REPRESENTATIVE DEMOCRACY AND THE ROLE OF THE MEMBER OF PARLIAMENT

CPA Working Papers on Constitutional Reform No. 17
April 2017

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Introduction[1]

Constitutional developments in Sri Lanka in recent years have highlighted the question of the role of the Member of Parliament in a democracy. The relevant constitutional provisions and the manner in which the judiciary has interpreted them in a series of decisions have demonstrated convincingly the importance of the freedom of conscience of Members of Parliament, and the indispensable nexus between this fundamental principle and a truly representative democracy. The decline in the authority of Parliament and the regard that people have for it is not only due to the concentration of power in the Executive Presidency, but also due to the development of the dangerous, 'anti-people' theory of 'party democracy'.

However, on the other hand, in more recent times we have witnessed another 'anti-people' phenomenon that undermines credibility in process and encourages corruption – Members of Parliament crossing the floor from the opposition to the government lured by positions and perquisites in the executive. Many countries have adopted anti-defection laws or constitutional provisions to respond to this trend in an attempt to curtail what in India is often described as 'floor-crossing' or 'vote-buying'.

This Working Paper discusses some of the constitutional issues that arise as a result of floor-crossing, critiques some of the early judicial decisions for failing to consider many of these constitutional issues, and argues in favour of a compromise that seeks to protect the freedom of conscience of Members of Parliament, the significance and importance of which has not been adequately recognised by the Sri Lankan legal community, while also discouraging floor-crossing for less altruistic and legitimate reasons. As the Constitutional Assembly deliberates on the introduction of a new electoral system along the lines of a Mixed Member Proportional (MMP) model of representation, another opportunity is presented for us to establish a balanced constitutional and legal framework for ensuring MPs' freedom of conscience while guarding against abuse. This paper underscores the importance of this issue, and urges constitution-makers to avail of the opportunity to address the current problems of the law discussed below.

The Constitutional Framework

The Second Republican Constitution which was promulgated in 1978, introduced a particular variety of proportional representation[2] which replaced the 'first-past-the-post' or simple plurality system which had existed in the country since independence in 1948. The system introduced in Sri Lanka contained several distinctive features: a bonus seat for the party / group that came first in a particular district, and a high cut-off point, both designed to give an advantage to larger parties and prevent smaller parties from entering

[1] This is a partially updated version of R. Edrisinha, 'The Freedom of Conscience of Members of Parliament' in R. Edrisinha & A. Welikala (Eds.) (2008) *The Electoral Reform Debate in Sri Lanka* (Colombo: Centre for Policy Alternatives): Ch.III.
[2] See Article 99 of the Constitution.

Parliament; and preferential voting permitting the voter not only to choose the party of her / his choice, but also the individual candidates on the party lists. These details were contained in a relatively rambling constitutional provision with the marginal note, 'Proportional Representation', which contained thirteen paragraphs: Article 99 (1) to (13).

Article 99 (13) provides for the principle of expulsion of Members of Parliament from Parliament if they ceased to be members of the party to which they belonged at the time they were elected to Parliament. The paragraph reads as follows:

> "a) *Where a Member of Parliament ceases by resignation, expulsion or otherwise, to be a member of a recognised political party or independent group on whose nomination paper (hereinafter referred to as the "relevant nomination paper") his name appeared at the time of his becoming such Member of Parliament, his seat shall become vacant upon the expiration of a period of one month from the date of his ceasing to be such member:*
>
> *Provided that in the case of the expulsion of a Member of Parliament his seat shall not become vacant if prior to the expiration of one month he applies to the Supreme Court in writing, and the Supreme Court upon such application determines that such expulsion was invalid. Such petition shall be inquired into by three judges of the Supreme Court who shall make their determination within two months of the filing of such petition. Where the Supreme Court determines that the expulsion was valid the vacancy shall occur from the date of such determination."*

Due perhaps to the fact that the expulsion provisions were spelled out in the same article which described the details of the proportional representation system, the myth that ***proportional representation necessarily entails the supremacy of the political party over MPs elected to Parliament on that party's ticket was perpetuated in Sri Lanka*.** The Supreme Court of Sri Lanka, in a series of decisions, seems to have grounded its judgments on this assumption, and has, therefore, not thought it fit to attempt to whittle down the scope of this obnoxious constitutional provision through a process of constitutional interpretation consistent with the values of liberal constitutionalism. This early trend of case law that ultimately favoured the party over the individual MP, was followed later by a series of cases that favoured the dissident MP rather than the party. However, the justification for such a shift was based on arguments based on procedural principles of natural justice, rather than on the larger, more important constitutional principles that, I argue, should have provided the main justification for such a position.

A Tale of Three Cases

Case 1: *Gunawardena and Abeywardena v. Fernando* (1989) SC (SD) 50, 51/87, decided on 18th January 1989

In the first case dealing with the so-called expulsion provisions,[3] two MPs belonging to the ruling United National Party (UNP) defied the party whip and abstained from voting in favour of the controversial Thirteenth Amendment to the Constitution and the Provincial Council Bill[4] at the stage of the second reading of the Bills, but, however, voted in favour of the Bills at their third reading. At the disciplinary inquiry initiated thereafter by the party Working Committee, Mr. Abeywardena explained his abstention on the ground that the various party organisations within his electorate were 'unequivocally opposed' to the Thirteenth Amendment. The Working Committee, nevertheless, decided to expel the two MPs from the party. In terms of the constitution, if the expulsion from the party was *valid*, thereafter, automatically the seats of the MPs would become vacant. The two MPs, as provided for by the constitution, applied to the Supreme Court for a determination that their expulsion was not valid. In a decision that revealed little if any sensitivity to the basic principles of representative democracy, the Supreme Court held that the expulsions were valid enabling the UNP to expel the MPs from Parliament.

Case 2: *Dissanayake et al. v Kaleel* (1993) 2 SLR 135

Gamini Dissanayake and Lalith Athulathmudali, two senior leaders in the ruling UNP, masterminded a plot, with the cooperation of the Opposition, to impeach President Ranasinghe Premadasa. They also launched an island-wide campaign against the Executive Presidential system and its incumbent.

The Disciplinary and Working Committees of the party recommended that the eight UNP MPs involved in the abortive attempt be expelled from the party. The Working Committee Resolution calling for their expulsion stated that President Premadasa was the Leader of the party and that the dissidents' action amounted to 'a betrayal of the party membership and confidence placed by the people in the Party and leadership.' It also condemned the dissidents for failing to raise their concerns within the party.[5] The resolution went on to say:

[3] The petitioners in this case based their challenge against their expulsion on Article 161(d)(ii) and not 99 (13). Article 161 is contained in the Chapter entitled 'Transitional Provisions' and dealt with the Parliament elected in 1977, before the promulgation of the new constitution. However, the fact that the two MPs were elected under the simple plurality system, thereby precluding the operation of the myth of 'party democracy', makes the decision of the Supreme Court all the more indefensible.

[4] These Bills were particularly controversial as they were introduced in Parliament after the Indo-Lanka Accord of July 1987, which as many commentators point out, was signed by the Sri Lankan Government under duress.

[5] This was perhaps an unrealistic expectation given the political context at the time. President Premadasa wielded almost absolute control over the United National Party. The fact that there was little, if any, intra-party democracy made it difficult to stand up to the party leadership.

> "And whereas the said 8 members had at the General Election of 1989 sought and obtained nomination on the lists of the UNP and the voters had elected them to Parliament on the basis and understanding that they are members and candidates of the UNP who accept the leadership of the party and the Executive Presidential system of Government and are therefore bound to adhere to the party manifesto and the party constitution and policies *whilst being representatives of the party in Parliament...*"[6]

Kulatunga and Wadugodapitiya, JJ. held that the expulsion of all eight MPs was valid. Fernando J., in his dissenting judgment, held that the expulsion of six MPs was invalid on the grounds of breach of natural justice. The expulsion of the other two MPs who, unlike their colleagues, were Cabinet Ministers at the time the impeachment motion was signed and who appeared to have participated at a Cabinet meeting after signing the motion, was held to be valid, as Fernando J. found their conduct to be abhorrent and the facts undisputable, so that an antecedent hearing would have in His Lordship's opinion made no difference to the decision to expel them.

Case 3: *Tilak Karunaratne v. Sirimavo Bandaranaike et al* (1993) 2 SLR 90

The petitioner was a Member of Parliament belonging to the Opposition, Sri Lanka Freedom Party (SLFP), and an advocate of party reform to reverse the trend of electoral defeats since 1977. He was publicly critical of the party leader, Ms. Sirimavo Bandaranaike who, he argued, had been at the helm of the party for too long, and of the lack of internal party democracy, as elections to various important committees of the party had not been held as scheduled under the party constitution.

A Disciplinary Committee was appointed to inquire into the conduct of the MP. The petitioner refused to participate in the inquiry on the grounds that no useful purpose would be served by doing so as the committee was constituted by persons who were not duly elected. The petitioner who was, thereafter, expelled from the party applied to the Supreme Court for a declaration that his expulsion from the party was invalid.

A majority of the Court took the view that since Mr. Karunaratne had repeatedly tried to raise his concerns within the party at various fora, and since the party constitution required that elections for party organisations and the party leadership be held annually, the public statements which were critical of the party were a legitimate exercise of his freedom of speech guaranteed by the constitution. Mr. Karunaratne's expulsion from the party was therefore held to be invalid, and the party was prevented from causing Mr. Karunaratne to be expelled from Parliament and appointing someone else as an MP in his place.

[6] Resolution of the Working Committee of the United National Party, 6th September 1991. Emphasis added.

The Constitutional Implications of the Cases

The facts of the three cases illustrate the fundamental problem: the undesirability of the constitutional provision, Article 99 (13), and in particular the principle contained therein that expulsion from the party *automatically* results in expulsion from Parliament as well. Due to the defects in the provision itself, a court which may want to prevent an MP from being expelled from *Parliament* is compelled to declare that the MP cannot be expelled from a *party*. The implications or consequences in terms of constitutional principle cannot be compared. Expulsion from a voluntary association, consisting of persons committed to a similar political ideology, is different from an elected representative of the people in the supreme legislature being expelled from that institution, without any consultation of the electors. Therefore, though it must be conceded that the fault lies in the constitutional provision, it is submitted that the Supreme Court failed to recognise the fundamental constitutional issues involved, and indeed often developed constitutional 'doctrines' which lacked validity and legitimacy. Instead of using liberal constitutionalism and creative interpretation as a basis for rendering the obnoxious constitutional provision innocuous, the Supreme Court often extracted 'doctrines' which enlarged its ambit and in effect undermined the very essence of representative democracy and constitutionalism.

This was particularly unfortunate given the fact that several other features of the constitution, including the unprecedented powers vested in the Executive President who, until the Nineteenth Amendment, enjoyed complete immunity from any legal proceedings, the absence of judicial review of legislation, the entrenchment of a public service controlled by the Cabinet of Ministers, and a chapter of fundamental rights which permits the executive to curtail such rights for a host of reasons almost at will, have prompted commentators to condemn the constitution as one that promotes authoritarianism. The combination of an 'overmighty executive'[7] and a relatively weak legislature, lacking independence and vitality, and further devalued by the decisions of the Supreme Court in the cases discussed in this paper, have done little to promote liberal democracy in Sri Lanka in recent years.[8]

The worst judgment in this respect was the judgment of Sharvananda C.J. in *Gunawardena and Abeywardena v Fernando*[9] where His Lordship developed a bizarre theory of representative democracy. Sharvananda C.J. somewhat cavalierly declared that:

> "But today thanks to the evolution of the party system, democracy has assigned to the individual member the role of a cog in the party wheel and it is the party that has become the spokesman of the country's interests. The party system has reached the stage where the individuality of the average party member has scarcely

[7] See C.R. de Silva, '*The Overmighty Executive? A Liberal Viewpoint*', in Chanaka Amaratunga (Ed.) (1989) ***Ideas for Constitutional Reform*** (Colombo: Council for Liberal Democracy): p.313

[8] The abolition of the Executive Presidency was an important pledge of the People's Alliance government elected in 1994 and the Sirisena-Wickremesinghe Coalition Government elected in 2015.

[9] Atukorale J. and de Alwis J agreed with the judgment.

> an opportunity of finding independent expression. The party caucus tends to override all opposition and once the party line is decided, the member becomes little more than a rubber stamp for its decisions. The party gives a mandate to the member; he gets his directions or instructions from them and he carries them out; even the speeches he may make and other activities in Parliament are settled by the party, ultimately on behalf of the constituencies, but immediately on behalf of the party itself."

He went on to suggest that this novel interpretation of representative democracy existed even in Britain:

> "The British system of government is government by party; the Conservative and Labour parties there, are no less democratic parties, because they discipline their members by threat of expulsion."

Sharvananda C.J. did not cite any examples of the discipline and threats he referred to. He must also have been unaware of the numerous occasions on which the so-called 'Wets' within the Tory party, including former Premier, Edward Heath, savaged their own party leader, Margaret Thatcher both in Parliament and outside it. There have also been the countless instances of dissidents within parties, speaking and voting contrary to the official party line. For example, 63 Conservative MPs voted against the Conservative government on the adoption of the Treaty of Maastricht. Political parties in Britain or in other liberal democracies are not monolithic units. As Paul Silk observes,

> *"Political parties are broadly based. Inside each there are disagreements about most individual aspects of policy, though there may be broad agreement about the broad direction of economic and social thinking. Analysis of voting records in the House of Commons has shown that MPs have increasingly shown their disagreement with party policy by voting against their party's line."*[10]

It is significant that Sharvananda C.J. did not deal with the argument put forward by one of the MPs that his constituents and local party organisations did not want him to support the legislation. It is submitted that the judgment totally ignored the fundamental principles of representative democracy.

In *Dissanayake v Kaleel*, both Justices Kulatunga and Fernando distanced themselves somewhat from the 'cog in the party wheel' reference of Sharvananda C.J. Nevertheless, they both, it is submitted, failed to pay sufficient attention to the constitutional cornerstone involved in the case, preferring instead to base their decisions on issues of natural justice and the relationship between the Working and Executive Committees of the party.

Kulatunga J.[11] took the view that the party constitution imposed obligations on all

[10] Paul Silk (1989) ***How Parliament Works*** (London: Longman): p.44

[11] Wadugodapitiya J agreed with the judgment of Kulatunga J.

members of the party. These obligations included being bound by the directions of the Leader of the party regarding matters in Parliament, the duty to harmonise with the policy and code of conduct of the party, and the duty to vote in Parliament according to the mandate of the parliamentary party as conveyed through the party whip. He stressed the fact that under the Sri Lankan constitution, "*the party is pre-eminent and carries the mandate of the electors*." He stated that this was essential for stability, order, and the smooth functioning of the party system.

But the fact that His Lordship failed to appreciate the core constitutional issues involved is demonstrated by the fact that he thought that an important constitutional provision which describes how the sovereignty of the people is exercised, and which some judges and commentators have considered an entrenched provision,[12] was subordinate to the provisions in the constitution spelling out the details of proportional representation:

> *"It is true that Article 4(a) refers to 'elected representatives of the people' but this is subject to Article 99 which provides for proportional representation which gives pre-eminence to the party."*[13]

While Fernando J.'s judgment was more cautious and sensitive to the need for an MP to exercise his / her discretion free from party dictates in certain situations, he too, it is submitted, attached too much importance to the role of the party. Fernando J., therefore, placed considerable importance on the implied obligation on the part of the dissidents to have raised their concerns within the party first, before participating in the abortive attempt to impeach the President. He also rejected the argument that Article 99 (13) should be interpreted restrictively so as to give as much freedom of conscience as possible to the MP. Quite surprisingly, Fernando J. considered it inappropriate to deal exhaustively with theories of representation, and preferred instead to focus more than 50% of his judgment on the more familiar issue of natural justice:

> *"The word 'representative' in Article 4(a) is by no means conclusive in favour of the 'free mandate theory' and the position of the Member has to be determined by examining the relevant provisions of the constitution as a whole. It is neither possible nor necessary in this case to attempt a comprehensive definition of that position and it is sufficient to ascertain whether he retains a power of independent action, in any significant respect."*

In the third case, *Tilak Karunaratne v. Sirimavo Bandaranaike*, Dheeraratne J. for the majority,[14] seemed to adopt a similar approach to that of Fernando J. in the previous case. Since Mr. Karunaratne had, however, raised his concerns within the party and was in fact raising matters which were designed to promote intra-party democracy, and ensure that

[12] See the judgment of Wanasundera J. *In Re the Thirteenth Amendment* (1987) 2 SLR 312 at 337

[13] It is submitted that it should be the other way round. Article 99 should be read subject to Article 4, which not only is the provision that sets out the principle, but has been recognised, controversially by the Supreme Court, as an entrenched provision.

[14] Wijetunga J agreed with Dheeraratne J., while Ramanathan J. dissented.

the values and principles enshrined in the party constitution were adhered to, Dheeraratne J. held that Mr. Karunaratne's impugned statements were justified as an exercise of his freedom of speech guaranteed by the constitution of Sri Lanka.

Dheeraratne J. rejected the argument put forward by counsel for Mrs. Bandaranaike and the party, that with respect to 'non-constitutional functions of a member' the cog in the wheel theory remained applicable:

> *"I am unable to agree with that proposition. If, for instance, the party gives a direction to a member in direct violation of a fundamental policy of the party, is that member meekly bound to obey such a direction?...I am unable to subscribe to a proposition which tends to devalue the nature of the contractual bond of a political party vis-a-vis a member (and particularly a Member of Parliament) to a relationship perhaps that of master and servant."*

It is submitted that it is not possible to categorise the various functions of a Member of Parliament into those which are constitutional and non-constitutional. Dheeraratne J.'s judgment is welcome as it went further than Fernando J. in stressing the importance of the freedom of conscience of MPs and the nexus between freedom of speech and the role of an MP.

The right to dissent is an essential prerequisite for a free society. This right, however, should not only be exercised by the ordinary citizen or political organisations, but by Members of Parliament as well. Unfortunately, with the possible exception of the majority judgment in *Tilak Karunaratne v. Bandaranaike*, the Sri Lankan Supreme Court, in the decisions discussed, has made a constitutional position which might have been considered ambiguous, unambiguously opposed to the exercise of dissent and independence by Members of Parliament.

The main justification for the stifling of the freedom of conscience of MPs was the widely held view that seemed to have been shared by most of the judges of the Supreme Court, that the system of proportional representation necessarily entails diminution in the freedom of MPs. It was implied in the cases that under proportional representation, it is the *party / group* that receives the votes rather than the individual candidate, and that *ipso facto* the mandate theory demands that MPs are bound by the dictates of the party. The apparent logic of this thesis, however, is not borne out in practice. In over 34 liberal democracies in the world, including Germany, Denmark, Belgium, the Netherlands, Spain, Sweden, Iceland and Norway, which use different varieties of proportional representation, Members of Parliament are permitted to dissent from their parties and even to leave the political parties from which they were elected. In *none* of these countries can such Members of Parliament be expelled from Parliament.

This is because the fundamental importance of free, independent Members of Parliament for the effective functioning of representative democracy has been recognised by the constitutions of these nations. Its paramount importance outweighs even the apparent logical consequence of the principle of proportional representation. The *free mandate theory* of representative democracy as opposed to the *imperative mandate theory* of

representative democracy is, therefore, applicable in nearly all liberal democracies, whether they have the simple plurality (first-past-the-post) system or a system of proportional representation.

The basis of modern representative democracy is that governmental power should not be exercised arbitrarily but on behalf of the citizens of the country. The legislature, therefore, should consist of representatives of the *people*, whose primary responsibility is to them, rather than to a party or a party leader. Indeed, the notion that a Member of Parliament is primarily loyal to her / his party is unknown in the liberal democratic world.

Theories of Representation

There are two main theories of representation in modern democratic theory:

1) The Free Mandate Theory
2) The Imperative Mandate Theory

The free mandate theory states that once elected, Members of Parliament exercise a free mandate in the national interest. The people elect a representative because they approve broadly of her party, her policies, her credentials, and they place their confidence in her to exercise her discretion and judgement on their behalf for the duration of the parliamentary term. As stated earlier, this theory of representation is widely accepted in most liberal democracies because it is recognised that in the modern welfare state where the executive wields so much power, a vibrant, independent legislature is a *sine qua non* for an effective system of checks and balances. For example, the free mandate theory is recognised in Germany which has a proportional representation system. Article 38 of the Basic Law provides that the deputies of the German Bundestag:

> "shall be representatives of the whole people, not bound by orders and instructions and shall be subject only to their consciences."

Article 88 of the Constitution Act of the Netherlands provides that,

> "the Staten-General represents the whole Dutch nation,"

while Article 96 declares that,

> "The members vote without the burden of mandates issued by the nominees or the electorate."

Dutch constitutional writers have pointed out that the constitution clearly indicates that parliamentarians represent the whole nation and that they exercise a free mandate in the national interest. The Netherlands too has a system of proportional representation.

Both the French and Swiss Constitutions embrace the free mandate theory. Article 91 of the Swiss Constitution provides that:

> "Members of both Councils shall vote without instructions."

Article 27 of the French Constitution provides that:

> "Any mandatory instructions shall be null and void. Members of Parliament shall vote according to their own personal opinion."

The imperative mandate theory specifies that Members of Parliament are obliged to act in accordance with the mandate of those voters who elected them as their representatives. It is important, therefore, to note that the debate over representation is between those who argue that an MP, once elected, is free to exercise her own judgement, and those who believe that an MP has to, as far as possible, reflect the wishes of her voters / electorate. The issue of the reflection of the wishes of the *party* does not arise even in the imperative mandate theory.

The Merits of the Free Mandate Theory

There are several reasons why the free mandate theory, sometimes referred to as the theory of uninstructed representation, is to be preferred to the imperative mandate theory or the theory of instructed representation. There are several weaknesses in the imperative mandate theory:

a) It is impracticable. It is impossible for voters to be aware of the MPs views on all issues. Also, new issues are bound to arise in the course of the parliamentary term.

b) It is immoral, for it demands the sacrifice of the judgement and conviction of the representative in favour of others.

c) It will adversely affect the quality of the legislature. Persons of superior intellect and integrity are unlikely to seek election to a place in which they are not free to think for themselves, or vote according to their consciences, but merely function as a reflecting mirror for the views of others. This will ultimately be detrimental to the nation.

d) It promotes parochial interests to the detriment of the national/common interest.

e) It undermines one of the most important functions of the legislature. In a representative democracy, Parliament is meant to be a *deliberative* assembly. The imperative mandate theory completely ignores this vital aspect by assuming that the member has arrived at his / her final conclusion on a matter *before* parliamentary deliberation commences.

Edmund Burke explained this, often neglected but important, role of Parliament;

> "Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates but Parliament is a deliberative assembly of one nation, with one interest, that of the whole; where not local purposes, not local prejudices, ought to guide, but the general good resulting from the general reason as a whole. You choose a member indeed, but when you have chosen him, he is not a member for Bristol, but he is a Member of Parliament."[15]

Appadurai, explaining the dangers of ignoring the deliberative function of Parliament, observes:

> "Indeed, as Burke rightly saw, it would result in an absurd state of affairs in which the determination precedes discussion, in which one set of men deliberates and another decides, and where those who form the conclusion are far away from those who hear the arguments."[16]

It seems clear, therefore, that the free mandate theory enables Parliament to realise its full potential as the paramount law-making institution, and as an effective check on the executive branch of government. That is why the free mandate theory has been accepted in most liberal democracies.

Judicial Recognition of the Free Mandate Theory

The free mandate theory is clearly a part of the British constitutional tradition. The imperative mandate theory was expressly rejected by the Court of Appeal in *Osborne v. Amalgamated Society of Railway Servants*,[17] where Farwell L.J. referred approvingly to a speech of Edmund Burke:

> "But authoritative instructions, mandates issued which the member is bound blindly and implicitly to obey, to vote and to argue for, though contrary to the clearest conviction of his judgement and conscience; these are things utterly unknown to the laws of this land…You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a Member of Parliament."

This view was affirmed by the House of Lords in *Amalgamated Society of Railway Servants v. Osborne*.[18] David Judge in *British Representative Theories and Parliamentary Specialisation* states that in 1947, the House of Commons rejected the proposition that a Member of Parliament could be bound contractually to act in a certain manner.

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[15] Speech to the electors of Bristol, 3rd November 1774: ***The Works of Edmund Burke***: p.159

[16] A. Appadurai (1975) ***The Substance of Politics*** (Oxford: OUP): p.528

[17] (1909) 1 Ch. 163

[18] (1910) AC 87

The free mandate theory was recognised in two important cases in Zimbabwe and South Africa. The importance that the judiciary attached to the theory, as vital for the independence of Parliament and its effective functioning as a check on the executive, can be seen in the judgments.

In *Chikerama v. The United African National Council* [19] members of a political party had been nominated on a party list through a system of proportional representation, to become members of the legislature. They had entered into an agreement under which they pledged to vacate their seats if they withdrew their support from the political party which nominated them. The members subsequently resigned from the party which nominated them and the party sought a declaration that their seats be declared vacant. The Appellate Division of the Zimbabwe High Court, refusing to grant such a declaration, stated that the wide wording of the pledges given were unenforceable as they were contrary to public policy. The court also accepted the free mandate theory and observed:

> "The contract in question calls for the resignation of the member if for any reason he ceases to be a member of the respondents' party. There might be the best and most commendable of reasons for a Member to resign from his party. His party might so drastically change its principles and its policies as to make resignation from it the only proper and honourable course for him to take. To take an extreme example, the leaders of the party might decide to collaborate with the terrorists or to indulge in subversive activities, leaving him no option but to resign from it. In such a case it would not be he but the leaders themselves, seeking to unseat him, who would be 'unfit for membership of the House' and deserving of expulsion."[20]

A similar approach was adopted by the South African Appeal Court in the case of *Du Plessis v. Skrywer*,[21] where a political party sought to force a member of the then Namibian National Assembly to vacate his seat on the ground that he had resigned from that political party. The court considered the role of Members of Parliament and declared unequivocally that they had the right to vote according to their consciences. The court stated that since the National Assembly in Namibia could pass laws in the national interest, this implied that members should exercise the freedom to speak and vote when considering parliamentary business irrespective of party prescriptions regarding policy and principles. It is significant that the court also referred to the Privileges and Competencies of Parliament Act in support of its conclusion that a Member is free to vote according to her / his conscience. Furthermore Rumpff C.J. observed that:

> "The members of the legislative assembly can, in my opinion, not be seen as representatives of the nominating parties or societies, but only as representatives of the people of the area."

[19] (1979) 4 SA 258

[20] Ibid, at p.273

[21] (1980) 3 SA 863

Thus, the tradition that a Member of Parliament, once elected, is free to vote according to her / his conscience and according to her / his conception of the national interest, has been asserted by political and legal authorities throughout the world, and in liberal democracies where *both* the simple plurality and proportional representation systems have been practised. This is because they have appreciated the pivotal importance of an independent Member of Parliament for the preservation of a vibrant Parliament and ultimately for a free society. Proportional representation is a method by which MPs are elected to Parliament. However, once elected, other more important considerations pertaining to the effective functioning of Parliament as an institution, override or trump what some perceive as the 'logic' of the system. Klaus von Beyme in *Political Parties in Western Democracies* observes that:

> "Most parliamentary democracies lay great stress on individual freedom for Members of Parliament…All the Western democracies see the Member of Parliament as independent of instruction, and nowhere has he been subjected by law to order from his voters…The independence of Members of Parliament has had to be defended not only against voters but also against the parliamentary party. But party discipline which emerged in many democracies as the parties gained in strength, has never been institutionalised."[22]

The final point made by von Beyme is significant. Most political authorities have acknowledged the enhanced role of the political party and its increasing control over MPs in modern democracies, but such a development has invariably been cited as a weakness, a dangerous trend, or a political reality, not as something positive or a principle to be institutionalised. It is indeed unfortunate that in Sri Lanka, on the other hand, this is referred to as an inevitable consequence of the electoral system of the country, exalted to the status of a legal doctrine and legitimised in the constitution.

The constitutional provisions relating to the freedom of conscience of Members of Parliament in Sri Lanka, therefore, need to be changed. It is submitted that the Supreme Court, through a process of creative constitutional interpretation, should have whittled down the scope of these provisions. A combination of various approaches could have been adopted to achieve this objective. The Court could have stressed the essence of representative democracy by doing the very opposite of what Kulatunga J. did in *Dissanayake v. Kaleel*; it should have read Article 99 (13) *subject* to the 'basic feature' set out in Article 4 (a), which reads as follows:

> "The legislative power of the People shall be exercised by Parliament, consisting of the elected representatives of the People and by the People at a Referendum."

The Court could have, like in the South African case, cited the constitutional and legislative provisions dealing with the powers and privileges of Members of Parliament which confer on Sri Lankan MPs the same rights and privileges enjoyed by their counterparts in the British House of Commons. The Standing Orders of the Sri Lankan Parliament hardly refer

[22] (1985): p312

to political parties, and the procedures laid out suggest clearly the *individual responsibility* borne by Members of Parliament in the conduct of their parliamentary duties.

The Abuse of the Freedom of Conscience

The challenge, however, is to uphold the principle of the freedom of conscience of Members of Parliament while ensuring that the principle is not abused for reasons that have nothing to do with conscience and legitimate dissent. In many countries in the Third World in particular, MPs are enticed to cross the floor by offers of Cabinet portfolios and other perquisites. Many countries have introduced anti-defection laws or other restraints on floor-crossing which are justified on the basis that it preserves the mandate of the people and serves to prevent corruption. The concern that floor crossing will therefore serve to advance the interests of dominant political parties or parties in government has even influenced the decisions of constitutional courts which have often upheld anti-defection laws based on this consideration.[23]

In Sri Lanka, the phenomenon of floor crossing has increased in recent years and the anomaly is heightened by the fact that the floor-crossers not only retain their membership of the Parliament but also of the party on which ticket they were originally elected to Parliament. In a number of recent cases dissident MPs from the opposition have crossed the floor, successfully invoked Article 99 (13) and obtained a favourable verdict from the Supreme Court. The Supreme Court has become increasingly fond of identifying minor procedural irregularities in the disciplinary and expulsion processes embarked upon by political parties, thereby preventing the dissidents from being expelled from the party.[24]
Given both the lack of consistency and application of a clear set of principles on the matter and the political nature of the actions of the MPs who cross the floor, it is undesirable and perhaps impractical to expect the Supreme Court to regulate floor-crossing based on an application of Article 99 (13). It is submitted that with the introduction of a new electoral system, there should be a constitutional provision that affirms the following principles:

1. The freedom of conscience of MPs and a statement similar to the German Basic Law that enjoins MPs to speak and vote free from instruction;
2. A prohibition on an MP crossing the floor and accepting any position in the executive;
3. A provision entitling MPs who leave or are expelled from their parties to remain for the duration of the parliamentary term as Independent MPs sitting in the Opposition.
4. Dissident MPs elected under the simple plurality system from electorates, who wish to resign, may resign and contest a by-election on any party ticket. In such an event the limitations in 2 and 3, above, will not apply.

[23] *UDM v President of South Africa* (2003) 1 SA 488 (CC).
[24] See e.g. *Sarath Amunugama and Others v. Karu Jayasuriya* (2000) 1 SLR 172; *H.A. Baila v. Sri Lanka Muslim Congress* (SC. Spl/Expulsion) No. 1 of 2005; *Keheliya Rambukwella v. United National Party* (SC Spl. No. 1 of 2006), *Mahinda Samarasinghe v. United National Party* (SC (Expulsion) No. 2 of 2006).

If these principles are incorporated in the constitution, it is submitted that it will act as a check on floor-crossing and encourage Members of Parliament to speak and vote according to their conscience, thereby promoting personal accountability vis-a-vis their constituents and also creating the space for freedom and dissent that is *bona fide* and probably in the public interest. It will also make it more difficult for floor crossing to be used by dominant political parties to strengthen their positions in Parliament.

Conclusion

Sri Lanka needs a new electoral system that incorporates the best features of the simple plurality and proportional representation systems. The MMP system provides such a system. However, Sri Lanka also needs to restore the credibility of Parliament as an institution that fulfils what a Parliament is expected to do in a liberal democracy; a Parliament that is a deliberative assembly; a Parliament that is representative of the diversity of the country with respect to its ethnic, religious and gender compositions; and a Parliament that acts as an effective check on the executive. For Parliament to fulfil these basic objectives, its members have to be representatives of the people and not ambassadors of their party leaders[25] or parties.

The freedom of MPs to speak and act as representatives of the people in accordance with their consciences is vital for ensuring that Parliament fulfils its primary functions. Under the 1978 presidential constitution, the decline in the calibre and quality of parliamentarians, parliamentary debate, and the decline in the significance of Parliament as a democratic institution in my view can be linked to the rise of the spurious notion of 'party democracy' that the Supreme Court of Sri Lanka helped to develop in its early interpretation of Article 99(13).[26] A legal and constitutional framework based on the free mandate theory must be established if the new constitution is to successfully reintroduce a robust parliamentary democracy in Sri Lanka.

It is conceded, however, that some limitations on floor-crossing are necessary to prevent the executive from using its powers of patronage to strengthen its powers by distorting the will of the people. The checks proposed above will prevent abuse while ensuring that deliberation and debate in Parliament is informed, vibrant, and meaningful, and that the role of a Member of Parliament is compatible with first principles of representative democracy and constitutionalism.

[25] The absence of intra-party democracy in nearly all Sri Lanka's political parties strengthens the significance of this factor.

[26] This is in addition to the introduction of the Executive Presidency, which I have argued consistently elsewhere, should be abolished.