

SRI LANKA: A TALE OF FOUR CONSTITUTIONS

The Constitutions we will examine in this essay are (i) the Jennings-Senanayake Constitution of 1946-48 which lasted till 1972 (ii) the Sirimavo-Colvin R. de Silva Constitution of 1972-78 (iii) the Jayewardene Constitution of 1978 and (iv) the proposed changes to be enacted vis-a-vis the G.L. Peiris-Chandrika Kumaratunga proposals, for a new Constitution of 1999. They cover the entire period from independence (1948) to the present day.

The first Constitution lasted till 1972, a period of a quarter century. Perhaps it will be the Constitution that lasted longest. Its origins lie in what was called the Ministers' *Draft Scheme* of 1944. This was a change enacted in the aftermath of World War II when radical thinking or behaviour had still to surface and make their presence felt. The two men behind the 1948 Constitution were two conservatives, both enamoured by the classical Westminster model and slaves as it were to Victorian thinking. The *Draft Scheme* incorporated all the features of Westminster and its guiding hand was Don Stephen Senanayake (D.S. for short) who wore top hat and tails on ceremonial occasions and liked to posture as one of Her Majesty's Privy Councillors, and Sir William Ivor Jennings, a conservative, nineteenth century Fabianist in the best sense of the term. Jennings claimed that he was the draftsman, not the architect of the Constitution. But as Jennings admitted, the scheme of representation in Parliament was of his own making, his brainchild during a spell of malaria. What was left out, a second chamber and a bill of rights was on his advice. Jennings was rewarded with a knighthood by D.S., who went on to become the first prime minister. Jennings also became the *eminence grise* of the first government, a speech writer for D.S., and the latter's honest broker in all the dealings with Whitehall. It can be rightly said, in the considered view of this writer, that if not for Jennings, Ceylon would not have obtained independence in 1948, so very swiftly and smoothly.

The Soulbury Constitution of 1947-48 was short-lived and did not last more than a couple of months from November 1947 to 4 February 1948 when Ceylon was granted complete independence. This Soulbury Constitution was more or less a copy of the Ministers' *Draft Scheme* (1944) which it should be noted was architected by Sir Ivor Jennings based on the thinking of D.S. Senanayake. The *Draft Scheme* was in the main a copy of the Westminster Model with modifications to meet local requirements. The latter had to do with legislative representation, the absence of a bill of rights and a quantum of discretionary powers vested in the governor. The Soulbury Constitution in addition provided for a second chamber, the Senate, and an all pervading clause 29 which prohibited Parliament from enacting any discriminatory laws against any of the minorities. It was also provided that the Governor will act as an impartial arbiter

whenever he felt the interests of a minority were being adversely affected by discriminatory legislation. Section 29 would be the barometer which would provide a test of the political temperature.

Section 29 read as follows:

- (1) Subject to the provisions of the Order, Parliament shall have power to make laws for the peace, order and good government of the Island.
- (2) No such law shall
 - (a) prohibit or restrict the free exercise of any religion; or
 - (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
 - (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other religions or communities; or
 - (d) alter the constitution of any religious body except with the consent of the governing authority of that body. Provided that, in any case, when a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.
- (3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.

This provision limited the powers of the Ceylonese Parliament. It was an entrenched provision. The highest judicial tribunal, the Judicial Committee of the Privy Council, pronounced in an *obiter dictum* in 1964 in *Bribery Commissioner versus Ranasinghe* (66 N.L.R. 73) that Section 29 (2) (b) was *unalterable* because it entrenched "religious and racial [sic] matters" and represented the "solemn balance of rights between the citizens of Ceylon and the fundamental conditions on which *inter se* they accepted the Constitution". We have no documentation that the Ceylon Tamils accepted the "solemn balance of rights" or "the fundamental conditions on which *inter se* they accepted the Constitution". The assumption of such a compact from our point of view does not

therefore bear validity. The *obiter dictum* nevertheless caused a stir in political circles.

However, a United Front (UF) headed by Mrs. Sirimavo Bandaranaike claimed that the decision of a foreign body such as that of the Judicial Committee of the Privy Council was an invasion of the island's sovereignty. The Judicial Committee's decision caused an outcry and the left-inclined United Front alliance headed by Mrs Bandaranaike sought a mandate at the general election of May 1970 to frame an entirely new constitution, a constitution which in effect would be autochthonous. They went even further and demanded the replacement of the foreign British imposed Constitution and even suggested that the Soulbury/Independence Constitution be replaced with a new home-grown Constitution from which ultimately would emerge the Constitution of 1972.

The objective of D.S. Senanayake had been to attempt a transplant of the Westminster model on the Ceylonese polity. To the extent that the constitutional system functioned without a major crisis during the years 1948 to 1972, it could be said that Westminster was a success. Not only was it a success but in hindsight Westminster seemed a model worth emulating for it was readily adaptable and flexible to deal with any circumstance. What was significant was that under this model it was provided under Section 46, that there shall be:

- 46 (1) a cabinet of Ministers who shall be appointed by the Governor-General and who shall be charged with the general direction and control of the government of the Island and who shall be *collectively responsible to Parliament*
- (2) of the ministers *one who shall be the head of the Cabinet shall be styled the 'Prime Minister'*; of the other Ministers one shall be styled the 'Minister of Justice' and another shall be styled the 'Minister of Finance'.

Thus the keystones of the unwritten British Constitution were enshrined in writing in the Ceylon Constitution of 1948, especially the enjoinder to the cabinet of ministers to be *collectively responsible to Parliament* and the reference to the *Prime Minister as head of the Cabinet*. To cap this all was the provision for the nominal executive in whose name all powers will be exercised to act in accordance with British convention; that is to say, to act in every instance on the advice of the Prime Minister (Section 4 subsection 2). There were only two instances of Ministers being forced to resign at the request of the Prime Minister concerned and that because, in the first instance, the Minister concerned (Mr. C. Suntheralingam) walked out of the chamber when in 1949 the vote on a significant piece of legislation, the Indian and Pakistani Citizenship Law, was being

taken and the second in 1975 when Dr. N.M. Perera, the Minister of Finance was requested by Prime Minister Mrs. Bandaranaike to resign for making allegedly disparaging remarks about the assassinated Prime Minister, the late S.W.R.D. Bandaranaike. These examples were by no means any attempt to maintain collective responsibility as the guiding principle of parliamentary government in the context of a rapid disintegration of ministerial responsibility. More they serve as illustration of the primacy of the Prime Minister and no more. The worst of the crises was in early 1959 when the right wing section of the cabinet of Mr. S.W.R.D. Bandaranaike refused to attend, or deliberately boycotted meetings of the cabinet until such time as the prime minister dismissed the two left wing ministers in the cabinet. The prime minister eventually succumbed to the pressure.

But more relevant was a principal issue in relation to the successful conduct of parliamentary government. This was the vital question of the need for there to be an *agreement on fundamentals*. There cannot be democratic government if government and opposition are at odds on how the state apparatus should be operated. And this is precisely what happened in the first two Parliaments (1947-56). The leading Opposition Party was the Trotskyist LSSP led by the constitutional expert on parliamentary procedure, Dr. N.M. Perera. But the LSSP along with its splinter, the Bolshevik Sama Samaja Party (BSP) led by Dr. Colvin R. de Silva, and the pro-Moscow Communist Party were wedded to the concept of the dictatorship of the proletariat and moreover the latter two were unwilling to concede the position of Leader of the Opposition to the LSSP leader, Dr. N.M. Perera on the score that none of the three Marxist parties were committed to the concept of the leadership of Her Majesty's alternative government. Thus on both grounds, the commitment to a revolutionary dictatorship and Her Majesty's alternative government, the Marxist parties were at variance with the Westminster-oriented United National Party (UNP) government of D.S. Senanayake. The government consequently ignored the Opposition, by and large, on the arrangement of parliamentary business. Their excuse was that if the opposition were in office, the UNP would obtain short shrift. So why should they respect the opposition's wishes? The same treatment resulted during the Prime Ministership of Sir John Kotelawala. The situation improved somewhat when Mr. S.W.R.D. Bandaranaike crossed to the opposition. His solid democratic Sri Lanka Freedom Party openly proclaimed that they respected parliamentary government and were therefore committed to operating it in the same way as the UNP government.

In all probability this method of government would have gone on indefinitely but for the decision of the Judicial Committee of the Privy Council in 1964 in *Bribery Commissioner versus Ranasinghe* where their lordships held that Section 29 (2) (b) of the Constitution was *unalterable* because it entrenched "religious and racial (*sic*)

matters". The Opposition parties constituting the United Front loudly protested that such an *obiter dictum* implied an erosion of the sovereignty of the Ceylonese Parliament and the Constitution must therefore be replaced with a home grown one. The UF campaigned at the general election of May 1970 for a mandate to effect the proposed change. The UF received such a mandate and accordingly proceeded to set up a Constituent Assembly which framed a new Constitution in 1972.

The Constitution of 1972 was in the end no more than a carbon copy of the 1948-1972 Constitution. The Westminster tradition tended to die hard and the Westernised, English-educated middle class judged severely deviations from British conventions that were the prevailing orthodoxy in the nineteenth century. However, the recent changes in Westminster have not been carefully noticed by members of this class. Consequently Westminster in Ceylon was cast in a very rigid mould. This explains how and why the island made the quantum leap in the dark when the Gaullist constitutional framework was introduced via the Constitution of 1978.

The adoption of the Gaullist style executive presidency was due to what was felt were three vital shortcomings in the Westminster model. First it was realised that the Prime Minister could not function as a stable executive given the unpredictable political climate in which he operated. There were four prime ministers who came to grief on account of the loopholes in the cabinet system. In 1957, the Prime Minister S.W.R.D. Bandaranaike was forced to unilaterally abrogate his pact with the Tamil leader S.J.V. Chelvanayakam owing to the sheer intimidation by Buddhist monks who demanded that he abrogate his pact or else face dire consequences. In 1965, the Prime Minister Dudley Senanayake concluded a similar agreement with Chelvanayakam but when a bill was prepared to implement the pact, Mr. Senanayake was faced with a revolt from his backbenchers and so decided that discretion in this instance was better. In 1962, the Prime Minister, Sirimavo Bandaranaike, faced the threat of a coup from dissatisfied military and police officers and possible dismissal by the governor-general. She successfully foiled both these manoeuvres. Then in 1965 (December) she fell a victim to a group of dissident MPs led by her deputy (Mr C.P. de Silva) who engineered her downfall by voting with the combined opposition on the division on the Vote of Thanks on the throne speech.

Thus with these examples to go by, there was a realisation that only a stable executive serving a fixed term and with overall control of the sinews of government could ensure political stability for any success in dealing with the growing dissent of the Tamil minority and ensure opportunities for foreign investment and economic development.

The second source of dissatisfaction was the tendency for governments to

collapse on the whim and fancy of dissenting members of the Opposition. Apart from the iron law of the executive presidency, a sword of Damocles hung over the heads of all MP's (1978) under changes introduced in the 1978 Constitution. If after election, an MP decided to change sides, he became liable to expulsion from his party. This was rendered more facile in the case of crossings over to the government side than the other way around. The insertion of this clause in 1978 meant that members voting against the government would cease to be MPs. In this way a government's majority was secured *ab initio*.

The third area of change was in regard to electoral procedure. Here again it was proven that a government was elected to office on a minority of the total votes cast. The Opposition party despite winning a sizeable vote failed to obtain seats in Parliament strictly in proportion to its total vote in the country. This was thought to be undemocratic. The governing party or coalition could muster adequate votes to force through Parliament far reaching legislation notwithstanding the stiffest opposition from oppositional parties. There was thus a threat to the foundations of the state, a sharp disagreement on its fundamentals.

These three shortcomings were the catalyst for the change of constitution in 1978. However, the foundations for the change were laid in the much publicised previous autochthonous Constitution of 1972. The 1972 Constitution had concentrated all powers, executive, legislative and judicial, in a single institution, the Cabinet of Ministers. The Prime Minister, who had been pivotal in this style of government, was the beneficiary. With the concentration, the Prime Minister's authority and powers approximated to those of an executive president as in the 1978 Constitution. The actual source of the change in 1978 was the Constitution of 1972.

The rationale for the 1972 Constitution was quite different from that of 1978. The chief motivation as we have stated in the above paragraphs was that the 1948-1972 Constitution had shortcomings which needed change given that it was meant for a post-colonial set up. 1972 was to be more a post-modern Constitution designed to meet the requirements of a developing economy. It was understood that Ceylon was entering a post-industrial phase and in such a context, the constitutional framework needed to be geared to meet the challenges of a rapidly changing world. But there was doubt that the new constitution should be consensual. Consensus was obtained at the elite level of the Sinhalese middle class but the leading Tamil Federal party refused to cooperate and so did the main Opposition party, the UNP.

In the end the 1972 Constitution bore the stamp of its principal draftsman, the Trotskyist leader, Dr. Colvin R. de Silva, but even he had little room for manoeuvre

given the stiff right wing opposition from within the ruling coalition. The expectation of a liberal and carefully executed work of perfection soon gave way to the fear that uncontrolled power in a single institution, the legislature in which the latter would be the beneficiary at the expense of all the other institutions of government constituted a danger to democratic government. There was no trace of the liberalism that the Ceylonese Trotskyists were noted for. Not even Dr. N.M. Perera, their parliamentary leader, the recognised constitutional expert on comparative parliamentary procedure, seems to have provided much input. And so a Constitution which was intended to be groundbreaking failed to make the grade. Both the UNP and FP rejected the Constitution.

The left oriented United Front headed by Mrs. Sirimavo Bandaranaike had asked the electorate for a mandate

to permit the members of Parliament you elect to function simultaneously as a *Constituent Assembly* to draft, adopt and operate a new Constitution. The Constitution will declare Ceylon to be a free, sovereign and independent *republic* pledged to realise the objective of a *socialist democracy*; and it will also secure *fundamental rights* and freedoms to all citizens.¹

There were to be four guiding principles in the new set up, a Constituent Assembly which will be identical as the newly elected Parliament, the only difference being that a Constitution was being drawn by a body which had derived its power from the people.

The second most significant feature of the new status quo was to rename Ceylon the Republic of Sri Lanka, and with it to sever all ties with the British Crown. Sri Lanka ceased to be a monarchy with a Governor-General as the monarch's representative and became a republic with a president as the ceremonial head of state. The president would not be elected by the chambers of government but appointed by the prime minister.

Thirdly Section 29, the catalyst of change was thrown out lock, stock and barrel notwithstanding the *obiter dictum* of their lordships of the Judicial Committee of the

¹ The reference is from "Party Manifestos" as published in The Ceylon Daily News, Seventh Parliament of Ceylon 1970 under Party Manifestos, "The S.L.F.P. in L.S.S.P. - C.P. United Front: Constitution" p. 173 (Colombo, The Associated Newspapers of Ceylon Limited, Lake House), nd.

Privy Council. Thus was removed "the balance of rights" with the minority communities of Sri Lanka. In its place was inserted a statement of justiciable fundamental rights but its provisions were rendered dysfunctional because of a qualifying proviso that these rights were subject "to national interests, national harmony, national economy" and so on.

Fourthly while the independence of the judiciary was safeguarded, a more malleable instrument, a Constitutional Court, was introduced for the purpose of determining the constitutionality of legislation. The Court had to give its decisions within a fixed period of twenty four hours in the case of urgency or two weeks in other instances.

Lastly the new Constitution validated the foundations of the Sinhala Buddhist state. The Sinhala language was entrenched and the state was required to foster and promote Sinhala *Theravada* Buddhism. In this way the foundations were laid for future conflict between the Sinhalese and Tamil communities--the seed bed of the bloody civil war that has torn the island apart.

The Constitution functioned for six years with Mrs. Sirimavo Bandaranaike as prime minister. Presumably, unknowingly she appears to have been manipulated by higher civil servants and scheming cabinet ministers. It was on the advice of bureaucrats of the Ministry of Education that the prime minister sanctioned the racial quota scheme for university admissions, a racial quota scheme which angered the educated youth of the Tamil community, which in turn precipitated the Sinhala-Tamil civil war now raging at tremendous cost to the government. For another, the prime minister could not bring under her control ambitious and communal-minded Sinhalese bureaucrats.

The Constitution failed in two respects. It did not ensure political stability. Promulgated in 1972, the Constitution was in the doldrums with the most significant component of the United Front, the Trotskyist LSSP, being expelled in 1975 and in its last stages, the pro-Moscow Communist Party's withdrawing support. The government was faced with massive labour unrest during 1975-6, stirred no doubt by the LSSP. Mrs. Bandaranaike's government shortly after 1975 came to a grinding halt. Not even the 1972 Constitution provided the much needed political stability.

With her unprecedented defeat by a huge majority at the general election of 1977, Mrs. Bandaranaike ceased to be prime minister. Her place was taken by Mr. J.R. Jayewardene. The latter served as prime minister for around a year and then ascended to the position of the first executive president of the Democratic Socialist Republic of Sri Lanka. A highly knowledgeable J.R. Jayewardene with a veteran's parliamentary

experience of more than forty years at the time of his ascendancy, J.R. Jayewardene understood very well the primary weaknesses of parliamentary government. First, he realised the necessity for firm and stable government, and secondly, he understood that for the ship of state to take the direction that he and his party had planned for during their years in the political wilderness, there was the compelling need for a strong and stable executive to ensure the continuing support of members of parliament belonging to the party with a majority in Parliament. Such a stable executive should be in overall charge of members of the cabinet who would henceforth be his lieutenants, not his colleagues; they would in effect obey directions given by a strong executive; the latter would also bring the bureaucracy under an iron grip so that it would not subvert policy directives and governmental plans. The new system was intended to achieve all these objectives.

The executive presidential system, inaugurated in 1977, has to date been operated by four persons and not anyone of them has had a primrose path, especially in relation to the Cabinet. The relationship worked well with President Jayewardene and his cabinet of ministers but it fell to appalling depths with President Premadasa. The latter's successor, Wijetunga, functioned only for a few months after the former's assassination and was therefore an interim and lame-duck president. He was an embarrassment to his party with his occasional intemperate and ill-advised public pronouncements. The unsatisfactory workings of the presidency, especially under R. Premadasa, led the Opposition People's Alliance to seek a mandate to revert to Westminster. Premadasa operated the system in a thoroughly authoritarian manner, hastily suppressing any opposition to him, thus provoking his senior cabinet ministers to unsuccessfully initiate moves towards his impeachment. With the cabinet ranged against him, Premadasa's government was virtually paralysed and the President who had visions of launching a new era found himself stifled. The present president, Chandrika Kumaratunga, came to power obtaining a mandate to abolish the presidency and to revert to Westminster. Her government has presented proposals for the switchback. Since the proposals are linked with an offer of autonomy for the Tamil minority, they have not found favour with the main opposition as well as with Sinhalese extremist groups in the country.

The principal feature of the 1978 Constitution which undoubtedly followed the Gaullist model of the 5th French Republic, is the stable position of Executive President. He or she will remain in office for a fixed term, regardless of whether the cabinet of ministers is defeated on a motion of want of confidence in the National State Assembly. If faced with a contradictory majority in the Assembly, the President and the hostile government will have to learn to cohabit.

The second significant feature is that members of a political party, and in this case the rules are loaded against members on the government side, will face expulsion and be replaced if they breach party discipline and vote against the government. A member of an opposition party will not face such dire consequences, for the governing party will only be too ready to welcome him or her to its side. It is a committee with a majority of government members that decides whether a member's conduct warrants expulsion from Parliament and replacement.

Thirdly, the first-past-the-post system of election has been replaced with proportional representation. President Jayewardene and his senior ministers realised that despite the large proportion of votes their party polled at a general election, if the party went down to a defeat in the country, it ended with an insignificant proportion of seats in the legislature. The winning party obtained such a huge majority that it could master the required majority to even amend the constitution or replace it.

This Gaullist-style presidency has successfully tackled the problem of instability by what seems draconian methods. President Jayewardene went so far as to obtain undated letters of resignation from all government MPs and used it to coerce his party members to support the unpopular Indian-imposed thirteenth amendment, which provided for a measure of autonomy for the Tamil minority. In the earlier phase it enabled the President to switch his country from a restricted economy to a free market and liberal one. Along with these major changes, a solution to the national question was almost achieved but for the dithering of the president.

To date, since its inauguration in 1978, no government has faced the problem of a dwindling majority nor has any government been threatened or undermined by the crossings over of MPs. The likelihood of the latter happening is only if a group of members cross *en masse*, but so far this route has not been taken or even contemplated.

All four constitutions retained in them the Westminster principle of cabinet government, in short collective responsibility and answerability to Parliament. But with advancing years, there was erosion of this principle till under the executive presidential system of 1978, it wore thinnest. The differences between ministers became increasingly sharp and not seldom public. The base line required ministers to vote with the government. So long as there was no violation of this code, ministers could go public on any other matter and air their differences even in Parliament. It was the President to whom they were answerable, no longer to the Prime Minister.

With the second De Silva-Mrs Bandaranaike Constitution (1972-78), the state increasingly leaned towards being identified with Sinhala Buddhism. The minorities, in

particular the Tamils, felt increasingly sidelined, and consequently, where a constitution could have built bridges, none of them, 1972, 1978 or 1998, gave the minorities a sense of reassurance. So that it could be rightly said that far from being bridge-builders, constitutions only opened the flood gates of ethnic conflict. Essentially these constitutional experiments indicated evidence of an inward looking Sinhala and Buddhist middle class virtually deaf to the cries of a dissatisfied Tamil minority. Had any of these Constitutions but indicated a desire to share power, the island would not have come to such a pass as it is in today. Only the Peiris-Chandrika Kumaratunga constitutional proposals of 1998 provide for the sharing of minimal powers with the Tamils. But these are a classic case of the stable door being locked, of concessions having been denied until too late and lost their grace, of what it is in vogue to describe in the contemporary vocabulary of Sri Lankan politics of being too little and too late.

What is actually being witnessed by the modern bourbons has been the escalation of Tamil demands which could have been satisfied at a much lower scale several decades ago. The B.C. Pact of 1957 and the D.C. Pact of 1965 would in all probability have been reassuring enough to the Tamils to enter the mainstream of politics and feel equal partners in a joint national partnership. Even the very much watered-down version of President J.R. Jayewardene's district development councils may have given the Tamils the opportunity of being convinced of the Sinhala Buddhist leadership's *bona fides*. But refusal to make concessions was followed by escalation in demands, first regional autonomy through regional councils, then constitutionally entrenched provincial Councils as embodied in the Thirteenth Amendment, preceded by the universally disliked Indian intervention, and finally a "do or die" all out war for a separate sovereign Tamil state.

That we should spend most of our space and time in discussing the Sinhala-Tamil relationship in the context of constitutional experimentation is proof enough of how central this national question has become to the political life of the island. Other factors no doubt need to be considered. How much did the distribution of the limited pie have to do with the exacerbation of Sinhala-Tamil rivalries? Certainly it contributed in regard to assigning racial quotas to university admissions and in the allocation of jobs in the public and private sectors. The blame lies entirely here with a self-seeing, power hungry leadership. The Tamils were forced to adopt the posture of a defensive nationalism to confront the juggernaut and the pogromization of Tamils that all along accompanied it.

Is there any hope for the future? Only a second Indian intervention at considerable expense to life and property will perhaps restore equilibrium. Possibilities of national reconciliation there are none. The idea of a Tamil homeland has vanished

forever, and the death, destruction and disease to which a whole people has been exposed to makes one wonder whether this is in effect a genocidal strife intended to kill a whole nation and an ancient civilization of more than two thousand years.

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