
keep repeating while our society continues to suffer from violence.

In order to get out of this trap, civil society has to get back to the basics from which this work began. The primary motivation for starting this work more than twenty years ago was not the interest of the elite or the international community. The main concerns were the problems faced by the people of this country and the denial of their rights. Civil society

activism needs to get back to this fundamental motivation and develop an agenda that covers issues of democracy, pluralism, human rights and social justice. Even if there is an agreement between the LTTE and the government of Sri Lanka tomorrow, these issues will still remain. These elites, armed or otherwise, are not going to deliver these goods. Civil society needs to work both locally and internationally with these wider objectives. The time has come for civil society to expand its horizon and get out of the conflict resolution trap. ■

THE CONSTITUTIONAL COUNCIL MUST FUNCTION

A meaningful interpretation needed says CRM

The meaning of a Constitution is to be found, not in slavish adherence to the letter, which sometimes killeth, but in the discovery of its spirit, which giveth life...¹

The general dismay voiced over the non-functioning of the Constitutional Council for over a year is shared by the Civil Rights Movement (CRM). Many have observed with amazement verging on disbelief the apparent unconcern with which institution after institution – the Public Service Commission, the Police Commission, the Judicial Service Commission - has been allowed to cease to function despite appeals and protests by the public. The latest casualty is the Human Rights Commission, whose term ended on 3 April this year.

Why should this happen when the Constitutional Council got off to a good start after the Seventeenth Amendment to the Constitution was passed in 2001?

The Seventeenth Amendment envisages a Constitutional Council of ten persons, three of whom are Members of Parliament – the Speaker, the Prime Minister and the Leader of the Opposition. The actual incumbent may change, but the law takes care that there is never a hiatus, so that we have at any given time three Council members.

Seven members are appointed by the President, but the President does not select them except for one. This one can be removed at will. The nominee of President Kumaratunga (Mr HL de Silva) resigned after some time and the Constitutional Council functioned with nine members. When the vacancy was filled

by the President, the appointment (of Dr Colvin Gunaratne) took effect for three years from the date of appointment, and not for the unexpired period. In March 2005, therefore, there was one other member surviving in addition to the three ex officio members. His term may or may not have expired by now. If it has, the President should make a fresh appointment. The position therefore is that today there are in place three or maybe four members of the Council. There is no question of the Council having gone out of existence or having to be totally “reconstituted”; it is a question of filling vacancies, which have occurred.

The remaining six members (as well as the President’s nominee) are all expected to be “persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party”.² Clearly the Constitutional Council is not meant for stooges, and lobbying for appointment is not contemplated.

Five members are selected by the Prime Minister and the Leader of the Opposition acting jointly. Three of these have to be selected after consultation with party leaders in Parliament to represent minority interests, ensuring that there is a Tamil, up-country Tamil and Muslim in the Council, or persons who represent their interests. The sixth member is chosen by MPs belonging to the smaller parties. According to uncontradicted press reports the selection of the five persons has been completed. If so it was the duty of the Prime Minister and Leader of the Opposition to communicate to the President their names in writing. If this has not been done, it must be done now, and we could then have a Constitutional Council of nine members. There is no requirement that the remaining nomination

should have been made and that all six names should go in at one and the same time. If the five names have in fact been so communicated, it was the duty of the President to appoint them. What the Seventeenth Amendment says is that the President shall “upon receipt of a written communication of the nominations under sub-paragraph (e) OR sub-paragraph (f) ... FORTHWITH make the respective appointments”.³ (Emphasis added). The sub-paragraph (e) referred to relates to the five chosen by the Prime Minister and Leader of the Opposition, and (f) refers to the nominee of the smaller parties. The nominee of the smaller parties in Parliament must be communicated by the parties taking part in the selection themselves. Common sense dictates that if these small parties fail to select a member they will simply forfeit, for the time being, a place in the Constitutional Council. The same principle would apply in the hypothetical case of a President failing to appoint his or her nominee. Is it conceivable that, by giving the President the right to select one person, the framers of the Seventeenth Amendment intended to give him or her the power to stymie the whole operation of this vital exercise?

The quorum for the Constitutional Council is six members, and once this number or more are appointed the Council should begin to function. True, there is no specific provision that the Council may function notwithstanding a vacancy, but this has to be read into the law. It is well established that constitutional provisions should be interpreted with their end, object and purpose in mind, and must receive “a broader and more liberal construction than statutes.”⁴ In examining constitutional language, if “by one mode of interpretation the right must become shadowy and insubstantial ... and by another mode it will attain the just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail”.⁵ This principle is particularly applicable where the underlying intention is to provide a remedy to an existing situation.⁶

Expounded in numerous US cases, the principle has been recognised by judges in the Commonwealth including Britain. The Constitutional Council forms the keystone on which the appointment of vital Commissions and officials depends, and the legal provision which creates it must be construed so as to give it meaning and efficacy. Having taken away the President’s unfettered power to make appointments there can be no construction of the Seventeenth Amendment that deliberately hands back to him these same powers.

The failure to appoint the tenth member is reportedly due to a dispute as to which political parties are entitled to participate in the selection. Apparently there is a misconception that this selection has to be by consensus. But the relevant constitutional provision is clear that the decision is by majority vote. Those

entitled to participate are the members of Parliament belonging to political parties or independent groups other than those to which the Prime Minister or the Leader of the Opposition belong. There is also apparently a dispute as to whether the JVP is entitled to participate. This would appear to depend on the manner in which they came into Parliament, in this case after the 2004 general election. But in any event CRM’s position is that these questions cannot hold up the functioning of the Council.

According to press reports the President, after an unsuccessful attempt to obtain, through the Speaker, a nomination from the smaller parties, has himself unilaterally appointed members to the Public Service Commission and the National Police Commission. There does not appear to have been an official communiqué from the Presidential Secretariat on this step. Such appointments, if made, are unconstitutional and misguided. They are also in direct contradiction of the spirit of the Seventeenth Amendment. An option would have been to seek a simple constitutional amendment enabling the Council to function with an acceptable number of vacancies. Parliament would surely have co-operated in passing this expeditiously. Another would have been for the President to seek the opinion of the Supreme Court, as he is empowered to do under the Article 129(1) of the Constitution, as to which parties are entitled to participate in the selection of the tenth member. Neither of these steps is necessary in view of the position taken by CRM, but they would have had the merit of finding a solution to the impasse within the bounds of constitutionality, while preserving the very basis and purpose of the Seventeenth Amendment.

The Constitutional Council is a salutary step forward in the depoliticisation of crucial public institutions and the furthering of democracy. Whatever shortcomings exist must be rectified in a separate exercise, with a responsible evaluation of experience so far, and public consultation. In the meanwhile the Council, which was created by a rare consensus in Parliament, and warmly welcomed by the people across the political spectrum, must be made to function. This is all the more vital in a pluralist, complex and conflict-prone society such as ours.

Suriya Wickremasinghe

Secretary

23 April 2006

End Notes

¹ Opinion of the Justices (1933) 204 NC 806, 172 SE 474, followed in re Advisory Opinion to the Governor (1944) 223 NC 845, 285 SE2d 567

² Article 41A(4)

³ Article 41A (5)

⁴ Carpenter v State (1966) 179 Neb 628, 139 NW 2d 541, 544

⁵ Prigg v Pennsylvania (1842) 41 US (16 Pet.) 539, 10 L.Ed 1060, 1088

⁶ Chisholm v Georgia (1793) 2 US (2 Dall.) 419, L.Ed 440, 465