

THE MAKING AND UNMAKING OF CONSTITUTIONS—SOME REFLECTIONS ON THE PROCESS

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I

'The making of a Constitution is not an isolated event but a step in the process by which a people assert their identity, articulate their basic values and aspirations and define the instruments of government through which the sovereignty of the people can be exercised'.

There are two approaches to this process which need to be distinguished and clarified.

The first approach is directed towards the elaboration of an institutional framework which more effectively corresponds to the political style of the regime in power. Such an approach is regarded as the 'instrumental' approach to constitution making and does not envisage the constitution to be an eternal instrument embodying the highest values and aspirations of the people. There is a measure of impermanency in such instruments as their lifespan is often limited to the duration of the political regime in power. They provide the means by which those who had captured power can more effectively organize and exercise power.

The second approach to constitution making envisages the constitution to be the fundamental law, enshrining for all times the basic values, aspirations and ideals of the different components of the body politic. Such constitutions are somewhat permanent instruments, and even the process of amendment gathers inspiration and direction from the underlying philosophy of the constitution itself. The second is the 'consensual' approach.

The instrumental approach recognizes a somewhat authoritarian process of constitution-making which disregards the aspirations of groups in opposition to the regime in power. The consensual approach, on the other hand, views the constitution as a legal and political compact capturing the compromises that have been worked out between different communities and political groups: it defines the framework with which the different groups may compete for power and gain access to the resources of a society.

Is the constitutional exercise that has been recently completed of the instrumental or consensual type?

II

The resort to a Select Committee procedure meant that the political parties unrepresented in the Assembly could not enjoy direct participation in the drafting process. The non-participation of the Tamil United Liberation Front in the Select Committee further eroded the exercise of its 'consensual' elements. The conceptual basis for the TULF's withdrawal from this process has been summarised by A. Amirthalingam, Leader of the T.U.L.F.

"The Republican Constitution of 1972 sought to sever the legal and constitutional link with the past. Once there is such a break in legal continuity, the sovereignty of the inhabitants of the Island, until then under eclipse (during a period of foreign domination or externally designed constitutional rule), resurfaced. Hence the sovereignty of the Tamil nation, which was ethnically, geographically and linguistically separately identifiable and distinct, revived. The United National Party had a clear, unequivocal mandate to assert the sovereignty of the Sinhala nation and enact a new constitution. The mandate of the majority of the Tamil nation pointed to a different duty".

The statement symbolized the major conceptual transformation in Tamil aspirations from 1972-77, which have added to a questioning of the relevance of "Constitutionalism" to the problems of a plural society. This conceptual transformation was related to the assertion of a corporate identity by the Tamil people which was shaped by their perception of a distinct history, language and culture. This identity was seen however by others to be incompatible with and antagonistic to the corporate and collective identity of the Sinhala people causing an ideological crisis in Sinhala-Tamil relations. The nature of this crisis is best understood by reviewing some of the events which signalled a shift in Tamil aspirations from the demand for equality to a desire for self determination.

We begin this exercise by taking our minds back to the 24th of May 1972, two days after the Republican Constitution was enacted. The then Federal Party, participated in the deliberations of the Constitutional Assembly, but withdrew from this process in despair after its attempts to work certain amendments into some of the basic resolutions were arrogantly disregarded. Despite the mood of pessimism within the Tamil leadership, an effort was made to formulate a programme which constituted the lowest denominator of Tamil needs and aspirations. This programme, which was later described as a Six-Point Plan, contained the following specific elements:—

The first element called for equality in constitutional status of the Tamil language and the Sinhala language. Secondly, it called for citizenship to be extended to all those who had settled in Ceylon and who had been rendered

stateless under the citizenship laws. Thirdly, it called for a commitment to a secular State, one in which the equality of all religions was assured. Fourthly, it called for constitutional guarantees of the fundamental rights and freedoms based on the equality of all persons on ethnic and cultural grounds. The fifth element of the Six-Point Plan involved the abolition of caste and untouchability. And finally, there was a call for a decentralised structure of government which would make it possible for participatory democracy to flourish and where power would be people's power rather than State power.

These demands presupposed a commitment to constitutionalism and represented a desire on the part of the Tamil leadership to work towards equality within a plural society. The stubborn refusal of the then government to seriously negotiate these proposals shattered the expectations of even the more optimistic exponents of this policy. The party leadership became embittered, and sought an opportunity to demonstrate to the government the complete rejection of the Republican Constitution by the Tamil people. S. J. V. Chelvanayagam, the Leader of the Federal Party, resigned his seat in the National State Assembly with a view to seeking a mandate for the six Point program.

During this period there were other forces which contributed towards a dramatic escalation in the nature of Tamil demands. The Tamils complained of a conscious policy of discrimination with regard to access to employment, education and the execution of developmental programs in the North and East. The language concessions contained in the Regulations framed under the Tamil Language (Special Provisions) Act were not implemented. In the area of land use and land settlement, the government was accused of pursuing a policy directed towards a transformation of the demographic composition of Tamil areas. When Indian estate labour displaced by the land reform policies of the government were voluntarily settled in the Eastern Province, emergency laws were mobilized to eject such persons. On the other hand, the government is alleged to have regularised the illegal settlement of thousands of Sinhala squatters in the North and the East.

Political resistance and agitation against such discrimination were further repressed through preventive detention and harassment of Tamil youths in the North. The politics of hostility, supported by repression and the arbitrary exercise of emergency powers hardened Tamil resistance to the Government.

These events had an important bearing on the emergence of a new Tamil consciousness. The Kankasanturai bye-election of 1975 became the focal point of agitation for the emerging aspirations of the Tamil people. The Federal Party fought the election on the Six-Point Plan, but it was the governmental coalition which irresponsibly contended that support for Chelva-

nayagam would accelerate the processes of separation. The overwhelming majority received by Chelvanayagam enabled the Tamil leadership to appropriate this argument. Chelvanayagam announced after the results, "I wish to announce to my people and the country that Eelam Tamil Nation should exercise the sovereignty already vested in the Tamil people and become free". By this historic statement the conceptual transformation and the demands of the Tamil people became crystallised. This statement represented a shift from the struggle for equality to an assertion of freedom; from the demand for fundamental rights to the assertion of self-determination; from the acceptance of the pluralistic experiment to the surfacing of a new corporate identity.

There are two other events which further consolidated this process. The first was the Vaddukoddai Resolution which sought to translate these vague and disconnected aspirations into a concrete political program. Secondly, the Trial-at-Bar (where three Members of Parliament and one former Member of Parliament were charged with sedition) in which a legal challenge was made to the validity of the Republican Constitution. This trial provided an opportunity for a sharpening of the juridical and historical underpinnings of the new corporate identity of the Tamil people. The TULF's refusal to participate in the deliberations of the Select Committee represented an extension of the juridical argument which was articulated at this trial.

III

The Select Committee constituted in November 3rd 1977 tabled its report on June 22nd 1978. Despite these major handicaps there was remarkable congruence between the views of the United National Party and the Sri Lanka Freedom Party as they related to some of the substantive concerns of the Select Committee. The area of agreement included fundamental rights, judicial review, language, citizenship, principles of state policy, the creation of an ombudsman. Although the SLFP has been consistent in its opposition to the Executive Presidency and some aspects of proportional representation its principal concern as reflected in its dissent appears more procedural than substantive. It protested against the total repeal of the Republican Constitution of 1972, and favoured the introduction of a Third Amendment containing substantive alterations to the existing instrument. This position appears to have been further hardened by the addition of controversial provisions in the general and transitional chapters after the Committee Report had been tabled. The SLFP dissent accordingly warned ominously. "The sanctity and continuation of a Constitution depends on public acceptance of its provisions. If at the next elections the people grant us a mandate do so, we shall introduce a Constitution consistent with the views expressed (in the Dissent) and the Republican Constitution of 1972".

The problem still remains whether the constitutional exercise which appears instrumental, can nevertheless acquire the formal attributes of a consensual instrument. The system of proportional representation provides the clue to this problem, and we must now briefly examine its main elements and their implications for the process of constitution making.

IV

The rationale of proportional representation is clearly articulated in the Report of the Select Committee which states that the present system is inadequate in that it is not fairly representative of the political opinion within the country. It points out that in 1970, the Sri Lanka Freedom Party was able to secure 60.3% of the total number of seats in Parliament, although it received only 36.9% of the total vote. On the other hand, the United National Party with 37.9% of the total vote was only able to secure 11.3% of the total number of seats. In 1977 the United National Party with 50.9% of the total votes secured 83.3% of the seats, while the Sri Lanka Freedom Party with 29.7% of the total votes secured only 4.8% of the seats. It should be noted that a 13% swing for the United National Party resulted in a 72% gain in representation, while the negative swing of 7.2% for the Sri Lanka Freedom Party resulted in 55.5% loss in representation. The Report reiterates that this is not merely unfair but leads to political instability.

We must then digress to examine the main elements of proportional representation which are found in Articles 135 to 139 of the Constitution.

Firstly, the identification of the district as the basic electoral unit. A Delimitation Commission will divide the country into several electoral districts. These electoral districts shall be one or more administrative districts. They shall remain unchanged thereafter.

Secondly, the principle of allocation of seats. The total number of seats will be frozen at 196; each province would be allocated 4 seats to be distributed amongst the districts contained within that Province. The remaining 160 seats would be distributed amongst the several electoral districts according to the number of registered voters. As the population increases the number of registered electors will correspondingly increase.

Thirdly, the voting would be for political parties and not for individuals. Recognized political parties present a list of candidates and voting could be based on such lists. There will be no Independents unless they form a group and present a common list of candidate.

Fourthly, the concept of a cut off vote. This means in effect that if a political party or a group of individuals receive less than 1/8th of the total number of votes cast, these votes would be cancelled and the political party concerned would not be able to return a candidate to the National Assembly.

I have elsewhere examined the impact of each of these elements on the growth of the party system. It would be sufficient for this purpose to summarise some of the major criticisms of proportional representation.

Firstly, one of the consequences of the district being recognized as the electoral unit, would be to eliminate the parliamentary electorate and erode the relationship that has evolved between the Member of Parliament and the constituency. The parliamentary electorate has evolved into a distinct political sociological and territorial entity. Within its framework there has evolved a system of social relations between the Member of Parliament and his constituents. This includes the system of reciprocity by which constituents assert the right to make demands upon their representatives for jobs, for governmental benefits; and the corresponding duty to be responsive to these demands. The Member of Parliament influenced the allocation of resources and even mediated inter personal conflict. It is difficult to see how this system of reciprocity and the net work of social relations within which it was contained could replicate itself with a district. The choice of a district as the basic electoral unit would blur the lines of accountability, between the representative and his constituents.

The second criticism relates to that of area weightage. The issue of representation has been one of immense controversy in the political relationships between various communities. We are all aware that the formula for balanced representation was rejected by the Soulbury Commission. The Commission held that representation should be on two principles, viz. one member for every 75,000 inhabitants and an additional member for every 1,000 square mile radius. The object of area weightage was to give additional weightage to the minority communities; so that the Northern and Eastern Provinces were given eight additional seats and the remaining provinces were given 17 seats. Article 136(4) has reversed this process of weightage by providing that each province will be entitled to 4 seats which in effect means that the ratio of 8:17 has now been escalated to one of 8:28. The additional bonus of 11 seats by increasing the representation to the majority community is inconsistent with the very purpose for which area weightage was introduced.

The third problem relates to electoral lists. One of the implications of a list system is that the power of returning individual representatives effectively shifts from that of the electorate to that of the political party. The nomination of candidates and the ranking of candidates become issues of immense importance over which the political party would have control. Under the existing system of local government elections the party lists of the candidates would not even appear on the ballot paper. No doubt there are other means by which these lists can be disseminated amongst the electorate. The list system we

have adopted places a greater distance between the individual voter and the individual candidate who would ultimately be returned to the National Assembly.

It is therefore submitted that a system of proportional representation must be preceded by a democratisation process within the political party itself. The enormous power that the party leadership enjoys in the nomination of candidates, must be modulated to ensure greater accountability to and consultation with the rank and file of the party. Most political parties have an organizational structure in which decision making is delegated by the party convention to a hierarchy of Committees. But the formal organisation often conceals that the real decision making is concentrated in the higher reaches of the leadership. Democratization should find expression both in form and spirit.

Let me revert to the general theme of this article. Does proportional representation provide the answer to whether the new constitution would evolve into the 'instrumental' or 'consensual' type?

Article 82 (5) provides that a Bill for the amendment or repeal of a constitution would require a special majority of two thirds of the members of the National Assembly. Given the pattern of electoral voting that we have seen over the past three decades, it is unlikely that any of the recognized political parties would be able to capture the legislative majority necessary to enact a Constitution of the instrumental type. Proportional representation would entrench an instrumental constitution and clothe it with the permanency of the consensual type. The President further implied during the deliberations of the Select Committee that this new reality could compel the U.N.P. and the S.L.F.P. to abandon the politics of partisanship and evolve the political style of consensus. He stated "Are you not always thinking in terms of the old British system—that the two party system or the three party system will survive? Can we not go ahead of that? Can we not think of a national way?" On this reasoning proportional representation could foreshadow a transformation—in the style of electoral politics and the emergence of a new configurations of power.

On the other hand, there are some who question the validity of this theory. They contend that no formula for representation could per se lead to such transformations. Consensual politics can only emerge out of a climate of political accommodation. And unless a conscious effort is made to create such a climate, it would require little legal ingenuity to work around the entrenched procedures of constitutional change to create another "legal revolution." We would then be thrown back into the cycle of making and unmaking of instrumental constitutional constitutions from which proportional representation can provide no escape.