaning of sovereignty in the people. Free and fair elections, alone, are not enough to ensure the government will act according to the people's will or their vision of the common good. A far wider range of human rights must be protected to achieve these goals; which is accounted for in the concept of substantive democracy. The next section describes the rights that must be protected and enforced to fulfil substantive democracy, and therefore achieve domestic legitimacy. It also discusses additional duties that go beyond those required for representative governmental decision-making that are necessary for ensuring sovereignty in the people.

---

[101] Reisman (1990): p.871. See also, d'Aspremont (2006): p.891.
[102] See e.g. A. Barak, '*Foreword: A Judge On Judging: The Role Of A Supreme Court In A Democracy*' (2002) ***Harvard Law Review*** 116: p.16 at p.39; d'Aspremont (2002): pp.881-882.
[103] G. Sapir, '*How Should A Court Deal With A Primary Question That The Legislature Seeks To Avoid? The Israeli Controversy Over Who Is A Jew As An Illustration*' (2006) ***Vanderbilt Journal of Transnational Law*** 39: p.1233 at p.1280.
[104] See e.g. Barak (2002): p.39; d'Aspremont (2006): pp.881-882.

3.2 *Sovereign Duties*

Meeting the criteria for legitimacy is not enough for a government to claim sovereign rights. A government may claim them only once it has met its responsibilities to the people. These duties are not merely domestic duties but create international responsibilities since international recognition of sovereign rights of a government should depend on them.[105] As John Alan Cohan describes it, "In the era of international human rights, it seems the international community has become a party to the social contract between citizens and their government."[106]

The duties required of governments to retain sovereign authority overlap with the substantive requirements of democracy and legitimacy,[107]but potentially also include wider responsibilities to the people.[108] Even if they are identical, it remains important to distinguish the requirements of legitimacy from sovereign duties. It ensures that the international community will look beyond free and fair elections to determine whether the government is protecting the people's will and common good beyond the electoral process. Without separate requirements, illiberal democracies in which governments are elected but do not adopt democratic decision-making could inappropriately benefit from sovereign rights as the elected representatives of the people.

The next question is how to determine what duties should be required for governments to claim sovereign rights. At a minimum, governments have a duty to protect the human rights

---

[105] Sourgens (2006): p. 468**;** R.N. Haass, '*Sovereignty: Existing Rights, Evolving Responsibilities*' (2003) Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University.

[106] Cohan (2006): p.943.

[107] Legitimacy and sovereign duties both include democratic rights. For example, both require governments to guarantee equality and free and fair elections.

[108] For example, states may use torture against suspected domestic terrorists with the support of the population terrified of terrorist crimes. The government utilising torture could be wholly legitimate in the eyes of its population if it fulfils its democratic responsibilities and the targets of torture are not determined by discrimination. The act of torture is illegal in all circumstances under customary international law regardless if the general population supports it. The use of torture, thus, would violate the government's sovereign duties even as it retains its legitimacy.

of their citizens: "individuals have certain rights as humans and…these rights are beyond the state. The state may hold these rights in trust, but cannot violate these rights for *raison d'etat*."[109] While ideally, the duties of the sovereign include protecting and promoting all human rights, it is unrealistic and not necessarily appropriate to deny sovereign rights when not all are met. No government is likely to achieve the ideal and it seems unfair to deny sovereign rights to governments substantially following the will and fulfilling the common good of the people.

Unfortunately, the determination of basic or fundamental rights is subjective and controversial. Many academics and practitioners argue that human rights are interdependent and indivisible, making it impossible to establish a hierarchy of rights.[110] Others fear that a hierarchy of rights will preference rights based on particular, rather than universal, political experiences and/or favour a dominant political culture.[111] Establishing objective criteria for ascertaining fundamental rights and corresponding duties is extremely difficult. This chapter offers some guidance as to which rights must be enforced for a government to benefit from sovereign rights based on the meaning of sovereignty in the people, and on which rights the international community has already recognised as fundamental. The rights listed here, however, are not fully inclusive of those that create sovereign duties; instead, they provide a preliminary basis for determining them.

At a minimum, legitimacy requires access to democratic rights. From a procedural perspective, in addition to the right to vote in periodic, free and fair elections, the people must be given rights that allow them to make informed decisions when choosing their representatives, including freedom of association, expression, and press. Substantive democracy further requires governments to ensure representative decision-making, once elected, to accomplish true self-determination; thus the right to equality must

---

[109] Mills (1998): p.372.
[110] T. Koji, '*Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights*' (2001) ***European Journal of International Law*** 12: p.917 at p.918.
[111] This chapter addresses these concerns in Part 3.3 below.

be viewed as a core democratic right.[112] Where there are minority groups that are historically disadvantaged within the state, equality may demand minority protections or affirmative action measures to ensure that all of the population has an equal opportunity to participate in the determination of the government and its policies.[113] Legitimacy also turns on the government's accountability to the people, which establishes a right to accountability.

International law provides further guidance in the decision over which rights must be met by the government in order for it to fulfil its sovereign duties. Customary international law, non-derogable rights, *jus cogens*, the 'Responsibility to Protect' and international criminal law offer a partial list of fundamental rights. These sources of law were chosen because they reflect the consensus of the international community as to which rights must be guaranteed in practice regardless of consent, and can be enforced by the international community regardless of sovereignty claims. They cannot be the only sources as the international law system currently protects the power of governments to determine what they are willing to abide by, which undermines the concept of sovereignty in the people.

Determining which human rights have achieved customary international law status is no less daunting a task than determining which rights are fundamental or basic. Customary international law derives "from a general and consistent practice of states followed by them from a sense of legal obligation."[114] Determining consistent and general state practice is complex since all countries violate human rights (although the extent of

[112] Nettesheim (2005): p.373.
[113] The concept of sovereignty in the people theorised by Locke and Rousseau accepted majority rule, seemingly never anticipating the risk of tyranny of the majority. Many years of experience show that majority rule can easily turn into majority domination and lead to internal strife, necessitating the development of sovereignty in the people to include minority rights. This is consistent with protecting the political community from disorganisation and internal strife.
[114] Restatement (Third) of Foreign Relations Law of the United States: Section 102(2).

violations varies) while promising to abide by them.[115] Hurst Hannum published a fairly comprehensive examination of the scope of acceptance of the Universal Declaration of Human Rights as customary international law in the mid-1990s. According to his research, equality rights, including equal treatment under the law and non-discrimination protected in Articles 1, 2, 6 and 7 have achieved customary law status.[116] Article 3's protection of the right to life is customary law, as well as the prohibition against extra-judicial murder and enforced disappearances.[117] The prohibitions on slavery and on cruel, degrading and inhumane treatment and punishment in Articles 4 and 5 have achieved customary law status.[118] Rules regarding the treatment of the criminally accused, particularly the right to be free from torture, the right to be free from arbitrary arrest and detention and the right to a fair trial protected in Articles 9, 10 and 11 also qualify as customary law. This list is not necessarily comprehensive but sets a minimum of which rights in the UDHR have achieved customary law status as of when Hannum's research was conducted. There may be other rights that over the last 17 years have achieved the status of customary international law, not to mention rights listed in other international declarations, treaties and conventions.

Non-derogable rights are another source of human rights that governments may have a duty to protect in order to receive the benefit of sovereign rights. Rights that are non-derogable cannot be abrogated for any reason, including during a state of emergency, war or any threat to the state.[119] The fact that an existential threat to the state does not permit violations of these rights indicates that they are fundamental.[120] There are two sources of non-derogable rights: customary international law and treaty law. Within customary international law there are *jus cogens*

---

[115] J.J. Paust, '*The Complex Nature, Sources And Evidences Of Customary Human Rights*' (1995/1996) ***Georgia Journal of International and Comparative Law*** 25: p.147 at p.151.
[116] Hannum (1995/1996): p.342.
[117] Ibid: p.343.
[118] Ibid:p.344.
[119] Koji (2001): p.921.
[120] Ibid.

norms that are considered binding and non-derogable.[121] These rights form part of customary law but have special status as a higher type of law; their violation is considered impermissible in all cases. Prohibitions on slavery, torture and genocide fall within this category.[122] Violations of *jus cogens* norms create obligations *erga omnes* that require the international community of states to take action to prevent or stop their violation.[123]

Within treaty law, the ICCPR, Article 4 declares the following rights non-derogable: (1) the right to life; (2) prohibition of genocide; (3) prohibition of torture, cruel, inhumane and degrading treatment and punishment; (4) prohibition of slavery; (5) prohibition on imprisonment for failing to meet a contractual obligation; (5) prohibition of punishment for an act that was not a crime at the time of its commission; (6) right of every person to be recognised as a person before the law; and (7) the right to freedom of thought, conscience and religion. Many of these rights already have been listed as customary international law, a few rising to the level of *jus cogens* norms.

The doctrine of Responsibility to Protect, which was adopted unanimously by the United Nations General Assembly, provides another source of duties a government owes its constituency in order to benefit from sovereign rights. The doctrine establishes that each state has a duty to prevent war crimes, crimes against humanity, genocide and ethnic cleansing; if any state fails to fulfil this duty, it becomes the responsibility of the international community to fulfil.[124] The crimes that arise from violation of this duty are defined primarily in the Geneva Conventions and the Rome Statute of the International Criminal Court (ICC).[125] The Rome Statute serves as a source of duties independently of Responsibility to Protect. The crimes listed within it are considered universal, which means they can be prosecuted by any

---

[121] Mills (1998): p.40.
[122] Ibid.
[123] D.S. Mitchell, '*The Prohibition Of Rape In International Humanitarian Law As A Norm Of Jus Cogens: Clarifying The Doctrine*' (2005) ***Duke Journal of Comparative and International Law*** 15: p.219 at p.230.
[124] Responsibility to Protect is markedly similar in application to the substance-infused concept of sovereignty in the people advocated here.
[125] *Responsibility To Protect* (2001): 3.30-3.31

state against the leadership of another, although a treaty signature is generally required for their enforcement by the ICC.[126]

Notably missing from this list of fundamental human rights so far are socio-economic rights. Despite vigorous arguments in favour of establishing socio-economic rights as customary law,[127] these rights are often controversial. They tend to be broad rights that when enforced could violate the separation of powers between the courts and legislature and cost significant amounts of money to implement.[128] Some scholars view them merely as benefits or aspirations rather than rights.[129] Despite this debate, some socio-economic rights are so fundamental to survival and therefore to the exercise of self-determination or the people's will, that their protection must be considered a duty that governments must discharge to invoke sovereign rights.[130] Included among the duties are access to basic health care, food, water, shelter and education.[131]

To prevent poorer countries from losing their claim to sovereign rights for no other reason than they lack the resources to fulfil these duties – which would be grossly unfair to the people – violations of socio-economic rights must be intended to oppress some or all of the people or must be done with little regard to the severe harm it will cause them. For example, a government that has insufficient food to feed its population during a famine does not violate its duty to the people; if the same government,

---

[126] See Rome Statute: Article 13(b), which permits the United Nations Security Council to refer a non-party state to the court when acting under its UN Charter, Chapter VII obligations.
[127] See e.g. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 31/08/2001. E/C.12/1/Add.69: para.12: "The Committee reminds the State party that even during armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law."
[128] B. Orend (2002) ***Human Rights: Concept and Context*** (Petersburg, Ont.: Broadview Press): pp.30-31.
[129] Ibid.
[130] A. Chang, '*South Africa: The Up Down, An Application Of A Downstream Model To Enforce Positive Socio-Economic Rights*' (2007) ***Emory International Law Review*** 21: p.621 at p.667.
[131] Ibid; Orend (2002): pp.30-31.

however, refuses aid that could alleviate starvation, it would not be entitled to sovereign rights. A government that denies girls and women education would similarly violate its duty to the people, whereas a government with insufficient resources to guarantee access to education to its entire population would not. The question is whether the government deliberately undertook a policy to violate these rights to the severe detriment of the people.

A final source of obligations a government owes its constituency before claiming sovereign rights is a national constitution. A constitution may provide the best insight into the will and common good of the people or the rights they consider most fundamental.[132] It could also reflect the will of an authoritarian government, making some state constitutions a less appropriate source. Regardless, if a government claims legitimacy on the power it receives from a constitution, then it inherently recognises that it is subject to the limitations and responsibilities written into that constitution.[133]

The list of fundamental human rights catalogued here are the bare minimum a government has a duty to protect in order to attain sovereign rights. The list is very conservative as it predominantly reflects international agreement on fundamental rights. It in no way should be treated as fully inclusive of all rights and duties owed to the people; instead, it offers a starting point for developing sovereign duties.

3.3 The Question of Cultural Relativism

The primary challenge to this list of duties required for a government to claim sovereign rights is likely to be that, by relying on international law, it risks cultural imperialism. Critics of international human rights law often argue that it is little more than a paternalistic attempt to foist Western values on cultures

[132] D. Philpott, '*Ideas and the Evolution of Sovereignty*' in S.H. Hashmi (Ed.) (1997) ***State Sovereignty: Change and Persistence in International Relations*** (Pennsylvania: Pennsylvania State UP): p.18.
[133] Mills (1998): p.38.

that prioritise or interpret rights differently.[134] They argue that the choice of rights protected under international law and deemed universal depends on Western cultural preferences, values and socio-economic conditions. Instead, these critics believe that prioritisation of human rights should depend on context, particularly the culture and history of the people claiming those rights. If each culture prioritises and interprets rights differently, then there is no one set of human rights that is fundamental.[135]

This position adopts cultural relativism, which is often invoked by countries that preference communitarian values and group rights over individual rights to promote community harmony.[136] They believe that individuals owe a duty of care to the community and should not simply receive individual entitlements.[137] For cultural relativists, promoting individual rights over communitarian or group rights could undermine the social fabric of society.[138]

The concern with relying on cultural and communitarian values to form the duties of governments is that they may impose a view of the common good and pretend a collective will of the people rather than reflect a true consensus. Cultures and religions are not monolithic; nor are they free of the power struggles for influence

---

[134] H. Blanchard, '*Constitutional Revisionism In The PRC: "Seeking Truth From Facts"*' (2005) ***Florida Journal of International Law*** 17: p.365 at p.396; L. Thio, '*"Pragmatism and Realism Do Not Mean Abdication": A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law*' (2004) ***Singapore Yearbook of International Law*** 8: p.41 at pp.50-51; S.K. Hom, '*Commentary: Re-Positioning Human Rights Discourse On "Asian" Perspectives"*' (1996) ***Buffalo Journal of International Law*** 3: p.209; G.M. Zhao, '*Challenging Traditions: Human Rights And Trafficking Of Women In China*' (2004) ***Journal of Law & Society Challenges*** 6: p.167 at p.169.

[135] R.D. Sloane, '*Outrelativizing Relativism: A Liberal Defense Of The Universality Of International Human Rights*' (2001) ***Vanderbilt Journal of Transnational Law*** 34: p.527 at p.532.

[136] See e.g. Y. Ghai, '*Universalism And Relativism: Human Rights As A Framework For Negotiating Interethnic Claims*' (2000) ***Cardozo Law Review*** 21: p.1095 at pp.1097-1098; H. Ludsin, '*Cultural Denial: What South Africa's Treatment Of Witchcraft Says For The Future Of Its Customary Law*' (2003) ***Berkeley Journal of International Law*** 21: p.62 at p.70; T.E. Higgins, '*Anti-Essentialism, Relativism, And Human Rights*' (1996) ***Harvard Women's Law Journal*** 19: p.89 at pp.93-94; S.R. Harris, '*Asian Human Rights: Forming A Regional Covenant*' (2000) ***Asia-Pacific Law and Policy Journal*** 1: p.1 at p.14.

[137] Ludsin (2003): p.70.

[138] Ghai (2000): pp.1097-1098.

that exist within any community of people.[139] Because not all individuals have equal power within a group, not all members have the opportunity to determine the group's values.[140] Using communitarian values to prevent individuals from exercising their individual rights results in the same paternalism cultural relativists claim pervades the concept of universal human rights.[141] In contrast, the individual rights on which governmental duties are based are intended to create the best opportunity for individuals to exercise their autonomy, which in turns lets them express themselves as individuals and as part of a group.[142]

The concept of sovereignty in the people does not reject group or communitarian rights; instead it demands that the government govern according to the will and common good of all the people or risk losing its sovereign rights. Group rights can promote self-determination by protecting the benefits members gain from their community[143] and, as already mentioned, may be necessary to ensure full democratic participation of minority groups.[144] The caveat, however, is that group rights are inappropriate when they are used against group members or against minority groups to restrict autonomy, equality and other fundamental rights.

Another point countering a potential claim of cultural relativism in the list of duties for governments is that the rights chosen

---

[139] See e.g. Higgins (1996): pp.111-113.
[140] Ibid: pp.111-112.
[141] See e.g. Sloane (2001): pp.590-592.
[142] See W.M. Carter, Jr., '*Book Review: The Mote In Thy Brother's Eye: A Review Of Michael Ignatieff, Human Rights as Politics and Idolatry (Princeton University Press, 2001)*' (2002) ***Berkeley Journal of International Law*** 20: p.496 at p.499.
[143] Group rights are rights that "derive…from a person's membership in a group rather than his/her status as an individual; these rights can belong to the group or to the individual as part of his/her membership in the group." H. Ludsin (2011) ***Women and the Draft Constitution of Palestine*** (Jerusalem: Women's Centre for Legal Aid and Counselling): p.110.
[144] See e.g. Sloane (2001): pp.540-541; H. Quane, '*Rights In Conflict? The Rationale And Implications Of Using Human Rights In Conflict Prevention Strategies*' (2007) ***Virginia Journal of International Law*** 47: p.463 at p.496, describing how protection of individuals from discrimination or providing equality does not prevent involuntary assimilation of minority groups into the majority society.

protect the values of "justice, equality and fairness,"[145] which are values found in all cultures and religions.[146] Governments often resort to cultural relativist claims to shield themselves from criticism of human rights abuses.[147] Claims of cultural relativism need to be parsed to determine whether they are a crude attempt to justify human rights violations, or whether any of the rights identified as fundamental in this chapter in fact undermine the values of any culture or religion.

Cultural relativism is also invoked by underdeveloped societies that challenge universal human rights on the basis they exclude socio-economic rights.[148] These critics argue that developed countries for which socio-economic rights are less urgent dominate the debate over which rights qualify as fundamental,[149] although survival and a decent quality of life is of greatest concern to most people.[150] As described above, sovereignty in the people as conceived here requires governments to guarantee socio-economic rights to qualify for sovereign rights, which dispenses with this aspect of cultural relativism.

4. Who are 'the People?'

So far, the description of the meaning of sovereignty in the people has assumed a unified voice for the people and that the individuals who comprise the people share a will and vision of the common good. In many countries unity is little more than an

---

[145] See e.g. Ghai (2000): pp.1097-1098.
[146] See e.g. Ibid.
[147] See e.g. I.L. Bostian, '*Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*' (2005) ***ILSA Journal of International and Comparative Law*** 12: p.1 at p.5; K.L. Zaunbrecher, '*Comment, When culture Hurts: Dispelling the Myth of cultural Justification for Gender-Based Human Rights Violations*' (2011) ***Houston Journal of International Law*** 33: p.679 at p.687.
[148] See e.g. Higgins (1996): pp.93-94: "[N]on-Western states have argued that the very hierarchy of human rights established in those instruments privileges civil and political rights over economic, social and cultural rights in a way that is biased toward both Western political traditions and the wealth of Western states relative to the rest of the world."; Zhao (2004): p.169.
[149] Higgins (1996): pp.93-94.
[150] See e.g. Zhao (2004): p.169.

illusion, thus the seemingly common outbreak of violence and civil war.[151] This reality raises the issues of who constitutes the people and how should their diverse interests be reconciled to achieve sovereignty in the people?

Beginning with the first issue, the people are individuals in the aggregate. These individuals typically form groups based on perceptions of common needs and interests and based on identity factors such as race, culture, language, ties to a territory, ethnicity and religion, among other characteristics.[152] How individuals choose to identify themselves typically represents societal divisions and is complicated by overlapping identities and socio-economic and other factors that create differing needs and interests within the group. Any cluster of individuals can define itself as a group deserving of a voice as part of the people.[153] Majority groups typically claim to represent the will and common good of the whole of the political community, while minority groups demand a voice in that determination. This contestation often simply perpetuates the need to identify oneself as part of a group.

Under classical democratic theory and in line with Rousseau, the will of the people is expressed through elections in which the majority determines the outcome and elected government determines how to achieve the common good.[154] Majority rule was adopted as a 'political solution' to the difficulty of implementing democracy.[155] It is expected to reflect the interests of a 'fluid' majority: who constitutes the majority changes with the issues so no set of individuals or groups are consistently excluded from decision-making.[156] Experience shows, however, that majority rule can lead to tyranny of the majority – or "the

---

[151] See e.g. Mills (1998): p.81.
[152] D. Archibugi, *The Self-Determination of Peoples* available at http://www.lse.ac.uk/Depts/global/Publications/DiscussionPapers/DP28_CriticalAnalysis.pdf (last visited 11 July 2008).
[153] Ibid.
[154] See e.g. Rosenfeld (2001): p.1332.
[155] R.A. Miller, '*Self-Determination In International Law And The Demise Of Democracy?*' (2003) ***Columbia Journal of Transnational Law*** 41: p.601 at pp.636-637.
[156] Ibid: pp.643-644, quoting L. Guinier 91995) ***The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*** (New York: The Free Press): p.3.

majority's ability to abuse its authority without compromise" – making this classical approach to determining the will and common good of the people inappropriate.[157]

To ensure that the will of the people truly represents all of the people, minority groups need to be given the opportunity for fair and effective representation.[158] They must be able to elect representatives and their needs and concerns must inform the vision of a common good rather than simply being overridden by the majority. Failure to account for minority group needs and interests is a risk factor for armed conflict: "When minorities are denied a say in political affairs, conflict often results because a political voice is the key to the enjoyment of all other rights."[159] It is also a risk factor for mass atrocities such as genocide.[160] Events in Sri Lanka illustrate this point.[161] Recognition of the importance

---

[157] See e.g. M.S. Weinert (2007) ***Democratic Sovereignty: Authority, Legitimacy And State in a Globalizing Age*** (London: Routledge): pp.61,63.

[158] This answer begs the question of who constitutes the people to the extent that it does not explain which minority groups deserve representation. Factors such as size of the group and the stability and sustainability of the shared identity are likely to play into the determination, along with the context of the group's treatment within the state. Minority Rights Group International claims that the internationally-accepted definition of minority is 'straightforward': "it is a group of people who believe they have a common identity, based on culture/ethnicity, language or religion, which is different from that of a majority group around them." C. Baldwin, C. Chapman & Z,. Gray (2007) ***Minority Rights: The Key to Conflict Prevention*** (London: MRGI): p.4. The Vienna Commission, which was responsible for producing a draft convention for the protection of minorities for the European Union, suggested the following definition of minority: "A group which is smaller in number than the rest of the population…whose members, although nationals of that state, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions religion or language." L. Porras Garzon, '*Group Rights vs. Individual Rights?*' ISIS International (2006) (citing European Commission for Democracy Through Law, *Proposal for a European Convention for the Protection of Minorities*, Council of Europe (91) 7), available at: http://www.isiswomen.org/index.php?option=com_content&task=view&id=281&Itemid=135

[159] Baldwin, Chapman & Gray (2007): p.12.

[160] Office of the UN Special Advisor on the Prevention of Genocide (2009) *Analysis Framework*: pp.1-2., available at: http://www.un.org/en/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf.

[161] See e.g. K. Cordell & S. Wolff (2009) ***Ethnic Conflict: Causes, Consequences and Responses*** (London: Polity Press): p.194, referencing a

of minority representation thus is consistent with the underlying purpose of the concept of sovereignty – to organise domestic affairs so as to protect the security and common good of the political community. Meaningful representation demands the removal of any barrier to effective participation of all groups in governance and an electoral system and human rights conditions that promote a more inclusive determination of the people's will and common good.

This ideal of representative government is complicated when minority groups refuse the assimilation inherent in the process. Some groups argue that there is no one people within their state's territorial boundaries but multiple peoples who have the right to be governed according to their differing wills.[162] These groups generally are less concerned with inclusion in the development of a unified will and vision of the common good and more interested in the survival of their particular linguistic, cultural, religious or ethnic characteristics.[163] They typically demand a state design that permits limited self-rule and allows for equal representation with the majority. [164] Examples of such designs range from accommodation for group rights through legal pluralism and protection of their ethnic, cultural or religious institutions to territorial autonomy through devolution of power, federalism, and semi-autonomous zones. These types of power-sharing arrangements may forestall or wholly prevent internal conflict,[165] although some believe that such accommodations increase

---

"proliferation of ethnic conflict since the end of the Cold War." Minority Rights Group International found that 71% of on-going conflicts had "an ethnic dimension", suggesting that "[w]here minority rights go consistently ignored, a descent into conflict is always a risk. *Conflict*, Minority Rights Group International, available at: at www.minorityrights.org/6857/thematic-focus/conflict.html.

[162] G. Gilbert, '*Autonomy And Minority Groups: A Right In International Law?*' (2002) ***Cornell International Law Journal*** 35: p.307 at p.338.

[163] F. Raday, '*Self-Determination And Minority Rights*' (2003) ***Fordham International Law Journal*** 26: p.453 at p.457.

[164] See e.g. Nettesheim (2005): p.367; Mills 91998): p.34.

[165] See e.g. G.H. Fox, '*Self-Determination In The Post-Cold War Era: A New Internal Focus? Book Review*, *Y. Beigbeder (1994) International Monitoring Of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy (Dordrecht: Martinus Nijhoff Publishers)*' (1995) ***Michigan Journal of International Law*** 16: p.733 at p.752.

societal divisions, preventing the healthy development of a national identity.[166] These claims need to be addressed in order for a government to retain legitimacy.

These alternatives to majority rule may not be accepted by the majority or may not satisfy the demands of a minority group, which leads to the next important question: what if one group in society is demanding secession as part of its right to self-determination? In theory, a healthy, functioning democracy that represents all groups in society and that does not enforce the will of the majority alone should weaken the desire for a separate state. Consistent with this theory, the United Nations General Assembly has adopted declarations maintaining a state's right to territorial integrity only when the government is truly representative and provides real equality for minority groups;[167] the stronger the violation of the minority group's rights, the stronger their claim for secession.[168] The phrase 'minority group' in this context is intended to refer to an ethnic, racial, linguistic or religious group, rather than any self-proclaimed minority group. [169] The international community of states is extremely reluctant to consider secession as an option for ensuring self-determination for fear that it will encourage other groups to make such demands. The secession discussion is tangential to the topic of this chapter, as secessionists demand a new state with a new political community rather than representation within the people for purposes of sovereignty in an existing state.

---

[166] K. Samuels, '*Post-Conflict Peace-Building And Constitution-Making*' (2006) ***Chicago Journal of International Law*** 6: p.663 at pp.672-674; Baldwin, Chapman & Gray (2007):p. 2: "Too often, separating groups along ethnic, religious or linguistic lines has been seen as a way of upholding minority rights and keeping peace between groups. While such solutions might be an easy option in the aftermath of conflicts, long term these divisions can entrench old hatreds and wounds."

[167] C. Bell & K. Cavanaugh, ''*Constructive Ambiguity*' *Or Internal Self-Determination? Self- Determination, Group Accommodation, And The Belfast Agreement*' (1999) ***Fordham International Law Journal*** 22: p.1345 at pp.1349-1350; Raday (2003): p.456.

[168] Bell & Cavanaugh (1999): pp.1349-1350; Raday (2003): p.456.

[169] M. Mutua, '*The Iraq Paradox: Minority And Group Rights In A Viable Constitution*' (2006) ***Buffalo Law Review*** 54: p.927 at p.929.

This discussion about who constitutes the people and how their will and common good are determined, while simplistic, is important for understanding the contours of sovereignty in the people. To prevent tyranny of majority, which risks conflict and mass atrocities, minority groups must be represented in the formation of the will and common good of the people. Thus, the government must retain legitimacy among and fulfil its duties to *all* the people to benefit fully from sovereign rights.

5. The Consequences

The next issue that needs to be examined is the consequences of finding that a government is illegitimate and/or is violating its duties to some or all of the people. As explained earlier, a government that lacks legitimacy and/or fails in its duties to the people should have its authority revoked to act on behalf of the sovereign and claim sovereignty rights. The first step in addressing a loss of authority is that the people must be given a right to change the government. This is inherent in the concept of sovereignty in the people. In most cases, the right to change the government is exercised through regular elections.

For an election to serve as a check on government power, the chosen government must represent all people, not simply the majority.[170] Free and fair elections for new representatives and a peaceful transition allow the changing government to maintain its right to claim sovereign benefits until the transition is complete. Because the right to change the government can be exercised with little turmoil, it is the method of first choice for responding to complaints that the government is failing in its duties to some or all of the people or that it lacks legitimacy.

[170] Part 4 above.

5.1 *Right to Revolt*

Unfortunately, changing representatives does not always correct a government's violation of duties or failure of legitimacy. Some governments refuse to relinquish power despite the demands of their constituencies. Others ignore pressing needs of a portion of the population regardless of who is in power; tyranny of the majority occurs when the representatives of the majority consistently ignore minority rights and interests. Corruption, dictatorship and illiberal democratic practices, among other circumstances, may make it impossible for some or all of the people to exercise self-determination and protect their safety, security and rights. When the people are denied their right to change their government or that change is to no avail, they gain an additional right: the right to revolt against the government.[171] The word 'revolt' refers to creating a revolution in the foundation of government; it does not denote a violent conflict. The right to revolt is not unlimited. It is restricted in the circumstances that justify a revolt, the category of people able to claim the right and the means the people can employ when exercising it. The restrictions placed on the right to revolt derive from the purposes of sovereignty in the people – to protect the safety, security and rights of the people.

The right to renegotiate the social contract together with the right to withdraw from the political community form the right to revolt. Its legitimate exercise effectively voids the social contract, creating a revolution in the foundation of the government. Both John Locke and Jean-Jacques Rousseau, two architects of sovereignty in the people, envisioned the right of the people to revolt against a government that is not acting according to its will and common

[171] Mills (1998): p37. As Mills describes: "If, then, the state exists only for the purpose of enabling the individuals who comprise the state to live their lives relatively peacefully, and for no other purpose, then one cannot say that sovereignty ultimately rests with the state. Rather, it rests with individuals within the state. They may turn over part of their sovereignty to the state as a condition for protection to enable the state to engage in activities which will provide for various needs of the individuals, but, ultimately, this is only a loan which, theoretically, can be called in whenever the state is not fulfilling the conditions implicit in the loan."

good.[172] The rights to renegotiate the social contract and withdraw from the political community are exercised only when the political system is ailing. To deny these rights would hold the people hostage indefinitely within a political community or under a social contract that no longer represents them as a whole and continuously violates their rights. This outcome would deprive the concept of sovereignty in the people of any meaning.

Exercising the right to renegotiate the social contract signifies that the people have revoked their consent to be governed by the existing social contract. The people employ this right when they seek to re-organise domestic relations without dismantling the territory of the existing state or reconstituting the political community. They may demand constitutional or institutional changes or the overhaul of the entire government – anything short of secession or the demand for a change in membership of the political community. Populations living under repressive regimes, for example, typically seek to install democratic governance, place constitutional restrictions on the power of the government, and institute rule of law. Minority groups attempting to exercise this right typically seek mechanisms to guarantee greater representation, legal pluralism that recognises distinct cultures or religions, some form of self-government, or the creation of autonomous zones.

In contrast, when the people or a group within them asserts the right to withdraw from the political community, they are seeking to remove themselves from 'the people' and any existing social contract, to form a new and separate political community with its own social contract. When majority groups make this claim, it is to remove themselves from under foreign domination by either occupiers or colonisers. In these instances, the majority is not seeking separate territory for their political community but to reconstitute the political community to exclude the current government.

The right to withdraw from the political community is tantamount to secession when it is demanded by a minority group. Minority groups seeking to form a new political community with a

[172] Stacy (2005), describing Locke's theory; Rousseau (1762): Bk.1, Ch.6.

new social contract need a separate territory to achieve this goal.[173] Without it, the minority group remains intertwined in the existing political community and part of the existing social contract. Claims for self-government, autonomous regions and other forms of devolution or federation are not efforts to withdraw from the political community because they retain the existing boundaries of the state and preserve the minority group's relationship with the remainder of the population. These are claims for renegotiation of the social contract.

Consistent with the overall purpose of sovereignty in the people, the goal of the right to revolt as a whole is conflict prevention through enhanced rights. Reorganising domestic relations by reforming the social contract may offer a peaceful solution to existing tensions that have not been solved by changing the representatives of government.[174] A societal group excluded from representation and suffering from human rights violations otherwise could resort to violence to alter its circumstances.[175] When demands for change remain unmet, minority groups are more likely to call for secession.[176] Permitting the renegotiation of the social contract then could "prevent a more catastrophic fracturing of government through revolution, secessionist inter-ethnic conflict, or political disintegration."[177] Granting this right

---

[173] In theory, a majority group could seek to create a separate political community and a separate state carved from an existing one. The remaining territory would be left from the minority groups. This is unlikely to happen frequently or even at all since demands for democracy would permit majority groups a dominant say in the government, ensuring their rights are protected.

[174] See, e.g. Quane (2007): p.487. As Raday describes, "preservation of equality principles, minority rights, and democratic representation, does not constitute the fulfilment of the demand for self-determination as much as it constitutes circumstances that pre-empt a claim for self-determination." Raday (2003): p.458.

[175] When minority rights to equality and freedom of expression are not granted, claims for self-determination erupt, possibly into violence. See e.g. E.A. Baylis, '*Minority Rights, Minority Wrongs*' (2005) ***UCLA Journal of International Law and Foreign Relations*** 10: p.66 at p.74.

[176] G.J. Simpson, '*The Diffusion Of Sovereignty: Self-Determination In The Postcolonial Age*' (1996) ***Stanford Journal of International Law*** 32: p.255 at p.282.

[177] Ibid: p.282. See also, P. Macklem, '*Minority Rights In International Law, Symposium: Constitutionalism in an Era of Globalization and Privatization II. Fundamental Rights in Light of Globalization and Privatization A. Rights at the*

also ensures the legitimacy of the government,[178] a necessary element for claiming sovereign rights.

Although seemingly counterintuitive, the right to withdraw from the political community also is a necessary option for preventing or solving internal conflicts. The risk of violence increases when the government continues to violate its duties to some or all of the people even after the renegotiation of the social contract. Secession may offer the only or best option to guarantee the self-determination rights of the group and prevent violence. To expect minority groups to sacrifice their rights to achieve territorial integrity and protect an illegitimate government is grossly unfair and negates the purposes of sovereignty in the people.

5.2 *Limiting the Right to Revolt*

Because of their revolutionary intention and despite their peace-making goals, renegotiating the social contract or withdrawing from the political community causes severe political upheaval that may lead to violent and seemingly intractable conflict.[179] For this reason, the right to revolt is restricted in the situations under which the right arises and by who may claim it. The limits themselves derive from and support the very purposes of sovereignty in the people, which are to avoid anarchy and promote the safety, security, rights and interests of the people. When establishing limitations, however, fear of destabilising the political community should not be used as a shield to protect against every attempt to revolt. It cannot be used as a pretext to stifle sovereignty in the people and self-determination. The remainder of this section details the preliminary restrictions on the

---

Intersection of International, Transnational, and Private' (2008) ***International Journal of Constitutional Law*** 6: p.531 at p.541.

[178] Quane (2007): p.487.

[179] Claims for greater autonomy or for secession in particular create massive problems with competing rights of groups. For example, a minority group may seek control over a mineral rich region on the basis of a historical link to the territory, while other groups demand control as part of national interest and development. See e.g. Quane (2007): p.476, describing the need to develop guidelines for granting minority groups self-determination while reconciling competing claims to territory.

right to revolt; more reflection and debate may reveal other necessary restrictions.

5.2.1 *Situational Restrictions*

The first category of restrictions on the right to revolt is situational restrictions. The right to revolt can be invoked legitimately by the people or a group within the people only when the government is not fulfilling its duties to all and is illegitimate. The violation of duties must be severe, systemic, long-standing and there must be no recourse within the government to correct them. Relatively inconsequential grievances cannot justify voiding the social contract, particularly when the right to revolt is claimed by a minority of the population. Everyone and every group at some point will follow rules with which they do not agree and may suffer from some human rights violations. Voiding the social contract for every minor grievance would cause anarchy and insecurity undercutting the purposes of sovereignty in the people. The systemic and long-standing requirements reflect that it would be inappropriate to permit a revolution in the political foundation of the state on the basis of individual incidents of human rights violations or as an immediate response to new violations.

Implicit in this category of restrictions is that the right to revolt cannot be invoked when all groups are represented within a state, particularly as fully representative governments can be assumed to have accountability mechanisms in place to correct human rights violations. If the domestic political and legal system permits all groups within society full participation in the activities and decisions of the state, or substantive democracy, then voiding the social contract seems both unnecessary and unfairly harmful to the people as a whole.[180]

The next situational limitation is that the right to revolt inheres only when a change in government cannot resolve the violation of the government's duties or its legitimacy failures. Voiding the social contract causes major upheaval and, at least temporarily, destabilises the political community. Tensions could easily flare

[180] See e.g. Raday (2003): p.457.

into internal conflicts when this right is claimed. For this reason, the right to revolt should not be invoked easily or as a method of first choice when confronting governmental failures.

Demands for secession are highly inflammatory and the consequences of secession are particularly severe, making withdrawal from the political community the option of last resort. Territorial integrity generally plays an important role in national and international security.[181] It promotes stability by forcing diverse groups to unify, maintaining peace. It also forces states to respect each other's boundaries. Dividing an existing state threatens internal conflict as groups within the state are likely to fight over the boarders of the separated territory, compensation for divided land, definitions of citizenship and many more extremely divisive issues. Carving up existing states should occur only when the purposes of sovereignty in the people cannot be achieved through other options.[182] If 'the people' or a minority group is thwarted at every attempt to renegotiate the social contract over a protracted period of time, this criterion should be deemed to have been met.

Demands for control over territory create a final situational limitation. The right to withdraw from the political community can be exercised only if there is a territory over which the minority group can exercise control. Otherwise, 'secession' would create an impossible situation in which two governments would be trying to exercise authority over the same territory. Whether the right to renegotiate the social contract is limited by territorial concerns depends on the demands of the group. For example, demands for autonomous zones imply control over territory;[183] demands for legal pluralism do not.

5.2.2 *Group Restrictions*

The right to revolt is also restricted in who may make exercise it. There is little reason to object when the whole of the population

[181] Simpson (1996): p.285.
[182] Ibid.
[183] See e.g. Raday (2003): p.458.

seeks to exercise its right to revolt, although a government threatened with a loss of power might protest bitterly and violently. Ending colonialism, occupation, or the control of a severely oppressive regime are causes over which most of the international community is united.[184] Demands for renegotiation of the social contract or withdrawal from the political community, however, are not limited to majority groups. Increasingly, minority groups are seeking to amend the social contracts to change the structure of the state to accord these groups greater rights or alternatively to separate themselves from the existing state.

A majority content with the *status quo* may protest that it is unfair to change the governance agreement that it supports or to deprive it of territory to meet the demands of a minority group. It is important at this point to remember that sovereignty in the people requires the protection of the rights and interests of all the people, not just that of the majority. Granting a right to revolt only to majority populations contradicts the very purpose of sovereignty in the people. It also greatly increases the chances that tensions between minority and majority groups will flare into an internal conflict. Determining which groups can claim a right to revolt, however, is complex as it requires picking and choosing between claims, often arbitrarily. Unfortunately, the theory of sovereignty in the people does little to correct this problem. Without context, at best it can delineate some boundaries regarding who may legitimately invoke the right to revolt.

The first group limitation is that these rights cannot be claimed by individuals, as the upheaval caused by voiding the social contract is too great to justify for an individual. Expecting the renegotiation of the social contract to meet the demands of every group also is unrealistic. Permitting political upheaval based on the demands of statistically very small groups in most cases is extremely unfair to the vast majority of the population and ultimately may result in anarchy as every group periodically could demand change. Neither outcome achieves the common good. Carving out pieces of territory for every small group attempting to secede also is unrealistic. Size of the complaining group, thus, will

[184] See Part 4 above.

serve as at least one limiting factor on the invocation of these rights. Having said that, the greater the oppression, the less relevant the size of the group is when determining the boundaries of the right to revolt.

The right to revolt also is limited to groups with a stable and sustainable identity. Granting this right to groups that are linked by transient characteristics risks destabilising the political community and the social contract each time those links break. For example, political groups that demand that the community be governed by a specific political ideology do not qualify for this right as people change their ideologies regularly and frequently. One approach to defining which groups qualify for a right to revolt is to limit it to cultural, ethnic, religious and linguistic groups. The characteristics that bind these groups together are anything but transient and could form a stable and sustainable basis for identity. There may be other characteristics that meet these same criteria that become apparent only with context. This chapter, however, defines a minority group as one that shares a cultural, ethnic, religious or linguistic identity.

5.2.3 *The Right to Revolt: Conclusions*

None of the limitations placed on the right to renegotiate the social contract and the right to withdraw from the political community is precise. Without context it is difficult to determine the contours of these rights and for this reason, whether claims to the right to revolt are legitimate. Whether these rights can be invoked must be determined on a case-by-case basis.

This answer is unsatisfying in its vagueness. Drawing bright lines around what percentage of the population a group must represent before claiming either right or which violations of human rights and to what degree they must be violated to qualify to make these claims, however, would be no less arbitrary. The vagueness does have at least one advantage: it permits the consideration of other factors that given context might affect the validity of claims to a right to revolt. Such factors might include, for example, the historical treatment of a particular group within the state and the

mechanisms that exist within a state to reach a less drastic solution to grievances.

5.3 *Potential Challenges to the Theory of a Right to Revolt*

The idea of a right to revolt is highly controversial as it is perceived as a threat to the stability of states and the international community as a whole.[185] This section describes why this perception does not justify denying a right to revolt. Because few challenge the rights of majority groups to exercise a right to revolt, the analysis here focuses on the criticisms of claims of revolt by minority groups.

The primary concerns raised by states confronting demands for renegotiation of the social contract or for dissolution of the political community is that fulfilling these demands will fuel tensions within the population. Many countries faced with demands for renegotiation of the social contract believe that granting self-governing rights to minority groups is politically risky. States fear that minority group rights could "induce political discord by hardening differences into rights, and by enabling political actors to capitalize on national, ethnic, religious, and linguistic differences to gain political power."[186] More ominously, countries faced with revolt fear that separate legal systems or other measures of autonomy in governance will "divide people into different communities, create insiders and outsiders, pit ethnicity against ethnicity, and threaten the universal aspirations."[187] Taken to an extreme, these tensions between groups could lead to demands for secession or an internal conflict.[188]

---

[185] It is rare to see a reference to a right to revolt in legal academic literature. Instead, demands for legal pluralism, autonomous zones, devolution of power or secession are treated with scepticism and are feared for their risk to peace and security.
[186] Macklem (2008): p.541.
[187] Ibid: p.532.
[188] Ibid: p.541.

At this point, it is important to remember that the right to renegotiate the social contract stems directly from failures of the government to meet its duties to these minority groups. Stated differently, it inheres to a group only when they are suffering severe, systemic, and long-standing human rights abuses linked to their identity. The right to renegotiate the social contract also applies only when a change in governmental representation fails to halt those abuses. Thus, those tensions feared by the international community already exist and group differences have already hardened at the point the minority group seeks to invoke its right to revolt. When group differences already are the source of tension, claiming that recognition of difference will cause tension is disingenuous.

The fear that once these demands for measures of autonomy are met their political success will lead to demands for secession is also illogical. The right to secede is a measure of last resort. It applies only when all other efforts to achieve appropriate representation and to have the government fulfil its duties and receive legitimacy have failed. Legitimate claims for secession can be made only when the political situation is already unstable, tense and divisive. Resort to violence is highly unlikely if the minority group is benefitting fully from its human rights and is fully represented in the government. To blame the claim of secession on the successful lobby for greater minority rights is little more than an attempt to obscure the real issues.

A more legitimate concern of the international community is that minority groups will demand separate cultural or religious legal systems that are discriminatory towards members of the group, particularly women and non-conformists, or that otherwise violate human rights protections guaranteed by the state.[189] Even without such negative outcomes, legal pluralism creates differentiated citizenship, meaning that citizens have differing rights within a state depending on their identity.[190] Governments facing this situation need to reach a compromise that satisfies the right to self-determination of minority groups without sacrificing the human rights of some of its members. While the people are

[189] See e.g. Baylis (2005): p.78.
[190] See e.g. ibid: p.79.

sovereign, they are not free to establish a social contract that violates the duties required to claim sovereignty rights or one that is not accepted as legitimate by all the people. The people are governed by the same restrictions as their representatives and can claim sovereign rights only under the same conditions. Any renegotiation of the social contract must meet the duties and legitimacy requirements essential to sovereignty in the people.

As already mentioned, the international community takes special exception to demands for secession.[191] The international community fears that recognition of any right of minority groups to secede would "portend…endless fragmentation, thereby imperilling peace and economic well being."[192] Severe oppression committed with impunity equally imperils international security and peace as it could lead to an internal conflict with all of the spill-over consequences of refugees and cross-border violence. Further, it seems highly unfair and far too beneficial to abusive regimes to deny the right of secession for severely oppressed groups who would otherwise gain the right under theory. The solution to the fear of instability caused by secession lies in limiting the circumstances in which it is permitted, discouraging most claims. As described above, strict limits on the right are consistent with the theory of sovereignty in the people as it protects against violence and anarchy without denying self-determination. The subject of debate should be how to tailor the right to withdraw from the political community rather than whether the right exists.

---

[191] E. T. Huang, '*The Evolution Of The Concept Of Self-Determination And The Right Of The People Of Taiwan To Self-Determination*' (2001) ***New York International Law Review*** 14: p.167 at p.172.

[192] L. Thio, '*Resurgent Nationalism and the Minorities Problem: The United Nations & Post Cold War Developments*' (2000) ***Singapore Journal of International and Comparative Law*** 4: p.300 at p.303, describing the concerns of the United Nations Secretary General during the drafting of the *Declaration* on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic *Minorities.*

5.4 *Loss of the Right to Be Free of International Intervention in Domestic Affairs*[193]

A final consequence of a loss of legitimacy or violations of the duties to the people is that the government loses its entitlement to sovereign rights, particularly the right to be free of international intervention in domestic affairs. A government that fails to meet the legitimacy requirement or fulfil its sovereign duties by committing systemic human rights violations with impunity loses some or all of its sovereign rights. The amount of sovereignty lost is proportionate to the severity of the human rights abuses. Once some or all sovereignty is lost, foreign states are permitted to intervene on behalf of the people to help them reclaim sovereign authority from their abusive governments. Intervention bolsters sovereignty as long as it is undertaken on behalf of the people, with their consent, proportionate to the amount of sovereignty lost and does more good than harm to the people.

6. From Sovereignty in the Majority to Sovereignty in the People

This next section applies the brief background to the ethnic conflict in Sri Lanka and its after effects to the concept of sovereignty in the people espoused here to explain why Sri Lanka must revisit its social contract. From the time of independence when Tamils first began requesting autonomy, through the shift to demands for secession, until the end of the nearly 30-year civil war waged to achieve it, it is clear that the Tamil population does not feel that its will is respected or its common good protected by the successive Sri Lankan governments. The very existence of a civil war negated the domestic legitimacy of the government; the fact that the government crushed the LTTE does not return domestic legitimacy to it. Rather, how the government treats the Tamil population now, whether the government is currently

[193] For a more detailed discussion of this consequence, including a discussion of issues such as who decides whether sovereignty is lost and under what conditions that the international community can intervene, see H. Ludsin, (forthcoming, 2013) '*Returning Sovereignty to the People*' ***Vanderbilt Journal of Transnational Law*** (on file with the Centre for Policy Alternatives).

addressing Tamil needs and concerns, and whether there has been any accountability for any crimes committed by the government during the course of the war and after are what determines its domestic legitimacy.

The very brief summary above shows that Sri Lankan Tamils have serious security fears, believe that the government is working to disperse concentrations of Tamils in the north and east, and feel their needs and concerns have not been addressed. Additionally, the polarisation between the two communities seems to have grown. According to the United Nations sponsored Panel of Experts, there has yet to be any real accountability for the alleged crimes against humanity and war crimes committed by the government against the Tamil population. Each of these factors negates any claim of legitimacy of the government among the Tamil population.

The government of Sri Lanka also is in violation of its duties to the people. First, there is no real representation of the Tamil population in government policy, which not only undermines legitimacy but also violates its democratic duties. The government considers the Thirteenth Amendment guarantees of some devolution of power to Tamils as negotiable, consistently violating the social contract agreed to by both the Sinhalese majority represented by the government and the Tamils nationalist parties during peace negotiations mediated by India. The war crimes and crimes against humanity, which were conducted with impunity, are very serious violations of government duties. There has been little meaningful effort to address Tamil needs and concerns as perceived by the Tamil population; rather the government seems to be sowing the seeds of further discord.

The ability to control the Tamil population does not give the government the right to claim sovereign rights with respect to it. Rather, consistent with the theories of Locke and Rousseau, the Tamil population likely qualifies for the application of the right to revolt through the renegotiation of the social contract. While Sri Lanka is a procedural democracy that allows the people to vote to change its government, in practice elections lead to tyranny of the majority. Sri Lankan elections in 2010 ended with the same government leadership that seems to have committed crimes

against humanity and war crimes against the Tamil population. Elections, while the appropriate first step in addressing the failure of legitimacy and the violations of the duties by the government, did not change the face of the government.

Having established that Tamils are unlikely to grant the current government legitimacy and that the government violates its duties to this minority group, the next step is to consider whether they qualify for a right to revolt. Tamils have been demanding autonomous zones in the north and east since independence – they no longer believe that their will and common good will be protected through a centralised government. This fear and corresponding demand for autonomy was wholly ignored in the 1972 and 1978 Constitutions. Although the current constitution was amended to allow for some devolution of power, the government is unwilling to fully implement it and the Tamil population seems discontent with how little power was actually devolved.[194] This discontent effectively serves as a demand for renegotiation of the social contract. Tamils have suffered persistent, severe human rights violations from the lack of recognition and representation of its will and common good. The conditions leading to the civil war have not changed and the tensions in fact may have been exacerbated by the post-war conduct of the government. Tamils constitute an ethnic minority group that is statistically significant, which means it meets the group requirements for application of a right to revolt.

If sovereignty in the people is to result in more than tyranny of the majority, then the social contract that has done little to reflect the will or protect the security or common good of the minority Tamil population must be reconsidered. This requires reconsideration of the formulation for devolution of power to the north and the east under the Thirteenth Amendment and the requirement of a unitary state. Additional areas for renegotiation should be the lingering favouritism toward Sinhalese-Buddhist culture in the current constitution and the restoration of constitutional minority rights protections. This remains true even if the Sri Lankan government begins to respect the rule of law and

[194] Daily Mirror, '*TNA Insists On Extensive Devolution Of Powers*' 18th November 2011.

supremacy of the constitution. Without any meaningful effort at renegotiating the social contract, the minority-majority tensions are unlikely to heal and the risk of internal conflict will persist, negating the very purpose of sovereignty in the people.

7. Conclusion

For sovereignty in the people first adopted in Sri Lanka's 1972 Constitution to be more than mere rhetoric, it must be infused with the substance. Based on traditional sovereignty theorists, the government is merely the representative, not the sovereign inherently entitled to sovereign rights. A government that fails to achieve legitimacy does not have the authorisation to act on behalf of some or all the people. A government that violates its duties to the people does not have the right to claim sovereign rights. Here, 'the people' connotes all significant groups with a sustainable identity that forms a minority group. These duties are owed to all such groups that form the people, not just the majority.

Currently, Sri Lanka operates under tyranny of the majority – the majority is allowed to bulldoze over the will and common good of the Tamil population. Because of the severity and persistence of the government's loss of legitimacy and the violations of duties, Tamils are entitled to invoke a right to renegotiate the social contract, including by changing or amending the constitution. On this 40th Anniversary of the drafting of the 1972 Constitution, it is time to remove any remains of tyranny of the majority first adopted in this constitution and later reaffirmed in the 1978 Constitution. It is also time to ensure that the Tamil population is given a fair opportunity to be governed by its will and according to its needs and concerns, which may not simply require the full implementation of the Thirteenth Amendment but possibly the full reconsideration of Tamil autonomy demands.