

PEACE PROCESS, DEVOLUTION AND CONSTITUTIONAL REFORMS

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Peace Process

The peace process is an important exercise in Sri Lanka at the moment. It is also a complex exercise for two important reasons. Firstly, we have to overcome the legacy of distrust and destruction which has overshadowed the relations between the North-east and the rest of the country. The second is the logistical constraint which make the pursuit of peace in Sri Lanka very different from that in the Middle East or Northern Ireland. There is the geographical isolation and the fact that direct contacts between the two sides — the government and the LTTE — have been rather limited and one has had to resort to communication through letters. Despite these two broad constraints, the peace process is moving ahead. There has also been a cessation of hostilities agreement which was worked out in the early part of January and y held for more than two months. These two factors are the most significant achievements in relation to the process.

There remains, however, a series of issues which need to be addressed. The first relates to certain issues arising out of the cessation of hostilities and the possibility of converting it into a ceasefire. The second relates to the economic embargo and the economic reconstruction in the North-East. The third of course are issues relating to the political resolution of the conflict. There needs to be further consultation with regard to the sequence in which these issues can be addressed. Can they be addressed simultaneously or can they be addressed in a particular sequence? These are issues relating to the modalities of the peace process, and the procedure for pursuing the agenda in regard to the process. In the future, there may be some setbacks, and some movements forward, but on taking an overall assessment, one has to be satisfied and remain quite hopeful.

Presently, there is the need for the two sides to come to an understanding with regard to the actual agenda for discussion and the sequence within which that agenda will be pursued while, at the same time, working out a specific time frame for addressing the various issues. The peace process has taken place amidst many difficulties and therefore no one could really expect a dramatic breakthrough within a short time frame. Nevertheless, achievements so far have been significant and positive and we have to approach the process with a measure of optimism.

Recent Changes

The overall situation with regard to ethnic relations in Sri Lanka now appears to be different from the past, because there has been a significant movement forward with regard to some critical issues in the political negotiation. Take, for example, the issue of language which in the fifties and sixties was the most acrimonious and divisive issue. But we have since the mid-fifties made significant progress with regard to language; Tamil was recognised as a regional language and subsequently in the Second Republican Constitution, it was made a National Language. In 1987 it was equated and regarded as an official language. A national consensus has evolved on this issue. There are of course problems which still remain with regard to the issue of equality of status and there are problems of implementation; but these are problems which we are now capable of addressing.

Devolution

When the Provincial Councils system was introduced in 1987, it was an issue which divided the country. The Sri Lanka Freedom Party at the time did not participate in the first provincial council election. They subsequently did. Later, we had the Mangala Moonesinghe select Committee to find a solution to the ethnic question. There was a considerable measure of consensus between the United National Party and the Sri Lanka Freedom Party. It was agreed that devolution should be on the lines of the Indian Model; they agreed that the concurrent list of subjects should be either totally or substantially absorbed by the provincial list. Thus, over the years we have seen a growing consensus and an advance in the thinking particularly of the political parties in the South with regard to some of the critical issues which have divided our society.

It is perhaps not necessary for the government to place their proposals on devolution before the public at this stage. Devolution is one of the issues which form part of the new constitutional reform exercise and in the first working draft of the constitution, the chapter relating to devolution has not been included. This position was clearly explained to most of the political parties; they felt that the devolution issues should initially be addressed in the peace talks. And it would be appropriate to let the issues define themselves in the course

of the peace talks, and subsequently if there is significant progress in the peace talks on the issues, to try and express that progress in the constitutional reform exercise. From a practical political perspective this seems to be a logical approach and there should be very little disagreement that we need to give time to the peace process to enable direct discussions between the government and the LTTE on the political issues.

Immediate problem in the peace process relates really to the agenda for discussion and the resolution of certain residual issues. These issues are now increasingly becoming clear and they are not incapable of resolution. There are many intermediate solutions which are possible to work out. The peace process is so critical to the political stability and economic prosperity of this country that the failure to resolve these issues would pose an insurmountable obstacles to further progress.

Constitutional Reform Proposals

The proposals that have been made before the Select Committee of Parliament relate essentially to the political and constitutional framework for the sharing of power between the North-East and rest of the country. They also relate to problems of equality in terms of language and equality of opportunities. The third issue relates to institutional arrangements which ensure that when there are disputes between the centre and the province that these disputes will be addressed in a manner which is consistent with the spirit and substance of the constitutional framework. And fourthly, some assurance that whatever political framework is agreed upon will not be subsequently abrogated or amended in a manner detrimental to the Tamils and Muslims. These are the four broad areas which need to be addressed in an overall political solution.

Meanwhile, the main problem in terms of restoring democracy to all parts of the country is the need for a political solution. If you look at similar conflicts in other parts of the world, take for example the Middle East conflict, as a result of the Oslo and Cairo agreements, a certain measure of autonomy was conferred on the West Bank and in Gaza. A devolved authority was established but it was recognised in these agreements that peace and democracy may not arise at the same time. There has to be a time frame, a transitional arrangement to ensure that once peace is established, there is an authority which can administer the areas during the transitional period, in preparation for the conduct of democratic elections. In our situation too, there are similar considerations which may be relevant.

Fundamental Rights and the Rights of Ethnic Groups

Effective securing and guaranteeing the rights of various ethnic groups is a very important aspect of the constitutional reform process. Here we are looking at three

different kinds of constraints. Firstly, the need to more effectively strengthen individual rights. The right to life, for example, is not expressly protected in the Constitution; nor is the right to privacy is expressly protected. There are certain rights with regard to the rights of the accused when they are interrogated which need to be protected. They are known as the Miranda rules in the United States. When a person is arrested by a Police Officer he has the right to counsel, and the right to remain silent; these are important procedural rights which need to be secured. So the first task in terms of strengthening individual rights would be to incorporate certain rights which are recognised in the International Civil and Political Covenant, and make them part of our laws. The second constraint relates to what are known as 'derogations' and limitations of fundamental rights. In times of emergency or in the interests of national security or the national economy, parliament may by law or by emergency regulation derogate from or limit these fundamental rights. It has been a very strong view of constitutional lawyers and human rights activists that the limitations in the present constitution are too sweeping and they need to be rationalised.

The third constraint relates to having more effective remedies. One of the proposals that is being considered intends to ensure judicial review of legislation. In addition to pre-enactment review, we will have a certain opportunity to challenge legislation which violates fundamental rights. There is also an attempt at what we call democratising remedies, meant to extend the period of time within which the fundamental rights challenge could be invoked. It will also allow public interest groups to intervene on behalf of a person who for reason of poverty or other disadvantage, is unable to intervene on his/her own behalf.

Enhancing Devolution

Is meaningful devolution possible within a unitary framework? Dr. Colvin R. de Silva used to say that there is nothing called a unitary constitution which is locked up in some mythical vault in heaven with which one could compare a constitutions and say whether it is unitary or not. So the question of whether a constitution is unitary or federal is a matter of which there has been a considerable debate. In India, for example, this issue has been very vigorously debated. But it is our strong conviction that in a unitary constitution the centre has the power of overriding either legislative or executive authority of the devolved unit. We have seen this in Sri Lanka, in a number of important areas such as agrarian service, education, and transport, where the authority of provincial councils have been legislatively and administratively overridden during the last several years.

The judiciary in most countries does not function as a neutral arbitrator between the Centre and the Provinces, particularly within a unitary framework. In such systems the judiciary seems to function rather as an extension of the centre than a neutral arbiter between the centre and the provinces. This again has led to a considerable concentration of power and

authority in the centre and to consequently weaken and dilute devolution. In the Sri Lankan context, there is another complicating factor, which is the Presidential System. In the Presidential system, power tends to gravitate towards the Centre, and when you have an active, interventionist Presidency, (as we have had in the period of former President Premadasa), we found that certain sub-district units, divisional secretariats, were established, which were controlled directly by the Centre. The devolutionary exercise was weakened and somewhat undermined by the creation of these sub-district units throughout the country.

There are many problems with the devolutionary framework which was introduced after the Indo-Sri Lanka accord. The first is the constitutional framework. The second is in regard to the distribution of power between the Centre and the Provinces. There is the question of 'national policy' on all the devolved subjects which was vested in the centre. Under the guise of national policy, what was given with the left hand was effectively taken away with the right hand. In a number of instances such an erosion took place of the devolutionary arrangement. Finally with regard to financing, there is extreme dependence of the Province on the Centre. And there are many provinces — even the North-east Council, which is administered by a Governor — which are in the midst of a serious fiscal crisis.

The changes that are currently being considered in the system of devolution are not marginal or modest changes; rather, they envisage a fundamental reconstruction of the distribution of powers by the Centre to Provinces. They further envisage more effective mechanisms for ensuring that the Centre does not intrude or encroach upon the powers of Provinces. More effective arrangements for settling of disputes between the Center and Provinces and a measure of assured finances for the Provinces are also being proposed.

Muslim Question in the East

With regard to the Eastern Province, there is clearly a need to have meaningful and adequate institutional arrangements for the Muslims there if we are to evolve a durable solution. There are many options which are being put forward. One is a power sharing arrangement which would ensure that Muslims will be able to enjoy representation in the legislature and the executive proportionate to their demographic presence in that area. Secondly, there is the need for some means of equitable sharing of resources between the Muslims and the other communities with regard to issues like economic development, land, financial resources, credit and

educational opportunities. This is one type of approach, which is essentially an arrangement for the Muslims to participate meaningfully in a devolved administration.

The second is to consider a kind of devolutionary arrangement which will involve areas which are not territorially contiguous and coming together in some kind of shoe-string manner. The third will be to consider carving out a contiguous Muslim area. If we take, for example, the former electorates in the Ampara district which are preponderantly Muslim like Pottuvil, Kalmunai, Samanturai, then we will be able to consider whether some kind of devolution of power could be worked out to that contiguous Muslim enclave.

Perhaps, a non-contiguous devolution will be extremely difficult to administer, because of the heterogeneity of population. It will be administratively and politically difficult to distinguish between one category of citizens who will be accountable and responsible to one political authority and another category of citizens living in the same village or in adjoining villages being responsible to another. So while there is the legitimate concern that the security and identity of the Muslims who live outside this contiguous enclave need to be protected (and we need to find a mechanism to do that), I think the idea of non-contiguous areas linked together would pose problems of implementation.

Unit of Devolution

The proposals that were presented by Mr Sivasithamparam of the Tamil United Liberation Front before the Select Committee envisages the unit of devolution which would link together the Tamil majority areas of the Northern, and Eastern provinces. He has in making these proposals recognised that there may be firstly the need to make special arrangements, institutional arrangements, for the Muslims and the need to consider the possibility of some adjustment of the boundary in the North-East province. These are the three elements which should form the basis of working out the unit of devolution.

In defining the unit of devolution, the principle of territoriality is important. The principle of territoriality in a way reinforces the pluralistic character of Sri Lankan society. This is a principle which is quite fundamental to any meaningful scheme of devolution.

The problem of power sharing of minorities is one which has arisen in several contexts, and it is not an easy problem to resolve. However, through the territorial principle, we are able to look at alternative ways of sharing powers with which most of the people of Sri Lanka would be quite comfortable. ■