

Asymmetric Solution for Kashmir

The Statesman

September 07 and 08, 2016

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Once again, Kashmir is under siege. Violence has been convulsing the unfortunate state since July 8, when the 22 year old charismatic separatist leader Burhan Muzaffar Wani was killed by the security forces. In the violent protests that ensued, and in the response of the security forces, scores have died and thousands injured, half of them being security personnel themselves. This time, the all too familiar script of containing violence with force and simultaneously engaging in dialogues with the stakeholders including separatist leaders is no longer working. The unrest shows no sign of abating and the state government seem to be bereft of all ideas about how to bring peace back to the troubled state. May be it is time to think of options to and experiment with some out-of-box solutions, by drawing lessons from how similar situations have been handled by other countries in the world.

The history of Kashmir's accession is too well known to merit any repetition. After the Constituent Assembly of J&K ratified the accession of the State to India in 1956, Government of India's stand had remained unchanged that Kashmir's accession to India was a settled fact and plebiscite was no longer an option. Article 370 of the Constitution, adopted by the Indian Constitution Assembly in 1949, promised a special status and internal autonomy for J&K while limiting the Indian Parliament's jurisdiction only to defence, foreign affairs and communication. The Union of India could not make laws with respect to the state without its concurrence. But "Article 370 - Temporary provisions with respect to the State of Jammu and Kashmir" - was meant to serve only as a temporary measure till Kashmir was finally integrated into the Indian Union. The Delhi Agreement signed in July 1952 between the Indian Government and Sheikh Abdullah much diluted the article, by extending provisions of Indian Constitution to the state in respect of fundamental rights, jurisdiction of the Supreme Court of India and emergency provisions under Article 356 and also empowering the Parliament to make laws for the State. The special category status awarded to the state later in 1969 addressed some of the developmental bottlenecks faced by it, but the promises held out by article 370 were never fulfilled. The promises were of guaranteeing an asymmetric status within the federation to integrate the State, dissimilar to other Indian states in many respects, into the Indian federation.

Many federations have learnt to accommodate diverse socio-economic, ethno-religious and cultural-linguistic differences between their constituent units – especially in large federations where differences between the constituent units are serious enough to breed and nurture the seeds of future potential conflicts. All federal systems have to provide for independence, autonomy and self-determination of their constituent units within a broader political union. While in symmetric federalism, no distinction is made between the constituent units in terms of their powers or autonomy within the federation, in asymmetric federal systems, different sub-national entities are given differential constitutional status with differential powers, with some entities enjoying higher degrees of autonomy than the others.

The Indian Constitutions makers were aware of the many divergent tendencies that existed within a newborn 'majoritarian' nation, and consciously decided to accommodate these fissiparous tendencies in a harmonious manner through articles 370 for Jammu and Kashmir and article 371, besides Schedules V and VI of the Constitution in respect of the north eastern states and certain other areas. Asymmetric powers embodied in these instruments were envisaged to accommodate the conflicting demands of language, religion, caste and tribe in our northeastern states. Similar powers have been institutionalised in many other countries.

No large society in the world is wholly integrated or wholly diversified. All societies fall somewhere in the wide spectrum between these two extremities. Similarly all federal countries thrive on the basis of a compromise between union on the one hand and autonomy and independence of all constituent subunits on the other, combining, as Edward Freeman had said, "the advantages of the large state - peace, order and general well-being – with those of the small state – the full development and autonomy of the individual citizen".

As Luis Moreno and Ceser Colino pointed out, of the 65 countries in the world that exhibit substantial diversity, meaning where ethno-cultural, linguistic or religious minorities account for more than 5 percent of population, only 15 have federal systems. Some of these countries have devised different institutional arrangements through legal, political and constitutional processes, political participation, fiscal federalism or other institutional means to deal with to deal with their own configurations of diversities arising from economic disparity, migration, religion, language, culture or ethno-national identities. The oft-quoted examples are of Belgium, Canada and Spain.

Belgium is a small country in Western Europe inhabited by little over ten million people. 58 percent of its population are Dutch speakers who live in the northern part of the country in Flanders. About 32 percent are French-speakers who live in Wallonia in the south. The remaining 10 percent German speaking Belgians live in the Brussels capital Region. Though territorially, Belgium is divided into three regions, linguistically it is divided into three Communities: Dutch, French and German, as seen above. Each of the regions and communities has its own parliament and executive, with their constitutionally-assigned powers. The executive and legislative powers are also divided evenly among the three regions and communities.

Both houses of the national parliament are divided into linguistic groups. The 71-member Senate has 41 members from the Dutch, 29 from the French and one member from the German speaking communities. In the lower house, there are 150 representatives who get elected from the respective political parties through the method of proportional representation. Thus there is no scope for over or under-representation by any linguistic group, which holds the diverse groups together within a coherent federation.

Unlike Belgium, Canada is a large federation with a population of 35 million, divided into two major linguistic groups: 59 percent Anglophone and 23 percent francophone, of whom 80 percent live in Québec alone. Canada is often described as a bi-national federation, with predominantly French-speaking Québec seeking constitutional recognition 'as a distinct society or nation', or aspiring to become an independent country while retaining its economic and political association with the rest of Canada.

Political tension between the British and French immigrants was a historical legacy dating back to the 18th Century, when French and British immigrants came together to settle in Canada.

Québec became home to the largely Catholic French settlers, while the largely Protestant English settled in Ontario. They were like ‘two nations warring in the bosom of a single state’ separating in 1840 and then coming together again in 1867 in a confederation of ‘equal partnership’, with both having rights to their language and religion guaranteed by the Constitution Act of 1867, which recognised the ‘unique character’ of Québec, permitting the Québécois to practice their own civil law as distinguished from the common law system prevailing in the rest of Canada, in striking similarity to our article 370. The Canadian Constitution ensures that the Canadian Parliament is bilingual, that each province is sufficiently represented, its provincial autonomy being fully protected.

There had been a consistent struggle between centralising and decentralising tendencies in Canadian society throughout. During 1960s and 1970s, the Québec nationalist movement was intensified by the separatist political party, Parti Québécois, which sought independence for the Québec ‘nation’. Besides its language and culture, Québec has retained exclusive authority employment and immigration issues within its borders, issues that are prerogatives of the federal government in all other provinces, a script that may be tried in Kashmir when everything else seems to be failing.

The asymmetry in Canadian federation actually goes much deeper than the issues of autonomy and rights. It addresses the fundamental question whether two distinct societies or nations can co-exist within a federation with an option to exit. It was a question of whether Québec can be constitutionally recognised as a distinct society within Canada with the right to secede. In a landmark judgment, the Canadian Supreme Court, while ruling that such a right did not exist under the Constitution, asserted that if Québec decides to secede on the basis of a ‘clear question’ and ‘majority vote’, then the other federal partners would have the Constitutional obligation to ‘negotiate a new pact’, making Canada one of the few countries to recognise the right of secession by a constituent unit. In a subsequent development, through a simple motion in the House of Commons in 2006, the federal government recognised Québec as a distinct society and assured that it would not support any constitutional change without the support of Québec and other regions of Canada. It resolved that Québec, at least sociologically, constitutes a ‘nation’ within Canada.

Canadians have so far failed to resolve their differences, but that has not prevented them from holding together as a strong, multi-national, multi-cultural federation committed to the constitutional principles of federalism, democracy, rule of law and respect for minority rights. Canadian experiment is an example of a fine balance between unity and diversity, symmetry and asymmetry and of peaceful and democratic management of multiple diversities through negotiation, accommodation and renegotiation.

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Complex societies that display remarkable diversities are often the products of their complex histories. Spain is a multinational state – a ‘nation of nations’ or to some, a ‘plurinational state’ with a long and complex history, during which it has experimented with republicanism, dictatorship, democracy and had to contend with anarchy, violence, civil war and periods of prolonged political instability. It was a dictatorship under General Francisco Franco till his death in 1975. In 1978 when its present Constitution came into force, Spain became an Autonomic State - *Estado de las Autonomias* – comprising 17 Autonomous Communities (AC) through an extensive asymmetric decentralisation of ‘competences’ – i.e. powers and responsibilities.

Spain has a multilingual population which is widely divergent - economically, territorially, demographically, ethnically as well as culturally. A strong Castilian majority exists with a number of minority nationalities – Catalonia, Galicia and the Basque Country – each with its distinctive history, culture and language. The four largest ACs – Andalusia, Catalonia, Madrid and Valencia – share among themselves about 58 percent of the national population of 46 million, and nearly 60 percent of Spain’s GDP. Catalonia and the Basque Country, regions that have histories dating back to several centuries, regard themselves more as ‘historical nations’, and demand recognition as such. In many ways Kashmir resembles the Basque Country which is similarly isolated in the Pyrenees Mountains, and is inaccessible with limited economic potential. This seclusion had marginalised it to resist assimilation into the Spanish mainstream and Christianity for a long time.

A homogenous administrative and legislative standard is applied to governance in all 17 ACs: each AC has a legislative assembly. However, as regards financial autonomy, two ACs, Navarre and the Basque Country, have additional competencies not enjoyed by the other ACs - they can collect some of the state taxes like income tax and pay to the state for the services they receive from it, while the other communities follow a uniform tax regime based on collection by the state and their redistribution and devolution to ACs.

Distributing legislative competences between the centre and the ACs is rather complicated and ambiguous. As Wilfried Swenden pointed out, such complexity arises from the lack of agreement on where the Spanish state should be heading: a federal, a regionalized or unitary decentralized state? The Spanish constitution lays down separate lists of competences for the federal centre and ACs, much like the Seventh Schedule of the Indian Constitution. Further, each of the regions also has a ‘Statute of Autonomy’ that must contain certain competences within the framework of the Constitution, which can be expanded by amending the Constitution; ACs can even encroach upon ‘exclusively Central’ competences. This opens a road for bilateral negotiations between the State and the ACs, and some ACs may wrest more powers from the state than others.

Spanish Constitution does not recognize the right of self-determination by Spain’s nationalities or regions. However, both Basque and Catalan Parliaments have already voted for recognition of the right to self-determination for their ACs. Permitting referendum is the exclusive prerogative of Spanish Parliament and hence a referendum by an AC would be invalid without its consent. In June 2008, the Basque Parliament passed a law for conducting a referendum, which was contested by the Central government before the Constitutional Court which confirmed the unconstitutionality of this law. The Basque government consequently abandoned the idea of holding this referendum. A similar thing happened with Catalonia. The rejection of their demands has incited nationalistic sentiments in both the regions, but Spain is still holding together as a strong, unified nation.

Nearer home also, there is a federation, Malaysia, whose constitutional mechanism has quite a few similarities with India’s and which also exhibits a high degree of diversity. Malaysia is a union of 30.5 million people living in thirteen states: eleven in peninsular Malaysia and two in the northern part of Borneo - Sabah and Sarawak, separated by 640 kms from the peninsula by the South China Sea. Malay and other indigenous people, called *Bumiputeras* (Sons of the Soil), together constitute nearly 62 percent of its population; among the rest, 23 percent are Chinese and 7 percent are Indians, besides 8 percent non-citizen immigrants. Islam is the official religion, though the Constitution gives fundamental right to all citizens to profess, practice and propagate their own religions. Muslims constitute just above 60 percent of the

population and Buddhists 19 percent. Like India, Malaysia is multi-ethnic, multi-racial, multi-lingual and multi-cultural.

Malaysia was formed in 1963 by the merger of the independent Federation of Malaya and the formerly British colonies of Singapore, Sabah and Sarawak. Singapore was a part of Malaysia until 1965, but the political and ethnic tensions between the ethnic Malays of Malaysia and the largely ethnic Chinese population of Singapore ultimately led to the secession of Singapore from the federation in 1965 and its emergence as an independent sovereign country under Lee Kuan Yew, after the Malaysian Parliament voted to expel it from the federation.

Malaysian society has perpetual tensions between the *Bumiputeras* and non-Malays largely based in peninsular Malaysia, between fundamental Islamists and moderate Muslims and also among the *Bumiputeras* - between Muslims based largely in the peninsula and non-Muslim natives of Sarawak and Sabah. The communal nature of these conflicts has close parallels in India. Malaysia addresses these conflicts by granting significant autonomy to Malays and indigenous peoples of Sabah and Sarawak, much in excess of the autonomy exercised by the other eleven states. The Constitution of Malaysia, like India's, provides for positive discrimination by safeguarding the special position of the Malays and natives of Sabah and Sarawak and the legitimate interests of other communities, by protecting and promoting their interests in the four main areas of reservation: land, quotas for admission into certain sectors of federal public service, the issuing of licences and permits for the operation of certain businesses and the provision of educational assistance.

Malaysia is a highly centralised federation where powers are strongly concentrated in the Central government rather than being evenly distributed between the Centre and the states, much like in India. Taxation is almost an exclusive monopoly of the federal government, but Sabah and Sarawak are allowed to make laws for imposing taxes; they are also exempted from the provisions of Article 76 that allows the federal government to encroach upon state subjects as enumerated in the State List. While the right to secede from the federation is denied, there are Constitutional safeguards, known as Twenty Points, for Sabah and Sarawak for their participation in the federation. These include that Islam's status as the official religion is not applicable to Sarawak and Sabah, besides granting them exclusive immigration control and special powers for raising revenues. No specific safeguard granted under the Twenty Points can also be amended by the federal government without the concurrence of Sabah and Sarawak state governments.

The Malay Federation gained independence from the British in 1957, and special privileges and rights of these communities emerged from its imperial legacy as they had enjoyed these rights also under the British administration. The Independent Constitutional Commission appointed in 1956 prior to the independence of the Federation of Malaya, while deciding to continue with these privileges, recommended that with the gradual integration of these communities into a common nationality, the need for these special preferences would gradually disappear, and, 'in due course the present preferences should be reduced and should ultimately cease so that there should then be no discrimination between races or communities'. Their Constitution finally rejected their stipulation of a time limit of fifteen years for this purpose, and made the Head of State responsible for activating a periodic review of any proposals.

In heterogeneous societies, as in these countries, the extent of diversities and differences determined the level of asymmetry necessary to establish the equilibrium for dissipating discontent and conflicts. More accommodation does not necessarily mean weakening of the

federation to the point of disintegration. It may actually contribute to assimilation and stability within the democratic structure and within the limits defined by the rule of law. In a centralised federation like India, this stability can be reinforced only if the process is guided not by considerations of political expediency, but by national interests established through consensus among the Centre and states and also among the political parties and all other stakeholders. This can happen when all the stakeholders rise above their narrow, parochial and short-term visions. Sadly, this consensus is yet to emerge for the beautiful state of Jammu & Kashmir which has been pulverised by repeated cycles of violence and terrorism. It is time to experiment with some unconventional solution like the ones discussed.