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CRISIS OF CONSTITUTIONALISM IN SOUTH ASIA

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At no other moment in recent history have the questions of constitution making and constitutional reform been of such importance to central focus in political discourse. The dramatic transitions in Eastern Europe compelled all of these nations to reconstitute the state and the institutions of the state. The critical elements in this reconstruction were the institutionalisation of a multi-party system, a competitive electoral process, an enforceable bill of rights and an independent judiciary as the custodian of the new constitutional values.

In Hungary almost the entirety of the Constitution was rewritten before the transfer of political power to a popularly elected government. In the Czechoslovakian federation the task of constitutional change became more complex, and reopened the wounds of Slovakian resentment against decades of Czech dominance. In Yugoslavia, even a bold attempt to transcend the conventional federal model through sovereignty-associations came too late to save the federation from disintegration. The dissolution of the Soviet Union has caused a myriad of problems to the framers of the constitutions of the individual Republics, and the loose association, the Commonwealth of Independent States. In Southern Africa we have the most complex and daring effort to reconcile Black nationalism and Afrikaan nationalism which have been in opposition to each other for centuries. South Africa faces the awesome challenge of facilitating black-majority rule, while establishing political institutions which uphold the rule of law, racial equality, and respect for the universal principles of human rights.

Even in the more established democracies like Canada the future of the nation state rests on questions of constitutional reform. With the collapse of the Meech Lake Accord, Canada is engaged in a widespread process of public consultation, with a view to accommodating Quebec's aspiration to be recognised as a distinct society, and the increasingly strident assertion by native Canadians of their collective identity and of their group rights. In the United Kingdom, until the middle of this century scholars firmly believed that the British constitution was a glorious achievement, worthy of emulation by less fortunate nations. But this complacency has given way

to the realisation that the unitary and centralised Parliamentary system of government has alienated Northern Ireland, failed to accommodate the autonomy demands of Scottish nationalists, and has failed to adequately secure individual human rights. There is, therefore, pressure in Britain to break out of its constitutional isolation and to adopt arrangements including a bill of rights which are more consistent with its membership of the European Community.

These examples point to two contradictory trends. The first trend is characterised by an intense faith in the capacity of modern constitutions to enthrone popular sovereignty, to empower disadvantaged groups and individuals and to fashion institutions of democratic accountability. This intense faith in the triumph of constitutionalism is accompanied by an equally intense skepticism about the efficacy of constitutional arrangements to deal with the horrors of ethnic fratricide, political violence, religious bigotry, and the crude and cynical manipulation of electoral and political processes. It is this skepticism which leads to the view that the constitutional arrangements are impermanent and indeterminate, often needing to be reconstituted and reconstructed to cope with new complexities and realities. The crisis of constitutionalism is to reconcile this passionate faith in the normative power of constitutionalism, with intense skepticism and even cynicism arising from the failure of constitutions in many societies to uphold human rights or democratic values, and the appalling disparity between constitutional theory and constitutional practices.

Comparative constitutionalism is a hazardous enterprise. Baxi has somewhat contemptuously described it as 'a hazardous occupation of the upwardly mobile Asian academic, all too keen to share the high table with the Master.' What I hope to do in this presentation is to disaggregate the concept of constitutionalism and to focus on the need for constitutional theory and thought to respond more imaginatively to some of pressing social and political issues of our time. I will then endeavour to highlight some commonalities which distinguish constitutionalism of South Asia, from that of East Asia, Latin America and Africa.



We may now proceed to contrast three distinct ways in which the idea of constitutionalism has been perceived.

Constitutionalism as a Discourse

Firstly Constitutionalism is viewed as a form of discourse, as a means by which issues relating to the construction of the institutions of the state, questions relating to legal and political legitimacy, democratic accountability, and the limits of political freedom, are conceptualised and articulated within a society. Baxi has in a recent essay emphasised that the dominant mode of constitutionalism is Euro-centric. He adds:

The dominant mode, overall insists that Asian constitutions be assimilated to Euro-centric discourse and its languages. For, after all is not constitutionalism and aren't constitutions either gifts of colonial history or marks of modernity, lying outside the historical grasp of Asian societies.

No doubt Asian constitutional theorists firmly reject this approach and contend that Asian constitutional theory and practice richly antedates by millennia the western tradition.

However the discourse of constitutionalism raises several issues which are central to the present crisis. Is constitutionalism a project of an elite minority, and is it morally legitimate for this small elite to impose ideals and values on those who do not share them? In any event, is it realistic to expect those who remain outside this discourse to work political and institutional forms which are otherwise unintelligible to them?

Several Indian scholars including Nandy, Kothari, Madan and more recently Kaviraj have grappled with these issues. In this regard although the constitutional experience of India, Pakistan, Bangladesh and Sri Lanka were shaped by a common colonial experience, the impact of the nationalist movement in the Indian sub-continent on this experience was different from our own. Throughout the Indian colonial experience there was a difference between the modernist discourse of the Indian elite and the more traditional discourse of the lower orders of society. One of the crucial contributions of Mahatma Gandhi was to bridge the gulf between these two sides, and to keep the values, objectives, and conceptions of the political world of each side intelligible to the other. Kaviraj also makes the point that the process of political mobilisation during the nationalist movement was such as to create an implicit trust by the masses in the initiatives of their political leaders. There was therefore no dialogue between these conflicting discourses on equal

terms. Nonetheless the Constituent Assembly was able to enact a Constitution which was not seriously contested. Kaviraj sees this as a consensus of discourse rather than of ideological positions. The constitutional frame and the institutional pattern that had been put into place came up for serious ideological criticism from the left, but there were commonalities at a different level. Looked at from the outside there were underlying unities based on common ways of arguing about structures, purposes, and ideals.

In the second phase of constitutional development, we see the falling apart of the Gandhian language, and a growing gap between elite discourse and popular consciousness. One of glaring failures of this period was the inability to take the conceptual vocabulary of rights, institutions and impersonal power into the everyday vernacular discourse of village or small town India. As a result, the ideals of modern nationalism, industrial modernity, democracy, and minority rights came to be regarded not as achievements of a common nationalist movement, but as ideals intelligible to and pursued by a modern elite which inherited powers from the British.

The expansion of the state resulted in the recruitment of personnel from groups who speak and interpret the world in terms of the other discourse. At the point of implementation these personnel reinterpret government programs beyond recognition, and there is a slide into a style of power which is irresponsible and unaccountable. Institutional forms come under more pressure as more common people enter party politics. There is a conflict between the institutional logic of democratic forms and the logic of popular mobilisation. The more one part of the democratic ideal is realised, the more the other part in terms of a secular polity, protection of minority rights, is undermined. This leads to the loss of the moral and legal legitimacy of the constitutional frame that was put into place by the modernising post independent elite.

Loss of Legitimacy

A similar conclusion is reached with regard to the erosion of the legitimacy of political institutions in Sri Lanka by the Youth Commission in March 1990. The Youth Commission reached this conclusion through a process of political diagnosis which emphasised ideology as opposed to the structure of discourse. I shall, however, deal with this analysis here, as it would facilitate an assessment of the constitutional and institutional prescriptions which flow from such a diagnosis.

According to the Commission, the erosion of Youth confidence in existing political and social institutions is due to two broad reasons. Firstly, the institutions have been



so eroded or reduced to atrophy due to excessive politicisation or institutional paralysis that they do not seem to perform any significant societal function. Secondly, youth grievances are not accorded any importance in these institutions and they remain unresponsive to the changing nuances and priorities in youth aspirations. These two explanations give rise to somewhat contradictory responses. The first is said to have given rise to ideologies with a strong anti-institutional bias, while the second gives rise to the demand for larger youth representation within the very institutions which have been so repudiated.

The agenda for constitutional and institutional reform include strengthening of the Public Accounts Committee, the Consultative Committee system and its extension to the district level, and the provision of legislative interns. Similarly with regard to youth disenchantment with regard to the legal processes, the Commission recommended procedural reforms to strengthen individual and group access to the Supreme Court, including the provision of judicial interns to strengthen the technical and institutional capacity of the apex court. One of the more ambitious proposals with regard to reform of representative institutions was, that relating to the creation of separate constituencies to ensure that youth constitute 40% of the representation in Provincial Councils and local bodies. However, fearing a range of constitutional and more pragmatic objections to such a proposal, the Commission proposed more modestly that political parties be mandated to nominate 40% of candidates from within the age group of 18-30. The Commission also urged political parties to engage in a process of self reflection on the lack of active involvement of youth in their organisational structures.

The Commission also made several other recommendations for institutional reform. These included a Nominations Commission to screen appointments to public institutions; a Media Commission to oversee both the print and the electronic media; a National Commission on Education to address long-term educational needs; and a Task Force on caste and caste related issues. With regard to Youth grievances the Commission recommended the creation of a Youth Ombudsman with powers to address grievances both at the national and village level.

The Commission's agenda for re-democratisation is a remarkable example of pragmatic empiricism or procedural constitutionalism of the British constitutional tradition. It is grounded on an intense faith in the normative power of constitutions, and in the capacity of reformers to revitalise democratic institutions through procedural and representational changes. The Commission's faith was unshaken by youth alienation, 'the intensity and ramifications of which are without parallel in regard to

any other problem which besets society.' It is an approach grounded in the dominant mode of constitutional discourse, and presumes without critical examination that the ideological critique is located within that discourse. The loss of institutional legitimacy could be recovered if youth could be actively engaged in the formal institutions of democratic governance and of adjudication. No doubt, the Commission had to evolve pragmatic solutions, and was handicapped by the lack of an institutional agenda which was explicit or implicit in the youth's ideological critique.

The Commission's report was by and large very well received, and it appeared that a national consensus could evolve around its principal recommendations. An All Party Conference was convened and mandated to implement one of the most ambitious programs of constitutional and political reform envisaged for decades. The objectives of this exercise included a fundamental reappraisal of all the institutions of governance including the legislature, the executive and the judiciary, and the induction of forces who remained outside the political mainstream. At one stage, all the major political formations were represented within the Conference including the principal opposition in the South, the Sri Lanka Freedom Party, and the political-military formation dominant in the North-East, the LTTE. But, with the collapse of the Southern insurgency, the Conference soon lost its sense of urgency, and part of its legitimacy, as both the SLFP and the LTTE progressively withdrew from this exercise. The remaining political parties plodded along with diminishing enthusiasm.

The only significant legislative reform was the requirement relating to a youth quota in nominations to local bodies, A National Education Commission was established, but its deliberations have yet to elicit any serious public interest. The Media Commission ran into serious opposition within the journalist community who remain unconvinced that it is a progressive measure. Nonetheless concerns relating to the liberalisation of the media have partly contributed towards the relaxation of the rigid state monopoly of the electronic media. The centre piece in the Youth Commission's reform package was the Nominations Commission. A truncated Nominations Commission bill was not pursued due to reservations by the Supreme Court relating to its constitutionality. However, there is an acknowledgment by the state that recruitment to the public service should be free of interference by the political party in power. Credit for this significant shift in policy must go to the Youth Commission.

The All Party Conference also devoted enormous time and effort to the revision of the chapter on Fundamental Rights and to the establishment of a Human Rights Commission. The government assured both the U. N.



Human Rights Committee last year, and the Human Rights Commission in February that the enactment of these laws would be part of its new resolve to protect human rights. But the prospect of an early passage of the 17th Amendment seems unlikely given the growing polarisation within Parliament. As we review these events, we must sadly conclude that despite some modest gains the program of constitutional reform envisaged by the Youth Commission is largely in a state of disarray. The All Party Conference continues to drift without clear political direction. To some elements within the ruling party, the very process seems more important than the substantive outcome, as it serves the immediate need of improving the human rights profile of the government. Some recent studies seem to confirm that disillusionment of the youth in universities, and the higher forms within secondary schools remains intense.

Crisis of Ethnicity

We must now move on to an equally complex issue: how did the dominant mode of constitutional discourse respond to the crisis of ethnicity and of nationalism? In exploring this issue, I must initially emphasise the fluidity of the concepts and ideas which form the core of this discourse. As we have emphasised in this lecture, most countries in South Asia share a common colonial experience. The colonial constitutional discourse dealt with questions of 'limited government', and the struggle for progressive transfer of power to hybrid legislatures with nominated and popular representatives. With the advent of political independence, this discourse shifted to questions of legislative supremacy and the distribution of power between the different organs of government. Such a discourse presupposed that the post-colonial constitutional arrangements were primarily intended to give effect to the majoritarian principle.

A politically and culturally resurgent majority deployed legislative and executive power to deny equal treatment to ethnic and cultural minorities. A vote in the hands of an intolerant majority was soon viewed as 'an instrument of oppression.' The focus of constitutional discourses began to shift to the need for restraints on the majoritarian principle and limitations on the exercise of state power.

More recently, the discourse has more sharply focussed on the constitutional arrangements necessary to preserve the multi-ethnic character of the polity. These issues relate to power sharing arrangements, pluralism, secularism and equalisation of opportunities, through the removal of historic and regional disparities. Within this discourse there are those who challenge the hegemony of the constitutional ideas associated with the modern state and inherited political institutions. Their argument is

that this form of discourse is no more than an extension of the colonial discourse, and does not offer any concepts, or categories of analysis which are capable of comprehending the experience of South Asian societies. They contend that this discourse must be extended to accommodate the forces of ethnicity and of nationalism.

These concerns further point to the need for new concepts and principles designed to protect ethnic, linguistic and religious minorities. The protection of such minorities must form a fundamental component of any bill of rights. Such protection should primarily be directed towards insulating minorities from any activity capable of threatening their very identity or existence. Such activities range from genocidal violence or pogroms directed against specific minorities, to policies of assimilation including state aided settlement schemes intended to alter the demographic profile of regions where a minority predominates. States need also to be mandated to actively foster and protect the linguistic, cultural and educational rights of minorities.

At the centre of this exercise is the effort to reconcile the protection of individual rights with the protection of group rights. Important and preliminary work in this direction is being undertaken both within the CSCE (Conference on Security and Cooperation in Europe) process and within the European Community. Constitutional theorists in South Asia need to be more attentive to these developments.

Unitary State and Sovereignty

The discourse of constitutionalism and international human rights jurisprudence have yet to imaginatively respond to challenges which place in jeopardy not merely the nation state, but the very foundations of a constitutional order. These concerns compel reappraisal of the very nature of the nation state and the concept of national sovereignty. The entrenchment of the unitary state in constitutional texts often leads to the absurd contradiction of imposing a mono-ethnic state on a multi-ethnic polity. The very definition of the state must increasingly reflect the ethnic diversity of the polity, and acknowledge that the state is an aggregation of ethnically and linguistically distinct regions and sometimes several distinct nationalities.

Colvin R. de Silva who played a part in the introduction of the concept of a unitary state into the first Republican Constitution (but not its subsequent entrenchment in the Second Republican Constitution) viewed it as no more than an intellectual construct. In later years he feared that the idea might become so embedded in legal consciousness so as to inhibit innovative constitutional ex-



perimentation. Dr. de Silva argued that there was no ideal type unitary constitution locked up in some mythical vault. He believed that unitary and federal constitutional arrangements formed part of a continuum, with the former being compatible with the most extensive forms of devolutionary and quasi-federal arrangements.

Recent judicial practice in the interpretation of this clause point to some of the difficulties of constitutional adjudication. The apex judiciary's self perception in constitutional adjudication is not that of a neutral arbiter between the centre and the province, but more of the custodian authority and power of the centralized state. This approach has contributed to the progressive erosion of the devolutionary arrangements. But there is even more serious danger to the very integrity of constitutional discourse and to constitutional adjudication.

The dissenting judgements in the 13th amendment case, (and some subsequent legal commentary) point to the danger of deep popular prejudices being elevated and rearticulated in the form of rational constitutional discourse. The transparency of this process, seems to undermine the very rationale of constitutional adjudication as a process with techniques of reasoning, recourse to neutral principles and in the very style of argumentation, which is distinct and independent of the discourse of the political arena.

Beyond Rhetoric of Rights

Another area in which the discourse of constitutionalism needs to be enriched is in the enforcement of fundamental rights. The rhetoric of basic rights and freedoms is based on statist and individualistic conceptions. The base of support for fundamental rights can be expanded if it is linked to belief systems which have given content and meaning to the social and religious experiences of the people within South Asia. These indigenous, cultural and religious traditions emphasise communitarian conceptions of justice, and conciliatory and consensual approaches to the resolution of conflicts.

Obligations of reciprocity within a family facilitate attitudes and values supportive of the right of the child and the needs of the elderly. Such an approach leads to more effective protection of social rights, than what could be available in a legal culture which views these issues exclusively in terms of an individual's claim against the state.

There are other ideas such as *dharma* which are central to the Hindu-Buddhist theory of justice and define the moral limits which rulers may not transgress if they are

to command the allegiance of their subjects. Very little effort has been made to imaginatively build on such concepts to articulate principles of governance and democratic accountability which draw on the language and idioms which form part of the Hindu-Buddhist tradition. Similar attempts need to be made to draw the linkages between constitutional values and the rhetoric of rights on the one hand, and the concepts, ideas and institutions which are central to the belief systems and the world view of Islam, on the other.

This point is perhaps illustrated by the recent intercession of the Thai monarch in the constitutional confrontation between pre-democracy forces and the military. It is significant that most comparative constitutional lawyers have often commented on the transient and evanescent nature of Thai constitutions. Between June 27, 1932 and January 29, 1959, Thailand had as many as seven constitutions of which two were described as provisional, (1932, 1947) and one as interim (1950). One scholar described this process as the practice of factional constitutionalism, which is the "process of drafting a new constitution to match and protect each major shift in factional dominance." But the more perceptive observation is that Thailand had two constitutions, the written constitution which is ephemeral and the more enduring substantial structure of law and custom which have remained as the fountain upon which government rests.' Tambiah points to the Theravada doctrine of Kingship (the king as *Boddhisatva* - the cosmic liberator - and as *Chakkravarti* - the terrestrial emperor) as being resilient throughout Thai history, and legitimating changing forms of state power.

Tambiah refers to a remarkable myth which leads to the assimilation of Manu's *Dharmasastra* and indigenous customs in the Theravada Buddhist countries of Burma and Thailand. This process of reincorporation required the creation of a new Manu to legitimise his code. The myth described him as a cow herd who, because of his flair for adjudicating disputes, was made the King's minister, while he was a child. Dissatisfied with one of the decisions involving the ownership of cucumber, he decided to retreat, practice meditation and to endure severe austerities. Eventually, he ascended to heaven, where he found the "*dhammadhat* laws engraved on the boundary wall of the solar system." He brought these laws back to the King, who is reconstructed as 'the embryo Buddha and an embodiment of justice.' In the Thai tradition of kingship, this leads directly to the "amalgamation of *Rajastham* (the individual acts and applications of law by the king) with *Dhammastham* (absolute moral law).



Democratic Ideal

The second meaning that is accorded to constitutionalism is to view it as an ideal of liberal democratic governance, accountable and answerable to popular will. It is in this symbolic and idealistic meaning that constitutionalism has been invoked as a rallying flag in the struggle against authoritarianism. During the Emergency in India and the struggle for the restoration of democracy in Pakistan, Bangladesh and Nepal and in the movements against constitutional authoritarianism in Sri Lanka, it is this conception of constitutionalism which gained ascendancy.

Mick Moore in a recent essay has expressed optimism that strong forces in Sri Lanka would remain supportive of the democratic ideal. Firstly, he refers to the norms of democracy and constitutionality having long commanded a following amongst the Sri Lankan electorate, even though the self-interest of politicians have led to their routine violation. He sees no weakening in that commitment despite the political violence, and chaos of recent years.

Similarly, he believes that the associational life of the Colombo bound middle classes provides a strong reservoir of resistance against authoritarianism. He sees that middle class as being ethnically heterogeneous and having overseas links and providing for a base for political dissent and for a more dispersed civil rights movement. He also sees the changing international environment leading to the more direct articulation of international concern about democratic and human rights abuses; through an emphasis on a link between aid and developmental assistance. Critical to this analysis is state-civil society relations, and the relative autonomy of private business, professional, welfare and developmental organisations. Although there has been no explicit articulation of an ideology of comprehensive state control of private associational life, recent developments cause concern with regard to the continuity of the existing legal, and policy framework on state-civil society relations.

Political Culture

The third meaning accorded to constitutionalism is related to the realisation that constitutionalism requires much more than a constitution. Constitutionalism requires a legal and political culture on which durable institutions could be firmly grounded. We have already noted that constitutional concepts are fluid, with old meanings giving way to new interpretations and even new concepts assuming the centre stage. In addition to the fluidity of concepts, constitutional arrangements are also of a transient nature. It was Ivor Jennings - the

framer of many defunct constitutions - who cautioned us that "constitutions come like water, and if they don't go like the wind, strange things happen to them which were beyond the contemplation of their framers." It is in this sense that the equation of constitutionalism with the process of value formation assumes importance. This is where our failure seems to be so glaring, and no imaginative project has as yet been designed to build democratic values, civic virtues, and communitarian attitudes.

The Italian social theorist Bobbio has argued that the democratisation project must go beyond the state and even make the institutions of civil society democratically accountable. This does not necessarily mean constitutions must always be based on a shared culture between the rulers and ruled. Bolivar Lamounier has argued that a Constitution must evolve out of a process of self reflection, rather than appear to emerge organically from social roots. A constitution ought to be more enlightened than the prejudices of the population at large. It is accordingly argued that constitutionalism can remain the project of a minority - a middle class elite which acquires legitimacy because of either its role in bringing about political transformation, or by subsequently acquiring legitimacy through electoral politics.

While being sensitive to the specificities of the national context within which constitutional experiences must be assessed, some general perspectives may be offered which distinguish the South Asian experience with constitutionalism.

First, in South Asia the strength and vibrancy of institutions such as the party system, the bureaucracy, the judiciary and the press is partly the result of long experiences with universal adult franchise and competitive political processes. This tradition of political democracy enabled the legal constitutional order to withstand periodic challenges from insurrectionary movements, *coups d'etat*, or subversion of constitutional values and institutions by the ruling elite. This is probably less true of Pakistan and Bangladesh where there had been a break in constitutional continuity with forcible seizure of power by the military. However, even in these countries the institutional legacy and the legal and bureaucratic culture of the pre-authoritarian years retained some resilience and helped mediate the recent transition from authoritarian rule. In comparison, the enterprise of constitutionalism has been more fragile and vulnerable in Africa, South-East Asia and even in parts of Latin America.

Secondly, despite the apparent resilience of political institutions and processes, South Asia is in the process of a major upheaval where there is a continuing effort towards redefining the nature of the polity, and the relationship between the different religious, ethnic com-



munities, tribal and caste groups. The political compact which followed the transfer of political power provided a framework for the resolution of inter group tensions. This framework no longer seems to hold and the concepts which were at the centre of the compact are being rejected.

In India, the balance between different communities differentiated by religion, ethnicity and caste were sustained by concepts such as federalism, secularism, and affirmative equality. The political consensus on these issues soon became eroded, with the inability to agree on alternative arrangements causing social upheaval. Revivalist and fundamentalist forces have also called into question the state's commitments to secular principles. The state is no longer viewed as the neutral arbiter between competing religious claims, and is being increasingly called upon to preferentially support the religious beliefs, institutions, and places of worship of a resurgent majority. There is a growing realization that there can be no finality in the resolution of these questions and that there would be constant need to renew and reconstruct societal arrangements for the resolution of inter-ethnic and inter-group conflicts. In South-East Asia, Africa and Latin America there is less agonising reappraisal of the basic relationship between groups and the very nature of the polity. The question of inter-group conflict seems less central to the process of constitutional reconstruction in Latin America, East Asia and (with the exception of South Africa), even possibly Africa.

Thirdly, there is to a much greater extent the element of civic participation, through human rights groups, and social action organizations engaged in creative interactions with journalists and lawyers towards redefining the constitutional agenda and the nature of the discourse. In India the emphasis on socio-economic rights in the enforcement of fundamental rights was partly the result of this process. It is thus clear that constitutional imagination and innovation is no longer the sole monopoly of law professionals or party leaders, and that all elements within civil society can play a part in expanding the frontiers of fundamental rights. It is not clear whether such civic involvement in expanding the base of legitimacy of constitutionalism is as pronounced in other Asian, African or Latin American experiences.

South Asia faces the dazzling and yet daunting prospect of expanding the frontiers of constitutionalism to reconcile the challenges of a reawakened civil society and the disintegrative process of ethnic and religious fratricide

with the imperatives of modern nation states. This is an opportunity which needs to be grasped.

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