

## Chapter XI

### NON-TERRITORIAL FEDERALISM: A PANACEA FOR OUR TIMES?

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#### Introduction

*And to prevent for the future any Differences arising in the Politick State, all and every one of the Electors, Princes and States of the Roman Empire, are so establish'd and confirm'd in their antient Rights, Prerogatives, Libertys, Privileges, free exercise of Territorial Right, as well Ecclesiastick, as Politick Lordships, Regales, by virtue of this present Transaction: that they never can or ought to be molested therein by any whomsoever upon any manner of pretence.*

*– Article LXIV, Treaty of Westphalia, 1648*

*We have arbitrarily selected the single human characteristic of place of residence, to the exclusion of all other human characteristics, as the principal determinant of citizenship and hence of our relations to governmental authority.*

*– Peter G. White, 2000*

Sri Lanka's debate on power sharing now centres on a broad commitment to federalism as the most promising way to resolve current ethnic conflicts and – more importantly – to prevent future ones. On December 5, 2002, the Government of Sri Lanka (GoSL) and the Liberation Tigers of Tamil Eelam (LTTE) agreed to “explore a solution founded on the principle of internal self-determination in areas of historical habitation of the Tamil-speaking people, based on the federal structure within a united Sri Lanka.” The statement emphasised that “the solution has to be acceptable to all

communities.” However, a concrete common understanding of what will be a uniquely “Sri Lankan federalism” is yet to emerge.

The Sri Lankan discussion of federalism has focussed on *territorial federalism*, which imagines a multinational state divided into a number of federal entities, each demarcated by a clear territorial boundary. These federal entities are typically called “provinces”, “states”, “territories”, or “regions”. A person’s membership and rights to political participation in a particular federal entity depends on his or her place of residence. That is, a person only enjoys political membership in province X (including whatever special rights are available in X) if she ordinarily lives within the territorial boundaries of X.

Clearly, territorial federalism, in some form, is imperative in Sri Lanka. Anton Balasingham, when asked about his view of a concept for a federal solution, stated,

*“The concept of a territorial unit is fundamental for a federal solution. Universally it is a common feature in every federal model. There has to be a territorial unit. As far as the Tamils are concerned, we have a historically constituted territory consisting of northern and eastern provinces...So the contiguous Tamil territorial unit is a fundamental aspect of any federal solution.”<sup>1</sup>*

However, as the discussion on federalism proceeds further in Sri Lanka, it is also becoming clear that a purely territorial solution will be fraught with problems. Non-territorial minorities, such as the Muslims and the Tamils of Indian origin, are becoming increasingly concerned with their potential cooption into territorial units where they will remain as under-represented minorities.

Therefore, in Sri Lanka, a process of “deep federalization” is crucial – an inclusive federalism that will choreograph a political landscape

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<sup>1</sup> F. Jansz, “This government and the peace process the only hope for Tamils” *Sunday Leader* (16 March 2003), online: <http://www.tamilcanadian.com/pageview.php?ID=1682&SID=52>.

where *all* ethnic minorities meaningfully participate in power sharing.<sup>2</sup> In this vein, a discourse has emerged around *non-territorial federalism*, or *personal federalism*. Non-territorial federalism envisions federal entities in which membership is determined by community identity, not place of residence. These federal entities may be termed "communities" or "groups". Thus, a federal entity's jurisdiction is exerted on a personal basis upon certain individuals who "belong" (according to some criteria) to that community, regardless of where those individuals may live.

Non-territorial federalism is rooted in the idea that ethno-linguistic identity rarely limits itself to territories, although territory may play an important political role in its full realisation. Many minorities are dispersed throughout a state, yet feel that they share a common identity. Therefore, we may ask why a person should have to live in a designated territory in order to claim cultural rights. Certainly, such a philosophy conjures up images of "reserves" or "enclaves" which are essentially racist and segregationist.

It is not necessary to choose between territorial and non-territorial federalism. Both types of jurisdiction can co-exist and overlap; they are not mutually exclusive. As this paper will show, non-territorial federalism is simply another mode of devolution. It does not necessarily give an ethnic group "more" or "less" rights than territorial federalism would. Instead, non-territorial federalism is concerned with how the ethnic group itself is defined for federalisation purposes. At the same time, because it entrenches ethnic groups as federal entities under the Constitution, non-territorial federalism is much more than rights-based protection for minorities.

This paper first examines aspects of non-territorial federalism, to provide a more comprehensive understanding of what such a concept might mean. Second, it presents some examples of its application in federal countries. Third, the paper discusses the opportunities and

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<sup>2</sup> J. Uyangoda at 2.

limitations of non-territorial federalism and fourth, gives a tentative evaluation of its potential as a solution to Sri Lanka's ethnic conflict.

### **Aspects of Non-Territorial Federalism**

At least for the purposes of this paper, I would like to lay down some propositions for what does – and what does not – qualify as non-territorial federalism. The concept of non-territorial federalism is a creative, but new development in global approaches to custom-tailoring federalism. As such, some definitional proposals may be helpful.

#### **What's Place Got to Do with It?**

Ideally, non-territorial federalism would *complement* but not *replace* territorial federalism. We may envision a nation state divided into two types of federal entities: one territorial, and one personal. The number of territorial entities need not match the number of non-territorial entities; rather, the boundaries of each federal entity should be chosen according to different criteria. Simply put, territorial federal entities are defined according to physical boundaries. Non-territorial federal entities are defined according to ideological boundaries.

Consider the following illustration. Nation state X is divided into ten territorially-defined "provinces." The boundaries of these provinces are defined according to criteria that may include:

- geography – rivers, mountain ranges, etc.;
- economy and lifestyle – urban, rural, agricultural land boundaries, traditional economies, etc.;
- political identity within the territory – existence of groups which claim a territory as their homeland, specifiable territorially-linked identities, etc.;
- minority vs. majority concerns – territorial boundaries may be chosen to make a national minority a regional majority, or vice versa;
- historical geographic contiguity;



- administrative efficacy; and/or
- indigenous claims over territory.

At the same time, X is divided into three non-territorial "communities". Membership in each community may be defined according to criteria such as:

- historical or "provable" genetic (or otherwise) membership in an ethnic group;
- language;
- religion;
- voluntary self-identification with a group;<sup>3</sup> and/or
- acceptance (in some form) by the group.

However, even in defining non-territorial federal entities, *place* may still play a role. The role of place varies along a spectrum, as follows:

- **Complete non-territorial federalism** – any person that satisfies non-territorial group membership criteria can claim autonomy associated with that federal group entity, no matter where that person lives within the state. For instance, if Sri Lanka had a non-territorial federal entity called "Tamil-speaking people", as well as a territorial federal entity called "Tamil Eelam", a Tamil-speaking person falling into the "Tamil-speaking people" ethnic group would benefit from autonomy given to that group, even if he or she did not live in the territory of "Tamil Eelam".
- **Partial non-territorial federalism** – a person may have to satisfy territorial membership criteria, as well as non-territorial membership criteria. For instance, in Belgium, a French-speaking person enjoys self-determination in the French territory, Wallonia, and also in the bilingual territory, Brussels. However, he or she does not have French-

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<sup>3</sup> The various aspects of voluntary self-identification will be discussed in more detail below.

community autonomy in the Dutch-speaking territory, Flanders (see below). Another example of partial non-territorial federalism is where territorial membership criteria dominate access to a person's group autonomy; for instance, an indigenous person in Canada may have to prove affinity to a tribal territory that receive certain special privileges.

- **Complete territorial federalism** – federal entities are defined only according to territory. Ethnic groups do not have autonomy or power-sharing mechanisms outside of their particular territory. Therefore, in Sri Lanka, if a purely territorial federal solution is used, a Tamil-speaking person outside of the territorial federal entity of "Tamil Eelam" would have no ethnic internal self-determination options.

Therefore, like all discussions of the federal idea, any discussion of non-territorial federalism must consider various possibilities of what form such federalism will take.

### **Who Does What?**

There should be no hierarchical relationship between the two types of federal entities (territorial and non-territorial). Rather, each type has different powers, appropriate to its role. If non-territorial federal entities are based on the concept of "ethnic group", they may have jurisdiction over "cultural" matters, typically: education, use of language, arts, media, religion, and so on. Territorial federal entities may have jurisdiction over "non-cultural" matters such as: roads and highways, regional economic policy, transportation, and resource use. Add to this mix the central jurisdiction, which may deal with matters of national concern, defence policy, and so on.

Of course, as in every federal system, many conflicts and areas of overlapping jurisdiction may arise. For instance, some aspects of trade policy may affect cultural integrity. A successful federal system must provide for resolution of such jurisdiction conflicts: an impartial tribunal, inter-party negotiations, inter-party councils, and so on.

## **Constitutional Power Sharing vs. Rights-Based Protection of Minorities**

Geographically-dispersed minorities may have their rights Constitutionally-protected, but such protection is not the same as having minority autonomy Constitutionalised in a federal arrangement. Non-federalist protection of rights may be embodied in human rights states, anti-discrimination laws, equal employment laws, and so on. Rights-based protection may take the form of protecting political and civil rights, including cultural and educational rights, the right to freedom of association, the right to freedom of expression, and so on. Rights-based solutions may have non-territorial subjects, but they are human rights solutions rather than federal ones. Conversely, non-territorial federalism goes further than protecting the rights of minorities. It gives minorities autonomy and implements the right to internal self-determination.

For instance, some speak of Darjeeling and Ladakh as examples of non-territorial federalism in India. Darjeeling is a region in the state of West Bengal, and Ladakh a region in the state of Jammu and Kashmir. In the 1990s, India began to give these tribal regions a limited form of what remains an essentially territorial autonomy – mainly in response to World Bank policies of “decentralization and democratic empowerment” rather than as an effort to devolve power to ethno-linguistic communities. Both regions have local government councils (the Darjeeling Gorkha Hill Council and the Ladakh Autonomous Hill Development Council), which are run by boards comprised partly of directly-elected members and partly of state-appointed members. The councils deal with day-to-day management, water, sanitation, transportation and power.<sup>4</sup> Such arrangements do not really qualify as non-territorial federalism. They are better described as simple territorially-based arrangements

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<sup>4</sup> J. Erk, “Federalism and Non-Territorial Representation”. Forum of Federations (May 2003), online: <[www.forumfed.org](http://www.forumfed.org)> at 16-18. Response by David Cameron, Forum of Federations (21 May 2003), online: <[www.forumfed.org](http://www.forumfed.org)>.

that provide local government, of which protection of minority cultural and linguistic rights are one aspect.

Such non-federal rights-based approaches, while they may provide effective minority protection, are often inadequate for resolving ethnic conflicts. Constitutional rights protection may be a sufficient safeguard against discrimination; that is, *negative* protection for groups such as sexual minorities, women, and religious minorities. But it is unlikely to provide the *positive* aspects of self-determination and regional autonomy that are so essential to the resolution of (especially violent) ethnic conflicts.

### **Consociationalism vs. Non-Territorial Federalism**

Consociationalism is often confused with non-territorial federalism. Consociationalism may be defined as “government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy.”<sup>5</sup> Consociationalism is a process and attitude of compromise and power sharing, literally of “living together”; however, it is not a political system *per se*. It may be used to describe inter-group relations in both a unitary and a federal state. Consociationalism is not a Constitutional arrangement; it is merely a word that reflects the realities of consensus politics between different parties.

Non-territorial federalism may involve consociationalist techniques, but it is fundamentally different because it *enshrines power sharing as a Constitutional principle*. A country’s Constitution must list the powers of the center, as well as the specific powers devolved to the territorial and non-territorial federal entities.

It bears mention in passing that several consociationalist regimes incorporated elements of non-territorial power sharing arrangements.

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<sup>5</sup> T. Khidasheli, “Federalism and Consociationalism: Prospects for Georgian State Reform”, online: Vrije Universiteit Brussel <[poli.vub.ac.be/publi/orderbooks/federal/09khidasheli.pdf](http://poli.vub.ac.be/publi/orderbooks/federal/09khidasheli.pdf)> at 197. Khidasheli also does a detailed explication of the differences between consociationalism and federalism.

For instance, **The Netherlands**, although a unitary state, is known as the "home of consociationalism" due to its well-known system of social pillars. The nation has four non-territorial pillars: Calvinist, Catholic, liberal and socialist. This system employs consociationalist techniques such as executive power sharing or grand coalition, proportionality, a high degree of autonomy for the segments, minority veto, depoliticisation, secrecy and deference to leaders. In its heyday, the pillar system made everyone a minority and meant, as Erk says, that "people would live their entire lives within the confines of a homogenous subculture."<sup>6</sup> However, with increased social and geographic mobility in recent years, the pillar system is now on the decline.<sup>7</sup>

Other consociationalist regimes either failed or were never fully implemented. For instance, **Lebanon** was divided into three religious/cultural groups on a non-territorial basis: Sunni Muslims, Shia Muslims and Christians. Smaller communities like the Druze and the Armenians also took part in this consociationalist regime. Government was run according to shared political power at the top levels, but proportional representation at lower levels. This system appeared to provide peaceful governance in a deeply divided society until the 1980s, when a civil war led to its downfall. **Cyprus** is a similar example.<sup>8</sup>

Likewise, the **Austro-Hungarian Empire** partially implemented the ideas of Karl Renner and Otto Bauer, generally known as the fathers of consociationalism. Faced with the tensions of ethnic groups in the Empire – Czechs, Slovaks, Poles, Ukrainians, Slovenes, Serbs, Croats, Bosnians, Romanians, Italians, Hungarians, and Germans – Renner and Bauer proposed a political system based on cultural sovereignty via the "principle of personality." They imagined that individuals would register their "nationality" of choice with appropriate authorities, creating aggregate "nations" on the basis of

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<sup>6</sup> Erk, *supra* note 4 at 11.

<sup>7</sup> For more detail on The Netherlands' system, see Erk at 9-11 and David Cameron, *supra* note 4.

<sup>8</sup> Erk, *supra* note 4 at 18-21.



the free association of individuals dispersed across a vast territory. The "nations" were to have power over education and culture. In 1905, an attempt to implement Renner and Bauer's ideas was made by dividing the education system between Czechs and Germans. Unfortunately, the implementation of the ideas transformed personal choice into compulsory membership, distorting the spirit of the proposed regime.<sup>9</sup> We are left, therefore, with no compelling examples of successfully implemented consociationalism, although it is useful as a principle to guide ideas about forms of non-territorial federalism.

### **Contemporary Examples of Non-Territorial Federalism**

It is important to note that there are no contemporary examples of *complete* non-territorial federalism. Some examples follow, to illustrate the range of forms that non-territorial federalism has taken in different countries, in the particular contexts of those countries. Please note, however, that a detailed and comprehensive description of all existing forms of non-territorial federalism is beyond the scope of this paper.<sup>10</sup> In general, however, non-territorial federalism is still an emergent concept that may take many forms.

#### **Canada: Indigenous Claims to Non-Territorial Self-Government: Many Non-Contiguous Territories Forming One Ethnicity-Based Federal Entity**

Indigenous, or First Nations, peoples in Canada have legitimate and legally-recognized claims to self-government. Currently, the final endpoint of the many negotiations and lawsuits is yet unknown. Many people, however, advocate non-territorial solutions to address the logistical problems of self-determination for a widely dispersed, and internally non-homogenous, group of indigenous people.

Aboriginal rights and treaty rights, both existing and future, are recognised and affirmed in section 35 of the Canadian *Constitution*

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<sup>9</sup> Erk, *supra* note 4 at 21-23.

<sup>10</sup> A good reference for those interested in such an explication is Erk, *supra* note 4.

*Act, 1982.*<sup>11</sup> However, First Nations people continue to fight for autonomy in the form of self-government, fee simple title to traditional lands, and freedom from the imposed governance of the *Indian Act*.<sup>12</sup>

Thomas Courchene has proposed the idea of a First Nations' Province – a new province built out of the 2,250 legally-designated Indian reserves. Although there would be a territorial component, the total provincial territory would be made of non-contiguous pockets of land. He proposes that the government of the First Nations' Province would exercise jurisdiction over matters similar to the devolved powers currently held by the other ten provinces.<sup>13</sup> So far, Courchene's idea has had little support, as the federal and provincial governments prefer to settle disputes through treaty negotiations. Also, First Nations are so heterogeneous that strong internal (let alone external) support for a single idea is hard to come by.

One success story, however, is the Nisga'a Final Agreement, a negotiated arrangement between the federal government, the British Columbia provincial government, and the Nisga'a people. Although the Nisga'a have their traditional territory within the Nass area of British Columbia, membership in the federal entity may be claimed by people living anywhere in Canada. Membership is not determined according to whether a person lives in the Nass area, but rather a person is of Nisga'a ancestry (mother born into one of the Nisga'a tribes), or adopted, or descended from such an individual. Enrolment is administered by the Enrolment Committee of the Nisga'a Tribal Council, whose decision can be appealed to a Nisga'a appeal board and ultimately to the British Columbia Supreme Court.

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<sup>11</sup> Section 35 states:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. ...

<sup>12</sup> BC Treaty Commission, "The Self-Government Landscape", online: <[www.bctreaty.net/files\\_2/pdf\\_documents/self\\_government\\_landscape.pdf](http://www.bctreaty.net/files_2/pdf_documents/self_government_landscape.pdf)>.

<sup>13</sup> See Thomas J. Courchene, *Rearrangements: The Courchene Papers*, Oakville, New York and London: Mosaic, 1992 at 104-106. Cited in Erk, *supra* note 4 at 15.

Thus, the Nisga'a Agreement is a good example of non-territorial federalism.<sup>14</sup>

The Nisga'a people now have important self-government provisions, meant to secure their autonomy in matters that are internal and integral to their culture. Under the Agreement, Nisga'a laws have paramountcy (that is, where there is a conflict of jurisdiction, Nisga'a laws will prevail over federal and provincial laws) in areas including:<sup>15</sup>

- administration, management and operation of Nisga'a government;
- Nisga'a citizenship;
- preservation, promotion and development of Nisga'a culture and lands;
- use, management, planning, zoning, and management of assets on Nisga'a lands – the Agreement provides fee simple land ownership of the Nass area to the Nisga'a First Nation;
- pre-school to grade 12 education, and post-secondary education at standards that are comparable to provincial standards;
- devolution of cultural property (e.g. ceremonial regalia) of a Nisga'a nation member who dies intestate;
- internal allocation of fish and wildlife.

In other areas, federal or provincial laws will prevail over Nisga'a laws if there is a conflict. These areas include: solemnization of marriages, provision of social services, health services, sale and

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<sup>14</sup> P. G. White, "Non-Territorial Federalism: A New Approach to Identity Politics or How Canadians Can Become Born-Again Federalists and Save the World" (26 January 2000), online: McGill Institute for the Study of Canada <[www.misc-icm.mcgill.ca/publications/white.pdf](http://www.misc-icm.mcgill.ca/publications/white.pdf)>.

<sup>15</sup> BC Treaty Commission, "Nisga'a Self-Government Provisions", Newsletter Update February 1999, online: <[http://www.bctreaty.net/updates\\_2/feb99nsgaa.html](http://www.bctreaty.net/updates_2/feb99nsgaa.html)>. For more detail on the provisions of the Nisga'a Final Agreement, see also Indian and Northern Affairs Canada, "Nisga'a Final Agreement in Brief", online: Government of Canada <[www.ainc-inac.gc.ca/pr/agr/nsga/nisgafb\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nsga/nisgafb_e.html)>.

consumption of intoxicants, and emergency preparedness. The Agreement also sets out areas of shared jurisdiction over wildlife, administered by a Joint Fisheries Management Committee under the authority of the federal government, and a Wildlife Management Board under the authority of the provincial government.<sup>16</sup>

Other versions of self-government for First Nations people in Canada are the *Schelt Indian Band Self-Government Act* (1986) and the *Westbank First Nation Self-Government Agreement* (1998). These differ from the Nisga'a Final Agreement in that self-government authority is delegated from the federal and/or provincial governments.<sup>17</sup> It is clear that self-government for First Nations in Canada has taken, and will take, many different forms.

Rainer Bauböck states that non-territorial federalism is particularly appropriate for recognizing the rights of indigenous people. Indigenous people are to be distinguished from other national minorities because of the international context of their claims to self-determination. Put differently, First Nations people have a legitimate claim to international sovereignty in their own right. Often, where colonising people entered treaties with indigenous groups, the treaties did not create confederations, but rather employed a "vastly asymmetric power relation with the settler societies that eventually led to coercive integration with few remaining areas of territorial and legal autonomy."<sup>18</sup> It is this *sui generis* right to self-government that makes First Nations an important group for the application of non-territorial federalism.

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<sup>16</sup> See BC Treaty Commission, *ibid.*

<sup>17</sup> *Supra* note 12.

<sup>18</sup> R. Bauböck, "Multinational Federalism: Territorial or Cultural Autonomy?" (2001), online: International Migration and Ethnic Relations <[www.bit.mah.se/imer\\_epub.nsf/e\\_catsortview/E743F9ECA6B5449DC1256B5E002FA64F/\\$File/012.pdf?OpenElement](http://www.bit.mah.se/imer_epub.nsf/e_catsortview/E743F9ECA6B5449DC1256B5E002FA64F/$File/012.pdf?OpenElement)> at 49.

## Canada: Schools, Religion, and Language: Non-Territorial Jurisdiction Over Education

In Canada, one oft-overlooked – but limited – type of non-territorial federalism was embodied in the Constitution as long ago as the *British North America Act* of 1867 (“the *BNA Act*”). Section 93 enshrined power sharing in jurisdiction over education, based on the personal characteristic of denominational religious confessionality. Autonomy over religious issues (Francophone Catholics and Anglophone Protestants) was particularly contentious in Canada at that time, and it is arguable that Confederation could not have occurred in Canada without recognition of this politically-important cultural difference.<sup>19</sup>

At the time of Confederation in 1867, the provinces had a well-established system of overlapping school boards. In Anglophone provinces, like Ontario, every school district had a public school funded by the provincial government; but where a school district included a Roman Catholic community, that community had the right to establish and fund its own “separate” school. The converse was true in the Francophone province of Québec.

Section 93 of the *BNA Act* specifically granted each province exclusive jurisdiction to make laws in relation to education, provided that “nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any *class of persons* have by law in the province at the union” [emphasis added]. As the education system stands today, the basic principle of non-territorial federalism is apparent (though many people may be surprised to hear it labelled as such): inhabitants of a single defined territory [a province] can choose to “differentiate themselves, not on a new territorial basis, but on the non-territorial basis of a particular personal characteristic not shared by all of them [religion], and legally use such a characteristic as the basis for setting up a form of

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<sup>19</sup> For a more detailed discussion of the shared jurisdiction over education in Canada, please refer to White, *supra* note 14.



local democratic government with the power to tax its declared supporters.”<sup>20</sup>

In this case, the federal entities are the school boards. Any person living in Alberta, for instance, can choose, on an annual basis, to declare support for either the public school system or the separate school system. Such a declaration entitles him or her to pay taxes in support of that system, stand for the office of school board trustee, vote for school board candidates, and send his or her children to that school system. The separate school system has certain entrance criteria which are self-defined; for instance, the general rule is that the child or at least one parent must be baptized Catholic, as proven by a baptismal certificate. Thus, two separate federal entities [French-speaking Catholics and English-speaking non-Catholics] have concurrent jurisdiction over the same territory [a province] for educational purposes. To make things more complex, the historical interplay of religion and language has evolved so that any person may choose to educate her child in: (a) the public English school system, (b) the public French school system, (c) the Catholic English school system, or (d) the Catholic French school system.

### **Belgium: A Double-Layered Federal State for a Tripartite Ethnic Clash**

Belgium was a unitary constitutional monarchy until severe ethno-linguistic tensions between French-speaking, Dutch-speaking, and German-speaking groups threatened to pull it apart. The process of devolution started in the 1970s, with the formal establishment of a federal state in 1993.<sup>21</sup> Since that time, despite continued tensions between the three groups, Belgium’s federal system has been lauded for successfully holding the country together.

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<sup>20</sup> *Supra* note 14.

<sup>21</sup> Forum of Federations, *Handbook of Federal Countries*, 2002. A. Griffiths, ed. Montreal: McGill-Queen’s University Press, 2002.

The Belgian Constitution establishes two different types of constituent units: Regions and Communities (Articles 2 and 3).<sup>22</sup> The three Regions are territorially-defined: Wallonia, Flanders and Brussels. Overlapping these Regions are three Communities, ethnolinguistically defined: Flemish, French, and German. Article 4 ties the two layers together by describing four regions (writ small): French-speaking (Wallonia), Dutch-speaking (Flanders), bilingual (Brussels), and German-speaking (small defined area in southeast of the country). Thus, two layers of jurisdiction exist in Belgium: territorial (Regions) and non-territorial (Communities).

It should be noted that the Communities' non-territorial jurisdiction is not complete. For instance, the Flemish Community brings together Dutch-speakers who live in Flanders and those who live in Brussels – but it does not include the small Dutch-speaking minority who live in Wallonia. Similarly, the French Community includes Francophones in Wallonia and Brussels, but not those in Flanders. Another limitation on the Communities' jurisdiction is that the German-speaking minority is recognized as a Community but has no corresponding Region.

### **India: Religious Minorities and Non-Territorial Representation**

In several countries, such as India and Israel, religious minorities receive a limited type of non-territorial jurisdiction by reason of their right to be governed by religious, or personal law, in certain areas. In both cases, religious traditions determine family law and some aspects of property law, with the result that citizens of different faiths are subject to different legal norms in those areas.<sup>23</sup>

In India, the hard lesson of Partition showed that Muslims felt endangered by a Hindu majority and needed reassurance that their corporate identity was recognized. Maintenance of personal laws was also important to ensure a sense of security for Hindus,

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<sup>22</sup> The Constitution of Belgium, available online: <<http://www.fed-parl.be/gwuk0001.htm#E12E1>>.

<sup>23</sup> *Supra* note 18 at 50.

Muslims, and Sikhs in a secular India. Article 29 of the Indian Constitution guarantees the right to maintain distinct "cultures," a euphemism for religions; Article 30 guaranteed the right of religious minorities to found and operate educational institutions. Each religion has its own Civil Code, which will be applied by secular courts – although it is worth noting that codification of "Hindu" or "Muslim" law was an exercise that necessarily involved significant homogenization.<sup>24</sup> In India, the Concurrent List states that personal laws governing Hindus, Muslims and others remain an area of shared jurisdiction. Insofar as the Concurrent List is concerned, the central government has paramountcy where a conflict arises between personal law and Parliament law.

Likewise, in Israel, personal laws are directly applied by religious courts.<sup>25</sup> Religion-based personal law is a limited form of non-territorial federalism, because it allows minority religious groups to have autonomy in areas such as family law. However, it does not provide more comprehensive autonomy or significant power sharing in the sense of devolved powers.

### **The Opportunities and Limitations of Non-Territorial Federalism**

At a conceptual level, non-territorial federalism is appealing because it seems to provide a flexible, tailor-made compromise that could resolve tensions between the main ethnic groups in Sri Lanka: the Sinhalese, Tamils, Tamils of Indian origin, and Muslims. This section examines the major arguments for and against non-territorial federalism.

**First**, non-territorial federalism may be a compromise to settle rival territorial claims. Creating non-territorial federal entities avoids politically-charged disputes over boundary-drawing and relative

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<sup>24</sup> For an interesting discussion of the role of personal laws in pluralism in India, see S. Rudolph, "Contesting Legal Pluralism in India: The Law and Politics of the Uniform Civil Code" (1998), online: American Political Science Association <[www.spc.chicago.edu/Nation/papers/rudolph.doc](http://www.spc.chicago.edu/Nation/papers/rudolph.doc)>.

<sup>25</sup> *Supra* note 18 at 50.

sizes of territories – disputes which may exacerbate the very conflict they seek to resolve.<sup>26</sup> This all-or-nothing feature of territorial sovereignty may be addressed by what Gidon Gottlieb calls “the eventual extension of the system of states to include along it a system of nations and peoples that are not organized territorially into independent states at all”.<sup>27</sup> Thus, self-government for non-territorial federal entities is not only an attractive, but also a plausible method of reflecting the realities of modern multinational states. Most minorities are dispersed across nation states – even those which may constitute majorities in certain territorial areas – and so non-territorial federalism solves the problem of lack of contiguity.

**Second,** non-territorial federalism may provide *security* for minorities, particularly religious minorities. For example, in Israel and India, the application of religious laws, or personal laws, over areas of family law were essential for providing religious minorities with a sense of security in an otherwise secular state.

**Third,** basic theories of identity politics say that it seems ideologically ridiculous to attribute such importance to an external characteristic (territorial place of residence), while failing to recognize more important, deep-seated personal characteristics (community identity, religion, etc.).<sup>28</sup> This argument assumes that if a person was asked to select the more essential element of his identity, he would be more likely to say, “I am a Tamil-speaking person that practices Tamil cultural traditions” than “I live in the northeast of Sri Lanka.” Similarly, a Tamil-speaking person may not live in the northeast region of Sri Lanka, and yet may be as passionate about his or her Tamil identity as Tamils who do live in the northeast. In this sense, modern Constitutions should stop

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<sup>26</sup> M. T. Jans, “Personal Federalism: A Solution to Ethno-National Conflicts? What it has Meant in Brussels and What It Could Mean in Abkhazia”, online: Vrije Universiteit Brussel, Politieke Wetenschappen <poli.vub.ac.be/publi/orderbooks/federal/11jans/pdf> at 218.

<sup>27</sup> Gottlieb, Gidon, “Commentary.” In W. Danspeckgruber & A. Watts, eds., *Self-determination and Self-administration: A Sourcebook*. Boulder: Lynne Rienner, 1997 at 165-170. Cited in Bauböck, *supra* note 18.

<sup>28</sup> *Supra* note 14 at 6.

doggedly clinging to outmoded notions of political membership, and instead provide innovative representative models that reflect modern political realities. In other words, non-territorial federalism simply makes sense: if a person's self-identity and claims to autonomy are linked to his or her ethnic group, why should his or her place of residence determine whether he or she has access to that autonomy?

I hesitate, however, to fully subscribe to this characterization of the relationship between identity politics and non-territorial federalism. For many ethnic groups, nationalist tendencies are inextricably linked with territorial claims. In Sri Lanka, for example, would a person more likely self-identify by saying, "I am a Tamil-speaking person that practices Tamil cultural traditions, including Hinduism" or "I live in the northern region of Sri Lanka" or "I am a person who lives in Tamil Eelam, the territory which I consider to be my cultural homeland and within which I have a right to self-determination"?

**Fourth**, in a related point, non-territorial federalism aims at addressing the root cause of ethnic conflict. Even this root cause, however, can be defined in different ways. Yael Tamir has argued that ethnic nationalism is driven by a desire for self-determination; therefore, nations are entitled to internal self-determination (a right of individuals to determine their own national identity and a corresponding right to a public sphere where their culture is expressed), but not to comprehensive self-rule.<sup>29</sup> Therefore, "a universal principle of territorial self-determination for nations is a recipe for endless war, because almost any given territory that could form a viable state can be claimed by many different national communities".<sup>30</sup> In this sense, non-territorial federalism would be the most effective salve for ethnic tensions.

However, this argument may not give enough weight to the territorial component of ethnic nationalism. Bauböck argues that ethnic conflicts are driven by a desire for self-government, and that "while cultural liberties and protection can and should be offered on a non-

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<sup>29</sup> *Supra* note 18 at 5.

<sup>30</sup> *Supra* note 18 at 3.



territorial basis, the desire for self-government has always a territorial component that must not be ignored in the design of institutions and settlements that are meant to prevent the escalation of these conflicts.”<sup>31</sup> He points out that “nationalists regard homeland territories and peoples as indivisible” and that “national identity codes are binary: you either belong or you don’t, and if you do belong it is for an entire lifetime.”<sup>32</sup> Often, the idea of homeland is a cornerstone marker that “makes the myth of common origin tangible. It sets the origin of the group in a particular place and provides the group members with ‘roots’”.<sup>33</sup> Jans observes that because control of land is so intimately connected with group identity, territorial disputes between ethno-national groups inevitably “turn into disputes where group survival is felt to be at stake, a struggle in which no group is willing to lose or to accept a compromise.”<sup>34</sup> Thus, ethnic nationalism attaches an overwhelming importance to territory as the major cultural marker.

We may counter Bauböck’s objection by reminding ourselves that non-territorial federalism ideally exists alongside territorial federalism. The question for careful consideration is: in what circumstances is non-territorial federalism warranted *over and above* territorial solutions? In other words, before embarking on non-territorial federalism, we must assess if territorial solutions are sufficient for handling ethnic conflicts.

**Fifth**, non-territorial federalism appears attractive because it paints a picture of groups living side by side, each group with complete autonomy, even on territory over which more than one group claims control. Optimists project that such a situation can only lead to greater understanding and social harmony. For instance, one Belgian study shows that since the system of non-territorial federalism was installed, a greater percentage of citizens (especially youth) prefer to express their loyalty to Belgium rather than to their region. The

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<sup>31</sup> *Supra* note 18 at 5.

<sup>32</sup> *Supra* note 18 at 56.

<sup>33</sup> *Supra* note 26 at 215.

<sup>34</sup> *Supra* note 26 at 216.

study concludes that Belgian federalism provides "contexts of choice" which allow individuals to structure their public and private lives in a manner free from ethno-linguistic tensions.<sup>35</sup> Certainly, non-territorial federalism may provide individuals with the enhanced psychological freedom that comes with peaceful multiculturalism.

However, it seems equally possible that Constitutional divisions along ethnic lines may simply exacerbate and deepen ethnic divisions. It may entrench a mentality in which people are protectionist and quick to exaggerate perceived threats to their ethno-linguistic borders. Bauböck argues that non-territorial federal entities are "likely to generate an excessive segregation between communities living in the same territory."<sup>36</sup> First, the lack of common education and cultural institutions hardly fosters an atmosphere of mutual understanding. Also, civil society would likely split into separate public spheres that are "at best indifferent and at worst hostile towards each other."<sup>37</sup> One may also argue, though, that if non-territorial federal arrangements can lead to such segregation – won't purely territorial arrangements be even worse?

**Sixth**, advocates of non-territorial federalism argue that using residency in a common territory as the main criterion for assigning political rights is inherently unstable, because it means that "the only way to subject different populations to different rules is to carve out a new territory."<sup>38</sup> Therefore, non-territorial federalism may be a way of reconciling minority rights with majority rule. Thus, an ethnic group that is a numerical minority in a territorial federal unit has added protection because it has its own non-territorial federal unit.

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<sup>35</sup> L. Moreno, A. Arriba and A. Serrano, "Multiple Identities in Decentralized Spain: the Case of Catalonia" (1998) 8 *Regional and Federal Studies* 3: 65-88; W. Kymlicka, *Multicultural Citizenship*. Oxford: Oxford University Press, 1995; *supra* note 4 at 14.

<sup>36</sup> *Supra* note 18 at 32.

<sup>37</sup> *Supra* note 18 at 32.

<sup>38</sup> *Supra* note 14 at 7.

**Seventh**, one of the most talked-about objections to non-territorial federalism is that it may facilitate, rather than impede, the internal oppression of minorities. As Bauböck puts it,

*"For the political leaders of national communities, the numbers and mobilization of their members is their only power-base. They must be interested in maintaining a strong social pressure for conformity within the group and adversarial relations with other groups. Individuals of mixed origins, those who want to assimilate into another culture, and dissenters who oppose the national agenda will be exposed as foreign elements or traitors to the cause. The great virtue of territorial systems of representation is that legislators elected on ideological or identity tickets are accountable to citizens who share neither their ideas nor their background. This source of solidarity between citizens and constraint on the abuse of power cannot operate in a purely identity-based system of representation".<sup>39</sup>*

In this vein, the issue of membership criteria must be addressed. As a base requirement, membership must be voluntary so people can freely self-identify – and change, if so desired – their national identities. But what about children who are “born” into membership by descent? And what types of membership criteria are legitimate in a democratic society – or is it even valid to assume that consent for membership must be mutual so that individuals do not force their way into national communities who do not wish to acknowledge them? What about children of mixed marriages, or other people who do not wish to identify with a single ethnic group? What about immigrants who may not feel an affinity with any of the non-territorial political entities?

Other potentials for discrimination against nested minorities also exist. What about other non-culturally-defined minority groups (women, disabled, sexual minorities, etc.), who will find themselves marginalized by the hegemonic ethno-linguistic discourse of political

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<sup>39</sup> *Supra* note 18 at 33-34.

power arrangements? Such groups may be forced to distort their distinct claims by fitting them into the mould of ethnic disputes. It is such internal tensions that may make non-territorial federalism unstable.

However, it is undeniable that a simple rights-based approach will be inadequate in Sri Lanka, where minority rights claims have been closely intertwined with claims for political and representational autonomy. Professor Uyangoda observes that the "Tamil claim to the right of self-determination goes far beyond a cultural rights argument and indeed it centers on the question of access to state power".<sup>40</sup> Clearly, something more is needed.

**Eighth,** Professor Uyangoda notes that in Sri Lanka, "constitutional and institutional complexities are viewed with great suspicion".<sup>41</sup> In light of that comment, an exceptionally intricate attempt at layers of power sharing may be inappropriate – or at least, much more challenging than other forms of federalism. Indeed, Jans also remarks that personal federalism arrangements tend to be highly complex, and that "institutional complexity is prone to obscurity and jurisdictional disputes."<sup>42</sup> This comment reflects the reality that non-territorial federalism may grant a high degree of autonomy, but it will require an equally high degree of intergovernmental cooperation to resolve the many inevitable conflicts of jurisdiction. A true spirit of cooperation between federal entities will be a challenge for Sri Lanka in the immediately foreseeable future.

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<sup>40</sup> *Supra* note 2 at 9.

<sup>41</sup> *Supra* note 2 at 7.

<sup>42</sup> *Supra* note 26 at 221.

## Conclusion

For Sri Lanka, one main question arises: is non-territorial federalism really necessary? Generally, territorial federalism works well for larger minority groups who can form a majority within regions. Non-territorial federalism would work best for minority groups who do not form such majorities. Is this the case in Sri Lanka – are there “enough” small and dispersed minority groups to warrant the added complexity, cost, and potential jurisdictional conflicts of non-territorial federalism?

P. P. Devaraj, in his article, “Federal Framework – Need for Innovation”, points out that there are several non-territorial entities that require Constitutional attention. He suggests that the Sri Lankan Muslim community would be best served by a non-territorial solution:

*“Muslims form about 8% of the total population of the country. But of this only about 30% are from the North East. While about half of this 30% are in Amparai District.*

*The territorial aspect of this 15% has found considerable emphasis in the demand for separate unit while the right of the non-territorial majority has not received so much attention.”<sup>43</sup>*

He also goes on to point out that a federal solution for the Tamil-speaking people in Sri Lanka must recognize that most Tamils of Indian origin do not live in the northeast region of Sri Lanka:

*“Tamils in Sri Lanka belong to two distinct categories. In the official census classification these two categories are given as Sri Lankan Tamils and Indian Tamils.*

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<sup>43</sup> P.P. Devaraj, “Federal Framework – Need for Innovation” *Ceylon Daily News* (9 January 2003), online:

<[www.tamilcanadian.com/pageview.php?ID=1518&SID=52](http://www.tamilcanadian.com/pageview.php?ID=1518&SID=52)>.



*LTTE Leaders both Prabhakaran and Anton Balasingham have spoken of Sri Lankan Tamils whose origins traditional habitat are in the North-East of Sri Lanka. The Sri Lankan Tamils apart from having a contiguous territory have also a specific economic existence and consciousness of national sentiments.*

*The Indian Tamils constitute 7% or a little more of the total population of the country.*

*They are concentrated in the Central, Uva and Sabragamuwa Provinces. The largest concentration is in the Nuwara-Eliya District where they constitute more than 50% of the total population of the district. Western Province, Southern Province and North Western Province also have smaller concentration of Indian Tamils. There are also Indian Tamils in North-East.*

*According to 1981 census, the population of Indian Tamils in Nuwara-Eliya district was 247,371. The Muslim population in Ampara during 1981 was 116,148. In the Nuwara - Eliya AGA division alone there were about 125,000 Indian Tamils out of a total population of 175,000. These figures will be higher in 2003.*

*The history, geographical location, economic existence, and consciousness of national sentiment of the Indian Origin Tamils are distinct and different to these of the Sri Lankan Tamils.*

*When a new system of power sharing is designed how will the interests and aspirations of the 4th largest ethnic identity group, the Indian Tamils, be accommodated in an overall solution that meets their concerns also.*

*The designing of adequately suitable structures and power sharing arrangements for Indian Tamils are of critical importance.*"<sup>44</sup>

Assume, therefore, that Sri Lanka's new Constitution divides territories such that there is a merged Northeast Province. Will non-territorial federalism be extended only to the Muslim community in the east? Will it be extended to Tamils of Indian origin as a separate ethnic group, or will they fall under the Northeast Province's jurisdiction? Or will they receive no status as a federal entity at all, and simply have to rely on rights-based protection? Is it appropriate to offer only *asymmetric* non-territorial federalism – in other words, must all major ethnic groups have community-based federal units? If not, why not (i.e. why only the Muslim community)? If so, why only recognize three or four groups (Sinhalese, Sri Lankan Tamils, Indian Tamils, and Muslims)? Surely it must be illiberal to force individuals to self-identify according to a circumscribed list of "legitimized" political identities? In what circumstances is a federal power sharing arrangement the answer to minority ethnic group concerns, and in what circumstances is rights-based protection the more appropriate response? Put differently, when do we stop federalising? Which groups are "important enough" to receive autonomy in a federal entity, and which groups are not so important?

Despite these logistical questions, non-territorial federalism still seems like a plausible option for federalisation. In Nepal, for example, some have proposed non-territorial federalism to protect the rights of *dalit*, *adibase-janajati* without traditional dominant territories, Muslims, and even women.<sup>45</sup> Analysts of the Georgian-Abkhazian conflict have also looked to the Belgian model for guidance.<sup>46</sup>

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<sup>44</sup> *Ibid.*

<sup>45</sup> M. Lawoti, "Inclusive Democratic Political Institutions for Nepal" (April 2003), online: Iowa State University <[www.public.iastate.edu/~shykeci/Mahendra-2.doc](http://www.public.iastate.edu/~shykeci/Mahendra-2.doc)>.

<sup>46</sup> See, for example, Jans, *supra* note 26 and Khidasheli, *supra* note 5.

In Sri Lanka, a country which is shaping its future, it is well worth pioneering a dialogue and investigation into the idea of non-territorial solutions to ethnic conflicts. Non-territorial federalism is a new idea in the global arena, rarely practiced and with dubious success. Yet it is a solution that captures the imagination and may be one more useful tool for a peaceful and sustainable resolution of Sri Lanka's ethnic conflict.