

The Federal Idea and Secession

By Bob Rae

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There has been a profound resurgence in interest in the federal idea in the last decade. I choose the phrase “federal idea” carefully because the “ism” in federalism has a way of limiting debate and understanding. In Spain, the central government is reluctant to use the word because it seems to connote the dissolution of sovereign authority; conversely the Catalonians won’t use it because in their eyes it does not sufficiently represent the unique nature of the Catalan claim to self-government. In South Africa the word fell into disrepute because it had some official approval from the apartheid government; similarly the African National Congress’s vision of “one South Africa” made the party reluctant to describe any new constitution as “federalist.”

These are hardly new debates: the Jeffersonian tradition in American politics was proud to call itself “anti-federalist” because it concluded that the centralizing forces behind John Adams and Alexander Hamilton had branded the “f word”. Yet both Thomas Jefferson and John Adams were clearly federalists who shared far more key assumptions than the rhetoric of democratic debate might have let some to believe.

What is happening today in South Africa, Spain, Mexico, Nigeria, the United Kingdom, Russia, Brazil, India, Pakistan, Cyprus, and Sri Lanka, to mention just a few countries, are a reflection of some important common tendencies that need to be understood. There is certainly more than one way to be a federalist; it is the common idea that matters.

Political arrangements of cooperation and association have their roots in many ancient societies, from African tribal councils to city state pacts to the Iroquois Confederacy. The modern federal idea is first and foremost a democratic idea. It implies a respect for people’s identities and their political choices, freely expressed and has to start from that premise. It is incompatible with populist concepts of democracy that are not based on a respect for individual rights, constitutional process, and the rule of law. It also runs against those elements in society who believe they have a pipeline to the “real” or “best” interests of the people. Ideologies that express a certain knowledge of political truth (or religious truths as made manifest in the world) are implacable enemies of the federal idea.

The federal idea, therefore, understands the vitality of politics and rival notions of the public interest. It also speaks to a common concern about limiting the sphere of

government. Constitutions that set out which level of government can do what, and then also guarantee rights and freedoms, if they are combined with a court structure with the capacity to interpret this balance – and to enforce that interpretation – are inevitably about the limits of popular sovereignty and the protection of both group and individual rights.

These points are basic to the defining element of the federal idea, namely that a federal country is one where power is at once divided and coordinated. That, of course, is the central tension in federalism: it is not just “one idea”. It implies a common agreement to do certain things separately and other things together. It is about more than just devolution, because the premise is that state or provincial governments have as much sovereignty in their sphere as the national or federal government have in theirs. There are different governments doing different things within a common framework. Nor is the national government a mere creature of the provinces, delegated by them to do certain tasks. It too has its own sovereignty, its own direct connection to the people.

The federal idea, therefore, implies an ongoing dialogue about who does what. There are significant issues in each federation about fiscal issues, how money is raised, how it is shared, how it is spent. In Canada resources are provincially owned and the windfall from that flows to different provincial governments. In Nigeria the central government claims all oil revenue and then divides it up according to a formula. With the return of democratic federalism to that country, the issue of how revenue should be divided is now being argued in court. Australia’s revenue sharing formula is said to so complicated that it brings to mind the British statesman’s comment that “there are only three people who know the causes of the Crimean War. Two of them are dead and I can’t remember.”

There is a growing consensus that local and state governments need to be able to raise the money to spend on their own programs: this increases both transparency and accountability. Where this is not possible, central revenue sharing needs to be both clearer and less unilateral. When this doesn’t happen, as is often the case, it gives rise to inevitable conflict.

Those opposed to federalism point to these conflicts, the sometimes-bewildering complexity of federal institutions, and the alleged cost of “too many governments” as justification either for separatism or simply abolishing regional governments altogether. In Sri Lanka, for example, federalism has often been opposed by elements of the majority because it is said to imply costs in a country that is too small for federal arrangements. Canadians will remember Quebec Premier Jacques Parizeau’s famous promise in Toronto that the appeal of separatism to the rest of Canada was that it would mean “no more trips to the dentist.” To which one might reply that if you don’t go to the dentist your teeth fall out.

On a much larger scale, it would be hard to point to the “efficiency” of a one party Mexico or the Nigeria of the military dictatorships. Switzerland is geographically small,

and politically complex. Yet it has remained for decades a symbol of efficiency and tolerance.

The federal idea is indeed about the complexity of things, but better the give and take of an endless negotiation – isn't that what much of life itself is, anyway? – than the simple desert of the Jacobin, the Leninist, the militarist, the religious fanatic, or even the old fashioned ethnic nationalist whose world has difficulty with any kind of pluralism.

The resurgence of the federal idea has at its core many different causes. The vitality of the values of democracy, the revolutions in the politics of identity and human rights, the twin collapse of apartheid and bureaucratic communism, the impact of the technological revolution, the economic changes we associate with the word “globalization”, all these have made their contribution. In Mexico, for example, one party rule for most of the twentieth century meant that while the constitution spoke of the federal nature of the country, the reality was quite different. The same was even more true for the Soviet Union. The man on horseback had an equally brutal effect in Brazil and Nigeria: the federal idea is quite incompatible with the command control mentality of the military hierarchy.

This renewal is not at all confined to countries that have a federalist tradition. Countries have long had to struggle with the simple truth that geography is rarely synonymous with automatic homogeneity. Ethnic, linguistic, racial, and religious conflicts have become the dominant issue facing the world order today. Wars after 1945 have been as much within countries as between them, with disastrous consequences for peace and security. It is no longer soldiers dying in the millions, but civilians. From Rwanda to Cambodia, from the Balkans to East Timor the battleground is within countries that are unable to resolve the conflicts of what Michael Ignatieff has called “blood and belonging”.

It is in this context that the federal idea is re-emerging. In Sri Lanka negotiations are focusing on practical arrangements for both dividing and sharing power, for civil rights for minorities, for linguistic and religious tolerance: this after a conflict which has taken over 60,000 lives in the past twenty-five years. The painful back and forth in Northern Ireland – where thousands have also died – depends for its resolution on a willingness to recognize the legitimacy of “the other”, a capacity for political and administrative flexibility, and an ability to bring terrorism into line. These are all easier to say than to do, but it is hard to see how the federal idea won't be part of the solution – if solutions are to be found – in each case.

The federal idea is part of another trend as well. European cooperation since the 1950's has now led to an elected European parliament common court, freedom of movement as well as free trade and a common currency. Supranational federalism is now a reality, despite extensive mutterings about the “F” word. National sovereignty is not dead and the nation state is not over. But the notion that these are exclusive or all defining is clearly outmoded. Governance practices within countries are inevitably subject to the scrutiny of world political and economic opinion. Religious

fundamentalists in Nigeria cannot claim that the implementation of sharia in one of its northern states is “no one else’s business”. As the European Court of Human Rights showed in Northern Ireland, it was not possible for the United Kingdom to become a “little bit European” and to insist on its unilateral right to impose any kind of security law it wanted.

Canada’s determination to recognize and resolve our internal conflicts explains our own federal story, which is in many ways similar to so many in the world today. We originally adopted the federal model because it was the only way French and English could live together. We dealt with ethnic, linguistic and religious conflict long before it was fashionable. There is also a growing recognition that how governance actually works in both the public and the private sector, has a profound effect on the development process itself. Corrupt bureaucrats, low respect for laws are a recipe for economic stagnation and decline as well as political tragedy.

Canada's love affair with the federal conversation is no longer a purely domestic affair. The collapse of one party states, the demands of identity, the urge to local empowerment, the insistence on greater openness and transparency in government, and the recognition that in a smaller and much more interdependent world "sovereignty" is no longer an absolute, has brought the federal idea to the fore again.

At the conclusion of the Mont Tremblant Conference on federalism in 1999, Bill Clinton remarked that "maybe the federal idea isn't such a bad idea after all". He was right, and it is against this backdrop of a broadly renewed interest in federalism that I want to speak to the major themes of this conference.

I am not a scholar of Indian federalism, but it would seem to me that it is impossible to imagine India without the federal idea. It is also the case that two important phenomena have contributed directly to the modern expression of Indian federalism. The first is that India’s political pluralism is even greater than it was at independence. The second is that the key decisions in the 1980’s and 1990’s to change the relationship between the Indian state and the market have inevitably contributed to a stronger economic regionalism.

Both these forces mean that India must be considered a “deep federation”: federalism is imbedded in its politics, its ethnic diversity, and its economics. This depth has been increased even further by the wise flexibility India has shown in dealing with issues of race, language, ethnicity and religion. As difficult and complex as are the new governing relations in the northeast, for example, they have done much to revitalize the idea of federalism.

Let me turn at the conclusion of my remarks to the vexing question of secession. I have frequently heard it said in the Sri Lankan context that one of the problems with federalism is that it risks being a stepping stone to separation. This is decidedly not my view, and I shall draw on recent Canadian jurisprudence and practice to support my position.

You will recall that the government of Quebec twice proposed a referendum to the people of Quebec – in 1980 and 1995 – on substantially altering the existing constitutional relationship between Quebec and the rest of Canada. The first referendum in 1980 was easily defeated. The second was much closer, and it was this second result in 1995 which led the Canadian government to its decision to pose certain questions to the Supreme Court of Canada: the first was whether there is a unilateral right to secession in Canadian law; the second was whether there is such a right in international law.

The court's conclusion was a clear "no" to both questions, and it was a view expressed with intelligence and distinction. The first answer – about Canada – is clear enough. The modern country of Canada was born in 1867 when a single, unified province was split into Quebec and Ontario, and other provinces joined to form a federation. There is no provision anywhere in the Canadian constitution then or now for a break-up of the federation.

The court goes on to say that the rule of law, Canada's commitment to constitutional government, the need to respect minorities and opinions in other provinces, and the operating principles of federalism make unilateral secession a non-starter.

The court adopted this language to talk about these competing commitments: *"A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation...when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation."*

However the court also made it clear that to reject an automatic right to exit did not mean that a minority community had no claim to autonomy or respect. Quite the contrary. The court went so far as to state that a clearly expressed free vote in a province would trigger not separation but a duty to negotiate by the majority.

Similarly, in applying international law the court struck another difficult balance. The court noted that international law places great importance on the territorial integrity of nation states, and that there is no general right of secession. At the same time the principle that a people has a right to self-determination is now a fundamental norm of international law. The expectation is that the exercise of these rights "will take place within the framework of existing states and consistently with the maintenance of the territorial integrity of those states."

There are, however, circumstances where the law recognizes a right to secession: where a people are manifestly oppressed, where they have no access to their own institutions, where access to government itself is denied, where they are subject to a colonial or foreign power.

The Supreme Court of Canada found that none of these conditions could, under any definition, be said to apply to Canada or Quebec.

I could simply end here, but clearly we have to take note of the different ways this judgment has been used and applied. In Canada the federal government took the view that legislation – the Clarity Act – was required to put the Supreme Court’s opinion into a binding law. This has now been done.

At the end of its judgment the court says
“A state whose government represents the whole of the people or peoples within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law, and to have that territorial integrity recognized by other states”.

The current conflict in Sri Lanka, it would seem to this observer, really turns on two questions. The first is the extent to which Sri Lanka itself conforms positively to the criteria set out in the paragraph above. Can the major political parties agree on “the principles of self-determination in its internal arrangements”? The most outstanding example of peaceful constitutional change in recent times is South Africa. That change was achieved because re-making the constitution was ultimately seen as an issue that transcended partisan politics. This is decidedly not the case in Sri Lanka. The persistence of political splits and raucous debate makes nation-building more difficult.

The second question is the legitimacy of the tactics and methods by which self-government is pursued. Violence against civilian populations, the assassination of political opponents, the recruitment of children into guerrilla units: where and when these means are used, they present an affront to any notion of civility and the rule of law. The continuing evidence of these tactics is incompatible with democracy and federalism.

The challenge ahead is great indeed. It requires, on the one hand, a clear and unambiguous commitment from the majority to pluralism and the principle of self-determination within a single country. Equally vital is a commitment to pluralism, democracy, the rule of law and non-violent change from the LTTE.

Constitutional change must be transparent. It cannot be done by stealth. Constitutional democracies are incompatible with intimidation, secrecy, and single party dictatorship. There is a need now for candid discussion at all levels of Sri Lankan society about several questions:

- If Sri Lanka is to have a federal system, what precisely are the provinces (or states) to be and what are their boundaries? Are we dealing with a two province solution, or a multi-province solution?

- What are to be the powers of the provinces and the federal government? What powers are exclusive? What powers are to be concurrent? Will concurrent powers have a federal or a provincial override?
- Is Sri Lanka prepared to consider an asymmetrical model of federalism?
- What changes are necessary with respect to central (federal) institutions? What would be the role of a second chamber? What would be the role of the courts, how would judges be appointed, and would the principle of judicial review of legislation be respected? Is any consideration being given to a shift in the powers of Parliament and the President?
- What guarantees would be in place for racial, linguistic and religious minorities? What protection for languages? What protection for education and social services? Would there be an entrenched charter of rights enforceable by the courts? When would elections be held in the provinces and what guarantees would there be that these elections would be free from violence and harassment?
- What process will be followed to achieve change? What ratification process will be followed to achieve this change?
- What steps, if any, will be taken to deal with the crimes and abuses of the past?

These questions are by no means exhaustive, but it is difficult to see how much progress can be made in negotiations unless they are dealt with in a systematic fashion. Interim steps are no doubt important, but they must be seen as steps to a more comprehensive settlement.

On my desk in my office is a quotation from a student of mine: “We are not at our best when perched at the summit. We are climbing at our best when the way is steep.” The way is decidedly steep, but that is precisely when we must be at our best.