BEYOND REPRESENTATIVE ELECTORAL DEMOCRACY: A ROLE FOR LAWYERS?

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South Asia has witnessed momentous political transitions during the last few years. In Pakistan, following the assassination of President Zia-ul-Haq, democratic elections were held in 1988 under a competitive electoral processes, and a popular governmnet was installed. The pro-democracy movement in Bangladesh led to the appointment of an interim government under whose auspices free and fair elections were conducted. These elections facilitated the replacement of military regimes by democratically constituted governments, and in Bangladesh a transition to a parliamentary form of government. Nepal also underwent dramatic political transitions to establish a multi-party state headed by a constitutional monarch. At the center of the South Asian region is India, a federal polity with a long tradition of representative institutions which have survived the continuing challenges of religious fundamentalism and sectarian violence, Sri Lanka also has been able to hold multi-party elections which have led to the alternation of power between the major political parties while besieged by two insurgencies and the militarization of civil society. The South Asian region therefore is one characterised by extraordinary geographical, political and socio-economic diversity. Despite this diversity and complexity, it remains a region which has the largest population ideologically committed to periodic elections and fundamental rights and therefore a region of considerable importance in terms of constitutional reappraisal and renewal.

Issues of constitutionalism, democratic transition, political accountability and human rights are at the center of the political and intellectual agenda. Nepal enacted a new constitution based on popular sovereignty, multi-party state and enforceable fundamental rights. Bangladesh amended its constitution to move from a presidential to a parliamentary system of governance. However, the minimum concerns between the government and opposition to sustain democratic forms is being rapidly eroded. In India, the secular foundations of the state and the federal character of the polity have faced challenges by revivalist and secessionist movements. Pakistan is struggling to reconcile the contradictions of a constitutional framework which sought to graft a Westminster style government into a highly centralised presidential system. Sri Lanka is on the threshold of a new programme of constitutional experimentation. It should involve the repeal and replacenment of the existing constitution. This exercise is intended to strengthen the existing Bill of Rights, to democratize remedies, to institutionalise a federal form of devolution, and to revert to a parliamentary form of government.

The purpose of this paper is to focus on the role of lawyers in the process of democratic transition and in strengthening the structures of political and democratic accountability. The paper will examine the role of the legal profession in ensuring the integrity of the electoral processes and in safeguarding the sanctity of the ballot. Democratic forms of governance draw their legitimacy from the will of the electorate. This in turn revolves on whether electoral laws and procedures are intended to ensure that an election is a genuine expression of this will. In many of our countries, democracy is often being limited to opportunities to participate in periodic elections with very few structures for continuing public engagement in the processes of national decision-making. The paper will therefore address the problems and challenges of popular involvement in the legislative process and in the review of maladministration. Finally we will examine the role of lawyers in facilitating political pluralism, i.e. in the strengthening of civil society and the forms of associational life outside the state.

Integrity of the Electoral Process

The SAARC Non-Governmental Observer Group has pointed out that *"elections are the most visible and symbolic form of political participation. Periodic, genuine and free and fair elections are essential for the achievement of effective participation"* The right to franchise has been conceptualised by some Asian constitutions and by political commentators as an integral component of the sovereignty of the people and as a basic human right on which all other rights---civil and political---are dependent.

The criteria for the assessment of free and fair election were procedural and substantive. The procedural factors relate to the manner and form of voting, counting and the declaration of results. The substantive factors relate to the context in which an election is conducted and include factors such as the open and competitive character of nominations, the fairness of electoral campaign, determination of the right to vote and the impartiality of the electoral administration. The legal profession has been active in defining the legal framework relating to the conduct of elections and in ensuring that the process is free and fair.

One of the critical factors in the South Asian context is to ensure that the government which conducts an election acts in a neutral, fair and impartial manner. These concerns become particularly important in situations where there has been a dramatic transition from an authoritarian or military form of government to a more participatory and democratic process. In Bangladesh, the pro-democracy movement was able to negotiate for an interim caretaker government headed by the former Chief Justice and composed of impartial civil servants. The primary responsibility of the interim government was to oversee the conduct of parliamentary elections and to ensure that international and domestic observer groups were invited to observe the electoral process. Similarly in Nepal, an interim government

headed by Prim Minister Krishna Prasad Bhattarai and consisting of representatives of the Nepali Congress, Communist Party and independent groups presided over a process which involved the enactemnt of the new constitution and conduct of parliamentary elections. In Pakistan, the caretaker government headed by Moeen Qureshi conducted itself with considerable acceptance and there were few complaints relating to the conduct of elections. The issue does however arise as to whether it would be legitimate to require that all elections conducted should be supervised by a neutral government representative of the major political formations in the country. This is one of the critical issues in the present political unrest in Bangladesh where the opposition is demanding the holding of general elections under the auspices of a multi-party caretaker government.

Amongst the matters which relate to the fairness of elections is the need for an up-to-date electoral register to avoid multiple voting and the disenfranchisement of eligible voters. Other factors which had traditionally vitiated the fairness of the electoral process are violence, intimidation, undue influence and bribery. The electoral campaign must be one in which competing political parties and the supporters are able freely and openly to hold public meetings, distribute election materials and canvass the electorate within the framework of the electoral laws. There has been considerable debate with regard to equal access to the electronic media and to ensuring the state controlled print media does not confer an unfair advantage on the ruling party. Similar concerns relate to equality of access to public resources and facilities such as public transportation and state vechicles and access to public grounds and meeting places. The Elections Commission, the Police and the bureaucracy also need to ensure that they would conduct themselves in an impartial and fair manner regarding the enforcement of electoral laws and procedures.

One of the more significant developments within South Asia has been the cooperation among civil society institutions in observing elections in South Asia. During the last six years, SAARC Non-Governmental teams have observed the Pakistan elections in 1988, 1990, and 1993, the Sri Lanka Presidential elections in 1988, the Bangladesh elections in 1991, the Parliamentary elections in Nepal in 1991 and the Lock Sabha election in India in 1991. One of the unforseen consequences of these developments is that governments have tended to appropriate and centralize such election observation exercises. These developments have taken place particularly in Sri Lanka and Nepal where the government and the Election Commission have constituted international observer missions and provided these groups with the facilities to observe the elections. There are difficulties when the authority which conducts an election is also called upon to coordinate the observation and evaluation of its fairmess. Regional and international observation exercises are credible when they are undertaken by indeependent non-governmental and inter-governmental organizations and the exercise is not dependent on the resources and facilities of the state. These exercises have also helped focus on the reforms of the electoral laws and procedures. For example, the interim government in Pakistan prior to the last elections introduced a new concept of electoral disqualification. This included the preclusion of individuals from contesting elections if they have defaulted on their bank loans. A similar development is the role played by the Indian Elections Commissioner to exclude communal parties from the electoral process and to ensure that Chief Ministers and other incumbents do not enjoy unfair electoral advantage in the use of state facilities.

Participation Beyond Representation

The process of law reform in most South Asian countries has not provided for the continuing engagement of non-governmental organizations and professional associations and other concerned member of the public in the legislative process. One of the important innovations in this regard has been the establishment of a law commission consisting of judges, lawyers and social scientists to undertake a systematic review of important branches of the law and to make recommendations for reform. In Sri Lanka the Law Commission was conceived as an independent entity and clothed with the power of making recommendations directly to the Parliament. It was envisaged that in this process, the Commission would engage in extensive public consultation and discussions with concerned groups and individuals. This promise however was not realised. The Law Commissions were primarily staffed by part-time persons who were unable to provide the sustained input which the tasks of reform required. The Commission was also not supported by a team of researchers who were able to undertake interdisciplinary research on existing laws and their impacts.

The existing arrangement within South Asian legislatures to establish Select Committees with a mandate to examine proposals for reform and to consult the public on the desirability of such reforms has also proved to be ineffective. The Standing Orders of most South Asian legislatures do not often provide for public sittings and public hearings. Concerned non-governmental organizations, academic and professional groups are also not adequately organized to intervene in the legislative process and to ensure that a range of opinions is placed before such Committees. There is an urgent and immediate need to rationalize and simplify parliamentary procedures with a view to ensuring that the deliberations of parliament are more open and accessible to the public. The public also need to enjoy access to draft legislation, reports and working papers on which legislative proposals are based. Registered non-governmental organizations and concerned groups should also be entitled to make written representations and submit material to legislative committees and ensure that such material is duly circulated. The Standing Orders of legislatures need to be amended to enable such concerned groups to also make oral representations to legislative committees and such representations should be given wide publicity. Facilities should also be provided for the electronic media to have access to legislative and committee proceedings.

A related concern linked to democratic accountability and public participation in representative institutions is the legal and policy framework relating to non-governmental organizations. Several South Asian countries have adopted a cautious and restrictive approach towards non-governmental organizations. They have generally viewed them with suspicion and introduced restrictive legis-

lation relating to their registration, operation, funding and financial reporting. Such restrictive legislation is found in Bangladesh and in India. In Sri Lanka, a Presidential Commission on Non-governmental Organizations has recommended a comprehensive scheme of regulation which includes mandatory registration and detailed and impractical financial reporting. Human rights organizations, environmental groups and developmental organizations projecting an alternative developmental vision have also faced other forms of harassment and intimidation by the state. The legal and constitutional framework of non-governmental organizations need to be strengthened with a view to protecting their freedom of operation and ability to recruit staff, and mobilize domestic and external funding without state interference.

In countries such as Sri Lanka, the norms of democracy and constitutionality have long commanded a following among the Sri Lankan people despite routine violation by the state. In South Asia in general the strong associational life of the urban middle class has provided a strong reservoir of resistance against authoritarianism. These associations have been ethnically heterogeneous and provided a base for political dissent and for a more dispersed civil rights movement. Similar counter state movements and social movements have successfully mobilized rural communities on environmental, developmental and human rights issues. The emergence of an independent civil society is therefore critical to democratic development and lawyers have an important role to play in defining and protecting the autonomy of professional, civil, developmental and environmental organizations.

Problems of Transparency and Accountability

In addition to institutionalisation of a multi-party system protecting the integrity of the electoral process and strengthening popular participation in the legislative process, democratic developments call for more effective forms of accountability. Concerns of widespread abuse of political power, maladministration and corruption have led to the need for new laws and institutions to combat corruption and correct maladministration.

Corruption erodes public confidence in the institutions of government, and breeds cynicism if there is a large scale of abuse of power at no cost or risk to those who abuse their powers. The co-existence of private wealth amidst public squalor and deprivation erodes the legitimacy of the political system. The model of economic development which accords primacy to the market and to private sector development is one which is essentially driven by greed. Large scale corruption is not possible without collusion between large private and often foreign corporations and public officials. Often the commissions are paid by foreign contractors, companies, and consultants who cynically view bribery as one of the costs of doing business in third world countries.

In approaching the task of reform we would ordinarily consult the best practice of countries which have successfully combated corruption. This would often reveal that sophisticated and strict legislation is alone insufficient. There are many short term and long term measures necessary to complement such legislation. The first of such measures should include a review and reform of laws and procedures relating to procurement and contracting standards. Similar review is required of disbursement procedures and audit requirements. These procurement procedures should wherever practicable be made applicable to private companies, public corporations and to privatized enterprises. These procedures need to be evaluated with respect to their transparency, the promotion of fair competition, the disclosure of objective and fair selection criteria, and mechanisms for dispute settlement. In addition, we need to address the issues of civil service reform, which could enhance the professionalism, remuneration, morale, motivation and accountability of the bureaucracy. We also need to encourage donors and recipient companies to exchange information on delinquent corporations and firms which engage in corrupt practices and to frame a black list which could serve as a deterrent to corrupt behaviour. There is a similar need to revise the professional and ethical standards and codes of conduct of engineers, architects, accountants, and lawyers to deter professional complicity with corrupt practices and to avoid situations where there is a conflict of interest. The Ministry of Justice must liaise with international watchdog bodies such as Transparency International. We need to encourage the creation of domestic watchdog bodies as vigilant and informed domestic public opinion is the ultimate safeguard against the abuse of power.

In Sri Lanka's recent history of the prosecution of bribery offences and investigation of abuse of power, we have seen certain predictable cycles. In the early seventies we witnessed a vigorous if not overzealous enforcement of the Bribery Act, to be quickly followed by public disillusionment with the procedural excesses, in turn resulting in loss of confidence in the integrity of the judicial process. It was found during this period that deviations from the normal rules of evidence and procedure in respect of special cases such as bribery and foreign exchange violations, have a corrosive impact on the image of the judiciary in general, and inevitably affects public perception of the fairness and integrity of the judicial process. We saw a similar shift in public opinion when the Special Presidential Commissions of Inquiry Act was vigorously if not overzealously invoked in the late seventies to investigate abuse of power. Public concern quickly shifted from the issue of accountability of elective officials to concerns with issues of due process and fairness of these procedures.

The goal of creating an effective institution for the redress of administrative grievances has also eluded South Asia for many decades. From the mid fifties many South Asian students of public law have followed with great interest the office of the Ombudsman, an institution which originated in Sweden in 1809 for the purposes of receiving and investigating complaints from citizens against unjust administrative action. This institution was subsequently adopted by Finland in 1909 and spread to Denmark, Norway and New Zealand. Even the United Kingdom which had for many years resisted this institutional innovation established a Parliamentary Commissioner for Administration in 1967 and a Commissioner for Local Administration in 1974 to remedy injustices caused by maladministration. There was however an important conceptual difference between the institution of the Ombudsman as it operated in Scandinavia from that in Britain. In the

Scandinavian model, the Ombudsman was conceptualized as an institution which was independent of existing political and administrative agencies whereas in the British model the Ombudsman was conceived as an adjunct to Parliament. The Sri Lankan experiment with the institution has however floundered between these two models.

There are number of reasons as to why the Parliamentary Commissioner for Administration in Sri Lanka whose office was established in 1981 has failed during the last 13 years to fulfil the expectations of the public of an independent, impartial and informal watchdog against maladministration. Firstly, the Office of the Ombudsman was essentially a very personal institution which derives its strength from the personality, the vision and vigorous commitment to the value of justice and fairness which are critical to the office. I do not think that governments have attached adequate importance to this office in the selection of the Parliamentary Commissioner of Administration and in the financial and human resources that have been placed at his disposal. Secondly, public understanding and confidence in the institution of the Ombudsman is limited. No meaningful program of public education has been undertaken and those who are aware of the institution have a negative view of its effectiveness. This is particularly marked in the case of fundamental rights, as for years the Ombudsman received no complaints of abuses of fundamental rights. Thirdly, the Ombudsman had an ambiguous relationship in a presidential parliamentary system. His appointment is made by the President but he is accountable to Parliament. The principal Act now being amended envisaged a close link with Members of Parliament and the Public Petitions Committee. but this link has proved to be more formal than real. The Public Petitions Committee has not provided the legislative overview that the Select Committee on the Ombudsman has provided in the United Kingdom Parliament. In the circumstances, the authority of Parliament has not been invoked to give teeth to the Ombudsman, and there has been little legisla tive interest in the reports of the Parliamentary Commissioner and his recommendations. It is also significant that despite the explicit requirement of the law that the Ombudsman shall at least once in every calendar year send to the President and the Parliament a report of the work done, there were only two such reports presented. Fourthly, a very important aspect of the jurisdiction and powers of the Ombudsman related to administrative practices which were unreasonable, discriminatory and oppressive. There has been no meaningful impact of the office of the Ombudsman on the review of such practices. In Sweden the penal system was reformed as a result of the work of the Ombudsman. In New Zealand, the Ombudsman's recommendations had a significant impact on the reform of administrative systems.

Conclusion

While being sensitive to the specificities of the national context, some general perspectives may be offered which distinguish the South Asian experience with democracy.

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 experience 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, of 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 commtinuity 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 transition from authoritarian rule.In comparison the democratic system 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 countinuing effort towards redefining the nature of the polity, and the relationship between the different religious, ethnic, 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 questions 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 preferentially to support the religious beliefs, institutions, and places of worship of a resurgent majority. There is a growing realization that there can be 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 agonizing 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 and democratic reconstructions in Latin America, East Asia and, (with the exception of South Africa) even possibly Africa.

Third, there is a much greater 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 civil involvement in expanding the base of democratic legitimacy is as pronounced in other Asian, African or Latin Americal experience.

The legal profession in South Asia faces the dazzling and yet daunting prospect of reconciling the challenges of a reawakened civil society and the disintegrative process of ethnic and religious fratricide with the imperative of modern nation states. This is an opportunity which needs to be grasped. ■

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