

INDIA- SRI LANKA CONSULTATION ON DEVOLUTION

Papers by

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COMPARATIVE FEDERALISM

The International Centre for Ethnic Studies has been engaged in a study of international comparative federalism. This monograph is the outcome of one part of this ongoing project on federalism.

The objectives of the project are to examine the distinguishing characteristics of ethnically based federalism, the utility of the federal device in managing ethnic tensions and the new challenges and demands faced by federal forms of devolution in plural societies.

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On

DEVOLUTION

**A.G. Noorani
Nirmal Mukarji**

With Comments by
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Held on
March 4, 1995

at the
BMICH Colombo

International Centre for Ethnic Studies
Colombo

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Powers of the Governor with regard to Centre-State Relations

Ramakrishna Hegde

May I offer my appreciation of the inaugural speech delivered by the Hon. Minister. It was remarkable not only for his lucidity but also for the insight that the Minister had into his subject. And the five factors that he has enumerated have relevance even in the Indian context. Indian federalism has been going through, if I may so call it, continuous convulsions. There have been discussions and debates and serious arguments on both sides. But ultimately the government of India, particularly the ruling party in the centre, has not been faithful to the constitution, particularly in regard to the devolution aspects.

There is perhaps no other provision of the constitution of India which received closer attention or a more detailed scrutiny in the Constituent Assembly than the ones which established the office of the Governor for each state of the Indian Union and defined the manner of his appointment and his functions and duties. These provisions received particular attention from the great leaders of the freedom movement, Pandit Jawarhalal Nehru, Sardar Vallabhai Patel, and was the subject of detailed exposition in the Assembly by the Chairman of the Drafting Committee, Dr B.R. Ambedkar, and his colleagues. They were debated at every stage and underwent radical changes. Yet it is highly significant that the central concept was never seriously altered. The Governor would be the constitutional head of the State in a federation in which both the Union and the States would have a parliamentary form of government. The office of the Governor is of crucial importance, not only for the proper

functioning of the federation but also for the success of democratic government in the country.

It is therefore a matter of greatest concern that these very provisions of the constitution should have been consistently systematically abused and perverted and the Governor reduced to the rank of a glorified servant of the Union in order to serve and promote the interests of his own party at the centre. The result is not only a gross distortion of the federal principle but also a negation of democracy. The issue is not one of the States vs the Union but the law of the constitution vs political malpractice. The drafting committee made several changes during this period about the powers and functions of the Governor. Once it was thought that the Governor should be elected, either directly or indirectly. But ultimately all that was given up and the consensus that emerged was on the coexistence of the governor with the elected Chief Minister. I wish to cite the observations made during the deliberations by one of the greatest leaders of the country Shri Jayaprakash Narayan. If the Governor is to be appointed by the President on advice of the federal government out of a panel of four persons chosen by the provincial legislature by means of a single transferable vote, the federal Prime Minister is likely to choose out of the panel a man of his own party even if the latter had not secured the largest number of votes. Such a situation is not likely to promote harmony in the provincial government. Then the drafting committee prepared a note in which it said that the criticism that the co-existence of a Governor elected by the people and Chief Minister responsible to the legislature might lead to friction and consequent weakness in the administration would also apply if the Governor was elected by the members of the legislature, that is indirectly of the State and representatives of the State concerned in the federal parliament. To meet the objections to the election of a panel of candidates for appointment to the office of the Governor the

Special Committee recommended that the Governor should be directly appointed by the President. It had also been proposed that the Governors should act on the advice of his Ministers in all matters: this would obviate the possibility of any friction between the Governor and his Ministers. So it was decided by the Drafting Committee that for Article so and so the following be substituted: Appointment of the Governor - The Governor shall be appointed by the President by warrant under his hands and seal. This was the final decision taken by the Constituent Assembly. So that was the general consensus that in our constitution we must try every method by which harmony could be secured between the centre and the provinces. If you have a person who is not elected by the State but you have a person appointed by the President of the Union with the consent, I take it, of the provincial cabinet you will add a close link between the centre and the provinces and a clash between the provinces and the centre will be avoided which would otherwise result. Only Jawarhalal Nehru observed during this debate — it is a very very important observation. I quote: “I think it would be infinitely better if the Governor was not so intimately connected with the local politics of the province, with a faction in the provinces, and as has been stated by Mr Munshi, would it not be better to have a more detached figure — obviously a figure that is acceptable to the province, otherwise he could not function there. He must be acceptable to the province, he must be acceptable to the government of the province and yet he must not be known to be part of the party machine of that province. He may be sometimes possibly a man from that province itself, we do not rule it out, but on the whole it probably would be desirable to have people from outside. I mean sometimes people who have not taken too great a part in politics. Politicians would probably like a more active domain for their activities, but there may be an eminent educationist or persons eminent in other walks of life who would

naturally by co-operating fully with the government and carrying out the policies of the government, at any rate helping in every way so that policy might be carried out, he would nevertheless represent before the public someone slightly above party and in fact, help the government more than if he was considered as part of the party machine. I do submit that it is really a more democratic procedure than the other procedure in the sense that the latter would not make the democratic machine work smoothly." T.D.Krishnamachary was known for this sharp incident. He argued that in no way should the Governor should be under the influence of the Union Government. He said, "Our idea is that the Governor would be appointed in the first place on the advice of the Prime Minister, who in turn will consult the Chief Minister concerned. Which particular person will have a veto? I think that the Chief Minister will have a veto and I think conventions have already grown in that direction, and the person so selected will be a person who will hold the scales impartially as between the various factions and politics of his State. The advantage of having a non-party man, a non-provincial man has been amply made out by the Hon. Prime Minister."

The concept of impartiality and independence of the Governor, despite his nomination by the President, could not have been more strongly emphasised by the architects of the constitution. You know in our country during almost the last twenty years Article 356 of the constitution has been abused again and again, and it would be interesting to know the dialogue in the Constituent Assembly in this respect. Dr Ambedkar was asked by one member to make one point clear, whether it was the purpose of Article 278A (later on it was 356) to enable a central government to intervene in provincial matters for the sake of good government of the provinces. Dr Ambedkar said "No, no, the centre is not given that authority, or only when there is such misgovernment in the province as endangers the public peace, only when the

government is not carried on in consonance with the provisions laid down for the constitutional government of the province. Whether there is good government or not in the province is not for the centre to determine. I am quite clear on this point." He further said in regard to the general debate in which it had been stated that these articles were liable to be abused, "I may say that I do not altogether deny there is a possibility of these articles being abused or employed for political purposes, [he was prophetic] but that objection applies to every part of the constitution which gives power to the centre to override the provinces. In fact I share the sentiments expressed by my Hon. friend, Mr Gupte, yesterday that the proper thing we ought to expect is that such articles will never be called into operation and that they will remain a dead letter. If at all they are brought into operation I hope the President who is endowed with these powers will take proper precautions before actively suspending the administration of the provinces. I hope the first thing he will do would be to issue a mere warning to the provinces that things were not happening in the way in which they were intended to happen in the Constitution. If that warning fails the second thing for him to do will be to order an election allowing the people of the provinces to settle the matter by themselves." And Dr. Ambedkar did not say that the provincial government should be suspended or the assembly must be kept in animated suspension. It is only in the event that these two remedies failed that he would resort to this article.

To another question Dr Ambedkar declared, I quote: "As to the relations between the centre and the state it is necessary to bear in the mind the fundamental principle on which it rests. The basic principle of federalism is that legislative and executive authority is partitioned between the centre and the states, not by any law to be made by the centre but by the constitution itself. This is what the constitution does, the states under our constitution

are in no way dependent upon the centre for legislative or executive authority. The centre and the states are co-equal in this matter. It is difficult to see how such a constitution can be called centralism. It may be that a constitution assigns to the centre too large a field for the operation of its legislative and executive authority than is to be found in any other federal constitution. It may be that the residuary powers are given to the centre and not to the state, but these features do not form the essence of federalism. The chief mark of federalism as I said lies in the partition of the legislative and executive authority between the centre and states. This is the principle embodied in our constitution."

Now the decline started very soon after the constitution came into force. These words remains pious wishes expressed and which today you can find them in the archives. I would read out one relevant quotation from a book written by Shri Prakash who is one of the leaders of the freedom movement and who was also a Governor for three periods. "I know of one Governor," he says, referring to the Governors indulging in extra-curricular activities, "I know of one Governor who thought he would continue to be a member of the All India Congress Committee, even as a Governor." It is true a Governor attended a party sessions, the All India Congress Committee annual sessions, without a sense of shame. "I know of other governors," he says, "who used to go to that state and undertake political chores." When Shri Lal Bahadur Shastri died in 1966, though the Governor as such is above party politics, one such Governor took (I quote), "took active part in canvassing for Shrimati Indira Gandhi for Prime Ministership as against Shri Morarji Desai, the other candidate for the office. Shri Jain realized the anomaly of his position and sent in his resignation because of the protest that was all over the country. His conduct was the subject of serious censure in the press. It is legitimate to ask whether

such a politician could have at all acted impartially whilst he was Governor. In Shri Jain's case the answer is provided by his own conduct in 1965 when he dissolved a newly elected state assembly even before it was duly constituted by summons to meet and without giving an opportunity for the leader of the largest single party to form a government. It is needless to add that that was the opposition party, the Communist Party of India. In the end Shri Prakash says that he was of the view that governorships should be really the last lap of the journey of politicians. If governors can later become Ministers and hold other official positions, then the dignity of that office is marred. But it has become familiar to have Governors who change their positions. You know Governors became the representatives of the Congress Party, Governors became the central Ministers, governors went back to the state as Chief Minister. You know Arjun Singh, for instance, it is a classic example. He was chief minister of Madhya Pradesh, and he went to the central government as a Minister and then he was appointed as the working President of the party, then he was made the Governor, and then he was again taken into the Cabinet, and this goes on and on. And where will be the sanctity for the post of the office of the Governor. There are innumerable such instances, Dr. Barua for instance, who said "Indira is India and India is Indira", you know the famous quote. You know he was Governor and later on he was made the Congress President. You know it was as Congress President he made this notorious infamous remark. I would not like as time is over.

Now in conclusion I would like to say that the record proves beyond a shadow of doubt that in most cases the Governors have used their office to serve the interest of the ruling party at the centre. It is unlikely that they would have acted thus except at the instance of the leaders of the ruling party. The clear intent of the framers of the constitution and the letter and spirit of constitution

have been violated in all significant aspects. These are, the appointment of the Governor in consultation with the consent of the state's Chief Minister, the calibre and stature of the Governors, the security of tenure to which a Governor is entitled, the imposition of President's rule and the Governor's rights and duty freely to discharge his functions and duties as head of the State without being disrupted or dictated by the centre especially in regard to the appointment of Chief Minister and dissolution of the legislature. Dr Ambedkar stated in express terms in the Constituent Assembly in 1948 that in regard to these two matters as constitutional head of state the position of the Governor is exactly the same as the position of the President. This clear constitutional position has been subverted by destroying the Governor's independence and suborning his impartiality. Governors are not allowed to follow and do not follow the established conventions of the parliamentary system in regard to the appointment of Chief Minister and dissolution of the legislature but abide by the directions of the leaders of the government of India. This is wholly unconstitutional in itself, quite independently of the fact that those directions are given in order to promote the interests of the ruling party. In the process the federal principle as well as the norms of democracy have suffered grievously. The state's autonomy is violated, if people are denied the right to be governed by their elected representatives in accordance with established conventions of the parliamentary system, as was clearly emphasized by the founding fathers of the constitution. You know I am glad the Hon. Minister elucidated the principle of devolution of power.

Comment

Rohan Edrisinha

Mr Chairman, I thought I should make some brief comments on the role of the Governor in Sri Lanka in the context of the 13th Amendment of the Constitution. As you know, the 13th Amendment contains a number of provisions which are broadly similar to the provisions of the Indian Constitution and the provisions with regard to the Governor are similar. But I think one has got to evaluate the role of the Governor in the context of two important points of difference between the Indian and Sri Lankan constitutions.

The first is that the 13th Amendment operates within the Executive Presidential system, where there is a very strong, centralised political institution. If you look at the powers with regard to the Governor set out in the 13th Amendment you see that in certain instances the Governor is expected to exercise his discretion on the directions of the President. So there are some very subtle but important differences in the constitutional provisions.

The second is that the Sri Lankan system of devolution operates within the context of a unicameral legislature at the centre. There is no real sensitivity to the concerns of devolution, the concerns of the provinces represented at the centre. I think this is a very significant distinction, and I would hope that perhaps in another session we could consider the need for some sort of provincial representation at the centre, because at the moment we have a very polarised system the provinces on the one hand, the centre on the other, and no channel of communication or interaction to represent provincial interests and concerns, at the centre.

Now if you look at the powers of the Governor under our constitution the powers can broadly be put into three categories: There are those powers and functions where the Governor is expected to act on the advice of the Board of Ministers, very similar to the Indian Constitution: with regard to prorogation of the Provincial Council, dissolution, selection of the Board of Ministers the Governor is expected to act on the advice of the Chief Minister etc. Then there are a cluster of powers where the Governor is expected to act in his own discretion: addressing the Provincial Council, sending messages to the Provincial Council, withholding of giving of assent with regard to provincial statutes, when the Governor feels there is a breakdown of administration communicating that to the President and triggering off a course of events, and also significantly deciding on the scope of his own discretion, the Governor decides when he is to exercise powers in his own discretion and when he is expected to act on the advice of the Chief Minister, a strange sort of provision.

Now apart from those two sets of provisions which are reasonably clear in the constitution, there is a tremendous grey area, a third area where there has been a lot of uncertainty in Sri Lanka as to whether the Governor should act on the advice of the Board of Ministers or whether the Governor should act in his own discretion. A number of these areas of contention and ambiguity are in the Provincial Councils Act, that is, the piece of legislation which supplements and spells out in greater detail, the powers of the provinces with regard to three main areas - the business of Provincial Councils, procedure etc., finance and the provincial public service. Now if you look at the Provincial Councils Act you will see that the Governor is expected to frame rules with regard to withdrawal of money from the provincial fund, withdrawal of money from the emergency fund. The question has arisen here: does the Governor frame these rules acting in his own discretion or is he expected to act on the advice

of the Board of Ministers? Then with regard to financial statutes, the governor has a tremendous amount of control. In fact, in reality if you look at the provisions of the Provincial Councils Act and take a literal interpretation of the statute, perhaps the Governor has more control than the Chief Minister or the Minister of Finance. A statute cannot be introduced without the approval of the Governor, withdrawal of money has to be on the recommendation of the Governor and the question has arisen as to whether the Governor, there too, acts in his own discretion or on the advice of the Board of Ministers. At several seminars that some of us have attended we see that the Governors themselves have different attitudes, and I think the practice has been different in different provinces.

The provincial public service was a contentious issue during the tensure of the last Western Provincial Council. If you look at the Provincial Councils Act, the appointment, transfer, dismissal and disciplinary control of provincial public officers are vested in the Governor. The Governor has to draw up rules with regard to appointment and recruitment. The Governor can alter or vary the decisions of any institution to which he may have devolved disciplinary power. The question arises here too whether the Governor has to act on the advice of the Board of Ministers with regard to appointments to the provincial public service or whether he can he act in his own discretion? In the Western Provincial Council, as far as I know, the previous Governor thought that he had to exercise those particular powers in his own discretion and the Chief Minister at the time thought otherwise. The question was about to be canvassed in court when there was a change of government at the centre and so the matter did not proceed to the courts.

One other interesting point that I should share with our Indian colleagues is that there is a very significant case, Premachandra v Jayawickrama which was decided a couple of years ago, which

dealt with the whole question of the Governors appointment of Chief Ministers. I believe, the courts in India have been reluctant to issue writs against Governors. But in this particular case, the Court of Appeal issued a writ of certiorari to quash the decision of the Governor. The Governor appointed as Chief Minister someone who belonged to the same party to which the Governor belonged, when it was quite clear that a rival candidate would have been able to muster a majority in that particular council. (There were actually two councils involved). The Governor's argument was that he has the discretion to choose the Chief Minister; the decision that he exercised in his discretion was final and the courts had no right to review the decision of the Governor. The Supreme Court took the view that the Governor's discretionary powers with regard to the appointment of a Chief Minister was reviewable by the court. In a very significant judgment the court referred to fundamental principles of the rule of law, public accountability, the whole purpose of the office of the Governor, the fact that Governor should not thwart the will of the people etc. These arguments were used to justify a review of the Governor's decision. A writ of certiorari was issued to quash the decision and also a writ of mandamus to compel the Governor to appoint someone else so that the will of the people was not thwarted. I think that this was a significant case which perhaps shows that the judiciary in certain areas with regard to devolution, has been willing to exercise its powers to ensure that the spirit of devolution is adhered to.

In conclusion, as the Minister of Justice and Constitutional Affairs said in his inaugural address, since we are considering federalism, I think the whole role of the Governor has to be rethought and perhaps one might have to develop a system where the Governor is appointed on the advice of the Chief Minister or where there is some sort of consultation between the

President of the Republic and the Chief Minister, and a person acceptable, to both parties is selected. But certainly there is a lack of clarity in the constitutional provisions with regard to the fundamental question: is the Governor primarily an agent of the President or is the Governor supposed to be a nominal figurehead of the Westminster variety who acts on the advice of the Chief Minister and the Board of Ministers.? Since unfortunately, in my view, the political consensus in Sri Lanka seems to be that we can go no further than Indian-style federalism, I think, Mr Hegde's presentation highlighting the inadequacy of the Indian system of devolution was very useful. In my view Indian-style federalism is quite insufficient at this point of time. Certainly Mr Hedge's presentation where he pointed out how the Governor has been used to subvert the original intention of the provisions of the constitution should remind us of the fact that perhaps we have to think about going much much further than Indian-style federalism.

FINANCIAL DEVOLUTION

Ashok Mitra

I have been in some agony since I listened in the morning to a remark from Dr Coomaraswamy that there is a wide body of opinion that devolution in Sri Lanka could lean on or get assistance from the experience of devolution in India. All I can say is: thank heavens! Certainly any country ought to learn from the mistakes and blunders in India, and that is where Christ should stop. Now let me come straight to the issue. Certainly we have to talk of financial devolution because we can have an impeccable structure of federal devolution, but we are in a money-tight system, and therefore if you do not have added resources to the units to whom you are supposed to have devolved powers and responsibilities, you will find that they cannot function.

If you look into the Indian constitution they have loaded the states with responsibilities — agriculture in states; land reform in states; irrigation in states; road building in states; power development: states; industry with the exception of defence industry in states. But where is the money? There is no money. This is why you have to come back and spell out what are the financial elements in your devolution, and I think it should be possible for us to delineate five distinct areas which we should discuss.

One: The familiar areas of taxation. What should be the division of tax-collecting authority, and whether there should be any tax-sharing, what should be the procedure for tax-sharing and so on. There is a whole host of issues around this where one can learn from the blunders of the Indian experience. I will come back to this presently.

Secondly, of course, is the issue of borrowing. Now this is very unusual in the Indian constitution: it is explicitly written that as long as a federating unit, meaning the State government, owes a single penny to the Union government, to the Federation, they have no independent power of raising money from the market. They cannot borrow from the market as long as they owe even a penny to the Indian government, which means in effect is that you cannot have any borrowing from the market without explicit permission of the Indian government. And what has come about is that you know at the time of independence, say 48 years ago, roughly about 93 or 94% of the total income from market borrowings used to be devolved to the state governments and only 6 or 7 % was retained by the centre. Now the situation is totally reversed. 92 or 93% of the total proceeds of tax borrowings the Federation preserves for itself, and the rest as a great act of charity goes out among the 27 state governments. This is an issue which can become a very delicate issue, a very contentious issue, which will come into prominence in any type of federal administration.

There is also note-printing power, the State indulges in deficit financing, just creates some money in the system through having recourse to the printing press. Now why should this power be used exclusively by the Union government? Now you take the Indian situation: roughly the Union government has been creating additional credit to the extent of 7-8% of gross domestic product over the last three or four years. And you take the overall size of the 27 State governments together - this will come to as much as roughly 2/3 of the size of the Indian government's budget. But there are strict limits to overdrafts which a State government can draw from the Central Bank, and if you add up all these limits together it will come to barely half a percent of the gross national product. So on the one hand 8 % of the total national income or gross domestic product, or

whatever you call it, the Indian government is indulging itself in trying to create additional liquidity for itself, while that privilege is being denied to the State governments - and this is something which we just tend to be oblivious about.

Now the banks also create money, the bank advances are as good as creation of money. You come to the bank, it issues a line of credit and you write cheques, cheques are just as good as money, cash, and this is the way the bank each year creates thousands and thousands of crores of rupees or dollars or whatever. In the Indian situation for example the total outstanding advances by the banks is even higher than the size of the Indian budget, but where does this money go, under what conditions, what should be the rate at which such money should be lent out, to whom, and what should be the specific terms and terms according to which it should go to A, B, C., who decides? The Indian government, the federal government, the federal entities have no say in the budget. They collect money from your state and they spend the money wherever they like. The credit-deposit ratio in your own state can be as low as 10% whereas the national average could be as high as 55% So the money that your people have deposited in the banking system the banks come under the directive of the Indian government and will take away and you will have no say in the matter. And this can also be a very contentious issue about who decides. And this is not just about bank funds. This could be equally true about funds of other public financial institutions. For example, if your life insurance and general insurance is in the public sector, premia are raised, how should this premia be invested? who decides? the ladies and gentlemen sitting in New Delhi or also some of us who are presiding over the Indian State Governments — another area of conflict.

Finally, I should mention the allocation of foreign exchange. It could be one part of the country has had a major role in earning

foreign exchange, but at the time of use of the foreign exchange for the purpose of economic development you find that not that foreign exchange is not available to you, it is going elsewhere.

These are the five areas which are sources of tension between the federation and the federative units in any federal entity, and one should examine some of the problems that arise in some detail. Now given the limited time that I have, I will not go into too much into detail but I have to come back to the issue of taxation. For example, if you look into the constitution, this is the area of demarcation — these are the taxes exclusively belonging to the Federation, these are the taxes which belong exclusively to the federating units, and there are certain areas of tax-sharing. Now problems arise, and in all three instances problems can arise. Now for example we say that taxation of income is the prerogative of the federal entity, but that the proceeds of taxation should be shared with the States, and who decides what the States will have? The Finance Commission will decide. What about surcharge on income tax? Just open the pages of the constitution and look carefully: there is no mention of the surcharge being also shared; so leave the surcharge out. What happens is that you keep the general rate of taxation dead low and you keep on raising the level of surcharge, and this is one game you can play so that the bulk of the extra revenue comes to the federal unit and the federating units are left high and dry. For example, soon after our constitution was introduced, they passed special legislation demarcating two distinct entities for income tax — income of individuals, families etc. and income of companies — and it was determined that income from companies should belong entirely to the central sector.

What has happened is that because of the rapid industrial and commercial growth now the total earnings from corporation taxes are two and a half times the yield from income tax. The State governments, the federating units, can merely watch the

burgeoning increase in revenue which they cannot touch, and then tension grows for very obvious reasons. The Union government may be a thousand miles away, but because of the activities of the Union government, prices may rise, employment may drop, industries may close, there could be a shortage of food and things. People with their problems may come to the local entities, and the local entities are always short of resources.

Now as far as income tax and excise duty proceeds are concerned the Union government is supposed to share the proceeds with the State governments. Who will decide this? The Finance Commission. What is the Finance Commission? Every five years the President will appoint a Finance Commission and it will decide what should be the distribution of the proceeds of income tax or excise duty between the Centre and the States and between the different States. In addition, if after a distribution of all taxes has been done it is found that some States would still be short of adequate resources.

The Finance Commission would be in a position to recommend some ad hoc grants of aid, statutory grants of aid, because statutorily it is written in the constitution. The problem is therefore (and this is a point which Mr Noorani mentioned in the forenoon) that if you have a body which is going to decide the distribution between the Centre and the States it should be equidistant from the Centre and the States. It is an arbiter, and an arbiter by definition should be neutral. But what happens is that under the particular article of our constitution the President has no independent power to act. He listens only if the Central Council of Ministers wants him to listen, he speaks if they want him to speak, he hears only when they want him to hear. So you say that the President every five years appoints a Finance Commission. In effect it means that the Ministry of Finance appoints a Finance Commission, the Ministry of Finance settles the terms of reference of the Commission, the Ministry of

Finance also decides on the composition of the Finance Commission.

Comment

Bertram Bastiampillai

Thank you Hon. Chairman, Hon. Members of the Parliament of Sri Lanka, Hon. Minister, distinguished audience and our distinguished visitors.

We have provisions governing finance spelt out in two sections. One section is found in the 13th Amendment to the Constitution, and the other is in the Provincial Councils Act of 1987.

If you look at the 13th Amendment, devolution of finance is strictly constrained by the Governor's powers and the Governor, as you know, is a creation of the President. So therefore what does the Provincial Council really do regarding finance, nothing. Fiscal powers devolved to Councils are constrained also by the concurrent list. In the morning, the Hon. Minister of Justice and Constitutional Affairs, Professor Peiris pointed out how they take away National Schools and National Hospitals out of the Councils' purview. So much of the better amount of money goes for expenditure on these institutions. You take them away, and you will deprive Councils of the money also.

Then the President's power to authorise expenditure and the sanction of Parliament that is needed thereafter is another restraint on the fiscal authority of Provincial Councils. Then the President also directs Provincial Governors to observe the canons of financial propriety. So the Governor gets the directive regarding spending from the President and not from the Councils but still the Councils' aspirations have to be met.

Governors, however, are not accountable directly to electorates. They live in a Province but they are not accountable to the Province but to the President who is at the Centre.

The Finance Commission recommends to the President principles on which grants to Councils are to be made. This Commission then considers also matters referred to it by the President relating to Provincial Finance. So who is really running the show? You know it very well: it is not the Provincial Councils. Then Provincial Councils have no role in financial affairs but it is decided for them.

The President, and Parliament alone have a voice, and the President later exercises in practice unquestionable substantial powers. We have known of Presidents in the past who have exceeded the powers that they were supposed to have but they are immune from suit and you can do nothing about them. This sort of power is exercised in regard to the Finance Commission too.

Provincial Councils have been restricted in the exercise of functions. They cannot discuss either the President or a Minister or a Member of Parliament. Therefore they can't even discuss it even if something happens that is wrong; they can't talk about it. They cannot discuss even what is vital to them.

Then when you look at the Provincial Councils Act what has been given. Governors have control relating to the custody of the Provident Fund, payment of money into it, and other connected matters. It is according to the rules of the Governor and not those made by the Council that financial matters are decided.

The Provincial Minister in charge may be well and really in charge of the financial portfolio, but he is at the same time well and truly subordinate to the Governor.

Then Foreign Aid that is asked for is negotiated by the Government for any project or scheme and not by the respective Provincial Councils. It should also be allocated if they get the Foreign Aid by the Central Government. Therefore it should also be diverted by the Government to the project. The Council is hence not the authority but it is the Centre that decides: that for

a Road to Jaffna the money for a road to Jaffna should be spent by starting the project from Matale and not from within the Northern Province.

Statutes to raise taxes, financial obligations, appropriation of moneys out of the Provincial Council's funds, and Statements that declare expenditure to be charged on the Provincial Council Fund or an increase in expenditure is again dependent on the Governor's recommendations. There is very little that the Provincial Councils can do; not very little indeed, there is hardly anything they can do. Even loans which they can get from the consolidated Fund have to be decided upon by the Centre. But the Councils cannot do any commercial borrowing. Even Statutes relating to money received on behalf of the Provincial Fund and for custody or issue of such money are dependent on the Governor's recommendation. Now here everything boils down to the fact that the Governor is a creature of the Centre.

Statutes curtailing expenditure from the Provincial Fund could not be passed by the Provincial Council unless recommended by the Governor to the Council. So even in such matters, they have to be recommended by the Governor. The other charges on the Provincial Fund have to be similarly recommended; I find interestingly even the Governor's emoluments and allowances. Why should it be so when he is a creature of the Centre? If he wants his garden labourer from the Centre and ask for it, why cannot he get his salary also from the Centre?

Well, he is not accountable to the Council and he is not accountable to the people there. I think his salary should not be paid out of there (the province), and the money instead should be allowed for development work there. Other charges such as expenditure declared by the Constitution of Parliament is again charged to the Provincial Fund and who declares these matters? It is not the Council; it is declared by the Constitution to be

Parliament. Then **முனைவர்** grants are based again on the Governor's recommendation. So if you are a good boy you will get a good character certificate, and you might get the funds. Then once more, no amendment can be made to a Statute of the Provincial Council that alters the amount as a target might need, in the grant that is borne by the Provincial Fund. They have the fund, there is the Fund but they (councillors) can't do any alterations or amendment or anything about it.

The Council's powers are frozen. In fact they had been emasculated at the beginning itself. So in crises the Governor authorises expenditure from the Provincial Fund for a period (that is in a period of time of crisis), but he is not accountable to the Provincial Council for it even later. So you can see I think, Minister Ashok Mitra of West Bengal will agree, the Indian situation in this respect is in a better position than us.

Then take the system of granting aid; it is a system of granting aid that we have but initiative itself is not encouraged, there is no room for initiative being encouraged. Look at the lack of planning powers. Again we have no planning units nor planning expertise given to Provincial Council. A lack of planning thwarts a Provincial Council's ability to use any funds or to put even together projects even if it could take initiatives. There has been a failure to dovetail microplanning into macroplanning. So planning has to come from the Centre. There is no way of planning even a Council's expenditure.

No power sharing is seen in respect of finance or resources at the Provincial Council level in spite of the word devolution being used. A genuine desire to devolve was not there, that was the main reason for all deficiencies; the will to devolve was not there!

Mobile Secretariats and Gam Udawas (that is uplifting the villages), were held with much ostentation, opulence and expenditure. These are held in provinces, Why can't the moneys

then be given to the provinces themselves to run them? Why should the Centre go and project itself and dominate the Province and then conduct these extravaganzas there. It means that you are making political capital using financial capital which should go to the provinces really.

Then you find that there is a Financial Commission. In my opinion, it could be made to remain more independent and non-partisan. But it is left to the goodwill of the President and changes in laws have to be made to make the Commission independent. So there is no power-sharing or autonomy actually in regard to finance allowed to Councils.

Now I will request Hon. Ashok Mitra to think a little more about whether we are better off in this sphere than India.

Ashok Mitra - Now I like to make two additional comments. You see I was not trying to compare the present situation but since you have said that you are thinking ahead and trying to redo the Constitution. All I would appeal to you is that please in the process don't look northwards beyond except for the actual experiences. That is you know will not help you move in the right direction. What you want is always going to be difficult.

Answer: So I shall solicit your sympathies as well as your good wishes.

The other thing that I forgot to mention but I should have mentioned is the state of our Planning Commission; again the Planning Commission ought to be a wise detached body. It should be responsible for overall co-ordination of social and economic planning of the country. So it should be equidistant from the State Governments and also the Indian Government, from the individual Ministers of the Union Government and take a view about what should be right for optimum balanced economic development of the country. But you see, this is the 45th year of the Planning Commission and through the decades they have succeeded in converting, I am sorry Mr Hegde was

working as head of Planning Commission, he knows the story in greater detail than I do, but it was rendered into just a hacked department of the Union Government. So appointments are made by the Union Government, allocations are made by the Union Government, the members of the Planning Commission including the Deputy Chairman behaves as members of the Union Government's entity. Now but even organically they do not bother at least to differ. Mr Hegde was an independent entity when he was Deputy Chairman of the Planning Commission and had no connection with a Union Ministry. But these days you find that you are the Minister of Industries but you also hold concurrent charge as Deputy Chairman of the Planning Commission. I remember once I told one of the Deputy Chairmen that you being a Deputy Chairman of the Planning Commission is a scandal. Did you say scandal? Yes, why should we say it was scandal? Because you are a Union Minister, you cannot judge properly as Deputy Chairman who is right and what is not. You will be biased in favour of Industry, the Minister of Industry will be biased in favour of the Union of the Indian Government. And this is continued. Now we have at the moment, a Deputy Chairman of the Planning Commission who is also our Minister for External Affairs. I think his vision would be biased.

Unitary & Federal Characteristics of Indian Devolution

A.G. Noorani

I do wish to thank the Centre for organising this Seminar. I wish to thank them particularly - this goes far beyond the normal calls of civility in thanking one's host - for three good reasons, First, you are at a historic juncture, amidst moves for constitutional renewal, and I have been intensely interested in this. For, while Sri Lanka will save itself by its exertions, there is a possibility that it might help India by its example. You are developing a national consensus in which your new Constitution will be rooted. And we in India need that consensus to sustain our Constitutional renewal, the prospects of which, by the way, are nowhere in sight. I have been invited by Dr Neelan Tiruchelvam to speak on constitutional reform and when the brilliant young lady, Dr Tej Thapa called me in Bombay and said "Will you speak on constitutional reform"? I said "My dear, there is hardly any sign of constitutional reform in India. So, what do you want me to speak on?" However, since I have to sing for my supper I will have to say something.

The second reason why I wish to thank you is that the very concept of federalism is undergoing a change today. Let's not lose hope. Let's take hope from what goes on in Europe. Don't be disheartened by the ethnic conflicts in South Asia. In a little country like Belgium the Flemish and Walloons are fighting over Brussels. We are not doing too badly. What are their divisions compared to ours? What about Basque nationalism and Scottish nationalism? Now, if Belgium can think of federalism today, we have to reflect on what federalism is in the

present context. Constitutional thought on federalism has ossified. Dr B.R.Ambedkar said that so long as a sphere is carved out where the States become completely autonomous and the centre cannot interfere, there is federalism, Is it a "federation" which assigns to the states powers merely in respect of, say, health, municipal self-government and protection of wild life, and under which in no circumstances, shall the Union intrude on these fields? By the technical definition of old it will be federal. Let me cite another instance - the Spanish constitution, it establishes a unitary system. But it enables regions and municipalities to form what are called autonomous communities. However, an autonomous community has greater protection against central encroachment than a state of the Indian Union has under its federal constitution. Before Madrid can dissolve an autonomous community it has to issue a notice setting out the charges and get its response. Next it has to move the Senate and get its vote of approval before taking action against the autonomous community.

The third reason for congratulating our hosts is that they are concerned with federal and unitary features of devolution. The true test is what exactly are the power given to the units of devolution? Are they adequate and significant for the State's role in nation-building? The test is whether the States are given an independent role in the enterprise. Of course, the centre must have power necessary for performance of its role. The two are complementary, not mutually exclusive.

In India none of the chief ministers - neither my friend Mr Ramakrishna Hegde nor Mr Jyoti Basu nor Mr N.T.Rama Rao, was consulted on the terms of reference or the composition of the Sarkaria Commission on Centre-State Relations established in 1983. There was no desire on the part of the Government to revive a federal polity. New definitions of federalism are being formulated. This one is by Professor Thomas Dyer in his book

“American Federalism: Competition amongst Governments”:
“Those governments cannot be truly competitive if the federal government determines national priorities and assigns responsibility to state and local governments for policy implementation”. This surely is not federalism. Federalism is something else. It implies assignment of significant degree of independent role in nation-building to the States.

Indian thinking has been shaped by two contradictory features. One is the appeal of federalism. The Government of India Act, 1935 sought to establish a federal polity as a solution to the minorities problem and to assure the rulers of Indian States. By the time India's constitution was being drafted, several things happened - the trauma of partition, the violent communist revolt in Telangana, and the assassination of Aung San and most of his cabinet in Burma. Chief ministers of states like B.G.Kher of Bombay urged the Constituent Assembly to give more powers to the Union. The result was a Centrist constitution. The anti-federal features are very evident. The United States Constitution has been said to establish an indestructible union of indestructible states. Ours is, I hope, an indestructible union, but, the states are very much destructible. A state of the Indian Union, Hyderabad, was carved up between three other states by Parliament.

Under Article 3 of the constitution, it is necessary only to consult the State's Legislative Assembly for Parliament to alter a State's boundaries. Its consent is not necessary. The entire map of India can be redrawn by Parliament. Moreover under Article 249 a resolution of the Rajya Sabha passed by a 2/3rd vote can empower Parliament to legislate on a matter in the State List. As for the emergency powers, it is true that by virtue of Article 250, India becomes a unitary state once a Proclamation of emergency is made. This is not unusual. The Australian Royal Commission noted in 1929 how much power the Centre had acquired during the war in 1914. Under the “war powers clause”

of the American Constitution, the American government enjoys enormous powers during the emergency. What the Australian Royal Commission said in 1929 was a fortiori true in 1939-1945. Under Articles 356 and 257 the Centre can give directives to the States in defined circumstances. If a directive is not complied with, the Centre can impose “President's rule” that is direct central rule under Art. 356 (read with Article 365) ousting the State Government. Of course, a directive can be given only in regard to the enforcement of a mandatory statute, not an enabling one. Also it must be specific and of real importance to be worth its name.

Unfortunately the Supreme Court of India has failed to hold the scales even in centre-state disputes. Its approach has been centrist.

Finally, Article 356, on President's rule, is a draconian provision. During the debates in the House of Commons on Section 93 of the Government of India Act 1935, which provided for Governor's rule in the Provinces, Sir Samuel Hoare, the Secretary of State for India, said it could operate only if the working of the ministry is constitutionally impossible. In 1982 appeared the last Volumes of *The Transfer of Power 1940-47* published by the British Government. They showed how its authors interpreted S.93. The Muslim League had won the referendum in the N.W. Frontier Province in 1947 and Mr Jinnah asked the Viceroy to direct the Governor to sack the government of Dr Khan Saheb in the Province. It was a Congress Ministry. The Viceroy sought legal opinion from London which is set out in the Volume. London said this was no ground for sacking the Ministry. In the Bommai case, decided in 1994, the Supreme Court ruled that there should be no dissolution of the Assembly before Parliamentary ratification of the Proclamation imposing President's rule. The other big gain in the ruling is that the question of Majority support for the Ministry is not a matter to be decided in the Raj Bhavan by the Governor but on the floor

of the Assembly on a motion of no-confidence. But the Supreme Court did not construe satisfactorily the crucial words in Article 356: "as situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution. Properly construed it means impossibility of governance; hence the word "cannot" The Constituent Assembly debates on this provision support this view. What is more, there was no agreement among the 9 judges on the Bench on the scope of judicial review of a Proclamation under Art. 356. The plethora of judgments delivered by a Bench of nine judges would provide little guidance to high court judges when they are faced with writ petitions, challenging the imposition of central rule. The judges disagreed hopelessly on some points with the concurring judges agreeing on some points with the dissenting judges. Like a maulvi interpreting the Quran or a pundit interpreting the Vedas and the Gita, this ruling has become a matter for exegesis by lawyers and judges. It was a waste of public time and money. Sadly the judges showed such a lack of judicial discipline, giving no clear directives. Barring the two points there is absolutely no agreement on any other major point at all. Article 356 is, therefore, in a very bad state today.

Article 253 of the Indian Constitution is so widely worded that if an international non-governmental organisation were to take a decision on any matter and the Government of India decides, even if it has not participated in the conference, to adopt that decision, it can legislate on the matter even if it be in the State List. Article 253 empowers Parliament to legislate on a matter in the State List in order to implement "any treaty, agreement or convention or any decision made at any international conference, association or other body". Sir Ivor Jennings pointed out that under this provision the Inter-Universities Board of India, Burma and Ceylon (as it then was) could take a decision and Parliament could then legislate on education.

Amendments to the Constitution added to the Centre's powers. Education was removed from the State List by the 42nd amendment and put in the Concurrent List. So were wild life, family planning and forests. But what is not realised is that many of the entries containing topics of legislation in the State List are made subject to the Union List or the Concurrent List. To cite an example, Economic and social planning is in the Concurrent List. Thus, the centre can plan as it wishes and its plan will prevail over the State's plans. "Economic and social planning" cover a host of matters. However, the Centre's executive power is confined to matters in the Union List. It has no executive powers in respect of matters in the Concurrent List. There is another glaring anomaly. Industries are in the State List, in entry 24 "subject to the provisions of Entries 7 and 52", in the Union List Entry 7 refers to industries which are declared by Parliament by law to be necessary for prosecution of war. That is fair enough. But Entry 52 of the Union List refers to "industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest". A British judge said that public policy is an unruly horse. So is the "Public interest". The very next year after the enactment of the Constitution, Parliament passed a law under Entry 52, the Industries (Development and Regulation) Act, 1951. As many as 38 industries are specified in its First Schedule of the Act for central control. Those industries include matters of such utmost importance and gravity as match-sticks, razor blades, hurricane lanterns, cigarettes, toilet preparations and zip fasteners.

To sum up, while there is in India a clear federal situation, and strong federal sentiment, there are also strong tendencies towards centralisation without comparable checks.

But of what avail is even a perfectly federal constitution if there is no political check against centralisation? There is something very warped about a parliamentary democracy in

which tickets are assigned, by all political parties without exception, by their "High Command". In every parliamentary democracy the candidate is chosen by the constituency branch of the national party, subject to the national headquarter's right to withhold the ticket if the candidate is an undesirable person. But Indian M.Ps. and M.L.As. have been, even at the best of times, nominees of the central leadership. In the past, the Pradesh (State) Congress would give their recommendations, and they were treated with respect. But since 1971 India has had what are called "ready made Chief Ministers" chosen by the Prime Minister. Even after Mr P.V. Narasimha Rao became Prime Minister Congress (I) State Legislature Parties uniformly voted to give him as Party President the power to nominate the Chief minister. How can anyone expect a Chief Minister who owes his office to the bounty of the Prime Minister, who is also the President of the party, to stand up to the Centre for the State's rights?

There is another perversion. The Rajya Sabha was meant to be a Council of States. But if people from outside the State, can regularly be elected by the State Assembly to the Rajya Sabha in flagrant violation of the law, its character is altered fundamentally. Such elections have been the norm. Short of an oath the candidates are required solemnly to declare that they are "ordinarily resident" in the State. Yet, many a person of integrity has claimed, with a straight face, that he is "ordinarily resident" in a particular State when every one knows he is not. This has led to a complete perversion of the Constitution.

People like to quote Dr B.R.Ambedkar on the removal of untouchability and other things. They forget that he was one of the few jurists who was steeped in economics, history and political science. He said that however a good constitution may be, it can become bad if the men who run it are bad. A lot depends on the political parties. He added that any constitution can be

perverted by the administration. Dr Ambedkar ended with the remark that if things went wrong under the Constitution, it will not be because the Constitution was bad. People will say rather that man was Vile.

Thank you, Mr Chairman.

Comment

Paikiasothy Saravanamuttu

Thank you Mr Chairperson, I will try to be as brief as possible in making some observations on the relevance of the federal elements in Indian Constitution in the situation in this country at the present moment and on federalism in general.

Now, on the question of the federal elements in the Indian constitution, Mr Noorani has given us a very detailed and lively discussion on their scope as well as, limitations. There is a crucial point that needs to be stressed with regard to the Indian experience in this field and its relevance to Sri Lanka.

For quite some time now in Sri Lanka, as events on the ground have unfolded and as the parameters of debate have expanded, there has nevertheless been a tendency to duck the basic political challenge involved here by using the term "the powers of the Indian state", as an euphemism for granting more than what has been hitherto given or indeed contemplated. I think, perhaps the greatest contribution of this gathering, from what has been said so far, is to have demonstrated quite clearly what Indian style devolution or Indian style federalism actually means in substantive terms and to ask ourselves as to whether it is really going to contribute, in any significant way, towards conflict resolution and democracy in this country. I want to stress this point.

Mr Noorani and previous speakers, did talk about the sources of inspiration for the Indian constitution and why the constitution became the kind of hybrid document that it is. What were these sources of inspiration and what were the immediate causal factors?

The argument has been made that the trauma of partition was very much in the minds of the framers of the constitution and that they came from a fairly strong democratic tradition. They were also elements within the indigenous political culture as well as from the experience of British colonialism. Accordingly, there was strong pressure for centralism and the unitary state. This was reinforced by the fact of partition in 1947.

Consequently, the framers sat down to draft a constitution that would provide a strong centre as a deterrent or preventive measure to secession. They accepted a trade - off between this and the pluses and advantages that would have otherwise been gained in terms of democratic pluralism and powersharing.

However, in interpreting the constitution and this is borne out by the various examples quoted by Hon. Mr Hegde from Dr Ambedkar's speeches, they saw it not just as a written document alone, but expected that it would be interpreted from the perspective of a particular political culture. They assumed that there would be a shared consensus of values that would give it life.

In particular, they assumed that although the balance of power would be weighted in favour of the centre, the centre would acknowledge these powers and use them only in exceptional circumstances. They assumed that in the workings of the constitution there would emerge a greater equilibrium and balance and that the centre would interpret the constitution not merely to preempt secession but also to facilitate pluralism. However, the arguments about the degeneration of political culture have been made and chronicle that what has really transpired in practice, is at great variance with what was intended.

Now in Sri Lanka we are embarked upon constitution - making in a context in which we have a ground situation, a factual situation, in which there is territory in this country that is not under the control of the Sri Lankan state. There is a

separate system of administration and a system of justice. For want of a less contentious term, there is a quasi-state.

We have to ask ourselves therefore, whether we are using the Indian example or making a new constitution to change the ground situation or to define a relationship that acknowledges the situation on the ground. This, I think, is of seminal importance, key importance, in terms of our constitutional process.

Is it a question of recognising a reality or is it a question of reversing a reality? This is fundamental and whichever is chosen as the objective of constitutional reform, what are the values that will be used to guide the process? Now I feel very strongly that federation does mean something very specific. It is about powersharing and it is a response to ethnicity and the self-determination of people.

However, it is not just a response to ethnicity alone, it is also part and parcel of democracy in that it is about empowering people, about sharing power, distributing power through structures of government at lower levels rather than concentrating it at the centre. I think these two ideas of federalism as a response to ethnicity and as furthering democracy, should be seen as complementary, consciously observed as going hand in hand in our constitutional reform process. Neither conflict resolution or the arguments for democracy, alone and in themselves, will be sufficient to lead the way out of our current crisis.

To quickly wind up, I endorse the point made by our distinguished Indian speakers. We have the example of India to go forward with. However, for us the fundamental question is not whether the Indian constitution or the Indian constitution-making experience can help us. For us the fundamental question is - what is the purpose of constitutional reform in this country and why do we need a new constitution? This is something we have to answer ourselves.

Thank you.

Resolving Centre-State Conflicts

Nirmal Mukarji

In the discourse in India on centre-state relations three characteristics of the states are often lost sight of.

One is that, unlike in the United States of America (USA), the states in India are not indestructible. Most of the states that are there now were only states-in-the-making the other day. They were born out of processes that are still going on. Therefore new states may keep being created. The present political map of India bears no resemblance to the one at independence in 1947. For all, we know tomorrow's map may be substantially different to today's. So when we in India talk of centre-state relations we talk of relations between an indestructible centre and not-so-indestructible states.

The second characteristic is that the states are units not of a federation but of a Union, aptly styled a quasi-federation. "Quasi" because, influenced by the trauma of partition, the construction makers opted for a strong centre, arguing that this would help to hold the country together. There is a federal scheme in the shape of division of powers between the centre and the states, but it is heavily skewed in favour of the centre. In practice the centre has become much more powerful than what the constitution-makers visualised. Centralised planning has contributed to this. So has the "fuehrer" model adopted by the Congress party, which has been in power at the centre for most of the time.

The third characteristic is the unevenness of the states in size, population and stage of development. Of the twenty five states, Uttar Pradesh (UP) is the largest with a population of 140

million or so. At the other end is Sikkim with a population of less than half a million. The constitution treats all of them at par, in that all have to conform to the prescriptive provisions of the part dealing with "The States". So each state has a governor, a chief minister, cabinet, legislature, high court, even a chief secretary and a uniformly patterned bureaucracy. Within a state laws and policies apply uniformly to all people and regions. The reality, of course, is that states and regions within the larger states differ widely. When this reality is ignored there is trouble.

I have mentioned these characteristics at the outset because they have a bearing on what I have to say.

I shall take the liberty of including states-in-the-making in this presentation, and shall in fact deal with these first.

The plain fact is that the centre has had, and still has, more visible conflicts with this category than with already constituted states. Looking at the past, in most instances the centre refused to yield to the demands from this category until forced to do so.

Potti Sriramulu's sacrifice, for instance, forced the centre to divide the old Madras presidency into two separate states of Telugu and Tamil speakers. It also compelled the setting up of the States Reorganisation Commission, which in turn led to a wholesale redrawing of state boundaries largely based on the linguistic-cultural principle. Even then Maharashtra and Gujarat could be constituted as separate states only after much blood was shed over the future of Bombay city, and Punjab only after long and sustained Akali agitations. In the northeast, Nagaland and Mizoram could gain recognition as states only after years of fierce insurgency by the people and fiercer counter-insurgency operations by India's armed forces.

The point to note is that in all such cases there was conflict or potential conflict between the centre and states-in-the-making. Resolution was obtained largely because demands were pressed through coercive means. In some cases the centre responded

through its own coercive instruments. Therefore it can be said that, however unpleasant it may sound to a country that claims to be a democracy, it was coercion that eventually produced accommodation. Since ruling classes seldom learn from history the same may happen, and is in fact already happening, in the case of other states-in-the-making. Uttarakhand may well be the first of a new crop of states. It has the backing of two unanimously passed resolutions of the UP legislature. One was passed when the Bharatiya Janata Party (BJP) was in power and the other now when a coalition led by the Samajwadi Party is there.

The other point to note is that in all these cases what was involved was the assertion of group identity. Universal suffrage was expected to arouse the political consciousness of the voters. It did. But through a process of social chemistry still to be fully understood, it has led to people clubbing themselves in groups on some principle or the other. Where such groups have geographical bases they become highly identity conscious and make demands in the general direction of autonomy and self-governance. Basically this creates bargaining situations where one side demands all and the other is not prepared to concede even an inch. Whether it is Bodoland or Jharkland or any of the others in the queue, resolution has yet to be achieved. The Gorkha Hill Development Council of Darjeeling, worked out between the centre, the West Bengal state and the leaders of the movement for a separate Gorkhaland, has not worked well. Yet, for the centre as also for the concerned states, it has virtually become the cure-all model to contain the demands of the Bodos and others. The "council" idea offers self-government well short of statehood. Whether it will succeed in its objective remains to be seen.

These are unresolved situations of conflict or potential conflict, all arising from this sector of stakes-in-the-making and identity assertion.

What about already constituted states ? In the early years after independence there was no conflict because the centre and all the states were ruled by the same Congress Party. Differences if any between the leaders at the centre and the states were settled within the party. This happy state - happy for the Congress - ended in 1957 when Kerala elected the first non-Congress government. The dismissal of this Left government two years later on tenuous grounds set a pattern in which, during all the years that Congress ruled at the centre, non-Congress state governments were constantly made to feel uncomfortable and found the going difficult. Often they were toppled, by manipulation or by misuse of the constitutional provision to impose President's rule. Tolerating "other party" rule has yet to become part of political culture in India. If some non-Congress governments survived for long periods, as in Tamil Nadu or West Bengal it was because they acquired near-impregnable bases among the people.

The Congress centre's aversion to non-Congressism in the states was in tune with the slide of the Congress party into the "Fuehrer" model. A "Fuehrer" neither brooks dissent nor shares power. But the model needs a charismatic vote-catching leader. There is no longer such a leader, and consequently state after state has been voting non-Congress. In this new situation the old game of state governments being toppled by an intolerant centre may be difficult to play, however great the temptation to do so. Electoral politics has, in a curious fashion, resolved this particular manifestation of centre-state conflict, at least for the present. The Congress centre seems to have become weaker and the states perhaps less weak than before.

The really enduring issue that generates differences in the centre-state arena is overcentralization. Things have come to such a pass that, in addition to central subjects, the centre has become the dominant actor in the concurrent field and even in

matters wholly the concern of the states, ranging from an item like the police to an all-embracing subject like rural development. Since there is little difference between the ruling elites at the centre and in most of the states, the phenomenon of over-centralisation has seeped into the polity widely. If the centre has been busy usurping the functions of the states, the states have been doing the very same thing with the functions of local governments. Governance as a whole has moved upwards and away from the people. Inevitably there are reactions. The states, cutting across party lines, have on this issue turned against the centre; sub-state ethnic and other groups against both; and the people against the entire system. Conflict has become inherent in the totality of the polity, not just between the centre and the states. The underlying issue is how much autonomy the people can exercise in the making of decisions concerned them. To date this has remained unresolved. India saw a lurch towards near-total centralisation during the Emergency of the mid-seventies. It has still to see a genuinely significant move in the opposite direction of decentralised, accountable, people-based, democratic governance.

Put in another way, the issue is not how to resolve differences between the centre and the states. So long as the ruling elites at these levels remain much the same the fight between them, if any, will be only how to share the spoils of power. The real issue is deeper. It is between those who have ruled so far, whether at the centre or in the states, and those who have been ruled over and have been at the receiving end, between the ruling elites and the people.

Perhaps the truth is that by and large there have been no real problems between the centre and most of the states. One seems this in the way institutions for discussing centre-state issues have functioned. The Rajya Sabha, which somewhat like the Senate in the USA was meant to be a council of the states, has

become just another debating forum no more concerned about the states than the Lok Sabha. The National Development Council composed of the Prime Minister and the chief ministers of all the states meets now and then, set speeches are made and eventually a consensus announced broadly reflecting what the centre has already decided. Much was expected from the Inter-State Council constituted by the National Front government at the centre. It has only succeeded in disappearing from sight.

So we have to turn to the exceptions like Jammu and Kashmir (J & K), Punjab and the Northeast which have occasioned tough conflicts. The demand in these places is expressed in evocative vocabulary, such as azadi (independence), Khud-mukhtari (self-determination) and the like. The discourse goes way beyond listed powers. It compels thought being given to the hitherto unthinkable. Why should such states not be allowed to write their own constitution's for autonomy ? They need be placed under only two constraints: one, that the centre must retain at least the minimum functions, defence and foreign affairs, and some aspects of communications and macro-economic management; and two, that the constitutions so written do not infringe the basic features of the Indian constitution. The doctrine that the national constitution has certain basic features that just cannot be amended, much less deleted, is one of the most creative contributions of the Supreme Court of India in recent years.

It needs to be borne in mind that the state of J & K already has its own constitution. It is another matter that J & K's autonomy has been steadily eroded by the centre in collusion with fraudulently elected governments in that state. What this suggests is that linking provisions tying state constitutions to the national constitution, like the famous Article 370 in the case of J & K, should be treated as unamendable basic features.

This "exceptions" sector raises two issues. First, is there necessarily merit in insisting on a uniform package of devolution for all states ? Should exceptional cases not be allowed specially packaged devolutions geared to their special circumstances ? Second, should the extraordinary demands of this "exceptions" sector be responded to militarily or democratically, through coercion or through dialogue ?

On the first issue, as already mentioned, the principle of special packages for individual states was conceded in the shape of Article 370 for J & K. It was later adopted for several other states in a series of provisions stretching from Article 371 to 371G. But the contents of these special packages has been overtaken by militant discontent in some places. India has still to recognise the need for substantially larger special packages for the states undergoing acute problems. There are instead backlash forces in the so-called mainstream demanding the scrapping of even the modest special packages that exist at present.

On the second issue, the mainstream ruling elites spread over all the so-called national political parties seem to be united in support of using primarily the military instrumentality. Which not only constitutes a non-solution but in fact keeps worsening problems.

Lastly, there are larger forces at work. Some sinister, like the rise of religions intolerance and extremism, which led to the destruction of the Babri Masjid and the unspeakable outrages of Surat, Bombay and many other places. Others hopeful, like the coming together of countervailing elements amongst disadvantaged sections such as the backward classes and the minorities. These are tending to shake and render out of date the set-piece chess board of the pre-existing polity configured by the centre and the states, for they cut across state boundaries and draw strength from deeper sources than what the ruling elites

have been accustomed to deal with. India is in the midst of a churning process in which regressive and hopefully progressive forces are wrestling with each other. Obviously it is impossible to tell which side will prove to be the eventual victor. But there is the undeniable fact that BJP which presided over the deplorable Mosque demolition at Ayodhya was democratically thrown out of power come next election in UP by a coalition of the backwards and the minorities.

In the face of these news forces, it is doubtful whether there is much to be learnt from the past handling of centre-state differences in India. There is an altogether new ball game. If there are lessons from the past they come from the way the "exceptions" sector has been handled or rather mishandled. The lessons are mainly two. One, that civilised governance must rely more on democratic dialogue than on authoritarian militarism. Second, that conflict in plural polities must be resolved without flinching from exceptional settlements that respect the aspirations of deeply troubled groups.

Comment

Austin Fernando

Since almost all of us are equally knowledgeable about the situation in Sri Lanka, I may not be dealing at length on this matter. I think we are also similar to India on power sharing, I don't call it the indestructible centre, but for devolution purposes, definitely there has been some sort of an indestructiveness which has been seen by way of a little bit of reluctance to devolve or share, as alleged by the Provincial Councils. But of course, as I said in a previous comment, due to the constitutional situation some of those things cannot be helped. Then, the centre-periphery relationships depended on the single political colour of the Provincial Councils which were in power up to last year, 1993. We had all the Provincial Councils under one banner, whereas it changed only in the last year or the year before, where three Provincial Councils went against the government party. Therefore, the situation became a little tough to handle because the political arrangements could not be made to deal with certain situations. Therefore, the conflicting situations started to raise their heads which created certain difficulties.

Mr Mukerji mentioned about some manipulations. It is alleged that in Sri Lanka also this had happened and sometimes on certain issues in a fairly undemocratic way I may call it. Like what has happened in Manipura, as you said. Then there were certain other institutional arrangements which had been built up by the then government, like the case of the establishment of Divisional Secretariats which was really pulling back the devolution of power to the divisional level. But then it was covered under the Transfer of Powers Act where the Divisional

Secretaries were given certain authority to be working under the Governor's authority by a letter of appointment. Anyway this was one way of generally creating some conflicting situation with the centre.

Then you have to understand devolution. If devolution is to succeed there are three things which people say should be in place. You should have the power and authority on resources, power and authority on manpower and the power and authority to make Statutes. Of course, Statute making has been taking place. Some of them have been challenged in courts, as the Transport Statute case. Then for resources, they had to depend on the centre and in the specific case of North-East Provincial Council revenue was not coming in and they had to be all dependent on the government contribution. And since the government had problems of liquidity and various other cash flow problems there were certain ways of creating problems.

At the same time, we must not forget the fact that sometimes the centre has been taking certain decisions which were creating problems for the periphery. For instance, sudden salary increases, sudden increases in advances have created lot of difficulties. For example, in the case of teachers salaries, in the middle of last year there was a change of position regarding the teachers' status; the trainee teachers being made full time teachers and certain salary advances being given. For teachers alone we had a bill of Rs. 641 million to be settled before the end of the year. This was not anticipated by the government, by the Provincial Councils and there was a big argument whether we are getting the money or whether we are not getting the money. So this type of problems have been erupting occasionally, but sometimes there are no solutions, because suddenly when the Treasury is told to give us Rs. 641 million, it is unimaginable.

The centre does auditing and there is some sort of arrangement between the Provincial Councils and the audit on accountability

to the Parliament, because the funds are voted in the Parliament.

Then there is another problem about the "national policy". There had been disputes about the "national policy" making and Mr Sambandan in the morning was asking me "Why do you want to have national policy making in Sri Lanka with the government? I think that this is the thinking of the Provincial Council themselves. What they say is that they are also an institution which has been elected by the people, but the only thing is that there are certain controls required due to over-dependence of the Provincial Councils on the government. For instance, except the Western Provincial Council no other Provincial Council in this country is self-sufficient. Western Provincial Council of course has more money than what they require for their own expenses, so they can be a little free but not others.

Then there is another legal provision where they say that in the Reserved List, there is a place where they say, whatever is not mentioned in Lists I and III will be automatically falling into List II. So therefore, there is no way one would know where the line can be drawn on the legalistic situation of powers, between the centre and the periphery. Of course on foreign assistance, under the Section 22 of the Provincial Councils Act, we find that foreign assistance is a matter for the centre to negotiate, but the provision is there that the monies which have been so negotiated and obtained through foreign assistance shall go to the provinces. As stipulated therefore, I don't think there is any problem in that particular matter.

Then we have, as I said a little while back, a vacuum at the district level. The members of Parliament do not have an assembly elected or otherwise. We have the national Parliament at the centre and we have the Provincial Council members, we have the Pradeshiya Sabha members but not a district level organisation. Therefore, there is a conflict occurring, mostly

dependent on the political aspects of administering, and there own resources, their own appointments, staffing and thing like that. We are having a District Secretary at the district level and a Divisional Secretary at the Divisional level who is responsible to the centre to the Ministry of Home Affairs. It brings in another dimension to this conflict because the Provincial Council officers are different from officers in these offices.

Then about the subject of Rural development in Sri Lanka, we have a ministry which is for rural development, but of course, all the rural development activities are undertaken by the provinces. There is no conflict of interest even though one can argue. I think Rural Development is Number 10 in List 1. One can point out this as a problematic situation. Therefore, this over-centralisation in local government is not found in our case even though Mr Mukarji was mentioning something to that effect in India. Under 4 (2) of List 1, there are only three things which are being looked after by the centre. The form, constitution and structure of a local authority can be decided by law. They are vested in the centre, whereas all other supervision of management of local authorities is a matter for the Provincial Council. Sometimes we find a competition between the provincial councillors and the local government authority members. Sometimes the support which is required by the local government authority is not received from the Provincial Council. The conflict is not in the centre but within the family of the Provincial Council and the local government. The only contradiction that we have in Sri Lanka in the devolution process in 1987 is that it commenced as a requirement to settle a certain political dispute in the North and East. So the place where devolution was most required was north and east where we don't have even a Provincial Council assembly. And we who are here in the southern areas never asked for devolution, but were given devolution and we have Provincial Councils. A little bit of contradiction is created due

to certain problems between the parliamentary representatives, the local authority representatives Provincial Council representatives and the rest. So therefore, its a contradiction which we have to face. Of course, it has nothing to do with the constitutional system in this country. I think I might as well stop at this because I just wanted to respond to certain things which I mentioned and I would like the participants to respond to Mr Mukarji's and my comments.

July 1995
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MONOGRAPH 4

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