

SRI LANKA'S 60TH ANNIVERSARY OF INDEPENDENCE: CONSTITUTIONAL CHALLENGES

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Sixty years ago, at the time of Ceylon's independence from colonial rule, the country was considered Asia's brightest prospect. Today, Sri Lanka is far, far away from that objective. Indeed, today Sri Lanka is a nation state in deep crisis and its Independence Day celebrations were held amidst bombs, fear and insecurity, not only in the north and east, but even in Colombo. Ten years ago at the 50th Anniversary celebrations, President Kumaratunga reflected that the country had failed in one of its major challenges, that of nation building. Today, the nation building project continues to be a failure, and sadly does not even seem to be a priority of the present political leadership.

The Rajapakse Government's strategy seems to be one of nation building through defeating terrorism. This is simplistic and shortsighted as it fails to consider that while terrorism is one aspect of the challenge, the causes of terrorism, the history of the island's ethnic conflict, the grievances and aspirations of the Tamil people, and basic principles of democracy, human rights and the rule of law have also to be addressed if Sri Lanka is to survive as a united, independent and free nation state.

The protection of the rights of the Tamils was an issue that figured prominently at the time of Independence in 1948. The main Tamil leader at the time, G.G. Ponnambalam, who believed in power sharing at the centre, lobbied the British to provide for a legislature where 50% of the seats would be held by all the non-Sinhalese groups in the island as a way of ensuring that discriminatory legislation would not be enacted by Parliament. This was rejected with the British opting instead for a constitutional provision, Section 29 of the Soulbury Constitution, which prohibited legislation that granted a privilege to any one community or that imposed a disability on any community. This minority safeguard failed as the judiciary failed to respond to legal challenges based on Section 29 in significant constitutional cases involving citizenship and language.

S.J.V. Chelvanayakam's Federal Party which soon emerged as the dominant Tamil political force campaigned not only for parity of status for the Sinhala and Tamil languages, but also for regional autonomy in the Tamil majority areas in the north and east of the country. On two occasions, in 1957 and 1965 he compromised and agreed to devolution of power within a unitary framework, but on both occasions, the two Prime Ministers he reached agreement with, reneged on the agreements due to opposition both within their parties and from the parliamentary opposition. Chelvanayakam who was a committed Gandhian adopted non-violent, democratic means for his political struggle from the 1950s to the 1970s.

THE TURNING POINT

Even as rumblings of discontent began to emerge that Chelvanayakam was too old, moderate and committed to conventional democratic politics and had been let down by two Prime Ministers during his long stint at the helm, the Federal Party reiterated its commitment to a federal and united Ceylon at the Parliamentary election of 1970. It called upon the Tamil people to reject the few candidates who contested on a platform of separation. The separatists lost their deposits and the Federal Party swept the polls in the north and east.

The United Front Government which formed the Government in 1970 decided to replace the “made in Britain” Constitution with a homegrown Constitution. Tragically, because the UF had a large majority in the assembly and a two thirds majority in the House of Representatives, it was arrogant, insensitive to the need to develop a consensus document, and so determined to enact a constitution that would facilitate “progressive development” and pursue its socialist vision, that the Republican Constitution it drafted was fundamentally flawed in a number of respects. The socialist United Front’s instrumental use of constitution making, to use Neelan Tiruchelvam’s, oft cited phrase, meant that the institution it controlled, the legislature or the National State Assembly, was given supreme power and the institutions it was suspicious of, the judiciary and the independent public service, were devalued. Minority safeguards, including Section 29 were jettisoned, and instead the language and religion of the majority were given an exalted constitutional status.

To make matters even worse, the socialists in the United Front, so obsessed with ushering in their socialist utopia, desired a highly centralized state and therefore inserted the unitary label into the Constitution which, in the circumstances, was a direct affront to the Federal Party. The pleas of Federal Party leaders were ignored; in a socialist society, it was said, the ethnic conflict would also wither away, and so the Tamil political leadership walked out of the Constituent Assembly. Sri Lanka’s homegrown, first Republican Constitution, therefore, did not involve the participation of, let alone the agreement of, the leading representatives of the Tamil community in the north and east of the country. The adoption of the Second Republican Constitution in 1978 followed a similar process and in any event had a juridical link with its predecessor. Tamil nationalists, including the LTTE never tire of making the claim, therefore, that the Tamils have never been stakeholders in the island’s homegrown constitution making process. It is perhaps not surprising that the violent phase of the Tamil nationalist struggle commenced soon after the adoption of the 1972 Constitution.

The history outlined above is important. It seems as if those in positions of responsibility in the Rajapakse Administration have forgotten this contextual background. The preferred option of the Tamil political leadership from the time of Independence was power sharing at the centre, then devolution within a unitary framework and agitation through satyagrahas on Galle Face Green, peaceful and democratic means, active engagement in democratic and parliamentary politics. It was when these efforts of more than 25 years failed that the violence and separatist project commenced. A reasonable

political solution offered in 2008 must take this context and the history of the past 60 years into account.

AN OBSESSION WITH EXECUTIVE CONVENIENCE

Another unfortunate consequence of indigenous constitution making was that both Constitutions were instrumental and partisan. Both in 1972 and 1978, the governments in power, aided by the distortions produced by a simple plurality, first past the post system, possessed two thirds majorities in Parliament. There was no need to reach out and build consensus for constitution making. Constitutions were therefore designed by governments in power for the governments in power, rather than for the People. Not surprisingly therefore, both Constitutions completely ignored the basic principles of Constitutionalism, restraints on those who wield political power and the empowerment and protection of the People rather than the politicians. Both Constitutions suffered from the same fundamental flaw- a concentration of power in a single institution. Under the 1972 Constitution it was the all powerful National State Assembly, the supreme instrument of state power, and under the 1978 Constitution it was the all powerful Executive Presidency. Both Constitutions made it easy for the Executive to curtail human rights, validated all existing legislation thereby shutting out constitutional scrutiny, prohibited constitutional review of legislation, a basic constitutional safeguard in nearly every constitutional democracy, and even included provisions setting out how Parliament could enact unconstitutional legislation without expressly changing the Constitution!

A relatively recent phenomenon is that Executive Presidents emboldened by provisions granting legal immunity and the inadequate response of a conservative judiciary, have intentionally refrained from observing and implementing constitutional provisions. Several provisions of the 13th Amendment have remained non-implemented for over 20 years; President Kumaratunga stubbornly refused to appoint members to the Elections Commission; President Rajapakse, has gone a step further, completely undermining the 17th Amendment to the Constitution by not appointing members to the Constitutional Council, then unilaterally appointing members to the independent Commissions, and more recently delaying to identify his nominee to the Council. The fact that there seems to be no effective legal or political remedy to deal with such constitutional transgressions highlights the major crisis of constitutionalism and the Rule of Law that faces the country. Given Sri Lanka's tradition of unimplemented and unenforceable constitutional provisions and laws on good governance, language, devolution and human rights, one wonders how the Government can convincingly claim full implementation of international human rights commitments in order to qualify for GSP+ privileges from the European Union.

THE WAY FORWARD?

The Constitution of Sri Lanka is a major part of the problem. Offering solutions within the framework of the problem is not only unreasonable, but also suggests a lack of understanding, empathy and seriousness of purpose on the part of its proponents. While terrorism and the targeting of civilians whether by the LTTE or the State or any other

political actor is immoral and unjustifiable, it is vital that efforts to suppress terrorism by the state must, given the history of the ethnic conflict and the fact that we are prosecuting a war against fellow Sri Lankans, be accompanied by reasonable political and constitutional reform that addresses the core underlying causes for the conflict. Only then can the unreasonable demands of the LTTE such as the ISGA proposals that were deeply flawed from both a constitutionalist and federal perspective, be effectively countered. The much mutilated 2 page document containing APRC interim proposals to the President (or the other way round?) which in effect is Thirteenth Amendment Minus, is woefully inadequate as indeed would be full implementation of the existing provincial council system. A reasonable solution must seriously consider the claims of G.G. Ponnambalam and S. J. V. Chelvanayakam, power sharing and federalism within a united Sri Lanka.

Equally important is that a new consensus Constitution must exclude the provisions and practices that are inconsistent with the core values of Constitutionalism. Recent political developments have demonstrated how the Executive Presidency, since its introduction in 1978, has promoted a creeping authoritarianism and undermined all efforts at forging consensus between the two main national parties. The locus of political power shifts from an elected, accountable Parliament to an unelected Presidential Secretariat with serious implications for accountability, transparency and good governance. Furthermore, since the Executive President is so powerful it is impossible for example to establish a national government with two roughly equal partners. When several of his party colleagues including J.R. Jayewardene and Ranasinghe Premadasa began extolling the virtues of a Presidential system, Dudley Senanayake, in 1971, observed almost prophetically-

"The Presidential system has worked in the United States where it was the result of a special historic situation. It works in France for similar reasons. But for Ceylon it would be disastrous. It would create a tradition of Caesarism. It would concentrate power in a leader and undermine Parliament and the structure of political parties."

Mahinda Chinthanaya has promised the abolition of the Executive Presidency by 2011. Those who revere it often cite it to oppose meaningful and secure devolution of power within a united country, federalism. They should not forget the chapter on the abolition of the Executive Presidency. A new constitution will not solve all our problems, but it is necessary if Sri Lanka is to address the major constitutional and political challenges facing the country- peace with dignity, human rights and the Rule of Law, and Governance that is responsive and accountable to the people.