

Chapter IV

FEDERALISM: MYTHS AND REALITIES

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The agreement reached between the Government of Sri Lanka and the LTTE to explore federalism and internal self-determination within a united Sri Lanka as the basis of a political solution to the ethnic conflict in late 2002 raised hopes for a durable peace in the island. It helped allay the concerns of the sceptics that the LTTE was a maximalist organization which was not interested in accommodation and compromise. The breakdown in the negotiations since April 2003 may have rekindled the views of the sceptics, but the constitutional debate in the country in the past one and a half years has focused on federalism which is in itself a significant development. Many of us have argued for years that a solution must be based on federal lines.

The evolution of Sri Lanka's ethnic conflict can be likened to a snowball rolling down a hill. At the beginning it is small, but as time passes, it develops a momentum of its own, becomes larger and more complex, absorbs other elements, thereby making it more difficult to respond to. Sri Lanka's ethnic conflict has evolved from one based on questions of representation, grievances based on discrimination and language to a demand for decentralization, then to autonomy and devolution. More recently the focus has been on Tamil aspirations including nationhood, self-determination and confederation. The response of Sri Lankan governments has often been too little too late. If the Bandaranaike-Chelvanayakam Pact had been implemented in 1957 we might have averted the bloody and traumatic civil war that has plagued this country for many years. The Draft Constitution of August 2000 might have actually constituted the basis for a political solution to the conflict if it were introduced in the early 1990s.

Furthermore every initiative that fails or is reneged upon, every set of talks and negotiations that collapses, creates its own dynamic of

betrayal, distrust and suspicion that makes the next venture or round of talks that much more difficult. So in terms of *process*, the peace initiative in 2002-3 had to contend with the failed negotiations of 1994-5. In terms of *substance*, the failure of the Thirteenth Amendment to the Constitution will inevitably provoke a demand for cast iron guarantees to prevent central encroachment on devolved powers in any future package of constitutional proposals. It seems almost certain that this will require moving beyond the frontiers of a unitary state.

One of the contentious issues that surfaced in the constitution reform project of 1995-2000 was the courageous decision of the drafters to delete the provision/label in the constitution that Sri Lanka is a unitary state. There remain widespread misconceptions about the terms 'unitary' and 'federal'. The terms united ("eksath") and unitary ("ekeeya") are often used interchangeably particularly in the Sinhala language. Therefore, those who advocate a departure from the unitary model are perceived as advocates of division and secession. The fact that the campaign for federalism is identified so closely with Tamil political demands exacerbates the problem. Another concern is that the critics of federalism fear that an unprincipled political deal with the LTTE will lead to a federal arrangement but with a virtual LTTE dictatorship in the northeast of the country. This will, of course, not be a federal solution for, as we shall see, federalism, pluralism and democracy are inextricably intertwined.

Federalism in Ceylon's Political Discourse

It is significant to note that long before Tamil political leaders advocated federalism, the young S.W.R.D. Bandaranaike in the mid 1920s and the Kandyan Sinhalese representatives before the Donoughmore Commission in the late 1920s, were advocates of a federal Sri Lanka. The Kandyan Sinhalese proposed a federal Ceylon with 3 provinces including a province for the north east. In fact it is possible to argue that it was the Kandyan Sinhalese and not the Ceylon Tamils who were not only the champions of a federal Ceylon, but also the merger of the north and east. The Kandyan Sinhalese in fact viewed themselves as a nation and many of the documents of the organizations

they established to advance their cause used language and arguments similar to Tamil nationalists and Tamil political groups in the more recent past. They were concerned about the influx of low-country Sinhalese to the Kandyan region. In a memorandum to the Donoughmore Commission, the newly created Kandyan National Assembly consisting of many leaders who had moved away from the Ceylon National Congress, declared:

"Ours is not a communal claim or a claim for the aggrandisement of a few: it is a claim of a nation to live its own life and realize its own destiny....We suggest the creation of a federal state as in the United States of America... A federal system ...will enable the respective nationals of the several states to prevent further inroads into their territories and to build up their own nationality".¹

The decision to insert the unitary label into the First Republican Constitution of 1972 seems almost perverse in that it was a direct affront to Tamil aspirations at the time. The Tamil political leadership attempted to address the Tamil people's grievances through the Bandaranaike-Chelvanayakam and Senanayake-Chelvanayakam Pacts both of which included substantial devolution of power. The Federal Party, the main Tamil party at the time, campaigned at the 1970 General election on a platform of Federalism. Its manifesto declared,

The Tamil-speaking people of Ceylon also believe that the Federal-type of Constitution that would enable them to look after their own affairs alone would safeguard them from total extinction. Only under such a Constitution could the Tamil speaking people of this country live in dignity and with our birthright to independence as equals with our Sinhala brethren.

¹ See Michael Roberts, *Problems of Collective Identity in a Multi-Ethnic Society: Sectional Nationalism vs Ceylonese Nationalism, 1900-1940 in Sri Lanka. Collective Identities Revisited*, Michael Roberts ed.

Since many Tamils felt that the Chelvanayakam strategy of peaceful agitation, Gandhian style satyagraha and democratic political engagement had failed, some rebels contested the 1970 parliamentary election as independents on a separatist platform. The Federal Party stood firm against such candidates. Significantly the manifesto included a categorical assertion against separation

It is our firm conviction that division of the country in any form would be beneficial neither to the country nor the Tamil speaking people. Hence we appeal to the Tamil speaking people not to lend their support to any political movement that advocates the bifurcation of the country.

There was no overwhelming need to introduce the unitary label. The Soulbury Constitution contained no label, which is the practice in most constitutions in the democratic world. It amounted to a slap in the face of the Tamil political leadership. To make matters worse, it was introduced as Basic Resolution No. 2, very early in the proceedings of the Constituent Assembly.

Basic Resolution No. 2 was introduced by Dr. Colvin R. de Silva who stated that "from the time that we can remember" Sri Lanka had been a unitary state. He defended the introduction of the unitary label on the grounds that it was essential for the well being of the country as a whole. The main criticism of the proposal was made by V. Dharmalingam, M.P. for Uduvil. He stressed that a Constitution should be based on the agreement of all the communities in the country, a consensus document and warned against the Sinhala people imposing a constitution on the Tamil people. He then presented the classic defence of a federal constitution; that it was more appropriate for a multi-ethnic, plural society. Dharmalingam argued that the Ilankai Tamil Arasu Kachchi wanted the establishment of a federal state in Ceylon, not to divide Ceylon, but to achieve unity in diversity. He predicted that ultimately Ceylon will have to be a federal state.

Responding to Dharmalingam's contention that there was communal amity in countries such as the USSR and Yugoslavia, Sarath Muttetuwegama, a Communist Party M.P. stated that the real

reason was not federalism, but rather socialism, where the means of production, distribution and exchange belonged to the people of those countries. Ratne Deshapriya Senanayake declared that it was only under a unitary state that a socialist national development plan could be implemented effectively.⁵ While there were defenders of the unitary postulate for Sinhalese nationalist reasons, it is interesting to note the defence was for reasons motivated by a socialist ideological perspective.

The unitary postulate was reinforced by Section 45 (1) of the Constitution which stated that:

The National State Assembly may not abdicate, delegate or in any manner alienate its legislative power, nor may it set up an authority with any legislative power other than the power to make subordinate laws.

This provision too, reproduced in the Constitution of 1978, continued to pose problems. The Sinhala Commission and other Sinhalese nationalist groups bestowed on it the status of the basic feature of the Constitution, which provision was, therefore, they argued, completely unalterable!

The introduction of the unitarianism and the exaltation of the language and religion of the majority in Sri Lanka's first autochthonous Constitution must surely be pivotal landmarks in the slide to the disintegration of Sri Lanka. The concentration of power in a single institution and the weakening of the traditional rival sources of political power, casting notions like "brakes", "restraints", "checks and balances" in a negative light while embracing the instrumental use of a Constitution, must also be seen as initiating the dangerous trend of executive convenience which has undermined good governance, people responsive governance and the rule of law. Sri Lanka's socialist forces were primarily responsible for the introduction of these corrosive developments through the adoption of the Constitution of 1972.

It was, therefore, not surprising that the campaign for separation commenced soon after the promulgation of the First Republican

Constitution of 1972. To many Tamil youth the campaign led by democratic political leaders for equality and political autonomy had not only failed, but the constitutional exaltation of the language and religion of the majority coupled with the repeal of minority safeguards introduced in the Independence Constitution, and the express repudiation of federalism in the supreme law of the land, had, in fact, made the situation worse.

Soon after the promulgation of the new Constitution several Tamil political groups resolved to close ranks and form the Tamil United Front. The demand for a separate state gathered momentum. The Tamil United Front changed its name to the Tamil United Liberation Front (TULF) in 1975 and at its first convention in 1976 under the chairmanship of Chelvanayakam, ratified the Vaddukoddai Resolution. The resolution accused the United Front Government of callously ignoring the "last attempt ...to win constitutional recognition of the Tamil nation without jeopardizing the unity of the country" and called on the Tamil nation and the Tamil youth to "throw themselves fully in the scared fight for freedom and to flinch not till the goal of a sovereign socialist state of Tamil Eelam is reached." The militant phase of the Tamil nationalist struggle commenced at about this time.

Another opportunity for a political solution to the conflict was squandered when the United National Party led by J.R. Jayewardene won the parliamentary elections of 1977 with a massive parliamentary majority and claimed a mandate to enact a new Constitution. Though Jayewardene was willing to countenance radical reforms such as the introduction of an executive presidential system and proportional representation in place of the British alternatives which were part of the country's first two constitutions, the Second Republican Constitution not only reproduced the unitary label, but elevated it to the status of a specially entrenched provision which could, therefore, not be amended by a two thirds majority vote in Parliament, but, in addition, required the approval of the people at a referendum.

Federalism continued to be an essentially "Tamil political demand" until the mid 1980s when a political movement called the Council for Liberal Democracy (CLD), consisting of persons of all ethnic groups

called for the adoption of a federal constitution as the basis for a political solution to the ethnic conflict. Thereafter, in 1987, several of the leaders of the CLD formed a political party, the Liberal Party, which called for a federal Constitution with nine provinces. Both the CLD and the Liberal Party highlighted the importance of federalism, not only as the basis for a solution to the ethnic conflict, but also as an antidote to the political authoritarianism that it stated had increased in the country since 1972. In a statement issued in 1986, for example the Secretary General of the CLD, Chanaka Amaratunga, cited Lord Acton's defence of federalism-

"Of all the checks on democracy, federation has been the most efficacious and the most congenial...The federal system limits and restrains the sovereign power by dividing it, and by assigning to Government only certainly defined rights. It is the only method of curbing not only the majority but the power of the whole people, and it affords the strongest basis for a second chamber, which has been found the essential security for freedom in every true democracy."

In 1991, the report of the Parliamentary Select Committee appointed "to recommend ways and means of achieving peace and political stability in the country" chaired by the then opposition M.P. Mr. Mangala Moonesinghe, considered the federal idea seriously. While the committee was unanimous in recommending greater devolution of power than that provided for in the 13th Amendment to the Constitution, a majority of the Committee agreed that the devolution of power "may be on lines similar to those found in the Indian Constitution," widely interpreted to mean a cautious advocacy of a quasi-federal constitutional arrangement.

Devolution of Power under the present Constitution

Indian pressure prompted the signing of the Indo-Lanka Accord in 1987, under which the Government of Sri Lanka undertook to introduce provincial councils with devolved powers within the

framework of the unitary constitution. Several constitutional challenges were mounted in the Supreme Court to the proposed Thirteenth Amendment to the Constitution on the ground that the proposed system of devolution undermined the unitary character of the constitution and required not only a two-thirds majority vote, but also the approval of the People at a referendum. The Jayewardene government could easily muster a two-thirds majority in Parliament as it had postponed the parliamentary elections scheduled for 1982, thereby retaining its massive parliamentary majority won in 1977. It had also become increasingly authoritarian and was able to use its power to withstand the legal challenge, avoiding the need for a referendum, and pass the amendment in Parliament with the requisite majority.² It is important to note however that four judges of the Supreme Court held that the provincial council system violated the unitary character of the Constitution and therefore needed the approval of the People at a Referendum in addition to a two thirds majority vote in Parliament.

The provincial council system which was introduced in 1987, however, failed to introduce substantial devolution of power. The provincial legislatures and executives have failed to inspire popular confidence and indeed have contributed to widespread disenchantment with the system and, as a result, the concept of devolution as well.

The main deficiencies of the Thirteenth Amendment to the Constitution are

- a) Provincial Councils do not have complete control over any subject whatsoever;
- b) The Provinces have no political influence at the centre;
- c) Partly due to b) above, the centre has taken devolved political powers back to the centre;

² See *In Re the Thirteenth Amendment to the Constitution* (1987) 2 SLR 312.

- d) The Constitution of Sri Lanka is not supreme. There can be (and indeed there are) numerous laws which violate the Constitution, including constitutional provisions on devolution of power.
- e) Provincial Councils can be abolished, or their powers curtailed, by the central Parliament acting unilaterally.
- f) In important areas such as health and education, the central executive too can recentralize power very easily.

The way to overcome the glaring deficiencies in the present Provincial Council system is to introduce a scheme of devolution of power which includes the five features described above as the essence of Federalism. Substantial devolution of power which is secure, guaranteed, which provides for a remedy in situations where such powers are exceeded or undermined, and which ensures that provincial/regional interests are represented at the centre and that the centre and provinces/regions do not have an adversarial relationship with each other, requires the incorporation of these basic features of federalism.

After the failure of the Thirteenth Amendment, it seems unreasonable to expect the Tamil political leadership and minority parties to accept a system of devolution that can be unilaterally withdrawn by a Parliament which does not even include a second chamber to represent regional concerns. Those who want the Constitution to retain the unitary label must realise the practical implications of what they advocate.

They should also remember that the unity of the country was perhaps best protected when the Constitution did not expressly provide for a unitary form of government and that paradoxically the seeds for a separatist movement were sown soon after the introduction of the 1972 Constitution which expressly declared that Sri Lanka is a unitary state.

Under a federal system, sovereignty vests in the People. The People's sovereignty is exercised by Parliament and by Regional/Provincial Councils. Under a Federal form of government, Parliament can be

given wide, sweeping powers to respond in situations which pose a threat to the unity, sovereignty and territorial integrity of the country. Parliament does not have to be sovereign. The sovereignty of Parliament is an obsolete British constitutional doctrine which has been incorporated in a handful of countries and today rejected in most of them, including the country of its origin! It is somewhat quaint that the Sinhala Nationalist forces are so besotted by this British doctrine, which, incidentally, was not a feature of our constitutional jurisprudence either from 1948-1972 or from 1978 to date! In Sri Lanka the doctrine of parliamentary sovereignty existed, and that too by implication, only between 1972 and 1978.

A Confederal Proposal

Maximum devolution within a united country seemed to be the philosophy behind a proposal submitted both to President Kumaratunga and V. Prabakaran, Leader of the LTTE on 20 December 1995. The framework document, as it was called, was prepared by a British firm of solicitors, Bates, Wells and Braithwaite on the request of the Sri Lanka Peace Support Group which consisted of Tamil academics, professionals and clergy from the international community.

The proposal basically provided for a confederation, the Union of Ceylon, consisting of two internally autonomous states, one for the primarily Tamil area (the north east of the country) and the other for the mainly Sinhalese areas. Apart from foreign affairs, external defence and security, monetary policy and currency, maintenance of relations between the states and a few other matters, each state would have the power to adopt its own constitution which would have to endorse certain core principles set out in the Preamble to the Constitution and entrenched clauses on human rights, while setting out its own structure of government, having its own Prime Minister and exercising complete autonomy in all other areas. It provided for a Central Council of the Union to exercise power with respect to the reserved subjects and to provide a channel of communication and

coordination between the two states consisting of an equal number of representatives from the states. The Council would appoint a President and Deputy President of the Union from amongst its members for a specified time with "agreed alternation" between representatives of each state.

The proposal provided for a Constitutional Court consisting of an equal number of judges from each state and a suggestion that one or more non-Ceylonese judges of international repute be included as well. The main function of the Court would be to interpret the Constitution and to ensure state compliance with the provisions of the preamble and the human rights provisions of the Constitution.

The proposal ended with a somewhat naïve and impractical provision titled 'Referendum and Guarantees' which provided for each state to conduct a referendum if it wished "to modify the powers of the Union affecting that State." It also declared that the implementation of the Constitution and the maintenance of peace between the States would be guaranteed by the United Nations! The proposal had several ambiguous provisions which suggested that the two states were, indeed, independent sovereign entities. A provision in the Preamble for instance stated that relations between the two States would be governed in accordance with "generally applicable principles of international law and justice." The provision on the referendum might have been naïve or an indirect way of including a unilateral right to secession, which will make it extremely difficult for the majority of Sinhalese to accept.

It was in this context- on the one hand, a centralised Constitution with a powerful Executive Presidency, an entrenched unitary label with a devolved system introduced much later primarily due to political pressure rather than commitment to principle, and on the other, demands for recognition of traditional homeland, nationhood, self-determination and a two-nation confederation, that President Kumaratunga, elected as President in 1994 on a platform of peace, initiated a process of fundamental constitutional reform. When negotiations with the Tamil Tigers collapsed in 1995 she decided to press ahead with proposals to address Tamil grievances and

aspirations. Several drafts of the proposals were presented and a major public education campaign was launched to persuade the majority Sinhalese in particular of the importance of a new constitution with enhanced devolution of power. The Devolution Proposals of August 1995 contained a set of general principles that suggested wide powers though when a more comprehensive second version was released in the Legal Draft of January 1996, the powers seemed less. The next significant document was the Draft Constitutional proposals of March 1997, where the provisions on devolution were strengthened, only to be whittled down again with the presentation of the Draft Constitution Bill of August 2000.

All four documents however proposed the deletion of the unitary label in the Constitution and in that respect were significant. Not surprisingly this proved to be the most controversial reform and met with strong opposition from Sinhalese majority groups who saw the term unitary as synonymous with united, federalism as a stepping stone to secession and who given the island's history and geography have often been termed a majority with a minority complex. Since the Tamil Tigers were opposed to the new Constitution as it was not drafted in consultation with them and also because they would have viewed the proposed devolution arrangements as inadequate, the Kumaratunga Government could not sell the new Constitution as one that would facilitate an effective peace. The Government therefore felt compelled to withdraw the Constitution Bill.

The Constitutional Debate and the Peace Process 2001-2003

The significance of the Oslo Agreement referred to at the outset is because it clarifies the positions of the two parties to the negotiations and affirms the parameters of a negotiated constitutional settlement-maximum autonomy and recognition of Tamil nationalism but within a united country and with appropriate safeguards for the minorities in the Tamil majority areas. The promise of Oslo was dimmed by subsequent developments in the negotiations and on the ground. The talks collapsed at a time when there was pressure to develop a roadmap to realise the Oslo formula. Both sides had doubts about the bona fides of the other. For example, the Tamil Tigers were angered

by unilateral initiatives to obtain international assistance in the wake of the peace process and delays in the restoration of normalcy on the ground in conflict ravaged areas in the north and east. Many Sinhalese in the rest of the country, on the other hand, pointed to the assassination of Tamil political leaders of rival groups and other human rights violations in support of the claim that the Tigers could not be trusted and that a federal solution would not be viable without commitment to basic democratic and pluralistic values.

Since the collapse of the direct negotiations in April 2003, the focus of attention shifted to interim arrangements to be put in place while the negotiations on a long term political solution take place. Attempts to recommence negotiations later in the year failed as a power struggle between President Kumaratunga and Prime Minister Wickremasinghe who spearheaded the peace process since his election in 2001 culminated in the dissolution of Parliament and the third parliamentary elections in four years scheduled for April 2004. One of the key issues at the election was the peace process and the allegation made by several groups contesting the election that the Prime Minister and his party had conceded too much to the Tamil Tigers.

Many of the fears and misconceptions about federalism in Sri Lanka were based on a lack of understanding of the concept. While there is no clear and fixed definition of the term "federal" it is possible to draw a distinction between a unitary constitution and a federal one.

The Essence of a Unitary Constitution

A unitary form of government is one in which all legislative and executive authority is vested in a single legislature and a single government. The Latin "unus" means one. It has also been described as one in which

"the habitual exercise of supreme legislative authority is carried out by one central power."

The single, central law making authority MAY, if it so desires, delegate powers to subsidiary, subordinate bodies. If this is done it is done from the plenitude of its own powers. Since the central law making authority gives powers to the subsidiary bodies, it can also withdraw, curtail or change these powers UNILATERALLY. As C.F Strong has observed in Modern Political Constitutions,

"It does not mean the absence of subsidiary law-making bodies, but it does mean that they exist and can be abolished at the discretion of the central authority."

The Essence of a Federal Constitution

*"A system for decision making is federalist if it is an entity composed of territorially defined groups, each of which enjoys relatively high autonomy and which together, participate in an ordered and permanent way in the formation of the central entity's will."*³

Max Frenkel's definition cited above highlights the importance of several key features of a federal form of government: autonomy; a division of powers between the centre and provinces/regions/states; the supremacy of the Constitution (for the ordered way) and provincial/regional representation at the centre.

There are several characteristics which can be identified as the basic features of a federal form of government. Ronald Watts, Professor of Politics at Queen's University, Canada, has surveyed several scholarly writings on Federalism and identified the following attributes as the basic features of Federalism⁴:

³ Max Frenkel, Federal Theory

⁴ See Ronald Watts, Contemporary Views on Federalism in Evaluating Federal Systems Bertus de Villiers (ed).

1. *Two orders of government each acting directly on their citizens, a formal distribution of legislative and executive authority and allocation of revenue resources between the two orders of government, including some areas of autonomy for each order; in short, a clear cut division of powers;*
2. *Provision for the representation of regional views within the federal (central) policy making institutions; this could be in the form of provinces/regions electing a certain number of members to a second chamber of Parliament.*
3. *A written supreme constitution not unilaterally amendable and requiring the consent of all or a majority of the constituent units; since a federal constitution is deemed to be a compact or covenant between the centre and the regions/provinces, amendments require the consent of both.*
4. *An umpire to rule on disputes between the centre and the provinces/regions; the umpire is invariably the judiciary.*
5. *Processes to facilitate relations between the centre and the provinces/regions where responsibilities are shared;*

These five essential features of a federal form of government ensure that there is substantial devolution of power to provincial/regional units and that such devolved power cannot be undermined or unilaterally reduced or abolished. Federalism (from the Latin "foedus", a compact, covenant, or agreement) which seeks to combine self rule and shared rule is considered a partnership between the two orders of government.

The Myth about Establishing Federalism

Another myth about federalism is that a federal form of government is always established by previously independent or sovereign states coming together to constitute a new state. This myth, coupled with the provision that Sri Lanka shall be a Union of Regions has unfortunately created the impression that under the Legal Draft of January 1996 or the Draft Constitution of 2000, Sri Lanka will be divided into quasi-

independent regions which will thereafter enter into a federal arrangement. There is therefore an implicit division of the country or at least an implied recognition of independent regions.

Mr. Batty Weerakoon M.P. in his writings on the subject, not only swallowed this myth, but helped to popularise it as well. He assumed that there is just one way to establish a federal form of government ;i.e. integrative federalism. In his article, The Federal Concept in Sri Lanka⁵, he declares:

"What is common to all these is the fact that it is the states that created their own respective federal units. The states existed as a precedent fact..."

"The reality is that in the absence of the precedent fact, which is the existence of viable units which together can constitute the federal state, federalism does not offer itself as an available solution to the country's ethnic conflict."

Constitutional scholars recognise that there are TWO methods by which a federal form of government may be established. The more common method known as Integrative Federalism is where previously independent states integrate to form a new political entity. The second method known as Devolutionary Federalism is where a country with a previously unitary form of government opts to change to a federal system. As Patrick Peeters of the University of Leuven, Belgium, has explained,

"Integrative Federalism refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities."

"Devolutionary Federalism, on the contrary, refers to a constitutional order that redistributes the powers of a previously unitary state among its component entities; these

⁵ See Christian Worker, Last Quarter, 1996

entities obtain an autonomous status within their fields of responsibility. The principal goal is to organise diversity within unity".⁶

Belgium, Spain and Nigeria are examples of countries which have adopted Devolutionary Federalism and moved from unitary to federal forms of government. The South African Constitution of 1996 has moved in that direction too.

The argument that Sri Lanka has to be first divided into autonomous regions which then amalgamate in order to adopt a federal form of government is therefore incorrect. The problem, however, is that there is an erroneous perception that this has to be done. Therefore the phrase "union of regions" has created as many problems as the term "federal" might have done.

Mr. Weerakoon's two articles were predicated upon basic assumptions that were completely erroneous. Mr. Weerakoon in his article The Unitary State and Devolution⁷ referred to a group of academics from the University of Colombo who argued that substantial devolution of power could not take place within the shackles of a unitary state.⁸ He declared

"Closer examination, however, exposes its fallaciousness. To allow it to pass unchallenged is dangerous. The obverse of it is that devolution of power if effected substantially in a unitary state will change the unitary nature of the state."

This statement is perfectly correct. The argument of the group of academics and the obverse of their thesis are both valid. A country with a unitary form of government, can, by introducing substantial devolution of power change its form of government to a federal one. Federalism is all about substantial devolution of power. Ultimately, it is

⁶ See Patrick Peeters, **Federalism: A Comparative Perspective- Belgium transforms from a Unitary to a Federal State**

⁷ See Christian Worker, Last Quarter 1996.

⁸ The author of this article is a member of the group.

the extent of power that the component units of a state have, that determines whether a state has a unitary or federal form of government.

Mr. Weerakoon then proceeded to make the astounding claim that

"the principle that is operative in the exercise of power distribution within a federal arrangement is not devolution but delegation."

He suggested that in the United States, since the states "delegated" powers to the centre, a state could secede but that secession had not taken place because of political compromise. A state had no right to secede in the United States, Canada and most countries with federal forms of government. It is absurd to argue that in all countries with federal forms of government the states/regions delegated powers to the centre. Delegation implies that the powers given can unilaterally be rescinded. This is not the case in most "federal states".

The preamble to the Australian Constitution describes the federation as "indissoluble."⁹ After the American Civil War, the Supreme Court declared that

*"the Constitution, in all its provisions, looks to an indestructible union composed of indestructible states"*¹⁰

While the Canadian Constitution like the American, is silent on the issue of secession, constitutional scholars are in general agreement that unilateral secession of a province would not be constitutionally valid.¹¹ This position has been confirmed by the Canadian Supreme Court in its determination on the Reference on the Secession of Quebec¹².

In its landmark decision, the Supreme Court of Canada held that even if a majority of the people of Quebec voted 'Yes' in a referendum on

⁹ See the Preamble to the Australian Constitution.

¹⁰ *Texas v White* (1868) 74 U.S.700 at 725.

¹¹ See Peter Hogg, *Constitutional Law of Canada*, (1992) p 126.

¹² Reference Re Secession of Quebec 1998 2 S.C.R. 217.

secession, this would not entitle the province of Quebec to secede unilaterally. The federal idea with its emphasis on partnership is essentially incompatible with the notion of unilateral action. The Supreme Court did, however, declare that if there was a clear vote on a clear question, in favour of secession, then the Federal Government and the other provinces of Canada would be obliged to negotiate this matter with Quebec. While the Court declined to clarify what it meant by the adjective 'clear' it significantly did set out parameters within which the negotiations should be conducted. These were the so-called foundational principles of Federalism, Democracy, Constitutionalism and the Rule of Law and Respect for Minorities. It is interesting to contrast the Canadian approach with the Sri Lankan one. In Sri Lanka, given the controversial Sixth amendment to the Constitution, it would not be possible to even advocate peacefully, the establishment of a separate state, let alone conduct a referendum on the issue either islandwide or in a province. In Canada, such a prohibition would be unthinkable. There are other mechanisms, more justified and democratic to deal with the issue of exit from a federation.

The Constitutions of some former communist countries in Central and Eastern Europe which had a nominal commitment to a federal form of government, did contain a nominal commitment to the right to secede. Mr. Weerakoon made the mistake of assuming that such commitments exist in all constitutions which incorporate a federal form of government.

Federal constitutions may or may not include the right of a state to secede. Delegation of power from either the centre to the states or the states to the centre, is incompatible with basic principles of federalism. Federal forms of government require power sharing which cannot be amended or withdrawn unilaterally; in short, power sharing with greater security and guarantees.

The logic of Batty Weerakoon's argument was that a federal form of government could not be introduced in Sri Lanka. He argued that the precedent fact of independent or units "capable of making a credible claim even to relatively independent viability" was a *sine qua non* for federalism and did not exist in Sri Lanka. In other words, Sri Lanka had

to be first divided into autonomous, independent regions which thereafter, amalgamated and delegated power to the centre in order to adopt a federal form of government.

Apart from being wrong because it completely ignores Devolutionary Federalism, and because it attaches too much importance to process as opposed to substance, which, as the five features outlined above, is the essence of federalism, the Weerakoon thesis supports the contention that federalism results in the break up of the country and includes the right to secession. It is therefore not surprising that the phrase "union of regions" which was suggested for incorporation in earlier versions of the Draft Constitution 2000 has created as many problems as the term "federal" might have done.

From the discussion above it is clear that

- a) A State with a unitary form of government can through the introduction of substantial devolution of power change to a state with a federal form of government.
- b) Though the draft constitution of August 2000 deleted the label "unitary", it did not necessarily introduce a federal form of government as a number of basic federal features had not been incorporated in the document.

The Absence of a Federal Political Culture

It is ironic that both the Sinhalese nationalists and the Tamil nationalists adopt a centralist, assimilation model in the case of the country as a whole and the Tamil "homeland" respectively. Many Sinhalese Buddhists claim that the island is a Sinhala Buddhist nation by virtue of the fact that they constitute the majority community in the country. They would accept the fact that the minorities possess rights, possibly even equal rights, but see no contradiction in asserting that the country is Sinhala Buddhist in terms of its identity. Similarly, Tamil nationalists for a time referred to the right of the Tamil speaking people to self-determination, thereby collapsing the significant distinctions that exist between the

Tamil and Muslim communities in the eastern part of the north eastern region. In October 2003, the Liberation Tigers of Tamil Eelam which from its inception opposed the majoritarian, unitary, centralised autochthonous Constitutions of Sri Lanka adopted in 1972 and 1978, proposed an Interim Self Governing Authority (ISGA) for the north eastern region of Sri Lanka which it claims as a Tamil homeland, which in turn was majoritarian, Unitarian, highly centralised, lacked basic features of constitutionalism, and included hardly any safeguards for regional minorities including the Sinhalese and Muslim communities.

The two most powerful and popular critiques of multi-nation federalism in Sri Lanka are the statist and communitarian critiques. The former is more popular and populist and lies at the heart of the present opposition to federal type political solutions to the island's ethnic conflict from the majority Sinhalese community. Sri Lankan statisticians believe that the Tamil project has always been the establishment of a separate, independent nation state and this suspicion is heightened by what is often referred to as the "majority with a minority complex" syndrome. Though a majority in the island, the Sinhalese are acutely conscious of the fact that their language is only used in Sri Lanka, whereas the Tamil language is used in many other countries including Malaysia, Singapore, South Africa and of course, in Tamilnadu to the north. The religion of a majority of the Sinhalese Theravada Buddhism it is believed is practised in its pristine form in Sri Lanka. An island mentality, a history of invasions from neighbouring India, and occupation by three waves of colonisers, the Portuguese, the Dutch and the British, provide a fertile breeding ground for the statist critique of multinational federalism.

Federalists are therefore seen as apologists for secession either through naïveté or design. They are often branded as traitors by Sinhalese statisticians who believe that the preservation of the unitary nation state and the territorial integrity of the country is the prime obligation of all citizens. Federalism is seen as a stepping-stone to secession as the control of the centre is weakened, sovereignty is divided and ultimately the country is divided. When the minority

group espousing autonomy has previously espoused separation, and done so in strong nationalist terms, stressing only the self rule rather than the shared rule aspects of federalism, statist arguments by critics of federalism are fortified.

The communitarian critique of multination federalism in Sri Lanka is less widespread and more sophisticated. In intellectual circles, there is the concern that the emphasis on the particular, the ethnic group, the region, will undermine the spirit of national unity and common identity. Many Tamils would counter by charging that the common Sri Lankan identity, if it ever did exist was designed in majoritarian, assimilationist terms which never embraced the pluralism and diversity of the country. Among federalists in Sri Lanka, divisions too have emerged in recent years as they respond to the strong nationalist project of the LTTE. Liberal federalists tend to emphasise the need to focus on the shared rule dimension of federalism, pluralism, individual rights and the need to work at the creation of a new overarching rainbow nation vision for a new Sri Lanka. This would not preclude the recognition of asymmetrical federal arrangements to address Tamil nationalism and demands for self-determination. Other federalists who might be termed social democratic federalists or confederalists would not emphasise the significance of shared rule as much and might even be sympathetic with the arguments of Tamil nationalists that in a struggle for national liberation collective rights trump individual rights.

Conclusion

What are the prospects for a federal Sri Lanka/Ceylon? There are doubts as to whether both the Government of Sri Lanka and the Tamil Tigers can internalise the federal idea and spirit. The Government of Sri Lanka and the political leadership, parties and elites, including the bureaucracy and judiciary, have become so accustomed to a highly centralised constitutional structure and political culture, that power sharing does not come easily to them. The Tamil Tigers given their military background and their poor record on human rights, democracy and the tolerance of dissent, will face challenges in adapting to the values of pluralism and diversity

and the principle of power sharing which are inextricably linked to the federal idea.

Furthermore, though both the parties to the conflict have paid lip service to the federal idea, the two sides seem to have very different conceptions of the federal idea for the country. The Government of Sri Lanka and the majority Sinhalese might have moved towards the acceptance of a somewhat orthodox, federal model combining shared rule and self rule, despite strong opposition from a small and vocal minority within the Sinhala community. The Tamil Tigers' conception of federalism is more confederal in nature and is probably similar to the Braithwaite proposals outlined above. It is also motivated by a strong nationalist discourse. Such a model will not only be strongly opposed by the majority community, but also the Muslim community. It will also undermine the efforts of Sri Lankan federalists to promote the federal idea as the best way of protecting unity in diversity and, therefore, ultimately, the territorial integrity and unity of the island. Perhaps the logical compromise or accommodation between these two positions- orthodox federalism and two nation confederation is a new Constitution with a fewer number of regions – five instead of the present nine- and asymmetrical federalism with special arrangements, Quebec style, for the northeast region.

Such a federal constitution will also have the value added feature as it were of preventing a concentration of power in a single political institution, thereby acting as a check on authoritarianism. There can be no federalism without constitutionalism and democracy. A federal constitution for Sri Lanka must also include strong constitutional safeguards for human rights, pluralism, the rights of regional minorities and must also emphasis the shared rule dimension of federalism. While federalism is obviously a more complex system of government, it may, in the Sri Lankan context, if it is not too little too late, offer the only basis for a political solution to the ethnic conflict; a solution based on justice, peace and dignity.

The challenge is, therefore, formidable. The main political actors– the SLFP, UNP and LTTE possess instincts that are essentially anti-

federal though they may be open to exploring federal constitutional arrangements. Sinhalese nationalist groups such as the JVP and the JHU remain steadfastly opposed to any departure from the unitary Constitution. However, federalism seems the only constitutional/political model which has the capacity to address reasonable Tamil aspirations without prejudicing the rights of the other major communities, within a united country.