

RE-WORKING AUTONOMY OPTIONS FOR SRI LANKA

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There are new mobilizational initiatives in the Eastern province seeking to organize political pressure to de-merge temporarily merged Northern and Eastern provinces. Organized by the JVP and called *negenahira udawa* (Awakening in the East), this campaign is also being organized to counter the LTTE's proposals that embody the Tamil nationalist argument that the Northern and Eastern provinces, despite the ethnic diversity in the Eastern province, constitutes a single, politico-administrative entity of the Tamil-speaking peoples. Securing the collective rights of the Tamils, the ISGA proposals imply, is contingent on the territorial unity of the "Tamil nation". It is this proposition that is being questioned in the new mobilizations.

Addressing concerns of the Sinhalese people in the Eastern province, at a time when a political settlement to the ethnic conflict is being spoken about, is not a bad thing. The government does not seem to address their concerns. Even those civil society groups who campaign for a federalist power-sharing arrangement for Sri Lanka do not take up the concerns of the Sinhalese minority living in the Eastern province. The LTTE, which seeks the administrative control of the Eastern province, has no specific plans for the non-Tamil minorities there. The JVP is taking up the cause of the Sinhalese in the Eastern province in this specific context.

However, there are serious political limitations in the way in which the question of the Sinhalese community in the Eastern province is being posed. In this reckoning, any power sharing arrangement with the Tamils will invariably result in the denial of the rights of the Muslims and Sinhalese communities in the East and therefore power sharing should be resisted. In this approach, either the unitary state system should continue so that the central government protects the Muslim and Sinhalese communities, or if there is devolution at all, the Eastern province should be de-linked from the North.

The main fault of this approach is that it does not lend itself to any new constitutional innovation. It stays within the old and outdated constitutional thinking that is deeply suspicious of any deviation from the venerable unitarist constitutionalist model. To come out of the crisis of the state, Sri Lanka urgently needs new constitutional directions. While such directions are seriously lacking, there is also a general crisis of constitutional discourse in Sri Lanka today. The crisis is manifested in the polarization of political visions in Sinhalese and Tamil polities with the Muslim polity caught in the middle. These visions are so mutually exclusive that they can hardly communicate with each other.

While the Tamil nationalist vision of the state has travelled beyond federalism, the finest minds of constitutional jurisprudence in the

Sinhalese polity are still grappling, with no success, with the elementary problem of whether federalism would become the stepping-stone to separation. Actually, whatever advances that constitutionalism in Sri Lanka has made during the past three decades -- as embodied in the PA's reform package of 1995 and the draft constitution of 2000 are there despite the opposition from most of the great constitutional-legal pundits in Sinhalese society.

Against the state of underdevelopment in constitutional jurisprudence in Sinhalese society there has now emerged a new constitutional vision for the Tamil polity in the form of the LTTE's ISGA proposals. Having remained itself within the narrow framework of constitutional unitarism, the Sinhalese nationalist discourse, in both its constitutional and political theory, has no categories to respond to the LTTE's proposals for confederal regional autonomy. Overcoming this huge gulf between two constitutional visions is indeed a new and difficult task in rebuilding Sri Lanka as a pluralist, multi-nation polity.

Conventional Federalism

Meanwhile, the federalist and confederal constitutionalism that has gained acceptance among some innovative constitutional thinkers in Sinhalese and Tamil societies also demonstrates a major limitation. It enunciates primarily the conventional federalist concept of spatial autonomy which is based on the principle of territorial federalism. In this approach, the solution to autonomy demands of an ethnic minority or nationality is to grant them autonomy in the territory where they are concentrated. This arrangement makes a national minority a regional majority. A fundamental shortcoming of this territorial autonomy model is that it does not provide for the grievances of regional minorities, except through a bill of rights.

The fear of federalism that has been expressed by Muslim and Sinhalese communities in the Eastern province is essentially one that emanates from the inability of the territorialized autonomy to assure the minorities within that unit their own rights, safety and security. Muslims in the Eastern province have been particularly apprehensive about the possibility of a peace deal between the government in Colombo and the LTTE at their expense.

But the Muslim political leaders have not been able to come out with an alternative to the eventuality of such peace deal, interim or permanent. They also need to breakaway from the conventional constitutionalist approaches to autonomy and power-sharing and envision innovative options. However, in the absence of fresh political and constitutional thinking, the Muslim political leaders,

as fragmented as they are, have been only allowing themselves, particularly of late, to be used by Sinhalese political leaders as pawns in their power struggles.

In the context of the contemporary political realities in Sri Lanka, the constitutional discourse on power sharing needs to be deepened in two areas. Firstly, in Sinhalese society, the state reform agenda should decisively shift away from the framework of outdated unitarism and de-centralization, go beyond devolution and explore federalist and confederal options for regional autonomy. If this advancement fails to take place in Sinhalese society, its constitutional thinking will continue to lag behind the constitutional thinking in Tamil society. Moreover, in the long run, secession, which all unitarists and decentralizationists dread to think about even as a distant possibility, might even become a constitutional reality.

Minorities

The second level at which the discourse on autonomy and power-sharing needs to be deepened is to address the concerns of all minorities. Sri Lanka has many minorities. Our political understanding of identity communities needs to be reinforced by the recognition that the constitution of majorities and minorities is not always as simple as the nationalists would want us to believe. In the specific way in which state power is spatially organized in Sri Lanka, the Sinhalese, for example, are both a majority and a minority. They are the national majority in the island and a regional minority in the Northern and Eastern provinces.

In a similar logic, the Tamils are a national minority and at the time they are the ethnic majority in the North and East. The conventional territorial principle of federalism gives power to the national minority making them a regional majority, but silent about that segment of the national majority which becomes a regional minority, as in the case of the Sinhalese in the Eastern province.

Other than 'national' and 'regional' minorities, there are 'local majorities' and 'local minorities' as well. The Muslim community in the Eastern province is a regional minority in the North and East. At the same time, they are a local majority in some distinct areas in the Eastern province while being a local minority in all districts in the North. The Plantation Tamils represent an equally complex picture. They are a major regional minority in the Central and Uva provinces, but a local majority in the Nuwara Eliya district.

Then, there is yet another construction of minorities as 'dispersed minorities.' They are dispersed in small, yet significant, numbers in many provinces and districts. Muslims are a dispersed minority in many districts outside the Southern region of the Eastern province. The Northern, Eastern as well as plantation Tamils are also dispersed in a number of provinces.

Finally, there are 'marginal minorities'. Burghers, Malays, Telugus and Malayalam communities, as well as the Vedda people who continue to remain small minorities, sometimes concentrated in certain localities. They are marginal in a double sense. They are not recognized as politically or electorally useful minorities. Therefore, in the democratic process, they continue to suffer marginalization. Similarly, deprived of political worth, they have no access as communities to the public goods which the state dispenses. In that sense too, they are marginalized from the domain of public resource distribution. The state at best treats them as marginal individual citizens.

Minority Concerns

Now, this picture of minorities in Sri Lanka can give rise to some novel ideas about power-sharing arrangements in a federal polity. Before engaging in any new constitutional imagination let us also delineate the grievances and concerns of all the minority communities that might better inform us what kind of institutions and arrangements could be envisioned anew. For analytical ease, we may group their concerns into the following four categories. (i) Recognition as political communities, (ii) security and safety, (iii) representation and (iv) access to institutions of governance. Translated into the language of rights, they constitute four specific domains of rights, namely, recognition rights, security rights, representation rights and governance rights.

How should we design Sri Lanka's future political institutions to constructively ensure and guarantee these rights of the minorities who occupy a wide spectrum spanning from the Sinhalese to the Veddas? It indeed requires the deepening of not only our understanding of federalism, but also the idea of federalism itself. In other words, we need to re-design the political organization of pluralist Sri Lanka in a new framework of deep federalization.

Asymmetrical Autonomy

Concerning federalism as regional autonomy, one challenge that the government will face in negotiations with the LTTE sooner than later, concerns the translation into constitutional principles the framework claims made by the LTTE in the ISG proposals. In fact, the ISGA proposals have baffled conventional federalists. The conventional federalism presupposes that autonomy units should have more or less similar degrees of competencies and powers. In this thinking, Sri Lanka's North and East should not be different in its range of competencies from the Southern province. But, the premise on which the ISGA is based is that the federal unit of the North and East should not be equal with other units of the federal republic. It seeks a special status to accommodate Tamil nationhood within one federated state. It can also incorporate the parallel state structure that the LTTE has built over the years.

This indeed calls for a framework of what has come to be known in constitutional discourse as asymmetrical power sharing. W

is that one unit of autonomy, like Quebec in Canada, would be accepted as being entitled to a higher degree of competencies and powers than the other units, on the principle of 'distinctiveness' of the people who constitute the majority in that unit. Translated into Sri Lanka's political realities, asymmetrical federalism would presuppose that the North and East in which the Tamils constitute the majority would be recognized as a distinct region in the sense that the autonomy there is designed to address the specific political aspirations of the Tamil people for self-determination within the state of Sri Lanka. In brief, the Tamil-majority North and East will have more powers than the Sinhalese-majority regions in the rest of the country.

There will invariably be objections to this model of asymmetrical autonomy on the premise that asymmetry itself will encourage secession. But actually, asymmetry is a framework that provides the secessionist community with a constitutional incentive to stay within the Sri Lankan state. It is the recognition of their 'special' or 'distinct status' that invites them back to the Sri Lankan state. The distinctiveness accorded their autonomous unit more powers than the units of the majority community. That special status is also acknowledged on the premise of past discrimination and deprivations which the community has suffered. It also recognizes the bitter reality that during the war of twenty years, the process of state formation in the Tamil polity had developed in a direction of separateness that cannot be easily wished away. In this reasoning, the accommodation of separateness as well as rectifying past discrimination requires not secession, but special and legally sanctioned special status within the constitutional state.

In devolving powers to the periphery within a federalist framework, in order to make the national minority a regional majority, adequate to address the possibilities for secession? The existing argument for devolution as well as federalism in Sri Lanka seems to say 'yes' to this question. It does not go beyond giving away powers to the periphery. The fear of federalism leading to separation is also largely linked to this 'giving away' approach to power sharing. This approach has also led to a situation where none of the proposals for ethnic conflict management in Sri Lanka contains ideas for reforming the power structure at the centre. This position needs to be revised now. Instead, a package of state reform that combines autonomy to regions, and at the same time links regions back with the central government is necessary. A strong Second Chamber, representing the regions and with powers similar to those in other federal countries like the USA and Germany, will be a useful institution to bring the periphery back to the centre. This will also provide an effective modality to address the concern that the LTTE's ISGA proposals are weak in shared rule while they are quite strong in self-rule. We may note in passing that the dominant constitutional discourse in Sinhalese society is weak both in shared rule and self-rule aspects of autonomy.

Non-Territorial Federalism

The institution of Second Chamber can also be creatively modified in order to combine territorial federalism with non-territorial federalism. The approach of non-territorial power-sharing is gaining particular attention among political scientists and constitutional jurists as one that can address the concerns of minorities in plural societies in an innovative way. As particularly developed in Belgium during the past two to three decades, the idea of non-territorial federalism creates assemblies called 'Community Councils,' the representatives for which are elected to represent their respective ethnic communities, who are either not confined to one territorial unit, or dispersed over a number of units. In fact, the very notion of non-territorial federalism is designed to define the concept of right to self-determination of communities from a non-territorial perspective. It seeks to empower members of an ethnic or cultural community, who subjectively profess a specific group identity and live either outside the boundaries of the so-called homeland or even dispersed without having any claim to such a homeland.

A creative application of the principle of non-territorial federalism in Sri Lanka will enable us to design institutions of representation at national, regional/provincial as well as local levels. At the national level, the composition of the Second Chamber could combine both territorial and non-territorial principles with weightage to the latter, or exclusively on the non-territorial principle, since the House of Representatives provides a representation on the basis of territoriality.

A slightly different option would be to establish separate Community Councils at the national level for the main ethnic communities with specific powers over group specific domains such as culture, language, education, religion and social welfare. It will also provide an institutional mechanism to address group rights claims of the ethnic communities. Professor Johan Galtung has proposed a set of cultural councils, on the basis of non-territorial federalism, for Sri Lanka as an option worth exploring.

Federalism at Lower Levels

In this national level of broadening federalism, there is still the possibility of representation being confined to the main communities, by excluding smaller communities in the districts. There are two ways to prevent this possibility of exclusion. The first is setting up of regional or provincial institutions of non-territorial power sharing (Regional/Provincial Community Councils), to run parallel with the territorially designed Regional/Provincial Councils. The second option is to create mechanisms for representation for the numerically smaller minorities in the region/province who would not get representation under the existing system. This will require re-working of the composition of the councils with changes to the election laws to ensure that all minorities are fairly represented, despite their numbers or the absence of localities of their demographic concentration.

For example, the composition of the Southern Provincial Council can be defined in such a way as to ensure fair representation to Muslims in Galle, Matara and Hambantota districts as well as the plantation Tamils in Galle and Matara districts. The electoral laws governing representation there can be modified to ensure fair representation, for example, to plantation Tamils in Matara and Galle districts, who would not stand to win at an election because of their numerical weakness. An option is to treat them as a single constituency within the Southern Provincial or regional council, although they live in two separate districts. What matters here is not the numerical strength of the community, but its numerical weakness as well as the commitment to empower them through guaranteed representation. The regional minority communities in the Western, North-Eastern, Central and Sabaragamuwa provinces will immensely benefit from an institutional scheme of this nature that combines territorial and non-territorial forms of power sharing.

There can still be exclusion of still smaller minorities from the assemblies of governance. For example, Malayalam and Telugu speaking working-class cultural communities in Colombo, the

Malay community in Colombo and Gampaha districts as well as Hambantota's Malay colony, will continue to remain unrepresented at the regional or provincial councils. Their numbers may be inadequate to make a community constituency adequate for separate representation at the regional level. To ensure their representation at a suitable level of governance, we need to design new institutions and mechanisms at local and municipal levels. There too institutional innovation can go hand in hand with reforms in the electoral laws. Guaranteed representation, even falling short of general qualifying cut-off point, can be combined with re-working the composition of local or municipal bodies to ensure participation at local governance of the marginal minorities.

Deep federalization, as a measure of further democratization of Sri Lankan polity, requires federalization at three tiers of the state—central, regional and local/municipal—combining territorial and non-territorial principles. In a sense, Sri Lanka provides an opportunity to show the way forward for other plural societies. Constitutional innovation in a context of civil war transition. ■

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