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A QUESTION OF CONSTITUTIONALITY

By

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"It may be questionable whether the wisest choice is made if one selects exclusively the most influential systems. The code of a relatively small and not very 'influential' nation may offer particularly interesting and constructive solutions for the very reason that its draftsmen have been influenced by several others and have eclectically woven the strands of several 'influential' ideas into a new and original pattern." So wrote R.B. Schlesinger sometime ago. 1

It is statements like these from eminent comparatists that embolden me to venture to suggest a few modifications in the procedure we have chosen to adopt in the matter of judicial review of legislation. I may, at the outset, mention a serious infirmity in these suggestions and it is that they are not part of the law of the United States. We tend to swear by the law of the United States on matters of review of legislation, perhaps because the Constitution

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1. R.B. Schlesinger in XXth Century Comparative and Conflicts Law 67 (1961).

of the United States envisages a federation and our Constitution is considered to have provided for a quasi-federal set-up for the country. We are stone-blind to any thing other than the American way in the area of testing the validity of legislation.

We shall address ourselves to two main aspects of judicial review of legislation. Are judges of the superior courts best qualified to review legislation which, in many instances, may be questions of governmental policy or of political philosophy? An advocate with a busy successful practice inthe field of property law may be raised to the bench of a High Court. Can one visualise him handing down helpful opinions when he is confronted with questions of, say, personal liberty? Would he not allow himself to be guided by Odgers and Maxwell forgetting all the time that it is a constitution and not a Dog's Act that he is interpreting. Perhaps it is no derogation to the impartiality and integrity of a judge if it is said that he has handed down political decisions. As a large number of questions before him in this area are political questions, his decisions are bound to be political decisions in the light of his own political philosophy. The fault, if any, is not in his making a sincere attempt at handing down an opinion in the light of his own political philosophy. An expert on property law who has been elevated to the bench of a superior court may as well be asked to paint or versify as he is required to pronounce judicially on the validity of laws which may generally involve issues of political policy. If he in his venturesome task of, say, painting fails to come upto the level of the children at Sankar's painting competition, who is to blame? It is perhaps because he is guided by Providence that he often succeeds in handing down reasonable decisions. It would therefore seem that it is not exclusively judges of the superior courts irrespective of their training who should be entrusted with the task of testing the constitutional validity of legislation.

A further question which is equally important is the timing of the review of legislation. If laws are frequently declared unconstitutional by courts, respect for the law will tend to diminish in the mind of the common citizen who is innocent of the niceties of constitutional interpretation. In the Indian context, there appears to be further danger if laws are declared void. Our representatives in the legislatures fortified, as they are, with privileges and immunities, regard themselves as luminous parts of a pantheon endowed with parliamentary 'sovereignty', whatever the phrase may mean, and are sensitive to any criticism of their oracles, not to speak of any attempt at voiding them; hence arises what is usually referred to as the confrontation between the judiciary and the legislature. We have had not a few instances of this where the judiciary and the legislature appeared to engage themselves in the game of musical chairs. If the review is made before laws are promulgated, or say, before the President or the Governor, as the case may be, assents to a bill, the two above-mentioned dangers can easily be eliminated.

It may also be suggested that the Constitutional Court or the institution by whatever name it may be called, which reviews laws before promulgation, may publish only one opinion, that is, the majority opinion, without dissenting opinions, if any, being made public. When there are dissenting opinions, the enlightened section of the public will incline to attach less significance to the majority opinion. This will especially be the case if the dissenting opinions are by eminent jurists or by those for whom one generally entertains high respect. One may even tend to cite instances of judges whose dissenting opinions became in later years the accepted view of the court. The existence as well as the reasoning in the dissenting opinions, may also reflect on the citizen's willing acceptance of a provision of law. If in the eyes of a citizen the validity of a law is nebulous in the light of the dissenting opinions, he may not be precluded by any qualms from breaking the law hoping that the reviewing body may have second thoughts and might reverse its opinion. This may prove good for the growth of the law, but the utility

of dissenting opinions in the enforcement of impugned law may happen to be negative. In a country where the government established by law considers that administrative detention, misnamed preventive detention is essential for the maintenance of the reign of law, the debilitating effect of a dissenting opinion may be specially relevant in the realm of review of legislation.

We shall now turn our attention to constitutional provisions regarding review of legislation in a few countries. One of them at least is not wholly outside the fold of the common law at whose high altar we offer our prayers and sacrifices.

II

Speaking on the proposal to set up a special Constitutional Court in Sri Lanka, Gamini Dissanayake, a member of the Constituent Assembly, stated:

> In my view, the question of interpreting constitutional laws is a specialised function and the question of determining the validity of laws in the present context and in the way envisaged by the Hon. Minister comes very rarely within the purview of the present Courts .... It is, I think, very desirable and necessary that when laws are being challenged, not ex post facto but in the process of legislation that a very expeditious, cheap and quick method is devised where the validity or not of a particular Bill is to be determined. Now, if one were to go and repose that function in the regular courts of law, in my view, it is going to be a very tedious, cumbersome and very expensive procedure, and it will make matters difficult both for the subject who goes to the court and for the judges who are called upon to determine the validity of those laws 2

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2. (Sri Lanka) Constituent Assembly Debates, Vol. I, 2882-3.

Dr. Colvin de Silva said that he would like to add the following to what Dissanayake had stated:

> If you bring the judges of a regular court with their regular position-- career judges, that is to say-- into a place like a constitutional court, they become involved in the ordinary every day matters of political issues in the political arena. That would do no good for the judges. 3

Making special reference to the composition of the Constitutional Council of France and of the Constitutional Court of the Federal Republic of Germany, de Silva said that for people to be chosen for the Constitutional Court from outside the judiciary "is quite a common practice and it is common not by accident". In the Constitution of Sri Lanka adopted in 1972 a constitutional court is envisaged and the members of the court who are five in number are to be appointed by the President of the Republic, which means, in a parliamentary form of Government, on the recommendation of the Council of Ministers. The provision made for appointing members of the Court on the recommendation of the Cabinet which initiates and pilots through the national assembly all government bills may not be a very happy arrangement. It is not unlikely that the Cabinet would recommend for appointment only those persons who, it considers, would toe the line. The Constitutional Council of France consists of three persons appointed by the President of the Republic, three to be nominated by the President of the House of Representatives, three by the President of the Senate as also all past Presidents of the Republic. The past Presidents may be regarded as impervious to petty political persuasion or influence, the Presidents of the two houses of legislature may be expected to exercise their own individual judgment, uninfluenced by partisan political considerations; it is perhaps the members selected by the President of the Republic who are likely to be partisan, especially in a parliamentary form of government where they have been recommended by the cabinet, most probably on political

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3. Id. 2894.

considerations. It may be desirable to exclude members of the legislature from membership as they are likely to think and vote on party lines. If a member of the legislature is appointed to the Court, he should cease to be a member. In the French context, they ought to be excluded because as the scrutiny of the laws takes place after their adoption, though before their promulgation, the members of the legislature will be sitting in judgment in their own cause. In Sri Lanka as the scrutiny is before the passing of the Bill this objection is not pertinent but the likelihood of the members of the legislature voting on party basis even when they are entrusted with a judicial function cannot be altogether ruled out. As what the Constitutional Court exercises is a judicial function, the Court would, it would seem, be properly manned if the membership included a few members of the higher judiciary who are nominated by their own peers. To ensure their independence, it may be necessary to provide that the members of the Constitutional Court after their term of office would not be permitted to accept any office of profit under the government. After all, they do receive their pension. And there are many more things than money-making that a person in the winter of his life can profitably pay attention to.

The Constitution of Sri Lanka, while making provision for judicial scrutiny of Bills before they are passed into law, has also provided for adversary proceedings before the Constitutional Court. The Attorney General has the right to be heard on all matters before the Court. It may, in its discretion, grant to any person such hearing as may appear to it to be necessary before dealing with any question referred to it as to whether any provision in a Bill is inconsistent with the Constitution. The Court may also, if it thinks it necessary or expedient, summon and hear witnesses and order the production before it of any document or other thing. 4

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4. Section 63 of the Constitution.

It may also be noted that any citizen of Sri Lanka may move the Court within a week of a Bill being placed on the agenda of the National State Assembly and the Court will then advise the Speaker of the Assembly that there is a question as to whether some provision in the Bill is inconsistent with the Constitution.[5] The Court has to advise the Speaker in this manner, because the Constitution provides that it is for the Speaker, or when he is unable to perform the function of his office, the Deputy Speaker, to refer such a question to the Constitutional Court. [6] The Speaker or when he is unable to perform the functions of his office, the Deputy Speaker, may take the view that there is such a question and may, on his own initiative, refer the question to the Court. It is the duty of the Attorney General to examine every Bill and see whether any provision in it cannot be validly passed except by the special majority prescribed by the Constitution for adopting an amendment of the Constitution.[7] Section 52(i) of the Constitution clearly provides that

> The National State Assembly may enact a law, which in some particular or respect, is inconsistent with any provision of the Constitution without amending or repealing such provision of the Constitution provided that such law is passed by the majority required for the amendment of the Constitution.

The special majority required for amendment of the Constitution is two-thirds of the whole number of members of the National State Assembly, including those not present. [8]

The Speaker or, in case of his inability, the Deputy Speaker, is required to refer to the Constitutional Court any question of inconsistency with the Constitution in any provision of a Bill if he receives within a week of the Bill being placed on the agenda of the National State Assembly a written notice raising such

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6. Section 54(2)

7. Section 53.

8. Section 51(5).

a question signed by the leader in the Assembly of a recognised political party or by such number of members as would constitute a quorum of the Assembly.

If a Bill is considered by the cabinet to be urgent in the national interest and bears an endorsement to that effect, it is not necessary to follow the usual requirement that it should be published in the Gazette seven days prior to its being placed on the agenda of the Assembly. Such a bill must be referred by the Speaker or the Deputy Speaker, in case of the former's inability, to the Constitutional Court to determine and advise him whether the provisions of the Bill are consistent with the Constitution, or the Bill or any of its provisions is inconsistent with the Constitution or whether it entertains any doubt that the Bill or any of its provisions is consistent with the Constitution. 9 The Court is required to communicate its advice to the Speaker as expeditiously as possible and in any case within twenty four hours of the assembling of the Court.10 If the Constitutional Court advises the Speaker that the Bill or any of its provisions is inconsistent with the Constitution or that the Court entertains a doubt as to the consistency of the Bill or any provision of it with the Constitution, such a Bill cannot be passed except with the special majority required for amendment of the Constitution. 11

Three members form the quorum of the Court which is required to hand down its reasoned opinion, in normal cases, within two weeks of the reference. A dissentient member may also state the reasons for his dissent and these will be forwarded along with the decision and reasons given by the majority.

What is of special significance about judicial review of proposed legislation in Sri Lanka is its timing, that is, the stage at which the review is made. In this respect

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9. Section 55(2)

10. Ibid

11. Section 55(4).

Sri Lanka may appear to have improved upon the constitutional provisions in France which envisage review before the law adopted by Parliament is promulgated. In the French arrangement, sessions of the houses of legislature are held, debates take place, amendments may be proposed, that is, the whole process of legislative gestation is gone through, though perhaps it may later be held by the Constitutional Council that what was adopted by Parliament aslaw was not valid. In Sri Lanka, on the other hand, the scrutiny of proposed legislation takes place before this process is gone through. This means a substantial saving of a great deal of time, energy and money. But there is one serious drawback. It may be that during the course of the debate in Parliament, there will generally be proposals for amending certain provisions which the Constitutional Court has considered unconstitutional. When these proposals are accepted, the inconsistency with the Constitution may cease to exist. When review takes place before the proposed piece of legislation is debated in Parliament, the legislature is bound either to adopt or to reject the legislative provisions in virtually the same form inwhich they have been approved by the Constitutional Court. The debate in Parliament will now be centred on either acceptance or rejection of the proposed legislation. The French dispensation gives the members of the houses of legislature ample opportunity to discuss and debate, free of inhibitions, every provision of the proposed legislation and suggest amendments to them. It is not improbable that in the system envisaged in Sri Lanka, members of Parliament would feel that they are deprived of the fulness of their significant role in legislation. Considering all this, it appears to be much more sensible to adopt the French system in which review takes place after the adoption of a law by the legislature but before its promulgation.

III

Malagasy was a French colony. We might, therefore, assume that when it became independent and framed its own republican constitution, it would adopt as its model the Constitution of the Fifth French Republic. It actually did so to a considerable extent; in what we might call its basic features or framework, its constitution is modelled after that of its erstwhile masters. But when it came to details, unlike many other francophone states and not a few anglophile ones in Africa, it deliberately departed from its model. One such departure may be seen in making provision for what is known as the High Council of Institutions. The main function of the Council is to oversee the confirmity of laws and ordinances to the

republican constitution.[12] Its composition reflects the inspiration of its French model, the Constitutional Council established by the De Gaulle Constitution. The High Council consists of five members, two to be nominated by the President of the Republic, two by the President of the National Assembly and one by the President of the Senate.[13] In addition to these five members, former Presidents of the Republic will be life members of the Council. A deliberate departure from the model is, however, made when the Constitution stipulates that three of the five nominated members of the Council should be chosen for their legal qualifications and experience in the field of law.

One may recall that the Constitutional Court in the Federal Republic of Germany is composed of federal judges and other members; half of the members are elected by the Bundestag (Federal Assembly) and half by the Bundesrat (Council of Constituent States). They may not be members of any government or legislature in the republic. The Malagasy provision for nomination of members by the President of the Republic and by the Presidents of the houses of legislature, based on the French model, with the additional stipulation that three of the members should have legal qualifications and experience may be regarded as a purposive refinement on what is provided for in the Constitution of France and in the Basic Law of the Federal Republic. While party allegiance more than anything else is likely to weigh with the members of the legislature in their choice of the members of the Constitutional Court, the Presidents of the houses of legislature, considered insulated from political alignments, are expected to base their preferences on broader considerations.

The members of the High Council in Malagasy are to be appointed for a period of seven years. They are not eligible for nomination for a further term. Their office will be incompatible with that of the members of government, with any elective office or with the exercise of any private profession.[15]

The President of the Republic, the President of the National Assembly or the President of the Senate may refer any law, before its promulgation, to the High Council to determine its constitutional validity.[16] The Council should hand down a

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12. The Constitution of the Malagasy Republic, article 45.
13. Id. article 46, paragraphs 1 and 4.
14. See Basic Law of the Federal Republic of Germany, article 94(1).
15. The Constitution of Malagasy Republic, article 46, paragraph 3.
16. Id., article 47, paragraph 1.

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decision within a time limit of one month.[17] In case of emergency, so attested by the President of the Republic, the High Council is required to give its decision within a period of eight days.[18] All ordinances, before promulgation, must be submitted by the President of the Republic to the High Council which shall give its decision within eight days.[19] Such provisions as are declared unconstitutional by the High Council will not be promulgated. The President of the Republic may either promulgate the other provisions of the law or submit them for reconsideration by the assemblies or consider them to have lapsed.[20] Apart from this provision for supervision before promulgation, the Constitution has also provided for post-promulgation control of legislation. It states that:

> After promulgation of a law, the High Council of Institutions may at any time deal with a request by the President of the Republic, taken in the Council of Ministers, for the annulment of a legislative provision deemed to be unconsitutional. If the High Council of Institutions, when so requested, considers that a legislative provision is unconstitutional, such provision shall be abrogated automatically.[21]

This again is a departure from the French model where there is no provision for post-promulgation control of parliamentary legislation. This provision, however, may not evoke any fulsome eulogy, as its utility will manifestly depend on the initiative taken by the President in consultation with the Council of Ministers. Even the pre-promulgation supervision apparently depends on the initiative taken by one of three high dignitaries of the state. It would seem that there should be provision made for enabling any citizen to move the High Council in regard to the constitutionality of a provision of law. A more convenient dispensation would perhaps be to require the President of the Republic to submit every law passed by the Assemblies to the

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17. Id., article 47, paragraph 2.
18. Id., article 47, paragraph 3.
19. Id., article 47, paragraph 4.
20. Id., article 47, paragraph 5.
21. Id., article 47, paragraph 6.

High Council for its scrutiny. A legally qualified person entrusted with the task of playing the role of the devil's advocate may be appointed with a view to his presenting before the Council any infirmity in a piece of legislation regarding its constitutional validity. If provision for post-promulgation scrutiny also is considered necessary, by way of abundant caution, the devil's advocate may be entrusted with screening petitions from citizens so that frivolous ones may be eliminated. If proper provision is made for effective scrutiny before the promulgation of law, it is perhaps unnecessary to provide for any control after promulgation. Adversary proceedings of the kind we are familiar with may be provided for in the pre-promulgation scrutiny of legislation, if persons trained in the common law system assume that such proceedings are absolutely necessary. But this would be a time-consuming process and may not find favour with the executive in our country, where, on the specious plea of urgency, issuance of ordinances during recess of the legislature has become the fashion, if not the order, of the day.

IV

When the civil law in the guise of common market law has made and continues to make instructions and erosions instrusions to the sandy foundations of the English common law, we might, in our vaunted spirit of surrender and renunciation, prefer to be guided by the latter's experimental foibles exhibited in another hemisphere. Perhaps all law is an experiment. In the realm of review of legislation, shall we walk the civil, legal way, if only for an experiment?