HUMAN RIGHTS:
THE SRI LANKAN EXPERIENCE
1947 - 1981

A thesis submitted to the University of London as an internal student of the School of Oriental and African Studies for the Degree of Doctor of Philosophy.

Nihal Mahendra Sudrikku Jayawickrama

September 1983.

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

ABSTRACT

This is an analysis of the attempts made in Sri Lanka to provide constitutional protection for certain civil and political rights. The 1972 and 1978 Republican Constitutions, each of which contained a chapter on Fundamental Rights and Freedoms, is examined against the background of the less idealistic Order in Council of 1946 which contained the first Constitution of Independent Ceylon. The latter, which served as the basis for government for nearly twenty-five years, was drafted in the mid 'Forties, at a time when Bills of Rights-consciousness was hardly evident in the British Empire and still less among the elitist leadership thrown up by colonial rule in Ceylon.

The thesis is structured into eight chapters. After an introductory survey in Chapter I of the "foundations of freedom" which were evident at Independence, the attempts made thereafter at formulating a Bill of Rights and the measure of success that attended, or eluded, these attempts are examined in Chapter II. The actual content of the protected rights in the 1978 Constitution, having regard to the overriding effect of "existing law", is examined in Chapter III. Since the effective enforcement of fundamental rights is dependent upon the existence of an independent court, the practical effectiveness of the legal safeguards designed to secure judicial independence are assessed in Chapter IV. The Sri Lankan experience of ex post facto and pre-enactment review of legislation is the subject of Chapter V. In Chapter VI, the effectiveness of the traditional as well as of the special remedies available at different times for the review of executive action is examined. Chapter VII looks at the impact on human rights of states of emergency which have existed in Sri Lanka for nearly half its independent life. The final chapter applies the experience of Sri Lanka to the problems involved in drafting and enforcing a Bill of Rights.

CONTENTS

TABLES

PREFACE

In April 1978, I began work at King's College London, under the supervision of Prof.James Fawcett, on a research project on International Human Rights Law. Three months later, while on a brief visit home, my passport was impounded by the Sri Lanka Government, and I remained grounded in Colombo until September of the following year. In October 1979, thanks to the kindness of the Department of Law, School of Oriental and African Studies, London, I was able to resume my research project. The results of the first part of it, which involved researching the national, regional and international jurisprudence on human rights, has now been published.[1] The second part was a country study of a bill of rights in operation. The country chosen was my own, and my examination of the Sri Lankan experience constitutes this thesis.

I have attempted to examine the effectiveness of the procedures contained in Sri Lankan law for the enforcement of civil and political rights which two recent Constitutions have sought to guarantee. Although much has been written in the past on Sri Lanka's constitutional evolution, and her Independence and Republican Constitutions have been examined and analysed by both lawyers and political scientists, the machinery which these Constitutions expressly provided or had in contemplation for securing fundamental rights have not been subjected to such scrutiny. The Sri Lankan experience in this regard has much to offer to those who still debate whether or not human rights need any special protection under the law, and what form such protection, if so desired, should take.

To understand the events of the period under review and the attitudes of people who often determined the course of those events, I have relied, not only on published historical matter, but also on parliamentary proceedings and contemporaneous reports in newspapers and journals, supplemented at times by my own notes

---

1. See Paul Sieghart, The International Law of Human Rights (Oxford: Clarendon Press, 1983).

and tape recordings. The analysis of the role of the Judiciary in the enforcement of protected rights has been based on judgments of the Supreme Court and the Constitutional Court.[1] In dealing with the period 1970-1977, when I was associated with the Government in the capacity of Permanent Secretary to the Ministry of Justice, I have referred to hitherto unpublished official correspondence and other documentation, copies of which are in my possession.[2] If I have dealt with any aspect of a subject in greater length than others, it is either because that aspect has not previously been examined adequately, or because I have felt that I was in a position to make a special contribution by reason of my own knowledge and experience of it. I have throughout attempted to evaluate Sri Lanka's needs, expectations and performance in respect of civil and political rights against the standards established by international instruments and their interpretation and application by international and regional tribunals. If, in so doing, I appear to have been unduly demanding, I trust that it would be appreciated that in the area of human rights, there can be no half-way house: human rights are not only fundamental; they are also inalienable.

---

1. The Supreme Court judgments were reported regularly until about 1974 when publication was interrupted and delayed by frequent strike action at the Government Press, the death of the long-serving editor, and the decision to publish each judgment not only in the English language but also with a Sinhala translation of it. In 1979/80, the reporting of these judgments appears to have virtually ceased. I am grateful to several friends and colleagues in Colombo who made available to me copies of all the relevant unreported judgments. I am also grateful to Mr.O.L.de Kretser, retired Puisne Justice, who gave me a copy of his District Court judgment in the Kodeeswaran Case (1964).

2. Following the impounding of my passport in 1978, a Special Presidential Commission of Inquiry appointed by the present Government to probe the political activities of the previous Government, subjected my official career to a searching inquiry. In so doing, the Commission provided me with access to nearly all the relevant files of that period and permitted me to take copies of whatever documents I desired. Although I did not then realise it, copies of several of these documents have proved as invaluable in my present study as they were for the purpose of my defence.

This study would not have been possible but for a generous research fellowship awarded to me by the Leverhulme Trust. To the Trustees, and to Mr.Paul Sieghart who initiated it and then helped to revive it after my extended "visit" home, I am most grateful. I am also grateful to five institutions in London which provided me with all the facilities for my research: the Institute of Advanced Legal Studies, the School of Oriental and African Studies, the British Institute of Human Rights, the Institute of Commonwealth Studies, and the Legal Division of the Commonwealth Secretariat. To Prof.James S.Read, Mr.Leslie Wolf-Phillips and Dr.Peter Slinn, who let me attend their Comparative Constitutional Law Seminar, and Mr. Reg. Austin who allowed me to participate in his Human Rights Seminar, I am grateful for many hours of stimulating discussion which helped me to acquire a perspective of the subject I was researching. For his direction, encouragement and kindness, at all times and in ample measure, I am deeply indebted to my supervisor, Dr. Peter Slinn.

As four years of research draw to an end, I remember with gratitude that but for the efforts of three dedicated members of my own profession, Mr.S.Nadesan,Q.C., Mr.J.C.T.Kotelawela, and Mr.Faiz Mustafa, who devoted their time, energy and experience, free of charge, from day to day, for nearly eight months, to defend me before the Special Presidential Commission of Inquiry and thereby, to secure the return of my passport, I would not have been able even to begin it. Through it all, my wife Sarojini, and my two little daughters, Nishana and Sharanya, have been compelled to lead a nomadic existence and they will, no doubt, be most comforted to know that my labour of love has now reached its completion.

Nihal Jayawickrama

London,
September 1983.

PROLOGUE

> Q: Does an Order, Lord, that is complete carry out an act that should be carried out in the presence of an accused monk if he is absent ? Lord, is that a legally valid act ?
>
> A: Whatever Order, Upali, that is complete carries out an act that should be carried out in the presence of an accused monk. If he is absent, it thus comes to be not a legally valid act, not a disciplinarily valid act, and thus the Order comes to be one that goes too far.
>
> Q: Does an Order, Lord, that is complete carry out an act that should be carried out by the interrogation of an accused monk if there is no interrogation ?
>
> A: Whatever Order, Upali, that is complete carries out an act which should be carried out on the interrogation of an accused monk. If there is no interrogation, it thus comes to be not a legally valid act, not a disciplinarily valid act, and thus the Order comes to be one that goes too far. [1]

Thus was enunciated, in this conversation between the Buddha and his disciple, the Venerable Upali, six centuries before the birth of Christ, the rule of natural justice.

In the course of a ministry of forty-five years, the Buddha expounded a philosophy of life based upon tolerance and compassion in which the human mind was the principal element:

> Mind is the forerunner of all evil states. Mind is chief; mind-made are they. If one speaks or acts with wicked mind, because of that, suffering follows one, even as the wheel follows the hoof of the draught-ox.[2]
>
> Mind is the forerunner of all good states. Mind is chief; mind-made are they. If one speaks or acts with pure mind, because of that, happiness follows one, even as one's shadow that never leaves.[3]

These poetic utterances of the Buddha, recorded three months after His passing away, encompassed a wide variety of subjects. For

---

1. I.B.Horner, trans., The Book of the Discipline (Vinaya-Pitaka), Vol.IV: Mahavagga or The Great Division IX (London, Luzac & Co.Ltd, 1962), pp.466-468.

2. Narada Thero, trans., The Dhammapada (Colombo Apothecaries' Co. Ltd, 1972), v.1.

3. Ibid., v.2.

instance, the need for an impartial tribunal:

> He is not thereby just because he hastily arbitrates cases. The wise man should investigate both right and wrong;[1]

the rejection of penalties that cause unnecessary suffering:

> All tremble at the rod. Life is dear to all. Comparing others with oneself, one should neither strike nor cause to strike;[2]

the sanctity of life:

> If a person destroys life, is a hunter, besmears his hand with blood, is engaged in killing and wounding, and is not merciful towards living beings, he, as a result of his killing, when born amongst mankind, will be short-lived;[3]

the futility of victory at war:

> A man may spoil another, just so far
> As it may serve his ends, but when he's spoiled
> By others he, despoiled, spoils yet again.
> So long as evil's fruits is not matured,
> The fool doth fancy 'now's the hour, the chance !'
> But when the deed bears fruit, he fareth ill.
> The slayer gets a slayer in his turn;
> The conqueror gets one who conquers him;
> The abuser wins abuse, the annoyer, fret.
> Thus by the evolution of the deed.
> A man who spoils is spoiled in his turn;[4]

the importance of ahimsa or non violence:

> Hatreds do not cease through hatred:
> through love alone they cease;[5]

the recognition of the supremacy of man:

> By oneself, indeed, is evil done;
> by oneself is one defiled.
> By oneself is evil left undone;
> by oneself, indeed, is one purified.
> Purity and impurity depend on oneself.
> No one purifies another;[6]

the equality of women:

> A woman child, O Lord of men, may prove
> Even better offspring than a male;[7]

---

1. Ibid., v.256.
2. Ibid., v.130.
3. Narada Maha Thera, The Buddha and His Teachings (Colombo: Associated Newspapers of Ceylon Ltd, 1972), p.309.
4. Ibid., p.201.
5. Narada, The Dhammapada, v.5.
6. Ibid., v.165.
7. Narada, The Buddha, p.313.

the repudiation of slavery and the caste system:

> Birth makes no brahmin, nor non-brahmin makes,
> 'Tis life and doing that mould the brahmin true.
> Their lives mould farmers, tradesmen, merchants, serfs.
> Their lives mould robbers, soldiers, chaplains, kings;[1]

the reciprocal duties of employers and employees:

> A master should minister to servants and employees by
> i. assigning them work according to their strength,
> ii. supplying them with food and wages,
> iii. tending them in sickness,
> iv. sharing with them extraordinary delicacies, and
> v. relieving them at times.
>
> The servants and employees, who are thus ministered to by their master, should:
> i. rise before him,
> ii. go to sleep after him,
> iii. take only what is given,
> iv. perform their duties satisfactorily, and
> v. spread his good name and fame;[2]

the relevance of the welfare state:

> Planters of groves and fruitful trees
> And they who build causeways and dams
> And wells construct, and watering sheds
> And (to the homeless) shelter give -
> Of such as these by day and night
> For ever doth the merit grow
> In righteousness and virtue might
> Such folk from earth to Nirvana go;[3]

and the freedom of thought, belief and expression:

> Do not accept anything on mere hearsay (i.e. thinking that thus have we heard it from a long time). Do not accept anything by mere tradition (i.e. thinking that it has thus been handed down through many generations). Do not accept anything on account of rumours (i.e. by believing what others say without any investigation). Do not accept anything just because it accords with your scriptures. Do not accept anything by mere supposition. Do not accept anything by mere inference. Do not accept anything by merely considering the appearances. Do not accept anything merely because it agrees with your pre-conceived notions. Do not accept anything merely because it seems acceptable (i.e. should be accepted). Do not accept anything thinking that the ascetic is respected by us (and therefore it is right to accept his word).
>
> But when you know for yourselves - these things are immoral, these things are blameworthy, these things are censured by the wise, these things when performed and undertaken conduce to ruin and sorrow - then indeed do you reject them.

---

1. Ibid., p.309.
2. Ibid., p.588.
3. Mrs.Rhys David, trans., The Book of Kindred Sayings (Sanyutta Nikaya) (London: OUP, 1917).

> When you know for yourselves - these things are moral, these things are blameless, these things are praised by the wise, these things when performed and undertaken conduce to well-being and happiness - then do you live and act accordingly.[1]

In Sri Lanka, the introduction of Buddhism is inextricably linked with the founding of the Sinhalese race. For nearly twenty-five centuries, the Sri Lankan outlook on life has been conditioned by exposure to the humanising influence of Buddhist philosophy. In almost every village there is a Buddhist temple, and in nearly every home there is an image of the Enlightened One who, through renunciation and meditation, searched for an answer to the perennial problem of human suffering. The concept of human rights is, therefore, not alien to Sri Lanka nor, indeed, to Asia. Many of the rights which are today internationally recognised as fundamental could well be described as a part of the traditions of the East.[2]

---

1. Narada, The Buddha, p.284.
2. See Justice T.S.Fernando, "Human Rights: A Tradition of the East", Ceylon Daily News, 10 December 1964.

CHAPTER I

THE FOUNDATIONS OF FREEDOM

One of the most significant developments in the aftermath of World War II was the recognition of human rights under international law. For the first time, human rights became the concern of the international community. The preamble to the Charter of the United Nations expressed a determination

> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.

One of the purposes of the United Nations was declared to be the achievement of international co-operation

> in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. [1]

The States which subscribed to the Charter and became members of the United Nations thereby pledged themselves to "take joint and separate action" to promote "universal respect for, and observance of, human rights for all without distinction as to race, sex, language or religion".[2] The Charter did not contain a precise definition of human rights. Nor did it prescribe any machinery for their enforcement. Yet a proper legal commitment was made by each of the original member states that it would, within its territorial jurisdiction, observe and respect human rights. On 14 December 1955, Ceylon accepted these obligations and was admitted to the membership of the United Nations.

When Ceylon entered the international community, a "common understanding" had already been reached in regard to the concept of human rights embodied in the UN Charter. The Universal Declaration of Human Rights (UDHR), which was proclaimed by the General Assembly on 10 December 1948, was a "common standard of achievement for all peoples and all nations". It contained nearly forty rights

---

1. Art. 1(3)
2. Arts. 55(c), 56.

and freedoms whose "effective recognition and observance" was intended to be secured by the member states through "progressive measures". At the first ten sessions of the General Assembly at which it was represented, Ceylon participated in the preparation of two draft treaties which sought to elaborate, and provide for the implementation of, the rights and freedoms contained in the Declaration. On 16 December 1966, the representative of Ceylon voted in the General Assembly for the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). These two instruments came into force on 3 January and 23 March 1976 respectively. On 29 May 1980, Sri Lanka's Foreign Minister signed the relevant documents of accession.

Under the ICCPR, the Government of Sri Lanka agreed "to respect and to ensure to all individuals within its territory and subject to its jurisdiction", and "to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to", the civil and political rights recognised therein.[1] Under the ICESCR, the Government committed itself "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation" of the economic, social and cultural rights therein recognised "by all appropriate means, including particularly the adoption of legislative measures".[2]

The principal legislative method by which States seek to secure civil and political rights within their national boundaries is by the adoption of enforceable bills of rights. Europe gave the lead in establishing the principle of collective enforcement when in 1950 the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed at Rome.[3] Three years later, when the United Kingdom extended the application of ECHR to over forty dependent territories, Ceylon no longer belonged to that

---

1. Art.2.
2. Art.2.
3. The American Convention on Human Rights (ACHR) was signed at San Jose, Costs Rica, in 1969. In 1980, the African States Members of the Organisation of African Unity, meeting at Nairobi, approved the African Charter on Human Rights and Peoples' Rights (AFCR).

category; on 4 February 1948, by the Ceylon Independence Act 1947 and the Ceylon (Independence) Order in Council 1947, the Crown Colony of Ceylon had been granted its independence.[1] But neither of these instruments, preceding as they did the formal proclamation of UDHR, contained a comprehensive bill of rights. It was ten years later, during the peak period of British decolonisation, that such a bill of rights became a standard element in the Westminster-Whitehall export model constitution which scores of countries emerging into statehood were encouraged to accept and operate. Consequently, during the first twenty-five years of independence, Ceylon had no bill of rights but only a constitutional limitation on the exercise of legislative power, designed to prevent Parliament from discriminating against minority communities or religions. By the Constitution of the "Tenth Day of the Waxing Moon in the Month of Wesak in the Year Two Thousand Five Hundred and Fifteen of the Buddhist Era" (22 May 1972), adopted and enacted by a constituent assembly, Ceylon declared itself the free, sovereign and independent Republic of Sri Lanka. On 8 September 1978, a new constitution passed by the National State Assembly rejected the pure Westminster model of 1972[2] in favour of a presidential executive for what became known as the Democratic Socialist Republic of Sri Lanka. The former contained a brief chapter on "Fundamental Rights and Freedoms", but did not indicate how these were to be enforced. The latter, which is now in force, contains a more elaborate statement of fundamental rights and has vested the Supreme Court with jurisdiction for their protection.

The existence of a bill of rights does not, however, by itself offer a guarantee that in that country human rights would be adequately or effectively protected; at most, it articulates aspirations. With the decolonisation of Africa, all but one of the independence

---

1. The grant of fully responsible status within the British Commonwealth of Nations was preceded by four months of limited self-government under the Ceylon (Constitution) Order in Council 1946 in its unamended form.

2. The 1972 Constitution which prohibited the judicial review of legislation and established a National State Assembly which was "the supreme instrument of state power" may be regarded as a closer model of Westminster than the 1946 Constitution under which Parliament was a "controlled" body with a restricted legislative power.

constitutions contained enforceable bills of rights. But, as Professor Read has noted, the circumstances attending the birth of African States did not appear to be propitious for the protection of human rights:

> The new states emerged often hurriedly from authoritarian colonialism with dominant nationalist movements but essentially weak political systems, with vulnerable opposition parties and institutions like the judiciary, the press and the professions too weak to exert effective pressures on government, with poor and poorly-educated populations and struggling economies - rocky soil for the nurture of human rights. [1]

In nearly every respect, Ceylon offered a sharp contrast to these African States. On the one hand, it was a relatively prosperous country, with the highest per capita income in Asia. Its sterling reserves were high, and in 1945 its registered unemployed was only 21,366. It had one of the smallest military budgets and one of the most extensive social welfare programmes, absorbing 56.1 per cent of the revenue and covering free education, a free mid-day meal for schoolchildren, free medical facilities, free milk for expectant mothers and growing children, and subsidised prices for rice and flour. On the other hand, a long familiarity with the application of English common law concepts, constitutionalism, experience of political and social organisation and agitation as well as of the conduct of government, a remarkably high standard of literacy, a vibrant middle class, a national press, and a spiritual commitment to the dignity and worth of the human person, were characteristics that were strikingly evident on the eve of independence. In other words, as the following survey suggests, the foundations of freedom[2] already existed.

---

1. James S.Read, "The Protection of Human Rights in Municipal Law", Human Rights: The Cape Town Conference, ed. C.F.Forsyth and J.E.Schiller (Cape Town: Juta & Co.Ltd, 1979), p.156.

2. The expression "Foundations of Freedom" is the first-level subheading of the work by Prof. Read cited above, as well as the title of a work by Prof.D.V.Cowen (Cape Town: OUP, 1961) acknowledged therein.

A National Consciousness

The island of Sri Lanka is approximately 25,000 square miles in extent: about one-half the area of England and Wales and five-sixth that of Ireland. It is located slightly north of the equator and is separated from the sub-continent of India by forty miles of shallow water. Between its furthest points, the island is 270 miles from north to south and 140 miles from west to east. Its principal towns are Colombo, Galle and Trincomalee, situated on the western, southern and eastern coasts (the latter is believed to be one of the finest natural harbours in the world); Jaffna in the north; and Kandy in the temperate central highlands. Its population rose from 1,167,000 in 1834 to 6,658,999 in 1946 and 12,711,143 in 1971. It is today estimated at approximately 15,000,000.

Sri Lanka is a multi-racial, multi-religious and multi-linguistic society. The numerically predominant Sinhalese, whose livelihood depends upon the very fertile soil of the country and the waters which surround it, are of Aryan stock and are said to be descended from the original settlers of the island. The ancient chronicle, the Mahavamsa,[1] fixes the date of the arrival of the first settler, a Bengali prince from North India, at 544 B.C. Environment and history have divided the Sinhalese into the better educated and more enterprising inhabitants of the low country and the sheltered and orthodox Kandyans. The Tamils are the second largest ethnic group. Of Dravidian stock, they are descended from successive waves of invaders from the Pandyan and Chola kingdoms of South India who, commencing around 400 A.D., established their own kingdoms in the northern and eastern parts of the island. An assiduous and hardworking people, the Tamils soon derived sufficient wealth from their comparatively arid homelands to be able to venture south and entrench themselves in increasing numbers in the professions and in the public service. The Moors are the descendants of Arab traders from the Persian Gulf who followed the path of Vasco da Gama and established themselves in the southern and eastern ports. The Burghers are the survivors of the Portuguese and the Dutch who

---

1. The history of Ceylon as recorded on ola leaves by a succession of Buddhist monks, commencing between 247 and 207 B.C.

ruled over parts of Sri Lanka from 1505 to 1638 and from 1639 to 1796 respectively. They are an essentially urban people who wielded considerable influence during the British occupation from 1796 to 1948. The Malays are of Javanese and other Indonesian and Malaysian descent and first arrived as soldiers in the Dutch army. The very small ethnic groups include the rich Indian merchant communities of Sindhis, Parsees and Borahs, and the few Englishmen who no longer work on the tea plantations or in commercial undertakings, but have opted to spend their retirement in a country which nature has treated very kindly. In addition to these groups, there are the Indian Tamils brought by the British from South India in the nineteenth and early twentieth centuries as cheap labour for the coffee and tea plantations of central Sri Lanka. This community continued to live in isolation from the mainstream of life and created sensitive political and social problems after independence. The most recent population statistics (1971) give the ethnic breakdown as follows:

TABLE 1
TOTAL POPULATION 1971

Race	Population	Percentage
Sinhalese [a]	9,146,679	71.9
Tamils	1,415,567	11.1
Indian Tamils	1,195,368	9.4
Moors	853,707	6.7
Burghers	44,250	0.3
Malays	41,619	0.3
Others	13,957	0.1
Total	12,711,143	100.0

Source: Statistical Abstract of the Democratic Socialist Republic of Sri Lanka - 1977 (Colombo: Dept. of Govt. Printing, 1979).

a. Includes low-country Sinhalese (5,445,706 or 42.8 per cent and Kandyan Sinhalese (3,700,973 or 29.1 per cent).

There is also a microscopic aboriginal population known as "Veddhas" who live in the backwoods of the Uva province. Historians are of the view that they were inhabitants of Sri Lanka at the time of the

arrival of the Aryans. Over the years they have become culturally assimilated into the surrounding populations and today what could be described as the Veddha population is less than seven thousand. They live by a form of unirrigated shifting agriculture and speak a dialect of Sinhala.

The second distinguishing factor among the Sri Lankan population is religion. While Buddhism predominates, as it has done for over two thousand years, several other religions also find many adherents in the country. Although the Sinhalese were initially all Buddhists, many of those who lived on the coastal belt and were thus exposed to the missionary zeal of the Portuguese, as well as others who sought education and obtained it in schools established by British missionaries, soon became converts to Christianity. The Tamils are mainly Hindus except those among them who were converted to Christianity in the American missionary schools which flourished in their homelands. The Moors and Malays are, of course, all of the Islamic faith, while the Burghers are either Roman Catholics or belong to the Dutch Reformed Church. The statistical breakdown by religions is as follows:

TABLE 2
RELIGIONS 1971

Religion	Adherents	Percentage
Buddhists	8,567,570	67.4
Hindus	2,239,310	17.6
Christians[a]	986,687	7.7
Muslims	909,941	7.1
Others	7,635	0.1
Total	12,711,143	100.0

Source: Statistical Abstract - 1977.
a. Comprises Roman Catholics (833,111 or 6.9 per cent) and other denominations (103,576 or 0.8 per cent).

The third distinguishing factor is language. Three languages are spoken: Sinhala, Tamil and English. Sinhala and Tamil are identified with the two ethnic groups. The Moors and Malays

generally speak the predominant language of the region in which they reside. The Burghers speak English, though many are able to make themselves understood in Sinhala. Until 1956, English was the language of administration, but the total English-speaking population in that year was minimal. In 1963, when the over-five-year population was 8,970,480 (of a total national population of approx. 10,582,000), the statistics relating to the English-educated among them were as follows:

TABLE 3
ENGLISH EDUCATED IN 1963

English only	...	37,321
English and Sinhala	...	548,266
English and Tamil	...	186,041
English, Sinhala and Tamil	...	106,518
Total		878,146

Among the Sinhalese and the Tamils, caste is yet another distinguishing factor. Though the caste system is less extensive and rigid than in India, it is still a significant factor in social life in some parts of the country. Numerically, the largest caste among the Sinhalese is the Goyigama which, apart from its traditional occupation of farming, has dominated the political life of the country during the past fifty years. The Karawa, Salagama and Durava castes have been traditionally associated with fishing, cinnamon-peeling and toddy-tapping respectively, but since the turn of the century these have provided the leadership in professional life as well as in trade, commerce and in the plantation sector. On the other side of the street are the Vahumpura (jaggery makers), Batgam (foot-soldiers), Hena (washers), Hunu (lime burners), Berawa (drummers), Navandanne (goldsmiths) and the Rodiyas (gypsies). No census of the castes has been taken in this century, but the estimated figures in mid-1970 were:

TABLE 4

CASTES AMONG THE SINHALESE

Goyigama	... 4.5 m.
Karawa, Salagama and Durawa	... 0.8 m.
Batgam and Vahumpura	... 3.0 m.
Others	... 0.6 m.

Source: Janice Jiggins, Caste and Family in the Politics of the Sinhalese, 1947-1976, p.35.

The social structure of the Tamils of the northern and eastern provinces is still based largely on the ancient caste system. Originally, the members of each caste had obligations to perform to one another, and corresponding to these obligations there were reciprocal rights. The different castes included:

TABLE 5

CASTES AMONG THE TAMILS

Madapallies	... bastards of royal descent
Karayars	... fishermen
Chiviars	... palanquin bearers
Kusavers	... potters
Vannan	... washermen
Kammalars	... blacksmiths
Koviars	... domestic servants
Thanakararars	... elephant keepers
Navalars	... coconut pluckers
Chetties	... merchants
Kaikulurs	... weavers
Vellalas	... land owners.

Source: H.W.Tambiah, The Law and Customs of the Tamils of Ceylon (Colombo: Tamil Cultural Society of Ceylon, 1954).

Despite the heterogeneous character of its society, despite mutual fears and jealousy raised by the conflicting claims of race, language and religion, despite the influence of nature which has also conspired to keep the ethnic groups apart confined to their traditional homelands, the diverse elements within the island had

blended sufficiently through many generations of association and several centuries of co-existence to create what was quite distinctly one nation. The cry for partition which reverberated across, and tore asunder, the sub-continent of India as the colonial empire began to be dismantled, did not produce even an echo beyond the waters of the Palk Strait as Ceylon prepared for self-government and independence.

A Legal Inheritance

At Independence, Ceylon's courts applied and administered a multiplicity of laws.[1] Roman-Dutch law was the common or residuary law of the country, applicable on all matters on which there was no relevant statute and the personal laws were silent. These latter were the Kandyan law, applicable to the Kandyan Sinhalese; Muslim law, accepted by all who profess the Islamic faith; Thesavalamai, or "the customs of the Malabar inhabitants of the province of Jaffna"; and Buddhist ecclesiastical law containing rules of succession to temples and temple lands. But by far the most comprehensive was the large body of statute law enacted during a century and a half of British rule. This statute law, which was of general application, introduced the basic concepts of English common law, including certain elements which today form part of international human rights law. Of course, this law lacked the sanctity attached to an entrenched bill of rights, in the sense that its amendment or repeal required no special procedure or majority. Yet, much of it had survived the vicissititudes of constitutional change and appeared to have achieved a degree of durability and tenacity which usually characterises the common law of a country.

Right to Life

The taking of life, except in the exercise of the right of private defence or in the execution of the lawful sentence of a competent court, was a punishable offence.[2] Sentence of death, which was mandatory for murder, the waging of war against the Crown, the giving

---

1. For a full discussion, see L.J.M.Cooray, An Introduction to the Legal System of Ceylon (Colombo, Lake House Investments Ltd, 1972), pp. 1-148.

2. Penal Code, Criminal Procedure Code.

of false evidence resulting in the execution of an innocent person, and the abetment of suicide, could, however, be imposed only upon conviction after a trial by jury before a judge of the Supreme Court, or upon a trial-at-bar by three Supreme Court judges without a jury.[1] Every such conviction was subject to an appeal to the Court of Criminal Appeal.[2] After sentence of death had been pronounced, the presiding judge was required to make a report to the Governor, setting out his opinion, with reasons, on whether or not the sentence should be carried out. After considering this report, the Governor was required to communicate his decision to the Supreme Court. The Governor also had the authority to grant a pardon or to commute a sentence of death to a term of imprisonment, whether on a petition from the condemned prisoner or on his own initiative. Sentence of death could not be pronounced on or recorded against any person who was under 16 years of age, or on any woman who was found to be pregnant at the time of her conviction.[3]

Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The practice of proceeding by torture against any person suspected of a crime had been abolished very early in the nineteenth century; so also, punishments such as breaking on the wheel and mutilation. The other Dutch requirement of a confession of guilt before sentence of death could be legally pronounced, which in turn required a sentence of torture for the purpose of obtaining the confession, had also been abolished at the same time.[4] Only a confession made to a judicial officer was admissible in evidence against an accused person, but only if it appeared to the court not to have been caused by any inducement, threat or promise. A confession made to a police officer or while being in police custody was not admissible.[5] Every death occuring in a police station, mental or leprosy hospital or prison was required to be investigated by a judicial officer.[6]

---

1. Criminal Procedure Code, s.440A.
2. Court of Criminal Appeal Ordinance, s.4.
3. Criminal Procedure Code, ss. 53, 54, 309, 328, 329.
4. Adoption of Roman Dutch Law Ordinance, s.4.
5. Evidence Ordinance, ss. 24, 25, 26.
6. Criminal Procedure Code, s.363.

A prisoner was prevented from being put under mechanical restraint as a punishment. Normal conditions of imprisonment included regular visits and correspondence. Prisoners were categorised and separated, but solitary confinement was prohibited. Ill-treatment by a jailor or subordinate prison officer was a punishable offence.[1]

Freedom from Slavery and Forced Labour

Slavery had been abolished in Sri Lanka in 1844.[2] The performance of any type of work by unconvicted prisoners except of their own accord in order to keep themselves occupied during otherwise idle hours, was prohibited.[3]

Right to Liberty and Security of Person

A person could be deprived of his liberty only on such grounds and in accordance with such procedure as was established by law. A person executing a warrant of arrest was required to notify the substance thereof to the person arrested and, if so required, to show him the warrant. Thereafter, he was required to endorse on the warrant the time when and the place where the arrest was made, and to bring the person arrested before a court without unnecessary delay. A person arrested without a warrant, unless he was released on his own bond or on bail, was required to be produced before a magistrate within 24 hours of the arrest. If the offence of which a person was accused was bailable, and he was prepared to give bail, the magistrate was required to release him on bail or, where the magistrate thought fit, on his executing a bond without sureties. Alternatively, the magistrate could, from time to time, authorise the detention of such person for a term not exceeding fifteen days in the whole.[4]

If a prisoner committed for trial before the Supreme Court (for a non-bailable offence) was not brought to trial at the first criminal sessions after the date of his commitment at which he might properly be tried (provided that 21 days had elapsed between the date of the commitment and the first day of such criminal sessions) he was entitled to be released on bail, unless good cause was shown to the contrary or unless the trial had been postponed on his application.[5]

---

1. Prisons Ordinance, ss. 48, 49, 71, 87, 88.
2. Abolition of Slavery Ordinance, s.2.
3. Prisons Ordinance, s.65.
4. Criminal Procedure Code, ss. 37, 39, 53, 54, 126A, 127A, 394.
5. Courts Ordinance, s.31.

Right to a Fair Trial

Every person was subject to the criminal law and had the capacity to sue and to be sued under the ordinary law of the land. Subject only to the procedural requirement of one month's notice of action, a minister or public officer was also liable to be sued in the ordinary courts in respect of an act or omission in the exercise or purported exercise of his official duties.[1]

No judge was competent to hear a case to which he was a party or in which he was personally interested; nor could he hear an appeal or review any judgment, sentence or order passed by him.[2] No district judge could, except with the express consent of the accused, try any case which he had committed for trial as magistrate.[3] A party to a case was entitled to apply to the Supreme Court for the transfer, in the interests of justice, of his case from one court to another.[4]

Trial by jury had been introduced in 1812, and all criminal trials before the Supreme Court were generally by jury before a judge.[5] An accused person was entitled to elect the linguistic panel from which the jury should be chosen for his trial, and could object to at least two such jurors without stating the grounds therefor. Jury service depended on the ability to speak, read and write a language and on income, and jurors were chosen by the drawing of lots.[6]

Every court was required to hold its sittings in public, except in proceedings relating to sexual offences when the court could, in its discretion, exclude therefrom all persons other than lawyers, witnesses and officers of court.[7]

The Evidence Ordinance provided that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.[8]

Applied to criminal proceedings, this section contained the rule that an accused is presumed innocent until proved guilty according to law. The burden of proving the commission of an offence, therefore, rested on the prosecution.

---

1. Civil Procedure Code, s.461.
2. Courts Ordinance, s.89.
3. Criminal Procedure Code, s.18.
4. Ibid., s.422; Courts Ordinance, ss. 22, 23.
5. Ibid., s.216.
6. Ibid., ss. 165B, 257.
7. Courts Ordinance, s.85. See also Criminal Procedure Code, s.7, Rural Courts Ordinance, s.19, Children and Young Persons Ord.,ss.18-20.
8. S.101.

An accused was furnished with the charge sheet or the indictment, and a list of prosecution witnesses and documents. If he had been committed for trial, he was entitled to receive, on payment, a copy of the record of the proceedings of the non-summary inquiry.[1] A criminal trial on indictment did not commence until 14 days at least had elapsed after service of the indictment on the accused. If he was on remand, he was entitled to receive visits from, and to communicate with, his legal adviser.[2] He was also entitled, as of right, to be defended by a pleader.[3] Communications between him and his legal advisers were privileged.[4]

All evidence in criminal trials was required to be taken in the presence of the accused or, when his personal attendance had been dispensed with, in the presence of his pleader. Where the evidence of any witness had been taken in the absence of an accused whose attendance had not been dispensed with, such evidence was required to be read over to him in the presence of such witness, in addition to being afforded a full opportunity of cross-examining such witness thereon.[5] An accused was entitled to cross-examine the witnesses who had testified against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[6] There were uniform rules for the examination, cross-examination and re-examination of witnesses.

If any evidence was given in a language not understood by the accused, and he was present in court, it was required to be interpreted to him in open court in a language understood by him.[7]

An accused could not be compelled to testify on his own behalf. A confession made to a police officer or while in police custody (except voluntarily to a judicial officer) was inadmissible in evidence.[8]

---

1. Criminal Procedure Code, s.165D.
2. Prisons Ordinance, s.71.
3. Criminal Procedure Code, s.287. But not in a Rural Court where lawyers were not permitted: Rural Courts Ordinance, s.21.
4. Evidence Ordinance, ss. 126-129.
5. Criminal Procedure Code, s.297.
6. Ibid., ss. 165, 189.
7. Ibid., s.300.
8. Evidence Ordinance, s.132.

Juvenile offenders were tried in special courts in accordance with a relatively informal procedure. Probation officers played an active role in these courts, and imprisonment as a form of punishment was required to be avoided. The publication of juvenile court proceedings was considerably restricted.[1]

Every order, judgment or sentence of a trial court was subject to an appeal to a higher court. The appeal might be on a question of law or fact or of mixed law and fact. An appeal court generally had the power to affirm, reverse or vary any judgment or give directions to the trial court, or order a new trial or a further hearing.

A person who had once been tried by a court of competent jurisdiction for an offence and been convicted or acquitted of such offence was not liable to be tried again for the same offence nor on the same facts for any other offence.[2]

Right to Privacy, Honour and Reputation

A search for purposes of criminal investigation could be made only upon the authority, and production, of a warrant issued by a judge, and in the presence of the occupant of the place searched.[3] The outer door of a dwelling house could not be forced open in order to seize a person under civil process.[4]

Officers of the post office were prohibited from opening any postal article in the course of transmission by post, except in so far as might have been necessary for the purpose of returning the postal article to the sender. It was also an offence for any other person to wilfully or maliciously open any letter intended for delivery to another. Where it was necessary to open and examine a postal article for purposes of enforcing the customs law, due notice was required to be given to the addressee whose presence was permitted at such opening.[5]

In regard to telegraphic messages (including telephonic conversation), any person who, without lawful authority, intercepted or acquainted himself with the contents of any such message or, being

---

1. Children and Young Persons Ord.,s.2. For principles to be observed by all courts in dealing with children and young persons, see ss.21-26.

2.Criminal Procedure Code, ss. 330-331.

3. Ibid., ss. 68-79. See also Excise Ord.,s.36; Firearms Ord.,s.39.

4. Civil Procedure Code, s.366.

5. Post Office Ord.,ss.56, 74, 75. See also Penal Code, ss.164-167; Criminal Procedure Code, s.67.

a public officer having official duties in connection with such message, disclosed its contents to any person other than in pursuance of such duties, committed an offence thereby.[1]

The publication of any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, was an offence. Also punishable was criminal intimidation, insult and annoyance.[2] The Evidence Ordinance prohibited indecent and scandalous questions as well as questions intended to insult or annoy.[3] The Telecommunication Ordinance prescribed penalties for tendering obscene or indecent messages and for causing annoyance by telephone calls;[4] while the Post Office Ordinance prohibited the transmission by post of injurious, filthy or noxious articles and indecent material.[5]

Freedom of Thought, Conscience and Religion

Early in the nineteenth century, it was provided that "liberty of conscience and the free exercise of religious worship" was allowed to all persons "provided always that they quietly and peaceably enjoy the same without offence or scandal to the Government".[6] Later, the manifestation of religion or belief in worship, observance or practice was protected by the Penal Code.[7] The religious festivals of the four major religions were recognised by law and celebrated as national holidays.[8] Legislation also incorporated several voluntary religious bodies and gave each of them the character of a legal persona capable, inter alia, of acquiring and holding property.[9] The Education Ordinance provided that a pupil in a government or assisted school should not be required to attend any instructions in, or any worship or observance connected with, a religion which was not the religion of his parents.[10] The University of Ceylon was

---

1. Telecommunication Ord., s.33.
2. Penal Code, ss. 479, 483, 484, 488.
3. Ss. 151, 152. See also Civil Procedure Code, ss. 176, 177.
4. Ss. 37, 38.
5. Ss. 19, 20.
6. Adoption of Roman-Dutch Law Ordinance, s.6.
7. Ss. 290-292.
8. Holidays Ord., Second Schedule.
9. For a list, see N.Jayawickrama, Human Rights in Sri Lanka (Colombo: Dept. of Govt. Printing, 1976), p.71.
10. S.35. The Children and Young Persons Ord., s.39, required regard to be had to religious persuasion of person being sent to approved or certified school.

declared to be open to all persons of whatever race, creed or class, and no test of religious belief or profession was to be adopted or imposed in order to entitle any person to be admitted as a teacher or student.[1]

Freedom of Association

The law recognised the legality of trade unions and of their normal activities, including the promotion, organisation and financing of strike action.[2]

Right to Family Life

A male who was above sixteen years of age and a female who was above twelve years of age (or if the daughter of European or Burgher parents, fourteen years of age) could contract a lawful marriage, provided that neither was already married, nor within the prohibited degrees of relationship. Every marriage was required to be registered in accordance with the law.[3] The marriage of minors required the prior consent of a parent or guardian, or of the court. No suit or action lay to compel the solemnization of a marriage by reason of any promise or contract of marriage, the seduction of the female or any other cause. Nor would such promise, contract or seduction vitiate any marriage which had been duly solemnized and registered.[4]

A marriage might be dissolved by a court on the ground of adultery subsequent to marriage, malicious desertion, or incurable impotency at the time of marriage.[5] An action for dissolution could be instituted by either spouse. Pending the action, the wife, whether she be plaintiff or defendant, was entitled to apply for the payment of alimony by the husband.[6]

A married woman was capable of acquiring, holding and disposing of movable or immovable property, and of contracting as if she were unmarried.[7] Upon a decree for dissolution being entered, the court was empowered, for the benefit of either spouse or of the children, to make order for a conveyance or settlement of property

---

1. Ceylon University Ord., s.7.
2. Trade Unions Ord., s.18. See also s.26 (immunity from civil action) and s.27 (immunity in respect of tortious acts).
3. General Marriages Ord., ss.15-18.
4. Ibid., s.20.
5. Ibid., s.19.
6. Civil Procedure Code, ss. 597, 614.
7. Married Women's Property Ord., s.6.

or for the payment of money. Questions relating to the custody, maintenance and education of children were determined by court in accordance with fixed principles of law.

The sanctity of the family was recognised in the following provision of the Evidence Ordinance:

> No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married, nor shall he be permitted to disclose any such communication unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other. [1]

Upon the dissolution of a marriage on the ground of the adultery of the wife, the court could award damages against the person found to have committed adultery with her, and also require him to pay the costs of the action.[2] In matters of succession too, the family unit was expressly recognised. If death occured without a valid will, the spouse and children of the deceased had priority; illegitimate children, however, inherited only the property of their intestate mother.[3]

Family life also received some recognition in the sphere of labour law. The employment of a woman worker at any time during the period of four weeks immediately following her confinement was prohibited; instead, she was entitled to receive maternity benefit for a period of six weeks.[4] On an estate where Indian labour was employed, the employer was required to provide each married labourer with a separate room for himself and his or her spouse, and was prohibited from compelling them to share such room with any person other than a child of such labourer or of his or her spouse.[5] Every Indian widow resident on an estate and having at least one child below the age of ten was entitled to receive an allowance of rice freeof charge each month from her employer.[6]

---

1. S.112.
2. Civil Procedure Code, s.598.
3. Matromonial Rights and Inheritance Ord., s.33.
4. Maternity Benefits Ord., ss. 2, 3.
5. Estate Labour (Indian) Ord., s.24.
6. Minimum Wages Ord., s.11.

Rights of Children

Every birth was required to be registered within 42 days of the event. A child of whom a married woman had been pregnant at any time during the marriage was presumed to be the legitimate offspring of the mother and her husband of that marriage.[1] The employment of children below the age of twelve years was prohibited, while the employment of older children was strictly regulated by statute. The law also sought to prevent cruelty to children and to ensure that a child received adequate food, clothing, medical aid and lodging, as well as care, from a parent or other person legally liable to maintain, or having the custody of, such child.[2]

Right to Participate in Public Life

A British subject who was not less than 21 years of age and had resided in an electoral district for a continuous period of six months was entitled to be registered as an elector, provided that he was not otherwise disqualified, if he was domiciled or permanently settled in the island or could read and write a language.[3] Voting was by secret ballot. The law contained very strict provisions designed to preserve the secrecy of the ballot as well as to ensure the purity of the election.[4]

The Constitutional Experience

Ceylon's transformation from a Crown Colony into Dominion Status was a gradual evolutionary process spread over a period of 146 years.[5] Consequently, when after over a century of experimentation with constitutional forms and techniques, the stage of representative and responsible government was finally reached, the Ceylonese had had an opportunity not only to acquire a knowledge of the system, but also to appreciate its value as an instrument for the protection and promotion of their own well-being. This was eloquently demonstrated in the years that followed: eight general elections at six of which the government in office was, often decisively, voted out.

---

1. Evidence Ordinance, s.112.
2. Children and Young Persons Ord., ss. 59, 71-74. See also Minimum Wages Ord., s.4, which prohibited the employment of children below ten years of age on estates.
3. Ceylon (Parliamentary Elections) Order in Council 1946, ss.4-7.
4. Ibid., ss. 37, 40-42, 53-58, 84.
5. For a detailed description, see K.M.de Silva, "The Legislative

In 1802, by the terms of the Peace of Amiens, the Dutch settlements in the maritime provinces of Ceylon became a British possession. Thirteen years later, upon the signing of the Kandyan Convention of 2 March 1815, the island of Ceylon in its entirety became a part of the expanding empire of King George III.[1] Yet, barely two decades later, the process of decolonisation was set in motion. In 1833, upon the recommendation of a constitutional commission headed by Lt.Col.W.M.G.Colebrooke, a confirmed Benthamite, provision was made for the appointment of a Legislative Council of nine official and six unofficial members; the latter were to be selected "as far as possible in equal proportions from the respectable European merchants or inhabitants and the higher classes of natives".[2] In 1835, three Ceylonese (a low country Sinhalese, a Tamil and a Burgher) were appointed; a beginning had been made in constitutional government in which the Ceylonese had a share, however minuscule. The Governor was, of course, the effective ruler of the colony. But in 1838, the Legislative Council, whose advice and consent he was required to seek before he made any law, was authorised to criticise and revise those portions of the budget which did not relate to the fixed civil and military expenditure. In 1860, members were allowed to put down motions for debate without the prior authorisation of the Governor, except where it was sought to dispose of or charge any part of the revenue. The composition of the Legislative Council, however, remained unchanged for the next fifty-four years: in 1889, the number of unofficial members was increased to eight by the addition of two Ceylonese to represent the Kandyan Sinhalese and the Moors. The Executive Council,

---

Council in the Nineteenth Century", History of Ceylon, Vol.3 (Colombo: University of Ceylon, 1973), pp.226-248; A.J.Wilson, "The Development of the Constitution, c1910-1948", ibid., pp. 359-380; K.M.de Silva, "The History and Politics of the Transfer of Power", ibid., pp.489-533.

1. The Kandyan Convention was entered into between the Governor and Commander-in-Chief of the British Settlements and Territories in Ceylon and the Adigars, Dissawas and other principal chiefs of the Kandyan Provinces. For full text, see Legislative Enactments of Ceylon, rev.ed (1956), chap.390.

2. Order in Council, 28 September 1833. See also G.C.Mendis, Documents on British Colonial Policy in Ceylon, 1796-1833,(OUP,1956).

which the Governor was required to consult "upon all occasions of difficulty or importance" but whose advice he was not obliged to accept, consisted predictably of officials only, though not exclusively of Englishmen. From time to time, Ceylonese who served permanently or acted in the office of Queen's Advocate or Colonial Treasurer sat in the Executive Council.

In 1910, the principle of election was introduced.[1] Four unofficial members were elected from constituencies described as Urban European, Rural European, Educated Ceylonese and Burgher. While the qualifications for inclusion in the Burgher constituency were racial stock and literacy in English, the franchise for the Educated Ceylonese seat was mainly confined to the very small English-educated Sinhalese and Tamil elite. Of a total adult male population of 1,120,762, only 2938, of whom 1659 were Sinhalese and 1072 were Tamils, were entitled to vote.[2]

In 1920, provision was made for an unofficial majority in the Legislative Council: 14 official and 23 unofficial members.[3] Of the latter, eleven were to be elected territorially and five from special constituencies (two by Europeans, one by Burghers, one by the European dominated Chamber of Commerce and one by the Sinhalese controlled Low Country Products Association. The principle of representative government was thus conceded. In 1924, provision was made for representative government as defined in the Colonial Laws Validity Act 1865: in the new legislature, over one-half of the members would be elected.[4] The new Legislative Council consisted

---

1. Royal Instructions, 24 November 1910.

2. Ironically, the contest for the Educated Ceylonese seat was strenuously fought on caste issues. Governor MacCallum, in a confidential despatch of 24 January 1912 to the Colonial Secretary (quoted by K.M.de Silva in History of Ceylon, Vol.3, at p.387) stated:

> "The Goyigamas were not of sufficient strength to secure the Educated Ceylonese seat for one of their own caste by election . . ./and so/ as a body they supported Mr.P. Ramanathan than accord a vote for Dr.H.M.Fernando, a Sinhalese who belongs to the Carawe caste."

Ramanathan, a Tamil lawyer, was elected.

3. Order in Council, 13 August 1920.

4. Ceylon (Legislative Council) Order in Council, 1923.

of 12 official and 37 unofficial members, of whom 34 were elected. Of them, twenty-three were elected territorially and eleven communally (three Europeans, two Burghers, one western province Ceylon Tamil, three Moors and two Indian Tamils). Although the Governor was ex-officio president of the Council, provision was made for a vice-president to be elected, and for the first time a Ceylonese began to preside over its deliberations. The franchise was based on an income or property qualification and a literacy test. For all practical purposes, power (but not responsibility) was vested in the English educated middle class. Four per cent of the population had been enfranchised.

Although the principle of representative government had been conceded, the elected representatives were not responsible for the conduct of the government. The Legislative Council was unable to implement its decisions. But the Governor, unless he secured the consent of the Council, could not enforce his will except by the use of his special powers which, if resorted to too frequently, would reduce representative government to a sham. He therefore had to attempt by one means or another to obtain the support of the elected representatives in a Council in which they tended to form a permanent opposition partly because they felt that that was the only way open to them to exercise any power and partly because they knew that in any event they could not be called upon to assume responsibility. Despite this conundrum, the system marked a significant leap in Ceylon's constitutional evolution. As the Donoughmore Commission observed in its report of July 1928:

> It was true that it transferred the balance of power from a responsible Executive to an irresponsible Legislature; an experiment which could not be without risk; on the one hand, the very extent of the power entrusted to them made the elected members in a real sense co-partners in the Government. It was clear that without their active co-operation the Government would be helpless, but it was equally clear that they were as anxious as the official members to promote the good government of the country and would not be likely to withhold that co-operation. The system thus provided a means of educating the unofficial members in the arts of government and the complexities of public business, and of providing them with that training which would enable them in future years to assume responsibility for the administration of the island. [1]

---

1. Ceylon: Report of the Special Commission on the Constitution (1928; Cmd. 3131), p.19. This report is commonly referred to as the Donoughmore Report.

1931 saw not only the consolidation of representative government, but also the grant of a considerable measure of responsible government and, more significantly, universal adult franchise. The Ceylon (State Council) Order in Council 1931, which was based on the recommendations of the Donoughmore Commission, which in turn was inspired by the committee system of the League of Nations and of English local government, provided for a State Council with both legislative and executive functions. It consisted of 50 members elected territorially on universal adult franchise, 3 ex-officio members without voting rights, and 12 persons nominated by the Governor to make the Council more representative. The Council divided into seven executive committees, each being charged with the general direction and control of a number of government departments. Each committee elected a chairman, and these seven chairmen together with the three officers of state formed the Board of Ministers. Certain areas of governmental activity were left to the officers of state who were responsible to the Governor - the public service, external affairs and defence under the Chief Secretary; elections, legal advice and the administration of justice under the Legal Secretary; and finance under the Financial Secretary. However, the Board of Ministers as a whole was charged with the general conduct of the business of government and in particular the preparation of the annual budget. The Governor was required to consult freely with his Ministers and to communicate to them all public despatches. The Chief Secretary functioned as chairman of the Board, with one of the Ministers (usually the Leader of the Council) as vice-chairman.

With the grant of universal adult franchise, the electorate in 1931 comprised over one and a half million. In 1936, when the second election was held, the electorate had increased to about two and a half million. The revised register in 1940 contained a total number of 2,635,000 electors. On the eve of dominion status, Sir Ivor Jennings summed up this last phase of constitutional evolution thus:

> The Donoughmore Constitution had few friends at its beginning and none at all at the end. It had nevertheless some advantages. It covered the awkward gap

> between representative government and responsible government. It enabled the Ceylonese Ministers to take some of the steps - especially in the fields of education and health - which they thought necessary. It gave them a broad experience of the problems of government. It taught them the necessity for co-ordination and common action. There may be argument whether they could have taken complete responsibility in 1931; there was no doubt at all in 1945. [1]

Nationalism and Trade Unionism

Ceylon's struggle for independence was relatively peaceful.[2] Except for the occasional romantic folk hero who emerged to lead a mild skirmish in the early years of British rule, very little blood was actaully shed in the cause of national independence. The movement was essentially one for the reform of the constitution and it was led from time to time by the emerging elite. Until the final stage, the dominant objective of the constitutionalists was a greater share of state power rather than freedom or liberation. As the events of 1956 were to demonstrate, the power base of the national elite who secured independence, properly attired in British morning dress, was to erode in less than a decade. They appeared to be as far removed from the common man as the colonial rulers had been. Consequently, independent Ceylon did not, unlike many African States, inherit a powerful nationalist movement which was capable of dominating the post-independence political life of the country and thereby stifling the growth of political thought and philosophy.

In 1864, a dispute between the Governor and the unofficial members of the Legislative Council on financial policy led to the formation by the latter of the Ceylon League. Led by George Wall, who represented the plantation interests, and C.A.Lorenz, who represented the Burgher community, it campaigned strenuously to secure for the Council control of the financial affairs of the colony. It did not succeed, and after five years it faded away. Yet it was the first credible attempt in the island to combine and agitate for

---

1. Ivor Jennings,

2. For a full discussion, see K.M.de Silva, "The Reform and Nationalist Movements in the Early Twentieth Century", History of Ceylon, Vol.3, pp.381-407.

constitutional reform. In 1916, the legal profession organised itself through the Ceylon Reform League and petitioned for the abolition of nominated members, racial representation and the official majority. In the following year, the Ceylon National Association was formed to demand "a share in the actual administration of the country". A joint conference on constitutional reform convened by these two bodies in 1917 led to the formation two years later of the Ceylon National Congress. At its first session, Ponnambalam Arunachalam, its president, described its moderate and reformist objective as being "only to substitute for one form of British administration which we have outgrown and which is impeding our development, another form more suitable to our needs and conditions". What was envisaged was a legislature with an unofficial majority elected on a territorial basis by means of a wide male and restricted female franchise, minority representation by nomination, and the introduction of a quasi-cabinet system with a few departments headed by unofficial members.

These efforts by the low-country elite, the westernised professional class, to acquire a share of political power for themselves produced counter reactions among other elitist groups. In 1918, the Kandyan Sinhalese, who feared that in a unified independent Ceylon they would be numerically outnumbered by the Sinhalese of the highly populous low-country, organised themselves into the Kandyan Association in order to maintain and assert their own separate identity. When the Congress intensified its demand for the abolition of communal electorates and for election on a territorial basis, the Kandyan wing defected altogether from it. In 1934, an attempt was made by S.W.R.D.Bandaranaike to bridge the schism between the Sinhalese through the Sinhala Maha Sabha, and partially succeeded in attracting members of the Kandyan elite to it. At the same time as the Kandyan defection, the Tamils too withdrew from the Congress. They formed the All-Ceylon Tamil Conference to unite Tamil resistance to the territorial principle of election and to agitate for communal representation. In 1944, the All-Ceylon Tamil Congress began arguing for an electoral system that would assure the minorities equal representation with the Sinhalese. At this time, the Burghers and Europeans also

declared their opposition to any further reforms that would lead to the transfer of political power to the Sinhalese. In 1927, the European Association was established to protect the interests of the community whose name it bore. The Muslims, however, recognising the inevitability of self-government and majority rule, asked only for "adequate representation" for themselves: in 1923, the Ceylon Muslim League urged them to work for full responsible government in Ceylon.

Parallel to the constitutionalist and the communally oriented reform movements, there were also other forces at work. The Christian missionary activities provoked a Buddhist resistance movement. It began in the western and southern provinces, the educational centres of the missionaries and the home of the emerging non-goyigama elite. It first manifested itself between 1864 and 1890, when Buddhist leaders engaged their Christian counterparts in five public debates at which they vigorously asserted the virtues of their own belief. These highly publicised, well attended, and emotionally charged denunciations of Christianity not only helped to boost the self-confidence of the Buddhists, but also enabled them vicariously to reject the cause of western imperialism with which all missionary activity was seen to be inextricably bound. Newspaper accounts of these debates attracted the attention of Col.H.S.Olcott, the American founder of the Theosophical Society. When, in 1880, Olcott and his Russian associate, Madame Blavatsky, arrived in Galle and dramatically embraced Buddhism, they did so amidst scenes of unparalleled religious fervour. The Theosophists taught the Buddhists the techniques of modern organisation, and this ability soon manifested itself in the temperance movement which caught the imagination of the masses to a far greater extent than the agitation for constitutional reform had succeeded in doing. From the villages it spread enthusiastically into the towns and brought together, ostensibly for a common purpose, sections of the rural elite such as school teachers, small traders and village notaries, and the conspicuously affluent urban elite, a few of whom even held controlling interests in the liquor industry. This movement provided the Ceylonese with an opportunity to learn the mechanics of organising and influencing public opinion. It provided the visible impetus for an otherwise remote constitutional dialogue.

More dramatic perhaps was another development which was taking place away from the centres of wealth and power. Working people were beginning to organise themselves and resort to strike action against their employers: in 1906, a strike by carters so alarmed British officials that they believed that Indian sedition had been imported in the guise of trade union agitation. In 1918, an attempt by A.E.Goonesinghe to mobilise youth to agitate for the immediate relief of social problems through the Young Lanka League was aborted when Goonesinghe was persuaded to join the Ceylon National Congress. Goonesinghe's conservatism was replaced by the more militant leadership of the Marxist movement which emerged during the depression of the 1930s. A group of intellectuals who had studied at British universities in the late 'twenties and had come under the influence of men such as Harold Laski formed the core of this new phenomenon in Ceylon society. One of them, Colvin R.de Silva, barrister-at-law, organised the Wellawatte Mill Workers Union, the first Marxist organisation for labour agitation in the colony.

Political Organisations

The political institutions established from time to time did not envisage the existence of opposing political parties. Indeed, even when a considerable measure of internal self-government was granted in 1931 and universal adult franchise introduced, the institutional structure then established was not designed to promote the development of political parties. Nevertheless, during the last two decades of colonial rule, due primarily to the desire of different social groups to safeguard and promote their own welfare, a number of political organisations emerged, and when the first parliamentary election was held in 1947, the voters were offered a choice between competing political philosophies.[1]

A.E.Goonesinghe, who had been a pioneer in labour agitation and whose Ceylon Trade Union Congress had organised a number of strikes in the 1920s, was invited to London by the British Labour Party in 1927. On his return, he formed the Labour Party upon a

1. For a fuller survey, see Calvin A.Woodward, The Growth of a Party System in Ceylon (Providence, U.S.A: Brown University Press, 1969).

somewhat less socialistic ideology than its British counterpart; its creed was described as "political democracy" and he stood for moderately progressive social reforms.

The return to Sri Lanka of a group of intellectuals who had been fervently attracted to Marxist doctrine while studying in British and American universities coincided with the depression of the 1930s. S.A.Wickremasinghe, Colvin R.de Silva, Philip Gunewardene, M.G.Mendis, N.M.Perera and Leslie Goonewardene were as articulate as they were individualistic. Yet a common antipathy towards British imperialism brought them together in 1933 in a campaign directed against the sale of poppies on Remembrance Day. The Surya Mal Movement, named after the indigenous flower which replaced the poppy in collections made on behalf of local servicemen, led to the formation, on 18 December 1935, of the Lanka Sama Samaj Party. While structured as a closed and militant body, the LSSP was able to develop a mass following through agitation and the creation of ancillary organisations such as trade unions and youth movements. It organised workers in the industrial, commercial, communication and harbour areas, and then moved into the economically critical plantation sector. It reached its widening popular base of workers and the middle class intelligentsia through two newspapers published in Sinhala and in Tamil. In 1939, the executive committee of the LSSP passed a motion of no-faith in the Third International and expelled the Stalinist minority from the party. Thereafter, it adopted a Trotskyist stance with a revolutionary programme inspired by the platform of the Fourth International. The expelled Stalinists formed the United Socialist Party in 1940 under the leadership of S.A.Wickremasinghe.

The LSSP espoused a policy of "revolutionary defeatism" towards World War II. Consequently, the party was proscribed in 1942 and its leaders detained. Some of them escaped to India where they helped to form the Bolshevik Leninist Party of India as a section of the Fourth International. On their return, a power struggle between them and those who had spent the war years in detention in Ceylon led to the formation in 1945, under the leadership of Colvin R.de Silva, of the Bolshevik Leninist Party. The USP did not oppose the war and was, therefore, not proscribed initially. However, its increasing use of the strike weapon was

considered dangerous to the war effort and, in March 1942, it was declared illegal. In July 1943, the USP dissolved itself and formed in its place the Ceylon Communist Party.

The fears and tensions of the declining years of communal rule gave birth to two other political parties with a purely communal basis. Efforts made since the late 1920s to organise the Indian estate labour into one comprehensive organisation had proved quite ineffective until eight thousand Indian railway road workers were dismissed in 1939. Then, on the suggestion of Jawaharlal Nehru, the Ceylon Indian Congress was formed under the leadership of G.R.Motha and I.X.Pereira. Its main objective was to obtain political and legal rights for Indians. The All-Ceylon Tamil Congress through which G.G.Ponnambalam had unsuccessfully advocated representation for the minorities on an equal basis with the Sinhalese, emerged as a political party seeking to represent the northern and eastern provinces in the new House of Representatives.

On the eve of Independence, several groups and personalities began searching for a broad ideological consensus. They realised that an electoral majority in the new Parliament could only be obtained by an organisation which was sufficiently comprehensive. They feared that the Marxists, with their charismatic leadership and a solid base of popular support acquired through trade union links with the working class, may well satisfy that requirement. Accordingly, after discussions between the Ceylon National Congress, the Sinhala Maha Sabha, the Ceylon Muslim League, the Moors Association and the leaders of the Tamil community such as Arunachalam Mahadeva and Subbiah Natesan, the United National Party was founded in 1946. The founding groups of the UNP were not dissolved upon its formation; they were permitted to retain their separate organisations provided they accepted the programme and principles of the UNP and acted in accordance with its constitution and the decisions taken by the party. They continued parallel to the party as organised blocs of power and interest. For the moment, therefore, potential areas of conflict between the different groups were submerged by the urgent need to form a political union based on a belief in progressive capitalism, private enterprise, parliamentary democracy, and a moderate approach to the solution of social problems; in short, a political party which would, after an electoral victory, ensure the maintenance of the status quo.

An Emerging Elite

The hundred years immediately preceding Dominion Status saw the emergence of a middle class in Sri Lanka.[1] Helped considerably by the educational and the economic policies of the colonial administration, an enterprising section of the community was able to break away from the traditional pattern of life and from the established social strata, and enter the professional, commercial and public service systems. In their wake, and often as complementary to their initiative, a larger section found employment of a type and nature which exposed them to new areas of economic activity and, consequently, to new values and standards in a rapidly changing world. When the stage of full self-government was finally reached and men and ideas were urgently required to grapple with a variety of problems, Ceylon was not found lacking in either.

Education

Education was at first not regarded as a service to be provided by the State. Instead, it was left in the hands of British missionaries who ventured out in quick succession seeking converts to Christianity. The London Missionary Society (1804) was followed by the Baptists (1812), the Weslyan Methodists (1814) and the Church Missionary Society (1818). Missionaries sent by the American Board of Commissioners for Foreign Missions arrived in 1816, and confined their activities almost exclusively to the northern province. From their separate efforts emerged a system of excellent denominational schools. In 1832, the government policy on education changed. Henceforth, it was to be a legitimate sphere of state activity, directed towards certain clear objectives: to prepare candidates for public employment, as an aid to natives to cultivate European attainments, to wean them away from caste and from a dependance on subsistence agriculture. The Colombo Academy (now Royal College) was established by the Government in 1835, and soon rivalled the missionary institutions in their efforts to create a class of Ceylonese who stood apart from the mass of their countrymen. More schools were established in the provinces, some teaching subjects like surveying and others providing a more rudimentary knowledge of

---

1. See Michael Roberts, "Elite Formation and Elites, 1832-1931", History of Ceylon, Vol.3, pp.263-284.

the English language. The literate percentage of the population which was 17.4 in 1881 and 26.4 in 1901, increased to 39.9 in 1921. In 1947, on the eve of Independence, 1,004,586 pupils were registered in primary and secondary schools, and the literacy rate was 57.8 (or 70.1 of the male and 43.8 of the female population).

The educational effort was not confined to the missionaries and the government. The Buddhist revival in the second half of the nineteenth century saw not only the establishment of two centres of oriental learning, the Vidyodaya Pirivena in 1872 and the Vidyalankara Pirivena in 1876, but also a sustained effort to build up a network of primary and secondary schools. Between 1880 and 1890, the Buddhist Theosophical Society established forty Buddhist schools. In the years leading to Independence, these schools fulfilled an important historical function. They served as the training ground of a new elite, educated in a Buddhist atmosphere, and therefore more responsive to the social and cultural ethos of the great mass of the Ceylonese people.

Parallel to the revival of Buddhism was the recovery of Hinduism and Islam - two phenomena which also contributed to the emergence of a viable middle class. The Saivaite scholar, Arumuga Navalar, established a school in every Tamil village where Saivaite education could be imparted in a purely Saivaite environment. Thereafter, mindful of the value of an English education, he founded in 1872 the Saivangala Vidyasalai (now the Jaffna Hindu College) where English could be taught along with the religious background necessary for Hindu children. The recovery of Islam came a generation later. The presence in Ceylon of the exiled Egyptial hero, Arabi Pasha, was the opportunity availed of by local Muslim leaders to jolt their community out of their conservative secularism. Education was used for this purpose, and the Muslim Educational Society which was established endeavoured to create an elite educated on modern lines who would provide the leadership which the Muslims sorely needed. The Al-Madrasatuz Zahira (now Zahira College) was established in 1892 with this end in view.

Economic Enterprise

The rapid economic expansion which began in the mid-nineteenth century offered Ceylonese with initiative an opportunity to break loose from a feudal social structure inhibited by caste and class

considerations. As early as the 1830s, a few low-country Sinhalese had involved themselves successfully in coffee smallholdings. From the 1850s, a larger number invested with equal success in cinnamon plantations and still more took to coconut. While rubber also attracted Ceylonese entrepreneurs, tea remained the preserve of the Europeans until the early twentieth century when the former began purchasing tea plantations which were already developed and carving out new plantations in the hitherto virgin mid and low country, particularly in the southern province and the Kelani valley. Equally lucrative were gemming operations in the Sabaragamuwa province, the extraction and export of graphite which gathered momentum in the 1860s, and the manufacture and distribution of arrack which appears to have been a profitable occupation even during the Dutch period. In Colombo, the ownership of urban property was a major source of capital accumulation.

These pioneering efforts of a class which soon achieved national elite status opened up a variety of other business lines. Servicing the plantations and the plantation districts assumed the proportions of a new industry. Forest clearing contracts, the supply of food and labour, the operation of general merchant stores and "hotels" in the new "bazaar towns", transport of supplies, supply of furniture, barrels and timber, railway sleepers and telegraph poles, and building contracts, were some of the less prestigious, nevertheless lucrative, channels of capitalist enterprise which bolstered the social mobility of a substantial section of the community. In 1946, the gainfully employed population accounted thus:

TABLE 6

GAINFULLY EMPLOYED POPULATION BY OCCUPATIONS, 1946

Occupation	Percentage
Agriculture, Forestry and Fishing	52.9
Manufactures	11.0
Commerce and Services	21.1
Public and Professional Services	5.7
Domestic and Personal Services	9.3

Source: B.L.Panditaratne and S.Selvanayagam, "The Demography of Ceylon - An Introductory Survey", History of Ceylon, Vol.3, at p.302.

Professionalism

The Civil Service was at first exclusively European, recruitment being dependant solely upon patronage. Ceylonese aspirations were satisfied with the appointment, mainly of Burghers, into a clerical service. However, following the recommendations of the Colebrooke Commission, local candidates began to be admitted into the service. By 1868, in a 1084-strong civil establishment, 894 were Ceylonese. Of 282 superior appointments, 92 were filled by Ceylonese. 84 of the superior appointments came within what was strictly the civil service, and of these ten were held by Ceylonese. Professionalism was evident in other areas too as the following statistics show:

TABLE 7

NUMBER OF CEYLONESE MALES IN SELECT OCCUPATIONS

Occupation	1881	1901	1911	1921
Barristers, Advocates and Proctors	268	356	553	800
Physicians and Medical Practitioners	(inv.)	326	(inv.)	789
Land Surveyors	99	160	(n.d.)	465
Civil Engineers	(n.d.)	11	(inv.)	56
Auctioneers and Brokers	(n.d.)	26	54	74

Source : Michael Roberts, "Elite Formation", History of Ceylon, Vol.3, p.272.

n.d. - no data

inv. - data ignored because categorisation is suspect.

In 1934, the percentage of Ceylonese in the public service had risen to 68.1 per cent, and by 1939 it had increased to 78 per cent. From 1943, recruitment to the Civil Service was by an open competitive examination held only in Ceylon.[1]

1. For a full account, see W.A.Wiswa Warnapala, "Bureaucratic Transformation, c.1910-1948", History of Ceylon, Vol.3, pp.408-427.

A National Press

The active involvement of Ceylonese in the economic life of the country from the early years of British rule, and the comparatively slow transfer to them of a share of political power, inevitably led to a search for other avenues of expression. The newspaper offered a wider audience than one's own social circle or economic interest group, and therefore soon became a popular medium. At first, a national newspaper would have a limited circulation confined to Colombo and perhaps a few other provincial towns; the average daily sale would have been considered very successful if it reached a thousand. But with the remarkable increase in literacy and the growing political consciousness of the people, the newspaper became a powerful medium of communication. On the eve of Independence, the transition from limited circulation to mass production had already taken place; newspapers in all three languages were being distributed to the furthest ends of the island, carried to their readers by the most modern means of transportation.[1] Of course, the press gave expression, in the main, to the views of a handful of newspaper proprietors who were, more often than not, anglicised, affluent, and ardent advocates of the established order. But the Ceylonese had learned quickly to discern. They joined common cause with the press barons to secure political independence for the country. But as later events were to demonstrate most eloquently, not all the sophistry, blandishments and wierd prognostications of the national newspapers could wean them away from a political course once they had decided to adopt it.[2]

The first newspaper in the island was the Government Gazette which contained "obituary notices recounting the virtues of departed ones, poetry of varied merit, and interesting and instructive communications on various subjects". In 1832, Governor Robert William Horton encouraged the publication of the Colombo Journal which was printed at the Government Press and was edited by its superintendent. In 1834, the merchants of Colombo combined to publish the Observer and Commercial Advertiser whose first issue

---

1. For a detailed and documented discussion on journalism in Ceylon, see H.A.J.Hulugalle, The Life and Times of D.R.Wijewardene, (Colombo: Associated Newspapers of Ceylon Ltd, 1960).

2. For instance, at the 1956 general election, all the national newspapers launched a vigorous campaign against S.W.R.D.Bandaranaike who eventually won a decisive victory.

invited "those who are inclined to favour a free press" to become subscribers. The Observer attacked the Government so relentlessly that in 1837 the Ceylon Chronicle emerged to offer a defence of the administration. This newspaper was privately aided by the Governor and sustained through the efforts of a committee of civil servants. The Governor was a frequent contributor until it folded up sixteen months later in September 1838. Within four days, the types and printing presses of the Ceylon Chronicle began issuing the Ceylon Herald, a newspaper which at first opposed and later supported the Government. It survived for eight years until July 1846 when it was purchased by a group of Europeans who wished to start a newspaper to oppose the Observer which by now had begun supporting the Government. Thus came into being the Ceylon Times which still survives as The Times of Ceylon.

The Examiner was first published in September 1846 by a few British merchants as a mercantile organ. It later passed into the hands of a group of lawyers before ceasing publication in 1900. Two other newspapers in circulation at this time were the bi-weekly Kandy Herald and the Ceylon Independent, both of which were published by the planting community. The Ceylon Standard was started in 1908 by a group of wealthy Sinhalese. Upon its liquidation, there arose the Morning Leader which was at first owned by the members of the De Soysa family; then by a syndicate of leading members of the Karawa community; and finally by one of them, W.A.de Silva. With information supplied and policy influenced by Sir Marcus Fernando, who was connected by marriage to the De Soysa family, and ably edited by Armand de Souza, the Morning Leader soon became very influential. In 1913, Ponnambalam Ramanathan, who was seeking election to the Educated Ceylonese seat in the Legislative Council against Sir Marcus Fernando, founded the Ceylonese. Its first editor and manager were both Americans, and its news presentation, sales promotion, reporting and methods of publicity were distinctly American.

At this stage there appeared on the journalistic scene a man who was determined to build for himself a newspaper empire similar to those which he had observed in England in the years he had spent at Cambridge and at the Inns of Court. D.R.Wijewardene, the eldest son of a wealthy Goyigama timber merchant from Sedawatte, a suburban hamlet in the Colombo district, perhaps also shared the belief of

the wealthy Goyigama upper-middle class at that time that a controlling share of political power and initiative ought to be snatched from their Karawa compatriots before it was too late. In 1918, Wijewardene bought for a pittance the goodwill and plant of the now bankrupt Ceylonese, and in its place launched the Ceylon Daily News. In 1923, he purchased the ninety year old Ceylon Observer and thus acquired an evening daily. When the Ceylon Independent was put in the market, Wijewardene bought it and then allowed it to die since to run it successfully would have meant creating a rival to the Daily News. With the aid of modern technical expertise and a rigorous and aggressive competitiveness, Wijewardene soon put the Morning Leader out of business, leaving the European-owned Times of Ceylon, an evening newspaper with a daily circulation of about 4000 copies, as the only rival.

The earliest Sinhala newspaper was the Lankalokaya, started in 1860 and edited by W.P.Ranasinghe. In the same year, the Lakrivikirana, and in 1865 the Lakminipahana, both weeklies, commenced publication. The Sarasavi Sandarasa which was started by the Buddhist Theosophical Society had as its editor, Pandit Weragama Bandara who "introduced a fine style, elegant and popular, and brought a new spirit into Sinhalese writing". Also in circulation at this time were the Sinhala Baudhaya and the Sinhala Jatiya: the latter being edited by Piyadasa Sirisena, a well-known publicist of his day. H.S.Perera founded the Dinamina which was bought by Wijewardene and transformed into the most influential Sinhala daily newspaper in the country.

Several Tamil newspapers were published in Jaffna. The first attempt at journalism was made in 1841 when the Morning Star, a bi-monthly Tamil journal was launched under the editorship of Henry Martyn. The Catholic Guardian commenced in 1876. Other newspapers published in Jaffna from time to time included the Ceylon Patriot, the Jaffna Freeman and the Hindu Organ. In course of time, two national newspapers, the Virakesari and the Thinakaran emerged to play an important part in the social and political life of the Tamils.

CHAPTER II

THE CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS

At Independence, Sri Lanka inherited a substantial body of law which provided for human rights. During the next three decades, as constitutional bills of rights gained acceptance throughout the new Commonwealth, efforts were made in Sri Lanka to build upon this inheritance by specifically protecting human rights in the Constitution. Each Constitution embodied a distinctive approach, different in style, technique and content from the standard Westminster-Whitehall model devised for inclusion in independence constitutions. In this chapter, it is proposed to examine Sri Lanka's attempts at formulating a bill of rights, and the measure of success that attended, or eluded, these attempts.

The 1946 Constitution

The 1946 Constitution [1] did not contain a bill of rights. In fact, a bill of rights was not demanded by any section of the community with any degree of seriousness; nor was it contemplated either by the Royal Commission which recommended the new constitutional scheme or by the British Government which brought the new Constitution into force. This apparent unconcern for what was soon to become the standard technique for prescribing the limits of state authority so as to ensure that the equally important area of individual rights and freedoms is not trespassed or encroached upon, was perhaps due to the fact that, despite the turmoil and turbulence that then prevailed on several continents both far and near but beyond the seas, the island of Ceylon had reached the penultimate phase of its extended constitutional evolution quietly and imperturbably. As a Colonial Office commentator has observed:

> Ceylon was able to approach independence with all the machinery of government well designed, smoothly running and in full working order. The Ceylon Civil Service

---

1. This expression refers to the Ceylon Independence Act 1947, and the Ceylon (Constitution and Independence) Orders in Council of 1946 and 1947 respectively.

> had been gradually transformed from a service staffed by British people to one staffed by Ceylonese: a service with a proud and undiminished record of efficiency and integrity, trained to give Ceylon Ministers the same kind of able and impartial advice and to execute their policy with the same devotion to duty as its United Kingdom model and counterpart. The financial business of the state was organised under well-tried regulations and practices. The Judiciary were secured in a position of full independence of political or external control, and the rule of law firmly established. The Police were recognised and respected as the instrument not of the executive government of the day but of the law; their function not to oppress or coerce the citizen but to protect him in the peaceful pursuit of his lawful occupations. [1]

The preparation of a constitutional scheme on which the 1946 Constitution was to be based was undertaken by the Board of Ministers of the State Council in June 1943 in response to a Declaration issued by the British Government in the previous month that "the post-war re-examination of the reform of Ceylon's constitution, to which His Majesty's Government stands pledged, will be directed towards the grant to Ceylon by Order of His Majesty in Council of full responsible government under the Crown in all matters of internal self-government".[2] The Declaration added that "such detailed proposals as the Ministers may in the meantime have been able to formulate in the way of a complete constitutional scheme" will be examined by a suitable commission or conference.[3] When the Ministers were preparing their constitutional scheme, the Ceylon National Congress submitted to the Board for its consideration a draft constitution prepared by one of its joint secretaries, J.A.L.Cooray, which embodied a comprehensive bill of rights. It was a justiciable bill of rights with procedural remedies for their enforcement. Some of the Ministers, including D.S.Senanayake, then Leader of the State Council and vice-chairman of the Board, believed that a constitution containing comprehensive guarantees of human rights would allay the fears of minority communities in regard to their position in the new political order. The majority of the Ministers, however, decided

---

1. Sir Charles Jeffries, Ceylon - The Path to Independence, (London: Pall Mall Press, 1962), pp.130-131.
2. Declaration by His Majesty's Government, 26 May 1943, S.P. XVII - 1943, para.1.
3. Ibid., para.7.

not to include such a bill of rights.[1] Several factors probably influenced their decision:

1. The 1943 Declaration had indicated quite clearly that the acceptance by the British Government of any constitutional scheme submitted by the Ministers would depend, firstly, upon full compliance with certain conditions set out in that Declaration, and secondly, upon the subsequent approval of the scheme by three-quarters of all members of the State Council. The conditions set out related, in the main, to certain reserved subjects and powers; they did not require the inclusion of a bill of rights.

2. The State Council elected in 1936, to which was to be submitted the Minister's scheme, consisted of the following:

TABLE 8

COMMUNAL DISTRIBUTION IN THE STATE COUNCIL,1936

Low Country Sinhalese	... 31
Kandyan Sinhalese	... 8
Ceylon Tamils	... 8
Indian Tamils	... 3 +
Europeans	... 5 +
Muslims	... 2 +
Burghers	... 1 +

+ includes nominated members.

To secure an affirmative vote of 44 (three-quarters of all the members), the total Sinhalese membership would have had to be supplemented by some at least of those who belonged to the minority communities. This, as the Ministers observed at that time, was "a difficult condition", although it was believed that the State Council possessed "the larger patriotism that transcends sectional differences".[2] In consideration of their support for a scheme prepared by the Ministers, the minorities could have insisted on the inclusion of a bill of rights. This they did not do. Instead, pre-occupied as they were with the fear of being swamped by majority rule, the minorities appeared to be satisfied with

---

1. J.A.L.Cooray, Constitutional and Administrative Law of Sri Lanka (Colombo: Hansa Publishers Ltd, 1973), p.508.

2. Statement by the Ministers on the Reforms Declaration by His Majesty's Government, 8 June 1943, S.P. XVII-1943, para.2.

checks on the exercise of legislative power which would ensure the integrity, not of the individual, but of the community.

3. There was no public participation in the preparation of the Ministers' constitutional scheme; nor was the scheme expected to be submitted to the people at a referendum. The only requirement was that it should be acceptable to three-quarters of the members of the State Council which included a substantial minority group. Neither within the Board, nor in the State Council at that time, was there an embryonic political opposition whose views would have had to be accommodated. The Ministers were drafting a scheme under which they themselves would be called upon to assume responsibility for full self-government. The only limitations which they need impose upon their share of political power would be those concessions required to be made in exchange for the support of the minority communities in the State Council.

4. The Ministers' scheme was prepared by Sir Ivor Jennings who, at that time, was Principal of the Ceylon University College. From the day on which the 1943 Declaration was issued by the British Government, Sir Ivor functioned as honorary constitutional adviser to the Board of Ministers, and in that capacity wielded considerable influence on the course of events leading to Dominion Status.[1] On one question, at least, he had quite definite views; as he himself wrote some years later:

> In Britain we have no Bill of Rights; we merely have liberty according to law, and we think - truly, I believe - that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man. [2]

It would appear that in later years Sir Ivor had occasion to change his views on this subject, at least with reference to Ceylon.[3] But at the material time there is no doubt that the Ministers' thinking was conditioned greatly by the views which Sir Ivor Jennings then held.

5. The 1946 Constitution was drafted before the Universal Declaration of Human Rights proclaimed a common standard of achievement; indeed, even before the United Nations was constituted.

---

1. Ivor Jennings, The Constitution of Ceylon, 2nd ed. (Bombay: Indian Branch, OUP, 1951), Preface.
2. Id., Approach to Self-Government (OUP, 1958), p.20.

3. According to Cooray, Constitutional Law, p.509, Jennings admitted, in a talk over the BBC in 1961, that a comprehensive

None of the constitutional documents that had led to responsible government and eventual Dominion Status in Canada, New Zealand, Australia or South Africa contained a bill of rights. In the then far flung British Empire, only the 1875 Constitution of the Kingdom of Tonga contained a declaration of rights: a unique phenomenon which may perhaps be attributed to the influence of Christian missionaries upon a very receptive local ruler.[1] Therefore, it is safe to assume that when in the early 1940s the Colonial Office set out to transform the constitutional structure of its "model tropical dependency" [2] into that of a Dominion (and thus pave the way for the emergence of the New Commonwealth), it did not have before it, as it has had since the 1960s, a model constitution in which a bill of rights formed an integral and essential component.

The Minister's Scheme

The constitutional scheme prepared by the Board of Ministers contemplated the following limitation on legislative power:

> 7. Parliament may make laws for the peace, order and good government of Ceylon.
>
> 8. In the exercise of its power under Article 7 Parliament shall not make any law -
>
> (a) to prohibit or restrict the free exercise of any religion; or
> (b) to make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
> (c) to confer on persons of any community or religion any privileges or advantages which are not conferred on persons of other communities or religions; or
> (d) to alter the constitution of any religious body except with the approval of the governing authority of that religious body. [3]

---

chapter on fundamental rights was very desirable in Ceylon's Constitution, particularly in the heterogeneous society of Ceylon. After admitting that the constitution he helped to draft had had only a limited success, Sir Ivor had added: "If I knew then as much about the problems of Ceylon as I do now, some of the provisions would have been different".

1. Professor Read states that King George Tupou I was prevailed upon by the Consul-General for Hawaii to include a bill of rights in the constitution based upon the Declaration of Rights of Hawaii of 7 June 1839. See James S.Read, "Bills of Rights in the Third World: Some Commonwealth Experiences", (1973) VRU, 21.

2. This expression was used in the Donoughmore Report.

3. S.P. XIV-1944. Also reproduced in Appendix I, Soulbury Report.

In an explanatory memorandum, the Ministers stated that:

> Article 8 is a general protection to minorities, whether racial, social or religious. This being a restriction on legislative power, it would be for the courts to say whether the Article was infringed, and they could declare an Act of the Ceylon Parliament to be invalid if it contravened the Article. It is based on a provision in the Constitution of Northern Ireland. [1]

Therefore, the only fundamental rights which the Ministers intended that the Constitution should protect, and prevent Parliament from interfering with, were: (1) the freedom of religion, and (2) the freedom of communities and groups from discrimination.

The Soulbury Report

In July 1944, the British Government appointed a commission headed by Lord Soulbury, a former Conservative Cabinet Minister in the United Kingdom, not only to examine the constitutional scheme prepared by the Ministers, but also to "provide full opportunity for consultation to take place with various interests including minority communities concerned with the subject of constitutional reform and with proposals which Ministers have formulated". [2] After a stay of nearly three and a half months in Ceylon, during which evidence was recorded at public sessions and information was gathered at private discussions, the commission submitted its report to the Secretary of State for the Colonies who presented it to the United Kingdom Parliament in September 1945. In its report the commission agreed, inter alia, that the legislative power of Parliament should be limited in the manner proposed by the Ministers. The commission did not make any other recommendations on this subject; nor did it propose the inclusion of a bill of rights. A White Paper embodying the decisions of the British Government was published on 31 October 1945,[3] and the proposals contained therein were accepted by the State Council by 51 votes to 3; only two Indian Tamils and one Sinhalese voting against it. [4]

---

1. Ibid.
2. Statement made by the Secretary of State in the House of Commons on 5 July 1944, Reform of the Constitution: Further Correspondence, S.P. XII-1944, p.3.
3. Ceylon: Statement of Policy on Constitutional Reform (1945; Cmd 6690).
4. Jennings, Constitution, pp. 11-12.

The Protected Rights

The Ceylon (Constitution) Order in Council 1946, which was made on 15 May 1946 to give effect to the recommendations of the Soulbury Commission, sought to protect only the following elements of some of the fundamental rights:

1. The right to periodic elections (Sections 11 and 15)
2. The right to protection against legislative action which seeks to prohibit or restrict the free exercise of religion (Section 29(2)(a))
3. The right to protection against legislative action which seeks to discriminate against a community or religion (Section 29 (2)(b) and (c))
4. The right to a competent, independent and impartial tribunal (Sections 52, 53, 54, 55 and 56), and
5. The right of access, on general terms of equality, to the public service (Sections 58, 59, 60, 61 and 62).

These sections could be amended or repealed only with a special majority of not less than two-thirds of the total number of members of the House of Representatives. A proposal contained in the constitutional scheme prepared by the Ministers that any such amendment or repeal should be by express words to that effect, did not find a place in the Constitution.[1]

The 1946 Constitution has been described as having "had entrenched in it all the protective provisions for minorities that the wit of man could devise".[2] Section 29 was undoubtedly the most important provision in this respect. Its relevant portions read as follows:

> (2) No such law shall -
>
> (a) prohibit or restrict the free exercise of any religion; or
>
> (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
>
> (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or

---

1. S.P. XIV-1944, s.10.
2. Jeffries, Independence, p.115.

(d) alter the constitution of any religious body except with the consent of the governing authority of that body, so, however, that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.

(3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.

The application of this provision is examined in a later chapter.[1] It would perhaps suffice at this stage to note the following:

1. Only the law-making process was sought to be regulated. Neither executive or administrative action, nor the acts of private individuals, fell within its control.
2. The protection offered was only against discriminatory treatment in respect of "privileges", "advantages", "disabilities" and "restrictions". The violation of human rights generally, whether of an individual or of a group, whether separately or in community with others, and conduct outside the scope of the four enumerated concepts, did not fall within its control.
3. The expression "community" was not defined. Was it intended to mean only ethnic groups, or did it also contemplate divisions based on language and caste ?
4. The expression "free exercise" was a vague and indeterminate concept. Was the right intended to be absolute or could a court whittle it down in the interests of orderly government ?

Despite its limited scope, however, section 29 did represent an embryonic form of an enforceable bill of rights.

The right to periodic elections was contained in those provisions which limited the duration of each elected House of Representatives to a period of five years, and required the Governor-General, upon making a proclamation dissolving Parliament, to summon a new Parliament on a date not later than four months. Although no remedy was provided for the enforcement of this right, it would have been possible for the validity of a purported legislative act made by a Parliament which had outlived its term of office or by an authority other than a duly elected Parliament,

---

1. Infra, Chap.V.

to be challenged in court. Thereby, any attempt to frustrate these provisions could effectively have been thwarted.

The right to a competent, independent and impartial tribunal was secured by providing that judges of the Supreme Court will be appointed by the Governor-General; they may hold office until the prescribed age of retirement and will not be removable except on an address of both Houses of Parliament; their salaries which may not be diminished will be charged on the Consolidated Fund; and that the appointment, transfer, dismissal and disciplinary control of other judicial officers will be the sole and exclusive responsibility of an independent Judicial Service Commission.

Similarly, the right of access, on general terms of equality, to the public service was secured by vesting the appointment, transfer, dismissal and disciplinary control of public officers in a Public Service Commission which was insulated from political influence. It must be noted in this connection that the Constitution did not claim to guarantee fundamental rights. It was merely seeking to provide certain "safeguards" in order to remove the fear which existed in the minds of the Tamil minority of "domination and oppression" by a "permanent and unassailable majority".[1]

The approach adopted by the Soulbury Commission may be contrasted with the recommendations made by the Willink Commission appointed in 1957 to ascertain the facts about the fears of minorities in Nigeria and to propose means of allaying those fears whether well or ill founded. That country, too, was on the eve of Independence. Almost all the witnesses who came before that commission were insistent that nothing but a separate state could meet their problems; only the Christian bodies asked for provision in the constitution guaranteeing fundamental rights. The commission, however, unanimously recommended a bill of rights:

> Provisions of this kind in the Constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless, we think they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A Government determined to abandon democratic courses will find ways of violating them but they are of great value in preventing a steady deterioration

---

1. Soulbury Report, paras 137, 177.

> in standards of freedom and the unobtrusive encroachment of a Government in individual rights. [1]

The Nigerian bill of rights was modelled on the European Convention on Human Rights and was itself to serve as the model for the New Commonwealth in the next two decades.

The Constitution in Operation

The Ceylon (Constitution) Order in Council 1946 was brought into operation progressively: Parts I, IV and IX on 17 May 1946; Part III on 5 July 1947; Parts II, V, VI and VII on 1 September 1947; and Part VIII on 14 October 1947, which was the date of the first meeting of the new House of Representatives. At a general election which was spread over a month, 55.9 per cent of the electorate had polled to produce the following result:

TABLE 9

THE 1947 GENERAL ELECTION RESULT

Party	Seats won	Votes polled	Percentage polled
United National Party	42	751,432	39.8
Lanka Sama Samaj Party	10	204,020	10.8
All-Ceylon Tamil Congress	7	82,499	4.4
Ceylon Indian Congress	6	72,230	3.8
Bolshevik Leninist Party	5	113,193	6.0
Communist Party	3	70,331	3.7
Labour Party	1	38,932	2.1
Independents	21	549,381	29.1

Source: Based upon Dept. of Elections, Results of Parliamentary General Elections in Ceylon, 1947-1970 (Colombo: Dept. of Govt. Printing, 1971).

D.S.Senanayake, as the leader of the largest party, was invited to form a government. His Cabinet consisted of eleven members of the UNP; two Independents, both of whom were Tamils; and the member of the Labour Party. The votes of six members nominated to represent "important interests" which were either "not represented" or were

1. Nigeria: Report of the Commission appointed to enquire into the fears of Minorities and the means of allaying them (1958;Cmnd 505), pp.97-103.

"inadequately represented",[1] together with those of several Independents, assured the Government of a comfortable majority in the House.

With the establishment of a Government, events moved swiftly towards Dominion Status. On 11 November 1947, three Agreements were signed in Colombo by the Governor on behalf of the United Kingdom and by the Prime Minister on behalf of Ceylon. They were:

1. A Defence Agreement to regulate the relations between the two countries in respect of defence
2. An External Affairs Agreement similarly regulating relations in respect of external affairs
3. A Public Officers Agreement transferring to the Government of Ceylon the responsibilities in respect of officers in the public service appointed with the consent of the Secretary of State for the Colonies.

Two days later, the Ceylon Independence Bill was introduced in the British Parliament, and after its passage through both Houses, received the Royal assent on 10 December 1947. On 19 December, the Ceylon (Independence) Order in Council was passed. The Agreements, the Independence Act and the Independence Order in Council all came into force on the "appointed day", 4 February 1948. On this day, the first non-European colony achieved independence. As Lord Soulbury remarked in the House of Lords:

> This is a historic occasion. It is a landmark in the development of the evolution of the British Empire, and it brings another step nearer what I believe to be the ultimate aim of British statesmanship - the fusion of Empire and Commonwealth. [2]

As with the older Dominions, Independence did not bring with it a new constitution; it was simply a matter of brushing aside the vestiges of colonial dependence. Therefore, for a bill of rights to find its way into the Ceylon Constitution, there was required both the prescribed majority and the desire to invoke it. During the life of the first Parliament, the Government possessed neither.

Before the life of the first Parliament ended, several significant events, some of which were ominous, took place. With the enactment of a citizenship law, the Indian Tamil community was

---

1. 1946 Constitution, s.11(2).
2. Quoted in Jeffries, Independence, p.126.

virtually disfranchised.[1] The elitist leadership of the Tamil Congress abandoned the demand for "balanced representation" and crossed the floor to join the Government, while those of the party who remained in the Opposition formed the Federal Party with regional autonomy as its objective. Disillusioned with the conservative economic and social policies of the Government, the Leader of the House, S.W.R.D.Bandaranaike, resigned and formed the Sri Lanka Freedom Party to provide "a democratic alternative to the party in power" and to afford "the people who, while being dissatisfied with the policies and programmes of the Government, wished to make a change that was neither revolutionary nor extreme, the opportunity of doing so".[2] Finally, in February 1952, the rugged but wily farmer who, as Prime Minister, had donned English morning dress to unfurl Ceylon's national flag on Independence Day, fell off his horse and died. The Governor-General, Lord Soulbury, interrupted a holiday in England to rush back to his office, and then stunned both Cabinet and Country by choosing the late Prime Minister's son, Dudley Senanayake, the youngest member of the Cabinet, to head the Government. The new Prime Minister immediately dissolved Parliament.

At the second general election, held in May 1952, 70.7 per cent of the electorate polled to produce the following result:

TABLE 10

THE 1952 GENERAL ELECTION RESULT

Party	Seats won	Votes polled	Percentage polled
United National Party	54	1,026,005	44.8
Sri Lanka Freedom Party	9	361,250	15.5
Lanka Sama Samaj Party	9	305,133	13.1
Communist Party	4	134,528	5.8
All-Ceylon Tamil Congress	4	64,512	2.8
Federal Party	2	45,331	1.9
Labour Party	1	27,096	1.2
Independents	12	326,783	14.0

Source: Ibid.

1. Infra, p. 279.
2. S.W.R.D.Bandaranaike, Speeches and Writings (Colombo: Govt. Press, 1963), p.141.

Together with the six nominated members and its allies in the Labour Party, the Tamil Congress and among the Independents, the Government of Dudley Senanayake commanded a two-third's majority in the House. But the rubber boom which followed the outbreak of the Korean war and almost coincided with Independence was beginning to subside. It was time not for constitutional reform, but for economic strategy. A reduction of the government subsidy on rice led to a "hartal" or a general stoppage of work; during a state of emergency which was declared to deal with widespread destruction of public property, several people died at the hands of the authorities.[1] Two months later, in October 1953, Dudley Senanayake, by then a sick man, resigned his office, quit politics, and left the island. He was succeeded by Sir John Kotelawela, the Cabinet's most senior member and a colonel in the volunteer force. Fiercely pro-west at a time when resurgent Asia was seeking to establish its own identity, Kotelawela brought back to Ceylonese society more than a touch of the ancien regime. Leaving aside domestic affairs, he concentrated on international politics. Having hosted a conference of Asian Prime Ministers, he next attended the Bandung Conference where, according to "The Economist", he "catapulted himself into American hearts". He then set out on a global tour of friendly capitals and returned home as Ceylon's most decorated personality.

In December 1955, Ceylon secured admission into the United Nations. By subscribing to the UN Charter, Ceylon re-affirmed its "faith in fundamental human rights" and pledged itself to take action in order to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". The minimum standards of human rights had already been set out in the Universal Declaration of Human Rights. This subject, however, did not receive any further attention from the Government. Instead, in February 1956, against a background of escalating tension between the Sinhalese and the Tamils on the question of an official language, Sir John advised the Governor-General to dissolve Parliament, fifteen months before it was due.

---

1. Infra, p.449.

The general election of April 1956 was a watershed in the life of the country. It was a confrontation between the forces of nationalism and the westernised elite who had secured and enjoyed Independence; between the common man and the establishment; between the many who had stood in the shadows for too long and the few who had stalked the corridors of power and influence for several decades. To face this election, the Sri Lanka Freedom Party led by S.W.R.D.Bandaranaike had formed a coalition, the Mahajana Eksath Peramuna (People's United Front), with two small but equally nationalistic groups, the Viplavakari Lanka Sama Samaj Party led by Philip Gunewardene and the Bhasha Peramuna (Language Front) led by W.Dahanayake, and entered into no-contest pacts with the Lanka Sama Samaj Party and the Communist Party. To secure the victory of their sixty candidates, in the weeks preceding the election, in the thousands of little villages in and around Ceylon, ten thousand Buddhist monks, ayurvedic physicians and village schoolmasters trekked from house to house. In three days of polling, 69 per cent of the electorate completely changed the face of Ceylon politics:

TABLE 11

THE 1956 GENERAL ELECTION RESULT

Party	Seats won	Votes polled	Percentage polled
Mahajana Eksath Peramuna	51	1,045,725	39.7
Lanka Sama Samaj Party	14	274,204	10.5
Federal Party	10	142,036	5.4
United National Party	8	718,164	27.4
Communist Party	3	119,715	4.6
All-Ceylon Tamil Congress	1	8,914	0.3
Independents	8	289,491	11.1

Source: Ibid.

Having secured an absolute majority of the elected members, Bandaranaike found no need to invite representatives of the two Marxist parties, with whom he had entered into an electoral arrangement, to join his Cabinet. Consequently, the LSSP occupied the front benches of the Opposition and the Government had to be content with its absolute majority.

Moves to Amend the Constitution

The first step towards the amendment of the 1946 Constitution for the purpose, inter alia, of incorporating a bill of rights, was taken one year after the assumption of office of the new government. On 26 April 1957, the Prime Minister moved in the House of Representatives:

> That it is expedient that a Joint Select Committee of the Senate and the House of Representatives should be appointed to consider the revision of the Ceylon (Constitution and Independence) Orders in Council 1946 and 1947, and other written law, with reference to the following among such other matters as the Committee may consider necessary -
>
> (1) the establishment of a Republic;
> (2) the guaranteeing of fundamental rights;
> (3) the position of the Senate and Appointed Members of the House of Representatives; and
> (4) the Public Service Commission and the Judicial Service Commission. [1]

The motion having been agreed to, on 7 January 1958 the Senate concurred. On 18 February 1958, by resolution of both Houses, the following were appointed to serve on the Joint Select Committee:

S.W.R.D.Bandaranaike (SLFP/MEP)
Stanley de Zoysa (SLFP/MEP)
D.P.R.Gunewardene (VLSSP/MEP)
T.B.Illangaratne (SLFP/MEP)
M.D.Banda (UNP)
S.J.V.Chelvanayakam, Q.C. (FP)
Colvin R. de Silva (LSSP)
M.S.Kariapper (Ind.)
P.B.G.Keuneman (CP)
N.M.Perera (LSSP)
R.S.V.Poulier (Nominated MP)
Senator M.W.H.de Silva, Q.C. (SLFP/MEP)
Senator A.P.Jayasuriya (SLFP/MEP)
Senator E.B.Wikramanayake, Q.C. (UNP)
Senator C.Wijesinghe (SLFP/MEP)
Senator S.Nadesan, Q.C. (Ind.)
Senator E.J.Cooray (UNP)
Senator N.U.Jayawardene (Ind.)

Represented on this Joint Select Committee were all the political parties in Parliament; the four major communities (and within the Sinhalese community, the four major caste groups and the two divisions of Kandyan and Low-country Sinhalese); and the four major religious groups (including the different Christian denominations). Of its eighteen members, only seven belonged to the ruling party and only six to the dominant Sinhalese-Buddhist-

---

1. First Report of the Joint Select Committee of the Senate and

Goyigama group. It was clear, therefore, that in this exercise in constitutional revision, what was intended was not that the pre-conceived views of any particular political party or interest group should prevail, but that a general consensus should be achieved: a fact which would have more than compensated for the Government's lack of a two-third majority in Parliament.

Before Parliament was prorogued, the Joint Select Committee was able to meet thrice in March and April of that year, and to cause a questionnaire to be published in the national newspapers seeking the views of the public on, inter alia, -

1. What are the "fundamental rights" which you would like to see guaranteed in the revised Constitution ?
2. What procedure do you suggest for dealing with any infringement of such rights ? In particular, what safeguards do you suggest in respect of legislation which is alleged to contravene the provisions of the Constitution ?

Thereafter, on the six occasions on which it was able to meet before Parliament was again prorogued, the Committee considered in the main matters relating to the delimitation of electoral districts. Among them was a matter which had a direct bearing on the requirement of "universal and equal suffrage". The Constitution provided that for every 75,000 persons resident in a province, a Delimitation Commission shall allot one electoral district to that province. In 1946, almost everyone resident in Ceylon was entitled to vote upon attaining the age of 21 years. In 1948, Parliament changed this position substantially. A large proportion of the resident population was excluded from the electoral process as they could not satisfy the stringent requirements of Ceylon citizenship.[1] In 1958, there were approximately 1,147,500 residents (out of a total resident population of 9,361,300) who were not citizens. Consequently, while certain electorates had as many as 70,903 voters (Kelaniya) and 68,115 (Balangoda), certain others, particularly in the central highlands, had as little as 9,484 (Kotagala) and 4,470 (Talawakele). In other words, one voter in Talawakele had the same electoral power as 14 voters in Kelaniya. The Committee recommended that this distortion be rectified by amending the Constitution to provide that the number of persons to be taken into account in the demarcation

---

the House of Representatives appointed to consider the Revision of the Constitution, Parliamentary Series, No.15 of the Third Parliament.

1. Infra, p.279.

of an electoral district should be only those residents who are citizens. This was a unanimous recommendation.

On 6 February 1959, the Joint Select Committee agreed, inter alia, that appeals to the Privy Council should be discontinued and a new judicial tribunal should be set up to adjudicate on constitutional issues as well as to entertain appeals from the Supreme Court.[1] On 5 March 1959, according to the minutes of the committee's proceedings,

> The following rights were generally approved of for inclusion in the Constitution, to be considered further in detail in the form of draft legislation:-
>
> (a) Political Rights -
>
> i) Equality before the law (cf. Articles 14 and 15 of the Indian Constitution).
> ii) Protection of life and personal liberty, of which no person shall be deprived except according to procedure established by law (cf. Article 21 of the Indian Constitution).
> iii) Right to freedom of speech and expression (cf. Article 19 of the Indian Constitution).
> iv) Right to assemble peaceably and without arms (cf. Article 19 of the Indian Constitution).
> v) Right to form associations or unions (cf. Article 19 of the Indian Constitution).
>
> The Rights (ii) to (v) are to be exercised subject to any reasonable restrictions imposed by law in the public interest.
>
> (b) Economic Rights -
>
> i) Equality of opportunity in matters of public employment.
> ii) The right to acquire, own and dispose of property according to law and the right not to be dispossessed of property save by authority of law (cf. Article 31 of the Indian Constitution).
> iii) The Right to reside and carry on any lawful occupation, trade or profession in any part of the territory of Ceylon (cf. Article 19 of the Indian Constitution).
>
> (c) Right to freedom of religion -
>
> i) Freedom of conscience and worship and the free profession and practice of religion.
> ii) Freedom to manage religious affairs.
>
> (d) Cultural and Educational rights of minorities -
>
> i) Right of any section of the citizens of Ceylon having a distinct language, script or culture of its own to conserve and develop the same.

---

1. Supra.

ii) Right of any section of the citizens of Ceylon to establish and administer educational institutions provided: (1) such institutions conform to the educational requirements of that State, and (2) such institutions do not have the right to claim assistance from the State except as provided by law.

iii) The State shall not in granting aid to educational institutions discriminate against any educational institution on the ground that it is under the management of a minority, whether religious or linguistic.

(e) Right to enforce Fundamental Rights -

The right to move the highest tribunal by appropriate proceedings for the enforcement of Fundamental Rights and to obtain suitable redress, for which purpose such tribunal shall be vested with the power to issue the necessary directions or orders or writs requisite for the enforcement of Fundamental Rights.

The Committee agreed that for purposes of Fundamental Rights the expression "State" shall be defined to include the Government and Parliament of Ceylon and all local and other authorities in Ceylon. [1]

The committee were also "generally of the view that it would be useful at this stage of their proceedings to obtain the services of officers possessing the necessary knowledge of constitutional law and practice to prepare detailed material necessary in the future deliberations". In this connection, Prime Minister Bandaranaike had preliminary discussions with Justice T.S.Fernando, a former Attorney-General who was an active member of the Geneva-based International Commission of Jurists, and J.A.L.Cooray, lecturer in constitutional law at the Ceylon Law College who in 1943 had prepared a comprehensive bill of rights for the Ceylon National Congress.[2]

In April 1959, Bandaranaike was faced with a Cabinet crisis - a confrontation between the right and left wings of his Cabinet, which he attempted to resolve by re-shuffling the subjects and functions allocated to the Ministers. This led to the resignation from the Cabinet in May 1959 of his left-wing Ministers, including two members of the Joint Select Committee, D.P.R.Gunewardene and M.W.H.de Silva, Q.C., the Minister of Justice and vice-chairman

---

1. Supra.

2. Interview with J.A.L.Cooray, September 1981.

of the committee. In June 1959, he re-constituted his government and reiterated the basic policies of his party thus:

> Politically, we are democratic as we believe that the democratic way of life is the most suitable for human progress. Economically, we believe in the socialist approach, as we are of the opinion that it is only in this way that justice can be done to the mass of the people. A third factor in our policy is our belief that cultural and religious views must be preserved and fostered. It will thus be seen that we are opposed to both communism and fascism, to capitalism and materialism. Our party stands against any attempt to impose any of these on the people of this country.[1]

But the Government had lost its vitality; its spiritual base had become questionable; and Bandaranaike himself was very much a prisoner of the right-wing. On 25 September 1959, the Prime Minister was assassinated at the hands of a Buddhist monk in a conspiracy in which several prominent right-wingers of his party were later found to have been implicated. He was succeeded by W.Dahanayake who had led the right-wing revolt six months previously. A series of bizarre events, including the dismissal of ten Cabinet Ministers and the survival of the Government on a no-confidence vote through the single vote of an appointed MP, culminated in the dissolution of Parliament barely two months later. The first reformist government of Ceylon had survived for only three and a half years.

At the general election held in March 1960, Dahanayake led his newly formed Lanka Prajathanthrawadi Pakshaya (Ceylon Democratic Party), while former Cabinet colleagues D.P.R.Gunewardene and C.P.de Silva led the MEP and the SLFP respectively. Four former members of Bandaranaike's parliamentary group, I.M.R.A.Iriyagolle, K.M.P.Rajaratne, S.D.Bandaranaike and T.B.Subasinghe, led four other new parties, the Samajawadi Mahajana Peramuna (Socialist People's Front), Jathika Vimukti Peramuna (National Liberation Front), Bosath Bandaranaike Peramuna (Bodhisattva S.W.R.D.Bandaranaike Front), and the Sri Lanka Jatika Peramuna (Sri Lanka National Front). At a free-for-all, but extraordinarily peaceful, election at which Prime Minister Dahanayake lost his own seat in a constituency which he had represented for over a decade, 77.6 per cent of the electorate polled to produce an indecisive result:

---

1. Bandaranaike, Speeches, 179.

TABLE 12

THE 1960 (MARCH) GENERAL ELECTION RESULT

Party	Seats won	Votes polled	Percentage polled
United National Party	50	908,996	29.6
Sri Lanka Freedom Party	46	648,094	21.1
Federal Party	15	176,492	5.7
Mahajana Eksath Peramuna	10	325,832	10.6
Lanka Sama Samaj Party	10	322,352	10.5
Lanka Prajathanthrawadi Pakshaya	4	125,344	4.1
Communist Party	3	141,857	4.6
Jatika Vimukti Peramuna [a]	2	11,201	0.4
All-Ceylon Tamil Congress	1	38,275	1.2
Samajawadi Mahajana Peramuna	1	24,143	0.8
Sri Lanka Jatika Peramuna	1	11,115	0.4
Bosath Bandaranaike Peramuna	1	9,749	0.3
Independents	7	270,881	8.8

Source: Ibid.

a. One member was returned uncontested.

The Governor-General invited Dudley Senanayake, who had returned to politics and assumed the leadership of the UNP in the previous year, to form a government. His minority government, which held barely a third of the seats in a 157-member House of Representatives, opened Parliament with a Throne Speech which promised, inter alia, that "early steps for the revision of the Constitution for the purpose of establishing a Republic of Ceylon within the Commonwealth and for providing a guarantee of fundamental rights to the minorities" would be taken.[1] The Government was defeated on the Address of Thanks. Senanayake advised a dissolution and Ceylon prepared to poll a second time in one year.

For the general election scheduled for July 1960, the Sri Lanka Freedom Party was led by Mrs. Sirimavo Bandaranaike, the assassinated Prime Minister's 41-year old widow. Though lacking any real political experience, she had reluctantly agreed to provide a symbolic, and undoubtedly charismatic, leadership to a fragmented

1. Throne Speech of 6 April 1960, Ceylon Today, Vol.IX, No.4, p.1.

party in the hope of restoring the credibility which it enjoyed in the heady days of Bandaranaike's administration. She immediately entered into no-contest pacts with the Lanka Sama Samaj Party and the Communist Party. Consequently, faced with two clear alternatives, 75.6 per cent of the electorate polled to produce a decisive result:

TABLE 13

THE 1960 (JULY) GENERAL ELECTION RESULT

Party	Seats won	Votes polled	Percentage polled
Sri Lanka Freedom Party	75	1,022,154	33.6
United National Party	30	1,143,290	37.6
Federal Party	16	218,753	7.2
Lanka Sama Samaj Party	12	223,993	7.4
Communist Party	4	90,219	3.0
Mahajana Eksath Peramuna	3	102,833	3.4
Lanka Prajathanthrawadi Peramuna	2	29,190	1.0
Jatika Vimukti Peramuna	2	14,030	0.5
All-Ceylon Tamil Congress	1	46,803	1.5
Independents	6	140,522	4.6

Source: Ibid.

Mrs.Bandaranaike, though not a member of Parliament herself, was invited to form a government. Upon her acceptance and appointment, a vacancy was created in the Senate to enable her to be nominated to the Upper House. Assured of an absolute, though tenuous, majority in the House of Representatives, Mrs.Bandaranaike formed an exclusively SLFP Government in the knowledge, no doubt, that for the radical programme of change in the social, cultural and economic spheres to which her Government was committed, the support of the left-wing parties would be forthcoming.

Mrs.Bandaranaike's Government did not show any immediate inclination to resume the task of constitutional revision which had been interrupted by the assassination of Bandaranaike in the previous year. A willingness to consider an amendment to the Constitution to make Ceylon a Republic, if Parliament so desired it, was expressed

in 1961, but was not followed up.[1] Mrs.Bandaranaike had asked for and obtained a mandate to continue her husband's programme of work, and perhaps believed that the economic restructuring of society should receive priority over everything else. It was this belief and the conviction that the Government was proceeding in the wrong direction that led to the abortive coup d'etat in January 1962 by right-wing elements in the higher rungs of the armed services, police and the civil service. They had planned to arrest the Prime Minister, the Minister of Finance Felix Dias Bandaranaike (who was her Parliamentary Secretary and spokesman in the House of Representatives), left-wing leaders and trade unionists and certain senior civil servants, dissolve Parliament, suspend the Constitution, and establish a government with the Governor-General at its head. It was claimed by the alleged conspirators that UNP leader Dudley Senanayake was aware of the plan.[2] The resulting state of emergency was hardly propitious for the discussion of a draft bill of rights.

Meanwhile, relations between the two major communities as well as the economic situation deteriorated, and the Finance Minister resigned when his proposal to cut the rice ration was rejected by Parliament, In August 1963, the three left-wing parties led by veteran Marxists, N.M.Perera, D.P.R.Gunewardene and S.A.Wickremasinghe, combined to form the United Left Front with a 21-point programme. This unity, however, was shortlived and the new Front disintegrated when, in April 1964, the LSSP coalesced with the SLFP and three of its members joined the Cabinet on a 14-point programme agreed to between the two parties. One of the points on the programme related to the establishment of a Press Council, a proposal which enabled the Opposition to re-group its diverse forces for attack. In December 1964, fourteen right-wing members of the government parliamentary group, including the Leader of the House C.P.de Silva, crossed the floor and voted with the Opposition on this issue, thus bringing down the Government by one vote. Two weeks later, Parliament was dissolved, eight months before it was due.

---

1. Throne Speech of 13 July 1961, Ceylon Today, Vol.X, No.8, p.1.
2. Coup d'etat: Statement read on behalf of the Government by Felix R.Dias Bandaranaike, Parliamentary Secretary for Defence and External Affairs, in the House of Representatives on 13 February 1962 (Colombo: Govt. Press, 1962).

The alignment of forces at the general election held in March 1965 followed the usual pattern, except that those right-wing members of the SLFP who defected had formed their own party, the Sri Lanka Freedom Socialist Party. At a poll at which 82.1 per cent of the electorate voted, the result was as follows:

TABLE 14

THE 1965 GENERAL ELECTION RESULT

Party	Seats won	Votes polled	Percentage polled
United National Party	66	1,579,181	38.9
Sri Lanka Freedom Party [a]	41	1,226,833	30.2
Federal Party	14	217,986	5.4
Lanka Sama Samaj Party	10	302,095	7.4
Sri Lanka Freedom Socialist Party	5	129,986	3.2
Communist Party	4	109,744	2.7
All-Ceylon Tamil Congress	3	98,726	2.4
Mahajana Eksath Peramuna	1	110,388	2.7
Jatika Vimukti Peramuna	1	18,791	0.5
Independents	6	237,805	5.9

Source: Ibid

a. The SLFP, LSSP and CP campaigned together on the basis of a no-contest electoral agreement.

Dudley Senanayake, the leader of the UNP, formed a "national government" which comprised representatives of the SLFSP, MEP, JVP, as well as the two Tamil communal parties, the FP and the TC. Together, the Government commanded the support of at least 96 members - nine short of a two-third majority.

The National Government promised that it will "be fair to all, irrespective of race, community or religion, and will protect human rights at all times".[1] It took steps to re-activate the Joint Select Committee on the Revision of the Constitution. By 8 October 1966, both Houses had resolved to appoint a committee with the same terms of reference which included the question of the guaranteeing

1. Throne Speech of 9 April 1965, Ceylon Today, Vol.XIV, Nos.3 and 4, p.8.

of fundamental rights. By 3 May 1967, a committee had been constituted with representatives from both government and opposition parties. But at its first meeting held on 19 May 1967, a letter signed by Mrs.Bandaranaike, Maithripala Senanayake, N.M.Perera, Leslie Goonewardene and P.G.B.Keuneman, requesting the Speaker to accept their resignations, was tabled. The reasons why these representatives of the three opposition parties declined to participate are discussed below. Their withdrawal meant that the chances of securing a two-third's majority, which was necessary to amend the Constitution in any respect, became quite remote. Nevertheless, the committee proceeded with its work, but not from the point at which an interruption had occured in 1959; thus further minimising the possibility of a consensus even on a matter such as fundamental rights. It prepared, as its predecessor had done nearly ten years previously, a questionnaire to be sent to Senators, Members of Parliament and recognised public organisations.[1] During the next session of Parliament, nine sittings were held at which, apart from considering the written replies received in response to the questionnaire, a number of witnesses who wished to give oral evidence were examined. In its report, presented to Parliament on 13 June 1968, the committee recommended that a chapter on fundamental rights be incorporated in the Constitution.[2] There is no record of the committee having met again; certainly, no action was taken to implement this recommendation.

Shortly after the defeat of the SLFP-LSSP Coalition Government at the general election of March 1965, these two parties together with the Communist Party decided to formalise their relationship and to prepare a programme of work which they would agree to implement in the event of a victory at the next election. Accordingly, several joint committees were appointed to examine and report upon a number of areas of governmental activity, including constitutional reform. On this subject, the three parties decided against attempting any patch-work revision of the 1946 Constitution; they resolved to have a new republican constitution drafted and enacted by a constituent assembly. This decision appears to have been motivated by a number of factors:

---

1. Report of the Joint Select Committee of the Senate and the House of Representatives, Parliamentary Series No.16 of the Sixth Parliament.

2. Ibid, Parliamentary Series No.30 of the Sixth Parliament.

1. The LSSP was proscribed in 1942, and during the war years its leaders were detained under Defence Regulations. Consequently, they took no part in the discussions and consultations that preceded the preparation by the Board of Ministers of their constitutional scheme. In any event, they had throughout agitated for a complete break with the British Crown, and regarded the 1946 Constitution as a fraud perpetrated to keep Ceylon in a continuous state of subjection. The LSSP's co-founder, Colvin R.de Silva, one of Ceylon's most eminent and successful criminal lawyers, had consistently declined to take silk and thereby be regarded as one of "Her Majesty's Counsel" learned in the law. Although the LSSP had been willing to go along with Bandaranaike's proposals for constitutional reform in the mid-fifties, they now advocated a deliberate break in legal continuity or a legal revolution so that the new constitution would have no links whatsoever with the British Crown or Westminster.

2. In academic circles the question had been raised whether in the exercise of the power of Parliament to amend or repeal any of the provisions of the Constitution, Parliament (i.e. the Queen, the Senate and the House of Representatives) could legally divest itself of one of its constituent parts; and in particular, that part from which it actually derived its legal authority. Parliament was shortly to attempt, successfully as it turned out, the abolition of the Senate. Yet, without the benefit of hindsight, before the Joint Select Committee itself, it had been argued by C.F.Amerasinghe, senior lecturer in law at the University of Ceylon, that Parliament as defined in the Constitution could not be organically changed except by the substitution of a totally new constitution.[1]

3. In 1964, in the case of Bribery Commissioner v. Ranasinghe,[2] Lord Pearce, delivering the judgment of the Judicial Committee of the Privy Council, had referred to section 29(2) of the Constitution which "entrenched religious and racial matters, which shall not be the subject of legislation", and expressed the opinion that:

> They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution.

---

1. Ibid, p.102.
2. (1964) 66 N.L.R. 73, at 78.

Previously, the Privy Council had referred to this subsection as containing "fundamental reservations", subject to which Parliament enjoyed the power to make laws for the peace, order and good government of Ceylon.[1] This obiter dictum of the highest court of appeal provoked a spirited controversy in Ceylon.

H.L.de Silva, a leading constitutional lawyer, asserts that whenever it is intended to erect a theory of unalterability of a constitution, "words of crystal clarity" are used.[2] He refers to Article 11 of the Constitution of Japan which states that:

> The fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolable rights.

Section 29, however, does not appear to be lacking in clarity, having regard to the language usually employed in similar statutory instruments. The legislative power of Parliament described in section 29(1) is restricted by section 29(2) so unequivocally that any law made in contravention of that subsection is declared by section 29(3) to be void. Section 29(4) states that Parliament "in the exercise of its powers under this section" may amend or repeal any provision of the Constitution with the prescribed majority; "its powers under this section" being clearly defined by the preceding subsections (1), (2) and (3).

The Privy Council's obiter dictum appears also to be borne out by historical fact. Some of the documents relating to the transfer of power have not yet been released for public inspection. But D.J.Morgan, who a few years ago was provided with full access to all official documents when he examined the history of colonial development, makes it quite clear that the provision of "lasting safeguards for the interests of minorities" was the predominant factor in the negotiations that preceded the 1946 Constitution and, indeed, Independence.[3] The intention expressed in the 1943 Declaration to reserve bills which "have evoked serious opposition by any racial or religious community and which in the Governor's

---

1. Ibralebbe v. The Queen (1963) 65 N.L.R. 433, at 443.
2. H.L.de Silva, "Some Reflections on the Interpretation of the Constitution of Ceylon and its Amendment", (1970) Journal of Ceylon Law, 238, at 249.
3. D.J.Morgan, The Official History of Colonial Development, Vol.5 (London: Macmillans, 1980), pp. 68-77.

opinion are likely to involve oppression or unfairness to any community"; the requirement that any constitutional scheme prepared by the Ministers should be approved by three-quarters of all the members of the State Council; the specific direction to the Soulbury Commission to hold discussions with minority groups; and the view expressed by the Colonial Affairs Committee even after the Soulbury Report had been presented that "the Sinhalese majority, whose power under a completely self-governing constitution would be predominant, has yet to prove their willingness and capacity to operate self-governing institutions in collaboration with the minorities, with due regard to their rights and susceptibilities", underlie the importance attached to this factor. According to Morgan, minority safeguards were to be included in the subjects specified for formal Agreements between the two Governments as a condition precedent to Independence; an insistence which the British Government agreed to drop upon being satisfied that "the rights of minority groups were safeguarded in the Constitution". Two of these safeguards were the Senate which was intended to impede precipitate legislation and to handle inflammatory issues in a cooler atmosphere, and the Public Service Commission which was designed as an impartial and authoritative body, free from partisanship; the most important safeguard was undoubtedly section 29(2). It was clearly the basis upon which Independence was sought and granted.

Be that as it may, even if Lord Pearce's observations were purely obiter and not expressed after a full consideration of the relevant facts, it nevertheless gave some indication to Ceylonese legislators of the perils that lay in the path of those who ventured to revise the Constitution in the traditional manner.

The Need for a Bill of Rights

Two events which took place in the early 1960s underscored the need for more comprehensive guarantees of individual liberty than were to be found either in section 29 of the Constitution or in existing law. The pressure of public opinion in the one case, and the strength of judicial activism in the other, helped to carry the day. But these were ephemeral forces and could hardly be relied upon as effective protective mechanism against the arbitrary reach of state power.

The Death Penalty (Special Provisions) Bill

On 18 January 1962, a bill was tabled in the House of Representatives "to impose the death penalty upon offenders convicted of murder, abetment of murder, conspiracy to murder, abetment of suicide, and other like offences, for which capital punishment was prescribed by law prior to the Suspension of Capital Punishment Act, No.20 of 1958, and to make provision for the execution of offenders so convicted, and to make special provision for the offenders convicted of conspiracy to murder the late Prime Minister in Case No.S.C.8/M.C.Colombo 23838A and in regard to further appeals in that case".[1] The sequence of events leading to this bill was evident from its preamble:

> Whereas according to the Penal Code the punishment prescribed for the offences of murder, abetment of murder, conspiracy to murder, abetment of suicide and other like offences was, prior to the Suspension of Capital Punishment Act, No.20 of 1958, death:
>
> And whereas by that Act the punishment for the said offences was altered for a period of three years from 9 May 1958 to rigorous imprisonment for life:
>
> And whereas the Prime Minister of this country was assassinated on 25 September 1959:
>
> And whereas Parliament thereafter decided to reimpose the death penalty for the said offences with the object that, among other things, the persons responsible for that assassination should suffer capital punishment:
>
> And whereas the Suspension of Capital Punishment (repeal) Act, No.25 of 1959, was enacted by Parliament for that purpose:
>
> And whereas three persons, namely, Mapitigama Buddharakkita Thera, Hemachandra Piyasena Jayawardene and Talduwe Somarama Thera, were found guilty by the unanimous verdict of the jury of the offence of conspiracy to murder the late Prime Minister and were duly sentenced to death in Case No.S.C.8/M.C.Colombo 23838A:
>
> And whereas the Court of Criminal Appeal has by its judgment on the appeal in that case upheld that verdict and the convictions against the said offenders:
>
> But whereas the Court of Criminal Appeal has also by its judgment on that appeal set aside the sentences of death imposed on the said offenders in respect of the offence of conspiracy to murder the late Prime Minister and substituted sentences of imprisonment for

1. Ceylon Daily News, 19 January 1962.

> life on the ground that the Suspension of Capital Punishment (Repeal) Act, No.25 of 1959, in so far as it was retrospective, did not relate to the offence of conspiracy to murder:
>
> And whereas it has now become necessary to declare the law according to the real intention of Parliament as aforesaid and to validate the sentences of death pronounced by the Supreme Court for the offence of conspiracy to murder in Case No.S.C.8/M.C.Colombo 23838A, and to make provision for the due execution of such sentences notwithstanding the judgment of the Court of Criminal Appeal.

An act of faulty draftsmanship had failed to give effect to the true intention of Parliament. But, as the Cabinet asserted:

> No legal technicality will be allowed by this Government to stand in the way of justice being meted out to the persons found guilty of the crime of assassinating the Prime Minister of the country.

It stressed that:

> It is the declared policy of the Government that the persons responsible for the assassination of the late Prime Minister shall suffer the extreme penalty. [1]

Accordingly, the bill sought to provide that:

1. The punishment prescribed for these offences "shall be deemed at all times to have been, and to be, death" in respect of offenders convicted after the date of the repeal of the suspending Act (i.e. 2 December 1959) "whether such offences were committed before or after that date".
2. The sentences of death pronounced by the Supreme Court on the three persons "shall be deemed at all times to have been, and to be, valid notwithstanding the judgment of the Court of Criminal Appeal which is hereby declared to have been, and to be, null and void to the extent that such judgment purports to substitute sentences of imprisonment for life in lieu of the sentences of death aforesaid".
3. Section 309 of the Criminal Procedure Code, which prescribed the mode of execution of sentence of death "shall notwithstanding that judgment or any other law apply to the execution of the sentences of death aforesaid".
4. No suit or proceeding shall lie against any person in connection with the implementation of its provisions in their application to Case No.S.C.8/M.C.Colombo 23838A.

---

1. Statement issued by the Cabinet, Ceylon Daily News, 25 January 1962.

5. No person or officer shall be liable to any civil or criminal proceedings for any act done for the purpose of giving effect to its provisions in their application to Case No.S.C.8/M.C. Colombo 23838A.
6. Its provisions shall have effect notwithstanding anything in any other law, and shall not be called in question in any court.

The government parliamentary group unanimously approved the bill "and complimented the Cabinet" for introducing it. In the course of the discussion, the members also suggested that the Government should introduce legislation to abolish appeals to the Privy Council.[1]

Public reaction was swift and predictable. There was almost universal revulsion. The entire Opposition was united in condemnation of it. Dudley Senanayake (UNP) described it as "the most vindictive, unconstitutional and undemocratic piece of legislation ever to be presented in a democratic country in the world".[2] Colvin R.de Silva (LSSP) called it "murder by statute".[3] The Communist Party urged that "in seeking to hang Buddharakkita and Jayawardene, the Government should not hang democracy in the process".[4] Local authorities throughout the country passed resolutions calling for the withdrawal of the bill. They were joined by trade unions and public interest bodies. The General Council of Advocates, with only three dissenting votes, resolved that the bill was "an outrage on justice"; H.V.Perera,Q.C., the doyen of the Bar and one of Ceylon's most respected lawyers, thought that it "debased the whole of society", while D.S.Jayawickrama,Q.C., another a-political leader of the Bar, described it as "judicially indefensible, wicked in design and inhuman in its intention".[5] Editorial comment in the national newspapers expressed the same sentiments. The Times of Ceylon pointed out that the bill "savours strongly of blind and unthinking vengeance, a sort of lynching by legislative act".[6] It reminded the Government that there would be no shame in its withdrawal: "The best of governments can and do make mistakes in

---

1. Ceylon Daily News, 19 January 1962.
2. Ibid, 22 January 1962.
3. Ceylon Observer, 21 January 1962.
4. Ceylon Daily News, 22 January 1962.
5. Times of Ceylon, 25 January 1962.
6. Ibid.

haste, and it is only wisdom to rectify a blunder at the earliest possible opportunity". It was only a matter of time before this national feeling began having an effect on Government MPs. On 23 January, the Parliamentary Secretary to the Ministry of Finance, George Rajapakse, wondered publicly whether "any man's life was safe today";[1] D.A.Rajapakse, another southern province MP, announced that he was unable to support the bill.[2] On 24 January, the Cabinet announced that since one of the accused had informed the Government of his intention to appeal against his conviction to the Privy Council, "the Government does not propose to have the bill debated upon at once".[3] In fact, the bill was never taken up for debate and had disappeared altogether from the order paper when Parliament reconvened after the next prorogation.

Restrictions on travel abroad

In August 1964, the Prime Minister, Mrs.Bandaranaike, clarified her Government's policy, which had been operative since July 1962, in regard to travel abroad.[4] Ceylonese wishing to travel were classified into: (1) those to whom exchange was released for travel and maintenance abroad, and (2) those whose travel expenses and costs of maintenance were met from funds provided by foreign governments, agencies or individuals.

A person in the former category, usually an official or a businessman (since exchange was not released for social or educational purposes) will be issued with a passport valid for a single journey and for travel only to that country for which exchange had been released and to the countries en route. If he was already in possession of a passport valid for travel to several countries, the validity of that passport will be appropriately modified. This had been done in the case of the President of the Senate when he left on a state visit to the USSR; all endorsements to other countries being deleted. The Prime Minister disclosed that foreign missions in Ceylon had been informed that the Ceylon Government would consider it "an unfriendly act" if holders of Ceylon passports were permitted, in the course of their travels

1. Ceylon Observer, 24 January 1962.
2. Ibid.
3. Ceylon Daily News, 25 January 1962.
4. Statement made by the Prime Minister in the Senate on 4 August 1964, Ceylon Today, Vol.XIII, No.8, pp. 9-12.

abroad, to enter their countries on temporary visas when their passports lacked the appropriate validation.

Any invitation to a person in the second category was required to be addressed to the Government. Any such invitation which named the individual concerned or stipulated that the selection should be made from any specific organisation in Ceylon, will not be entertained. The Prime Minister explained that if, for instance, a writers association abroad wished to invite a writer of repute from Ceylon to attend a conference, "surely the government of Ceylon is in a better position than a foreign agency to select a writer of repute who will bring credit to Ceylon in the country concerned". The rationale for these restrictions was simple:

> If these safeguards are not applied assiduously, we lay ourselves open to the possibility of the subversion of our citizens to serve foreign interests and of the weaning away of our citizens from their loyalty to their motherland. In a small country like our's, situated as we are, competing forces can wage and, in fact, are waging, a strong battle to capture the minds of our people. The device of the 'pre-paid ticket' is a powerful weapon, that can be used by foreign elements to win over the loyalties of our people. [1]

A veritable wall was constructed along the sandy beaches of Ceylon to protect the Ceylonese from the evils that lay beyond the waters of the Indian Ocean.[2] To maintain the integrity of this "wall", airline and shipping agencies were prohibited from issuing any travel tickets unless "clearance" had first been granted by the Ministry of Defence and External Affairs. This clearance usually took the form of an appropriate endorsement on the passport.

In October 1964, the general secretary of the United Nations Association of Ceylon received an invitation from its parent body, the Geneva-based World Federation of United Nations Associations, to attend a seminar in Kuala Lumpur. All expenses involved in his participation were being met by WFUNA. He applied to the Ministry for a certificate of clearance and was notified that the clearance required could not be granted. He then applied to the Supreme Court

---

1. Ibid, at p.10.
2. Douglas J probably contemplated this type of governmental action when he observed that if it is argued that travel may increase the likelihood of illegal events happening, "so does being alive". See Aptheker v. Secretary of State, 378 US 500.

for a writ of mandamus on the Permanent Secretary, claiming that as a free citizen he was entitled to leave his country and return without let or hindrance; the Permanent Secretary had, maliciously and for reasons best known to himself and which he had chosen not to disclose, refused to grant that clearance. Whether mandamus lay was a matter of some considerable doubt since "clearance" was unknown to the law and was an executive device which was being applied without legal authority therefor. But, upon ascertaining that this was indeed the position, T.S.Fernando J, who presided over the three-judge bench, expressed in such strong terms the Court's disapproval of the attitude of the executive and insisted that no restrictions other than those warranted by law should be placed on a citizen's freedom of movement, that Crown Counsel assured, after a brief adjournment, that the necessary clearance would be granted forthwith.[1]

A few weeks later, a lawyer member of the United National Party who had been nominated by his party to attend a legal conference in Instanbul, with all expenses involved being met by the host organisation, was refused clearance to leave the island. As soon as he invoked the writ jurisdiction of the Supreme Court, the executive caved in and granted the clearance. When Sri Skanda Rajah J insisted on knowing why this illegal practice was being continued, Crown Counsel announced that the Government had decided that in future there would be no legal bar to anyone leaving the country if he had a valid passport and a travel ticket. The Court, however, as an expression of its strong disapproval of the repetition of an executive excess, ordered the Permanent Secretary to pay the petitioner the costs of the application.[2]

In each instance, the Supreme Court had intervened to redress a wrong. But had the State insisted on a considered judgment, after full argument, it is unlikely that, in the absence of a proper legal enunciation of the freedom of movement, the Court would have been able to base an order on the informal regime of rights which it was seeking to observe and apply.

---

1. Aseerwatham v. Permanent Secretary to the Ministry of Defence and External Affairs, Journal of the ICJ, Vol.VI, p.319.

2. Gooneratne v. Permanent Secretary to the Ministry of Defence and External Affairs, ibid., p.320.

The Response of Political Parties to the Demand for a Bill of Rights

The demand for a bill of rights gathered momentum in the late 1960s. But apart from small civil rights interest groups, this agitation was largely confined to minority ethnic communities and was identified with the demand for greater recognition of minority rights. Ten years earlier, all the political parties had responded enthusiastically to Bandaranaike's proposal to incorporate a bill of rights in the Constitution. Now they approached the subject very warily. This was particularly evident when, in 1968, the United Nations Association invited representatives of the major political parties to express their views on the question whether fundamental rights should be incorporated in the Constitution.[1]

M.Sivasithamparam (Tamil Congress) and M.Tiruchelvam (Federal Party) were both agreed that section 29 of the Constitution was "absolutely inadequate". The latter, who was then a Minister in the Government, in a very emotional speech declared that the only protection for the minorities against the "despotism of the majority community" lay in the incorporation of fundamental rights in the Constitution. Justice Minister A.F.Wijemanne (United National Party), who spoke on behalf of the Prime Minister, pointed out that many, if not all, the fundamental rights were already in existence in the ordinary statute law; he wondered whether it would not be wiser to leave them there. He concluded, however, by observing that:

> In the circumstances of our country, where there exist racial, religious and linguistic minorities, it is the cherished desire of all lovers of freedom, justice and equality, that there should be a declaration of fundamental rights in the Constitution.

Presumably, his party was included in that category, although he did not say so specifically.

The Opposition representatives believed that the agitation for a bill of rights had developed upon a misconception, namely, that fundamental rights were synonymous with minority rights. Pieter Keuneman (Communist Party) questioned the relevance, in the Ceylonese context, of the Universal Declaration of Human Rights

---

1. The proceedings of this meeting were recorded on tape by the author, and these tapes constitute the source material for this section.

which was "not the acme of wisdom", but the result of hard bargaining; the right to work and the right to leisure were significant omissions, while the right to property was inconsistent with socialism. [1] Felix Dias Bandaranaike (Sri Lanka Freedom Party) believed that the "fundamental right of free elections at periodic intervals" was the "basic safeguard against tyranny"; it was the only right that needed to be enshrined in a constitution. Colvin R.de Silva (Lanka Sama Samaj Party) was deliberate and emphatic: he could not conceive of rights being enshrined in a constitution:

> Constitutions are made in terms of the stage of development at which any given society or country has arrived. In terms of that stage of development it looks upon things, and for any generation of people to imagine that it can so completely project itself into the infinity of the future so as to be able to decide in its own generation that it will constrain a future generation or generations for ever within the confines of its own postulates is to make the mistake of thinking that any human collectivity is the equivalent of the divinity. It is not.

According to him, one consequence of placing a statement of fundamental rights in a constitution and contending that "it must be eternally inviolate" is to say that "the only means of changing that statement will be successful revolution". The other consequence was equally objectionable:

> If you place a declaration as being fundamental, then you have to accept an authority outside the makers of laws with the task of deciding whether the law is in fact a law. Whether we have faith in the Supreme Court is not the issue. Do we want a legislature that is sovereign or do we not ? That is the true question. If you say that the validity of a law has to be determined by anybody outside the law-making body, then you are to that extent saying that your law-making body is not completely the law-making body.

In his view, it was "absolutely essential" that "this country at this stage of development" had a legislature that was sovereign; "it must be in a position no different from the Parliament of England".

Fundamental rights cannot be regarded as the postulates of a particular generation. The right to life, liberty or equality, the freedom of expression, assembly or association, does not

---

1. He made no reference, however, to ICCPR which does not include the right to property.

become less relevant as society continues to transform, whether for better or for worse. Dr.de Silva believed that the aim of all governments must be "to provide the general framework within which the individual personality can most completely flower". These rights surely are very necessary components in the constitution of that framework. Even the right to property, in the limited sense of encompassing food, clothing and shelter, the tools or implements of a trade or profession, and the fruits of one's labours, appear to be a no less material component.

Dr.de Silva's second objection was based on the assumption that a sovereign legislature, fashioned on Westminster, would thrive on Ceylon's soil. This was a questionable assumption, having regard to the fact that neither constitutional conventions nor a consensus between the government and the people or between opposing political parties existed in any real sense in Ceylon to temper the exercise of legislative power. As the presidential commission which investigated whether a bill of rights should be incorporated in the Constitution of Tanzania noted:

> The process of government in the United Kingdom provides a striking example of the force of a national ethic in controlling the exercise of political power. A government in Britain with a majority of one seat in Parliament could legislate to abolish elections, detain political opponents without trial, and establish a censorship of the press, radio and television. Indeed, most of these things were done by Parliament when the British people stood on the brink of disaster in the Second World War. They are not done in peacetime; not because there is anything in the law to prevent a government acting in this way but because they are unthinkable. In other words, there is a consensus between the people and their leaders about how the process of government should be carried on. It is on this that the traditional freedoms of the British people depend. [1]

In the absence of these informal restraints, express constitutional limitations would appear to be necessary.

Twenty years after the 1946 Constitution had come into force it was clear that time had run out in so far as the inclusion in it of a bill of rights was concerned. From the experience of India and that of other colonies which, from the mid-fifties, began graduating into statehood within the Commonwealth, it would appear

---

1. The United Republic of Tanzania: Report of the Presidential Commission on the Establishment of a Democratic One Party State (Dar Es Salaam: Govt. Printer, 1965), para. 104.

that Ceylon lost its best opportunity of having a genuine, enforceable bill of rights when in 1946 it received a constitution which did not contain such mechanism. There is no doubt that, on the one hand, had the minority communities so demanded or the Board of Ministers so provided; or on the other, had the Colonial Office so insisted or the Soulbury Commission so recommended, a constitution with an enforceable bill of rights would have been accepted by the State Council. That opportunity passed by, virtually by default. The next opportunity presented itself when in 1959 the Joint Select Committee of Parliament resolved unanimously, influenced no doubt by the Indian experience, to amend the Constitution to include an enforceable chapter on fundamental rights. Apart from the consensus which had been reached between political and interest groups on this subject in the euphoric atmosphere of a social revolution, Bandaranaike himself had an abiding commitment to the twin concepts of democracy and socialism, to the rule of law and social justice. But, as has already been noted, fortuitous circumstances were to arise to let this opportunity too pass by.

The 1972 Constitution

The manifesto of the United Front of the Sri Lanka Freedom Party. the Lanka Sama Samaj Party and the Communist Party stated, inter alia:

> We seek your mandate to permit the members of Parliament you elect to function simultaneously as a Constituent Assembly to draft, adopt and operate a new Constitution. This Constitution will declare Ceylon to be a free, sovereign and independent Republic pledged to realise the objectives of a socialist democracy; and it will also secure fundamental rights and freedoms to all citizens. [1]

At the general election held on 27 May 1970, a remarkably high poll of 85.2 per cent produced the following result:

TABLE 15

THE 1970 GENERAL ELECTION RESULT

Party	Seats won	Votes polled	Percentage polled
Sri Lanka Freedom Party[a]	91	1,812,849	36.6
Lanka Sama Samaj Party	19	433,224	8.7
United National Party	17	1,876,956	38.0
Federal Party	13	245.747	5.0
Communist Party	6	169,199	3.4
All-Ceylon Tamil Congress	3	115,567	2.3
Independents	2	225,559	4.6

Source: Ibid.

a. The SLFP, LSSP and CP campaigned together on the basis of a no-contest electoral agreement, under the name "United Front".

In terms of the agreement reached between the three parties, the United Front formed a government under Mrs.Bandaranaike and, with a parliamentary majority of more than three-quarters in the House of Representatives, pledged itself to implement the Common programme. On 14 June 1970, the Governor-General in his Speech from the Throne reminded members that:

> By their vote democratically cast the people have given you a clear mandate to function as a Constituent Assembly to draft, adopt and operate a new constitution which will

1. Joint Election Manifesto of the United Front, 1970 (Colombo: M.D.Gunasena & Co.Ltd, 1970).

> declare Ceylon to be a free, sovereign and independent Republic pledged to realise the objectives of a socialist democracy including the securing of the fundamental rights and freedoms of all citizens. In terms of this mandate, My Government calls upon you to draft and adopt a new constitution which will become the fundamental law of this country, superseding both the existing Constitution in the drafting of which the people of Sri Lanka had no share and also other laws that may conflict with the new Constitution you will adopt. [1]

On 24 June 1970, the Address of Thanks was passed in the House of Representatives without a division.

The Constituent Assembly

On 11 July 1970, the Prime Minister addressed a letter to each of the 157 members of the House of Representatives[2] inviting them to attend a meeting at the Navarangahala,[3] Royal Junior School, Colombo on 19 July to consider and adopt the following resolution:

> We the Members of the House of Representatives in pursuance of the mandate given by the People of Sri Lanka at the General Election held on the 27th day of May 1970 do hereby resolve to constitute declare and proclaim ourselves the Constituent Assembly of the People of Sri Lanka for the purpose of adopting enacting and establishing a Constitution for Sri Lanka which will declare Sri Lanka to be a free sovereign and independent Republic pledged to realise the objectives of a socialist democracy including the fundamental rights and freedoms of all citizens and which will become the fundamental law of Sri Lanka deriving its authority from the People of Sri Lanka and not from the power and and authority assumed and exercised by the British Crown and the Parliament of the United Kingdom in the grant of the present Constitution of Ceylon nor from the said Constitution and do accordingly constitute declare and proclaim ourselves the Constituent Assembly of the People of Sri Lanka and being so constituted appoint the 29th day of July at 10.00 a.m. as the

---

1. Ceylon Today, Vol.XVIII, Nos.1-6, p.22.
2. The 157 members included the six nominated members. This appeared to conflict with the manifesto which sought a mandate to permit the members "you elect" to function as a constituent assembly. Their inclusion, however, may be justified on the ground that they represented important interests which were otherwise "not represented" or were "inadequately represented" in the House and, therefore, in the constituent assembly. These included three minority castes among the Sinhalese and a "depressed community" among the Tamils, in addition to the Indian Tamil community.
3. "The new theatre".

> date and time when the Constituent Assembly shall next meet in the chamber of the House of Representatives for carrying out the said mandate under the Presidentship of Wanniarachige Don Stanley Tillekeratne M.P. or in his absence of Ibrahim Adham Abdul Cader M.P. and to consider business introduced by or on behalf of the Minister of Constitutional Affairs. [1]

After some hesitation, both the United National Party and the Federal Party decided to respond to the Prime Ministers's invitation. The latter were perhaps influenced to do so by an appeal which the Prime Minister broadcast on 15 July in which she promised that the new constitution would:

> . . . serve to build a nation ever more strongly consciousness of its oneness amidst the diversity imposed on it by history. Though there are among us several races such as Sinhalese, Tamils, Moors, Burghers, Malays and others; and several religious groups such as the Buddhists, Hindus, Christians and Muslims, we are one nation. [2]

Indeed, if the Government was so inclined, the opportunity was about to present itself to resolve finally the grievances of the Tamil minority community. The UNP, on the other hand, was concerned that the new constitution would be seeking to commit itself to the objectives of a socialist democracy, which they equated with increasing state control and governmental interference in the private sector. They also questioned the validity of the mandate which, they argued, was from less than 50 per cent of the electorate.[3] Finally, however, the Leader of the Opposition, J.R.Jayewardene,[4] having stated the objections, expressed himself thus in the discussion on the resolution:

> If, however, the victors and the vanquished - the vanquished on this side - in a Legislature powerless to replace the source of its own authority agree to make common cause in enacting a new basic law by

---

1. Birth of a Republic (Colombo, Dept. of Govt.Printing, 1972), p.7.
2. Ceylon Daily News, 16 July 1970.
3. The United Front polled 2,415,302 out of a total of 4,949,616 votes; i.e. 48.8 per cent.
4. The leader of the UNP was Dudley Senanayake, After the defeat of his Government, he declined to serve as Leader of the Opposition and agreed to his deputy performing that task. It soon became apparent that there was a sharp divergence of opinion between Senanayake and Jayewardene on many matters, including the question of participating in the constituent assembly. Before the work of

> means of a 'legal revolution', there is no law that says you cannot do so. The law we create together if accepted by the people will become the full expression of the hopes, desires and aspirations of the present generation. [1]

On 21 July 1970, the resolution was passed unanimously.[2]

The unanimity displayed at the Navarangahala and the sentiments expressed there by the representatives of all the political parties were most heartening as the business of constitution making got under way. But the indications as far as the preparation of an effective bill of rights was concerned were somewhat less encouraging. What was it that the Constituent Assembly was committed to achieve ? The manifesto promised a constitution which will "secure fundamental rights and freedoms to all citizens". The Speech from the Throne anticipated a constitution which will declare Ceylon to be a republic "pledged to realise the objectives of a socialist democracy including the securing of the fundamental rights and freedoms of all citizens". The resolution establishing the Constituent Assembly aspired to a republic "pledged to realise the objectives of a socialist democracy including the fundamental rights and freedoms of all citizens". The mandate was unmistakably clear: to secure fundamental rights and freedoms to all citizens. The mission was becoming obscured, and appeared to be imperceptibly shrinking in both scope and content.

That some doubt should exist as to whether a bill of rights designed to secure the fundamental rights and freedoms of all citizens would in fact be produced was inevitable, although few gave expression to it at the time. In the first place, the Constituent Assembly assumed the authority not only to draft and adopt a new constitution, but also to operate it. In other words, the draftsmen were also to be the beneficiaries. It was not intended that the constitution drafted by the Constituent Assembly should be submitted to the people for approval; nor was it intended that once

---

of the constituent assembly was completed, Senanayake attempted to expel Jayewardene from the UNP; the latter reacted by obtaining an injunction from the District Court. In April 1973, on Senanayake's death, Jayewardene was elected leader of the party.

1. Proceedings of a meeting of Members of the House of Representatives on 19 July 1970 (Colombo: Dept. of Govt.Printing, 1970), col.57.

2. For a detailed description of the procedure adopted by the constituent assembly, see Cooray, Constitutional Law, ch. 3.

the constitution had been drafted and adopted by the Constituent Assembly, it would be brought into operation following a general election held in terms of that constitution. In either of these eventualities, the people would have had an opportunity of pronouncing judgment upon the work of their delegates; and the delegates, in turn, would hardly have failed to consider that prospect. A bill of rights is necessarily a limitation on both legislative and executive power. The members of the Constituent Assembly in whom would be vested both legislative and executive power under the constitution which they were drafting, had to determine what limitations ought to be placed on the exercise by them of that power. It was as if at Runnymede, almost to the day 755 years earlier, the Barons had invited King John to draft the Magna Carta.[1] Secondly, the resolution stated explicitly that the Constituent Assembly would "consider business introduced by or on behalf of the Minister of Constitutional Affairs". In other words, the Government would take the initiative at all times in guiding the Assembly in its deliberations, and it would do so through a Minister specially appointed for that purpose. The constitutional proposals would be government proposals approved by the Cabinet and therefore in accord with its own political philosophy.

A 17-member Steering and Subjects Committee, consisting of representatives of all the political groups in the Assembly but with an overwhelming government majority, was established on 12 August 1970. Its function at that stage was to prepare resolutions embodying the basic principles according to which the constitution was to be drafted and to cause such resolutions to be placed on the order book in the name of the Minister. Its personnel were:

Sirimavo Bandaranaike (SLFP): Chairman
M.Senanayake (SLFP)
T.B.Illangaratne (SLFP)
B.Mahmud (SLFP)
F.R.Dias Bandaranaike (SLFP)
H.Kobbekaduwa (SLFP)
T.B.Subasinghe (SLFP)
G.Rajapakse (SLFP)
T.B.Tennekoon (SLFP)

---

1. See S.Nadesan, Some Comments on the Constituent Assembly and the Draft Basic Resolutions (Colombo: Nadaraja Press, 1971).

N.M.Perera (LSSP)
Colvin R.de Silva (LSSP)
P.G.B.Keuneman (CP)
J.R.Jayewardene (UNP)
Dudley Senanayake (UNP)
S.J.V.Chelvanayakam, Q.C. (FP)
C.Arulampalam (TC)
C.X.Martyn (Ind.).

This committee was most unrepresentative of the people on whose behalf it was seeking to act. It was a predominantly Sinhalese-Buddhist-Goyigama body (ten of its members belonging to this dominant group), with more Kandyans than Low-country Sinhalese. Only two caste groups among the Sinhalese were represented: Goyigama and Salagama; there was no Catholic member at all. The Indian Tamil community was also not represented although A.Aziz, leader of the Ceylon Workers Congress, was a nominated government MP representing their interests in Parliament. Twelve of its members were Ministers of the Cabinet; the Tamil Congress and Independent representatives were also members of the government parliamentary group. Its composition, therefore, assured quick and easy approval for the basic resolutions placed before it by the Minister of Constitutional Affairs.

The draft basic resolutions were initially prepared by a Drafting Committee of thirteen (including four non-lawyers) which functioned in the Ministry of Constitutional Affairs under the chairmanship of the Minister.[1] These were then independently vetted by a group of senior SLFP Ministers and by the leadership of the LSSP and the CP. They were channelled through a 12-member Ministerial Sub-Committee to the Cabinet[2] for formal approval before being tabled at a meeting of the Steering and Subjects Committee.[3] There could have been no doubt that, as the Minister

---

1. The lawyers in the drafting committee were drawn from both the official and unofficial Bar, and included lawyers serving the Government such as the Director of Cabinet Affairs and the Permanent Secretaries to the Ministries of Information and Justice. The non-lawyers included a professor of political science and a linguist.

2. This sub-committee consisted of the 12 Ministers who were members of the steering and subjects committee.

3. According to M.S.Alif, Secretary to the Cabinet, there were in all: 46 meetings of the constituent assembly; 21 meetings of the steering and subjects committee; 114 meetings of eleven sub-committees of the assembly at which nearly 3000 memoranda from the public were considered; 18 meetings of the cabinet; 22 meetings of the cabinet committee on the constitution; and 278 meetings of the drafting committee: Birth of a Republic, p.36.

himself claimed, the basic resolutions were "completely in accord with the United Front and Government policy".[1] It could not have been otherwise since the Constituent Assembly was committed to drafting a constitution which would declare Sri Lanka to be a republic "pledged to realise the objectives of a socialist democracy". To accommodate this ideological objective, the Government believed that the scope of a bill of rights would necessarily have to be circumscribed. In a letter to the Minister of Constitutional Affairs, the Prime Minister expressed herself thus:

> I am myself of the view that there should be no impediment in the new Constitution to the realisation of socialistic objectives. If it is anticipated that the inclusion of any particular fundamental rights will stand in the way of implementing socialistic policies, decisions should be taken in regard to each one of such fundamental rights; that is, as to whether a particular right should find a place in the Constitution, and if so, whether it should be circumscribed in any way. [2]

She appeared to be echoing an objection expressed in Tanzania by the presidential commission on the establishment of a democratic one-party state to the inclusion of a bill of rights in the constitution of that country:

> Tanganyika has dynamic plans for economic development. These cannot be implemented without revolutionary changes in the social structure. In considering a Bill of rights in this context we have had in mind the bitter conflict which arose in the United States between the President and the Supreme Court as a result of the radical measures enacted by the Roosevelt Administration to deal with the economic depression of the 1930s. Decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate. [3]

---

1. Ceylon Daily News, 18 January 1971. In fact, a three-party committee for constitutional affairs under the chairmanship of Dr. Colvin R.de Silva had already held 32 meetings before the United Front manifesto was issued in 1970. This committee had discussed several alternative proposals for a future constitution: Birth of a Republic, p.36.

2. Letter dated 9 December 1970 (unpublished). The full text of this letter is reproduced in Appendix 1.

3. Op.cit., para. 103.

Whether or not a particular right should be circumscribed or excluded in order that the realisation of socialist objectives could proceed unimpeded would depend very much on one's conception of a socialist democracy. S.W.R.D.Bandaranaike, who founded the Sri Lanka Freedom Party and whose policies the United Front Government professed to follow, had no difficulty in distinguishing a socialist democracy. Addressing the Convocation of the University of Ceylon on 8 November 1957, he said:

> There are experiments going on all over the world, experiments in government: here a fascist state; there a communist state; here a semi-fascist state; there a semi-communist state; and various varieties of democracies ranging from capitalist democracies such as that of the United States to liberal democracies such as that of England to socialist democracies such as those of the countries of northern Europe. [1]

His concept of socialism, therefore, was the concept of socialism as understood in the welfare states of northern Europe and not the Marxist concept of socialism adopted in eastern Europe. Addressing the first annual conference of his party in December 1952, he said:

> As the term 'democracy' is very often loosely used, it may be as well for us to have a clear idea of what it really means. It consists of an agglomeration of freedoms - not only the individual freedoms in the classic definitions, e.g. freedom of speech, freedom of expression and public meeting, freedom from arbitrary arrest, freedom of the press, and freedom of the vote, but also certain collective freedoms recently enunciated, e.g. freedom from fear, freedom from ignorance, freedom from disease, freedom from want; in a word, freedom to be really free. That is the true spirit of democracy and this is the democracy for which our party stands. [2]

Addressing the Indian Council of World Affairs on 4 December 1957, he clarified his thoughts further:

> Coming to the modern conception of democracy (democracy is defined in various ways today), even the totalitarian regimes of the communist countries claim that their's is the true democracy; they claim that democracy, as we know it, is not true democracy, that their's is the true democracy because the people really rule. But if I may say so, our conception of democracy is somewhat different.

---

1. Bandaranaike, Speeches, p.333.
2. Ibid., p.154.
3. Ibid., p.407.

> Perhaps the most comprehensive description of modern democracy in effect would be that it consists of the combination or the agglomeration of a number of individual liberties and collective liberties. [1]

When on 5 March 1959, shortly before he was assassinated, he actively sponsored a draft bill of rights in the Joint Select Committee of Parliament, he did not believe that that would be an impediment to the realisation of the objectives of a socialist democracy to which he, too, was committed; nor did he consider it necessary to exclude or circumscribe a particular fundamental right in any way.[2]

Why then did Mrs.Bandaranaike concede that a particular right may be excluded or circumscribed ? Her letter when examined in its entirety tends to show that already the Prime Minister and her Minister of Constitutional Affairs were on divergent paths, and her concession on this point appears to have been in the nature of a sop in exchange for concessions from him on more basic and crucial political issues. The answer, therefore, lies in the dominant personality of the doctrinaire politician she chose to be her minister in charge of constitutional affairs. This was the third reason for doubting whether an enforceable bill of rights would eventually find its way into the new constitution. When the Cabinet was appointed immediately after the general election, no ministry of constitutional affairs was created, nor was that subject assigned to any other ministry. The 1946 Constitution required the Minister of Justice, to whom logically the subject ought to have been assigned, to sit in the Senate. Not being a member of the House of Representatives, he would have had no seat in the Constituent Assembly. In the Cabinet there were several lawyers, at least three of whom had been in active practice until they accepted ministerial portfolios: George Rajapakse, the SLFP Minister of Fisheries; Felix R.Dias Bandaranaike, the SLFP Minister of Public Administration, Local Government and Home Affairs; and Colvin R.de Silva, the LSSP Minister of Plantation Industries. It was the latter who, sometime in early June 1970,

---

1. Ibid., p.407.
2. For a fuller discussion of this aspect of his political philosophy, see Nadesan, Comments, ch.2.

was sworn-in as Minister of Constitutional Affairs. Colvin R.de Silva, who held a doctoral degree in history from the University of London, was one of the country's leading criminal lawyers. He was also an avowed Trotskyite, having pioneered the left movement in Ceylon in the depression-ridden 'thirties. And he did not believe in an entrenched bill of rights.[1] As he himself told the Constituent Assembly:

> Those who asked for and received a section on fundamental rights and freedoms in the coming constitution have wanted it because they feel that some special protection is needed in certain matters. Now, I may hold the view that such protection is not necessary. I may also hold the view that to endeavour to give such special protection can be an obstruction in the way of the progress of . . . an under-developed country. But at the same time, in the light of the fact that a constitution when it is constructed should receive the widest acceptance, it seemed much wiser that one should allow those worries and anxieties that are still in the country to prevail, but not to prevail absolutely.[2]

That the constitution, if it was to receive the widest acceptance, should contain some statement of fundamental rights, is apparent from the Minister's response to Felix Dias Bandaranaike who wondered whether it was necessary to spell out the fundamental rights in detail in the basic resolutions:

> Increasing public interest on this subject, apparent from memoranda received from various sections of the community and from newspaper reports of public utterances, makes me think that it would hardly be possible ultimately to resist the demand for fundamental rights. Like the language question, this question too is charged with emotion: and here too it would, I think, be wise to remove suspicion at the earliest possible opportunity by spelling out in the basic resolutions the content of the proposed fundamental rights. [3]

Finally, it became clear that the passage of government business in the Constituent Assembly would be ensured by applying the party whip. It is interesting to note that during the entire discussion of the basic resolutions relating to fundamental rights

---

1. Supra, p.75.
2. Constituent Assembly Debates, 4 July 1971, col.2891.
3. Letters dated 4 November and 16 November, 1970. This correspondence was circularised to the members of the cabinet sub-committee on the constitution.

and allied matters, the only speaker on behalf of the government was the Minister of Constitutional Affairs. An opposition member who alleged that the party whip had been applied on a government backbencher who had wanted to move certain amendments was not contradicted either by the member concerned or by the party leadership.[1] Therefore, the members of the government parliamentary group functioned in the Constituent Assembly as party members shackled by the party manifesto. This was in sharp contrast to the attitude adopted by Jawaharlal Nehru, former Prime Minister of India who,in inviting members to participate in the Indian Constituent Assembly, said:

> I should like to make it clear, on behalf of my colleagues and myself, that we do not look upon the Constituent Assembly as an arena for conflict or for the forcible imposition of one viewpoint over another. That would not be the way to build up a contented and united India. We seek agreed and integrated solutions with the largest measure of goodwill behind them. We shall go to the Constituent Assembly with the fixed determination of finding a common basis for agreement on all controversial issues. And so, in spite of all that has happened and the hard words that have been said, we have kept the path of co-operation open and we invite even those who differ from us to enter the Constituent Assembly as equals and partners with us with no binding commitments. It may well be that when we meet and face common tasks, our present difficulties will fade away. [2]

A suggestion that when the Constituent assembly met, the members should not sit in their usual seats, but that they should sit in alphabetical order, so that by their sitting together the necessary psychological climate may be created for compromise and rapport, was not accepted.[3] Instead, they sat facing each other and between them lay an unbridgeable gap which was particularly evident when the highly charged and emotional issue of language rights was taken up for discussion.

On 17 January 1971, 38 draft basic resolutions submitted by the Minister of Constitutional affairs to the Steering and Subjects Committee were published. Basic Resolution 5 dealt with fundamental rights and freedoms. In February 1971, these

---

1. Gamini Dissanayake (UNP) made this reference to certain amendments which were sought to be introduced by Prins Gunesekera (SLFP): Constituent Assembly Debates, 10 June 1971, col.1298.
2. Quoted by Nadesan, Comments, p.19.
3. Ibid., p.7.

resolutions were unanimously adopted by the Steering and Subjects Committee, and on 14 March 1971, the Constituent assembly began its discussion of them. After a two-day debate, Basic Resolution 5 was adopted in the form in which it had been proposed by the Minister. Amendments which were moved by the United National Party and by the Federal Party were rejected. On 10 July 1971, the Constituent Assembly adjourned in order that a draft constitution in accordance with the basic resolutions might be prepared and placed before the Assembly. A draft constitution was presented by the Minister to the Steering and Subjects Committee on 24 December 1971, and to the Constituent Assembly on 29 December 1971. It was published in the Ceylon Government Gazette on that day as a government notification. On 3 January 1972, the Assembly met and adopted the following resolution:

> This Assembly is of the view that the Draft Constitution prepared by the Steering and Subjects Committee which was presented on 29.12.71 is in accordance with the basic principles adopted by the Assembly.[1]

The Assembly then divided itself into eleven committees for the purpose of examining the draft constitution in greater detail. The public were assured that any proposals for amendment would be considered by the appropriate committee provided that they were in conformity with the basic principles adopted in the form of basic resolutions by the Assembly. This meant that only questions of form and detail and not of principle would be considered at this stage. The committee which examined the chapter on fundamental rights perused a large number of memoranda from the public and heard oral representations from individuals and organisations at sixteen meetings which it held.[2] However, in its report to the Assembly, it only recommended that the marginal title be amended and that the Sinhala version of that chapter be further examined by a special committee of experts "with a view to imparting greater clarity and elegance in respect of language".[3] The reports

---

1. Constituent Assembly Debates, 3 January 1972.
2. This committee was chaired by B.Mahmud, Minister of Education, who was a non-lawyer. Of its 14 members, only two were lawyers. There were no members of the opposition: Reports of the Committees of the Constituent Assembly Appointed to Consider the Draft Constitution (Colombo: Dept. of Govt. Printing, 1972), p.90.
3. Ibid., p.93.

of the committees and a draft revised constitution were placed before the Steering and Subjects Committee on 4 May 1972, and before the Assembly on 8 May 1972. On 22 May 1972, the Constituent Assembly adopted the draft constitution by 119 votes to 16, and adjourned to the Navarangahala where, at the auspicious time of 12.43 a.m., the President of the Assembly certified the adoption and enactment of the new Constitution by the Constituent Assembly.

The Protected Rights

The major portion of the fundamental rights which were sought to be protected by the 1972 Constitution were contained in section 18(1) which read as follows:

In the Republic of Sri Lanka -

(a) all persons are equal before the law and are entitled to equal protection of the law;

(b) no person shall be deprived of life, liberty or security of person except in accordance with the law;

(c) no citizen shall be arrested, held in custody, imprisoned or detained except in accordance with the law;

(d) every citizen shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching;

(e) every citizen has the right by himself or in association with others, to enjoy and promote his own culture;

(f) all citizens have the right to freedom of peaceful assembly and of association;

(g) every citizen shall have the right to freedom of speech and expression, including publication;

(h) no citizen otherwise qualified for appointment in the central government, local government, public corporation services and the like, shall be discriminated against in respect of any such appointment on the ground of race, religion, caste or sex:

Provided that in the interests of such services, specified posts or classes of posts may be reserved for members of either sex;

(i) every citizen shall have the right to freedom of movement and of choosing his residence within Sri Lanka.

The rights relating to politics and democracy were sought to be protected by the inclusion of the following principles:

1. The National State Assembly to consist of elected representatives of the people (section 29)
2. Every Assembly, unless sooner dissolved, to continue for a period of six years and no longer, and the expiry of the period of six years to operate as a dissolution (section 40(1))
3. The Assembly to be summoned to meet at least once in every year (section 41(1))
4. The Assembly not to be prorogued for any period longer than four months (section 41(2))
5. The election of members of the Assembly to be held within a period of four months of a dissolution (section 41(7))
6. The Assembly not to abdicate, delegate or in any manner alienate its legislative power (section 45(1))
7. Every citizen of the age of 18 years and over, unless disqualified in terms of the Constitution, to be qualified to be an elector (section 66)
8. Every person who is qualified to be an elector to be qualified to be elected as a member of the Assembly unless disqualified in terms of the Constitution (section 69)
9. The election of members to the Assembly to be free and by secret ballot (section 72).

The right to an independent and impartial tribunal was sought to be protected in the following principles:

1. Judges of the Court of Appeal and of the Supreme Court to be appointed by the President (section 122(1))
2. Such judges to hold office during good behaviour and not be removable except by the President upon an address of the National State Assembly (section 122(2))
3. The term of office of a judge of the Court of Appeal to be as provided by the Court of Appeal Act, and the age of retirement of a judge of the Supreme Court to be 63 years (section 122(3))
4. The salaries of such judges to be determined by the Assembly and charged on the Consolidated Fund (section 122(4))
5. The salary payable to, and the age of retirement of, such judge not to be reduced during his term of office (section 122(5))

6. Every person who, without legal authority therefor, interferes or attempts to interfere with the exercise or performance of the judicial powers or functions of any judge to be guilty of an offence (section 131)
7. Every person who immediately prior to the commencement of the Constitution held judicial office to continue to hold such office under the same terms and conditions (section 132).

The protection accorded to these rights and principles by the Constitution was that their amendment or repeal required a special majority of two-third of the whole number of members of the National State Assembly voting in favour.[1] During a state of public emergency, regulations made by the President in the interests of public security could not derogate from any of these provisions.[2]

The Constituent Assembly undertook the task of preparing a bill of rights at a time when substantial progress in defining standards for the protection of human rights had been made elsewhere. Apart from the Universal Declaration of Human Rights, which the Government of Ceylon had acknowledged at the International Conference on Human Rights at Teheran in 1968 as constituting "an obligation for members of the international community",[3] work had been completed on several other international and regional standard-setting instruments, including the two Covenants. The European Convention on Human Rights had been in force for nearly twenty years and had already been supplemented by five protocols. In Central and South America, the American Declaration of the Rights and Duties of Man of 1948 had been articulated in a more justiciable form in the American Convention on Human Rights. In the Constitutions of several Commonwealth countries from the Caribbean Sea to the Pacific Ocean, efforts had already been made to secure fundamental rights.[4] In other words, there was then in existence a body of law relating to human rights which had almost universally been accepted by the international community which Sri Lanka was seeking to enter as a free, sovereign and independent Republic.

---

1. S.55(5).
2. S.45(4).
3. "The Proclamation of Teheran, 1968", Human Rights - A Compilation of International Instruments of the United Nations (New York: United Nations, 1973).
4. For example, the Constitutions of Tonga (1875), India (1949), Nigeria (1960), Cyprus (1960), Jamaica (1962), Zambia (1964), Malta (1964), Barbados (1966), Guyana (1966), Botswana (1966), Lesotho

At first glance it is apparent that the 1972 Constitution did not contain a comprehensive statement of rights. Nor did each right, when looked at separately, appear to be comprehensively defined. Indeed, only the right to freedom of thought, conscience and religion appeared to possess all the attributes of that right. It existed, of course, alongside a directive to the Republic to "give to Buddhism the foremost place" and to "protect and foster Buddhism while assuring to all religions the rights granted by section 18(1)(d)". Short of declaring Buddhism to be the State Religion, such a provision was inevitable when considered in the context of over four hundred years of missionary activity in the country. As the Prime Minister explained to her Marxist Minister of Constitutional Affairs:

> I have glanced through a summary of representations received by your ministry from the public. I find from these and other sources that there appears to be a considerable demand in the country for Buddhism as a state religion, and for the protection of its institutions and traditional places of worship. Some provision will have to be made in the new constitution regarding these matters without, at the same time, derogating from the freedom of worship that should be guaranteed to all other religions. [1]

It is now proposed to examine and contrast the rights protected in the Constitution against the internationally accepted standards.

The Inadequately Protected Rights

The right to life is an "inherent" right which "shall be protected by law", and no one may be "arbitrarily deprived of his life". The death penalty is recognised as an exception if it has not already been abolished; but it may be imposed only by a "final judgment" of a "competent court" for the "most serious crimes" in accordance with a non-retroactive law. Its imposition on persons below eighteen years of age (or over seventy, under the ACHR) and its execution on pregnant women are both prohibited. A person sentenced to death has the right "to seek pardon or commutation", and amnesty, pardon or commutation "may be granted in all cases". [2] ACHR adds a further element by prohibiting capital punishment for "political offences or related common crimes", and seeks to

---

(1966), Mauritius (1968), Uganda (1967), Nauru (1968), Swaziland (1968), Kenya (1969), Fiji (1970) and The Gambia (1970).

1. Op.cit.
2. ICCPR, Art.6.

encourage the progressive reduction of the death penalty by prohibiting its extension to new crimes as well as its re-establishment once it has been abolished.[1] Section 18(1)(b), however, provided merely that no person shall be deprived of life except in accordance with law. In other words, the legislature was not limited in any way from extending the death penalty, even retroactively, to new offences; nor indeed, from attempting to enact a law similar to the abortive Death Penalty (Special Provisions) Bill of 1962.[2]

Liberty is a concept which is capable of an expansive interpretation or a narrow definition. The United States Supreme Court considered it to be a "broad and majestic term".[3] The Indian Supreme Court has regarded it as one of the widest amplitude, including within its ambit the right to travel abroad.[4] But the expression "liberty and security of person" in ECHR has been narrowly defined; the institutions of Strasbourg being of the view that "liberty" contemplated the physical liberty of the person, while "security" meant only freedom from arbitrary arrest and detention.[5] Since no White Paper was issued in explanation of the constitutional proposals, and the Minister himself did not elucidate the statement of rights which he introduced in the Constituent Assembly, it remained a matter of conjecture as to what was meant or intended by section 18(1)(b) when it provided that no person shall be deprived of liberty or security of person except in accordance with the law. No assistance was forthcoming from the fact that the next clause, section 18(1)(c), provided that "no citizen shall be arrested, held in custody, imprisoned or detained except in accordance with the law"; a meaning usually ascribed to the term "security of person" which was already provided for. Did "liberty" encompass a wide variety of interests not otherwise provided for such as the right to a fair trial, liberty

---

1. ACHR, Art.4.
2. Supra, p.68.
3. Board of Regents v. Roth, 408 US 564.
4. Maneka Gandhi v. Union of India (1978) S.C.R. 312.
5. Arrowsmith v. United Kingdom (7050/75), Report: DR 19,5; Guzzardi v. Italy (7367/76), Judgment: 6 November 1980; X v. United Kingdom (6998/75), Judgment: 5 November 1981.

to pursue any livelihood or lawful vocation, freedom of personal choice in matters of marriage and family life, the right to privacy, the right to travel abroad and the liberty of parents to direct the upbringing and education of children under their control; or did it have a much narrower content ? Whatever might have been intended, neither of the clauses guaranteed specifically even the attributes which had been assigned to the concept in the international instruments. Articles 9, 10 and 11 of ICCPR identifies the rights of persons whose liberty has been infringed by the State. Article 5 of ECHR specifies exhaustively what the grounds of deprivation of liberty may be, and thereby effectively forbids arrest or detention on any other grounds, even if established by law. Provisions such as these give substance and meaning to otherwise airy concepts. When entrenched in a constitution, they offer protection to the citizen against social and political vicissititudes. They were, unfortunately, lacking in the 1972 statement of fundamental rights. Instead, the National State Assembly was vested with a plenitude of power to legislate at will on matters affecting the liberty of the individual without providing any indication as to where the perimeter of state authority lay.

The freedom of movement falls into six distinct categories: (1) freedom to choose a residence within the territory of a state, (2) freedom to move about within the borders of a state, (3) freedom to leave a state, (4) freedom to enter a state, (5) freedom from expulsion from a state, and (6) freedom from exile.[1] The Constitution protected only the first two categories, omitting altogether the freedom to leave the country. The latter freedom existed even in the Hellenic age,[2] was recognised in 1215 in the Magna Carta, had been claimed as a part of the Indian tradition [3] and of the American heritage,[4] and has been described as the freedom which

---

1. ICCPR, Arts. 12, 13; ECHR P4, Arts. 2, 3, 4; ACHR, Art.22.
2. In Maneka Gandhi v. Union of India, supra, Krishna Iyer J noted that it is recorded that Socrates, in his dialogue with Crito, spoke thus: "We further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he please and take his goods with him. None of our laws will forbid him, or interfere with him. Anyone who does not like us and the city, and who wants to emigrate to a colony or to any other city may go where he likes, retaining his property". (at para.99).
3. Ibid., per Bhagwati J.
4. Kent v. Dulles, 357 US 116, per Douglas J.

makes all other rights meaningful.[1] Even in Ceylon, four years previously, T.S.Fernando J had asserted that:

> Speaking for myself, I think it appropriate to add that the right to freedom of movement is an important right of a citizen, and our courts may not be found unwilling on a proper occasion and in appropriate proceedings to consider whether executive discretion can be equated to executive whim or caprice.[2]

The freedom of expression extends beyond the liberty to express one's own opinions, and includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".[3] It is a two-way flow, both outbound and inbound. Section 18(1)(g), however, protected only the "right to freedom of speech and expression, including publication"; the right to seek and receive information and ideas was not expressly recognised. In its absence, it was possible to argue that what was contemplated was a one-way flow of material. This argument would have gained strength from the fact that in all the international instruments it has been considered necessary to state explicitly that this right includes the freedom to seek and receive information and ideas.

Section 18(1)(f) stated that all citizens had the right to peaceful assembly and of association, but made no reference to the right to form and join a trade union. Although the former is the overall concept, with the latter as an element in that concept rather than a separate distinct right,[4] the omission in that section of a specific reference to "the right to form and join trade unions for the protection of his interests" could well have had a debilitating effect, if not on the overall concept, at least on the nature and scope of trade union freedom.

Equality before the law, equal protection of the law, and non-discrimination are three related concepts. Section 18(1)(a) contained the first two concepts. But section 18(1)(h) which sought to protect citizens from discrimination in the exercise by them of their rights and freedoms, did so only in respect of one single right, namely, the right of access, on general terms of

---

1. Ibid.
2. In Re Ratnagopal (1968) 70 N.L.R. 409.
3. ICCPR, Art.19; ECHR, Art.10; ACHR, Art.13.
4. Young, James and Webster v. United Kingdom (7601/76,7806/77), Report: 3 EHRR 20.

equality, to the public service. Furthermore, it proscribed discrimination only on the grounds of "race, religion, caste or sex", leaving out the sensitive and no less relevant classifications in Sri Lankan society of "language", "political or other opinion", "national or social origin", and "birth or other status", all of which were grounds on which discrimination was prohibited in the international instruments.[1] Similarly, section 18(1)(e) which presumably sought to give effect to Article 27 of ICCPR relating to the rights of ethnic, religious and linguistic minorities, recognised the right of a citizen only "to enjoy and promote his own culture", and specifically omitted his right, in community with the other members of his group, to use his own language. These provisions would have contributed very little to reassure the minorities of equal treatment in the new Republic.

History of language legislation

The right of a minority community "to use their own language" is a fundamental right. Before examining the provisions in the 1972 Constitution relating to language, it would be useful to examine briefly the history of language legislation in Ceylon since Independence. The Senanayake Governments of 1948 and 1952 were committed to the progressive replacement of English with Swabasha, i.e. Sinhala and Tamil, but took no tangible action to give effect to this commitment. The only practical step was the appointment in 1951 of an Official Languages Commission for the purpose of determining the procedure to be followed in adopting Sinhala and Tamil as official languages. This apparent apathy on the part of the Government soon gave rise to a suspicion that the English-educated Sinhalese, who held the positions of power, were quite content to let the status quo remain. The movement for Swabasha received an impetus with the resignation of S.W.R.D. Bandaranaike from the Cabinet in July 1951. The immediate cause for his resignation had been a resolution of the Sinhala Maha Sabha, which he then led, charging the Government with procrastination and delay on the language question. In September 1951, the Sri Lanka Freedom Party which he founded announced that:

> It is most essential that Sinhalese and Tamil be adopted as official languages immediately so that the people of

---

1. ICCPR, Arts.2(1), 26; ECHR, Art.14; ACHR, Art.1.

> this country may cease to be aliens in their own land; so that an end may be put to the inequity of condemning those educated in Sinhalese and Tamil to occupy the lowliest walks of life.[1]

The Swabasha movement in its first phase was clearly a protest against the privileges maintained by the small and exclusive English-educated elite and the dearth of opportunities available to the Swabasha-educated. It was essentially a class, rather than a communal, issue. The Swabasha movement was also chiefly a Sinhalese movement since the Tamils, who had received a good grounding in the English language in the Christian missionary schools in the north, had no compelling reason to wish a change from that language.

In 1953, in a rider attached to the final report of the Official Languages Commission, chairman Sir Arthur Wijewardene expressed the view that:

> The replacement of English by Swabasha would have been very much easier if instead of two Swabasha languages as Official Languages one alone had been accepted. [2]

In the next year, Wijewardene as chairman of the Commission on Higher Education in the National Languages, in a rider to a report of that commission, warned of grave disadvantages faced by Sinhalese students because few educational materials existed in Sinhalese, while materials in Tamil were available from South India. He concluded:

> Of course, this difficulty will not arise, if there is only one official language. [3]

Wijewardene, who was a retired chief justice, was clearly stepping outside his terms of reference to give quasi-official expression to a view rapidly gaining ground among the Sinhalese that the size of the Tamil minority was not sufficient to justify equal treatment for the Tamil language.[4] Having regard to the fact that both in the civil service and in the judicial service, there were nearly half as many Tamils as Sinhalese, parity of status was seen by many as a device for perpetuating that position of

---

1. Bandaranaike Speeches, p.141.
2. Final Report of the Official Languages Commission, S.P.XXII -1953, p.26.
3. Interim Report of the Commission on Higher Education in the National Languages, S.P.XXI-1954, p.6.
4. For a fuller account, see Robert N.Kearney, Communalism and Language in the Politics of Ceylon (North Carolina: Duke University Press, 1967).

advantage and for securing an unwarranted place for the Tamil minority vis-a-vis the Sinhalese majority. The SLFP re-examined its language policy and, in 1955, changed it to Sinhala only with a reasonable use of the Tamil language. The LSSP and the CP remained committed to parity. As the Sinhala-only movement gathered momentum in the country, the UNP led by Prime Minister Kotelawela, in an abrupt volte-face, abandoned its "national" stance, adopted Sinhala-only without any concessions for Tamil, and announced a premature dissolution of Parliament to obtain a mandate to implement its language policy.

In the wake of his decisive victory in April 1956, Prime Minister Bandaranaike encountered considerable difficulty in preparing draft legislation to give effect to his policy of Sinhala-only "with a reasonable use of Tamil". Extreme chauvinist elements within his coalition objected to any reference to the Tamil language in the proposed legislation, and a university lecturer began a fast-unto-death on the steps of parliament house to ensure that no such reference would be made. Consequently, the Official Language Act, which was passed in July 1956 amidst scenes of unprecedented communal violence in many parts of the country, merely provided that "the Sinhala language shall be the one official language of Ceylon". Bandaranaike admitted that his bill was defective in that the reasonable use of the Tamil language was not provided for. But, he urged:

> Let us all discuss round round-tables, or any other method, the practical difficulties that arise not merely in the implementation of this bill as it stands, but the practical difficulties that arise even apart from that. Let us discuss all these matters in a quieter atmosphere after the passage of this bill. [1]

In August 1956, the Federal Party issued an ultimatum to the Government and gave it one year to resolve the language question. As this year drew to a close and the Federal Party prepared for its threatened Satyagraha campaign, Bandaranaike began discussions with FP leaders and, on 26 July 1957, entered into a formal agreement which became known as the Bandaranaike-Chelvanayakam Pact.[2] Under

---

1. Parliamentary Debates (House of Representatives), 14 June 1956, col.1922.

2. Logos, Vol.16, ed. Tissa Balasuriya,o.m.i. (Colombo: Centre for Society and Religion, 1977), pp.66-69.

this pact, it was agreed that Tamil would be recognised by law as the language of a national minority, and that the language of administration in the northern and eastern provinces would be Tamil. It was also agreed to establish Regional Councils with powers over specified subjects including agriculture, co-operatives, lands and land development, colonisation, education, health, industries and fisheries, housing and social services, electricity, water schemes and roads. The Federal Party withdrew its proposed satyagraha, and Bandaranaike addressing the next annual sessions of the SLFP announced that "an honourable solution" had been reached:

> The campaign which certain small elements of the Sinhalese started after my discussions with the Federal Party with the object of creating trouble and embarrasing the Government, as you all know, proved an ignominious failure. You will thus see that communal harmony has been restored to a great extent with honour and self-respect. Such harmony and friendship is absolutely necessary if we were to solve the grave economic problems that face our country.[1]

Far from having been an ignominious failure, the campaign against the pact grew in intensity. Bandaranaike was accused of having betrayed the Sinhalese community; the UNP led by J.R.Jayewardene organised a 72-mile march from Colombo to the Temple of the Tooth in Kandy "to save the Sinhala race"; and the Eksath Bhikku Peramuna (United Front of Buddhist Monks) threatened a satyagraha of their own if the pact was not repudiated. Meanwhile, the Federal Party made its own contribution to inflame Sinhalese passions by launching a campaign in the north to obliterate with tar the Sinhala letter "ශ්‍ර" (Sri) which, in a supreme act of thoughtlessness, had been used to replace the English alphabet on the licence plates of motor vehicles. Finally, in April 1958, besieged in his own residence by demonstrating Buddhist monks, Bandaranaike announced the abrogation of the pact.

The next few weeks saw an outbreak of communal violence, the like of which had not been seen before. A state of emergency was declared, and both Federal Party leaders as well as militant Sinhalese politicians were detained. As soon as the disturbances subsided, but while the FP Members of Parliament were still under

---

1. Bandaranaike, Speeches, pp.165-166.

detention, Bandaranaike introduced the Tamil Language (Special Provisions) Bill which sought to define the "reasonable use of Tamil". This Act provided for the use of Tamil as a medium of instruction in schools and in the universities, and as a medium of examination for admission into the public service. It also provided for the use of the Tamil language for "prescribed administrative purposes", and authorised the appropriate Minister to make the necessary regulations for the purpose. "The language issue", declared Bandaranaike, "can now be considered as settled, and it is not likely that serious communal disturbances will recur in the future". [1] At the time of his death in September 1959, no regulations had, however, been made to prescribe the administrative purposes. Nor were any such regulations made by the Government of Mrs.Bandaranaike between 1960 and 1964. Instead, the Language of the Courts Act, enacted in 1961, provided for the progressive introduction of Sinhala-only in those courts in which it was practicable to do so.

The Federal Party agreed to support, and in fact joined, the UNP Government of Dudley Senanayake in 1965 on the express understanding that, inter alia, regulations would be framed under the Tamil Language (Special Provisions) Act.[2] On 11 January 1966, while the SLFP and the left parties demonstrated outside, and a state of emergency was declared following the shooting of a Buddhist monk who was participating in these demonstrations, Parliament approved the regulations.[3] They provided that the Tamil language shall also be used: (1) in the northern and eastern provinces for the transaction of all government and public business and the maintenance of public records, (2) for correspondence between persons educated in Tamil and government officials, and (3) for correspondence between local authorities in the northern and eastern provinces and the central government. They also provided for the translation and the publication in Tamil of notifications, forms and other publications issued or used by public bodies, including the Government Gazette.

---

1. Message to the SLFP Seventh Annual Number, 1959, quoted by Kearney, Communalism, p.88.

2. Senanayake-Chelvanayakam Pact, 24 March 1965, reproduced in Logos, op.cit., at pp.71-72.

3. Government Gazette 14653 of 2 March 1966, reproduced in Logos, op.cit., at pp.69-70.

The regulations, of course, asserted that the use of the Tamil language in the manner prescribed was "without prejudice to the operation of the Official Language Act, No.33 of 1956, which declared the Sinhala language to be the one official language of Ceylon". These regulations, however, were not implemented.

This, then, was the position in law in regard to the use of the Tamil language when the Constituent Assembly met in 1970. English was the mother tongue of the dwindling Burgher community, who accounted for 0.3 per cent of the total population in that year, but no government since Independence had considered it necessary to take note of that fact; and the strength of that community dwindled further as the Burghers continued to emigrate to Australia and Canada. Noting that the draft basic resolutions dealt with the language question in considerable detail, the Prime Minister informed her Constitutional Affairs Minister that:

> There is already ordinary legislation covering this topic and I doubt whether it would be wise to open this matter for debate again at this stage. The better course would appear to be to let those laws operate in the form in which they are. [1]

Felix Dias Bandaranaike thought differently. He asked:

> Must there not be some provision in this basic resolution for the Sinhala law to be the authentic law ? Is it not necessary to provide in the basic resolution the idea that Sinhala is to be the language of administration throughout the country, subject to the Tamil Language (Special Provisions) Act of 1958 ? [2]

Having presumably made these comments in his capacity of Minister of Public Administration, he then donned his other hat and as Minister of Justice observed that:

> These resolutions deal with the language of the courts. They constitute an important departure from the Language of the Courts Act. It seems to me that this matter is more appropriately left to the National Assembly to decide upon what rules should be made for the future. If some resolution is needed, would it not be sufficient to state in general terms that 'Sinhala shall be the language of record in the courts in such areas as may be determined by the National Assembly; provided that facilities shall be provided for translations for witnesses, accused persons and parties, both oral and documentary, whenever necessary'. [3]

---

1. Letter dated 9 December 1970, op.cit.
2. Letter dated 4 November 1970, op.cit.
3. Ibid.

Colvin R. de Silva intended, however, to "follow as closely as possible the terms of the United Front manifesto" on the subject of language. He believed that if the language provisions were spelt out explicitly at that stage it may be possible "to achieve the co-operation of Tamil speaking people at the earliest possible stage of our proceedings".[1]

Dr.de Silva's optimism was not justified. How could the co-operation of the Tamil community have been achieved when, very early in the proceedings of the Constituent Assembly, a Federal Party proposal for the establishment of an autonomous Tamil State within the framework of a Federal Republic of Ceylon was summarily rejected without discussion. The Government's attitude appeared to be that the language issue, which it believed to be basic to the Tamil question, had been satisfactorily resolved and no further discussion or compromise was necessary at that stage. This unrealistic, and unsympathetic, appraisal not only led to the withdrawal of the Federal Party from the Constituent Assembly; it was to lead very shortly to the transformation of the Federal Party into the Tamil United Liberation Front, committed to finding solutions to the problems of the Tamil community within the context of a separate Tamil State altogether.[2]

The 1972 Constitution recognised Sinhala as the official language of Sri Lanka, and as the language of legislation and the language of the courts.[3] The use of the Tamil language was recognised to the following extent:

1. In accordance with the Tamil Language (Special Provisions) Act, but without having regard to the regulations made thereunder[4]
2. By requiring that every law should be "translated" into Tamil[5]
3. By providing that parties to legal proceedings and their pleaders, as well as judges, may participate in such proceedings in Tamil, and by requiring the State to provide interpretation facilities to enable them to do so.[6]

---

1. Letter dated 16 November 1970, op.cit.
2. Resolution of the TULF National Convention at Pannakam, Vaddukoddai, on 14 May 1976, Logos, op.cit., p.5.
3. Ch. III.
4. S.8.
5. S.9(2).
6. S.11.

By refusing to recognise the Tamil Language Regulations made in 1966, the Constitution in fact guaranteed to the Tamil speaking people less than what was already provided for by law. By references to Tamil "translations" of laws and by specifically providing that the Tamil Language Regulations "shall be deemed to be subordinate legislation", not only was the superior position of the Sinhala language repeatedly asserted, the Tamil community was also unnecessarily humiliated.

The provisions in the Constitution which sought to protect the right of every citizen to "take part in the conduct of public affairs, directly or through freely chosen representatives", and to "vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot" [1] were, but for two exceptions, immaculate. Firstly, in the delimitation of electoral districts, the number of "residents" and not "citizens" continued to be the determining factor.[2] Consequently, in the central highlands where the large majority of "stateless" persons of Indian origin continued to reside, a vote was of greater value than elsewhere. Secondly, the Constitution provided that the Constituent Assembly which became, by operation of law, the first National State Assembly shall, unless sooner dissolved, "continue for a period of five years commencing on the date of the adoption of the Constitution by the Constituent Assembly".[3] The members of the Constituent Assembly were those who had been elected to the House of Representatives at the general election held in May 1970. At that time, the life of Parliament was five years. Since no mandate was sought at the time to extend that period, it must be presumed that the people intended to delegate their legislative and executive authority only for that period. When the Constitution was adopted on 22 May 1972, two years of that period had already elapsed. Therefore, when the Constitution provided that the first National State Assembly shall continue for a period of five years,[4] the elected representatives were unilaterally giving themselves authority to continue to exercise

---

1. ICCPR, Art.25. See also ECHR P1, Art.3; ACHR, Art.23.
2. S.78(2).
3. S.42(5).
4. The usual term of a National State Assembly was six years. Hence, this term of five years appeared to have been arbitrarily fixed.

power for an additional two years. It was an indefensible position and was in conflict with the spirit of the right which the Constitution was seeking to guarantee.[1]

The Omitted Rights

If the rights which were sought to be protected in the 1972 Constitution were deficient in many respects, the statement of fundamental rights and freedoms was also a remarkably incomplete document. Several rights which are almost universally accepted in contemporary society were omitted. For instance:

1. The prohibition of torture and cruel, inhuman or degrading treatment or punishment.[2] It could not have been contended that these forms of treatment were non-existent in Sri Lanka. One year before the Constituent Assembly met, a commission of inquiry which investigated the police had reported, inter alia, on police excesses in the following terms:

> The Police do not enjoy the goodwill of the public. The public image of the Police is not at all what it should be. The fear of battery by the Police is in every citizen. Several cases of torture have come to light in the courts . . . Even after public attention has been focussed on a number of incidents in which the Police have belaboured the public, reports of Police violence still continue to appear in the Press.[3]

2. The prohibition of slavery, the slave trade, servitude and forced or compulsory labour.[4] While slavery, in the conventional sense, had been abolished in 1844, some of the "institutions and practices similar to slavery" were perhaps not altogether non-existent either in the paternalistic south or in the caste-ridden north of Sri Lanka. These included debt bondage, serfdom, forced marriages and exploitation of child labour.[5] The concept of "forced or compulsory labour" was also no longer understood solely in terms of the literal meaning of the words. In interpreting it, in the light of relevant ILO Conventions, it included other elements such

---

1. For a legal justification of the "extension", see Colvin R.de Silva, "The Right to Rule till 1977", Ceylon Observer, 21 May 1974; and "JR and the Constitution", Ceylon Daily News, 20 May 1975.
2. ICCPR, Arts.7, 10(1); ECHR, Art.3; ACHR, Art.5(2).
3. Final Report of the Police Commission, S.P.XXI-1970, para.54.
4. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956, Art.1.

as that the work or service is performed by the worker against his will, that the requirement that the work or service be performed is unjust or oppressive, or that the work or service itself involves unavoidable hardship.[1]

3. The right to a fair trial. In the determination of his civil rights and obligations or of any criminal charge against him, a person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[2] Only the last mentioned element of this right was sought to be protected by the Constitution.

4. The rights of accused persons. Everyone charged with a criminal offence is entitled to the following minimum rights:[3]

a) to be presumed innocent until proved guilty according to law;
b) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
c) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
d) to be tried without undue delay;
e) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
f) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
h) not to be compelled to testify against himself or to confess guilt;
i) not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, and not to have imposed on him a heavier penalty than the one that was applicable at the time the criminal offence was committed;

---

1. Iversen v. Norway (1468/62), CD 12, 80; X v. Federal Republic of Germany (4653/70), CD 46, 22. See also ILO Convention No.29 concerning Forced Labour, 1930, and ILO Convention No.105 concerning the Abolition of Forced Labour, 1957.
2. ICCPR, Art.14(1); ECHR, Art.6(1); ACHR, Art.8(1).
3. ICCPR, Arts. 14, 15; ECHR, Arts. 6, 7; ACHR, Arts. 8, 9.

j) to have his conviction and sentence reveiwed ny a higher tribunal according to law;
k) not to be tried and punished again for an offence for which he has already been finally convicted or acquitted in accor- with the law;
l) to be compensated in accordance with the law if he had been sentenced by a final judgment through a miscarriage of justice.

Some of these rights were provided for, in varying degree, in the nineteenth century Criminal Procedure Code and Evidence Ordinance. But being ordinary statutes, they have sometimes been ignored or expressly superseded in later special legislation. Some, like the prohibition of retroactive criminal legislation and the right to compensation, were not provided for anywhere. In any event, the Constitution did not seek to protect any of these principles.

5. Family Rights. There are six distinct family rights,[1] namely:

a) the right to marry;
b) the right to found a family;
c) the right not to marry without the free and full consent of the parties;
d) equal rights of the spouses to, in, and after, marriage;
e) the family's right to protection;
f) the right of the child to registration at birth, a name and a nationality, and to necessary protection.

Some of these rights arose by implication in the regulatory laws relating to marriage, divorce and the registration of births and deaths, but none were guaranteed in the Constitution.

6. The right to privacy, honour and reputation. Everyone has the right to respect for his private and family life, his home and his correspondence, as well as to protection by law against unlawful attacks on his honour and reputation.[2] This right assumes particular importance in the context of interferences made possible by modern scientific and technical devices which are now at the disposal of the State. Therefore, the protection afforded by the nineteenth century statutes regulating the activities of postal and telecommunication authorities was hardly adequate.

---

1. ICCPR, Arts.23, 24; ACHR, Arts.17, 19.
2. ICCPR, Art.17; ECHR, Art.8; ACHR, Arts. 11, 14.

7. The rights relating to property. Without prejudice to the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties, every natural or legal person may be said to be entitled to the peaceful enjoyment of his possessions, and the right not to be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[1] In the Constituent Assembly, the UNP moved the inclusion of the following provision:

> (a) No person shall be deprived of his property save by law.
> (b) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for reasonable compensation for the property so acquired or requisitioned and fixes the amount of the compensation or specifies the principles on which, and in the manner in which, the compensation is to be determined and given.[2]

This amendment was sponsored very eloquently and at length by J.R. Jayewardene, but it was rejected and no reasons were given for the rejection. The United Front manifesto, however, recognised the concept of private ownership. It promised, inter alia, to "redeem rural indebtedness", "develop land holdings", "consolidate fragmented holdings", "distribute land among landless peasants", "make it easier for persons to build houses for themselves and their children by providing and extending facilities for clearing title to land and making land, material and low interest loans available for this purpose", "to actively pursue the policy of Ceylonisation of ownership in the private sector", and to assist "small industrialists". [3]

One more observation remains to be made on the statement of fundamental rights contained in the 1972 Constitution. Apart from the concepts of equality before the law and equal protection of the law, and the rights to life, liberty and security of person, every other right was guaranteed only to citizens of Sri Lanka. There were in Sri Lanka in 1971 a total of 1,195,368 Indian Tamils. Of them, 134,316 had obtained Ceylonese citizenship. In 1964 agreement had been reached between the Governments of India and Ceylon that, of an estimated 975,000 who were "stateless", 525,000 would be returned to India over a fifteen year period,

---

1. ECHR P1, Art.1; ACHR, Art.21. See also UDHR, Art.17.
2. Constituent Assembly Debates, 20 May 1971, col.1154.
3. Op.cit.

while 300,000 would be granted Ceylonese citizenship.[1] The fate of the remainder was to be examined on a later occasion. Therefore, there was in Sri Lanka in 1972 a very substantial body of persons who were not citizens of Sri Lanka, but whose continued presence was vital for the economic development of the country. They were virtually permanent residents who lived and worked on the tea plantations of the central highlands. But in the new Republic, to them was not guaranteed the right to freedom of thought, conscience or religion; the right to enjoy or promote their own culture; the right of peaceful assembly or of association; the right to freedom of speech or expression; the right to freedom of movement; or the right not to be arrested, held in custody, imprisoned or detained except in accordance with the law.

Limitations on the Exercise and Operation of the Fundamental Rights

The statement of rights was, of course, not absolute. In the form in which they were guaranteed, and in regard to their future exercise and operation, they were subject to the following limitations;

1. Section 18(3) declared that all existing law shall operate notwithstanding any inconsistency with any of the rights. In other words, the guaranteed rights were to operate subject to the entire body of laws, written and unwritten, which already existed in the country. However archaic such a law might have been, and however inconsistent such archaic law might be with a right considered fundamental in the last quarter of the twentieth century, that archaic law was to prevail in order to determine the rights of citizens and other persons in the Republic. This was the opposite of what the Governor-General had exhorted the Members of Parliament to do when they functioned as a Constituent Assembly. The 1970 Throne Speech promised that the new Constitution will become the fundamental law of the country, superseding both the 1946 Constitution "and also other laws that may conflict" with it.[2] The

---

1. W.T.Jayasinghe, Tamils in Sri Lanka (Colombo: Dept. of Govt. Printing, 1976), pp.12-19.
2. Supra, pp.78-79.

Indian Constituent Assembly achieved this result by providing in Article 13(1) of the Constitution that:

> All laws in force in the territory of India before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

Thereafter, it was the duty of the Indian Supreme Court, whenever its jurisdiction was invoked in that regard, to determine whether or not an earlier law conformed to the new standards.

2. Section 18(2) provided that:

> The exercise and operation of the fundamental rights and freedoms provided in this Chapter shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy set out in section 16.

In other words, the National State Assembly was authorised to make laws that conflicted with fundamental rights if it considered that to do so would be in the interests of one or other of the enumerated grounds. While it is necessary that the limitations on the exercise and operation of certain rights should be clearly set out in a bill of rights, the weakness in an omnibus escape clause such as this is easily discernible. For instance, the right to life may have to be restricted to the extent necessary to protect the right to life of others. This is usually done by enabling one to exercise his right of self-defence even to the extent of causing the death of an aggressor if he had reason to believe that his own life was in danger. But when the legislature is empowered to restrict the right to life in the interests of "national unity", "national economy" or "for the protection of public morals", not only does the right cease to exist altogether, but a whole new hitherto untraversed and sanctified territory is laid bare at the feet of a ravaging legislator. That is, the legislature is expressly authorised to extend its legislative power into areas which it would not otherwise have dared to enter. Again, certain rights may have to be restricted on grounds peculiar to them. For instance, the right to freedom of expression may have to be restricted by

by law to prevent the disclosure of information received in confidence, or to maintain the authority and impartiality of the judiciary. Therefore, the effect of inserting an omnibus escape clause such as this, particularly one so wide and extensive, was to detract altogether from the guaranteed rights. Indeed, if section 18(2) had merely stated that "the exercise and operation of the fundamental rights and freedoms shall be subject to such restrictions as may be prescribed by law", the result may perhaps have not been very different.

In the Constituent Assembly, the Minister assured that whether a law

> is in the interests of national unity, etc., is subject to what we lawyers call an objective test.[1]

But it is possible to argue that section 18(2), by using the words "as the law prescribes" made the legislature the sole judge as to whether it was necessary to transgress a right. Support for this contention is found in comparable provisions in foreign instruments. For instance, the Indian Parliament was empowered to "impose reasonable restrictions" on the exercise of particular rights.[2] Similarly, ECHR contemplated "restrictions as are prescribed by law and are necessary in a democratic society".[3] The ICCPR speaks of restrictions which "are provided by law and are necessary" for the protection of certain interests.[4] There can be no doubt that where qualifying words such as "reasonable" or "necessary" are used, it is only by applying an objective test that a court can, in each case, determine whether or not the legislature has acted within its authority. But where the exercise and operation of a right is not subject to considerations which are capable of being objectively assessed by a court, it would appear that the question whether or not a restriction ought to be prescribed in the interests of one or other of the specified grounds might well be entirely within the subjective determination of the legislature. At most, if a petitioner had succeeded in showing that an impugned bill was

---

1. Constituent Assembly Debates, 10 June 1971, col.1328.
2. Art.19(2).
3. See, e.g. Art.11.
4. See, e.g. Art.12.

prima facie inconsistent with section 18(2), the onus would probably have shifted upon the State to show that the proposed legislative measure was "in the interests" of one of the purposes described in that subsection; "in the interests", of course, being words of great amplitude, as the Constitutional Court was shortly to hold.[1]

3. Section 52 provided that:

> (1) The National State Assembly may enact a law, which, in some particular or respect, is inconsistent with any provision in 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.
>
> (2) A law passed under the provisions of subsection (1) of this section shall not be interpreted as amending the provisions of the Constitution with which such law is inconsistent.

In the Constituent Assembly, the Minister explained that this section meant what it said:

> There can be cases - they are extremely rare cases but they can, in fact, happen in practice . . . - where a bill or a provision thereof may be repugnant to the Constitution, which the House wishes nevertheless to accept and pass into law without thereby changing the Constitution. We may wish to preserve the Constitution in its generality completely, but we may wish to pass in one particular way a special law that may offend the Constitution. [2]

Therefore, under section 18(2), a bill which was in conflict with a fundamental right could nevertheless be passed by a simple majority if it was possible to fit that bill into one of the slots created by that subsection. But if that bill fell outside the ambit of that subsection, in that it could not be legitimised by reference to a single of the many grounds on which the legislature was permitted to transgress a fundamental right, it could yet be passed by a two-third majority under section 52. Meanwhile, the bill of rights remained inviolate in all its virginal purity.

4. Section 48(2) provided that:

> No institution administering justice and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question the validity of any law of the National State Assembly.

---

1. Sri Lanka Press Council Bill, (1973) DCC Vol.1, p.1, at 15.
2. Constituent Assembly Debates, 4 July 1971, col.2849.

Accordingly, it was possible for a bill which was in conflict with a fundamental right, and to which section 52 should have applied, to find its way into the statute book with a simple majority, and to remain there. Subsection (1) of this section provided that a bill passed by the National State Assembly shall become a law when the certificate of the Speaker is endorsed upon it. But if the question of its inconsistency was not raised within the prescribed time and in the prescribed manner, the Speaker would not be alerted to any possible inconsistency and the bill would receive his certificate upon its passage with a simple majority. Thereafter, however patent the inconsistency might be, and however seriously it might derogate from a fundamental right, the law inadvertently passed with an inadequate majority will continue to remain on the statute book. For instance, section 55 of the 1946 Constitution required judicial officers to be appointed by the Judicial Service Commission. Section 41 of the Bribery Act, No.11 of 1954, as amended by the Bribery (Amendment) Act, No.40 of 1958, empowered the Governor-General, acting on the advice of the Minister of Justice, to appoint members of a bribery tribunal. These members were judicial officers within the meaning of that expression in the Constitution. The amending Act had not been passed by the special majority required for bills which sought to amend any provision of the Constitution. The Privy Council held that the amending Act was invalid and that the provisions of the Constitution prevailed.[1] But if this situation had arisen under the 1972 Constitution, both the fundamental law as well as the offending law would have been regarded as valid and would co-exist with each other.

The Enforcement of Fundamental Rights

The United Front manifesto promised a constitution which would "secure fundamental rights and freedoms to all citizens". The ordinary dictionary meaning of the term "secure" in this context is "to guarantee". When a right is guaranteed, there would immediately arise a corresponding duty on the part of the relevant state agencies to observe and respect that right; a duty which would be capable of being enforced at the instance of a person who is entitled

---

1. Bribery Commissioner v. Ranasinghe, supra.

to enjoy that right. Without the power to enforce, a statement of fundamental rights merely serves as an adornment or as a piece of political rhetoric. In 1959, the Joint Select Committee of Parliament headed by Prime Minister Bandaranaike, which examined the question of guaranteeing fundamental rights in the Constitution, recognised:

> The right to move the highest tribunal by appropriate proceedings for the enforcement of Fundamental Rights and to obtain suitable redress, for which purpose such tribunal shall be vested with the power to issue the necessary directions or orders or writs requisite for the enforcement of Fundamental Rights.[1]

Since the question of declaring Ceylon to be a Republic was also under consideration at that time,

> The Committee . . . were of the opinion that appeals to the Privy Council should be discontinued, but that a new judicial tribunal should be set up to adjudicate on constitutional issues as well as to entertain appeals from the Supreme Court.[2]

When fundamental rights are guaranteed in a constitution, one of the agencies which is placed under a duty to observe, respect, and not to transgress them, is the legislature. Since the legislature speaks and acts through laws made by it, the jurisdiction of a court to enforce fundamental rights must necessarily include the power to examine and test the validity of laws by reference to the guaranteed statement of fundamental rights. There is no reason to believe that in 1959 the Joint Select Committee understood the concept of "enforcement" in any other way.

Eleven years later, all the political parties which had been represented on that committee, including some of the members who had actually served on it, appeared to have undergone a dramatic change of attitude. In the Constituent Assembly, on the proposal of the Minister of Constitutional Affairs, it was unanimously agreed that:

> No institution administering justice, nor any other institution, person or authority, shall have the power to inquire into or pronounce upon the validity of any law enacted by the National Assembly.[3]

Before this basic resolution was discussed in the Assembly, the ministry of constitutional affairs explained to members of the government parliamentary group, many of whom were laymen unfamiliar

---

1. Supra.
2. Supra.
3. Basic Resolution 22, Constituent Assembly Debates, 4 July 1971, col.2895.

with legal concepts and principles that:

> If we must have justiciable rights and freedoms and if we must at the same time move, without hindrance, towards the establishment of socialism, we have no option but to adopt a procedure ensuring that the implementation of laws passed by the Assembly is not held up by court actions relating to the validity of laws.
>
> It would be foolish not to take heed of what happened in India. There, the implementation of progressive legislation was held up for years by court proceedings challenging the validity of progressive laws mostly upon the pretext that they were inconsistent with justiciable rights and freedoms. In the first fifteen years after the commencement of the new Constitution, a vast number of constitutional cases were instituted; and of these, about 8000 cases, reported in the law books, are generally available in Ceylon to members of the legal profession.
>
> The problem arising out of uncertainty as to the validity of laws is bad enough under the present Constitution. It is sufficient to refer to a few instances. It is now fifteen years since the enactment of the Official Language Act was passed /sic/ and the ordinary courts of the land have still not decided whether this important piece of legislation is good law or not. The utter confusion and the consequent injustice that arose as a result of the uncertainty as to the validity of laws relating to Labour Courts and Tribunals is another example. The Citizenship Act, the validity of which was challenged in the courts of Ceylon as well as in the Privy Council, is still another.
>
> Under the new Constitution, which will contain a statement of justiciable rights and freedoms, the position will be immeasurably worse. Reactionaries of every kind will exploit to the limit the normal judicial processes to oppose and delay social progress if no adequate constitutional safeguard is provided.[1]

The Prime Minister, at least initially, appears to have had a different perspective of the problem. In her letter to the Minister of Constitutional Affairs three months previously,[2] she made the following observation which "represents not only my own thinking, but also that of my party":

> The resolution adopted by the Constituent Assembly contemplates the establishing of a Constitution which will be the fundamental law of Sri Lanka. To give effect and meaning to this resolution, the new Constitution should provide that even the Legislature should be bound by this fundamental law. There appears to be no better way of securing this

---

1. Comments on Basic Resolutions submitted to the Steering and Subjects Committee, 3 February 1971.

2. Op.cit.

> result than by giving power to an independent body like an established court to examine whether any piece of legislation is contrary to such fundamental law. The arrangements contemplated for this purpose in the basic resolutions proposed by you do not appear to be satisfactory. To give the power of judicial review to the courts is not to establish the superiority of the courts over the legislature. It only proceeds on the assumption that the power of the people is superior to both the judiciary and the legislature; it means that where a law conflicts with the will of the people as enshrined in the Constitution, the courts ought to give effect to the Constitution rather than to the law which is in breach of it. If, however, the will of the people as contained in the Constitution subsequently undergoes a change, the provisions for amendment of the Constitution should be sufficient to meet such a situation.

Dealing specifically with the question of securing fundamental rights, the Prime Minister added:

> The concept of fundamental rights as I understand it when incorporated in a Constitution is intended primarily to be a limitation on legislative and executive abuses of power. Here again I think that the new Constitution should give a sufficient assurance to the citizens of this country that legislatures and governments of the future will be bound to observe the fundamental rights written into the Constitution, and that they will not remain mere declarations of intent which can be departed from by any future legislature if it were so minded.

The dichotomy in the coalition Cabinet was clear. The LSSP Minister of Constitutional Affairs believed that enforceable rights constitute road blocks on the march towards socialism. The Prime Minister and the SLFP majority believed that fundamental rights constitute the limits of state power, and should necessarily be enforceable in every respect. The liberal optimism of the SLFP was, however, short-lived.

On 3 July 1971, the Minister of Constitutional Affairs introduced in the Constituent Assembly the basic resolution which sought to deprive the courts in Sri Lanka of the power to examine and pronounce upon the validity of legislation. He explained that:

> This is a principle which is a direct application of the principle that prevails in respect of the sovereignity of Parliament in Britain. I suggest the equivalent sovereign National Assembly should be in the same position. [1]

---

1. Constituent Assembly Debates, 3 July 1971, col.2831.

He did not explain, nor did any member from the opposition benches observe, that the United Kingdom had neither a written constitution nor a bill of rights; and that the supremacy of the Parliament of that country rested on two principles: that no Parliament is bound or limited by Acts of its predecessors or by its own earlier Acts, and that the statutes enacted by Parliament and in force at any time are the highest law in that they alter or nullify any common law rules or earlier statutory provisions that are inconsistent with them.[1] Neither of these principles appeared to have any relevance to the constitutional scheme envisaged in the United Front manifesto, to implement which the people's mandate had been sought for and obtained. Indeed, they ran counter to that scheme.

In support of his basic resolution, and to illustrate the urgent need for it, the Minister cited three cases. The first of these was Kodeswaran v. The Attorney-General[2] which was concerned with the highly emotional subject of language. The plaintiff was a Tamil officer in the general clerical service of the government who had been denied an increment, on the authority of a treasury circular, for having failed to obtain proficiency in Sinhala. In the District Court of Colombo, he successfully argued that the Official Language Act of 1956, in pursuance of which the circular had been issued, was ultra vires on the ground that in enacting it Parliament had transgressed the prohibitions against discrimination contained in section 29 of the 1946 Constitution. The District Judge, in entering judgment for the plaintiff, held the Act to be void on that ground. On appeal, the Supreme Court held, on 30 August 1967, that the provisions of the covenants and rules governing the public service were not enforceable by action. Accordingly, the judgment of the District Court was set aside. The Supreme Court did not examine or pronounce upon the validity of the Official Language Act; it noted the principle observed by both the United States and Indian Supreme Courts that if a case could be decided on one of two grounds, one involving a constitutional question and the other a question of statutory construction or general law, the court will decide only the latter. On further appeal, the Privy Council, on 11 December 1969, held that a civil servant in Ceylon

---

1. J.E.S.Fawcett, "Bills of Rights: Some Alternatives", Do We Need a Bill of Rights ? ed. Colin Campbell (London:Temple Smith,1980), p.134.
2. D.C.Colombo 1026/Z.

did have a right of action against the Crown for arrears of salary. It did not consider it proper to express an opinion on the constitutional question "without the assistance of the considered judgment of the Supreme Court". Accordingly, the case was remitted to the Supreme Court for that purpose.

Explaining this case to the Constituent Assembly, the Minister said:

> It will astonish most people in this country to hear that what has been considered the most vital law that was passed in 1956 by the Government of the late Mr. Bandaranaike is still in issue in the courts . . . Can you imagine a situation like that ? Here is a basic law of our country, and by reason of the power given to the courts to sit in judgment on the validity of the law as distinct from the interpretation of the meaning of the law, we do not know where we are and we are rightly acting on the footing that the law is a good one until it is set aside. But, just imagine, how do you run this country in that situation ? . . . If the courts do declare this law invalid and unconstitutional, heavens alive ! The chief work done from 1956 onwards will be undone. You will have to restore the egg from the omlette into which it was beaten and cooked. [1]

The Minister omitted to point out that the 1946 Constitution expressly limited the legislative power of Parliament and prohibited it from making certain types of laws. If, therefore, a court declared a particular law to be invalid, it was because Parliament in purporting to make that law had exceeded its powers. In fact, when the Official Language Bill was presented to Parliament, several members submitted that the Bill sought to confer on the Sinhalese community a privilege or advantage which was being denied to persons of other communities,[2] and it was precisely on that ground that the law was later challenged in court. If, on the other hand, the Minister's complaint was of delay, and the consequent uncertainty as to the state of the law, there were other options available which were not presented to the Constituent Assembly. For instance, jurisdiction on constitutional questions could have been vested exclusively in the highest court, as had been done under several Commonwealth constitutions and as was contemplated by Bandaranaike in 1959. Additionally, such court could have been directed to give priority to such matters. It could have been clarified that

---

1. Constituent Assembly Debates, 3 July 1971, col.2832.
2. Parliamentary Debates (House of Representatives), 5 June 1956, cols.735-746.

the decision of a court on the validity of a law should not affect past acts done under that law. If provisions such as these had been included in the 1946 Constitution, the question of the validity of the Official Language Act might have been examined and determined in the same year in which it was preferred, and there would have been no reason to fear that sometime in the dim uncertain future the egg would have to be restored from the omlette into which it had been beaten and cooked.

The second case cited by the Minister was Walker Sons & Co.Ltd v. Fry[1] which was instituted during the upsurge of "judicial power" consciousness in the early 1960s. Section 55 of the 1946 Constitution required judicial officers to be appointed by the Judicial Service Commission. The Industrial Disputes Act, as amended by Act No.62 of 1957, provided for the appointment of Presidents of Labour Tribunals by the Public Service Commission. The function of a Labour Tribunal was to entertain applications by workmen for relief or redress in respect of matters relating to the terms of employment or the conditions of labour. These included questions arising out of the termination of the workman's services and relating to gratuities or other benefits payable on termination. On such matters, the Tribunal was empowered to make such order as may appear to it to be just and equitable. The workman had to make his choice between the remedy afforded by this Act and any other legal remedy he may have. The Tribunal's order was final, subject to an appeal to the Supreme Court on a question of law. Any sum of money ordered by a Tribunal to be paid to a workman could be recovered summarily through a Magistrate's Court in the same manner as a fine. In 1962, it was argued before the Supreme Court that the President of a Labour Tribunal was a "judicial officer" and that, not having been appointed in the manner required by the Constitution, he had no jurisdiction to make any order. On 30 November 1965, in Walker Sons & Co.Ltd v. Fry, three judges of the Supreme Court, with two others dissenting, held that a Labour Tribunal exercised judicial power and that it had no jurisdiction to exercise that power unless it had been appointed by the Judicial Service Commission. On 16 May 1966, in Moosajees Ltd v. Fernando,[2] a bench of five judges of the Supreme Court, by a majority of four

1. (1965) 68 N.L.R. 73.
2. (1966) 68 N.L.R. 414.

to one, interpreted the judgment of the Privy Council in Liyanage v. The Queen [1] as precluding officials whose powers and functions are mainly administrative from exercising judicial power. Accordingly, it held that an Industrial Court appointed by the Minister of Labour under the Industrial Disputes Act, or an Arbitrator appointed by the Commissioner of Labour under the same Act, was not entitled to exercise judicial power and therefore had no jurisdiction to adjudicate upon existing rights of parties. On appeal, the Privy Council held, on 9 March 1967, that the powers and duties of an Arbitrator, an Industrial Court and of a Labour Tribunal were the same, namely, arbitral, and that none of them were judicial offices. The judgment of the Privy Council was by a majority of three to two.[2]

The Minister referred to this series of cases as an illustration of "the utter disorganisation that flows from the principle that the courts can sit in judgment on the validity of a law". He said:

> Another major contribution of the late Mr.S.W.R.D. Bandaranaike's Government to the legal system of this country, for the solution of problems pertaining to industrial relations, was the bringing in of an amendment which added a whole chapter to the Industrial Disputes Act creating the labour tribunals . . . The labour tribunals functioned for a time until there came a stage at which the employers of the country found the labour tribunal system extremely troublesome because, rightly, the presidents thereof brought a non-judicial attitude - not a merely judicial attitude - to bear. Ultimately there was an application for a writ taken to the Supreme Court . . . on the ground that the labour tribunal that decided a particular case was illegal, unconstitutional, in that the provisions of the Constitution had not been observed and the Judicial Service Commission had not appointed the president of the tribunal.
>
> Now what happened ? The matter went before three judges. Then it went before five judges, and given half the chance, it would have gone before seven or nine. It was discussed from every point of view. The judges were divided among themselves as to the grounds on which they came to their conclusions. No two judgments were alike or agreed on what they said was the law, except that three judges for three different sets of reasons came to the conclusion here that . . . the Judicial Service Commission should have appointed the president . . . and two judges said otherwise.

---

1. (1965) 68 N.L.R. 265.
2. United Engineering Workers Union v. Devanayagam (1967) 69 N.L.R. 289.

> The matter went to the Privy Council, and in the Privy Council we had the unusual situation where the judges permitted themselves to publish their division. Three judges of the Privy Council said: 'No, this is correct'. Two said: 'This is wrong'. So three judges here and two there said one thing, and three judges there and two here said another . . . the view of the three judges there prevailed. [1]

The Minister was not complaining of the ultimate outcome of this case:

> What they held was a very important decision: that the labour tribunals are not courts in the sense of the usual court, and that their function is that of settling disputes, not just sitting in judgment upon people - a very valuable judgment of the utmost social importance on the country.[2]

Nor did he think that judges in Ceylon lacked social consciousness. In 1968, speaking from the opposition front bench he had paid tribute to them:

> It is to my knowledge the endeavour of our courts to march with the times. It is so. There are plenty of judges of that spirit and outlook in the field, for instance, of industrial law. Permit me to say this here. One should not be speaking of the judges before whom one practises. On the other hand, one should not be inhibited in respect of them when a general point can be illustrated. I say with all respect and without any possibility of others misunderstanding that, for instance, contemporary judges from the Chief Justice downwards have in respect of certain matters of industrial legislation concerning trade unions and so forth made pronouncements from the bench which indicate clearly that the contemporary spirit is being sought to be applied in the courts . . . Contemporary judges from the Chief Justice downwards have in judgments, in the very industrial fields I have spoken of, shown that they are infused with anxiety to bring the spirit of the times into play in that field.[3]

What then was he complaining of ? Was it that this particular point of constitutional law had been raised, whether because "the employers of the country found the labour tribunal system extremely troublesome" or, more probably, because a sharp-witted lawyer sensed that the current trend of judicial reasoning might well apply to the brief he had in hand ? Or was it that there was a lack of uniformity in the thought processes of judges ? These are

---

1. Constituent Assembly Debates, 3 July 1971, col.2834.
2. Ibid., at col.2835.
3. Parliamentary Debates (House of Representatives) 6 November 1968, col.1845.

all features of a free, democratic and open society. But if the Minister was complaining of the disorganisation that resulted from the judgment of the Supreme Court in November 1965, the responsibility ought to have been placed squarely on the government of the day. It was incumbent on the government to have taken immediate action either to amend the Industrial Disputes Act to bring it into conformity with the Constitution, or to amend the Constitution so as to exclude from the jurisdiction of the Judicial Service Commission those institutions and offices created under the Industrial Disputes Act.[1]

The third case on which the Minister relied in support of his proposition was an unusual one. He said:

> In the 1940s when the first Parliament of this Island was elected there were several election petitions. And in connection with them there were matters taken to the Supreme Court in appeal in regard to the question of deposits. There was a decision arrived at by three judges about 19 or 20 years ago which had remained there; and there had been neither occasion nor need to challenge a point in respect of which I think all of us as lawyers have advised our clients. Then as a result of the Bandaragama by-election an appeal came up before three judges in modern, or more accurately, in contemporary times, and after tremendous argument it was held that what had been decided some 19 years ago in one direction was obiter in character or open to be revised, and there was an exactly opposite decision given.[2]

The Minister was referring to the 1969 case of David Perera v. Peries.[3] The question which arose was whether, upon an appeal from the decision of an Election Judge, a report of the Supreme Court that a corrupt practice had been committed by a person, was effective to disqualify that person from membership of the House of Representatives. It had been argued, by Dr.Colvin R.de Silva himself, that the expression "report of an Election Judge" in section 13(3)(h) of the Constitution did not include a report of the Supreme Court on appeal. He relied on a 1948 decision of the same court in Thambiayah v. Kulasingham[4] which contained a statement to that effect. H.N.G.Fernando CJ, however, held that

---

1. The Industrial Disputes Act was amended only in September 1968 by Act No.37 of 1968 which had retrospective effect from 9 March 1967.
2. Constituent Assembly Debates, 3 July 1971, col.2836.
3. (1969) 70 N.L.R. 217.
4. (1948) 50 N.L.R. 25.

this statement in Thambiayah was both obiter and per incuriam: the attention of that court not having been drawn to the principle that a court will not pronounce upon the constitutional validity of a statute unless a decision as to validity was essential for the purposes of the case actually before it. He proceeded to examine the matter afresh, and held that the report of the Supreme Court on appeal was as valid and effective as that of an Election Judge. If the course adopted by the Chief Justice was objectionable, the remedy lay with the legislature: it could have provided, as Dr.de Silva argued on that occasion, that when the Supreme Court has once declared a provision of an Act of Parliament to be ultra vires, the court must not again review the correctness of its previous declaration. Whether it is desirable that a court should stubbornly adhere to previous error is, of course, another relevant aspect of the matter.

Having excluded the judicial review of legislation, what other machinery existed for the enforcement of fundamental rights ? A memorandum issued by the ministry of constitutional affairs stated thus:

> The fundamental rights and freedoms, assured to all citizens, are protected in three ways under the proposed constitution:
>
> (a) No law /sic/ can be passed by the National State Assembly in the way that laws are ordinarily passed if the law infringes any fundamental right or freedom;
> (b) Review by the Supreme Court of administrative action infringing fundamental rights and freedoms; and
> (c) Judicial acts being subject to correction by the superior courts if fundamental rights and freedoms are infringed. [1]

The references were to the special procedure prescribed in the Constitution for the examination of bills; the writ jurisdiction of the Supreme Court; and the right of appeal. The Supreme Court's appellate jurisdiction was defined by law. It extended only to the correction of errors of law or fact, committed in the course of civil or criminal proceedings by original courts, and which were apparent on the face of the case record. It is difficult to visualise how a fundamental right could have been invoked by either

---

1. Op.cit.

party at the stage of appeal if such right was not relevant to the matters in issue at the trial. The other two methods, of course, need to be examined more closely.

Review of Bills

The Constitution created a Constitutional Court consisting of five members appointed by the President for a term of four years. They would enjoy security of tenure to the extent that they could be removed by the President only "on account of ill-health or physical or mental infirmity". Prior to their appointment, the National State Assembly was required to fix the remuneration to be paid to them; the remuneration so fixed would remain unaltered and be charged on the Consolidated Fund. Whenever occasion arose for the determination of any matter, three members of the Court were to be chosen in accordance with the rules of the Court. The Court would have no permanent head; the chairman for each occasion being also chosen in accordance with the rules. The intention was clearly to create a special institution for the purpose of examining bills in order to determine whether they contained any provisions inconsistent with the Constitution.

Gamini Dissanayake (UNP), himself a lawyer, welcomed this proposal in the Constituent Assembly:

> 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 law 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 very 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. Therefore, it is in that context that I welcome the proposal of the Hon.Minister that the function of testing the validity of legislation be given to a specialised tribunal independent of the regular courts of law.[1]

Whether a matter could be disposed of expeditiously would often depend on the procedure prescribed in respect of that matter. In Ceylon, the laws relating to criminal and civil procedure had remained unamended for nearly a century. Consequently, there were enormously heavy backlogs in the original courts, and a delay

1. Constituent Assembly Debates, 4 July 1971, col.2883.

of several years between the institution of an appeal and its final determination. Therefore, if an "expeditious, cheap and quick method" of subjecting bills to scrutiny by the Constitutional Court had been devised, perhaps a regular court, such as the Court of Appeal which was then in the process of being constituted to replace the Privy Council, may well have been able to perform that task in the same exemplary manner. Indeed, the leader of the UNP, J.R.Jayewardene, gave expression to this view:

> What better institution than the judiciary can be given the power to decide, adopting the procedure that the Hon.Minister has set out ? That is, before a bill becomes law . . . why not the judiciary or, say, the highest court, the Supreme Court, or some other higher court, sit as the constitutional court ? Why not an institution of trained judges, independent judges, within the two weeks you have mentioned here, motivated by the very people who you say should bring this matter before a court, decide the validity of the law ? That is the suggestion I wish to make because, we feel, the country will be happy, even the critics of this method will be happy, if they know that the judiciary in which they have confidence, in which the Hon.Minister has confidence, has that power. [1]

Why the Minister did not accept this proposal was not merely because he wanted a different "court"; he also intended that it should be manned by different people. "Some people have expressed horror", he said, "that one can even leave room for people other than members of the judiciary to be members of the Constitutional Court". He referred to the French Constitutional Council and the Federal Constitutional Court of Germany, to both of which non-lawyers had been appointed,[2] and urged two reasons why it ought to be possible to do likewise in Sri Lanka:

> 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 everyday matters of political issues in the political arena. That would do no good for judges . . .
>
> There is also one other thing. In the matter of this question of the constitutional Court, it must be realised

---

1. Ibid., col.2868.

2. The Constitutional Council of France consisted of nine members, three of whom were appointed by the President of the Republic, three by the President of the National Assembly, and three by the President of the Senate. They were appointed for nine years and their terms of office were not renewable. In addition, former Presidents of the Republic were members ex

> that expertise in legalism alone is not enough. For instance, supposing we had an equivalent to Sir Ivor Jennings here, would we not consider him a suitable member of the Constitutional Court ? But if you say it shall be just a portion of the Supreme Court bench or a division thereof, all such men are shut out. We have professors of constitutional law, we have men of goodly position and expertise; and what has to be brought in is not only the legal expertise but proper attitudes.[1]

Ceylonese courts had hitherto exercised a variety of jurisdictions. These included the determination of disputed elections, allegations of breach of privilege of Parliament, charges of criminal defamation of government personalities, applications for writs in matters affecting individual liberty and, of course, questions relating to the validity of legislation. Strong political under-currents flowed through many, if not all, of these cases. Yet the judges who tried them often emerged with their reputations undiminished, and the institutions continued to enjoy the confidence of the large majority of the people of the country. Ceylon did not have a professional judiciary. Judges of the superior courts were usually drawn from the Bar, the bench and the legal departments of government.[2] No academician had yet been appointed, but judges sometimes ventured into academic life either concurrently or after retirement.[3] Therefore, it would not have been accurate to say, in 1971, that "legalism" was the dominant characteristic of the Ceylonese judiciary.[4] The question of "proper attitudes" is, however, a different matter, and perhaps a subject for a separate study. It would suffice to note at this stage that the Minister, in common with at least the

---

officio for life: see The French Constitution, 4 October 1958, Title VII. The Federal Constitutional Court of Germany, however, was a regular court exercising judicial power. It consisted of federal judges and other members, half of whom were elected by the Bundestag and half by the Bundesrat: see Basic Law for the Federal Republic of Germany, 23 May 1949, Arts.92-98. Both these institutions examined the constitutionality of proposed legislation, in addition to other functions assigned by the respective constitutions.

1. Constituent Assembly Debates, 4 July 1971, col.2894.

2. Infra, ch. IV.

3. For example, Sir Francis Soertsz (visiting lecturer at the Ceylon University College), H.W.Tambiah and N.Tittewella (visiting lecturers at the University of Colombo), C.G.Weeramantry (Professor of Law at Monash University, Australia), M.F.S.Pulle and S.R.Wije tilleke (Principals of the Ceylon Law College).

4. Cf. views expressed by Colvin R.de Silva in 1968 on "the the endeavour of our courts to march with the times", supra, p.121.

other members of his political party, shared a deep distrust of the judiciary. Expression was given to this fear, though not in the Constituent Assembly, in a memorandum on the appointment of judges which was prepared by the ministry of constitutional affairs and distributed to members of the government parliamentary group. Dealing with an impractical and perhaps hypothetical[1] proposal that judges, and not the executive, should have the power of making appointments to the judiciary, the memorandum observed:

> The suggested procedure would be comforting to the privileged classes, since it would provide a means of perpetuating the class composition of an institution which, they could hope, might operate as a bastion of conservatism against the common man's demand for a egalitarian society and for progress towards socialism. The suggestion is an example of the natural attitude of those who fear the people and their representatives.
>
> It is hardly necessary to labour the point that this suggestion is fraught with social and political danger. The Supreme Court would in time tend to be out of sympathy with the people and their aspirations. In a changing world, an explosive situation is bound to arise if privilege is entrenched in this way.
>
> The above criticism does not involve the view that the Supreme Court, generally speaking, is capable of dishonesty. But it does involve two propositions: firstly, that the judges of the Supreme Court are, generally speaking, drawn from the strata of society that can be described as privileged; and secondly, the proposition that judgments are not purely objective, particularly in cases where the State or the conflict of interest of classes are involved. Decisions often depend upon a judge's personal view of what is fair or what is reasonable; and this in turn must, generally speaking, depend upon the judge's personal philosophy and social background. It is clear that laws can never be made so as to eliminate this personal factor.[2]

The jurisdiction of the Constitutional Court would be invoked in the following manner. Every bill will be published in the Gazette at least seven days before it was placed on the agenda of the National State Assembly.[3] Any question as to whether any provision in a bill was inconsistent with the Constitution will be referred by the Speaker to the Court. This reference will be made by him if: (1) he was of the view that there was such a question;

---

1. The memorandum did not identify the source from which this proposal originated. It was not proposed by any of the political parties.
2. Op.cit.
3. S.46(1).

(2) he received from the Attorney-General a communication that in his opinion the question whether any provision in a bill cannot be validly passed except by the special majority prescribed by the Constitution should be referred to the Court; (3) he received within a week of the bill being placed on the agenda a written notice raising such a question signed either by the leader in the Assembly of a recognised political party, or by at least such number of members of the Assembly as would constitute a quorum; or (4) the Court on being moved by any citizen within a week of the bill being placed on the agenda, had advised him that there is such a question.[1]

The Attorney-General was under a duty to examine not only every bill, but also every amendment proposed to a bill.[2] Presumably, therefore, the Attorney-General and the Speaker could form the view that there was a question which ought to be referred to the Constitutional Court at any stage right up to the final voting on the bill. But both these officers were in a rather unenviable position. The Speaker, being not necessarily a lawyer, would depend on his own legal adviser, the Attorney-General. The latter, being the legal adviser to the Government as well, would probably have been consulted before or in the course of the drafting of the bill, and may have committed himself to a particular view long before he entered upon the constitutional duty of examining the bill. If that view was that the bill was inconsistent with the Constitution, and the Government had disregarded his advice, he would now find himself compelled by law to take the extraordinary step of taking his Government to Court. As far as the citizen was concerned, it was required of him that he should be vigilant enough, first to follow all bills published in the Gazette and then presented in the National State Assembly, and then to discover that a provision in a particular bill, which may or may not have a relevance in his life, contravened a fundamental right. He would have to make this discovery by examining the proposed law in the abstract. The price to be paid for negligence, ignorance or inadvertence, was the diminution of one's rights and freedoms.

---

1. S.54.
2. S.53.

Not every bill could be canvassed in this manner. As the Minister explained:

> There comes once in a way, very rarely, but it comes, as came for instance in this Parliament in the case of the demonetization law, the need for a government in the national interest urgently to pass a law in the shortest possible time before people can make preparations against that law.[1]

Section 55 exempted a bill which was, in the view of the Cabinet, urgent in the national interest, and bore an endorsement to that effect, from being published in the Gazette. It would be referred by the Speaker to the Constitutional Court which was required to communicate its advice to the Speaker within 24 hours of assembling. Such advice would be that: (1) the provisions of the bill were consistent with the Constitution; (2) the bill or any provision therein was inconsistent with the Constitution; or (3) that it entertained a doubt that the bill or any provision therein was inconsistent with the Constitution. By the device of the appropriate endorsement, whether made bona fide or not, it was, therefore, possible for a government to avoid subjecting a bill either to public scrutiny or to legal arguments thereon, in regard to its constitutional validity.

The Attorney-General had the right to be heard on all matters before the Constitutional Court.[2] When an "urgent bill" was being examined, none other than the Attorney-General had the right to be heard. On other occasions, the Court had the discretion to grant to any person such hearing as would appear to it to be necessary.[3] Therefore, a citizen who was questioning the validity of a bill could not, as of right, insist on being heard. The practice and procedure of the Court was not prescribed in the Constitution, but was left to be regulated by rules of Court which required the approval of the National State Assembly.[4] All hearings before the Constitutional Court were open to the public.[5] Every decision would be by a majority vote, and no member was permitted to refrain from voting.[6] While decisions on "urgent bills" were required to be communicated to the Speaker within 24 hours,[7] other decisions

---

1. Constituent Assembly Debates, 4 July 1971, col.2856.
2. S.63(1).
3. S.63(2).
4. S.59.
5. S.62.
6. S.61.
7. S.55(1).

were required to be given, together with the reasons, within two weeks of the reference.[1] Excluding weekends, this would leave ten days for the parties to be summoned, for written submissions to be filed, for oral arguments to be made, and for the judgment of the Court to be written and despatched. If more than one party had raised questions of inconsistency, and if the Court decided to grant to all such persons a hearing, the proceedings might have become uncomfortably tight.[2]

Review of Administrative Action

Section 121(3) of the Constitution provided that the highest original court shall have "the power to issue such mandates in the nature of writs as the Supreme Court is empowered to issue under existing law". These were the writs of habeas corpus, mandamus, certiorari, quo warranto, prohibition and procedendo. In the Constituent Assembly, the Minister explained that:

> It is precisely this mandate issuable from the Supreme Court that is the means by which these matters concerning fundamental rights can and would be enforced.[3]

He added that if a person "wishes to go to the ordinary courts by way of a normal every-day action such as those filed in the District Court, he can do so". He was presumably referring to the declaratory action and the application for an injunction.

These remedies had existed in the normal law for over a hundred years. They had been introduced for the ordinary purposes of adjudication and dispute settlement. Over the years, their scope and applicability had been defined by courts. Without any express provision to that effect in the Constitution or in any other law, they were now intended to be invoked for the enforcement of fundamental rights. The Indian Constituent Assembly appears to have believed that these ancient remedies may not only be inadequate, but may also require special authority in order to be adapted and utilised for this purpose. Accordingly, the Indian Constitution, while guaranteeing the right to move the Supreme Court by appropriate proceedings for the enforcement of rights, provided that:

> The Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of the rights . . .

---

1. S.65.
2. Infra, pp. 241 - 260.
3. Constituent Assembly Debates, 10 June 1971, col.1302.

The constitutions of other Commonwealth countries which have sought to protect fundamental rights also contain similar provisions. For instance, the Constitution of Fiji, which came into operation on 10 October 1970 while Ceylon's Constituent Assembly was in session, contained the following provision for the enforcement of fundamental rights:

> (1) If any person alleges that any of the provisions of this chapter has been, is being, or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction -
>
> (a) to hear and determine any application made in pursuance of the preceding subsection;
>
> (b) to determine any question which is referred to it in pursuance of the next following subsection [i.e. by a subordinate court];
>
> and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this chapter. [1]

In April 1972, while the final draft of the constitution was receiving its finishing touches, the House of Representatives amended the Interpretation Act.[2] This amending law, which was introduced by the Minister of Justice, Felix Dias Bandaranaike, "to facilitate the acquisition of land for village expansion and other public purposes" and which preceded the new Constitution by eleven days, seriously eroded the remedies upon which the new Constitution relied for the enforcement of fundamental rights. The declaratory action was made inapplicable in respect of statutory decisions and orders; the issue of injunctions against the State was prohibited; and the writ jurisdiction (other than habeas corpus) was emasculated by confining it only to ex facie errors of law. Consequently, the fundamental rights were rendered almost unenforceable.

---

1. Art. 17.
2. Interpretation (Amendment) Act, No.18 of 1972. For a fuller discussion of its implications, see infra, pp.362-370.

The 1978 Constitution

At the general election held on 21 July 1977, 86.68 per cent of the electorate polled to produce the following result:

TABLE 16
THE 1977 GENERAL ELECTION RESULT

Party	Seats won	Votes polled	Percentage polled
United National Party	140	3,179,221	50.9
Tamil United Liberation Front	18	421,488	6.7
Sri Lanka Freedom Party	8	1,855,301	29.7
Ceylon Workers Congress	1	62,707	1.0
Independents	1	353,073	5.6

Source: Ceylon Daily News, Parliament of Sri Lanka 1977 (Colombo: Associated Newspapers of Ceylon Ltd, 1977).

For the first time since Independence, neither the Lanka Sama Samaj Party (225,317 or 3.6 per cent) nor the Communist Party (123,856 or 1.9 per cent) were represented in the legislature. Following the implementation of the Indo-Ceylon Agreements of 1964 and 1974, the Indian Tamil community was able to elect one of its own representatives for the first time in nearly thirty years. The leader of the UNP, J.R.Jayewardene, was appointed Prime Minister, and the leader of the TULF, A.Amirthalingam, was elected Leader of the Opposition.

In its manifesto[1] the UNP had sought a "mandate to draft, adopt and operate a new Republican Constitution in order to achieve the goals of a democratic socialist society":

> We shall include in the Constitution the Basic Principles accepted by the 1975 Party Sessions with reference to Religion and Language and among them being the guaranteeing to the people their Fundamental Rights Privileges and Freedoms, re-establishing the independence of the Press and the Judiciary and freeing it from political control and interference. We will ensure in the Constitution that every citizen, whether he belongs to a majority or minority, racial, religious or caste group enjoys equal and basic human rights

1. "A Programme of Action to Create a Just and Free Society", (Colombo, 1977).

> and opportunities. The decisions of an All-Party Conference which will be summoned to consider the problem of non-Sinhala speaking people will be included in the Constitution. Executive power will be vested in a President elected from time to time by the people. This will ensure stability of the executive for a period of years between elections. The Constitution will also preserve the parliamentary system we are used to, for the Prime Minister will be chosen by the President from the Party that commands a majority in Parliament and other Ministers of the Cabinet will also be elected Members of Parliament.

Within less than two months of assuming office, the new Government took steps to introduce the concept of an executive presidency. On 14 September 1977, a bill for this purpose was certified by the Cabinet as being "urgent in the national interest". It was neither discussed in the government parliamentary group nor published in the Gazette for public information. But, curiously, after the Prime Minister had introduced the bill in the National State Assembly, the debate on it was adjourned for two weeks, and it was thereafter debated and approved in one day after the two opposition parties had walked out in protest. On 20 October 1977, the Speaker certified the Second Amendment to the Constitution which combined in the President the powers of both the constitutional Head of State and of the Prime Minister. It was announced that the law would come into operation nearly four months later, on 4 February 1978, when, in terms of it, the Prime Minister would assume office as President.

Select Committee

On the same day on which the Second Amendment was certified by the Speaker, the National State Assembly resolved to appoint a Select Committee from among its members "to consider the revision of the Constitution of the Republic of Sri Lanka and other written law as the Committee may consider necessary". The TULF declined to serve on this committee. Its leader explained that:

> We felt that the Government itself had not set about the question of solving the problem of the Tamil-speaking people in the way in which they said they were going to solve it. In their election manifesto as well as in their Policy Statement they said that they would find a solution on the basis of a consensus and that they would summon an all-party conference as stated earlier and implement its decisions. In

> fact, even in the paragraph dealing with the Constitution in their manifesto they said that the decisions of an all-party conference which would be summoned to consider the problem of the non-Sinhala speaking people would be included in the Constitution. So, if the Government had either summoned an all-party conference or started negotiations with us with a view to evolving a formula as a basis for the solution of this problem, we could have gone into the Select Committee in order to work out a scheme of government - a Constitution embodying that as one of its aspects.[1]

The SLFP agreed to serve on the Select Committee in the belief "that a Third Amendment was to be introduced making further changes in the Constitution, including changes consequent on the Second Amendment":

> Our objects in participating in the deliberations of the Select Committee were (a) to restore the supremacy of the National State Assembly, and (b) to prevent the transfer of any substantial power into the hands of one individual who was already not only above but also beyond the control of the legislature and of the courts.[2]

Also from the opposition benches, the leader of the CWC, which had "been always sidetracked" and "ignored" whenever constitutions were framed. decided to participate. As he too explained later:

> I am glad to say that my participation in the Select Committee helped me not only to understand other people's points of view, but also to make both the Government and the SLFP leaders understand our problems.[3]

Accordingly, on 3 November 1977, the Speaker nominated the following to serve on the Select Committee:

J.R.Jayewardene (UNP): Chairman [4]
R.Premadasa (UNP)
L.W.Athulathmudali (UNP)
R.J.G.de Mel (UNP)
Gamini Dissanayake (UNP)
K.W.Devanayagam (UNP)
M.H.M.Naina Marikar (UNP)
S.Thondaman (CWC)

---

1. National State Assembly Debates, 2 August 1978.
2. Ibid.
3. Ibid.
4. After Jayewardene assumed office as President on 4 February 1978, Prime Minister Premadasa functioned as chairman on this committee. Jayewardene, however, was invited to be present and in fact actively directed its proceedings.

Sirimavo R.D.Bandaranaike (SLFP)
Maithripala Senanayake (SLFP).

The committee was heavily weighted in favour of the Government.[1]

The Select Committee held 16 meetings between 18 November 1977 and 7 June 1978.[2] It caused to be published in the national newspapers a questionnaire seeking the views of the public on a variety of matters including the following:

3. What are the other "fundamental rights which you would like to see guaranteed in the revised Constitution ?

4. What procedure do you suggest for dealing with any infringement of such rights ? In particular, what safeguards do you suggest in respect of legislation which is alleged to contravene the provisions of the Constitution ?

10. What do you consider should be done to preserve and foster the independence of the judiciary ?

18. What are your views in regard to the functioning of the Constitutional Court under the present Constitution ? Do you favour the testing of the constitutionality of any act of the legislature in the normal courts ?

19. What provisions and safeguards would you wish to have included in the Constitution to solve the problems faced by the minorities ?

The TULF and the two left parties, the LSSP and the CP, ignored the questionnaire. The lack of public interest or enthusiasm in this second attempt in six years to draft a new constitution was evidenced by the fact that of 1400 persons who obtained copies of the questionnaire, only 281 replied.[3] The committee then invited political parties, associations and other groups, and individuals who had made "substantial submissions" in their written replies to give oral evidence in amplification of the views expressed by them. Of those who responded, nearly all spoke at length on the

---

1. Five of the government members were lawyers. At the request of the two non-lawyer representatives of the SLFP, two lawyers - the former Speaker of the National State Assembly and the former Permanent Secretary to the Ministry of Justice, were invited to be present at meetings of the committee. In attendance on behalf of the government were J.A.L.Cooray and M.Sanmuganathan, both of whom had helped to draft the 1972 Constitution; and attorney-at-law Mark Fernando who, together with Gamini Dissanayake, had prepared a constitutional scheme for the UNP when it was in opposition.

2. Report of a Select Committee of the National State Assembly appointed to consider the revision of the Constitution (Parliamentary Series, No.14, 22 June 1978).

3. Ibid.

on the subject of fundamental rights, and urged not only that the scope of the protected rights be widened, but also that the restrictions be reduced and that proper machinery be established for their enforcement. Meanwhile, in December 1977, at a government-sponsored seminar attended by members of the legal profession, the subject of fundamental rights was further examined. It was agreed at this seminar that the rights protected in the 1972 Constitution were "not sufficiently exhaustive and explicit"; that the National State Assembly should not have the power to enact with a two-third majority a law which was inconsistent with the Constitution; that if a bill had not been examined for constitutionality by the highest court, the citizens should retain the right to challenge the constitutionality of such legislation within a period of six months of its enactment; and that the right to a remedy should be specifically provided for in the Constitution. The seminar, however, could not agree on which rights ought to be guaranteed to all persons and which only to citizens.[1]

The SLFP, freed from the constraints of office and unencumbered by the doctrinaire politics of its erstwhile allies, expressed itself quite expansively on the subject of fundamental rights.[2] However, to the extent that the SLFP considered that it "would not be so naive as to participate in an exercise to repeal the Constitution we ourselves have promulgated", the process of self-criticism was inhibited. On the subject of the scope of the rights, it had this to say:

> The Second Amendment vested supreme state power in the hands of one individual who is superior to the National State Assembly and outside the jurisdiction of the Courts. In this situation, it is essential that adequate protection should be accorded to the citizen against the abuse of state power. This can only be done by strengthening the provisions relating to fundamental rights. The concept of fundamental rights was first introduced into our Constitution in 1972. Since then, many significant developments in the field of human rights have taken place at the international level, and a more elaborate definition of fundamental rights is now almost universally ãĉĉepted. We are of the view, therefore, that a

---

1. Seminar on the Administration of Justice, Fundamental Rights and Freedoms: Report of the Proceedings of 28 December 1977.

2. The memorandum of the SLFP to the select committee is published in the Report of the Select Committee, op.cit., at p.165.

> more comprehensive statement of fundamental rights should be formulated for incorporation in the Constitution by reference, in particular, to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which came into force in 1976.

While the reason implied in the above paragraph for the sketchy statement of rights in the 1972 Constitution does not bear examination since the two covenants were already in existence in 1972 though not in force, it was significant that the SLFP had now re-committed itself, after eighteen years, to the liberalism of its founder. On the subject of minority rights,too, it had obviously reverted to its original views:

> We recommend that Sinhala and Tamil be declared the national languages of Sri Lanka while Sinhala remains as the one official language. We also recommend that all the existing laws, regulations and rules relating to the use of the Tamil language be accorded constitutional status by being incorporated in the Constitution. These would include the Tamil Language (Special Provisions) Act, No.28 of 1958 and the regulations made thereunder; and the Language of the Courts (Special Provisions) Law, No.14 of 1973 and the determinations and regulations made thereunder.

On the subject of the independence of the judiciary, while it considered the existing provisions adequate to secure the independence of the judges of the superior courts, it recommended that the Judicial Services Advisory Board with which it had experimented under the 1972 Constitution[1] be replaced by the Judicial Service Commission which had existed under the 1946 Constitution.

On the subject of legislation which contravenes any provision of the Constitution, the SLFP expressed itself categorically against the empowering clause in the 1972 Constitution:

> We are of the view that it should not be possible for the National State Assembly to enact, even with a special majority, a law which in some particular or respect, is inconsistent with any provision in the Constitution without first amending or repealing such provision of the Constitution.

---

1. The Judicial Services Advisory Board consisted of the Chief Justice (ex officio) and four other members appointed by the President, of whom two were required to be state officers administering justice. For an evaluation, see N.Jayawickrama, "Security of Tenure of Judicial Officers - the Sri Lankan Experience", Commonwealth Judicial Journal, 1980.

But on the subject of the enforcement of fundamental rights and the concept of a Constitutional Court for the review of bills, the SLFP remained rigidly committed to the 1972 Constitution. While it had "no objection to any further remedies being provided" for canvassing the validity of administrative action, it strenuously opposed the ex post facto review of legislation. By its inflexible attitude on this last-mentioned matter, the SLFP not only denied itself a forum to resist, in later years, the tyranny of a five-sixth legislative majority, but also offered the government a lever with which to overcome the growing body of opinion within its own ranks which favoured a strengthening of the citizen's rights in respect of legislative action.

There was reason to believe that a bill of rights drafted by the UNP Government would not only be comprehensive, but would also be properly enforceable. Firstly, the UNP did not suffer from any ideological inhibitions. It was a pragmatic political party, committed to "dharmishta" - a free and just society, with the minimum of state control; to the expansion of the private sector and the dismantling of much of the bureaucratic apparatus which had grown enormously in recent years; to the lifting of curbs on travel and all other restraints on individual freedom. The party machinery had been streamlined and effective power lay in the hands of, and all decisions of consequence were taken by, its new leader, J.R. Jayewardene. One of the few surviving members of the State Council and of the Independence Cabinet of 1948, he was a lawyer who had abandoned the profession quite early in life to form a radical wing in the Ceylon National Congress. His own political philosophy had apparently metamorphosed from extreme right wing in the years of the Dullesian cold war into "indigenous socialism". But through it all, he remained a firm believer in constitutionalism. Secondly, the experience of the six-year state of emergency under the SLFP Government was fresh in the minds of the new legislators. Some of them who had been incarcerated for varying periods at the instance of the executive had personally experienced the sense of futility and frustration that must arise when confronted with absolute state power. Thirdly, the hard core of the new Government was the legal profession, many of whom while not actually sharing the burden and responsibilities of day-to-day government, nevertheless continued to be a powerful pressure group within the party. But many of the

expectations were to remain unfulfilled. Once more, it was a government that was drafting this charter of citizens' rights. It would be adopted by a legislature which was government-controlled, and not by the people at a referendum. It would be operated, in the first instance, by that same government for very nearly the entire period for which it had been elected. Accordingly, the same constraints that operated on the Constituent Assembly were to apply to the Select Committee and the National State Assembly too.[1]

On 7 June 1978, the Select Committee, by a majority vote, adopted its report. To the report was annexed, inter alia, a draft constitution. The two SLFP members submitted a dissent in which, on the subject of the "free expression of the opinion of the people in the choice of a legislature", they observed that the concept of the cut-off point of 1/8 or 12 per cent in the proposed system of election by proportional representation was "utterly undemocratic and unreasonable"; and that the proposal to impose civic disability on, and move for the expulsion of, a member of the legislature on account of his political, as distinct from criminal, conduct, was a device which would enable a parliamentary majority to eliminate its political opponents. The CWC leader, S.Thondaman, submitted a memorandum in which, apart from criticising the concept of the cut-off point as being likely to "wipe out the representation of several recognised political parties" as well as "cultural and ethnic interests", he observed that in respect of fundamental rights:

(a) the proposed limitations were "as extensive and vague" as section 18(2) of the 1972 Constitution, and
(b) the provisions with regard to urgent bills had already been abused and would continue to facilitate "vast inroads into the fundamental freedoms of the people with no real judicial scrutiny".[2]

On 22 June 1978, Prime Minister Premadasa presented the report to the National State Assembly.

---

1. For a fuller discussion of the emergence and character of the UNP, see T.D.S.A.Dissananayake, J.R.Jayewardene of Sri Lanka (Colombo: Swastika Press, 1977), and Eamon Kariyakarawana, JR:The People's President (Colombo: State Printing Corporation, 1981).

2. The dissenting report and memorandum are both reproduced in the Report of the Select Committee.

The bill containing the proposed new constitution was published in the Gazette on 17 July 1978 and presented in the National State Assembly eight days later. On 2 August, when the Prime Minister moved its second reading, the two main opposition parties, the TULF and the SLFP, indicated that they did not propose to participate in the debate. In a statement which he made before walking out of the chamber with his party colleagues, TULF leader Amirthalingam described the struggle "for the liberation of our people" who had "been enslaved first by the Portuguese, next by the Dutch, next by the British, and now in the name of independence by our own brothers, the Sinhalese nation". On behalf of the SLFP, Mrs.Bandaranaike rejected the proposed constitution and withdrew from the chamber. In her statement, she protested that after the report of the Select Committee had been presented to the Assembly and published as a Sessional Paper, three new sections had been smuggled into the draft constitution:

> These sections are so fundamental in nature and so draconian in character that had they even been suggested at a meeting of the Select Committee, the Sri Lanka Freedom Party would have immediately withdrawn, and disociated itself from further deliberations of the Select Committee. These three sections, in our view, constitute the most diabolical threat to the continued survival of the democratic process in Sri Lanka.[1]

The three sections referred to by her were:

a) Section 157 which made it an offence to advocate the amendment of the constitution otherwise than in accordance with the prescribed procedure:

> The punishment for speaking out one's thoughts, for expressing one's ideas on change, for seeking to assert one's freedom of speech, is imprisonment for ten years, an unlimited fine, forfeiture of all property, loss of one's seat in Parliament and the disqualification for all time and for all purposes, of all the candidates of the political party to which one belongs.[2]

b) Section 158 which prohibited Parliament from enacting a law in contravention of the provisions of a treaty or agreement relating to foreign investment in Sri Lanka which had been

---

1. National State Assembly Debates, 2 August 1978.
2. Ibid. This section was deleted before the National State Assembly was called upon to vote for the adoption of the draft constitution. H.W.R.Wade, in the course of his Hamlyn Lecture in

approved by Parliament by a resolution passed with a two-third majority:

> At the time when sovereign governments and international organisations are acting in unison to curb the corrupting tentacles of multinational corporations, you are seeking by means of your constitution to place our country at the disposal of foreign adventurers, and to make our people and our people's representatives impotent to act in the national interest should it become necessary to do so.[1]

c) Section 161 which provided that where a Member of Parliament ceased by resignation, expulsion or otherwise, to be a member of the political party to which he belonged at the time of the commencement of the constitution, his seat would become vacant, and that political party would be entitled to nominate another person to fill that vacancy:

> A Member of Parliament, having campaigned strenuously in his electorate, having faced the vicissititudes of a general election, having been elected by the free votes of an overwhelming majority of the voters, can now be summarily removed from Parliament and replaced by one more acceptable to the President by the simple device of expelling him from the party. Such a member would not have been found guilty of a corrupt or illegal practice, nor would he have become subject to any other disqualification. His only crime would have been to incur the wrath or the displeasure of His Excellency the President. Parliament will soon comprise not members elected by the people representing their simple aspirations and sensitive to their daily problems, but the President's nominees reflecting his conception of a Sri Lanka as another Singapore or South Korea, sharing his dreams of an era of unbridled capitalism, and helping him reach his goal of absolute power.[2]

On the subject of fundamental rights, she objected to "the illusion" which was sought to be created by the draft constitution:

> In reality, some of the most fascist legislation of recent times, such as the Parliamentary (Powers and Privileges) (Amendment) Law, the Special Presidential Commissions of Inquiry Law, the Criminal

---

1980, described this section as a "bizarre form of entrenchment"; see H.W.R.Wade, Constitutional Fundamentals (London: Stevens & Sons, p.40.

1. Ibid.
2. Ibid.

> Procedure (Special Provisions) Law, the Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, and the Local Authorities (Imposition of Civic Disabilities) Bill . . . are being entrenched as "existing law". [1]

On 16 August, the National State Assembly, with 137 voting in favour and none against, enacted the Constitution of the Democratic Socialist Republic of Sri Lanka. Mr.Thondaman voted in favour:

> I do not for a moment say that this Constitution is perfect or ideal or that it provides equality of status for Tamils. But I definitely say that this is an improvement on what went before. Particularly for the sections of the people who have been kept out for the last thirty or forty years, anything given is an improvement;[2]

and a month later, accepted a portfolio in the Cabinet. On 31 August 1978, the bill was certified by the Speaker, and on 8 September 1978, the new Constitution was brought into operation, thus establishing the Second Republic.[3]

The Protected Rights

Chapter III of the Constitution contains the substantial portion of the protected rights:

a) freedom of thought, conscience and religion
b) freedom from torture
c) the right to equality
d) freedom from arbitrary arrest, detention and punishment
e) the right to a fair trial
f) protection against the retroactivity of the criminal law
g) freedom of speech
h) freedom of peaceful assembly
i) freedom of association, including the freedom to form and join a trade union
j) freedom to engage in any occupation
k) freedom of movement
l) freedom to enjoy own culture and use own language.

These rights are protected by the provision that their amendment or repeal requires the affirmative votes of not less than two-thirds

---

1. These laws are discussed in Ch.III.
2. National State Assembly Debates, 16 August 1978.
3. The expression "Second Republic" in used by A.J.Wilson in his study of the 1978 Constitution, The Gaullist System in Asia (London: Macmillans, 1980).

of the total number of members of Parliament; in the case of the first two rights enumerated above, approval by the people at a referendum is also required.[1] Unlike in the 1972 Constitution, the rights relating to, or arising from, the deprivation of personal liberty, have been made applicable to "all persons", while the others are confined to citizens. But what is more significant and relevant, in the particular circumstances of Sri Lanka, is the following provision which was included in the Constitution at the insistence of the leader of the CWC:

> A person who, not being a citizen of any other country, has been permanently and legally resident in Sri Lanka immediately prior to the commencement of the Constitution and continues to be so resident shall be entitled, for a period of ten years from the commencement of the Constitution, to the rights declared and recognised by paragraph (1) of this Article. [2]

The "stateless" community of Indian Tamils, who remained unrecognised under the 1972 Constitution, were now guaranteed all the rights enjoyed by the citizens, for a period of ten years by when, hopefully, the Indo-Ceylon Agreements of 1964 and 1974 would have been fully implemented and the problem of statelessness no longer existed.

The Inadequately Protected Rights

This statement of fundamental rights is more comprehensive than that contained in the 1972 Constitution, and has been formulated with a greater degree of care and precision. Yet, when examined and contrasted against international law, it is still deficient. For instance:

1. "Birth or other status" an expression capable of extending the protection of fundamental rights to children who at birth are regarded as illegitimate, and therefore devoid of all the legal attributes of a "child", is not one of the prohibited grounds of discrimination.
2. The grounds on which a person may be deprived of personal liberty are not prescribed. The right of a person deprived of his liberty to trial within a reasonable time or to release

---

1. Arts. 82-84.
2. Art.14(2). Some others who gave evidence before the select committee also urged that fundamental rights be made applicable to the Indian Tamils who were not yet citizens of Sri Lanka. See, e.g., the evidence of Vajira Cabraal who was a member of the delegation from the Centre for Society and Religion: Report of the Select Committee, p.288.

on bail; the right to take proceedings before a court in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful; the enforceable right of a victim of unlawful arrest or detention to compensation; the right of juveniles and unconvicted persons to segregation and separate treatment in prison; and the right not to be imprisoned for inability to fulfil a contractual obligation, have all been omitted.

3. The right to a fair hearing "for the determination of his civil rights and obligations" is not protected.
4. The rights of accused persons which have been enumerated do not include:
   a) the right to be informed promptly and in detail in a language which he understands of the nature and cause of the accusation against him;
   b) the right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   c) the right to be tried without undue delay;
   d) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e) the right not to be compelled to testify against himself or to confess guilt;
   f) the right, if convicted, to have his conviction and sentence reviewed by a higher tribunal;
   g) the right not to be tried or punished again for an offence for which he has already been finally convicted or acquitted;
   h) the right to be compensated if he has been the victim of a miscarriage of justice.
5. The right to freedom of speech and expression does not include the freedom "to seek, receiveand impart information and ideas".
6. The right to freedom of movement does not include the freedom to leave the country.

The Omitted Rights

As with the 1972 Constitution, a number of rights have been omitted altogether. For instance:

1. The "inherent" right to life is not protected. While provision

has been specifically made for the imposition of the death penalty, the concomitant duties not to impose sentence of death on persons below 18 years (or over 70 years) of age; not to execute such sentence on pregnant women; to confine such sentence only for the most serious crimes and pursuant to a final judgment rendered in accordance with a law enacted prior to the commission of the crime; not to extend such punishment to crimes to which it does not at present apply; not to re-establish it once it has been abolished; and to recognise the the right to seek amnesty, pardon or commutation of sentence, are all omitted.

2. Slavery, the slave trade, servitude, and forced or compulsory labour are not prohibited.
3. The family rights are not provided for.
4. The right to privacy, honour and reputation is not guaranteed.[1]
5. The rights relating to property, which the UNP had strenuously, but unsuccessfully, urged for inclusion in the 1972 Constitution, are omitted.

The rights relating to politics and democracy which were contained in the 1972 Constitution have been repeated.[2] The inequality which then existed in regard to suffrage has been remedied in the process of introducing the concept of proportional representation.[3] Hereafter, the value of a seat in Parliament will be ascertained in the following manner:

> The total number of electors whose names appear in the registers of electors of all the electoral districts is divided by 160. The whole number resulting from such division is referred to as the 'qualifying number'. The total number of electors of each electoral district is then divided by the qualifying number, and each electoral district is entitled to return such number of members as is equivalent to the whole number resulting from the division of the total number of such electors in that electoral district by the qualifying number.

Accordingly, the number of votes required to win a seat will be the same throughout the country. However, some distortion has been

---

1. The art of telephone tapping is now reportedly being perfected by the security arm of the state. A recent report claimed that the purchase of "sophisticated equipment" by the Intelligence Services Division will enable that Division's "telephone surveillance unit" stationed at "the Telephone Tapping Room at No.10 Cambridge Place, Colombo" to have "much wider access to telephone surveillance and will cover not only the city but the suburbs too": Weekend Sun, 9 January 1983, p.1.

2. Arts.62, 70, 76, 88, 90, 93. 3. Arts.98, 99.

introduced into the scheme by the requirement that a further 36 seats be allocated equally among the nine provinces.[1] Consequently, province 'A' which has three electoral districts will return four additional members, while province 'B' which in itself constitutes just one electoral district will also return the same number of additional members. In other words, more votes would be required to secure a seat in the three electoral districts of province 'A' than in the single electoral district of province 'B'. To that extent, the right to "equal suffrage" is impaired.

Two other provisions appear to infringe upon the principle of the "free expression of the will of the electors":

1. Article 99(5)(a) provides that:

> Every recognised political party and independent group polling less than one-eighth of the total votes polled at any election in any electoral district shall be disqualified from having any candidates of such party or group being elected for that electoral district.

The votes polled by a disqualified party are deducted from the total votes polled at the election in that electoral district, and are thereafter not taken into account for any purpose whatsoever. In other words, even if a political party or independent group has polled a sufficient number of votes to secure at least one seat, such party or group will not be allocated that seat if it has polled less than one-eighth of the total polled by all the parties in that electoral district. Consequently, small political parties and interest or pressure groups, including minorities, will have little chance of being represented in the legislature.

2. Article 81 enables Parliament, by a resolution passed by two-thirds of its members, to impose civic disabilities on a person for a period of up to seven years, and to expel such person from Parliament if he is already a Member of Parliament. This power may be exercised only if a Special Presidential Commission of Inquiry has found that person guilty of abuse or misuse of power, political victimisation or corruption. None of these concepts have been defined by law; nor are any of them criminal offences. In the exercise of this power, it would be possible

---

1. Art. 96(4).

> for a government to eliminate from the legislature some at least of its political opponents for political conduct which was hitherto judged, not by judges sitting as commissioners, but by the people at a general election.[1]

The right to an independent and impartial tribunal has been guaranteed in the usual manner by providing for the security of tenure of judges.[2] In respect of judges of subordinate courts this has been done by re-introducing the Judicial Service Commission which existed under the 1946 Constitution. For the first time, the jurisdiction of the superior courts has been set out in the Constitution, thus minimising the danger of any erosion of judicial power through legislative action. But while seeking to safeguard the independence and impartiality of the administration of justice in the years to come, the Constitution in its transitional provisions dealt an almost irrecoverable blow at these very same concepts. While Article 164 provided that all persons who held office in subordinate courts and tribunals immediately before the commencement of the Constitution would continue to hold such offices under the same terms and conditions, Article 163 provided that:

> All Judges of the Supreme Court and the High Courts established by the Administration of Justice Law, No.44 of 1973, holding office immediately before the commencement of the Constitution shall, on the commencement of the Constitution, cease to hold office.

This section applied to persons who already enjoyed constitutional guarantees of security of tenure in terms no different to that which their successors were to be offered by the new Constitution. As Mrs.Bandaranaike warned in the National State Assembly:

> Every Constitution has guaranteed the judges of our highest courts security of tenure and provided that they may be removed by Parliament for proved misconduct. Every government has so far honoured this provision whenever it has sought either to amend or replace a Constitution. For the first time, the present Government is seeking to remove all the judges of the two highest courts in the country in order to constitute new courts of a particular flavour. This blatant and gross interference with the judiciary

---

1. Infra, p.226.
2. Infra, p.193.

> can only result in creating courts whose term of office would necessarily have to be limited to that of the government itself. [1]

The right of the Tamil minority community "to use their own language" was more adequately protected than in the past. Ironically, the constitutional provisions were substantially those proposals which the SLFP had submitted to the Select Committee, but which, while in office, it had not found possible to offer. While continuing to recognise Sinhala as the official language, the Constitution accorded to both Sinhala and Tamil the status of "national languages of Sri Lanka".[2] A Tamil-speaking person was guaranteed the use of his language:

a) in Parliament or in a local authority;
b) as a medium of instruction in school and in university;
c) to correspond with officials;
d) to transact business with any official, and therefore, to obtain from such official, documents, or copies of, or extracts from, any official register, record, publication or other document, in his language;
e) as a medium of examination for admission into the state services;
f) to institute, or to participate in, proceedings in any court or tribunal.

The State was required to make laws, subordinate legislation, orders, proclamations, notifications, etc.,and to publish the Gazette and all other official documents, including circulars and forms, in both national languages. While Sinhala continued to be the language of administration and of the courts throughout the country, Tamil was granted an equivalent status in the northern and eastern provinces. But in one field of activity, the Sinhala-speaking person continued to have an edge over his fellow Sri Lankan: while a Sinhala-speaking state officer was not required to have a knowledge of, or to acquire proficiency in, the Tamil language, a Tamil-speaking person may be required to have a sufficient knowledge of the official language as a condition for admission into a state service, or to acquire such proficiency within a reasonable time after admission.[3]

---

1. National State Assembly Debates, 2 August 1978. Cf. circumstances leading to the removal of some of the judges of the Court of Appeal in 1973, infra, p.
2. Art.19.
3. Art.12(2), proviso.

Limitations on the Exercise and Operation of the Fundamental Rights

Existing Law

Article 16(1) provided that:

> All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.

Accordingly, as in the 1972 Constitution, the protected rights would operate subject to the entire body of existing law.[1]

Exemption and Restrictive Clauses

Apart from the right to freedom of thought, conscience and religion, and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment, the other protected rights were subject to exemption and restrictive clauses. These clauses, though drafted with greater circumspection than previously, were sometimes as irrational as in the 1972 Constitution. For instance, the right of a citizen to return to Sri Lanka is subject to:

> such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[2]

The following is a table of the exemptions and restrictions:

TABLE 17

EXEMPTIONS AND RESTRICTIONS ON THE EXERCISE AND OPERATION OF THE FUNDAMENTAL RIGHTS IN THE 1978 CONSTITUTION

Right	Restrictions
Thought, Conscience and Religion	
Torture; Cruel, inhuman or degrading treatment or punishment	
Equality before the law and equal protection of the law	A B C D E K L
Discrimination	A B C D E M L
Access to shops, etc.	A B C D E N L

1. For a detailed examination of the effect of this provision, see Ch.III.
2. Art.15(7).

Right	Restrictions
Arrest	A B C D E K L
Deprivation of personal liberty	A B C D E K L V
Fair trial	K
Punishment	K
Presumption of innocence	A K R L
Retroactive legislation	A K L S T
Speech and Expression	A B C D E F J K L
Peaceful assembly	A B C D E F K L
Association	A B C D E F H K L
Trade unions	A B C D E K L
Worship	A B C D E K L
Rights of minorities	A B C D E K L
Occupation and Profession	A B C D E G K L
Movement	A B C D E H K L
Right of return	A B C D E K L

A: Interests of national security
B: Interests of public order
C: Protection of public health or morality
D: Purpose of securing due recognition and respect for the rights and freedoms of others
E: Purpose of meeting the just requirements of the general welfare of a democratic society
F: Interests of racial and religious harmony
G: In relation to (a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental rights, and (b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.
H: Interests of national economy
J: In relation to parliamentary privilege, contempt of court, defamation or incitement to an offence
K: In their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them
L: Derogable during a state of emergency

M: Exemption relating to knowledge or proficiency in the official language
N: Exemption in favour of women, children and disabled persons
P: Exemption in respect of the deprivation of liberty pending investigation and trial
R: Exemption in respect of proving particular facts
S: Exemption in respect of criminal acts in accordance with general principles of law recognised by the community of nations
T: Exemption in respect of a minimum penalty
V: Exemption in respect of the deprivation of personal liberty pending deportation

As in the 1972 Constitution, the terminology in which the restrictions are imposed is:

> shall be subject to such restrictions as may be prescribed by law in the interests of . . . [1]

Inconsistent Legislation

Article 84 provided that a bill which is inconsistent with any provision of the Constitution may be passed with a two-third majority, and may thereafter co-exist with the inconsistent provision of the Constitution. Where the amendment or repeal of such provision requires approval by the people at a referendum as well, such bill would have to comply with that requirement too. But finally, as under the 1972 Constitution, a law which infringes a fundamental right may validly be enacted and remain on the statute book.[2]

Validity of Laws Not to be Questioned

Article 80(3) provided that:

> Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon, or in any manner call in question, the validity of such Act on any ground whatsoever.

Accordingly, it was possible, as under the 1972 Constitution, for a bill which was in conflict with a fundamental right, and to which Article 84 should have applied, to find its way into the statute book through a simple majority and to remain there, for the reason that no question of inconsistency in relation to such bill was raised within the prescribed time in the prescribed manner.[3]

---

1. The scope of the exemption and restrictive clauses is examined in Ch.III.
2. For instances when such bills have been passed, see Ch.V.
3. For an example of such a bill, see p.312.

The Enforcement of Fundamental Rights

Review of Bills

Apart from a few cosmetic changes, the procedure for the review of bills remained the same as under the 1972 Constitution. The Supreme Court replaced the Constitutional Court; the President, and not the Speaker, refers bills for examination by the Court; and the Supreme Court now has three weeks, and not two as in the past, to communicate its determination. In regard to urgent bills, the President may extend the 24-hour limit to a period not exceeding three days for the communication of the determination.[1]

Review of Administrative Action

In a radical departure from the previous constitution, provision was made in 1978 enabling a person to apply to the Supreme Court, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled. An application for relief or redress is required to be made, with the leave of the Supreme Court first had and obtained, within one month of the action complained of. The Supreme Court is required to hear and finally dispose of such complaint within a period of two months, and for this purpose it is empowered to "grant such relief or make such directions as it may deem just and equitable in the circumstances".[2]

---

1. Arts. 118, 121-123. For a detailed examination of this method of enforcement, see Ch.V.
2. Arts, 17, 126. For the application of this remedy, see Ch.VI.

CHAPTER III

THE CONTENT OF THE FUNDAMENTAL RIGHTS

The 1978 Constitution describes itself in the preamble as the "Supreme Law" of the Republic. Other Commonwealth Constitutions which use this expression proceed to amplify it by stating that a law inconsistent with any provision of the Constitution shall, to the extent of such inconsistency, be void and of no effect.[1] This Constitution, however, contains the very unusual and paradoxical provision that "all existing written law and unwritten law shall be as valid and operative notwithstanding any inconsistency" with the statement of fundamental rights contained therein.[2] In other words, the statement of fundamental rights in the Constitution, at least in regard to existing law, is not supreme; existing law in conflict with any attribute of a protected right, whatever its origin may be, prevails to the exclusion of that attribute. Such a law prevails whether or not it can be brought within the permissible grounds on which Parliament may further restrict the exercise and operation of fundamental rights.

It has already been noted that the legislature has failed to include within each definition of a right all the recognised attributes of that right. It is now proposed to ascertain the actual content of the fundamental rights declared and recognised in the 1978 Constitution after each has been subjected to the debilitating effect of existing written law. It is also proposed to examine the scope of Parliament's power to further restrict by law the exercise and operation of these rights.[3]

---

1. See, for example, the Constitution of Ghana, Art.1(2).

2. Art.16(1).

3. For the interpretation of the human rights concepts by independent international institutions and superior national courts, see Paul Sieghart, The International Law of Human Rights (Oxford: Clarendon Press, 1983).

THE RIGHTS

Freedom from Arbitrary Arrest

Article 13(1) states that:

> No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

This Article appears to contemplate the power of arrest being exercised by the traditional law enforcement agencies, namely, the courts and the police, according to well-established principles of criminal justice.[1] But since this Article is read subject to existing law, the protection offered is considerably less than what it appears to be. Under existing law, an arrest may be made either on a warrant or without a warrant. A warrant may be issued by a judge,[2] a justice of the peace,[3] a commission of inquiry,[4] Parliament or a parliamentary committee,[5] or a Minister of the Government.[6] An arrest without a warrant may be made by a police officer,[7] a judge,[8] a headman,[9] a revenue officer,[10] a prisons officer,[11] an excise officer,[12] an officer of the Ceylon Transport Board,[13] a railway official,[14] an officer of the Salt Department,[15] a forest officer,[16] a customs officer,[17] a public officer authorised by the Government Agent,[18] or by the Government Agent himself,[19] or by a private person.[20] A person making an arrest "may use all means

---

1. Gopalan v. State of Madras (1950) SCR 88.
2. Administration of Justice Law, s.84; Excise Ord.,s.36; Civil Procedure Code, ss.298, 650; Mental Diseases Act, s.3.
3. Mental Diseases Act, s.7.
4. Bribery Act, s.34(2).
5. Parliamentary (Powers and Privileges) Act, s.27A.
6. Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, s.11; Mental Diseases Act, s.6.
7. Administration of Justice Law, s.85; Official Secrets Act, s.19; Stay-in Strikes Act, s.2(b); Excise Ord., ss.34,35; Police Ord., ss. 63, 69; Firearms Ord., s.38; Forest Ord., s.48; Parliamentary (Powers and Privileges) Act, s.21; Houses of Detention Ord., s.10.
8. Administration of Justice Law, s.87; Firearms Ord., s.38;
9. Salt Ord., s.20; Firearms Ord., s.38.
10. Firearms Ord., s.38; Excise Ord., s.35.
11. Administration of Justice Law, s.88.
12. Excise Ord., ss.34, 35, 37; Salt Ord., s.20.
13. Motor Transport Act, s.84B.
14. Railways Ord., s.38.
15. Salt Ord., s.20.
16. Forest Ord., s.48.
17. Customs Ord., s.127; Excise Ord., s.35.
18. Firearms Ord., s.38.
19. Excise Ord., ss. 36, 37.
20. Administration of Justice Law, s.86; Police Ord., s.94.

necessary to effect the arrest",[1] including causing the death of that person if he is accused of an offence punishable with death.[2] For the purpose of making an arrest, he may enter and search any premises and may, if necessary, break open any outer or inner door to effect such entrance.[3] A person arrested may be searched.[4]

A person who is arrested shall be informed of the reasons for his arrest. The purpose of this requirement is to inform the detained person adequately of the reasons for his arrest so that he may judge the lawfulness of the measure and take steps to challenge it if he sees fit.[5] Such an opportunity is afforded by Article 13(2).

The exercise and operation of this right may be restricted by law in the interests of national security, public order or the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[6] Under international law, however, this right is absolute.[7] On the one hand, the limitation clause appears to be irrelevant. The procedure of arrest already "established by law" is to be found in the Criminal Procedure Code, which is of general application, and in the special statutes referred to above. If Parliament is to vary that procedure in the interests of, say, public security, and vest the power of arrest in respect of certain offences in a larger body of persons such as service personnel, it can do so only by means of a law, and as soon as it does so, that would also be a procedure "established by law". In other words, the right declared in Article 13(1) is such that a limitation clause is not necessary in order that the procedure established by law may be varied, from time to time, to meet the needs of changing conditions and circumstances. On the other hand, the limitation clause

---

1. Administration of Justice Law, s.90(1).
2. Ibid.
3. Ibid., s.90(2).
4. Ibid., s.90(5).
5. See X v. United Kingdom (6998/75), Judgment: 5 November 1981; The Queen v. Gnanaseeha Thero (1969) 73 N.L.R. 154; Corea v. The Queen (1954) 55 N.L.R. 457; and the other cases cited in Sieghart, Human Rights, pp. 150-152.
6. Art. 15(7). See also Art.15(8) for additional restrictions in respect of service personnel, and Art.13(7) which exempts a "removal order" and a "deportation order" from the application of this Article.
7. ICCPR, Art.9(1); ECHR, Arts.5(2), 9(2); ACHR, Art.7(3).

appears to be indiscriminately worded. The right of an arrested person to be informed of the reasons for his arrest may be restricted, for instance, by not informing him of the "full reasons" for his arrest, or perhaps by delaying to inform him of such reasons. (To deny him reasons altogether may be a denial and not a restriction of the right). But it is incomprehensible how such a restriction can become necessary for the purpose of "meeting the just requirements of the general welfare of a democratic society", which is one of the grounds enumerated in the limitation clause. The general welfare of a democratic society, as distinct from the interests of national security, ought to require that any member of that society who is deprived of his liberty should be informed promptly and in full why he has been so deprived of one of the essential characteristics of that society.

Freedom from Arbitrary Detention

Article 13(2) states that:

> Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

The purpose of bringing an arrested person before a judge is three-fold: firstly, to interpose a person who is independent both of the executive and of the party concerned; secondly, to enable such person to hear the individual brought before him; and thirdly, to enable him to review the circumstances militating for and against detention and decide, by reference to legal criteria, whether there are reasons to justify detention and to order his release if there are no such reasons.[1] The object of this exercise is to give the arrested person an opportunity of exculpating himself as soon as possible. There is, therefore, implied a right to be heard either in person or, where necessary, through some form of representation.[2] In other words, there is at that stage, a justiciable issue before a court.[3]

---

1. Schiesser v. Switzerland (7710/76), Judgment: 2 EHRR 417.
2. Winterwerp v. Netherlands (6301/73), Judgment: 2 EHRR 387.
3. Kolugala v. Superintendent of Prisons (1961) 66 N.L.R. 412.

Under existing law, a person arrested under the Customs Ordinance or the Railways Ordinance is not brought before a judge, but taken before the principal collector of customs or the station master, as the case may be.[1] Nor is a person arrested under the Police Ordinance for being drunk in a public place brought before a judge; he is held in police custody "until he gets sober".[2] Under the Parliamentary (Powers and Privileges) (Amendment) Law, No.5 of 1978, a person arrested by order of Parliament or a parliamentary committee is produced before Parliament or such committee, and no court has jurisdiction to examine the validity of, or the sufficiency of reasons for, such arrest.[3] Two statutes passed three months before the 1978 Constitution came into force took away altogether the court's power to examine the justification for certain arrests. The Criminal Procedure (Special Provisions) Law, No.15 of 1978, required every court before which any person is produced "on an allegation that he has committed or has been concerned in committing, or is suspected to have committed or to have been concerned in committing" any one of a large number of scheduled offences under the Penal Code, to remand such person until the conclusion of the trial, and in the event of an appeal following conviction, until the determination of the appeal.[4] The Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, No.16 of 1978, contained a similar injunction in respect of persons "suspected or accused of any offence" under that law.[5]

The exercise and operation of this right may be restricted by law in the interests of national security, public order, or the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[6] The unduly wide scope of this

---

1. Customs Ord., s.127; Railways Ord., s.38.
2. S. 69(2).
3. S. 4.
4. S. 2.
5. S. 8.
6. Art.15(7). See also Art.15(8) for additional restrictions in respect of security personnel.

limitation clause is immediately apparent. For instance, is it conceivable that "in the interests of the protection of public morality", someone other than a judge should determine whether and for how long a person should be held in custody; or that the concept of judicial supervision should be restricted "for the purpose of meeting the just requirements of the general welfare of a democratic society ? Under international law, this right is absolute.[1]

The Right to a Fair Trial

Article 13(3) states that:

> Any person charged with an offence shall be entitled to be heard, in person or by attorney-at-law, at a fair trial by a competent court.

Article 13(5) adds:

> Every person shall be presumed innocent until he is proved guilty:
> Provided that the burden of proving particular facts may be placed on an accused person.

The four protected elements of this right, therefore, are:

1. The right to a competent court
2. The right to a fair trial
3. The right to be heard, in person, or by an attorney-at-law
4. The right to be presumed innocent until proved guilty.

The concept "court" applies to an organ which can be said, because of the way it is organised, to have a judicial character in that it is independent of the executive and of the parties to the case; it must also offer adequate procedural guarantees.[2] The expression "fair hearing" means, generally, that the tribunal which adjudicates upon a person's rights must act fairly, in good faith, without bias and in a judicial temper, and must give such person the opportunity adequately to state his case.[3]

The Parliamentary (Powers and Privileges) (Amendment) Law, No.5 of 1978, which was certified seven months before the Constitution came into operation, provides for a trial to take place before an institution other than a court. Under that law, every

---

1. ICCPR, Art.9(3); ECHR, Art.5(3); ACHR, Art.7(5).
2. Eggs v. Switzerland (7341/76). Report: DR 15, 35.
3. Duke v. The Queen /1972/ SCR 917.

breach of privilege is an offence punishable summarily by Parliament; Parliament being deemed for such purpose to be the "competent court". However, no procedure has been prescribed by law for such trial and whether or not the elements of a "fair trial" would be afforded appears to depend very much on the mood of Parliament at the relevant time. On the occasion that this Law was first invoked, on the same day that it was certified, the National State Assembly resolved shortly after 2 p.m. that two newspapermen be ordered to attend before the Assembly at 5 p.m. to show cause why they should not be punished for having published a defamatory statement concerning a Member of Parliament.[1] Upon their appearing, without lawyers, the 168-member Assembly formed itself into a Committee of the Whole Assembly and heard prepared statements in which the newspapermen admitted the facts alleged and apologised profusely. Several members then proceeded to question them. Thereafter, they were asked to withdraw "in the custody of the Sergeant-at-Arms" while the Assembly deliberated on what action it should take. It was unanimously resolved that a fine be imposed, the actual quantum having given rise to some differences of opinion.[2] The Prime Minister thought that the Assembly "has conducted itself admirably on the first occasion on which it is sitting in the capacity of a court", although he did confess that "we do not know exactly what crime the two suspects have committed because we did not go into the details of it".[3] In fact, the two accused had neither pleaded, nor been called upon to plead. In proposing that a fine of Rs.1000 be imposed on each accused, Prime Minister Jayewardene explained:

> The reason why we have decided to impose a fine is that, firstly, we want to give a donation to the Deaf and Blind School; secondly, we wish to show that this Bill is now a Law with teeth in it, and in future anybody who comes before this House may not escape with a fine; thirdly, the Associated Newspapers of Ceylon Ltd, of which I am a shareholder, is not an indigent organisation. It has enough money to pay the fine of both these editors.[4]

---

1. This matter arose out of an inadvertent mix-up of captions below two photographs, one of which was of the Minister of Foreign Affairs being shown around an industrial complex in South Korea, and the other was of a man travelling in a launch accompanied by a woman.

2. For the proceedings of this "trial" see National State Assembly Debates, 2 February 1978, cols. 943-946, 999-1037.

3. Ibid., col.1034.

4. Ibid., cols. 1034-5.

Since the Associated Newspapers of Ceylon Ltd was a government-controlled company in which the Public Trustee held 75 per cent of the shares on behalf of the Government, and it functioned as an institution under the charge of the Prime Minister, it is reasonable to assume that this "legal proceeding" was undertaken at such short notice, without affording the "accused persons" the basic rights of defence, and the penalty was determined in such perfunctory fashion, with some other objective in view. The objective probably was, in the words of the Prime Minister, "to show that this . . . is a law with teeth in it". Another Minister expressed this idea more emphatically when he warned newspapermen to "take to heart and learn that hereafter they should not - they dare not - attack this Government in a low and unseemly manner".[1]

The right to be presumed innocent is, in popular terms, a way of expressing the fact that the prosecution has the ultimate burden of establishing guilt. If there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused person must be acquitted. In a more refined sense, the presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit of any reasonable doubt.[2] A rebuttable presumption of fact which the defence may, in turn, disprove (e.g. a statutory provision which states that when certain facts are proved by the prosecution, certain other facts shall be presumed) does not perhaps vitiate this presumption. Existing law contains several such provisons.[3] However, this form of provision could, if widely or unreasonably worded, have the same effect as a presumption of guilt. The European Commission has observed that it is not sufficient to examine only the form in which the presumption is drafted; it is necessary to examine its substance and effect.[4]

---

1. Cyril Mathew, ibid., col.1034.
2. The Queen v. Appleby /1972/ SCR 303.
3. Protection of Produce Ord., s.4; Old Metal Ord., s.8; Forest Ord., s.52; Fisheries Ord., ss.23, 24; Excise Ord., s.53; Gaming Ord., ss.7, 8; Betting on Horse Racing Ord., ss. 18, 19; Food and Drugs Ord., ss. 8, 52.
4. X v. United Kingdom (5124/71), CD 42, 135.

The proviso to Article 13(5) allows the burden of proving particular facts to be placed, by law, on an accused person. This principle is also enunciated in section 103 of the Evidence Ordinance, and further amplified in section 105. That latter section states that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances. For example, where the mitigatory plea of grave and sudden provocation is set up, the burden of proving the facts giving rise to that plea falls on the accused. In The King v. Chandrasekera,[1] a bench of seven judges held that an accused person cannot discharge the burden required of him by section 105 by merely adducing evidence, or by creating in the minds of the jury a reasonable doubt whether the facts on which the relevant exception is based, existed or not. That section requires the accused not merely to lead evidence, but to ensure that the effect of the evidence led is to persuade the jury that the facts relied upon as the basis of the exception, actually existed.

The right to a fair trial by a competent court, including the right to be defended, is, as in the international instruments, absolute and non-derogable. The presumption of innocence, however, which under international law is also absolute, may here be restricted by law in the interests of national security.[2]

Protection against Retroactivity of the Criminal Law

Article 13(6) states that:

> No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

This Article also provides, as an exception to the rule enunciated therein, that a person may be tried and punished "for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the

---

1. (1942) 44 N.L.R. 97.
2. See also Art.15(8) for additional restrictions on the presumption of innocence and for restrictions on the right to a fair trial in respect of security personnel.

community of nations". This provision has been borrowed from ICCPR, Article 15(2), and ECHR, Article 7(2). It does not appear in later instruments such as the ACHR. In X v. Belgium,[1] the European Commission explained, with reference to the travaux preparatoires, why that provision had been included in the ECHR. It was to make it clear that ECHR, Article 7(1) "does not affect laws which, under the very exceptional circumstances at the end of the Second World War, were passed in order to suppress war crimes, treason and collaboration with the enemy". This provision was designed to meet objections such as those levelled against the war crimes tribunals that they applied retrospective legislation. The Commission has applied this provision only in cases from countries occupied during the Second World War which subsequently introduced retrospective legislation to punish collaborators.[2] The apparently inadvertent inclusion of this provision in the 1978 Constitution suggests that it will be competent for a Sri Lankan court to enforce the law of another State even where the conduct concerned is not contrary to Sri Lankan law. In other words, a person may be tried and convicted in Sri Lanka for an act or omission which does not constitute a crime in Sri Lanka. This is not only contrary to the principle of legality inherent in the substantive Article; it is also in conflict with State practice which excludes the enforcement of a foreign criminal judgment if the act concerned in not an offence in the enforcing State.[3]

Article 13(6) also states that it shall not be a contravention of the rule against retroactivity to require the imposition of a minimum penalty for an offence, provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed. In the United States, the Supreme Court has held that in determining whether legislation increases the punishment for a prior offence, the key question is whether the new law makes it possible for the accused to receive a greater punishment, even though it is possible for him to receive the same punishment under the new law as could have been

---

1. 1038/61, YB 4, 324.
2. See, for example, De Becker v. Belgium (214/56), Judgment: 1 EHRR 43, Report: 21 August 1961.
3. F.G.Jacobs, The European Convention on Human Rights (Oxford, 1975), p.123. See European Convention on the International Validity of Criminal Judgments (European Treaty Series, No.70), Art.4(1).

imposed under the prior law.[1] If this test is applied, the third paragraph of Article 13(6) contains, contrary to what is stated therein, an exception to the substantive rule.

The third exception to the rule enunciated in Article 13(6) is to be found in existing law. The Criminal Procedure (Special Provisions) Law, No.15 of 1978, which was certified on 23 May 1978, four months before the Constitution came into operation, requires every court which convicts a person of a scheduled offence to:

> notwithstanding its ordinary powers of punishment, impose on such person, in addition to any other punishment which it may lawfully impose for the offence, a sentence of imprisonment for a period of not less than one-third of the maximum period of imprisonment for which he may be sentenced for such offence.[2]

This additional punishment, which cannot be reduced even in appeal,[3] is clearly contrary to Article 13(6). In fact, on a number of occasions, it has been held by the United States Supreme Court that a law which imposes an additional punishment to that prescribed when a criminal act was committed is an ex post facto law prohibited by the Constitution.[4]

This right may be restricted by law only in the interests of national security.[5] In international law, the protection against the retroactivity of the criminal law is absolute and admits of no restrictions, whatever the circumstances.[6]

Freedom from Arbitrary Punishment

Article 13(4) states that:

> No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person pending investigation or trial, shall not constitute punishment.

This Article does not deal with all forms of punishment but only with death and imprisonment. Existing law under which the forfeiture

---

1. Lindsay v. Washington, 301 US 397. See also Warden, Lewisburg Penitentiary v. Marrero, 417 US 653.
2. S. 4(a).
3. S. 4(b).
4. Calder v. Bull, 3 US 386; Re Medley, 134 US 160. See also Kedar Nath Bajoria v. State of West Bengal (1954) SCR 30.
5. But see Art.15(8) for additional restrictions in respect of security personnel.
6. ICCPR, Art.15; ECHR, Art.7; ACHR, Art.9.

of property may be imposed by a Minister of the Government,[1] and civic disabilities may be imposed by Parliament,[2] do not therefore appear to be in conflict with it. However, the Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, No.16 of 1978, which was certified barely four months before the Constitution came into operation, empowers a Minister of the Government to make order detaining any person for a period of one year. The Minister's order may not be called in question in any court. Since a person so detained in not held "pending investigation or trial", this provision of existing law is clearly an exception to the rule enunciated in this Article.[3] The other exception was also effected a few months before this Article came into operation. By an amendment to the Parliamentary (Powers and Privileges) Act, the National State Assembly gave itself concurrent jurisdiction with the Supreme Court to try any offence under that Act, and to impose, inter alia, punishment of imprisonment for a term extending to two years. Such punishment is enforced and carried out as if it were a punishment imposed by the Supreme Court.[4]

Freedom from Torture

Article 11 states that:

> No person shall be subjected to torture or to cruel inhuman or degrading treatment or punishment.

The prohibition contained in this Article appears to extend to seven distinct modes of conduct:

a) torture [5]
b) cruel treatment
c) cruel punishment
d) inhuman treatment
e) inhuman punishment
f) degrading treatment
g) degrading punishment.

---

1. Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, s.7.
2. Special Presidential Commissions of Inquiry Law, s.7. see also 1978 Constitution, Art.81.
3. Ss.11, 13.
4. Law No.5 of 1978, ss.2, 5.
5. For definition of "torture", see Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted unanimously on 9 December 1975 (Res.3452(XXX))

Under existing law, the following are among the punishments that may be inflicted:

a) death[1]

b) whipping[2]

c) corporal punishment[3]

d) forfeiture of property[4]

e) deprivation of civic rights.[5]

If the permissible aims of punishment are considered to be deterrence, isolation and rehabilitation, the death penalty may conflict with this Article. In Furman v. Georgia[6] it was once held by the United States Supreme Court that the imposition of the death penalty was not necessary as a means of stopping convicted individuals from committing further crimes; that there was no reason to believe that the death penalty was necessary either to deter the commission of capital crimes or to protect society; that it could not be concluded that death served the purpose of retribution more effectively than imprisonment; and that it was likely that the death penalty could not be shown to be serving any penal purpose which could not be served equally well by some less severe punishment. The fact that the imposition of the death penalty is mandatory for certain offences only aggravates its objectional quality.[7]

In Tyrer v. United Kingdom,[8] the European Commission has already held that birching as a punishment, ordered by a court and administered as provided for in the Isle of Man, is an assault on human dignity which humiliates and disgraces the offender without any redeeming social value. Federal German courts have held that the deprivation of civic rights as a punitive measure constitutes

---

1. Penal Code, s.52; Criminal Procedure Code, s.308.
2. Penal Code, s.52; Criminal Procedure Code, ss.13-15, 308, 315-319; Corporal Punishment Ord., ss.2-7; Knives Ord.,s.11.
3. Children and Young Persons Ord., s.29.
4. Penal Code, s.52; Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, s.7.
5. Special Presidential Commissions of Inquiry Law, s.7; Local Authorities (Imposition of Civic Disabilities, No.1) Law; Local Authorities (Imposition of Civic Disabilities, No.2) Law.
6. 408 US 238.
7. Ibid.
8. 5856/72, 2 EHRR 1.

degrading treatment.[1] Referring to the similar penalty of denationalisation, the United States Supreme Court provided the rationale:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organised society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.[2]

The European Commission held, in Patel et al v. United Kingdom,[3] that the general purpose of the prohibition of degrading treatment was to prevent interferences with the dignity of man of a particularly serious nature. Accordingly, any act which lowers a person in rank, position, reputation or character, can be regarded as "degrading treatment" if it reaches a certain level of severity. Viewed in this light, the forfeiture of all property of a person, with its attendant consequences on his family as well, would appear to infringe Article 11.

The Prisons Ordinance permits the use of "side cuffs with body-belts", handcuffs and other mechanical restraints for periods in excess of 24 hours, and the securing of groups of prisoners by "gang chain and wrist cuffs".[4] In Denmark, Norway, Sweden and Netherlands v. Greece,[5] the European Commission stated that the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical. It has also held that securing a prisoner by fastening one hand and one foot in the same handcuffs while he was being transported from one place to another could constitute inhuman treatment.[6] The Austrian Constitutional Court has held that the unnecessary application of physical force in escorting an arrested man to the police station constitutes degrading treatment.[7] Accordingly, the use of mechanical restraints provided for in the Prisons Ordinance could conflict with Article 11.

---

1. Decision of 14 July 1971 of the Federal Supreme Court, NJW 1971, 20.
2. Trop v. Dulles, 356 US 86, at p.101.
3. 4403-19/70, Report: 3 EHRR 76.
4. Ss. 89-91.
5. 3321-23/67, 3344/67, YB 12.
6. Wiechert v. Federal Republic of Germany (1404/62), YB 7,104.
7. Decision of 6 October 1977, JB 1978, 312.

Freedom of Thought, Conscience and Religion

Article 10 states that:

> Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

Article 14(1)(e) guarantees to every citizen:

> the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

Existing law derogates from the freedoms recognised by these two Articles to the extent that a pupil in a government school is required to be provided religious instruction in the religion of the parent of such pupil.[1] Such pupil is also prohibited from attending any place of worship or participating in any worship or observance connected with a religion which is not that of his parents.[2]

The exercise and operation of the right protected by Article 14(1)(e) may be restricted by law "in the interests of national security, public order, and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society".[3] Article 10, however, remains non-derogable under any circumstances. But although these two Articles contain two concepts - freedom to believe and freedom to act,[4] the former concept is of very little practical value without the latter. Indeed, it has been suggested that freedom of thought or of conscience per se cannot be invaded since, short of "science fiction" incursions into the domain of private introspection, interference with this freedom is impossible.[5] Freedom of thought, conscience and religion is restricted, therefore, to the extent that the freedom to manifest such thought, conscience or religion is restricted.

---

1. Education Ord., s.35(1).
2. Ibid., s.35(2).
3. Art.15(7). Art.15(8) permits additional restrictions in respect of security personnel.
4. For a fuller discussion of these two concepts, see Cantwell v. Connecticut, 84 US 310; In re Places and Objects of Worship Bill, (1973) DCC, Vol.1, p.27. For a definition of the concepts, see Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981.
5. Morris B.Abram, "Freedom of Thought, Conscience and Religion", Journal of the ICJ, Vol.VIII, p.43.

Freedom of Speech

Article 14(1)(a) states that every citizen is entitled to "the freedom of speech and expression, including publication".

The right to freedom of publication means the freedom of the press.[1] As early as 1784, Lord Mansfield defined the freedom of the press as "printing without previous licence, subject to the consequences of the law".[2] In Sakal Papers (P) Ltd v. Union of India,[3] the Indian Supreme Court held that for propagating his ideas, a citizen had the right to publish them, to disseminate them, and to circulate them, either by word of mouth or by writing. Existing law limits this right in many ways. The publication of certain matter is prohibited: news relating to horse racing;[4] the contents of a Cabinet document;[5] a Cabinet decision unless officially released;[6] proceedings of a meeting of the Cabinet;[7] a proposal alleged to be under consideration by a Ministry, unless it is true;[8] an official secret;[9] matter relating to police or service establishments, equipment or installations which is likely to be prejudicial to the defence and security of the country;[10] any statement relating to any monetary, financial or economic measures alleged to be under consideration by the Government if its publication is likely to lead to the creation of shortages or windfall profits or otherwise adversely affect the economy;[11] or any activity of a proscribed organisation, including any investigation into such activity.[12] Publication is also regulated in a

---

1. For an early exposition of this freedom, see Blackstone, 4, Commentaries, 145 (1876).
2. The King v. Dean of the State Asaph (1784) 3 TR 428.
3. (1962) 3 SCR 842.
4. Control of Publications on Horse Racing Act, s.15(1)(c).
5. Sri Lanka Press Council Law, s.16(2)(a).
6. Ibid., s.16(2)(b).
7. Ibid., s.16(1).
8. Ibid., 16(5).
9. Ibid., s.16(3).
10. Ibid.
11. Ibid., s.16(4).
12. Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, s.5(1)(a).

variety of ways. For instance, the Press Council may recover a registration fee from the proprietors of newspapers,[1] and obtain information from editors and journalists;[2] it may also censure an editor or direct the publication of an apology or correction.[3] A newspaper may be published only after a declaration containing particulars of such newspaper has been delivered to the Registrar of Newspapers, to whom one copy of every edition of that newspaper signed by the printer and publisher is also required to be delivered.[4] It is an offence to distribute any newspaper, whether printed in Sri Lanka or abroad, which contains any matter relating to the activities of a proscribed organisation.[5] 75 per cent of the shares of the principal national newspaper company are held by the Public Trustee on behalf of the government,and by virtue of this share-holding, the Public Trustee nominates a majority of the directors of that company.[6]

The right to freedom of speech and expression may be exercised through different means. Motion pictures are within the ambit of this protection. As the United States Supreme Court has observed:

> The beneficiaries of freedom of expression include the actor on the stage or screen, the artist whose creation is in oil or clay or marble, the poet whose reading public may be practically non-existent,the musician and his musical scores, and the counsellor, whether a priest, parent or teacher, no matter how small his audience.[7]

Existing law permits a stage entertainment or other public performance to be exhibited only in a building previously licensed for that purpose.[8] A film, stage entertainment or other public performance also requires to be previously certified by the appropriate authority as suitable for public exhibition.[9]

---

1. Sri Lanka Press Council Law, ss. 19, 25.
2. Ibid., s.10.
3. Ibid., s.9.
4. Ibid., s.26; Newspapers Ord., s.7.
5. Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, s.5(1)(b).
6. Associated Newspapers of Ceylon Ltd (Special Provisions) Law, ss.2, 6.
7. Paul Poe v. Abraham Ullman, 367 US 497.
8. Public Performances Ord., s.3.
9. Ibid., s.6.

Speech is not stripped of its protection merely because it appears in the form of a paid commercial advertisement.[1] Existing law prohibits any advertisement which is calculated to injure public morality.[2]

A demonstration is a visible manifestation of the feelings or sentiments of a group and is, therefore, a form of speech or expression.[3] So is the activity of peaceful pamphleteering and picketing.[4] An assembly or procession may, however, be conducted in any public place only with a prior licence from, or in accordance with directions issued by, a police officer.[5] Four copies of every pamphlet (or book) printed are required to be delivered to the Registrar of Books.[6]

Streets are natural and proper places for the dissemination of information and opinions. One who is rightfully on a street which is open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion, and this right extends to the communication of ideas by handbills and literature as well as by the spoken word.[7] However, music may be played on a street only with a prior licence from a police officer.[8] The use in a public place of an instrument which produces, reproduces or amplifies sound also requires a prior permit from the police.[9]

In Handyside v. United Kingdom,[10] the European Court held that ECHR, Article 10 was applicable "not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population". In Terminiello v. City of Chicago,[11] Douglas J thought that a

---

1. Bigelow v. Virginia, 421 US 809; cf. Hamdard Dawakhana v. Union of India (1960) 2 SCR 671.
2. Sri Lanka Press Council Law, s.15(1)(c).
3. Kameshwar Prasad v. State of Bihar (1962) Supp. 3 SCR 369; Decision of 7 November 1967, Hoge Raad, Netherlands, NJ 1968 199.
4. Police Department v. Mosley, 408 US 92.
5. Police Ord., s.78.
6. Printers and Publishers Ord., s.2.
7. Flower v. United States, 407 US 197; Talley v. California, 362 US 60; Jamison v. State of Texas, 318 US 413.
8. Police Ord., s.78.
9. Ibid., ss.80, 96.
10. 5493/72, Judgment: 1 EHRR 737.
11. 337 US 1.

function of free speech under a democratic system of government is to invite dispute. He elaborated:

> It may indeed best serve its high purpose when it induces a condition of unrest, create dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

In Roth v. United States,[1] Brennan J was of the view that free speech encompassed "all ideas having even the slightest social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" This protection has since been extended to "information and ideas regardless of their social worth";[2] to "opinions that are loathed";[3] and to criticism of public men and measures made "foolishly and without moderation".[4] Even the advocacy of the use of force or of law violation as a means of securing a change of government, as distinguished from a conspiracy to advocate the overthrow of the government, is within the protection accorded to speech and expression.[5] Existing law, however, prohibits several forms of such expression on pain of severe punishment: that which brings the President into contempt;[6] that which excites or attempts to excite feelings of disaffection to the President or the Government;[7] that which excites or attempts to excite hatred to, or contempt of, the administration of justice;[8] that which excites or attempts to excite the citizens to procure, otherwise than by lawful means, the alteration of any matter by law established;[9] that which attempts to raise discontent or disaffection among the

---

1. 354 US 476.
2. Stanley v. Georgia, 394 US 557.
3. Patriot Co. v. Roy, 401 US 265.
4. Cohen v. California, 403 US 15.
5. Brandenburg v. Ohio, 395 US 444; Eugene Dennis v. United States, 341 US 494.
6. Penal Code, s.118.
7. Ibid., s.120.
8. Ibid.
9. Ibid.

among the citizens;[1] that which attempts to promote feelings of ill-will and hostility between different classes of citizens;[2] any obscene or indecent matter;[3] any profane matter;[4] subject to certain exceptions, any imputation concerning any person with the intention of harming the reputation of such person;[5] an insult which is likely to provoke a person to break the public peace;[6] and any statement concerning the conduct of a Member of Parliament which is defamatory in nature.[7]

The exercise and operation of this right may be restricted by law in the interests of racial and religious harmony, national security, public order or the protection of public health or morality; for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society; or in relation to parliamentary privilege, contempt of court, defamation or the incitement to an offence. These grounds broadly fall within the grounds upon which, under the international instruments, the exercise of this right may be restricted.[8]

Freedom of Peaceful Assembly

Article 14(1)(b) states that every citizen is entitled to the freedom of peaceful assembly.

The Police Ordinance contains provisions which authorise the police to regulate or prohibit the holding of processions in public places and the use of instruments which are capable of producing, reproducing or amplifying sound in public places.[9] Such procedures are generally necessary in order that the authorities may be in a position to ensure the peaceful nature of a meeting. Accordingly, existing law which prohibits an "unlawful assembly" is perhaps not

---

1. Ibid.
2. Ibid.
3. Ibid., ss.285-287; Obscene Publications Ord., s.2; Sri Lanka Press Council Law, s.15(1)(d).
4. Profane Publications Act, s.2; Sri Lanka Press Council Law, s.15(1)(a).
5. Penal Code, s.479; Sri Lanka Press council Law, s.15(1)(b).
6. Penal Code, s.484.
7. Parliament (Powers and Privileges) Act, s.22.
8. ICCPR, Art.19(3); ECHR, Art.10(2); ECHR, Art.13.
9. Ss.78, 80, 96.

inconsistent with this Article. Questionable, however, is a law which enables an assembly of five or more persons "likely to cause a disturbance of the public peace" to be dispersed by the use of force.[1] Guidance on the exercise of such power has been provided by the European Commission which has observed that the possibility of violent counter-demonstrations, or the possibility of extremists with violent intentions, not members of the organising association, joining the demonstration cannot as such take away this right. Even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organising it, such procession does not for this reason alone fall outside the scope of the protected right.[2]

The exercise and operation of this right may be restricted by law in the interests of racial and religious harmony, national security, public order, or the protection of public health or morality; for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[3] These grounds broadly correspond to those in international instruments.[4]

Freedom of Association

Article 14(1)(c) states that every citizen is entitled to the freedom of association. The term "association" presupposes a voluntary grouping for a common goal.[5] ACHR, Article 16(1) specifies the purposes of association: ideological, religious, political, economic, labour, social, cultural, sports, and "other".

Under existing law, the Tamil separatist organisation styled as the "Liberation Tigers of Tamil Eelam" is proscribed.[6] Additionally, the President has the power to proscribe any other movement, society, party, association or body or group of persons

---

1. Administration of Justice Law, s.58.

2. Christians Against Racism and Fascism v. United Kingdom, 8440/78, DR 21, 138; cf. Beatty v. Gillbanks (1882) 9 QB 308; O'Kelly v. Harvey (1883) 14 LR.Ir. 105; Duncan v. Jones /1936/ 1 KB 218; Feiner v. New York, 340 US 315.

3. Arts.15(3), 15(7). See also Art.15(8) which permits additional restrictions in respect of security personnel.

4. ICCPR, Art.21; ECHR, Art.11(2); ACHR, Art.15.

5. Le Compte, Van Leeuven and De Meyere v. Belgium (6878/75, 7238/75), Judgment: 23 June 1981.

6. Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, s.2(1). For consequences of proscription, see ss. 4, 5, 7, 8, 9, 11.

if he is of opinion that such organisation "advocates the use of violence and is either directly or indirectly concerned in or engaged in any unlawful activity.[1]

The exercise and operation of this right may be restricted by law in the interests of racial and religious harmony, national economy, national security, public order, or the protection of public health or morality; or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[2] These grounds broadly correspond to those recognised under international law.[3]

Freedom to Form and Join a Trade Union

Article 14(1)(d) states that every citizen is entitled to the freedom to form and join a trade union. Under existing law, every trade union is required to be registered.[4] This requirement of compulsory registration is not, by itself, incompatible with this Article.

The exercise and operation of this right may be restricted by law in the interests of national security, public order, or the protection of public health or morality; or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[5] These grounds broadly correspond to those recognised under international law.[6]

Freedom to Enjoy Own Culture and Use Own Language

Article 14(1)(f) states that every citizen is entitled to:

> the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language.

In ICCPR, Article 27, this right is accorded to persons belonging to minority groups in those States in which ethnic, religious or linguistic minorities exist. Article 14(1)(f), however, draws no such distinction. But in regard to language, the Constitution has already regulated the use of the Tamil language, giving it a

---

1. Ibid., s.2(2).
2. Arts. 15(4), 15(7). But see Art.15(8) for further restrictions which may be imposed in respect of security personnel.
3. ICCPR, Art.22(2); ECHR, Art.11(2); ACHR, Art.16(2).
4. Trade Unions Ord., s.8.
5. Art. 15(7). See Art.15(8) for further restrictions which may be imposed in respect of security personnal.
6. ICCPR, Art.22(2); ICESCR, Art.8; ECHR, Art.11(2).

status inferior to that of the Sinhala language. The Constitution also ignores English, which is not only the language of the dwindling Burgher community, but is also the country's lingua franca.[1]

The exercise and operation of this right may be restricted by law in the interests of national security, public order, or the protection of public health or morality; or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[2] The limitation clause appears to be unnecessarily wide. The protected cultures and languages are those of Sri Lanka's citizens and form part of Sri Lanka's cultural heritage. After centuries of cultural co-existence, the intervention of the law appears hardly necessary at this stage to ensure continued co-existence. Moreover, it is incomprehensible how the use of a national language could possibly offend against "public health" or "public morality", or threaten or imperil "national security" or "public order", which are all grounds that comprise the limitation clause.

Freedom to Engage in Any Occupation

Article 14(1)(g) states that every citizen is entitled to:

> the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.

A corporate body is not a "citizen", and is therefore not entitled to invoke this right.[3] But a citizen who, in association with others, forms a company for the purpose of engaging in a business, does not thereby become disentitled to invoke it.[4]

Existing law already regulates the exercise of this right. For instance, an importer of goods is subject to orders made by the Minister prohibiting the importation of certain types of goods into the country.[5] Certain occupations may not be engaged in without a licence from the competent authority: e.g. as a trader,[6]

---

1. 1978 Constitution, Ch.IV.
2. Art.15(7). For further restrictions in respect of security personnel, see Art.15(8).
3. State Trading Corporation of India v. Commercial Tax Officer, AIR 1963 SC 1811.
4. In re Associated Newspapers of Ceylon Ltd (Special Provisions) Bill (1973) DCC, Vol.1, p.35, at 49; In re Church of Sri Lanka (Consequential Provisions) Bill (1975) DCC, Vol.3, p.5, at 14.
5. Imports and Exports (Control) Act.
6. Licensing of Traders Act, s.2.

a manufacturer of weapons,[1] or as a private broadcaster.[2] Certain areas of activity are totally prohibited even to citizens: e.g. the provision of an omnibus service;[3] the transaction of the business of life or other insurance;[4] the establishment of a school for the education of persons between the ages of five and fourteen years;[5] and the import, export, sale, supply and distribution of petrol, kerosene and diesel oil.[6] On the other hand, a person graduating from a university in Sri Lanka may be required by the State to provide compulsory public service in his field of specialisation for a period of up to five years.[7]

The exercise and operation of this right may be further restricted by law in the interests of national economy, national security, public order, or the protection of public health or morality; or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. Restrictions may also be imposed in relation to the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such right, as well as in relation to the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise, whether to the exclusion, complete or partial, of citizens or otherwise.[8]

Freedom of Movement

Articles 14(1)(h) and 14(1)(i) state, respectively, that every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka, and the freedom to return to Sri Lanka.

---

1. Offensive Weapons Act, s.2.
2. Ceylon Broadcasting Corporation Act, s.44.
3. Motor Transport Act, s.12.
4. Insurance Corporation Act, s.10.
5. Assisted Schools and Training Colleges (Supplementary Provisions) Act, s.25.
6. Ceylon Petroleum Corporation (Amendment) Act, s.4.
7. Compulsory Public Services Act, s.4.
8. Arts. 15(5), 15(7). For further restrictions which may be imposed in respect of security personnel, see Art.15(8).

Existing law regulates the exercise of the former right by requiring the licensing of boats, motor vehicles, aircraft and other vehicles before they can be used as a means of transportation.[1] Tolls may also be levied on modes of transport.[2] The Petrol (Control of Supplies) Ordinance, when invoked, is capable of being used to restrict movement within Sri Lanka through the control of the supply and the conservation of the stocks of petrol.[3] Under the Pilgrimages Ordinance, the Minister may restrict the number of persons who may proceed on any pilgrimage from any part of the country and the period of their stay at the place to which such pilgrimage is made.[4]

Under international law, the latter right may be exercised by a citizen whether or not he has a passport or other travel document, and no sanction, penalty, punishment or reprisal may attach to any person for exercising or attempting to exercise it.[5] Existing law, however, provides that a citizen may not leave Sri Lanka unless he has in his possession a valid passport.[6] That passport may be cancelled or suspended by the competent authority at any time "in his absolute discretion", and the exercise of that discretion may not be called in question in any court.[7] The competent authority may at any time and in his discretion, restrict the validity of such passport as regards its duration or as regards the countries of travel, or require the holder, if employed abroad, to remit in foreign exchange such amounts at such intervals as may be determined by him.[8] The question does arise whether a citizen who has forfeited his passport while being abroad will be permitted to enter the country without any valid travel documents.

---

1. Boats Ord., s.2; Motor Traffic Act, s.2; Air Navigation Act, s.15; Vehicles Ord., s.3.
2. Tolls Ord., s.2.
3. Ss. 4-7, 10.
4. S.2.
5. Principles on freedom and non-discrimination in respect of the right of everyone to return to his country, formulated by the UN Economic and Social Council, Resolution No.1788 (LIV), 18 May 1973. This Resolution is reproduced in ICJ Review (Dec.1973), pp. 61-64.
6. Immigrants and Emigrants Act, s.35.
7. Passport (Regulation) and Exit Permit Act, ss. 3, 17. See also Immigrants and Emigrants Act, s.36.
8. Ibid., ss. 12, 14.

The exercise and operation of these rights may be restricted by law in the interests of national security, public order, or the protection of public health or morality; or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[1] The exercise and operation of the former right may also be restricted in the interests of national economy.[2] Under international law, the freedom of a citizen to enter his own country is absolute and not subject to any restriction, except that ICCPR, Article 12(4), requires that a citizen should not be "arbitrarily" deprived of that freedom.[3] By authorising the legislature to restrict the right of a Sri Lankan citizen to return to his country, the Constitution envisages a most impracticable situation. If this strange and inexplicable limitation clause is actually implemented, a new class of people who, though not stateless, are condemned to spend part of their lives either in the atmosphere or on international waterways, would have been created.

Right to Equality

Article 12(1) states that all persons are equal before the law and are entitled to the equal protection of the law. Article 12(2) states that no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion or place of birth. Article 12(3), contemplating primarily a problem peculiar to the northern province, states that no person shall, on the grounds of race, religion, caste or sex, be subject to disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment or places of public worship of his own religion.[4] Three related concepts are enshrined in these paragraphs: equality before the law, equal protection of the law, and non-discrimination.

The exercise and operation of these rights may be restricted by law in the interests of national security, public order, or the protection of public health or morality; or for the purpose of

---

1. Art. 15(7).
2. Art. 15(6). For further restrictions on both rights in respect of security personnel, see Art. 15(8).
3. ECHR P4, Art.3(2); ACHR, Art.22(5). See also UDHR, Art.13(2).
4. See Prevention of Social Disabilities Act.

securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[1]

Additionally, the Constitution itself contains the following exceptions to the concept of equality:

a) a person may be required to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the public, judicial or local government service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office;[2]

b) a person may be required to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language;

c) special provision may be made by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

None of the international instruments admits of any exception to, or restriction of, the concept of equality. Nor do they authorise discrimination under any circumstances.[3]

---

1. Art. 15(7). For further restrictions which may be imposed in respect of security personnel, see Art. 15(8).

2. Having regard to the fact that Sinhala is the one official language of the country, this and the following exception will be sufficient authority for requiring non-Sinhala-speaking persons to acquire a knowledge of the Sinhala language within a prescribed time on pain of exclusion from the relevant public service.

3. ICCPR, Art.26; ECHR, Art.14; ACHR, Art.24. The concept of equality does not, however, prevent classification which rests upon reasonable grounds of distinction. See Opinion of Judge Tanaka in the South-West Africa Case, Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1966, at pp.284-316. But cf. warning of Subha Rao J in Lachhman Das v. State of Punjab, AIR 1963 SC 222, that overemphasis on the doctrine of classification may "end in substituting the doctrine of classification for the doctrine of of equality".

THE RESTRICTIONS

The exercise and operation of the fundamental rights declared and recognised in the 1978 Constitution are "subject to such restrictions as may be prescribed by law". The restrictions may be prescribed "in the interests of", "in relation to", or "for the purpose of", a number of designated objectives. Law, in most instances, includes emergency regulations made by the President under the Public Security Ordinance.

Restrictions

Article 4(d) states that the fundamental rights declared and recognised by the Constitution shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent provided in the Constitution. To abridge, to restrict, and to deny are three distinct concepts. "Abridged" means to limit the scope of a right, to reduce its content. If the word "teaching" is deleted from Article 14(1)(e) which declares the freedom to manifest one's religion or belief, or the expression "and of choosing his residence within Sri Lanka" is deleted from Article 14(1)(h) which protects the freedom of movement, those two rights would have been abridged. "Denied" means to refuse, disallow or withhold from. A right may be denied by repealing it and thereby denying recognition to it under the Constitution, or by suspending its exercise or operation. If in Article 11, "citizen" was substituted for "person", the protection against torture would then have been denied to non-citizens. Between these two concepts of abridgement and denial is that of restriction. To "restrict" is to check, curb, impede, hamper, obstruct, keep within limits, regulate or control. The right to practise a profession may be restricted by requiring prior qualification; the right to carry on a trade, by requiring a prior licence; the right to travel, by requiring the possession of a travel document. What Article 15 authorises the legislature to do is not to abridge or to deny, but to restrict the exercise and operation of the fundamental rights.

Prescribed by Law

A restriction is required to be prescribed by law. This expression appears in ECHR, Articles 9(2), 10(2) and 11(2), the equivalent in the French text being, in each case, prevues par la loi. In Times Newspapers Ltd v. United Kingdom,[1] the European Court held that at least two requirements flow from this expression. Firstly, the law must be adequately accessible: the citizen must be able to have an indication of the legal rules applicable to a given case that is adequate in the circumstances. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

There appears to be a third requirement that flows from this expression, namely, that the restriction must be prescribed by "law". A law must set out precisely the manner and extent to which a right is being restricted. If the law, without prescribing the restriction, authorises a person or body to do so, the restriction would not have been "prescribed by law". For instance, if a law provided that a competent authority may prohibit, in the interests of the protection of public morality, the publication of such matter which he considers expedient to so prohibit, the exercise and operation of the freedom of speech and expression would not have been made subject to a restriction prescribed by law, because the law would not have, with sufficient precision, formulated the manner and extent to which that right is restricted. A competent authority may make an order, but he cannot make a law; "law" as defined in the Constitution means an Act of a legislative body.

National Security

National security means the security of the nation. The security of the nation is generally threatened by war or rebellion; by external or internal aggression directed at the principal organs of the State. A restriction imposed in the interests of national

1. 6538/74, Judgment: 2 EHRR 245.

security must bear some proximate relationship to, or be directed at, the prevention of either of these conditions, or must seek to facilitate governmental efforts to deal effectively with such conditions. In Romesh Thappar v. State of Madras,[1] the Supreme Court of India considered that the expression "security of the State' referred to "serious and aggravated forms of public disorder" and did not comprise ordinary breaches of "public safety" or "public order" which do not involve any danger to the State itself.

Public Order

The contravention of law may often affect order, but before it can be said to affect "public order" it must affect the community or the public at large. The playing of loud music at night may disturb public tranquility without affecting public order. Similarly, when two drunkards quarrel and fight, there is disorder, but not public disorder.[2] The Indian Supreme Court has explained this distinction very succinctly:

> One has to imagine three concentric circles, the largest representing "law and order", the next representing "public order", and the smallest representing "security of the State". An act may affect "law and order" but not "public order", just as an act may affect "public order" but not "security of the State".[3]

Therefore, a restriction justified as being in the interests of public order must bear a reasonable and proximate nexus to the prevention of disorder of a grave nature, and not merely acts which disturb the public tranquility or are breaches of the peace.

Public Health or Morality

Since the word "public" qualifies both health and morality, the restriction appears to be directed at the protection of the health and morality of the community.[4] In Dudgeon v. United Kingdom,[5] the European Commission interpreted the expression "protection of morals" in ECHR, Article 8(2), to refer primarily to the protection of the moral ethos of society, thus preserving

---

1. (1950) SCR 594.
2. Lohia v. State of Bihar, AIR 1966 SC 740.
3. Ibid., at para. 52.
4. In X v. Netherlands (1068/61), YB 5, 278, the European Commission held that compulsory membership of the Health Service may be required by the Government in the interests of the protection of health.
5. 7525/76, Report: 3 EHRR 40.

to the individual an area of strictly private morality in which the State may not interfere. The European Court, while agreeing that this expression implied safeguarding the moral standards of society as a whole, thought that it also covered protection of the moral interests and welfare of particular sections of society, e.g. schoolchildren.[1] In that case, it was held that a law which prohibited homosexual acts committed in private between consenting adult males was in breach of the applicant's right to respect for private life and could not be justified on the ground of the "protection of morals".

Does a majority have an unqualified right to impose its standards of morality on the whole of society ? In Dudgeon, the European Commission observed that "even if the majority of people in Northern Ireland disapproves of homosexual conduct on moral grounds, this does not mean that it is necessary to prohibit it in order to protect morals in a democratic society". Account must be taken of the effect which allowing the conduct in question is likely to have on the moral standards of society as a whole.[2]

Rights and Freedoms of Others

It is not made clear whether the "rights and freedoms" of others, for the recognition and respect for which the exercise and operation of a fundamental right may be restricted by law. are those which are specifically declared and recognised in the Constitution, or whether that expression is intended to include a variety of vague, undefined interests. As pointed out by Connelly:

> The term 'the rights of others' is inherently vague. Indeed, it is arguably so open-ended that a liberal interpretation could sweep away much of the protection ostensibly afforded the human rights which are the subject of the Convention. Put differently, the rights singled out for protection in the Convention could be subordinated to other rights not specified but 'read or written into' the Convention by the Commission and the Court. Surely it is not desirable that rights 'be picked out of a hat' according to the personal inclinations and preferences of the members of these bodies albeit with the laudable motive of securing justice in a particular case. [3]

---

1. Ibid., Judgment: 22 October 1981.
2. Supra.
3. A.M.Connelly, "The Protection of the Rights of Others", 5 Human Rights Review, 117 at 133.

This expression has been borrowed from UDHR. In that instrument, what is stated is that:

> Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[1]

Having regard to the context in which it first appeared in UDHR, it seems reasonable to infer that what was contemplated was that individual rights and freedoms should, when necessary, be subordinated to the general interests of the community. For instance, the right of a jazz enthusiast to enjoy his particular brand of music must necessarily be subordinated to the right of the community to be spared loud raucous sounds at a time when most people sleep. Hence, a law which insists on a silent night. A Sri Lankan Buddhist family having the traditional overnight pirith ceremony in which drumming plays a significant role, will be required by law to obtain a permit from the local police station, which permit is usually issued with the consent of the immediate neighbours. Therefore, the "rights and freedoms" contemplated appear to be not those individual rights and freedoms which are already declared and recognised in the Constitution; nor are they some nebulous, unspecific, yet-to-be defined individual interests which a legislature is empowered to raise to a level even above the constitutionally protected rights. What is envisaged seems to be the broad collective interests of the community which, when applied, may have the effect of restricting the exercise and operation of individual rights and freedoms.

Just Requirements of the General Welfare of a Democratic Society

This ground, which is also borrowed from UDHR, Article 29, permits a restriction to be placed in the interests of the general welfare which is just and such as would be compatible with a democratic society. A "democratic society" would have attributes other than the characteristics of democracy as a form of government.

---

1. Art.29.

As Humphrey points out:

> A society is not democratic simply because its government represents the majority, has the outward trappings of a democracy or because it calls itself a democracy.[1]

He proceeds to explain:

> In a democratic society there are or should be some limits on the exercise of governmental powers including the powers of the legislature. This is sometimes achieved by entrenching a bill of rights in the constitution, by the separation of powers, or by some other system of checks and balances to restrain the powers of the various branches of government. These limits are imposed on the assumption that whoever possesses power, it is safer that power should be restrained. In a democratic society there will be freedom of expression and of opinion, and public opinion will exercise some control over the imposition of restrictions on the enjoyment of freedom.

In brief, a democratic society may be described as one in which the rule of law prevails.[2] It is to meet the just requirements of the general welfare (i.e. the greatest happiness for the greatest number) of such a society that restrictions may be prescribed by law.

Racial and Religious Harmony

Harmony means compatibility or concord. A restriction imposed in the interests of racial and religious harmony will be one directed towards preventing discord, unpleasantness or dissonance between racial and religious groups.

National Economy

This is a ground peculiar to Sri Lanka; it was first included in section 18(2) of the 1972 Constitution. It was successfully invoked by the State before the Constitutional Court in 1973 to justify the Associated Newspapers of Ceylon (Special Provisions) Bill. On that occasion, the Court applied this concept without actually explaining what it understood by the term. However, in setting out the circumstances that led to the Government's decision to convert a one-family newspaper business into a public company; in particular, the findings of

---

1. John P.Humphrey, "The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society", The Practice of Freedom (Toronto: Butterworths, 1979), p.137.

2. For essential requirements of a society under the rule of law, see The Rule of Law and Human Rights: Principles and Definitions (Geneva: ICJ, 1966), pp.5-8.

a commission of inquiry that the directors of the company had contravened the exchange and import control laws of the land, the Court expressed itself thus:

> Since the dawn of independence the economy of our country has been to a great extent influenced by the foreign resources available to the country. Every developing nation in the world has had to fight the hard way to earn valuable foreign exchange for its development programmes. Sri Lanka is no exception. The depletion of our foreign exchange resources has always caused an imbalance in our economy. Ways and means had been devised by the enactment of exchange control laws to prevent the trafficking in foreign exchange, but whatever preventive measures had been adopted, the designing mind had always found loop-holes and gaps in the law to swindle the nation of foreign exchange which should legitimately have come to the State.
>
> Every person or company which indulges in activities which deprive a nation of vitally needed foreign exchange is in fact waging an economic war against the State. The State is therefore both morally and in the interests of the nation justified in enacting laws which will serve to curb the powers and tendencies of those who are in commanding heights from which they could deprive the country of such foreign exchange.
>
> The magnitude of the offences in relation to foreign exchange has attained such proportions that the State has even found that the normal laws of the land are inadequate to bring the offenders to justice. Special legislation in the form of the Criminal Justice Commissions Act, No.14 of 1972, has been enacted in relation to offences of foreign exchange which endanger the national economy of the land.[1]

A restriction on the ground of "national economy" may, therefore, be imposed only if the activity sought to be curbed or regulated relates to an area such as foreign exchange or currency, and such activity, if unckecked or unregulated, is likely to affect the economy of the country.

Parliamentary Privilege

The Parliament (Powers and Privileges) Act, No.21 of 1953, as amended by Law No.5 of 1978, already contains a statement of restrictions imposed on the exercise and operation of the freedom of speech and expression. The rationale for this restriction is that Members of Parliament should, for the proper performance of

---

1. (1973) DCC, Vol.1, p.35, at 46.

their functions, enjoy complete freedom of speech and debate within the chamber. Accordingly, no right of reply is available to a citizen in respect of statements made in Parliament;[1] the proceedings of Parliament or of a parliamentary committee may not be published if such publication has been prohibited by Parliament;[2] the proceedings of a parliamentary committee may not, in any event, be published before they are reported to Parliament;[3] and the publication of any statement which Parliament considers to be defamatory of itself or of a member, is prohibited.[4]

Contempt of Court

The law of contempt is contained in decisions of the Supreme Court applying, in appropriate circumstances, English common law on the subject. Accordingly, the following forms of speech and expression are punishable as contempt of court:

a) that which scandalises the court or a judge thereof,[5] or the judiciary generally;[6] i.e. any matter which is calculated to bring a court or a judge of the court or the judiciary into contempt or to lower his or its authority (e.g. by attributing dishonesty, impropriety or incompetence); or which is calculated to hold the court or the judge thereof up to odium or ridicule;[7]

b) that which is calculated to obstruct or interfere with the due course of justice or the lawful process of the court[8] (e.g. any comment on the proceedings of a pending case reflecting on the judge, jury, parties, their witnesses or counsel appearing in the case and which is calculated to prejudice the fair trial or influence the decision); or any matter affecting the proceedings of a pending case which has a tendency to prejudice

---

1. S.3.
2. Schedule, Part A, s.6.
3. Ibid., Part B, s.9.
4. Ibid., Part A, ss. 7, 8.
5. In the matter of Armand de Souza (1914) 18 N.L.R. 33; In the matter of a Rule on H.A.J.Hulugalle (1936) 39 N.L.R. 294; In the matter of a Rule on P.Ragupathy, Advocate (1945) 46 N.L.R. 297; Reginald Perera v. The King (1951) 52 N.L.R. 293.
6. In re S.A.Wickremasinghe (1954) 55 N.L.R. 511.
7. In the matter of the Rule on De Souza (1914) 18 N.L.R. 41.
8. Abdul Wahab v. Perera (1936) 39 N.L.R. 475; Jayasinghe v. Wijeyesinghe (1938) 40 N.L.R. 68; Veerasamy v. Stewart (1941) 42 N.L.R. 481; Reginald Perera v. The King, supra; Attorney-General v. Vaikunthavasan (1951) 53 N.L.R. 558; In re Jayatilleke (1961) 63 N.L.R. 282.

the public for or against a party.[1]

As early as 1899, the first category noted above had become obsolete in England since "courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them"; it continued to be applicable, however, "in small colonies consisting principally of coloured populations" where it was "absolutely necessary" to preserve "the dignity of and respect for the court".[2] Nevertheless, courts of independent Sri Lanka have continued to commit persons for contempt on the ground that they have "scandalised the court".[3]

Defamation

Defamation, under existing law, is both a tort[4] and an offence. For the latter purpose, a person is said to have defamed another if he:

> by words, either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person.[5]

The following matter is, however, excepted:

1. Imputation of any truth which the public good requires to be made or published
2. Opinion expressed in good faith on the conduct of a public servant in the discharge of his public functions
3. Opinion expressed in good faith on the conduct of any person touching any public question
4. Publication of reports of proceedings of courts of justice
5. Opinion expressed in good faith on the merits of a case decided by a court or on the conduct of witnesses or others concerned therein
6. Opinion expressed in good faith on the merits of a public performance
7. Censure passed in good faith by a person having lawful authority over another

---

1. The Queen v. Peries (1964) 68 N.L.R. 372.
2. McLeod v. St.Aubyn [1899] AC 549.
3. Reginald Perera v. The King, supra; Attorney-General v. Vaikunthavasan, supra.
4. For a full exposition of the subject, see C.F.Amerasinghe, Defamation and other aspects of the actio iniurarum in Roman-Dutch Law (Colombo: Lake House Investments Ltd, 1968).
5. Penal Code, s.479.

8. Accusation against a person preferred in good faith to a person having lawful authority over that person
9. Imputation on the character of another made in good faith by a person for the protection of his interests
10. Caution made in good faith intended for the good of the person to whom it is conveyed or for the public good.[1]

Incitement to an Offence

This ground on which the freedom of speech and expression may be restricted by law is incitement to an "offence" and not incitement to "violence". "Offence" is a very wide term, and includes every act made punishable by law. Under existing law, incitement to (or instigation of) an offence is already punishable as "abetment"; the penalty attached being the same as provided for the commission of the offence concerned.[2]

1. Ibid.
2. Ibid., s.100.

CHAPTER IV

THE COURT

The effective enforcement of fundamental rights presupposes the existence of a tribunal which is independent. This independence is acquired and possessed only when, and for so long as, the men who constitute such tribunal are free to make up their own minds. That is, a judge must be free to act according to his own knowledge and understanding of the law and to be guided by his own conscience. He will, of course, find it extremely difficult to do this if he is subjected to influences, inducements or pressures, direct or indirect, whether gratifying or distasteful, from whatever quarter and for whatever reason. All three Constitutions under review, as well as ordinary statute law, contained provisions designed to secure the independence of the judiciary. In this chapter, it is proposed to examine these legal safeguards, and the extent to which they have served their purpose. This examination will be confined to those superior courts within the island which are, or were, vested with jurisdiction in respect of the protected rights, namely, the Supreme Court and the Court of Appeal on the one hand, and the Constitutional Court on the other. The former were regular courts; the latter was a new institution outside the traditional court structure which was conceived of and experimented with as Sri Lanka emerged into republican status.

The Regular Courts

The Supreme Court which was in existence when the 1946 Constitution came into force had been established by the Charter of Justice 1801, and been continued in existence by the subsequent Charters of 1810, 1811 and 1833, by the Administration of Justice Ordinance 1868 and by the Courts Ordinance 1889. The latter provided for a Chief Justice and eight Puisne Justices (later increased to ten[1]). Apart from an original criminal jurisdiction

---

1. Criminal Law (Special Provisions) Act, No.1 of 1962.

and an appellate and revisionary jurisdiction, the Court had the power to grant and issue mandates in the nature of writs as well as injunctions of limited application.

The Government decided in 1970 that, independent of steps being taken to declare Ceylon a republic, a court of appeal sitting in Colombo should replace the Privy Council which sat in London as the country's highest appellate tribunal. A bill introduced in Parliament for this purpose received the Governor-General's assent on 28 October 1971 and was brought into operation on 15 November 1971.[1] The Court of Appeal thus established comprised a President and six other Justices of Appeal. An appeal lay, inter alia, from any judgment of the Supreme Court granting or refusing to grant a mandate in the nature of a writ, being an appeal on a question of law; and from any judgment of the Supreme Court on any question as to whether any written law was ultra vires the Constitution, or as to the interpretation of any constitutional provision. The Court was also vested with a consultative jurisdiction, in terms of which the Governor-General could seek its opinion on any question of law or fact of sufficient public importance.

The Administration of Justice Law, No.44 of 1973, which came into operation on 1 January 1974, replaced the existing courts structure with an entirely new judicial system based on the principle of a single appeal. The Courts Ordinance and the Court of Appeal Act were among the statutes that were repealed. A new Supreme Court, consisting of a Chief Justice and twenty other Judges, was established as the only superior court of record. Its jurisdiction was substantially similar to that of its predecessor, except that its original criminal jurisdiction and the power to grant and issue injunctions was transferred to a new High Court.

A further break in continuity occured in 1978 when the new Constitution repealed the Administration of Justice Law and established two new superior courts and defined their jurisdiction. The higher of these was the Supreme Court, the final court of appeal, which was vested, inter alia, with jurisdiction to protect

---

1. Court of Appeal Act, No.44 of 1971. This Court which was to be the supreme court in the country was not so designated in order to avoid changing the designation of the existing Supreme Court and thus appearing to interfere with the terms and conditions of appointment of the judges of that Court.

fundamental rights and to examine bills for constitutionality. With the principle of a second appeal restored, this Court was fashioned on the lines of the short-lived Court of Appeal of 1971, with provision for not less than seven nor more than eleven Judges, including a Chief Justice.

The 1946 Constitution sought to guarantee the independence of Judges of the Supreme Court by providing that they shall be appointed by the Governor-General, shall hold office during good behaviour until they reach the retirement age of 62 years, shall not be removable except by the Governor-General on an address of the Senate and the House of Representatives, and that their salaries shall be determined by Parliament and be charged on the Consolidated Fund.[1] When the Court of Appeal was established, it was hoped that it would be possible to attract to that Court the best available talent in the country irrespective of age. Accordingly, a fixed term of five years was fixed by the Court of Appeal Act for its Judges. In every other respect, the guarantees offered for security of tenure were the same as those contained in the 1946 Constitution; indeed, they were supplemented by the additional provision that the salary payable to a Judge may not be diminished during his term of office.

The inaugural session of the Court of Appeal took place on 9 March 1972 in surroundings at Hulftsdorp[2] which bore a marked resemblance to the Downing Street panelled chamber of the Judicial Committee which it replaced. But even as the Attorney-General rose "to welcome the new institution as a functioning body in the appellate structure of our judicial system",[3] the new Minister of Justice was preparing his proposals for the re-structuring of that judicial system; proposals which did not contemplate the continued existence of the Court of appeal.[4] Accordingly, the 1972 Constitution, which came into force two months later, recognised the

---

1. S.52. The Governor-General was required to exercise his powers, authorities and functions "as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty": s.4(2).

2. Hulftsdorp, named after a Dutch Governor who resided there, had been the seat of the superior courts since the beginning of the century. Its vicinity abounds with hundreds of Proctors' offices.

3. Ceylon Daily News, 10 March 1972.

4. Felix Dias Bandaranaike replaced Senator Jayamanne as Minister of Justice after the abolition of the Senate in January 1972. Unlike his predecessor, Bandaranaike was firmly committed to a single-appeal system.

continued existence of the Court of Appeal and the Supreme Court "unless the National State Assembly otherwise provides".[1] The two superior courts began to live on borrowed time, in the sense that they were now liable to be abolished or replaced at any time by ordinary legislation. Meanwhile, the Constitution guaranteed that Judges shall be appointed by the President; that they shall hold office during good behaviour and not be removable except by the President upon an address of the National State Assembly; that while the tenure of a Judge of the Court of Appeal shall be as provided in the Act which created that Court, the age of retirement of a Judge of the Supreme Court shall be 63 years (thus obviating the need for them to depend on executive largesse for that extra twelve months);[2] that their salaries shall be determined by the Assembly and be charged on the Consolidated Fund; and that neither the salary payable nor the age of retirement of a Judge shall be reduced during his term of office.[3] Despite protestations to the contrary, the ground had been prepared to base an argument that the Assembly could not only establish new courts in place of the existing ones, but that it could go further and prematurely terminate the services of serving judges. Indeed, the Assembly asserted the power to do precisely that, not once but on two separate occasions.[4]

The 1978 Constitution now declares that Judges of the Supreme Court are appointed by the President; that they hold office during good behaviour until they reach the age of 65 years; that they are not removable except by order of the President upon an address of Parliament presented for such removal on the ground of proved misbehaviour or incapacity (the procedure for the investigation and

---

1. S.121(2).

2. The 1946 Constitution provided that the Governor-General may permit a Judge who had reached the retirement age to continue in office for a period not exceeding twelve months: s.52(3). For the application of this provision, see infra, p.

3. S.122. The 1972 Constitution also required every judge to exercise his judicial powers and functions without being subject to any direction or other interference proceeding from any person, other than a superior court, and declared it to be an offence punishable with imprisonment or fine for any person to so interfere or attempt to interfere: s.131. Under Roman-Dutch law, which was applicable in Sri Lanka in this respect, a judge was not liable to be sued in respect of his acts unless he had been actuated by some indirect or improper motive: Voet, 5.1.88.

4. Infra, p. 211.

proof of the alleged misbehaviour or incapacity being prescribed either by standing orders of Parliament or by law); and that their salaries are determined by Parliament and are not reducible.[1]

To what extent have these constitutional safeguards in fact protected the judiciary from influence or interference by the executive and the legislature ?

Power of Appointment

Judges

While a legal training and a minimum period of actual practice were a sine qua non for appointment to the minor judiciary,[2] no such qualifications were prescribed, either by law or regulation, for appointment to a superior court. Nevertheless, the appointing authority has not, during the period under review, looked outside the legal profession when making such appointments.

The 37 lawyers appointed as Puisne Justices in the original Supreme Court were all drawn from the traditional sources: 17 from the Judicial Service, 11 from the Ministry of Justice and the Official Bar, and 9 from the Unofficial Bar.[3] In respect of those who were already employed under the State, the twin principles of seriority and merit appears generally to have been the determining factor in their selection for high judicial office. The average age of the appointees was 54 years; somewhat higher in the case of judicial officers and lower in the case of legal officers. Therefore, a Judge of that Court usually brought with him to the bench at least 25 years experience of judicial work in the original courts in different parts of the country or of intimate involvement as a lawyer in the executive and legislative branches of government. It has not been one of the traditions of the Sri Lanka Bar for its leaders to make themselves available for judicial office. This is due to a number of reasons: the wide disparity between incomes at the Bar and judicial salaries;[4] the prohibition of private practice after retirement from the Court; and the increasing involvement of lawyers in political activity. Indeed, some of the appointments

---

1. Arts. 107, 108.

2. Under Rules formulated by the Judicial Service Commission (and later by the Cabinet), only lawyers who had had at least six years practical experience at the Bar could be considered for appointment to the Judicial Service. The term "Judicial Service" is used to describe District Judges and Magistrates. They are also sometimes described as "judicial officers" or as "members of the minor judiciary".

3. See Appendix 2.

4. Infra, p. 216.

of successful middle-rung private practitioners were initially received with some scepticism; in particular, the appointment in 1965 of thirty-nine year old C.G.Weeramantry shortly after having served as the counting agent of Prime Minister Dudley Senanayake, and in 1972 of Jaya Pathirana, an intensely vocal SLFP member of the 1960-64 Parliament.[1] Similar principles determined the choice of Judges for Ceylon's substitute for the Judicial Committee. Two were retired Puisne Justices (one of whom was a Tamil), two (of whom one was a Roman Catholic) were among the four most senior functioning Puisne Justices, and the fifth was the Attorney-General.

The same traditionalist approach was adopted in the selection of personnel for the 1974 Supreme Court, seniority in service being the primary consideration. The re-constituted Court comprised two Judges of the former Court of Appeal, all nine Judges of the original Supreme Court, the five serving Commissioners of Assize,[2] the most senior District Judge, a deputy Solicitor-General, and three successful private practitioners. Vacancies on the Court were filled by the appointment in December 1974 of the Public Trustee; in June 1975 of the acting Attorney-General; and in January 1976 of the senior High Court Judge. But the sudden expansion of the Court, from eleven to twenty-one, necessarily meant the appointment of a number of persons who, in normal circumstances, would probably not have been chosen. The pool of selection was transformed into the Court itself. A deterioration in standards was inevitable. Indeed, breadth of vision, versatility, and a commitment to the Rule of Law, which had been the hallmarks of a Supreme Court Judge and which distinguished him from the judicial officer of a subordinate court, and gave him the confidence to act without fear even in highly contentious matters to which the State was a party, became less discernible.

---

1. Pathirana had declined an appointment as a Commissioner of Assize in October 1970 "as he desired to remain in active politics" (Private and confidential letter from Felix Dias Bandaranaike, Minister of Public Administration, to Senator Jayamanne, Minister of Justice, dated 4 October 1970, Records of the Special Presidential Commission of Inquiry 1978, marked P 160).

2. Commissioners of Assize were appointed to preside over criminal sessions of the Supreme Court in a particular circuit. Each such session usually extended for about three months. They were drawn from the same sources as permanent Judges of the Supreme Court, with leading criminal lawyers showing a greater willingness to accept these short-term assignments.

A departure from these principles took place in 1978 when the Supreme Court was again re-constituted. The new Court was a much more compact body than its predecessor, but if the Government had so wished, all the outgoing nineteen Judges could conveniently have been accommodated in the two new superior courts - the Supreme Court and the Court of Appeal. Since the Government had not followed the 1971 precedent of designating the final appellate tribunal as the Court of Appeal, the most senior of the outgoing Judges (supplemented if necessary by other available talent) could have been appointed to the new Supreme Court, and their remaining colleagues to the new Court of Appeal which was to exercise substantially the jurisdiction of the former Supreme Court. This course, however, was not adopted. Instead, eight of the Judges were excluded altogether, and the remaining eleven were re-appointed to the two Courts without regard to seniority, experience or age.[1]

Of the seven Judges who were hand-picked for appointment to the Supreme Court, four were comparatively junior Judges of whom two had been chosen by the President earlier that year to be his commissioners for the purpose of probing the political acts and conduct of the Prime Minister, Ministers and officials of the previous government.[2] The third member of that commission, a District Judge, by-passed the High Court to take a great leap on to the Court of Appeal. Other new appointees to the Court of Appeal included a High Court Judge who had left the bench soon after the general election of July 1977 to serve as Secretary for Justice, and three members of the Unofficial Bar who had been associated in political and legal work on behalf of the ruling United National Party. One of them, J.A.R.Victor Perera, a provincial Proctor, had stormed his way into the limelight only a month previously by making public a letter allegedly written by him to the former Minister of Justice, Felix Dias Bandaranaike.[3] This letter, which was read out in the National State Assembly by Prime Minister Premadasa, expressed "joy that the nefarious regime in which you played such a prominent role has come to an end". The letter went

---

1. For the movement of Judges, see p.215.
2. Infra, p.226.
3. Ceylon Daily News, 4 August 1978. Bandaranaike, however, denies having received it.

on to allege, inter alia:

> You have ruined our legal system and shattered the confidence we had in the judiciary and in state officers. Your doctrine of rule by the Party for the Party and with the Party alone created all the chaos, nepotism and corruption during the past seven years. The appointments you made during the past seven years of party stooges and sycophants to quasi-judicial tribunals and other offices of importance ruined the country and were responsible for your ignominious downfall.

Perera was appointed to the Court of Appeal barely a month after this alleged letter had been made public. Very soon after, he was also to adorn the Supreme Court, being preferred for appointment over several senior colleagues including the President of the Court of Appeal. Unmistakably, the process of politicising the Supreme Court had been set in motion. Seniority and merit had given way to that ambiguous criteria of "political acceptability".

Chief Justices

The selection of the Chief Justice has always been regarded as a matter entirely within the discretion of the Prime Minister. In making that selection, existing seniority among Judges has sometimes been respected. At other times, seniority has been artificially created. On one occasion, at least, seniority was altogether ignored. Finally, the principle was established that the selection need not be made from within the judiciary at all.

In October 1947, when the 1946 Constitution came into force, the Chief Justice was Sir John Howard,K.C., an officer in the Colonial Legal Service. A.E.P.Rose,K.C., another expatriate, who had been appointed a Puisne Justice in January 1945 and had served as acting Legal Secretary from October 1954 until the State Council ceased to exist two years later, was appointed Attorney-General. At the time of his appointment it had been agreed that the salary attached to his post would be higher than that of a Puisne Justice; that the status of the post would take precedence before that of Puisne Justices; but that the seniority of two serving Judges who had been appointed before him, Justices Wijewardene and Jayatilleke, would remain unaffected for purposes of promotion.[1] Accordingly, after Sir Arthur Wijewardene,K.C., and Sir Edward Jayatilleke,K.C.,

---

1. Letter of 13 October 1947 from the Secretary to the Governor to Hon.A.E.P.Rose, quoted in Parliamentary Debates (House of Representatives), 15 March 1955, col.2587.

had each served as Chief Justice, Sir Alan Rose,K.C. was appointed, on 11 October 1951, to an office to which he would ordinarily have succeeded at that stage had he remained throughout on the Supreme Court.

Justice Basnayake succeeded Rose as Attorney-General. He was third in seniority on the Supreme Court, but unlike on the previous occasion on which this office was filled, no reservation was made in regard to the seniority of Justices Dias and Nagalingam for purposes of promotion. On the contrary, when occasion arose a few months later to make an acting appointment to the office of Chief Justice, Prime Minister D.S.Senanayake wrote thus in a strictly confidential letter to the Governor-General:

> Normally the Attorney-General who has much higher precedence than the Puisne Justices should act as Chief Justice, but I am not anxious that the work in the Attorney-General's Department should be disturbed by such an appointment, specially because the Solicitor-General is also functioning in some other capacity and is not in the Department. I, therefore, feel that the next senior Puisne Justice should act for the Chief Justice on the distinct understanding that it will in no way enhance his claims for permanent appointment to this post at some future date.[1]

Accordingly, Justice Nagalingam, the senior Puisne Justice, acted as Chief Justice in March 1952, July 1953, October 1953 and February 1954; but it was not until the last occasion that he was informed by the Governor-General that:

> I have to add that neither this nor any previous acting appointment as Chief Justice confers any claim to the permanent office of Chief Justice. [2]

Clearly, it had been decided that Basnayake should, by virtue of his appointment to the office of Attorney-General, supersede Justice Nagalingam who had been his senior in public service and on the Supreme Court,[3] and a principle was now being sought to be established. It was later claimed by Prime Minister Kotelawela that when Justice Basnayake was offered the post of Attorney-General, he had been given an assurance by the then Prime Minister

---

1. Letter of 16 January 1952, ibid., col.2594.

2. Letter of 26 February 1954 from the Governor-General to Justice Nagalingam, ibid., col.2558.

3. Nagalingam, who was nine years older than Basnayake, was Attorney-General from 15 January 1946. On his appointment as acting Puisne Justice, Basnayake succeeded him as acting Attorney-General. Nagalingam was appointed a Puisne Justice on 22 July 1947; Basnayake followed on 23 October 1947: Civil List 1955 (Colombo, Govt.Press,1955).

that he would be appointed to succeed Sir Alan Rose as Chief Justice.[1] Having regard to the fact that Rose was not due to retire until 8 October 1962 (or 8 October 1961 if he had not been granted the hitherto customary extension of an year), this assurance, if in fact given, would have been of very little avail or consequence to Basnayake who would have retired from the office of Attorney-General on reaching his sixtieth year on 3 August 1962. Whether a Prime Minister could have thus fettered the discretion of his successors in the matter of recommending the appointment of a suitable person whenever the office of Chief Justice fell vacant is also an equally relevant question.

But events took quite a different turn. On 1 July 1954, the "Trine", a left-wing weekly newspaper issued a special edition in which it alleged that the Governor-General designate, Sir Oliver Goonetilleke, and the Governor of the Central Bank, N.U.Jayawardene, were engaged in swindles on an international scale. On 5 July, the Prime Minister, Sir John Kotelawela, made a statement in Parliament on a £ 5,000,000 loan which had been floated by the Government and which was referred to in the newspaper article; he denied any impropriety on the part of any official.[1] On the same day, the Leader of the Opposition, S.W.R.D.Bandaranaike, moved in the House of Representatives that the appointment of Goonetilleke as Governor-General should not become effective until a commission of inquiry into certain other charges of improper conduct by N.U. Jayawardene, which was then sitting, had concluded its business.[2] On 17 July, the offices of the "Trine" were raided by the C.I.D. and certain documents seized.[3] Two weeks later, the passport of Mrs.Theja Goonewardene, the editor of the "Trine",was impounded.[4] On 7 August, Attorney-General Basnayake filed an Information in the Supreme Court alleging that Theja Goonewardene had defamed Goonetilleke and thereby committed an offence punishable under section 480 of the Penal Code.[5] On the same day, the Minister of Justice directed that the trial of Theja Goonewardene be held at Bar without a jury.[6] On 26 October, the Trial at Bar commenced

---

1. Times of Ceylon, 5 July 1954.
2. Ceylon Daily News, 6 July 1954.
3. Ibid., 18 July 1954.
4. Ibid., 1 August 1954.
5. Ibid., 8 August 1954.
6. Ibid.

in the Supreme Court before three Judges: Chief Justice Rose, Justice Gunasekera and Justice Pulle. The Attorney-General led a formidable team for the Crown; the defendant was represented by D.N.Pritt,Q.C.[1] The trial was an acrimonious one. Epithets were flung at each other across the Bar table. The usually unruffled Attorney-General felt that this was "the result of admitting to our Bar people who are untrained here; these foreigners are untrained in the traditions of our Bar"; Mr.Pritt countered that "if my learned friend the Attorney-General is the leader of this Bar, I thank God that I am not trained in its traditions".[2] The newspapers thought that counsel behaved like peevish schoolboys.[3] On 3 December, the Chief Justice delivered the Order of the Court, acquitting the defendant; the material adduced by the Crown to establish that the defendant had published the issue of the newspaper in question with the necessary knowledge of its contents was insufficient to justify calling upon her for her defence.[4] A highly publicised, politically charged cause celebre had fizzled out.

Barely seven weeks later, on 22 January 1955, the Ceylon Daily News carried the following official announcement:

> The Governor-General has appointed Mr.H.H.Basnayake, Q.C., Attorney-General, to act as the Chief Justice with effect from June 15, until the leave of Sir Alan Rose, the permanent Chief Justice, preparatory to retirement expires, and thereafter to be the Chief Justice.
>
> It is understood that Mr.Justice C.Nagalingam, Senior Puisne Justice, who was scheduled to retire on October 24 this year, has sent in his papers for retirement earlier than expected.
>
> Mr.Basnayake's successor as Attorney-General has not yet been named. Mr.T.S.Fernando,Q.C., Solicitor-General, is now acting as Attorney-General as Mr.Basnayake is on leave.

There had been no prior intimation that Sir Alan Rose had any intention of taking long leave, let alone retiring prematurely; indeed, he had availed himself of six months leave abroad only in the previous year. This bland announcement in the pro-government newspaper also suggested that Justice Nagalingam, who

---

1. Ceylon Daily News, 27 October 1954.
2. Ibid.
3. "Heard in Hulftsdorp" by Lex, Times of Ceylon.
4. Ceylon Daily News, 4 December 1954.

had acted for the Chief Justice on every previous occasion when that office was temporarily vacant, would not be available to do so in July as he had "sent in his papers for retirement earlier than expected". It cleverly suppressed the fact that Justice Nagalingam had actually walked out of his chambers in a huff and sent in his papers for retirement on the previous afternoon when he had heard the official announcement that he was being superseded.[1] Above all, what was unique in the announcement was that a permanent appointment was being made to an office one year before it became vacant and an acting appointment six months in advance, thereby binding any future administration which may have succeeded the present prior to either of those dates. As it turned out, Basnayake assumed office as Chief Justice on 1 January 1956; the Government that appointed him was decisively defeated at the polls three months later.

Why did Sir Alan Rose quit the office of Chief Justice prematurely ? The "Guardian", a short-lived but independent English daily newspaper, explained thus:

> The immediate reasons which led to the resignation of Sir Alan are openly discussed in legal and parliamentary circles today. These circles state that Sir John sent for Sir Alan and told him that he had been hard on Mr.Basnayake during the trial, that he could also have stopped Mr.Justice Gunasekera being hard on Mr.Basnayake and that Sir Alan had entertained Mr.D.N.Pritt,Q.C., senior defence counsel in the Theja Goonewardene case, to lunch.[2]

This report was not contradicted. In the House of Representatives, the question was specifically asked:

> Did or did not the Prime Minister summon Sir Alan Rose and charge him with misconduct in the Theja Goonewardene defamation case ? In particular, did he or did he not refer to the misconduct of Sir Alan Rose in reference to Mr.Basnayake ? Did he or did he not refer to Sir Alan Rose having entertained the senior defence counsel, Mr.D.N.Pritt, to lunch ? Mr.Speaker, we would like to have definite replies to these allegations.[3]

There was no immediate answer forthcoming from the Prime Minister

---

1. Parliamentary Debates (House of Representatives), 15 March 1955, col.2548. See also Morning Times, 23 January 1955, p.1.
2. 24 January 1955.
3. W.Dahanayake, Parliamentary Debates (House of Representatives), 15 March 1955, col.2522.

who was present in the House at the time. Later, in the course of a prepared statement which was read out by him, Kotelawela explained that Rose's premature departure was to facilitate the process of "Ceylonisation" of the Supreme Court. He tabled a letter dated 15 January 1955 from the Chief Justice to the Governor-General which stated, inter alia, that:

> In view of the considered policy of Government that all key posts in the Island should be held by Ceylonese, my own position as Chief Justice naturally arises for consideration.
>
> In order, therefore, to avoid any possible embarrassment to Government, I have discussed the matter with the Prime Minister and have informed him that I am placing in your hands my papers for retirement.[1]

In fact, the "Ceylonisation" of the Chief Justiceship had been achieved as far back as 1949 with the appointment of Sir Arthur Wijewardene. The more plausible and probable explanation was either that the Government being displeased with the performance of the Chief Justice in the Trine Case wished, in the words of a Member of Parliament, to "shove him out";[2] or that, having regard to the impending general election, it desired to reward a loyal Attorney-General or secure a safe Chief Justice. Whatever might have been the truth, the reaction of at least a section of the public to this chess-board approach to the Supreme Court was expressed in the following motion which was moved by the Leader of the Opposition, S.W.R.D.Bandaranaike, and debated in the House of Representatives:

> That since the circumstances attendant on the retirement of the Chief Justice and the appointment of a successor to him on the advice of the Prime Minister have led to a loss of public confidence in the administration of justice and are calculated to undermine the independence of the Judiciary, this House has no confidence in the Government.[3]

Shortly after Basnayake assumed office as acting Chief Justice, in June 1955, influenced perhaps by the recently enunciated principle

---

1. Parliamentary Debates (House of Representatives), 15 March 1955, col.2591. For Prime Minister's reply, see col.2592.

2. Ibid., col.2552.

3. Ibid., col.2500. For proceedings of the debate, see cols. 2500-2608. See also questions asked in the Senate by Senator S. Nadesan,Q.C., and the answers thereto by the Minister of Justice, Parliamentary Debates (Senate), 25 January 1955, col.931 and 8 March 1955, col.988, respectively.

that "the Attorney-General should not only act for the Chief Justice, but should also succeed him in the permanent office",[1] Justice Gratiaen, the senior Puisne Justice, took the unusual step of applying to the Governor-General in writing for appointment as Attorney-General. His application was forwarded through the Minister of Justice who recommended it. The Governor-General very properly returned the application to the Minister, reminding him that appointment to that office is made on the advice of the Prime Minister "who would, no doubt, tender such advice after due consideration of all those who are eligible for that office".[2] In fact, no permanent appointment was made to that office until the next general election. T.S.Fernando,Q.C. continued to function in an acting capacity until his own appointment to the Supreme Court by the newly-elected Bandaranaike Government on 2 May 1956. On the same day, Justice Gratiaen moved over to the Attorney-General's Chambers.

When Chief Justice Basnayake, having survived three changes of government, retired from office on 3 August 1964 on reaching the age of 62 years, the Attorney-General was D.St.C.B.Jansze,Q.C. He had held that office for six years, having reached it by promotion within the department. But the principle enunciated in 1955 was neither invoked by him, nor applied by the Government of Mrs. Bandaranaike. Instead, Justice Sansoni, the senior Puisne Justice, who was then about to conclude the Trial at Bar arising out of the alleged attempted coup d'etat of January 1962,[3] was appointed Chief Justice. On his retirement, upon reaching the age of 62 years on 18 November 1966, the Attorney-General was A.C.M.Ameer,Q.C., a former deputy Solicitor-General who after a spell at the Bar during which he had taken "silk", had been appointed chief law officer earlier that year. Prime Minister Dudley Senanayake did not apply the 1955 principle; he recommended the senior Puisne Justice, H.N.G.Fernando, for appointment as Chief Justice.

When the Court of Appeal was established in November 1971 as the country's highest appellate tribunal, Prime Minister Mrs.

---

1. Ibid., at col.2596, per Sir John Kotelawela.
2. Much publicity was given to this application in the Ceylon Daily News of 8 November 1955. For the circumstances in which such publicity came to be given, see J.L.Fernando, Three Prime Ministers of Ceylon (Colombo: Gunasena, 1963), pp.74-79.
3. Infra, p. 422.

Bandaranaike's choice for the prestigious office of President of that Court was not Chief Justice H.N.G.Fernando, but 65-year old retired Puisne Justice T.S.Fernando,Q.C. who was then the President of the Geneva-based International Commission of Jurists. His appointment lent credence to the Government's professed desire to establish an independent and competent tribunal which would enjoy the confidence of all sections of the community. In an editorial comment on his appointment, the pro-Opposition Ceylon Daily News, several of whose directors had only recently been found by a commission of inquiry headed by him to have been guilty of wide-ranging offences under the exchange control laws of the country, commented thus:

> The independence of the Judiciary is not merely institutional. It is also personal. The calibre of judges, the integrity of the individual, is as vital as the guaranteed independence of the institution. It is in this perspective that we welcome the appointment of Mr.T.S.Fernando,Q.C., as the first President of Ceylon's Court of Appeal. While congratulating him on this, the crowning glory of his judicial career, we warmly commend the Prime Minister for her impeccable choice of this internationally known jurist, scholar and man of high integrity and accept it as a token of the Government's respect for the vital principle of an independent judiciary.[1]

In the view of the incumbent Chief Justice:

> By reason of his distinguished career both at the Bar and on the Bench, by reason of his being a devoted exponent of the principles of the Rule of Law, and by reason of the high esteem he is held in, he is eminently qualified for his appointment. We all wish to congratulate him and we welcome his return to Hulftsdorp.[2]

On 1 July 1970, Justice Tennekoon, who ranked fifth among the Puisne Justices, had accepted the invitation of the new Prime Minister, Mrs.Bandaranaike, to become Attorney-General. No reservation was made, for purposes of future promotion, of the seniority of Justices Silva, Sirimanne, Alles and Samarawickrema who ranked above him. In his letter of acceptance, 55-year old Tennekoon informed

---

1. Ceylon Daily News, 22 November 1971. For report of the commission, see S.P.VIII-1971.

2. Speech made on the occasion of the unveiling of the bust of the late H.V.Perera,Q.C., at the Colombo Law Library: Ceylon Daily News, 27 November 1971.

the Governor-General that he did not expect to serve in the office of Attorney-General for more than three years.[1] In the course of a previous discussion he had had with the Prime Minister, no assurance had been sought, nor given, in regard to the office of Chief Justice which was due to fall vacant, in accordance with the Constitution, two and a half years later, in November 1972.[2] But, having regard to the precedent established when a Puisne Justice last accepted office as Attorney-General, Tennekoon obviously hoped to succeed to the office of Chief Justice when that office next fell vacant.

Two events, however, supervened shortly thereafter. By the Court of Appeal Act, No.44 of 1971, a Court superior to the Supreme Court was established in November 1971. By the 1972 Constitution, which came into force on 22 May 1972, the retiring age of the Chief Justice was raised to 63 years. While the President of the Court of Appeal ranked above the Chief Justice, the position of the Attorney-General in the new legal hierarchy remained undetermined.[3] Meanwhile, in March 1972, the Minister of Justice submitted a Cabinet Memorandum on the proposed re-structuring of the superior courts: one appeal and one appellate court was what was envisaged.[4] He also recommended that:

> . . . all the existing Judges of the Supreme Court and of the Court of Appeal, and all the existing Commissioners of Assize, be offered appointments in the new Supreme Court even if some of them are above the age limit suggested above /65 years/. These persons could hold office in the new Court for the balance period of their current terms of office in their existing Courts. If their present salaries are higher than those of the new Court to which they are appointed, they could retain their present salaries as personal to them. There are at present 4 Judges of the Court of Appeal, 9 Judges of the Supreme Court and 4 Commissioners of Assize.[5]

On 5 April 1972, the Cabinet approved these proposals, and on 16 June 1972 a draft law to give effect to them was submitted to the Cabinet. On 3 July 1972, the Minister informed the President

---

1. Letter of 30 June 1970.
2. Private information.
3. In April 1973, the revised Precedence Table placed the Attorney-General below the Chief Justice, but above the Judges of both the Court of Appeal and of the Supreme Court.
4. Cabinet Memorandum No.112/72 of 20 March 1972.
5. Ibid.

of the Court of Appeal, the Chief Justice and the Attorney-General of his proposals. The President of the Court of Appeal was further informed that he would be the President of the new Supreme Court, and he was requested to inquire from his colleagues on the Court of Appeal whether they would agree to seniority in the new Court being determined among them by reference to their respective dates of appointment to the existing Supreme Court.[1] On 7 July 1972, the President of the Court of Appeal wrote to the Minister to say that his colleagues were agreeable to that arrangement. Accordingly, if the proposed law was passed in that form and brought into operation, the President of the new Supreme Court would be T.S.Fernando,Q.C., who, having been appointed President of the Court of Appeal on 20 November 1971, would have been entitled to continue in office until the end of 1976.

Attorney-General Tennekoon was clearly faced with a dilemma. If he remained as Attorney-General, he would have to retire on 9 September 1974; if he reverted to the Supreme Court before that date as he had originally intended to, he would probably have been accommodated, following the principle agreed upon with the Judges of the Court of Appeal, at the point of his old seniority. On 26 June 1973, shortly after the final draft of the Administration of Justice Bill had been approved by the Cabinet, Tennekoon wrote to the President of the Republic intimating his desire to retire from the public service "for reasons which are entirely personal" on reaching his 59th year on 9 September of that year, and applied for leave preparatory to retirement with immediate effect. On the next day, he withdrew his application for immediate retirement and applied for leave instead.[2] In the twenty-four hours that intervened between these two dramatic communications, Tennekoon had discussions with both the President of the Republic and the Prime Minister.[3] No record of either discussion, even if made, is available. However, at the first meeting held thereafter, the Cabinet reviewed the Administration of Justice Bill and decided, without any memorandum before it, that no person who was over 63 years of age should be appointed to the new Supreme court.[4] On 2 August 1973, Tennekoon was appointed to the Court of Appeal.

---

1. Private information.
2. Letters dated 27 June 1973 to the Minister of Justice and to the Secretary for Justice.
3. Ibid.
4. Private information.

On 17 November 1973, six weeks before the date fixed for the replacement of the Court of Appeal and the Supreme Court by the new Supreme Court, Chief Justice H.N.G.Fernando reached his retirement age of 63 years. He was succeeded by the senior Puisne Justice, G.P.A.Silva. Accordingly, of the Judges available for appointment to the new Supreme Court on 1 January 1974, G.P.A.Silva (60), who had been appointed a Puisne Justice in 1962, was the most senior. Next in seniority were A.C.Alles (62) appointed in 1964, G.T.Samarawickrema (57) appointed in 1966, and V.Tennekoon (59) appointed in 1967. But it was to Tennekoon that the Government offered the highest judicial appointment in the country. The principle was thus established that the Prime Minister was free to choose a Chief Justice from among the existing Judges irrespective of, and on considerations unrelated to, seniority. It was an extension of the earlier principle that seniority may be artificially conferred on a favoured Judge by prior appointment to the office of Attorney-General.

In September 1977, when Tennekoon retired from the Supreme Court, the most senior Judge was Samarawickrema who by then had completed eleven years on the bench, during which period he had acted as Chief Justice on several occasions, the most recent being in August of that year. S.Pasupati had been Attorney-General for two years, having succeeded to that office by promotion within the department. Although Samarawickrema was widely expected to be appointed Chief Justice, the choice of the newly-elected Prime Minister, J.R.Jayewardene, was his own personal lawyer, N.D.M. Samarakone,Q.C. 58-year old Samarakone was a leading civil lawyer in the District Court of Colombo who had never previously held any judicial office. As the President of the Bar Association remarked at the ceremonial sitting held to welcome the new Chief Justice, it was an "unprecedented step".[1] Samarakone himself said that he was "deeply conscious of the departure from tradition" that his appointment involved.[2] The principle had been firmly established that a Prime Minister is completely free and unfettered in his choice of a Chief Justice.

---

1. Ceylon Daily News, 15 September 1977.
2. Ibid.

Tenure

The age of retirement of Supreme Court Judges is fixed by law. Under the 1946 Constitution, however, the Governor-General could permit a Judge who had reached the retirement age to continue in office for a period not exceeding twelve months.[1] In 1949, the Government permitted the Chief Justice, Sir Arthur Wijewardene, who had been appointed to that office at the age of 61 years 10 months, to continue in office until he reached the age of 63 years. Similarly, in 1950, his successor, Sir Edward Jayatilleke, who was appointed Chief Justice at the age of 61 years 5 months, was permitted to function until he reached the age of 63 years. In June 1955, when Chief Justice Rose took six months leave preparatory to premature retirement, the Judge next in seniority to him was Justice Nagalingam who was due to reach his 62nd year in October. Had he been shown the same consideration and been granted an extension until he reached his 63rd year, it would have been possible for him not only to have acted as Chief Justice for six months, but also to have functioned in that office in a permanent capacity for a further ten months. But Nagalingam was not granted an extension.

In twenty-five years, only one Puisne Justice received the benefit of an extension: on 11 April 1971, Justice A.L.S.Sirimanne was permitted to continue in service for an additional year. Neither Justice Pandita Gunewardene, who reached his retirement age on 10 February of that same year, nor Justice de Kretser, who reached that age on 20 January of the following year, received such favoured treatment from the same Government. It is no doubt the recognition that this provision was capable of being utilised to derogate from the independence of the judiciary that led the framers of the 1972 and 1978 Constitutions to omit it altogether.

Parliament's constitutional power of requiring the removal of a Judge has, during the period under review, never been invoked. Although Bandaranaike, as Leader of the Opposition, had sought to censure the Government for the circumstances leading to the appointment of Attorney-General Basnayake as Chief Justice, he did not, after his own election as Prime Minister in April 1956, set in motion

---

1. S.52(3).

the widely expected proceedings for the removal of the Chief Justice. When the votes of the Supreme court were being discussed in August of that year, the new Leader of the Opposition, Dr.N.M.Perera, who had spoken in support of Bandaranaike's censure motion in the previous year, asked the new Prime Minister to:

> give us some definite idea as to what he intends to do with regard to the present holder of the office of Chief Justice of the Supreme Court, because if the Government does not intend to take action, we intend to take action of our own. We are intending to move a substantive motion. So far as this House is concerned, Members both on that side and on this side are thoroughly dissatisfied and there is not the slightest doubt in our minds as to the undesirability of that person continuing in office.[1]

He asked for a "definite pronouncement on the subject", and received from Finance Minister Stanley de Zoysa the curt reply that:

> once a Judge has been appointed, it is altogether undesirable for any Government to express an opinion on the merits or demerits of the man who holds the office.[2]

Earlier, in reply to Colvin R.de Silva, the Finance Minister had been more explicit in clarifying the new Government's attitude to the Court:

> I quite agree with the Hon.Member that it was incorrect for the previous Prime Minister to have made the appointment in advance which really implied a somewhat more than justified confidence in the continuance of himself in office. But I would like to say this, that as far as the administration is concerned, as far as the executive government is concerned, we would wish to interfere as little as possible in the affairs of the Supreme Court.[3]

Indeed, during Chief Justice Basnayake's nine-year term of office, although his judgments were often criticised, his own conduct as a Judge was beyond reproach, and the question of his removal was thereafter neither pursued by N.M.Perera nor raised by anyone else. The Opposition in Parliament did, however, give notice of a motion against his successor, "deploring" his conduct, but not calling for his removal.

---

1. Parliamentary Debates (House of Representatives), 9 August 1956, col.43.
2. Ibid., col.44.
3. Ibid., col.37.

Sansoni had barely completed his first year in office as Chief Justice when he decided to hear the petition challenging the election of the new Prime Minister, Dudley Senanayake, to the Dedigama seat in the House of Representatives. This was a singularly unwise decision since the Chief Justice is perhaps the one member of the Supreme Court who has the closest contact with the Prime Minister; he probably meets the Prime Minister regularly in Colombo's diplomatic circuit and at official functions, and is invariably invited to state dinners where, by reason of the precedence he enjoys, he sits with the Prime Minister at the same table. The trial commenced on 17 January 1966; judgment was reserved on 31 January. On 19 February, Dudley Senanayake left the country for medical treatment in the United States. On the following day, the Ceylon Observer carried a photograph of Senanayake being seen off at the airport by the Chief Justice.[1] In the House of Representatives two days later, when questioned by an Opposition MP as to why usual protocol was not observed at the Prime Minister's departure, Minister of State J.R.Jayewardene explained that it was a private visit and that no one had been invited. "Some people heard of it and they came", he said. In the mistaken belief that the question had been inspired by the failure to invite Leader of the Opposition Mrs.Bandaranaike to the airport, the Minister added: "The fact that some people did not come would not be taken amiss by the Prime Minister. He was very considerate and really did not wish anybody to come . . . It would be ungentlemanly to disturb a lady at one o'clock in the morning".[2] The implication was clear: the Prime Minister had left on a private visit and had been seen off only by his friends who, though uninvited, had braved a 25-mile journey in the middle of the night to wish him goodbye. The Chief Justice, who was in the process of deliberating whether or not Senanayake had committed a corrupt practice and thereby forfeited the right to hold office, was one of them.

It was inevitable that Sansoni should face the following Opposition motion in the House of Representatives; the first substantive motion directed specifically against the conduct of a Judge

---

1. Ceylon Observer, 20 February 1966.
2. Parliamentary Debates (House of Representatives), 23 February 1966, col.2459.

in Ceylon:

> That this House deplores the action of the Hon. the Chief Justice in attending an unofficial gathering, for which no invitations were issued, at the Katunayake Airport to bid farewell to Hon. Dudley Senanayake on his departure to the United States of America for a medical check-up and other purposes at a time when he was presiding over the hearing of an election petition challenging Hon.Dudley Senanayake's election as Member of Parliament for the electoral district of Dedigama.[1]

The motion, however, lapsed with the prorogation of Parliament and was thereafter not seriously pursued. Meanwhile, the election petition was dismissed, the Chief Justice holding that Senanayake was not guilty of any of the corrupt or illegal practices alleged against him.[2]

Had that been the record of legislative and executive intervention against the judiciary, there would have been no real cause for concern. Instead, three events, equally traumatic, all within a period of five years, appear to have set a pattern of conduct which makes the future appear very bleak.

The Administration of Justice Law 1973 which repealed both the Court of Appeal Act and the Courts Ordinance under which the two existing superior courts had been established, fixed the age limit for the new Supreme Court at 63 years, thus preventing the absorption into that Court of Judges above that age although their security of tenure was constitutionally guaranteed. On 1 January 1974, when the new Supreme Court was constituted, the movement of Judges was as follows:

---

1. Sun (date not available).
2. Ceylon Daily News, 4 June 1966.

TABLE 18

RE-CONSTITUTION OF THE SUPERIOR COURTS IN 1974

1972 Constitution

COURT OF APPEAL

President

T.S.Fernando,Q.C. (OUT)

Judges

V.Sivasupramanium (OUT)

A.L.S.Sirimanne (OUT)

G.T.Samarawickrema,Q.C.

V.Tennekoon,Q.C.

SUPREME COURT

Chief Justice

G.P.A.Silva (Retired)

Judges

A.C.Alles

S.R.Wijetilleke

V.T.Thamotheram

H.Deheragoda

C.B.Walgampaya

J.Pathirana

D.Wimalaratne

T.W.Rajaratnam

D.Q.M.Sirimanne

Commissioners of Assize

C.V.Udalagama

T.A.de S.Wijesundera

S.D.M.L.Perera

I.M.Ismail

J.G.T.Weeraratne

SUPREME COURT

Chief Justice

V.Tennekoon,Q.C.

Judges

A.C.Alles

G.T.Samarawickrema,Q.C.

S.R.Wijetilleke

V.T.Thamotheram

H.Deheragoda

C.B.Walgampaya

J.Pathirana

D.Wimalaratne

T.W.Rajaratnam

D.Q.M.Sirimanne

C.V.Udalagama

T.A.de S.Wijesundera

S.D.M.L.Perera

I.M.Ismail

J.G.T.Weeraratne

A.Vythialingam

N.Tittewella

S.Sharvananda

S.W.Walpita

W.D.Gunasekera

Chief Justice Silva declined to serve on the new Court when it became known that he would be superseded by a Judge who was five years junior to him in service; he availed himself of retirement benefits which are usually available in the public service upon abolition of office. Of the three Judges who were omitted from the new Court, T.S.Fernando (68) had served only two years of the five-year term for which he had been appointed as President of the Court of Appeal; V.Sivasupramanium (65) and A.L.S.Sirimanne (64) had barely completed two years of the five-year term for which each had been appointed to that Court. By repealing the Court of Appeal Act, and thereby abolishing the Court of which these three Judges were members, they were effectively removed from their judicial offices. By subjecting them to a law which prescribed a lower age of retirement, they were effectively excluded from re-appointment to the new Court that was established. The Constitutional Court, however, agreed with the Attorney-General that the "non-absorption of these three Judges is consistent with section 122(3) of the Constitution".[1] That section read as follows:

> Unless the National State Assembly otherwise provides, the term of office of a Judge of the Court of Appeal shall be as provided by the Court of Appeal Act, No.44 of 1971, and the age of retirement of Judges of the Supreme Court shall be 63 years.

The Constitutional Court understood this section to mean "that the term of office of the Judges of the Court of Appeal can be altered by a simple majority of the National State Assembly".[2] Dealing thereafter with the salary reduction to which those Judges of the Court of Appeal who were absorbed into the new Supreme Court would be subjected to, the Constitutional Court expressed the view that section 122(5) which provided that:

> The salary payable to or the age of retirement of any such Judge shall not be reduced during his term of office.

had no application if "the office of Judge of the Court of Appeal has been abolished under the Bill".[3]

Unlike the Constitutions of most other Commonwealth countries, the 1972 Constitution did not expressly provide that an office of judge may not be abolished while there was a permanent holder

---

1. In re Administration of Justice Bill (1973) DCC, Vol.1, p.62.
2. Ibid.
3. Ibid.

thereof.[1] However, the effect of guaranteeing that a judge was irremovable during good behaviour and that his age of retirement was irreducible, was to achieve the same result. The power given to the legislature to establish a court in place of an existing one could not, in view of these two guarantees, have included a power to remove a judge from office. Indeed, it is doubtful whether, having regard to subsection (5) of section 122 referred to above, even the reduction of the term of office or the age of retirement of a judge would have applied to one who was already in office. Therefore, it would appear that the Constitutional Court erred in its decision on this provision of the bill. It did more. By its cursory and cavalier analysis of the bill, it gave the stamp of judicial authority to this new and simple device for circumventing constitutional guarantees and securing the removal of judges otherwise than in the manner provided for by law. Before long, the three members of the Constitutional Court who had legitimised the removal of judges by the substitution of one court for another were themselves to fall victims to this same device.

This happened when the 1978 Constitution provided, in its transitional provisions that:

> All Judges of the Supreme Court and the High Courts established by the Administration of Justice Law, No.44 of 1973, holding office on the day immediately before the commencement of the Constitution shall, on the commencement of the Constitution, cease to hold office.[2]

As has already been noted,[3] eight Judges whose security of tenure until they reached the prescribed age of retirement was constitutionally guaranteed were, in effect, prematurely removed from office. Five of them had abandoned the Unofficial Bar, and by accepting judicial office had forfeited the right of private practice for life; two had graduated through the Attorney-General's Department and reached the bench in the normal course of promotion; and one, a judicial officer, had been appointed to the Supreme Court, as many of his colleagues had previously been, at the end of a long career served in different parts of the country. The movement of Judges into the two new superior courts, as well as up, down and out, was as follows:

---

1. See, for example, the Constitution of Zimbabwe, Art.86(3) and the Constitution of Belize, Art.95(2).
2. Art.153.
3. Supra, p.196.

TABLE 19

RE-CONSTITUTION OF THE SUPERIOR COURTS IN 1978

1972 Constitution	1978 Constitution
SUPREME COURT	SUPREME COURT
Chief Justice	Chief Justice
N.D.M.Samarakone,Q.C.	N.D.M.Samarakone,Q.C.
Judges	Judges
G.T.Samarawickrema,Q.C.	G.T.Samarawickrema,Q.C.
V.T.Thamotheram	V.T.Thamotheram
J.Pathirana (OUT)	I.M.Ismail
D.Wimalaratne	J.G.T.Weeraratne
T.W.Rajaratnam (OUT)	S.Sharvananda
C.V.Udalagama (OUT)	R.S.Wanasundera
T.A.de S.Wijesundera (OUT)	
S.D.M.L.Perera (OUT)	
I.M.Ismail	COURT OF APPEAL
J.G.T.Weeraratne	D.Wimalaratne
A.Vythialingam	A.Vythialingam
N.Tittewella (OUT)	B.S.C.Ratwatte
S.Sharvananda	P.Colin Thome
S.W.Walpita (OUT)	J.F.A.Soza
W.D.Gunasekera (OUT)	M.M.Abdul Cader
B.S.C.Ratwatte	K.A.P.Ranasinghe
R.S.Wanasundera	K.C.E.de Alwis
P.Colin Thome	J.A.R.V.Perera
	H.D.Thambiah
HIGH COURT	H.Rodrigo
J.F.A.Soza	
M.M.Abdul Cader	
J.R.M.Perera (OUT)	
H.A.G.de Silva	
C.N.de S.J.Goonewardene (OUT)	
L.H.de Alwis	
T.J.Rajaratnam (OUT)	
K.D.O.S.M.Seneviratne	
K.A.P.Ranasinghe	
J.S.Abeywardene	
A.A.de Silva (OUT)	
C.L.T.Moonemalle	
S.Selliah	
B.E.de Silva	
G.R.T.D.Bandaranaike	
D.G.Jayalath	
T.D.G.de Alwis	
B.Senaratne	
DISTRICT COURT	
K.C.E.de Alwis	

The third event took place shortly before the re-constitution of the Supreme Court in 1978. On 1 August, the proceedings of the Special Presidential Commission of Inquiry[1] commenced with an opening address by Counsel appearing for the State. In the course of his address, which contained many vitriolic comments on officials of the previous administration, he referred to the conduct of certain Judges. One of them was Justice Pathirana whom he described as "a political stooge introduced to the Supreme Court bench by Felix Dias".[2] This address was broadcast on the State radio and published widely in the national newspapers. The headline on page one of one newspaper was "POLITICAL STOOGE ON SC BENCH - COUNSEL"; the lead story of another was captioned: "JUSTICE PATHIRANA ACTED ILLEGALLY: FELIX'S POLITICAL STOOGE IN SUPREME COURT: COUNSEL".[3] The Supreme Court took no action either against State Counsel or against the newspapers;[4] nor did the commission investigate and report on any of the several allegations made against the Judge. When the Supreme Court was reconstituted a month later, Justice Pathirana was one of the Judges who was excluded. It had been possible for the executive to have ignored the constitutional processes and to have caused a judge whom it did not appear to like or whose judicial conduct it obviously disapproved of, to be publicly abused in a forum in which no reply was possible and no defence was available.[5]

Conditions of Service

Salary

The constitutional guarantee that the salary of a judge will not be diminished during his tenure of office presupposes that such salary is, upon an objective assessment, sufficient. As a general rule, a judge of a superior court has always received a salary comparable with that of the highest paid state officers. For instance, in 1954, Judges of the Supreme Court, the Attorney-General and the Secretary to the Treasury all received a salary of Rs.27,000

---

1. Infra, p. 226.
2. Ceylon Daily Mirror, 11 August 1978.
3. Ibid; Ceylon Daily News, 11 August 1978.
4. For the Supreme Court's powers of dealing with contempt, see p.187.
5. At the stage of the opening address, the proceedings were conducted ex parte and none of the persons whose conduct the commission was invited to investigate were permitted to be present or to be represented. Later, after evidence had also been recorded, notices were issued on certain persons. No inquiry was held in respect of Justice Pathirana.

per annum, while the salary attached to the posts of Permanent Secretary was Rs.21,600-600-24,000.[1] The relevant 1959 statistics were:

TABLE 20

COMPARATIVE SALARY SCALES, 1959

Chief Justice	... Rs.42,000
Attorney-General) Secretary to the Treasury)	... Rs.36,000
Judge of the Supreme Court	... Rs.33,000
Permanent Secretary	... Rs.25,800

Source: Ceylon Civil List 1959 (Colombo: Govt.Press, 1959).

and by the end of 1981 they had been increased to:

TABLE 21

COMPARATIVE SALARY SCALES, 1981

Chief Justice	... Rs.78,000
Attorney-General	... Rs.67,000
Judges of the Supreme Court) President of the Court of Appeal)	... Rs.66,000
Judges of the Court of Appeal) Solicitor-General)	... Rs.62,400
Secretary to the Cabinet) Secretaries to Ministries) Auditor General) Commissioner of Elections)	... Rs.54,000

Source: Public Administration Circular, No.197 of 29 December 1981.

The judges, in common with other state officers, were until 1977 liable to pay income tax on their salaries and other income. In that year, the salaries of all state officers, including judges, were declared to be non-taxable. Other perquisites now enjoyed by judges include an official car and telephone, and a pension after retirement.

1. Ceylon Civil List 1954 (Colombo: Govt.Press, 1954).

Judicial salaries, however, are not comparable with the earnings of lawyers engaged in private practice, and it is unrealistic to even attempt to do so. The fee of a successful lawyer in respect of an appeal brief in an ordinary civil appeal used to be about the same as the monthly salary of a Supreme Court Judge. In recent years, the gap between the two has assumed incredible proportions: in 1981, the fees paid in respect of a single appeal brief by a state corporation was reported to be Rs.273,000 to senior counsel and Rs.196,000, Rs.183,000 and Rs.84,000, respectively, to the three junior counsel.[1]

Leave

Judges of superior courts are entitled to the facility of leave, subject to the same terms and conditions as state officers of comparable rank.[2] An application for leave is made by the judge concerned directly to the President. When the President (or Governor-General) was a constitutional Head of State, such applications were referred to the Prime Minister for advice, and the latter, in turn, usually consulted the Minister of Justice on the nature of the advice to be tendered. There appears to have been only one instance of leave being refused.

By letter dated 27 August 1965, Justice T.S.Fernando requested the Governor-General to permit him to avail himself of 15 days' vacation leave commencing on 10 September to be spent out of the island. The Judge wished to attend a conference of the World Peace Through Law Center scheduled to be held in Washington to which he had been invited. He had previously attended conferences of the same organisation held in Athens and in Tokyo. One week after the date from which he had requested that his leave be made effective, the Judge was informed by the Governor-General that:

> I am advised that it is not possible to recommend the leave applied for by you.[3]

By letter dated 20 September, addressed to the Governor-General, the Judge requested that he be informed of the reasons for which

---

1. Parliamentary Debates, 3 November 1982, col.1352. These fees were paid by the Bank of Ceylon to H.W.Jayewardene,Q.C., and his three juniors, J.W.Subasinghe, K.N.Choksy and L.C.Seneviratne.
2. Establishments Code 1971, Ch.XII.
3. Letter dated 16 September 1965.

the leave applied for had been refused:

> The leave applied for was available. The work of the Court was in no way to be disrupted; the truth in regard to the work of the Court is that, at the moment, for the available work, there are too many judges in Colombo. I have reason to believe that the Honourable the Chief Justice had at no time taken up the position that a grant of the leave applied for by me will inconvenience the work of the Court.

He pointed out that:

> Article 13(2) of the Universal Declaration of Human Rights of 1948, which I have reason to hope the Government of this country does not intend wilfully to contravene, proclaims that 'Everyone has the right to leave any country, including his own, and to return to his country'. This is the first occasion on which I have been refused leave, and I trust Your Excellency will agree that I have a right, in a country which has only recently authoritatively proclaimed that it intends always to abide by the Rule of Law, to be informed of the reason or reasons for the refusal.

No reply having been received at the end of a month, the Judge, on 21 October, invited the Governor-General's attention to his letter. Another four weeks were to elapse before the latter replied that:

> I have the honour to inform that, Iam advised that it is not considered necessary to disclose the reasons for the decisions conveyed to you.[1]

On 22 November, the Judge wrote to the Governor-General reminding him that he had accepted office on well-understood conditions, and leave from duties was one of them. He submitted that by depriving him, without reason, of a right to leave to which he was entitled, the executive had interfered with the independence of the judiciary.

In this case, the Judge concerned actually availed himself of leave within the island (for which only the Chief Justice's approval was necessary) during the relevant period.[2] Therefore, the refusal of leave could not have been due to "exigencies of service". The implication is that the executive, for reasons which it was not prepared to disclose, had decided that the Judge should not be permitted, on this occasion at least, to pursue a legitimate private interest. Thereby, the executive was either "punishing" the Judge or expressing its displeasure with his conduct, and in so

---

1. Letter dated 17 November 1965.
2. Private information.

doing was interfering with the independence guaranteed by law. The intervention of the executive appears to be hardly necessary in respect of trivial matters such as leave which are best left for the Judges to regulate among themselves.

Extra-Judicial Activity

Acting Head of State

The Ceylon (Office of Governor-General) Letters Patent 1947 provided that:

> Whenever the office of Governor-General is vacant, or the Governor-General is absent from the Island, or is from any cause prevented from, or incapable of, acting in the duties of his office, then such other person as We may appoint under Our Sign Manual and Signet, or if there is no such person in the Island and capable of discharging the duties of the administration, then the person for the time being lawfully performing the functions of Chief Justice shall, during Our pleasure, administer the Government of the Island.[1]

Similarly, the 1972 Constitution provided that during any period in which the office of President was vacant, such other person as the Prime Minister might nominate, or in the absence of such nomination,

> the person for the time being lawfully performing the functions of the Chief Judge of the highest Appellate Court

shall act in that office.[2] The 1978 Constitution, under which the President is also Head of the Government and Chairman of the Cabinet, provides, however, that in his absence either the Prime Minister or the Speaker may, if so required by him, act in that office.[3]

The assumption of office, either as Officer Administering the Government or as acting President, brought the head of the judiciary into direct contact with the executive government of the country. During such acting period, apart from meeting the Prime Minister regularly, the Chief Justice also received copies of all Cabinet memoranda.[4] Sometimes, an acting spell could prove more eventful. For instance, in 1952 when Chief Justice Rose was administering the Government during the absence on leave of Lord Soulbury, the then Prime Minister fell off his horse and died. Rose was called upon to choose a new Prime Minister; a task which he avoided when informed

---

1. Art.7(1).
2. S.28(1).
3. Art.37.
4. J.L.Fernando, Three Prime Ministers, p.83.

that Soulbury would be hurrying back. However, the delay in making an appointment, and the popular belief that the person whom Soulbury appointed on his return was not necessarily the person who would have been found acceptable to the Cabinet and Parliament five days previously had Rose duly performed his constitutional duty, exposed the Chief Justice to some political criticism at the time.[1] In 1953, when Chief Justice Rose was next administering the Government, he was called upon to declare a state of public emergency and legislate by emergency regulations to deal with violence which followed a day of political agitation.[2]

Whether or not a Chief Justice should be afforded the opportunity of acting as Head of State, even for a few days, was a matter entirely within the discretion of the Prime Minister. For instance, in 1954, when Soulbury flew to London to be at the bedside of his wife who had been knocked down by a bus, Chief Justice Rose was himself away in the United Kingdom on leave. Soulbury suggested to Prime Minister Kotelawela the names of two Europeans, one of whom might be appointed to act for him.[3] Kotelawela, however, declined to take any such step and permitted Justice Nagalingam, acting Chief Justice, to become the first Tamil to occupy Queen's House. In 1975, when it became known that President Gopallawa would be leaving the island on a ten-day visit to Nepal, the Speaker of the National State Assembly, Stanley Tillekeratne, wrote to the Prime Minister and argued that, since the National State Assemnbly was the supreme instrument of state power, "it will be the duty of the Prime Minister under the Constitution to consider the Speaker as the first choice when called upon to appoint a person to act for the President".[4] Mrs.Bandaranaike rejected this unsolicited advice and decided not to make any nomination herself, thus enabling Chief Justice Tennekoon to assume that office upon the departure of the President.[5]

---

1. Ibid., pp.39-44. See also Sir John Kotelawela, An Asian Prime Minister's Story (London: Harrap & Co.Ltd, 1956), pp.77-83.
2. Infra, p.449.
3. Kotelawela, Asian Prime Minister, pp.115-16.
4. Letter dated 14 February 1975 from the Speaker of the National State Assembly to the Prime Minister.
5. Letters dated 17 February 1975 from the Attorney-General to the Prime Minister and from the Secretary for Justice to the Secretary to the Prime Minister.

Thus, ordinarily, a decision by the Prime Minister to send the Head of State on a mission abroad or to grant him leave from his duties, together with a further decision not to make an acting appointment during the period of such absence or leave, were necessary before a Chief Justice could have assumed the highest office in the land. Of the eleven heads of the judiciary who have functioned since Independence, only four were afforded that privilege by the executive.[1]

Commissions of Inquiry

1. The Commissions of Inquiry Act

The Commissions of Inquiry Act, No.17 of 1948, empowered the Governor-General to appoint a commission consisting of one or more members to inquire into and report on the administration of any department of government or of any public or local authority or institution, the conduct of any member of the public service, or any matter in respect of which an inquiry would, in his opinion, be in the public safety or welfare.[2] It had been the general pre-Independence practice to request Judges of the Supreme Court to serve on such commissions. In 1950, two commissions were appointed to inquire into the procedure, practice and administration of the civil and criminal courts of Ceylon and to report on necessary reforms, including amendments to the Civil Procedure Code and the Criminal Procedure Code, respectively.[3] The former included two Judges, Justice Nagalingam (Chairman) and Justice Gratiaen; the latter consisted only of two Judges, Justice Gratiaen (Chairman) and Justice Pulle. Two years later, another commission was appointed under the chairmanship of Chief Justice Rose to examine and report on the question of the re-constitution of the Supreme Court. All three commissions dealt with technical aspects of the law.

In 1956, widespread rioting took place in Gal Oya, a colonist town, following the introduction of a bill designed to make Sinhala the one official language of the country. As a newspaper described it at that time, it was a major disturbance - a disturbance which resulted in the loss of more than twenty lives, which involved several communities, and which was preceded, accompanied and followed

---

1. Sir Arthur Wijewardene, Sir Alan Rose, H.N.G.Fernando and V.Tennekoon.
2. S.2.
3. S.P.XXIII-1955 and S.P.VI-1953 respectively.

by the bitterest of communal controversies.[1] The Government wished to ascertain the cause of the riot so that it may take appropriate remedial measures. Prime Minister Bandaranaike invited Justice T.S. Fernando to be the one-man commission of inquiry for this purpose. The Judge accepted this invitation, but changed his mind shortly thereafter when the Chief Justice unearthed a minute made by the Supreme Court Judges following the publication of the report of the Bracegirdle Commission nearly two decades previously. That commission had been headed by the then Chief Justice Sir Sydney Abrahams, and consequent to severe public criticism of its report, the Judges had decided that "they do not wish to undertake inquiries in which there may be political implications and which may expose them to criticism".[2]

Two years later, in December 1958, following allegations in the House of Representatives of an attempted coup d'etat, Prime Minister Bandaranaike visited Hulftsdorp and addressed the Judges of the Supreme Court in an attempt to persuade one of them to serve as chairman of a commission of inquiry which he intended to constitute for the purpose of inquiring into and reporting on these allegations.[3] The Judges requested that the Commissions of Inquiry Act be amended by the inclusion of a new provision that:

> Any person who makes any allegation of incompetence, or of partiality, bad faith or other misconduct against a Commission or any member or former member thereof, or who in any other manner brings or attempts to bring into contempt or disrespect such Commission or member or former member thereof, whether before or after such Commission is functus officio, shall be guilty of the offence of contempt or disrespect of the authority of such Commission.

They also asked that where a commission consisted solely of a Judge or Judges of the Supreme Court, such commission shall, in addition, have "all the rights, powers and privileges, and the immunities of a Judge of the Supreme Court" so that:

> Any such offence of contempt against or in disrespect of the authority of a Commission . . . may be punished under section 47 of the Courts Ordinance either by such Commission or by the Supreme Court or a Judge thereof as though it were an offence of contempt committed against or in disrespect of the authority of that Court.

---

1. Morning Times, 18 September 1956.
2. Quoted by S.W.R.D.Bandaranaike and reported in the Times of Ceylon, 7 July 1956.
3. Times of Ceylon, 7 December 1958; Ceylon Daily News, 12 December 1958.

A substantial section of the government parliamentary group, led by an influential member of the Cabinet, insisted that only criticism "made without sufficient reason" should be punishable as contempt. This was not acceptable to the Judges, and they, therefore, declined to serve on the commission.[1]

On 28 June 1963, the Governor-General appointed a commission of inquiry consisting of Justice T.S.Fernando (Chairman), Justice Adel Younis, Judge of the Court of Cassation, United Arab Republic, and Justice G.C.Mills-Odoi, Judge of the Court of Appeal, Ghana, to inquire into and report on certain matters connected with the assassination of Prime Minister Bandaranaike.[2] These included matters such as whether any persons other than those found guilty by the Supreme Court were concerned in the conspiracy; whether any organised body of persons was involved in the plot, and if so, the underlying objectives or motives of such body; and whether any police officer or other person hampered the investigation or did any act to screen anyone involved. Justice Fernando had apparently taken the responsibility himself of deciding whether or not to accept the invitation of the Government to head this commission. He had been the presiding judge at the trial of the persons accused of the murder of Bandaranaike, and perhaps felt obliged to lend his authority to the commission and to share his particular knowledge of the subject with the two other foreign commissioners in the investigation of the alleged cover-up which had, no doubt, created a crisis of confidence in the country. His colleagues on the Supreme Court, who had not been consulted by him on this matter, met to discuss its implications. They decided that, in future, if a direct invitation by the Government was made to a Judge of the Supreme Court to serve on a commission, the matter should be reported to the Chief Justice who would summon a meeting of all the Judges to consider whether or not that invitation should be accepted.[3]

---

1. Times of Ceylon, 15 December 1958 and 2 January 1959; Ceylon Daily News, 19 December 1958.

2. Bandaranaike had been shot in the verandah of his own home on 25 September 1959; he died on the following day. Plaint had been filed in the Magistrate's Court against seven persons, five of whom later stood their trial before Justice Fernando and a special English-speaking jury. In May 1961, two of the accused were found guilty of conspiring to commit the murder and one of committing the murder; two were acquitted.

3. Ceylon Daily News, 17 August 1963.

It was thirteen years later that a government next approached a Judge of the Supreme Court to serve on a commission of inquiry. Justice Wimalaratne was appointed on 23 November 1976 to inquire into and report on certain events that had taken place on the university campus at Peradeniya which had culminated in the shooting by the police of a university student. The Prime Minister's assassination and the shooting of the undergraduate were both explosive situations, each of which had created a crisis of confidence. In each case, only the finding of a judge of irreproachable integrity could have diffused the situation. Both reports were accepted by the public, though not wothout some heartburning by the governments concerned.[1]

2. Delimitation Commissions

The 1946 Constitution required the Governor-General to estab- a Delimitation Commission within one year after the completion of every general census.[2] Such a commission was to consist of three persons who "are not actively engaged in politics". It was the function of a Delimitation Commission to divide each province of the island into a number of electoral districts. In 1959, Prime Minister Bandaranaike invited a senior Puisne Justice to function as chairman of a Delimitation Commission which was then required to be established. He argued that the report of the commission would be final and binding on the Governor-General. The Judges discussed this matter, but decided by a majority vote, on the basis of the Bracegirdle Minute, against accepting the invitation.[3] A similar invitation was extended in 1974 to Justice Tittewella, who accepted without any prior consultation with his colleagues. The delimitation of electorates is essentially a political matter, and when existing boundaries are varied in order to create new electorates, some degree of political protest is inevitable. The reaction to the publication in October 1976, barely six months before the scheduled general election, of the commission's report was, therefore, not that of general acceptance. It was perhaps not entirely coincidental that, following the general election, Tittewella was one of the Judges excluded from the Supreme Court when that Court was reconstituted in 1978.

---

1. S.P.III-1965 and S.P.1-1977 respectively. The former report had been handed over on 30 April 1964, but was published, after insistent public demand, only on 20 March 1965.
2. S.40. See also s.77 of the 1972 Constitution.
3. Times of Ceylon, 26 January 1959.

3. Special Presidential Commissions of Inquiry Law.

The Special Presidential Commissions of Inquiry Law, No.7 of 1978, empowered the President to appoint a commission consisting of judges of a court not below a District Court, whenever it appeared to him to be necessary that an inquiry should be held and information obtained as to the administration of any public body or local authority, the administration of any law or the administration of justice, the conduct of any public officer,[1] or any matter in respect of which an inquiry would, in his opinion, be in the public interest or be in the interest of public safety or welfare. The basic difference between a commission appointed under the Commissions of Inquiry Act and one appointed under this Law is that the latter is required to find and report to the President whether "any person has been guilty of any act of political victimisation, misuse or abuse of power, corruption or any fraudulent act", and whether such person should be made subject to civic disability.[2] Any such finding or report is final and conclusive, and may not be called in question in any court or tribunal by way of writ or otherwise.[3] A special presidential commission of inquiry has many of the attributes of a court except the power to punish; it being left to Parliament to decide, on the recommendation of the Cabinet, whether or not to impose civic disability on a person found guilty by a commission.[4]

In introducing the Special Presidential Commissions of Inquiry Bill in the National State Assembly, Prime Minister Jayewardene explained:

> We want this law to be on the statute book for any government to use it against any previous government, against any men in the government, against any women in the government who need to be examined and dealt with.[5]

---

1. Public officer includes the Prime Minister, a Minister, Member of the National State Assembly, a state officer, and a chairman, director or employee of any public body. A public body includes a ministry or department of government, a public corporation, commission or board, and a registered co-operative society.

2. S.9(1). Civic disability means disqualification from being an elector or a candidate at any election of the President of the Republic or of a Member of the National State Assembly or of any local authority; and from holding office or from being employed in the public sector.

3. S.9(2).

4. 1978 Constitution, Art.81.

5. National State Assembly Debates, 1 February 1978, col.872.

Justifying the penalty clause, he said:

> We are saying that such persons if found guilty have no right to exercise their civic rights or to sit in this House, that they have no right to be in a government in the future.[1]

Therefore, a special presidential commission of inquiry would be called upon to perform a political function; that of inquiring into the administration of a previous government and of deciding whether the political leaders of that government should be removed from political life, a task hitherto performed by the electorate. A Supreme Court Judge who agreed to serve on such a commission would immediately have become embroiled in political controversy.

In March 1978, President Jayewardene announced the appointment of a commission for the purpose of inquiring into the administration of his predecessor in office as Prime Minister, Mrs. Bandaranaike. The commission consisted of Justice Weeraratne and Justice Sharvananda, two members of the 21-member Supreme Court, and K.C.E.de Alwis, a District Judge. One of the first acts of the commission was to direct that the passports of a number of persons who had served the previous government be impounded. The commission commenced its public sittings on 1 August 1978, by permitting a lawyer member of the working committee of the ruling United National Party to address the commission. He had been retained by the Government to present the Government's case before the commission.[2] His eight-day address was described by Mrs.Bandaranaike as "an orgy of

---

1. Ibid. Jayewardene also explained that: "This Bill became necessary, firstly, because our present Commissions of Inquiry Act does not make provision for certain types of matters to be inquired into, specific matters; secondly, because it provides no punishment flowing from the decisions of the commission; and thirdly, because it does not give enough power to the commission to admit certain types of evidence" : Ibid., col.809.

2. Prime Minister Premadasa stated in Parliament that the Government had retained A.C.de Zoysa to appear for the Government. He said: "Mr.Bunty Zoysa is a member of our committee and also a member of our party. He is one who has gone with us all over the country. He knows what we said when we went all over the country. But it is not he who will give the judgment. He will only appear for us, for the State" : Parliamentary Debates, 20 November 1978.

character assassination".[1] Nevertheless, the commission allowed it to be recorded by the State-controlled radio for broadcasting to the nation at peak hour each day.[2] Thereafter, for the next four months, the evidence of witnesses was led by Counsel for the State at ex parte proceedings, interspersed with political comments and prejudicial remarks.[3] Notices were eventually served on a number of persons, together with a transcript of the evidence led against them, and they were required to file statements in defence and then appear for inquiry. By the end of 1981, the commission had conducted only three inquiries, and at the conclusion of each had found the person noticed guilty: a former Permanent Secretary, of misuse and/or abuse of power;[4] a former Minister, of corruption and abuse of power; and the former Prime Minister, Mrs.Bandaranaike, of misuse and/or abuse of power.[5] On each of them, Parliament by resolution imposed civic disability for the maximum period of seven years; additionally, Mrs.Bandaranaike was also expelled from Parliament.[6]

The participation of two Supreme Court Judges in this commission could not have helped to enhance the independence of that Court. Apart from the special preference shown by the executive to all three Judges and their rapid promotion in the course of the proceedings,[7] the commissioners aroused bitter criticism from counsel who appeared before them,[8] and from the opposition benches in Parliament,[9] for their disregard of the procedure hitherto observed by commissions of inquiry. It was alleged, not without

---

1. Statement made by Mrs.Sirima R.D.Bandaranaike, Third Interim Report of the Special Presidential Commission of Inquiry (Colombo: Dept. of Govt. Printing, 1980), Appendix A, p.158.
2. Ibid.
3. Ibid.
4. Second Interim Report of the Special Presidential Commission of Inquiry (Colombo: Dept. of Govt. Printing, 1979).
5. Second Interim Report, op.cit.
6. Parliamentary Debates, 8 January 1980, 11 January 1980, and 16 October 1980. Of the three persons, the first faced a full inquiry, the second did not choose to cross-examine any witnesses, and the third did not participate in the inquiry at all.
7. Infra, p.196.
8. See Opening and Closing Addresses of S.Nadesan, Q.C., senior counsel for Nihal Jayawickrama, Proceedings of the Special Presidential Commission of Inquiry, January-July 1979.
9. Parliamentary Debates, 20 November 1978.

basis, that the commission had abdicated its functions of investigation and inquiry to counsel retained by the State, and allowed its platform to be used for the purpose of conducting political propaganda. Before it could complete its task, the commission had become a major political issue, and every opposition party was committed to its abolition and the restoration of the civic rights of the persons against whom it had reported.

Should a Judge undertake the task of investigating and ascertaining facts for the information of the executive ? In 1923, in Australia, Sir William Irvine, Chief Justice of Victoria, wrote thus to the Attorney-General of that State in response to a request that a Judge be made available to act as a Royal Commissioner to inquire into charges made in connection with the Warrnambool breakwater:

> The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary. It is mainly due to the fact that, in modern times, at least, the Judges of all British Communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people.[1]

This letter, which has come to be known as the Irvine Memorandum, has continued to be invoked in that State.[2] Fifty years later, Sir Garfield Barwick, Chief Justice of Australia, gave expression to similar sentiments when he said:

> Governments continue to request the services of judges to act as Royal Commissioners or as chairman in inquiries of diverse subject matter. I quite understand that Governments realise that the community as a whole recognises the integrity of the judiciary and that the citizen is likely to feel confident of the correctness and honesty of a judge's conclusions. Thus, the appointment of a judge as a commissioner or chairman is politically attractive. But many of the matters into which commissioners or chairman are asked

---

1. Sir Robert McInerney has quoted the text of this letter in "The Appointment of Judges to Commissions of Inquiry and Other Extra Judicial Activities", Australian Law Journal, vol.52, p.540 at 541.
2. Ibid., at 549.

> to inquire are completely divorced from the law and all too frequently involve the formation of opinions on matters which are truly political in character. To require a judge to express a view on such questions is to my mind to do a disservice to the judiciary itself.[1]

This attitude has not been peculiar to Australia either. In 1973, Britain's Lord Chancellor Hailsham warned that the independence of the judiciary was being endangered by increasing demands for tribunals of inquiry over which Judges were expected to preside. He added:

> You cannot keep independent Judges in Britain if you constantly expose them to ordeal by public criticism, which is not only inevitable but legitimate and proper whenever you ask them to preside over tribunals of inquiry.[2]

Four years later, he asked how it could be supposed that the reports produced by a Judge presiding over an inquiry "will not affect a Judge's reputation for impartiality, or his chances of appointment or promotion if he offended some powerful minority, influential Minister, or popular prejudice or pressure group ?"[3] Even in the United States, the policy now adopted is that members of the Supreme Court do not serve on committees or perform other services not having a direct relationship to the work of the Court.[4]

In Sri Lanka, it is unfortunate that the Special Presidential Commissions of Inquiry Law specifically included Judges of the Supreme Court in that category of persons from whom the President was authorised to choose his commissioners,[5] and that the 1978 Constitution empowers the President to require a Judge of the Supreme Court to "perform or discharge any other appropriate duties or functions under any other written law".[6] Despite these enabling provisions, it would have been preferable if the Supreme Court had insisted that its members scrupulously observe at least the minimum standards laid down in the Bracegirdle Minute, however tempted some of them might have been to enjoy the benefits of political patronage by making themselves useful to the executive branch of government.

---

1. Sir Garfield Barwick, "The Use of Judges to Chair Commissions of Inquiry and Tribunals": a paper submitted to the Meeting of Commonwealth Chief Justices, Canberra, 1980.
2. Daily Telegraph, 18 July 1973, quoted by McInerney, op.cit.
3. Times, 25 May 1978, quoted by McInerney, op.cit.
4. McInerney, op.cit., explains that Warren CJ agreed to serve as chairman of the Kennedy assassination commission as a result of a request from President Johnson put to him in such terms that the Chief Justice felt himself unable to decline.
5. S.2. 6. Art.110(1).

The Constitutional Court

The Constitutional Court established under the 1972 Constitution was required to exercise a jurisdiction not previously exercised by the judiciary in Sri Lanka, namely, the review of bills. In the absence of the ex post facto review of legislation, which was expressly prohibited by that Constitution, the Constitutional Court offered the only filtering process by which proposed legislation which infringed fundamental rights could be identified and then either rectified or excluded. Therefore, it was crucial that the Constitutional Court should not only be competent to perform that task, but that it should also be independent both of the executive and of the legislature. At its conception, it was intended to be "nothing but a court of the highest status in the land".[1] Accordingly, it was vested with many of the attributes of such a court: security of tenure for its members, finality for its determinations, and powers of contempt to maintain its authority.[2] But in the first six months of its existence, this novel institution was subjected to such interference both by the executive and by the legislature, and treated as if it were but a parliamentary committee, that eventually, in the form in which it emerged, it offered little hope of being an effective protector of fundamental rights.[3] The measure of success, if any, that attended the technique of anticipatory review embodied in the Constitutional Court is examined in a later chapter.[4] At this stage, it is proposed to identify the factors and the circumstances that stultified its progress and impaired its credibility, despite the constitutional provisions which sought to facilitate its work and guarantee its independence.

---

1. Colvin R.de Silva, Minister of Constitutional Affairs, National State Assembly Debates, 22 June 1972, col.101. But see view of party and Cabinet colleague, N.M.Perera, that it is not "an independent court having independent rights", but "an advisory body only to give advice to the Speaker", National State Assembly Debates, 12 February 1972, col.1467.

2. Supra, p.124.

3. The Constitutional Court was, for instance, quite different in character and composition from the Senate Legal Committee which in Zimbabwe performs the same function. That committee consists of members who have held high judicial office but who serve in that committee in their capacity as Senators; it is, in fact, a parliamentary committee and not a court. See Constitution of Zimbabwe, Arts. 36, 37.

4. Infra, Ch.V.

Location

For the greater part of this century, Hulftsdorp has been the home of the superior courts of Sri Lanka, and as recently as 1971 when the Court of Appeal replaced the Judicial Committee of the Privy Council, it was in Hulftsdorp that that Court sat. The Government decided, however, that the Constitutional Court should sit in the premises of the National State Assembly, and a committee room which the government parliamentary group used for its meetings was cleared and re-arranged for this purpose.[1] Parliamentary staff and equipment were provided on loan; even the Clerk to the Assembly doubled up as Registrar of the Court. One floor above the chamber of the National State Assembly, the Constitutional Court would meet to determine the propriety of what was proposed to be done below. For the first time, the judiciary was being asked to function from premises which were entirely under the control of the legislature; a move which was perhaps symbolic of the new relationship between the supreme instrument of state power of the Republic and one of its agencies, now exercising "not a separate power, but a part of the power of the National State Assembly".[2]

But whatever the philosophic justification for this unprecedented move may have been, it was a singularly unfortunate choice of location. At first, the Legislature looked upon the Court benignly but with a proprietorial eye, and hoped that it would provide guidance in its deliberations.[3] When, four days after it had first assembled, the Court indicated that it may have to deal with an errant Member of Parliament for contempt,[4] the first rumblings began to be heard.[5] When, not very long thereafter, the Legislature began

---

1. Colvin R.de Silva, National State Assembly Debates, 12 December 1972, col.1526.

2. T.S.Fernando, at the inaugural session of the Court of Appeal, Ceylon Daily News, 10 March 1972.

3. See, for instance, Colvin R.de Silva, National State Assembly Debates, 22 June 1972, cols.105-111.

4. Dudley Senanayake, UNP MP for Dedigama, in respect of a statement reported to have been made by him at a political meeting that "In the event of the Press Bill being implemented, the masses will rise against this undemocratic piece of legislation" : Ceylon Daily News, 25 November 1972.

5. For instance, J.R.Jayewardene, speaking on the votes of the National State Assembly, pointed out that when the Court was in session, that part of the Assembly building belonged to the Court, not to the Speaker. "The Court can send anyone to jail. I don't like that" : Ceylon Daily News, 5 December 1972.

to be irritated by the tenor of the arguments presented by counsel as well as by the asides of the Court, the ground was being prepared for a confrontation. Finally, when the Assembly broke out in open conflict with the Court over the interpretation of the Constitution, and decided to assert what it mistakenly believed was its "sovereignty", the confrontation was complete.[1] In its view, when the Court failed to give its decision on an impugned bill within fourteen days of a reference, the Court ceased to exist. A Government member argued that "we can throw the judges out",[2] while an Opposition member urged the Assembly to "find a way of closing that up".[3] The Minister of Constitutional Affairs believed that "If you tell them to leave this room, which I beg of you not to, the three of them can go and continue purporting to be a court in the house of any of the three of them",[4] while the Deputy Minister of Planning asked the Speaker why he had failed to deal with the "unlawful group of men who have entered a room in this building and are continuing to occupy it ?"[5]

Remuneration

While the Constitution contemplated the payment of "salaries" to Judges of the Court of Appeal and of the Supreme Court, it required the National State Assembly to fix the "remuneration" to be paid to the members of the Constitutional Court.[6] A section of the Assembly understood by this difference in terminology that what was intended was payment for each sitting of the Court;[7] a practice not uncommon in the country as far as industrial courts and such other inferior tribunals were concerned. The Government rejected this contention and, on 22 June 1972, secured the adoption of a resolution in terms of which members of the Constitutional Court would be remunerated on the same basis as Judges of the Supreme Court. But if a member of the Constitutional Court was already a Judge of the Supreme Court, he would receive no further payment; and if he was a retired public officer or judge, he would be treated as a re-employed state pensioner and would receive only the difference between his pension and the salary of a Supreme Court Judge.[8] Thus, a non-judge or a pensioner

---

1. Infra.
2. Mrs.V.Gunewardene, National State Assembly Debates, 12 December 1972, col.1519.
3. B.Neminathan, ibid.
4. Ibid., col.1518.
5. R.D.Senanayake, ibid.,col.1389.
6. S.57.
7. See, for instance, R.Premadasa, National State Assembly Debates, 22 June 1972, col.90.
8. Ibid., col.84.

who was appointed to the Court would be precluded from undertaking any other work but would receive a monthly salary of Rs.3000 during his four-year panel membership, while a Judge of the Supreme Court who was called upon to exercise the jurisdiction vested in the Constitutional Court in addition to his usual duties, would receive no additional remuneration for his services. A Judge, therefore, could hardly be blamed if, as actually happened, he regarded his work on the Constitutional Court as ancillary to the duties of his sustantive office. The payment of a salary to one member of the Court and the denial of any remuneration to another who was required to perform the same services, was inconsistent with the principle that a Judge should receive at regular intervals remuneration for his services at a rate which is commensurate with his status and not diminished during his continuance in office.[1]

Composition

In the Constituent Assembly, the Minister of Constitutional Affairs, in explaining the concept of a Constitutional Court, had indicated quite clearly his view that persons other than Judges should serve as members of this Court.[2] A different view was, however, expressed by the Permanent Secretary to the Ministry of Justice, in a confidential minute addressed to the Prime Minister a few days before the Constitution came into force:

> This institution has been severely criticised during the past one and a half years on the ground that it could well turn out to be a 'stooge court' of the government in power. To allay any such fear or suspicion and criticism of that type, I would suggest that the persons for appointment to the Constitutional Court be chosen, as far as possible, from among those already serving as Judges of the Court of Appeal and the Supreme Court.[3]

Should the Constitutional Court consist of Judges or of political scientists and constitutional lawyers ? The Prime Minister sought to effect a compromise between these two conflicting views: T.S. Fernando,Q.C., President of the Court of Appeal;[4] V.Siva Supramanium,

---

1. Draft Principles on the Independence of the Judiciary submitted for the consideration of the UN Sub-Commission on the Protection of Minorities and the Prevention of Discrimination, (1982) 8 CLB 715.

2. Supra, p.215.

3. Minute dated 15 May 1972. On 22 June 1972, a UNP member urged that the Judges of the Court of Appeal be appointed to this Court: N.Wimalasena, National State Assembly Debates, cols.91-94.

4. When the 1972 Constitution was being drafted, T.S.Fernando,Q.C. (then in retirement) together with S.Nadesan,Q.C., made represent-

Judge of the Court of Appeal; and H.Deheragoda, Judge of the Supreme Court,[1] along with two nominees of the Minister of Constitutional Affairs: K.D.de Silva, who had retired from the Supreme Court as far back as 1960;[2] and J.A.L.Cooray, lecturer in constitutional law.

From this curious mixture of judges, ex-judges and non-judges, and from the fact that the Constitutional Court had no permanent head, nor any clearly defined principles for its constitution or procedure, there arose a number of operational problems which, in a very short time, led to a serious constitutional crisis.

Chairman

On being invited to serve on the Constitutional Court in addition to his other duties, the President of the Court of Appeal informed the Prime Minister that, while he had no objection to being a member of that Court, he held the view that a person holding office in one of the superior courts of the country should not in any way compromise the dignity of that office if and when he was called upon to accept or perform other assignments. Accordingly, it was his view that whenever a member who was a sitting Judge was chosen to serve on the Constitutional Court, that Judge should function as the chairman. He felt that it would help the members of the Court considerably in formulating an appropriate rule on that matter if, in making the first appointments, the President of the Republic would place the sitting Judges ahead of the others, instead of following the alphabetical order.[3] The Prime Minister acceded to this request, and the formal gazette notification announced the appointments in the following order:

Thusew Samuel Fernando,Esquire, President of the Court of Appeal;
Veeravagu Siva Supramaniam, Esquire, Judge of the Court of Appeal;
Ekanayake Rajapakse Kodippili Dissanayake Mudiyanseralahamillage Hector Deheragoda, Esquire, Puisne Justice;
Kaludura Dhammikasiri De Silva, Esquire;
Joseph Anthony Leopold Cooray, Esquire.

---

ations to the Cabinet against the concept of a constitutional court and argued, inter alia, that it would be impractical to expect a court to determine a question relating to the validity of a bill within a period of fourteen days.

1. Deheragoda was a comparatively junior judge whose appointment was probably due to his familiarity with the statute law, acquired in his capacity as an assistant to the commissioner for the revision of the legislative enactments of Ceylon.

2. De Silva was 74 years old.

3. Letter dated 20 June 1972 from the Secretary for Justice to the Secretary to the Prime Minister.

On 24 June 1972, the members of the Constitutional Court took their oaths of office before the President in the same order.[1]

While the Constitution required the chairman to be chosen in accordance with rules of court, it also stated quite explicitly that such rules should be made by the Constitutional Court, published in the gazette whereupon they came into operation, and then brought before the National State Assembly for approval. However, on 24 June at President's House, before the oaths were administered to the members of the Court, each of them was presented by the Registrar (who himself had not then taken his oath) with a cyclostyled copy of draft rules complete with forms of application and warrants.[2] In respect of the chairmanship of the Court, the text of the relevant draft rule was as follows:

> Rule 12. When the Constitutional Court assembles on the date fixed for the commencement of the proceedings, the members of the Court shall by agreement decide which of them shall officiate as the Chairman of the Court, but where a retired Judicial Officer is a member of the Court, he shall officiate as Chairman. If a Court consists of more than one retired Judicial Officer, the most senior among them shall officiate as Chairman. If the majority of the members of the Court do not agree in the choosing of the Chairman, the member of the Court whose name was drawn first shall officiate as Chairman.

These draft rules had been prepared without any indications or guidelines being provided by the Court. On the Registrar being told by one member of the Court that rules should not have been thus framed by him, "I received no intelligible reply except that he was only trying to be helpful".[3] It is improbable that the Registrar, who was also the Clerk to the National State Assembly, would have had either the time or the inclination to have prepared this set of draft rules by himself; it is more likely that they were prepared by the Ministry of Constitutional Affairs. Indeed, the reference in the draft rule reproduced above to "retired Judicial Officers" suggested the absence of serving Judges on the Constitutional Court; the Ministry of Constitutional Affairs had consistently opposed the appointment of serving Judges.

---

1. See Gazette Extraordinary No.13/11, 28 June 1972, Notification No.46/6 of 1972.
2. Letter dated 7 September 1972 from T.S.Fernando to the Minister of Justice.
3. Ibid.

Within three weeks of their appointment, the members of the Constitutional Court had met and drafted all the necessary rules except one.[1] The sole exception related to the choosing of the chairman. On this matter, a sharp difference of opinion existed. The three serving Judges wanted the rule to be so framed that, whenever a Judge of a superior court was one of the three members chosen by lot to determine or advise on any matter referred to the Court, such Judge (or if more than one such Judge were chosen, the senior of such Judges) shall be the chairman. The other two members wanted the rule to be framed to enable the three members chosen by lot to decide by majority vote who shall be chairman. The three Judges did not wish at that stage to make this rule by a majority vote as they were entitled to; they preferred, if possible, to make it without dissent. For instance, if there was some seniority implicit in the order of their appointment, they felt it would be possible to provide that the senior member among the three chosen by lot shall be chairman. Accordingly, they addressed the President and inquired whether or not seniority as among the five members was as indicated in the gazette notification.[2] The other two members also wrote to the President to "place the matter before Your Excellency for consideration and decision".[3]

As required by the Constitution, the President referred these two communications to the Prime Minister for advice. On 1 August 1972, the Secretary to the Prime Minister sought the advice of the Secretary for Justice. The simple reply ought to have been: (1) that seniority was implicit in the order of appointment of members, and (2) that it was not within the President's powers to take a "decision" on the disputed rule. Such a reply would have enabled the Constitutional Court to have proceeded to make its own rule. But no such reply was sent. Instead, the Minister of Justice began discussions with the members of the court with a view to effecting a compromise. He suggested a rule which would provide that among the five persons appointed to the first Constitutional Court, seniority should be determined according to the date of the first

---

1. Minute of 30 January 1973 from the Secretary for Justice to the Prime Minister.

2. Letter dated 19 July 1972 from T.S.Fernando, V.Siva Supramaniam and H.Deheragoda to the President of the Republic.

3. Letter dated 19 July 1972 from K.D.de Silva and J.A.L.Cooray to the President of the Republic.

appointment of each to the Supreme Court or any other Court with a parallel or higher jurisdiction.[1] This compromise was acceptable to the three Judges, but was rejected by the other two members, one of whom was not, and had never been, a Judge in any Court.

Thereupon, the Minister of Justice forwarded all the relevant papers to his colleague, the Minister of Constitutional Affairs. The latter then sought to participate in the rule-making process by adding the weight of his authority in support of the minority view, which was "in keeping with the outlook and background of the Constitution".[2] He rejected the claim that the gazette notification, in the making of which he had not been consulted, was intended to indicate seniority:

> There can be no doubt whatsoever that all members of the Constitutional Court are by the Constitution regarded as equals and that, apart from any convention or courtesies that may grow amongst them, no member of the Constitutional Court is entitled to any precedence over the others qua members of the Constitutional Court.[3]

In any event, he considered the order in which the names appeared in the gazette to be "a very tenuous basis for a contention of this nature, if indeed it can provide a basis at all". He added:

> I do not of course know whether there was any understanding between these gentlemen and the Prime Minister or the President; but I wish to state certain facts which have a decisive bearing on the question whether the Prime Minister comes into the picture in regard to this contention. It was I who contacted Messrs J.A.L.Cooray and K.D.de Silva on behalf of the Prime Minister to sound out their willingness to serve in the Constitutional Court. At no time either before I contacted Messrs Cooray and De Silva or after I reported their willingness, did the Prime Minister tell me that she even contemplated the condition referred to in respect of the appointments she was considering. Nobody can persuade me that she would have failed to mention such a matter to me because, first of all, she would have known the need to communicate such condition to Messrs Cooray and De Silva before their appointment, and secondly, because it is hard to believe that the Prime Minister would have contemplated any arrangement which she was not

---

1. Minutes of 21 August 1972 from the Secretary for Justice to the Minister of Justice, and of 25 September 1972 from the Minister of Justice to the Secretary to the Prime Minister.

2. Letter dated 30 August 1972 from the Minister of Constitutional Affairs to the Minister of Justice.

3. Ibid.

> empowered by the Constitution to make, After all, the express provision of the Constitution, by section 60, is:
>
> 'The Chairman of a Constitutional Court for any occasion shall be chosen in accordance with the rules of the Constitutional Court.'
>
> These rules had to be made by the Constitutional Court itself under the provisons of section 59 of the Constitution.[1]

It is, no doubt, the knowledge that the Minister held this view that prompted K.D.de Silva to make the remark at one of the meetings of the Court that if the rule was framed as suggested by the three Judges, they "could be sure that it will not be approved by the National State Assembly".[2]

On 4 September 1972, the Minister of Justice forwarded this "secret" letter from the Minister of Constitutional Affairs to the President of the Court of Appeal. In doing so, he also suggested a new compromise formula:

> I think upon a consideration of all the circumstances, it might be best if you could discuss with your colleagues the question of formulating a rule so that the Chairman of the Constitutional Court could be selected by lot or on a principle of rotation in such a manner that none of the members of the Court would be excluded from functioning as Chairman.[3]

While the Ministers continued to offer unsolicited suggestions on how the relevant rule ought to be formulated, the question which the three Judges had raised with the President still remained unanswered. The appointments had been made by the latter after the receipt of advice from the constitutional authority. That authority presumably advised also the order to be observed in notifying the appointments. The order had not followed the familiar alphabetical pattern. The change could not have been fortuitous. The three Judges wished to know whether it signified anything. The answer to that question, the three Judges believed, would help them to perform their constitutional task of formulating an appropriate rule. But from the attitude of the Ministers, as evidenced from their communications, the three Judges appeared to have realised

---

1. Ibid.
2. Letter dated 7 September 1972 from T.S.Fernando to the Minister of Justice.
3. Letter dated 4 September 1972 from the Minister of Justice to T.S.Fernando.

that the form of the rule would ultimately be determined not by them but by the Ministers. Accordingly, T.S.Fernando, having asserted that he was unable to agree that the rule they intended to make was repugnant to the Constitution, expressed himself thus:

> We would like to state without reserve that if it is felt by the framers of the Constitution that a rule such as that we intend to make is against the spirit of the Constitution (of which spirit we can be but inadequate judges) we would like to seek His Excellency's permission to tender our resignations . . . If equality in the sense Mr.de Silva speaks was the constitutional requirement, it is a pity that the draftsman of the still-born rule blatantly overlooked it. Indeed, that draft rule is a pointer to our belief that it was probably intended to appoint to the Constitutional Court persons who were not sitting judges at all. If that was the intention, whatever be the meaning of section 54, there would be an additional reason to induce us to request that we be permitted voluntarily to tender our resignations.[1]

The Minister of Justice informed his colleague of what the three Judges intended to do.[2] Meanwhile, the Minister of Constitutional Affairs had received "an important piece of information" from Cooray, one of the members of the Court:

> He tells me that on the last occasion the Constitutional Court members met, he found an important change of attitude in TS and the others; mainly that they were ready for the rule to be that each Court elects its Chairman. On that basis, you may think that a reasonable arrangement is possible; for election would be by a majority of the three members and it is hard to believe that each one will vote for himself only. Provision could, of course, be made against that eventuality by stating that, in the event of there being no majority, the member whose name is first drawn when constituting the Court shall be the Chairman.[3]

He suggested to his colleague a further discussion later in the week "if the above either does not appeal to you or proves to be unacceptable". The three Judges made no further move, and it is probable, therefore, that what Cooray had communicated to the Minister was a misunderstanding of the situation. On 9 October 1972, the Prime Minister thought "that the Minister of Constitutional

---

1. Letter dated 7 September from T.S.Fernando to the Minister of Justice.

2. Letter dated 15 September 1972 from the Minister of Justice to the Minister of Constitutional Affairs.

3. Letter dated 18 September 1972 from the Minister of Constitutional Affairs to the Minister of Justice.

Affairs and yourself [the Minister of Justice] might go into this whole question and advise her in due course as to what might be done".[1] It was apparent that by now everyone had quite forgotten the specific matter on which the three Judges had sought, and were awaiting clarification from the President. The intervention of the Ministers of Justice and of Constitutional Affairs, without any legal authority therefor, had only confused the issue and contributed towards a hardening of hearts all round.

On 7 November 1972, the Sri Lanka Press Council Bill was presented to the National State Assembly by the Minister of Justice.[2] On 8 November, a motion was filed in terms of section 54(2)(e) of the Constitution alleging inconsistencies between the provisions of the bill and the Constitution.[3] On the same day, the five members of the Constitutional Court met in the premises of the National State Assembly and adopted by a majority vote the rule relating to the selection of a chairman as proposed by the three Judges.[4]

The First Reference

On 15 November 1972, the Speaker referred to the Constitutional Court a written notice raising a question of inconsistency in respect of the Sri Lanka Press Council Bill, signed by J.R.Jayewardene, the leader in the National State Assembly of the United National Party. On the next day, at the Assembly premises, the names of the five members of the Court were placed in a cylindrical container and, in the presence of two of them, the Registrar drew out the names of the three members who would constitute the first Court. They were T.S.Fernando,Q.C., H.Deheragoda and J.A.L.Cooray. The Court so constituted chose Fernando as its chairman. Six other motions filed by citizens, which were also referred by the Speaker upon the Court advising him that they raised questions of inconsistency, reached the Court on 21 November, on which day it held its public session. The Attorney-General, who alone had the right to be heard on all matters before the Court, was present in person, assisted by the Solicitor-General and three State Counsel. The leader of the UNP was represented by his brother, H.W.Jaye-

---

1. Letter dated 9 October 1972 from the Secretary to the Prime Minister to the Minister of Justice.
2. Ceylon Daily News, 8 November 1972.
3. Ibid., 9 November 1972.
4. K.D.de Silva and J.A.L.Cooray requested the Registrar, when he sent the rules to the Assembly, to append a minute that they

wardene,Q.C. Two of the petitioners, W.Dahanayake, MP and Prins Gunasekera, MP, appeared in person. The other four petitioners were represented by S.Nadesan,Q.C., H.L.de Silva, M.Tiruchelvam,Q.C., and H.W.Jayewardene,Q.C.[1]

Very early in the proceedings, the question arose whether section 65 of the Constitution, which required the Court to give its decision within two weeks of the reference, was mandatory or directory. The Court had no doubt as to its meaning; it informed Counsel that it was prepared to sit even a month in order to enable them to present a full argument on the question of inconsistency. The Ceylon Daily Mirror chose to report this statement thus:

> DECISION ONLY AFTER I HAVE MADE UP MY MIND - CHAIRMAN
> The Constitutional Court will not give its decision within 14 days even though the Constitution stipulates that it should do so. This was announced by the Chairman of the Constitutional Court, Mr.T.S.Fernando, yesterday.[2]

Other comments and asides made by the Chairman also received wide publicity in the local newspapers. For instance:

> I have not been bothered by the 14-day stipulation. I have persuaded my brothers that we may have to go on for a longer time if necessary. If the National State Assembly is not satisfied with us, they have their remedy.[3]

> This is a very important matter. In fact, it would have been better if it was possible for the whole Court to examine this question, but that is not possible.[4]

> I accepted this office on the basis that I am not bound by the 14-day rule.[5]

> This is not a matter of life and death. The Bill can wait.[6]

---

dissented in regard to the rule relating to the selection of a chairman. The Registrar was requested to have the rules approved by the Legal Draftsman, gazetted, and then presented to the Assembly. Although he undertook to "get it done in a day", it was not until two weeks later that the Legal Draftsman received a letter dated 18 November 1972 from the Registrar stating that he was forwarding for approval the rules made by the Constitutional Court. The Legal Draftsman himself took his own time, and it was only on 15 January 1973 that he returned the rules, approved by him, to the Registrar: Minute dated 30 January 1973 from the Secretary for Justice to the Prime Minister.

1. Communique issued by the Registrar of the Constitutional Court, Ceylon Daily News, 17 November 1972.
2. Ceylon Daily Mirror, 22 November 1972.
3. Sun, 24 November 1972.
4. Ibid.
5. Ibid.
6. Ibid.

> I hope the Bill is not here on the presumtion that it is good. We have to express our views. I go on the basis that if the Constitutional Court says that such and such a section of the Bill is in conflict with the Constitution, it would be accepted by the National State Assembly. I like to assume that the Assembly will respect our views and will not pass the Bill with a two-thirds majority.[1]
>
> I was one of those who spoke against the concept of a Constitutional Court to examine Bills. I have, however, been made the Chairman of the Court. The bad boy has been made the monitor of the class.[2]

One of the arguments presented to the Court was that section 52(1) of the Constitution, which enabled the Assembly to enact by a two-thirds majority a law which was inconsistent with any provision of the Constitution without amending or repealing such provision, did not enable the Assembly to enact a law which was in conflict with any of the fundamental rights guaranteed in the Constitution.[3] On 29 November, the Speaker decided to express his view on this argument. In the course of a discussion of a point of order raised in regard to a bill under consideration, he made the following pronouncement:

> I want to tell you that some people have from time to time been advising this Assembly as to the course of action this Assembly should take. This Assembly is very hesitant to express opinions in obiter without deep and profound deliberation. I must say that this Assembly is a sovereign body which has the right even to pass a law which is inconsistent with the Constitution under section 52(1). Even though it is inconsistent you can pass it by a two-thirds majority, and that law which is passed is not a constitutional amendment.
>
> The Constitution enumerates three categories of bills which can be passed: firstly an ordinary bill which can be passed with a simple majority; secondly, an amendment to any section of the Constitution which requires a two-thirds majority; thirdly, a bill which, in some particular or respect, is inconsistent with any provision in the Constitution, which could be passed by a two-thirds majority. A law which is passed under this proviso shall not be interpreted as amending the provisions of the Constitution with which such law is inconsistent.
>
> As Speaker of the National State Assembly, I should like to say, respectfully, that nobody outside this

---

1. Ceylon Daily News, 24 November 1972.
2. Sun, 27 November 1972.
3. Ceylon Daily News, 30 November 1972.

> Assembly , not even the judiciary, has the right to tell this body, which is sovereign, "We hope that the National State Assembly will not pass this bill by a two-thirds majority". [1]

The Minister of Justice thought that the Speaker "put it very well" when he stated that "no outside body as far as you are concerned can tell this sovereign legislature what it should or should not do even in the way of advice". "I am entirely in agreement with your position", he added.[2]

T.S.Fernando was also the head of the country's highest appellate tribunal, the Court of Appeal. Its calendar was usually arranged at least a month in advance, and some of the matters awaiting adjudication included appeals from men languishing in the condemned cells. In civil cases too it was desirable that the law should be clarified very early for the benefit of the subordinate courts. Although provision existed for seven Judges, the Government had appointed only four, of whom one was in poor health; three Judges were required to constitute the Court. Accordingly, having sat for five consecutive days on the Constitutional Court, including a Saturday, he sat on the Court of Appeal on the first two days of the following week, 27 and 28 November. He returned on 29 November to the Constitutional Court which continued its sittings until Saturday 2 December, when it adjourned for a week, until Monday 11 December, to enable the Court of Appeal to complete its own work. The crucial fourteenth day was reached on Monday 4 December.

The question of the "14-day limit" by now appeared to be causing some concern both to the Government and to the Speaker, although the bill as such was not an urgent one. On 27 November, the Minister of Justice addressed a "secret and confidential" letter to his colleague, the Minister of Constitutional Affairs:

> In two separate sections, the Constitution provides (a) that the Constitutional Court should tender its advice to the Speaker in 14 days, and (b) that no proceedings shall be taken on any Bill which is before the Constitutional Court, until the Court has tendered its advice, by the National State Assembly.
>
> My own view is that (a) above is not directory, but imperative, and that, therefore (b) above can only

---

1. National State Assembly Debates, 29 November 1972, cols.2460-61.
2. Ibid., col.2475.

> apply for the period of fourteen days. Whether this view is correct or incorrect, it would be most unfortunate if we were placed in such a position in the very first case.
>
> I should therefore like to suggest that if there is any problem over this, we should clarify the position at least for the future by an appropriate constitutional amendment.[1]

The Minister of Constitutional Affairs, however, preferred to "wait on events". His reply on 8 December read as follows:

> I have also been concerned by the statements reported to have been made by the Hon.T.S. Fernando who is currently presiding over the deliberations before the Constitutional Court, that the Court is not obliged to give its decision within two weeks of the reference of a question by the Hon.Speaker and further, by the frequent adjournments of that Court. As you know, I have had occasion to discuss this matter with the Hon.Prime Minister, the Speaker and yourself.
>
> As you know, I hold the same view as you that the Constitutional Court is obliged to give its decision within two weeks, and I honestly think that there is no doubt on this point. We also do not as yet know the views of the Constitutional Court as distinct from those of Mr.T.S. Fernando. You will perhaps agree, therefore, that we should wait on events. Moreover, the Speaker has now come into the picture, and it may be better to await the outcome of his intervention before considering such a step as amending the Constitution.

Meanwhile, on the fifteenth day, 5 December, the Minister of Justice, in consultation with his colleague, the Minister of Constitutional Affairs, the Speaker and the Leader of the Opposition, decided to speak to the members of the Constitutional Court in regard to their interpretation of section 65 as "directory".[2] He felt that the Constitution ought to be interpreted in the "only practical way of interpreting it";[3] namely, by treating section 65 as neither directory nor mandatory:

> I quite realise that sometimes there may be circumstances in which the Court cannot finish its work in 14 days' time. With the best will in the world, without adjourning for the Appeal Court to sit or without adjourning for other tribunals to sit, even

---

1. This view was not expressed to the Court at any stage of the proceedings by the Attorney-General.
2. National State Assembly Debates, 12 December 1972, col.1354.
3. Ibid., col.1345.

> sitting non-stop for 24 hours a day, there might be circumstances in which a Court might find it difficult to finish it in 24 hours [sic] time. I, therefore, communicated with the members of the Court and suggested to them that, perhaps as they were not able to finish their work in 14 days, they might on the 14th day communicate with you, Mr.Speaker, inform the National State Assembly that they have not been able to finish their work and ask you to make suitable arrangements for them to be able to continue their work beyond the 14-day limit. I suggested that in that event, you, perhaps, would put the matter to the National State Assembly and I would be prepared to move a resolution, seconded by my good friend, the plaintiff, the Leader of the Opposition, and by joint consent, with the consent of the whole Assembly, the ultimate residuary and authority of power under section 5, the National State Assembly could extend the time limit at the request of the Court. [1]

The Minister had no doubt in his own mind that his view of the law was correct. After all, as he later explained:

> What the Constitution intended, what we intended, we collectively in this House, as the makers of the Constitution, know better than anybody else. [2]

Therefore;

> I thought I would express this point of view to the Chairman of the Court and tell him what I thought was perhaps a more reasonable interpretation, and to commend it to him for his consideration. [3]

He telephoned the home of the Chairman of the Court; the Judge was not in. He managed, however, to contact the other two members of the Court.

> I asked them to please communicate with Mr.T.S. Fernando and to let me know. The Cabinet was meeting on Wednesday, the morning of the 14th day [sic], and I, therefore, requested that I should like to be informed what the position was. [4]

When the Chairman of the Court returned home from a social engagement, he was informed of the Minister's telephone call; he was also informed by his two colleagues of the Minister's proposal. He did not ring back the Minister. In his view, section 65 was merely directory and, therefore, there was no need for the Court to ask for an extension

---

1. Ibid., col.1354.
2. Ibid., col.1347.
3. Ibid., col.1354.
4. Ibid., col.1355.

of time. If, on the other hand, section 65 was mandatory, the Court could not ask, nor could the National State Assembly grant, any extension at all in the absence of constitutional provision to that effect.[1]

Justice Deheragoda telephoned the Minister on the following morning, 6 December, and informed him that the members of the Court were not agreed in regard to his proposal that they should ask for an extension of time by writing to the Speaker. The Minister was peeved. As he told the National State Assembly a week later:

> I was then informed by Mr.Justice Deheragoda of a matter which I regretted very much. He informed me that Mr.T.S.Fernando, if he was writing a letter, insisted on saying that he was writing it at the request of the Minister of Justice. I indicated at that stage that it was wholly unsatisfactory. While I was certainly prepared to take the responsibility of informing the house and its members that I had certainly spoken to the Judges on a matter like this to make the Constitutional Court work, I did not want the Court to think on a statement like that, later when a judgment of the Constitutional Court comes the Judges will equally well create the impression: "My God, this damned judgment was written at the dictation of the Justice Minister". This is not what we want. We want a fair judgment. We want the Constitution to work. But I considered that it was nothing more than an attempt to fix the Minister of Justice, to try to bring him into this operation when all he had tried to do was to make the Constitution work and to be helpful.[2]

Later in the morning, the Registrar of the Constitutional Court wrote to the Clerk to the National State Assembly in the following terms:

> I am directed by the majority of the Constitutional Court to inform you that the proceedings in respect of the above questions which have been referred to the Constitutional Court are still continuing and that a decision would be given as soon as possible.[3]

The Minister of Justice was not satisfied.

> It is merely a piece of information. There is no request. "Majority of the Court"; not the Court by a majority. A majority of the Court, that is, two members of the Court had told Mr.Sam Wijesinha something which he has told himself and then told you, that a decision would be given as soon as possible. "As soon as possible" may mean, if necessary, sitting for four years or till doomsday.[4]

---

1. Interview with T.S.Fernando.
2. National State Assembly Debates, 12 December 1972, col.1356.
3. Ibid., col.1358.
4. Ibid.

The Minister made another attempt. He spoke to the two members of the Court who were in contact with him and told them: "No use of being abject, no use of using words, no use of using anything. Merely request the Speaker to enable you to continue your sitting".[1] If they did, he promised to "get a unanimous agreement from the Assembly".[2] The Chairman, however, refused to comply with the request.

At the weekly meeting of the Cabinet held on that day, it was decided "to uphold the Constitution, quite independent of other persons elsewhere".[3] In the National State Assembly that afternoon, replying to questions asked by a Federal Party member and by the Deputy Minister of Planning, the Minister of Justice said that he doubted very much whether there could be "an institution or court which can be over and above this Assembly".[4] But if the Constitutional Court, even at that stage, requested the Assembly to grant it further time to submit its determination on the Press Council Bill, "some arrangement could be worked out to grant such an extension".[5]

> Mr.Prins Gunasekera: The 14 days have already lapsed.
> Mr.Bandaranaike : I do not know. I have not counted the days. I do not even know how the 14 days should be counted. [6]

When the National State Assembly met at 10 a.m. on 7 December, the Speaker announced that since the Constitutional Court had not given its decision within the stipulated period of two weeks, the proceedings in relation to the Sri Lanka Press Council Bill "will now proceed in accordance with the Standing Orders of the National State Assembly and the provisions of Chapter IX of the Constitution."[7] Thereupon, the Leader of the House informed the Assembly that the bill will be taken up for second reading "at the earliest opportunity".[8]

At an emergency meeting of the Opposition, it was decided to request the Speaker "to permit today a debate on a matter or urgent public importance expressing opposition to the decision of the Government to proceed with the second reading of the Press Council

---

1. Ibid.
2. Ibid.
3. Ibid.
4. Ceylon Daily News, 7 December 1972.
5. Ibid.
6. Ibid.
7. National State Assembly Debates, 7 December 1972, col.760.
8. Ibid.

Bill while important constitutional issues raised before the Constitutional Court are still undecided".[1] A meeting of party leaders was fixed for the next day to discuss the request.

Meanwhile, on the adjournment motion in the Assembly, the Deputy Minister of Planning was permitted by the Speaker to make references derogatory of the Court and its members.[2] For instance, the Deputy Minister asked the Speaker what action he intended to take against the "illegal" Court which, if it assembled on Monday, would by so assembling constitute an "unlawful assembly" within the meaning of the Penal Code; whether the members of the Court who had failed to perform their duties should not be removed or whether they would themselves take the initiative and resign; whether he would take steps to have the Constitution amended to prevent the President of the Court of Appeal, who was an officer of an institution subordinate to the "supreme" National State Assembly, from acting for the President of the Republic should the need arise in the future. Having permitted these references to be made, the Speaker concluded the proceedings by making the following observation:

> In respect of the matter raised by the Deputy Minister of Planning, I have to say that the Constitutional Court sits in the premises of the National State Assembly as a result of the courtesy extended to it by me. That courtesy will always be extended to them by me, and the officers of this House who are now in the service of this Court will render the same assistance as required.

At 7 p.m. on 10 December, the Speaker met the Minister of Justice at the latter's residence. The Attorney-General and the acting Secretary for Justice, B.S.C.Ratwatte, were also present. The purpose of the meeting, according to the Minister, was:

> to review the situation and to try to work out some formula to prevent a situation of deadlock and to find out ways and means even at that point of time to save this country [sic], to help us out of the embarrassment of our Constitution being brought to nought by an arbitrary opinion expressed by the members of the Constitutional Court.[3]

At the end of the discussion it was decided, on the Minister's suggestion, to "invoke the President of the Republic of Sri Lanka as the ultimate authority to try and help to solve this matter, to

---

1. Sun, 8 December 1972.
2. National State Assembly Debates, 8 December 1972, cols.963-976.
3. Ibid., 12 December 1972, col.1360.

try to find a solution which we have not been able to find ourselves". It was, of course, not within the competence of the President to act as an appellate court or even as an arbitrator on the matter in dispute which was one entirely within the jurisdiction of the Constitutional Court. Therefore, what was being sought was obviously the opportunity as well as a neutral ground for the two Ministers and the Speaker to meet and talk to the members of the Constitutional Court in an effort to persuade them to accept their interpretation of the constitutional provision in question.

At about 11 p.m. that night, the President telephoned all five members of the Constitutional Court and invited them to President's House "to discuss an important matter".[1] When they arrived, the Speaker, the Minister of Justice, the Minister of Constitutional Affairs, the Attorney-General and the acting Secretary for Justice were already with the President. The two Ministers and the Speaker argued forcefully that section 65 of the Constitution was mandatory, but that even at that stage if the Constitutional Court were to make a request to the Speaker for an extension of the period of fourteen days specified therein, they "could get together and consider the matter of granting an extension of time in such a way as to make the Constitutional Court to continue".[2] K.D.de Silva agreed with this view. But, as the Minister of Justice later explained to the National State Assembly:

> Our deliberations concluded in a deadlock. The Chairman of the Court took up the categorical position at that discussion - and I must tell the Assembly that - that they had no difficulty whatsoever. 'We are clear in our own minds about the interpretation of this section. We do not admit that anybody has the right to give an extension of time or that we are obliged to ask for time.[3]

The other three members of the Constitutional Court, including V.Siva Supramaniam, agreed with the Chairman that section 65 was directory. It was 4.30 a.m. on Monday when the abortive discussion at President's House was concluded.

When the Constitutional Court assembled on 11 December, which was the twenty-first day, the Attorney-General was not present; nor were any of his juniors present. The Attorney-General had been

---

1. Evidence of H.Deheragoda before the Special Presidential Commission of Inquiry, Ceylon Daily News, 29 August 1978.
2. National State Assembly Debates, 12 December 1972, col.1360.
3. Ibid., col.1361.

directed by the Minister of Justice to withdraw "from the proceedings of the body of people who are now sitting on the third floor".[1] By complying with this directive, without even seeking the leave of the Court to do so, the Attorney-General failed to perform the constitutional duty he owed the Court. When Tiruchelvam rose to continue his submissions, the Chairman addressed him thus:

> Let us say what we think is the present position.
>
> It is the duty of us all, whether we be judges or not, to uphold the Constitution. To uphold the Constitution we as judges must first understand the meaning of the relevant provisions of the Constitution. For that understanding we have to rely on our own judgment assisted, if need be, by the opinions of learned counsel. Any other course of action involves, in our opinion, an abdication of our functions.
>
> We have expressed to you on the very first day itself our meaning of the relevant provisions, principally sections 65 and 54(4). Such further consideration as we have so far given to the matter only confirms, in our opinion, the correctness of our earlier view.
>
> We will therefore hear you, the other Counsel and the Attorney-General in that order.[2]

In the National State Assembly, the Speaker announced that the party leaders had agreed to hold a full day's debate on the constitutional situation.[3]

On 12 December, it was apparent that the proceedings in the Constitutional Court were drawing to a close, in so far as the submissions of the petitioners were concerned. However, a motion had been filed seeking a summons on the Minister of Information. The application was made under section 63(3) of the Constitution which empowered the Court to summon or hear witnesses if it thought it necessary or expedient to do so. The Chairman indicated that the Court would make its order on that application on the following day.[4]

Meanwhile, on the floor below, the debate on the Appropriation Bill was interrupted and the motion for adjournment was moved by the Leader of the House, barely ten minutes after that body had

---

1. Ibid., cols.1361, 1371, 1448. The Minister explained to the Assembly that he issued this direction to "my counsel" ("the representative whom I sent to express my point of view": col.1347) since "I am not prepared to participate in a mock trial". This was a misunderstanding of the Attorney-General's role vis-a-vis the Constitutional Court. He appeared before that Court in his own right and not on behalf of the Minister of Justice or of the State. See s.63(1).
2. Ceylon Daily News, 12 December 1972.
3. Ibid.
4. Ibid., 13 December 1972.

assembled, to enable its members to discuss "the Constitutional Court and the Sri Lanka Press Council Bill".[1] For ten hours thereafter, members from both sides of the House indulged in an unprecedented public attack on the Constitutional Court and its Chairman. Comments made by the Chairman in the course of the proceedings were often taken out of context, misquoted or misconstrued, and were then used to support the argument that the Constitutional Court was seeking to usurp the "sovereignty" of the National State Assembly.

The Minister of Justice posed the question in simple terms:

> Are we going [therefore] to accede to the position that there is any other institution superior to this National State Assembly and capable of frustrating and avoiding the express terms of the Constitution upon which we have all agreed and which we have adopted on behalf of the very people of Sri Lanka ? That is the question before us.

Or, as he put it in other words:

> The question is, Who has the power ? Have they the power to arrogate to themselves the right to sit for four years at their will and pleasure, or must they subordinate themselves to this Assembly ?

He explained the effect of conceding that the Constitutional Court's interpretation of section 65 was correct:

> If we once concede to the Constitutional Court the right to determine its own time limit . . . please remember that what you are doing is establishing an institution higher than the National State Assembly and, quite apart from the merits or demerits of the Bill that is being discussed, creating an issue far bigger than that. The entire legislative programme of a government can be brought to nought by this procedure.

The Minister insisted that the Constitution contemplated a decision being given within fourteen days:

> You ask me, how can this be done ? I agree, if you decide to give each person a chance to speak for five to six days through his counsel without time limits; if you decide to sit for a few hours only for a day; if you decide to postpone the case every time you decide that you prefer a change of atmosphere in Hulftsdorp or sit in the Court of Appeal; then, of course, you will never be able to finish your work in fourteen days time.

---

1. The full proceedings are published in National State Assembly Debates, 12 December 1972.

The Minister said that he knew of no case which is so complicated in its effects that one could not arrive at a decision within fourteen days:

> What we have here is a court conducting a dialogue. The newspaper reporters are there. Political views are expressed. Legal views and all kinds of other views are expressed. It is quite a different situation that I should have expected. If you have got to do this work within 14 days, give the various persons a time limit of a few days to make their submissions in writing and take time to study them. If you have any questions to ask, send for the people concerned. It is a tragedy when lawyers go on talking for hours and hours.

When an Opposition member intervened to point out that the Attorney-General had remained seated and said nothing while the Court had repeatedly expressed its views on section 65, the Minister replied:

> The Attorney-General may choose to remain silent when irrelevancies or rubbish are being spoken by anybody in his presence. It is not the duty of the Attorney-General to jump up and start interrupting. How many times have I remained silent while the Member for Nintavur made inane remarks.

The Minister did not think that the Constitution needed amendment. "I take the view", he said, "that there is no question of the Constitution requiring amendment. I think it is as plain as a pikestaff". He added:

> If you ask me whether the Constitution is defective. I would repeat, no, no, and no again. The Constitution is perfectly correct in every line and word of what it says. Merely because you choose to give the Constitution meanings to satisfy the vanity of any one individual who wants to set himself above the Constitution, I repeat that is not a possible way of testing the validity of the Constitution.

The Minister thought that:

> If . . . with all the panoply of what was the Constitutional Court on Friday, the same three people continue to sit, not as a Constitutional Court but as a mock trial on Monday, the people of this country will not see that distinction and will wonder why the Assembly is in fact stulifying itself.

Therefore:

> If the Constitutional Court is not prepared to respect the wishes of this House, there is no alternative, the Constitutional Court will have to go.

As for himself:

> I shall not shift an inch in surrendering our rights under the Constitution; nor am I prepared to participate in a mock trial.

He asked the Assembly:

> Are you prepared to accept a subordination of the position of the National State Assembly ?
>
> Members: No, no !
>
> That is the question.

The Minister of Constitutional Affairs was indignant that the Court should have heard Counsel who argued that certain provisions of the Constitution, which he had drafted, were unamendable even with a two-third majority:

> No Court should have tolerated that for one minute . . . The Court that was so sure about its 14 days might have been sufficiently aware of the constitutionality even to tell that Counsel at once that he is talking through the back of his head . . . It is laid down in black and white . . . Everybody in this country knows that this Assembly by a two-thirds majority has the right to change the Constitution, amend this Constitution, repeal the provisions of this Constitution, and to substitute another Constitution for this Constitution if it wishes. He knows it. If the Court did not know it, I take this opportunity of saying that it is not fit to sit there.[1]

The Minister of Finance, Dr.N.M.Perera, was "surprised" at the latitude allowed to Counsel:

> In that place, the whole Constitution is being discussed. That Court has no power to do that. Those people have no power to discuss the rights and wrongs of our Constitution. All they have to do is to tell us whether any provision of a Bill is inconsistent with the Constitution. Can that not be done in 14 days ? But if they begin to indulge in irrelevancies and unnecessary talk, if they start examining all the constitutions in the world, not only will 14 days not be sufficient; even four years will not do. That gentleman has spoken of four years. He is right. I believe that the Prime Minister should send for the members of the Constitutional Court and tell them that before they start lecturing to us what the law is or is not, they should perform the duty which the law has cast on them. She has the power to do that.

The Finance Minister referred to the Chairman's statement that "the bad boy has been made the monitor of the class". He recalled that the Chairman, in the company of S.Nadesan,Q.C., had made representations to the Cabinet, at the time the Constitution was being drafted,

---

1. Six years later, Colvin R.de Silva himself argued before the Constitutional Court that a bill inconsistent with a "fundamental provision" could not be proceeded with even by a two-third majority: (1978) DCC, Vol.6, at p.33.

against the concept of a Constitutional Court:

> I thought he took up the position of an independent judiciary. I think he may have conceived of a judiciary which was above the National State Assembly. He believed in the separation of powers, I think. . . . I do not think he will misunderstand if I were to say that it was his duty to have told the Prime Minister: 'At the outset I was opposed to the concept of a Constitutional Court; I have different views on it; I will find it difficult to do this job; therefore, it would not be proper to entrust me with this task.' But without saying any of this, he undertook the task. Having done so, it was his duty to have abandoned his previous views and entered upon his duties with an independent mind. By not doing so, he has done himself a disservice.

He countered the argument that the Government had appointed T.S. Fernando in full knowledge of all this by explaining that "we appoint Judges, with the best of intentions, considering all the circumstances as to their honourable qualities, their independence, their capacity, and so on". He pleaded:

> We do not know at what time mental aberrations may arise. Some kind of infirmities sometimes arise suddenly. We cannot always be sure of the people we appoint, but as far as we possibly can. As the Member for Jaffna would say, it is human to err. So, in the choice of persons also it is human sometimes to appoint a wrong person.[1]

The view of the Opposition, as expressed by J.R.Jayewardene, was that "provision should be made by an amendment to the Constitution, for the Speaker, with the consent of the House, to grant time, if he is satisfied that the request for time to exceed the two weeks is bona fide". In regard to the present impasse, he suggested that the government withdraw the bill from the agenda of the Assembly and present it again; thus bringing the proceedings of the Constitutional Court to an end. The problem, as he saw it, was not to find out who was responsible for the impasse that had occured, nor to attach blame to anyone; not to decide whether the decision of the Court should have been given within two weeks of the reference or not. These, he said, cannot be decided in that debate.

---

1. Opposition members also took this opportunity to hurl a few brickbats themselves. Gamini Dissanayake (UNP) wondered whether Fernando could be sued for non-performance of his duties. Prins Gunasekera (Ind.) berated him for a judgment which he had delivered in a labour tribunal appeal some twelve years previously. But cf. R.Premadasa (UNP) and M.M.Mustapha (UNP) who paid tribute to the Chairman's "independence" and "integrity".

Dissolution of the Court

The debate concluded when the Assembly adjourned at 8.43 p.m. About an hour later, Deheragoda received a telephone call from Hector Kobbekaduwa, Minister of Agriculture and Lands. According to Deheragoda,[1] Kobbekaduwa told him that unless he resigned from the Constitutional Court, there was a strong likelihood of an address in the National State Assembly for Deheragoda's removal from the Supreme Court. He immediately met the President of the Republic who told him that it was a matter for decision by him and that since "they might not give in", it was safer to resign. He also met the Chief Justice, H.N.G.Fernando, and the Chairman of the Constitutional Court, T.S.Fernando, both of whom advised him to resign from the office of member of the Constitutional Court.

According to T.S.Fernando,[2] Deheragoda visited him late that night. He said that he had received a telephone call from Kobbekaduwa; the latter was speaking from the office of the Clerk to the National State Assembly. "Kobbekaduwa said that the Government had decided to remove the three members of the Constitutional Court from office. The Constitution would be amended to give the National State Assembly the power to do so. Kobbekaduwa said that he was not concerned about Fernando or Cooray, but that he was deeply concerned about me since there was also the likelihood that, following my removal from the Constitutional Court, I might also have to be removed from the Supreme Court. Kobbekaduwa said that the Minister of Justice was also with him, and then handed the telephone over to Felix Dias Bandaranaike who confirmed what Kobbekaduwa had just said." Deheragoda told Fernando that he had no private income, and that Kobbekaduwa had reminded him that in the event of his removal from the Supreme Court he would probably forfeit his pension in respect of nearly thirty years of public service. Fernando told Deheragoda that in this situation he should not consider himself bound by a decision taken by the three members of the Court earlier that day that they would complete the hearing, submit their decision to the Speaker, and then resign their offices

1. Evidence of H.Deheragoda before the Special Presidential Commission of Inquiry, Ceylon Daily News, 29 August 1978. See also Order of the Commission, Ibid., 28 November 1978.

2. This version of the events was provided by T.S.Fernando on 1 January 1973.

on the Court. This was a matter on which Deheragoda should advise himself after discussion with his wife and other members of his family.

There was no provision in the Constitution for the removal of a member of the Constitutional Court by an address of the National State Assembly. There was no suggestion made in the course of the debate that the Constitution should be amended to enable this to be done. According to the Prime Minister, Mrs.Bandaranaike, the Cabinet had not taken a decision to introduce such an amendment.[1] Therefore, it is safe to assume that the Government had no intention of removing the members of the Constitutional Court. Fernando and Deheragoda were both Judges of superior courts who held office "during good behaviour" and could be removed from their offices by the President upon addresses of the National State Assembly. But their removal from other Courts for conduct unrelated in any way to their work on such Courts would not only have been an abuse of constitutional powers; their tenure on the Constitutional Court would have remained unaffected. Therefore, it may also be assumed that the Government had no intention of removing either Fernando or Deheragoda from the Court of Appeal or the Supreme Court, as the case may be. Why then did the Minister of Agriculture and Lands tell his friend, Deheragoda, that "there was a strong likelihood of an address in the National State Assembly for his removal from the Supreme Court ? The answer probably lies in what the Minister of Justice had publicly declared earlier that day: "The Constitutional Court will have to go". Cooray had held office on the Constitutional Court only for six months and may not have minded going back to teaching and to the Bar; in fact, he had already decided to do so after he had signed the decision. Fernando, then head of Sri Lanka's judiciary, had weathered many storms during a long and distinguished career on the bench; in any event, he had been unapproachable even on the telephone and it was only through the intervention of the President that the Ministers had been able to communicate with him. Deheragoda, on the other hand, had just commenced, at the tail end of a perfectly ordinary and uneventful career in the public service, what he must have hoped would be an

---

1. This information was provided by Mrs.Bandaranaike in January 1973.

equally uneventful tenure of office as a Judge; retirement on full pension with the occasional invitation to head a commission of inquiry lay but three years ahead. He was clearly the weakest link. If the Court was determined not to resign until it had concluded its task, despite the battering it had been subjected to earlier in the day; if the Court were to make a determination on the bill and forward it to the Speaker; if the National State Assembly had by then taken action on that bill which was inconsistent with such determination, the Government would be faced with a most awkward and embarrassing situation. If, as the Minister of Justice had declared, "the Constitutional Court will have to go", it had to be done now and it could only be done by breaking one of the links that held the Court together.[1]

Early in the morning, Deheragoda wrote the following letter to the President and handed over copies of it to his two colleagues on the Court:

> In view of recent developments, I, Ekanayake Rajapakse Kodippili Dissanayake Mudiyanseralahamilaye Hector Deheragoda, do hereby tender my resignation with effect from today from my membership of the Constitutional Court in terms of section 56(1)(b) of the Constitution of the Republic of Sri Lanka.
>
> I might incidentally mention that my officiating as a member of the Constitutional Court so far has interfered with the expeditious hearing of the inquiry now before the Criminal Justice Commission.
>
> I take the liberty of writing in English as the matter is urgent and confidential.

With his resignation, the Constitutional Court became instantly immobile. There was no provision for the other two members to sit by themselves; nor was there any provision for substituting another member. At 9.30 a.m., the Registrar told Counsel who had assembled in the court premises: "I have been informed that the Court is not sitting".[2] Later that morning, T.S.Fernando called

---

1. In a statement filed in the Special Presidential Commission of Inquiry, Kobbekaduwa admitted the telephone call from his house to a "personal friend" whose "interest he had at heart". His intention was to "apprise him of the mood prevalent among Members of Parliament" that evening. It was "furthest from my mind to threaten him in any way". Kobbekaduwa said that, following the debate in the National State Assembly, "he was alarmed, on the one hand, that precipitate action might bring the judiciary into ridicule and thereby harm the image of the Government". He was alarmed, on the other hand, in regard to the possible consequences such an action might have on Deheragoda: Ceylon Daily News, 28 November 1978.

2. Ceylon Daily News, 14 December 1972.

on the President and handed over the following letter of resignation:

> Mr.H.Deheragoda, member of the Constitutional Court, has informed me this morning that he has tendered to Your Excellency his resignation from membership of that Court.
>
> Even at the time of adjournment of Court last afternoon it was the intention of all three members of the Court, in view of our opinion as to the meaning of the relevant sections of the Constitution, to continue the hearings and give a decision. The resignation of Mr. Deheragoda leaves only two members to continue the hearings, and it is not possible for the Court to continue in the present matter.
>
> In view of what I have stated in the paragraph above, and having regard to statements made in the National State Assembly on the 7th and the 12th December 1972, it has become apparent to me that duty, self-respect and conscience combine to compel me to avail myself of the relevant provision of section 56(1) of the Constitution and tender to your Excellency my resignation of the membership which I have held in the Constitutional Court since the 23rd June 1972. That resignation I hereby tender.
>
> You Excellency will permit me to add that I am satisfied that I have done everything to uphold the true meaning of section 65 of the Constitution, a meaning with which my two colleagues agreed on the morning of the commencement of the hearings on the Press Bill. This resignation would have been tendered immediately after the 7th December had we not considered it our duty to continue till we gave our decision.

Shortly thereafter, Cooray wrote to the President in the following terms:

> Messrs T.S.Fernando and H.Deheragoda have informed me this day that they have tendered to Your Excellency their resignation from membership of the Constitutional Court.
>
> As a result of these resignations it is obviously not possible to continue the present Court proceedings, and give a decision on the questions referred to the Court by the Speaker.
>
> In view of these developments and certain statements made in the National State Assembly recently with regard to the Court and its proceedings, I consider it my duty to tender to Your Excellency my resignation from membership of the Constitutional Court - which I hereby do in terms of section 56 of the Constitution.

Perhaps oblivious of the fact that the Court no longer existed, the Deputy Minister of Planning rose in the National State Assembly at 8 p.m. to speak on "the unconstitutional court". He asked what steps would be taken to remove "the jokers" on it. He wished to

know whether the Constitution would be amended to enable the President to remove a member of the Constitutional Court for misbehaviour. If the illegal court continued to sit after the fourteenth day, who would meet its expenses ? Since the Court had failed to make its rules, will steps be taken to recover the entire expenditure of the illegal sessions from the remuneration paid to its members ?[1]

Reconstitution of the Court

The Chief Justice, H.N.G.Fernando, made it known to the other Judges of the Supreme Court that, in his view, having regard to the treatment meted out to one of them, they should not agree to serve on the Constitutional Court.[2] Consequently, when Justice Wimalaratne was invited by the Minister of Justice to be a member of the Constitutional Court he declined to do so. D.Q.M.Sirimanne, a District Judge serving as a Commissioner of Assize and about to be appointed as a Puisne Justice, was then invited by the Minister; he felt that as the most junior judge, his appointment to the Constitutional Court coupled with his appointment to the Supreme Court at the same time might be open to the criticism that he was being appointed for the purpose of hearing a particular case in which the Government had an interest.[3] Finally, on 22 January 1973, nearly six weeks after the three vacancies had occured, the President announced the appointments of Justice Pathirana; C.V.Udalagama, a District Judge; and T.A.de S.Wijesundera, a Deputy Solicitor-General; both of whom were then officiating as Commissioners of Assize. Not only the renewal of their short-term commissions, but also the question of their eventual promotion to the Supreme Court, were matters which were entirely in the discretion of the executive. Five days later, rules made by the Constitutional Court were gazetted. The reconstituted Court had been quite willing to formally approve a set of rules which had been prepared by the Legal Draftsman on the instructions of the Minister of Justice even before their appointment to the Court.[4]

---

1. National State Assembly Debates, 13 December 1972, col.1919.
2. Private information.
3. Letter dated 8 January 1973 from the Minister of Justice to the Prime Minister.
4. By letter dated 17 December 1972, the Minister of Justice forwarded to the Minister of Constitutional Affairs a copy of draft rules prepared by him. On 15 January 1973, the Legal Draftsman sent

The terms of office of the original appointees to the Constitutional Court and of the successors of some of them expired on 22 June 1976. The Minister of Justice, whose advice was sought by the Prime Minister, thought that "it is desirable that appointments be made as far as possible from among the serving Judges of the highest Court".[1] As he pointed out, this "will also represent a considerable saving of money to the State because, as serving Judges, they would not have to be remunerated separately for their services". He recommended the re-appointment of Justices Pathirana, Udalagama and Wijesundera.[2] In place of retired Judges K.D.de Silva and V.Siva Supramaniam, he recommended the appointment of Justice Tittewella, who had served as Permanent Secretary to the Ministry of Constitutional Affairs and Secretary to the Constituent Assembly, and Justice Vythialingam, since "it is very desirable to have on the Consti tutional Court a Tamil member to watch over special minority interests that may come up for consideration from time to time by the Constitutional Court". These five members were appointed on 23 June 1976 and held office until the Constitutional Court ceased to exist in September 1978. It was perhaps more than a coincidence that they were all removed from office when the Supreme Court was reconstituted that month in terms of the 1978 Constitution.

---

the Registrar of the Constitutional Court, with copy to the Minister of Constitutional Affairs, these draft rules duly approved by him. They were further amended on the suggestion of the Minister of Constitutional Affairs, and the final draft, also approved by the Attorney-General, was placed before the reconstituted Constitutional Court. See Letters dated 25 January 1973 from the Minister of Constitutional Affairs to the Minister of Justice; 30 January 1973 from the Minister of Constitutional Affairs to the Minister of Justice; and 23 January 1973 from the Secretary for Justice to the Prime Minister.

1. Letter dated 10 May 1976 from the Minister of Justice to the Prime Minister.

2. The two last named were appointed to the Supreme Court on 1 January 1974.

An Assessment

The legal safeguards designed to secure judicial independence are now more exhaustive than ever before; for the first time, there is even a chapter in the Constitution actually headed "Independence of the Judiciary". But these legal safeguards have not in the past prevented the executive from securing the removal or resignation of Judges; nor the legislature from proceeding to subject the judiciary to public attack; nor even the Prime Minister from ensuring the appointment, whenever he wished, of persons known to be politically sympathetic to him.

Unlike under earlier constitutional arrangements in Sri Lanka, the President is now both Head of State and Head of Government, and when he appoints Judges, he does so in his absolute discretion. Under the 1972 Constitution, the President acted on advice, and in tendering that advice in regard to judicial appointments, the Prime Minister invariably consulted the Minister of Justice. There ~~was~~ were, therefore, several opportunities for the exercise of caution and restraint. The Constitutions of a number of Commonwealth countries which have presidential executives, do not leave the matter of judicial appointments in the absolute discretion of the President. For instance, in Guyana, the Chancellor of the Court of Appeal and the Chief Justice of the High Court are appointed by the President "acting after consultation with the Minority Leader",[1] while the other Judges of these Courts are appointed by him "acting in accordance with the advice of the Judicial Service Commission".[2] In Nigeria, the Chief Justice is appointed by the President in his discretion "subject to confirmation of such appointment by a simple majority of the Senate",[3] while other Judges are appointed by him "on the advice of the Federal Judicial Service Commission subject to approval of such appointment by a simple majority of the Senate".[4] In Ghana, the President appoints the Chief Justice "acting in consultation with the Judicial Council",[5] and the other Judges

---

1. Constitution of the Co-operative Republic of Guyana 1980, Art.127(1).
2. Ibid., Art.128(1).
3. Constitution of the Federal Republic of Nigeria 1979, Art. 211(1). The Senate consists of five members elected from each State and one from the federal capital territory.
4. Ibid., Art.211(2).
5. Constitution of the Republic of Ghana 1979, Art.126(1).

"acting on the advice of the Judicial Council"[1] and with the approval of Parliament. Even where the President is empowered to appoint the Chief Justice in his discretion, some of the Commonwealth Constitutions require the President, when making other appointments to the Court, to act either on the advice of, or in consultation with, the Chief Justice or the Judicial Service Commission.[2] If the 1978 Constitution had contained a provision which required the President to consult the Leader of the Opposition before making judicial appointments, that might have served not only to caution the President to seek only "individuals of integrity and ability, well-trained in the law and its application",[3] but also to induce prospective judges and aspirants to higher judicial office to be more circumspect in their own conduct.

Influenced, no doubt, by British traditions, all three Constitutions under review have required an address of Parliament for the removal of a Judge. However, no resolution for the presentation of such an address may now be entertained by the Speaker unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament.[4] Having regard to the fact that in the 168-member present Parliament the total strength of the Opposition is only 26, no such resolution can, in fact, be submitted against any Judge by the Opposition,

---

1. Ibid.

2. See Constitutions of the United Republic of Tanzania 1977, Art.61(2): "after consultation with the Chief Justice"; Republic of Seychelles 1979, Art.67(2): "shall consult the Chief Justice"; Republic of the Gambia 1970, Art.90(2): "acting on the advice of the Judicial Service Commission"; Republic of Uganda 1967, Art.84(2): "acting in accordance with the advice of the Judicial Service Commission"; Republic of Botswana 1966, Art.97(2): "acting in accordance with the advice of the Judicial Service Commission"; Republic of Mauritius 1968, Art.77(3): "acting in accordance with the advice of the Judicial and Legal Service Commission"; Republic of Sierra Leone 1978, Art.113(2): "in accordance with the advice of the First Vice-President"; Republic of Kenya 1969, Art.61(2): "acting in accordance with the advice of the Judicial Service Commission"; Republic of Zambia 1973, Art.110(2): "acting in accordance with the advice of the Judicial Service Commission".

3. Draft Principles on the Independence of the Judiciary, op.cit.

4. Art.107(2).

however legitimate its grievance against such Judge may be. For instance, the three superior court Judges who served on the Presidential Commission of Inquiry could, in the course of that extra-judicial activity, have proceeded to castigate the political leaders of the Opposition with impunity, secure in the knowledge that the victims were powerless to retaliate. On the other hand, Parliament's power to remove Judges from office and the privilege it enjoys of commenting on their conduct, have both been misused and abused in the recent past, and it would today require extraordinary moral courage on the part of a Judge to free his mind of all but the clear stream of reason.

None of the Sri Lankan Constitutions have contained a provision which prohibited the abolition of a judicial office while there was a substantive holder thereof. The recent Constitution of Zimbabwe provides that:

> The office of a judge of the High Court shall not, without his consent, be abolished during his tenure of office. [1]

The even more recent Constitution of Belize provides that:

> The office of a justice shall not be abolished while there is a substantive holder thereof. [2]

Provisions similar to these are found in several other Commonwealth Constitutions as well. Had such a provision existed in the 1972 Constitution, it is possible that the course of Sri Lanka's judicial history might have taken a different turn. If such a provision is included in the present Constitution, it may assist Judges of the future in acquiring and retaining some of the essential attributes of judicial office.

The path to judicial independence, however, is not a single carriageway. If the Judges were to turn the searchlight inwards, would they not see, not only the beam in the eye of the executive, but also the mote in the eye of the judiciary ? for instance, it is essential if judicial independence were to be maintained, that "judges can and should decline to sit in cases where their independence may properly be called into question, whether or not so requested by one of the parties". [3] This principle, though scrupu-

---

1. Art.86(3).
2. Art.95(2).
3. Draft Principles on the Independence of the Judiciary, op.cit.

lously observed in the early years, has tended to be ignored in more recent times, particularly in matters to which the State is a party. In 1960, acting Justice Tambiah heard an application for a special jury made on behalf of the five persons accused of the murder of Prime Minister Bandaranaike. On the day on which he was due to make his order, Queen's Counsel appearing for two of the accused submitted that the Judge should refrain from dealing with the matter "as His Lordship was one of the speakers at a meeting held on the Bandaranaike Commemoration Day", two months previously. The Judge agreed that justice must not only be done, but must also appear to be done. Accordingly, he directed that the application be argued again before another Judge.[1] But in June 1973, when one of the petitioners questioning the constitutionality of the Associated Newspapers of Ceylon (Special Provisions) Bill before the Constitutional Court, submitted that the Chairman of that Court, Justice Pathirana, was disqualified from sitting on the ground of bias or the likelihood of bias, this principle was not applied. It was submitted that the Judge had, between 1960 and 1964, as a Member of Parliament, actively supported the introduction of legislation to either broadbase or take over this particular newspaper company. The Judge, however, insisted on sitting, and later held that the bill was not inconsistent with the Constitution inasmuch as it sought, inter alia, to give effect to the Principles of State Policy.[2] More recently, in January 1979, a Special Presidential Commission consisting of two Supreme Court Judges and one Judge of the Court of Appeal insisted on proceeding to hear evidence relating to a number of charges laid against the person noticed in respect of which they were the virtual complainants. Rejecting a plea of bias, the commissioners observed that since they were all Judges, they were quite capable of being "objective".[3]

---

1. Ceylon Daily News, 8 December 1960.
2. Affidavit of R.S.Wijewardene, dated 12 June 1973, filed in the Constitutional Court of Sri Lanka (Proceedings in the matter of Bill No.42 of 1973).
3. Proceedings of the Special Presidential Commission of Inquiry, January - July, 1979. See also Second Interim Report, op.cit., pp.132-134.

In the final analysis, it is not legal safeguards that secure the independence of the judiciary. The Government must have the strength of purpose and the will to respect the integrity of the Court, without seeking to make it conform to its own judgment of men and matters. A Judge must have the capacity, consciousness and inclination to act uninfluenced by fear and unbiassed by hope in matters concerning the rights and freedoms of the individual. When these attributes are present, the legal safeguards serve to buttress them. In their absence, the law serves as nothing more than an empty shell.

CHAPTER V

JUDICIAL REVIEW OF LEGISLATIVE ACTION

Judicial review of legislative action is an important element in the enforcement of fundamental rights. In the current debate in the United Kingdom on whether or not a bill of rights should be enacted, two alternative forms of review have been suggested.[1] One is to enable the judiciary to declare a law invalid which it holds to be repugnant to a protected right. This is a jurisdiction now being exercised by the Supreme Court in India and in the United States and by the Judicial Committee of the Privy Council in respect of several Commonwealth countries. The other is to enable a bill to be examined for repugnance before it is enacted. This function of anticipatory review was entrusted to the Federal Constitutional Court in Germany by the 1949 Basic Law; to the Constitutional Council in France by the 1958 Constitution; to the Minister of Justice in Canada by the 1960 Bill of Rights; and to the Senate Legal Committee in Zimbabwe by the 1980 Constitution. One of the suggestions made in the United Kingdom is that perhaps the Parliamentary Commissioner (or Ombudsman) could perform this task.[2] In Sri Lanka, provision has existed, under different Constitutions, for the ex post facto review of legislation as well as for the examination of bills for constitutionality. In this chapter it is proposed to examine the effectiveness of these two forms of review in ensuring the inviolability of fundamental rights.

---

1. For the debate in the United Kingdom, see Selected Bibliography, infra.

2. The Earl of Arran's Bill of Rights provided that: "The Parliamentary Commissioner shall examine every Bill introduced in or Statutory Instrument laid before either House of Parliament, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part of this Act, and he shall report any such inconsistency to both Houses at the first convenient opportunity": (Clause 3).

Ex Post Facto Review of Legislation

General Observations

Assumption of Jurisdiction

The 1946 Constitution did not specifically declare the right of a Court to inquire into and pronounce upon the validity of an Act of Parliament. Section 29(2), however, prohibited Parliament from legislating in respect of certain subjects; and any law made in contravention of that prohibition was declared by section 29(3) to be void. Section 29(4) required a bill for the amendment or repeal of any provision of the Constitution to bear a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of that House; presumably, such a bill which did not bear this certificate was also void.[1] Section 29(1) which authorised Parliament to make laws for "the peace, order and good government of the Island" was not regarded as a limitation clause; it denoted rather the plenitude of sovereign legislative power.[2] The Supreme Court did not consider itself competent to examine a statute to decide whether it was actually for the peace, order and good government of the country and if it was not, to pronounce it void. As it explained:

> To do so would be to negative the Sovereignty of Parliament which is limited only in the manner set out in the other subsections of section 29. To extend the scope of judicial review beyond that would be to place in the Courts a new power unrecognised by the Constitution at the expense of a power vested in Parliament by the Constitution.[3]

As early as 1951, a magistrate functioning as a revising officer of electoral registers refused to apply a law enacted by Parliament on the ground that it purported to deal with one of the subjects prohibited by section 29. He held that the Ceylon (Parliamentary Elections)(Amendment) Act, No.48 of 1949, which prescribed citizenship of Ceylon as a necessary qualification of an elector, and the Citizenship Act, No.18 of 1948, were invalid as offending section 29(2) of the Constitution, and that the operative law was

---

1. In Thambiayah v. Kulasingham (1948) 50 NLR 25 a pronouncewas made that a provision in the Parliamentary Elections (Amendment) Act, No.19 of 1948, was in conflict with s.13(3)(h) of the Constitution but had not been passed in the manner required by s.29(4) and was, therefore, void.
2. Bribery Commissioner v. Ranasinghe (1964) 66 NLR 73.
3. The Queen v. Liyanage (1962) 64 NLR 313, per T.S.Fernando J.

that contained in the original Order in Council of 1946 as it stood before it was amended. When the Attorney-General applied to the Supreme Court to have that order quashed, it was assumed by everyone concerned in that proceeding that the Court undoubtedly had jurisdiction to examine and pronounce upon the question whether a statute offended against section 29(2).[1] Ten years later, in Senadhira v. Bribery Commissioner,[2] the Supreme Court asserted its jurisdiction to strike down a law which offended against any other provision of the Constitution. In that case, it was held that the power given to a Bribery Tribunal appointed by the Governor-General on the advice of the Minister to convict, fine and imprison persons charged before it was unconstitutional inasmuch as such power being exclusively a judicial power, could be exercised only by a judicial officer appointed by the Judicial Service Commission in terms of section 55 of the Constitution.

Impugned Laws

The 1938 revised edition of the Legislative Enactments of Ceylon, which was in force at Independence, contained 337 statutes. Between its publication and Independence, a further 568 Ordinances had been enacted by the Governor with the advice and consent of the State Council. Accordingly, at Independence, approximately 905 statutes were in force. Between January 1948 and May 1972, Parliament enacted 1002 Acts. Therefore, under the 1946 Constitution, approximately 1907 statutes were in operation. Of these, only 26 statutes (or 1.3 per cent) were impugned during the twenty-five years that that Constitution remained the supreme law of the country. They were:

TABLE 22

STATUTES IMPUGNED UNDER THE 1946 CONSTITUTION

Statute	Number
Criminal Procedure Code	15 of 1898
Income Tax Ordinance	2 of 1932
Workmen's Compensation Ordinance	19 of 1934
Co-operative Societies Ordinance	16 of 1936

1. Mudannayake v. Sivagnanasunderam (1951) 53 NLR 25.
2. (1961) 63 NLR 313.

Statute	Number
Public Security Ordinance	25 of 1947
Commissions of Inquiry Act	17 of 1948
Citizenship Act	18 of 1948
Parliamentary Elections (Amendment) Act	19 of 1948
Army Act	17 of 1949
Ceylon (Parliamentary Elections) Act	48 of 1949
Industrial Disputes Act	43 of 1950
Muslim Marriage and Divorce Act	13 of 1954
Bribery Act	11 of 1954
Immigrants and Emigrants Act	16 of 1955
Prevention of Social Disabilities Act	21 of 1957
Motor Transport Act	48 of 1957
Industrial Disputes(Amendment)Act	62 of 1957
Official Language Act	33 of 1956
Bribery (Amendment) Act	40 of 1958
Ceylon Parliamentary Elections (Amendment) Act	72 of 1961
Criminal Law (Special Provisions) Act	1 of 1962
Imposition of Civic Disabilities (Special Provisions) Act	14 of 1965
Rent Restriction (Amendment) Act	12 of 1966
Industrial Disputes (Special Provisions) Act	37 of 1968

The Privy Council invalidated almost the entirety of the Criminal Law (Special Provisions) Act on the ground that it "constituted a grave and deliberate interference with the judicial power of the judicature".[1] The Supreme Court held that certain provisions of the Bribery Act,[2] Muslim Marriage and Divorce Act,[3] Licensing of Traders Act,[4] and the Co-operative Societies Act[5] were ultra vires section 55 of the Constitution. A District Court judgment of 1964, which was yet in appeal when the 1946 Constitution was superseded, found the Official Language Act to be in contravention of section

1. Liyanage v. The Queen (1965) 68 NLR 265.
2. Senadhira v. Bribery Commissioner, supra; Piyadasa v. Bribery Commissioner (1962) 64 NLR 385; Ranasinghe v. Bribery Commissioner (1962) 64 NLR 449.
3. Jailabdeen v. Danina Umma (1962) 64 NLR 419.
4. Ibrahim v. Government Agent, Vavuniya (1966) 69 NLR 217.
5. Karunatilleke v. Abeywira (1966) 68 NLR 503.

29(2) of the Constitution.[1] Apart from the last-mentioned, the legal validity of which was never authoritatively determined, none of the invalidated statutes were of any real social or economic significance in the life of the country.

Method of Challenge

Since no express power to pronounce upon the validity of legislation was conferred by the Constitution on a particular court, the aggrieved party was left to his own ingenuity in locating a suitable forum in which to ventilate his grievance and in choosing the manner of invoking the jurisdiction of that forum. Of the reported cases (excluding the instance of the revising officer already referred to), in all but one the forum chosen was the Supreme Court; the single exception being an application for a declaration filed in the District Court of Colombo. The unpopularity of the declaratory judgment was probably due to the fact that though a safe all-purpose remedy, it could only be obtained after a dilatory and protracted original court proceeding. The majority of the petitioners invoked the prerogative writ jurisdiction of the Supreme Court; certiorari being preferred to all the others. A few raised the issue of vires as a ground of appeal or by way of a defence in a criminal prosecution or election petition. The adequacy or otherwise of these remedies for this purpose is examined in the next chapter. However, the perils which some of the petitioners who relied on traditional or antiquated remedies such as these had to face may be noted at this stage.

In Don Anthony v. Bribery Commissioner,[2] the Supreme Court pointed out to an appellant who challenged the constitutionality of the Bribery Act that, while the argument presented by him was "not without attraction", it was not competent for him to attack as invalid the very Act of Parliament which alone conferred on him the right of appeal. It was the Court's view that "any relief on the ground of the invalidity of the Act must be found by a process other than appeal". Six months later, the Supreme Court ignored its earlier decision and upheld an appellant's submission that a Bribery Tribunal established under the Bribery Act was an unconstitutional body and that all proceedings before it were null and void.[3]

---

1. Kodeeswaran v. Attorney-General, D.C.Colombo 1026/Z.
2. (1962) 64 NLR 93.
3. Piyadasa v. Bribery Commissioner, supra.

Shortly thereafter, one of the two Judges who participated in the Don Anthony decision declared that he "no longer adheres to the opinion I had formed when Don Anthony's case was decided".[1] He explained that "it was through a misconception" that the Court assumed that a questioning of the power of a Bribery Tribunal to adjudicate upon a charge of bribery involved a questioning of the validity of the entire Act under which the tribunal was established. He clarified that although counsel for the appellant in Don Anthony thought he was challenging the validity of the entire legislation, or rather that he had to make such a wholesale challenge, "he could well have been content to challenge merely the constitution of the particular tribunal which tried the case, on the quite narrow ground that the persons functioning as the 'judges' on that tribunal had not been duly appointed to judicial office".

In Suntheralingam v. Inspector of Police,[2] the Privy Council refused to permit the appellant to raise an argument on vires which he had not previously taken in the Supreme Court since "so fundamental a question as one which concerned the constitutional validity of the 1957 Act under the 'free exercise of religion' provision of the Constitution, could not be entertained in the absence of any consideration of it by the Courts of Ceylon, and without the necessary evidence as to what is comprised in Ceylon within the phrase 'the free exercise of religion' ".

In Weerasinghe v. Samarasinghe,[3] the brother of a detenue held in custody under emergency regulations applied for a writ of mandamus on the chairman of the advisory committee established under those regulations, directing him to inform the detenue of the grounds on which he was detained and to furnish the detenue with such particulars as would be sufficient to enable him to make his objections against the detention order. The petitioner also moved for a writ of habeas corpus and submitted that the emergency regulations were invalid inasmuch as the Public Security Ordinance under which they were made was ultra vires the power of Parliament under the Constitution. The Court examined the constitutional arguments and held the impugned Ordinance to be intra vires. But,

---

1. Ranasinghe v. Bribery Commissioner, supra, per H.N.G.Fernando J.
2. (1966) 68 NLR 361.
3. (1971) 74 NLR 457.

as the Court pointed out:

> Regulation 26(10) takes away the power of this Court to issue a writ of habeas corpus during the emergency and that is the final answer to the application for that writ.

In regard to mandamus, the Court pointed out that the petitioner "has no status to make the application, because no duty is owed to him by the chairman of the advisory committee".

In Attorney-General v. Kodeeswaran,[1] a public officer who successfully impugned the Official Language Act in the District Court in an action instituted against the Attorney-General for a declaration that he was entitled to be paid an increment denied to him because he had not passed a test in the official language, had his action dismissed by the Supreme Court on the ground that in Ceylon a public servant had no right to sue the Crown for recovery of wages claimed to be due for service under the Crown.

In Kariapper v. Wijesinghe,[2] the substantive question before the Supreme Court was the validity of the Imposition of Civic Disabilities (Special Provisions) Act in terms of which the petitioner, a Member of Parliament, forfeited his seat in Parliament. He was one of six persons named in the schedule to the Act to whom alone the Act applied, being persons who had previously been found guilty of bribery by a commission of inquiry. The petitioner brought the question before the Supreme Court by praying for a writ of mandamus against the Clerk to the House of Representatives, ordering him to recognise him as a Member of Parliament and to pay him his remuneration and allowances as such member. The Privy Council observed:

> The unusual procedure which the appellant adopted to obtain a decision upon the validity of the Act - which, not surprisingly, has turned out to be a source of difficulty - was followed because, strangely enough, it seemed the only way to bring the question of the validity of the Act directly before the Supreme Court.

But the Supreme Court and the Privy Council both felt obliged to uphold the preliminary objection that "a person cannot ask for mandamus against a public officer to pay him money which the latter holds as a servant of the Crown". Accordingly, the procedure adopted was considered "inappropriate".

---

1. (1967) 70 NLR 121.
2. (1966) 68 NLR 529.

Principles of Interpretation

The Supreme Court agreed that in the interpretation of the Constitution, special considerations had to be applied. For instance, if the question arises whether a term in the Constitution should be read in a narrow sense or should be given a broader interpretation, the Court should be inclined to use it in the latter sense unless there is something in the context which militates against such view.[1] Although the Constitution had been "framed in the light of existing legislation and the constitutional development of the country as it existed in 1947", it was intended to apply to varying conditions brought about by later developments.[2] Alles J explained that "this does not mean that the meaning of the legal expression changes, but having regard to its generic form it is capable of being adapted to new situations".[3] He cited with approval the language of Lord Wright who tendered the advice of the Privy Council in James v. The Commonwealth of Australia:

> It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissititudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.[4]

But the Court was cautious. In applying the provisions of the Constitution, a presumption was always recognised in favour of the validity of a legislative enactment; the Court would not rule such enactment to be ultra vires unless the invalidity was clear beyond doubt.[5] Often quoted with approval was the principle set out by Isaacs J in Federal Commissioner of Taxation v. Munro:

> It is always a serious and responsible duty to declare invalid regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its

---

1. Peiris v. Perera (1968) 71 NLR 481, at 490.
2. Ibid., at 491.
3. Ibid.
4. [1936] AC 478.
5. per Alles J in Peiris v. Perera, supra. See also Sirimanne J in Tuckers Ltd v. Ceylon Mercantile Union (1970) 73 NLR 313, at 316.

> propriety or expediency - as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us - the question is: 'Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers ?' It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim Ut res magis valeat quam pereat. Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.[1]

Another principle which the Supreme Court enunciated was that a pronouncement upon the constitutional validity of a statute should not be made unless a decision as to validity was essential for the purposes of the case actually before it. H.N.G.Fernando CJ not only applied this principle in Attorney-General v. Kodeeswaran,[2] to avoid examining the vires of the Official Language Act; in Perera v. Peiris,[3] a previous pronouncement of a Divisional Bench made twenty-one years previously with which he disagreed was declared to be obiter and made per incuriam for the reason that the attention of that Court had not been drawn to this principle. In other words, if a case could be decided on one of two grounds, one involving a constitutional question and the other a question of statutory construction or general law, the Court will decide only the latter.

A third principle of general application was that in examining an enactment with reference to any alleged constitutional invalidity, the Court must strive to reach a conclusion which will render the will of the legislature effective, or as effective as possible.[4] As a corollary, the Court would be entitled to sever an "offending" provision from the remaining provisions of the Act.[5]

Within this threshold, the Supreme Court was willing to search for the "pith and substance" or the "true nature and character" of a statute, rather than adopt a "blind adherence to a strictly

---

1. (1926) 38 CLR 153, at 180.
2. Supra.
3. (1969) 72 NLR 217, at 222.
4. Senadhira v. Bribery Commissioner, supra; Kariapper v. Wijesinghe, supra; Peiris v. Perera, supra; Suntheralingam v. Inspector of Police, Kankesanturai (1970) 74 NLR 457.
5. Thambiayah v. Kulasingham, supra; Ismail v. Muthu Marliya (1963) 65 NLR 431.

verbal interpretation":[1]

> In considering whether a particular piece of legislation is within the permitted field it is I think the duty of the Courts to look at the substance of what has been done and not merely at the form which particular subsections have taken.[2]

For this purpose, the Court was prepared to look at the background to legislation, including White Papers and other matters extraneous to the legislation itself; in other words, at the general legislative scheme.[3] The Privy Council thought that judicial notice ought to be taken of such matters as the reports of parliamentary commissions and of such other facts as must be assumed to have been within the contemplation of the legislature when the impugned Act was passed:

> There may be circumstances in which a statute though framed so as not to offend directly against a constitutional limitation of the power of the legislature may indirectly achieve the same result. In such circumstances, the statute would be ultra vires.[4]

The fact that the legislature had no intention to violate the Constitution, or that it was beset by a grave situation and it took grave measures to deal with it, thinking that it had the power to do so and was acting rightly, would be irrelevant and would give no validity to Acts which infringed the Constitution.[5]

Nevertheless, the Court was always conscious that the legislature must not be unduly hampered in the performance of its own functions. It was prepared to look at the statute as a whole and not at a particular section isolated from its other provisions.[6] It was not prepared to declare a statute void because it was said to offend against the spirit of the Constitution.[7] It recognised that the Court's sole function was to interpret a constitutional description of power or restraint upon power and to say whether a given measure fell within one side of a line or on the other and had nothing whatever to do with the merits or demerits of that measure. When invited to say that once a provision of an Act of

---

1. Kodakkan Pillai v. Mudannayake (1953) 54 NLR 433; Meera v. Dias (1957) 58 NLR 571; Liyanage v. The Queen, supra; Ranasinghe v. Bribery Commissioner, supra; Walker Sons & Co Ltd v. Fry (1965) 68 NLR 73.

2. Tuckers Ltd v. Ceylon Mercantile Union, supra, per Tennekoon J.

3. Ibid., per Weeramantry J.

4. Kodakkan Pillai v. Mudannayake, supra. See also Senadhira v. Bribery Commissioner, supra; Bribery Commissioner v. Ranasinghe (1964) 66 NLR 73; Anthony Naide v. Ceylon Tea Plantation Co Ltd (1966) 68 NLR 558.

5. Liyanage v. The Queen, supra. 6. Tuckers Ltd v. CMU, supra.

7. Kariapper v. Wijesinghe, supra.

Parliament had been declared to be ultra vires, the Court would not again review the correctness of its previous decision, H.N.G. Fernando CJ emphasized that:

> If accepted, the proposition will tend to place the Judiciary in a position of obstructive opposition to the Legislature, which is not the position which the Judiciary in my understanding occupies under our Constitution.[1]

These then were the rules of interpretation which the Supreme Court would apply to a statute which was alleged to have infringed a group right protected by the Constitution. It was not a daringly assertive approach; nor was it unduly conservative. The Court was prepared to enforce the provisions of the Constitution in a manner which would not seriously disrupt the orderly conduct of governmental business.

Enforcement of Fundamental Rights

Freedom of Religion

Section 29(2)(a) of the Constitution provided that no law shall prohibit or restrict the free exercise of any religion, while section 29(2)(d) provided that no law shall alter the constitution of any religious body except with the consent of the governing authority of that body. To the extent that Parliament's legislative power was thus limited, freedom of religion was protected. The Prevention of Social Disabilities Act, No.21 of 1957, sought to prevent, particularly in the northern province, the imposition of social disabilities on persons by reason of their caste. Any person who imposed any social disability on any other person on the ground of such other person's caste was guilty of an offence punishable with imprisonment or fine (s.2). A person was deemed to impose a social disability on any other person if he, inter alia:

> prevents or obstructs such person, being the follower of any religion, from or in entering, being present in, or worshipping at any place of worship to which followers of that religion have access (s.3(b)).

Entry into the Hindu temple at Maviddapuram had always been determined by usage and custom. Accordingly, Hindus of inferior castes were denied entry into or beyond the inner courtyard and worshipped only from outside. Attempts by them to secure religious

---

1. Perera v. Peiris (1969) 72 NLR 217, at 223.

equality with Hindus belonging to higher castes invariably led to violent caste confrontations. On 1 July 1968, C.Suntheralingam, a former professor of mathematics and ex-cabinet minister, acting with the authority of the high priest, prevented one Sinniah, also a Hindu by religion but socially of a lower caste, from entering the inner courtyard for the purpose of worshipping. He was charged with, and convicted of, an offence under section 2 (read with section 3(b)), of the Prevention of Social Disabilities Act.

On appeal, Suntheralingam argued that his intervention was necessary to prevent defilement of the temple by the entry of a person of low caste; if there had been such defilement, poojas could not thereafter be performed in that temple. Accordingly, he argued that section 3(b) had the effect of altering the constitution of a religious body. This submission appeared to have been misconceived. As H.N.G.Fernando CJ pointed out:

> The question whether some person may or may not enter, or be prevented from entering, premises controlled by a religious body, is not one which relates to the 'constitution' of that body. Section 29(2)(d) would, in my opinion, apply only to a law which purports to alter the mode by which a religious body is elected, appointed or otherwise set up, or to commit any power or function of such a body to some other person, or to change the principles governing the relationship inter se of members of the body.[1]

But did section 3(b) constitute a restriction on the free exercise of the Hindu religion in accordance with its usages and customs by requiring high-caste Hindus to kneel and pray on the same courtyard with those of inferior castes ? A "religion" is not merely a doctrine or belief; it includes rituals and observances, ceremonies and modes of worship.[2] Therefore, if the mode of worship at Maviddapuram temple, as regulated by usage and custom, entitled only high caste Hindus to enter the inner courtyard, would not the insistence on the entry of Hindus of inferior castes to that inner courtyard restrict the free exercise of religion in that temple ? Amerasinghe submits that a provision similar to section 3(b) would be in keeping with the needs of public morality and should be regarded as outside the prohibition of section 29(2)(a) on the basis that

---

1. Suntheralingam v. Herat (1969) 72 NLR 54, at 55.
2. Commr.,H.R.E.,Madras v. Swamiar, AIR 1954 SC 182, at 290.

there is implied in the latter section a power of Parliament to interfere with the exercise of religion in the interests of public order, morality and health.[1] But whether such an implied power ought to have been read into section 29(2)(a) which was a mid-twentieth century enactment in clear and absolute terms, on the authority of the interpretation placed by the United States Supreme Court on the American Constitution which contains one of the earliest formulations of fundamental rights, or whether the "free exercise of religion" meant that

> with man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted,[2]

were questions which were not judicially examined or pronounced upon since Suntheralingam's belated attempt to base an argument on section 29(2)(a) at the final stage of appeal was disallowed by the Privy Council.

Freedom from Discrimination

Sections 29(2)(b) and (c) prohibited Parliament from conferring any privilege or advantage, or from imposing any disability or restriction, on persons of any community or religion, which was not conferred or imposed on persons of other communities or religions. To the extent that Parliament was thus limited in the exercise of its legislative power, freedom from discrimination was sought to be achieved. These two provisions were invoked only in respect of the three subjects which are examined below.

1. Citizenship and Franchise. At Independence, persons living in Ceylon were either British subjects or aliens. At the first general election conducted under the 1946 Constitution, which preceded Independence by approximately six months, a British Subject who had reached the age of twenty-one years and who had resided in an electoral district for a continuous period of six months in the immediately preceding eighteen months, was entitled to vote in that electoral district:

a) if he was domiciled in Ceylon: in the case of a person who did not possess a Ceylon domicile of origin, domicile was deemed to have been acquired by a total period of five years' residence; or

---

1. C.F.Amerasinghe, The Doctrines of Sovereignty and Separation of Powers in the Law of Ceylon (Colombo: Lake House Investments Ltd, 1970), pp.47-8.

2. Davis v. Beason, 133 US 333, at 342, per Field J.

b) if he satisfied a basic literacy and property qualification; or
c) if he was in possession of a certificate of permanent settlement which was issued upon proof that a person had been continuously resident in the island for a period of not less than five years (exclusive of temporary absences not exceeding a total of eight months during such period) with intent to settle therein or was permanently settled.

These enabling provisions were contained in sections 4, 5, 6 and 7 of the Ceylon (Parliamentary Elections) Order in Council 1946.[1] They were applied, for the purpose of determining the electorate, on a total population comprised as follows:

TABLE 23
TOTAL POPULATION 1946

Race	Population	Percentage
Low Country Sinhalese	2,903,000	43.6
Kandyan Sinhalese	1,718,000	26.0
Indian Tamils	781,000	11.7
Ceylon Tamils	734,000	11.0
Burghers and Eurasians	42,000	0.6
Indian Moors	36,000	0.5
Malays	23,000	0.4
Others (including Europeans and Veddhas)	49,000	0.6
Total	6,657,000	100.0

Source: Ranasinghe, A.G., Census of Ceylon 1946 (Colombo: Government Press, 1951).

Of the major communities resident in Ceylon, the Indian Tamils were the most recent in origin. Their presence was inextricably linked with the plantation economy of the country.

> Plantations organised on rational economic lines generally called for a regular and disciplined labour force to prepare the land for the crop, to nurture it, and to gather it. To the vast majority of the Sinhalese, being proletarian workers of this sort was unpalatable. Such an occupat-

1. Government Gazette, 26 September 1946. For relevant extract, see G.P.S.H.de Silva, A Statistical Survey of Elections to the Legislatures of Sri Lanka 1911-1977 (Colombo: Marga Institute, 1979),p.15.

> ion carried low status in the Sinhalese value system . . . The wage inducements offered by the planters were rarely sufficient to overcome their aversion to serving as mere hired labourers. At the outset, however, during the period dating from about 1820s to the early 1840s, the coffee planters were able to employ some local labour, both that of Kandyan Sinhalese and that of migrant low-country Sinhalese. But it was fitful in supply. And this meagre supply soon petered out. [Therefore] for their regular crop-bearing and crop-gathering labour force, the planters began, for the most part, to look to South India.[1]

At first, the South Indian estate labourers were migrants rather than immigrants. The maximum supply of labour was needed only during the two-to-four month coffee harvest season; at other times, the plantations needed only one-half to one-third the labour force.[2] With the rapid decline of the coffee industry and the establishment of tea plantations which required a constant supply of labour throughout the year, the Indian population increased to approximately 123,000 by 1871, 195,000 by 1881, and 235,000 by 1891.

> By that stage, if not earlier, some of the labourers were tending to settle down. More women were joining the inflow. The economy was buoyant. There was reason to turn immigrant.[3]

The importation of South Indian labour continued into the twentieth century and throughout the first three decades of that century, during which instead of seasonal arrivals, the trend was towards permanent or semi-permanent settlement.[4]

If the influx of South Indian labour upset the equilibrium of Ceylonese society in the central highlands by introducing a foreign element that either refused or failed or was not permitted to assimilate, the opening of large and extensive plantations also created other problems. Through legal devices, such as the Crown Lands Encroachment Ordinance No.12 of 1840, the Temple Lands Registration Ordinance No.10 of 1856, the Partition Ordinance No.10 of 1863, and the Grain Tax, vast tracts of land were placed at the disposal of British planters, and the Kandyan peasantry was either hemmed in or forced out to the periphery of the expanding plantations.[5]

---

1. Michael Roberts, "Export Agriculture in the Nineteenth Century", History of Ceylon, at p.98.
2. Ibid., at 100.
3. Ibid., at 101.
4. Ibid.
5. For a detailed account, see Michael Roberts, "Land Problems and Policies, c.1832-c.1900", History of Ceylon, Vol.3, pp.119-145.

The plight of the peasant was expressed very graphically by Hector Kobbekaduwa, himself a Kandyan, when he introduced the Land Reform Bill in the National State Assembly:

> To the peasant the presence of the White Sahib in his neighbourhood was an earthquake in his life. It was an era of living horror. The heart of the village became bits of merry England. Secured with gates and fences, armed with guns and bullets and with horses and whips, the White Sahib became a king and acted on the maxim that the king can do no wrong. He denied access to the villager and on anyone who trespassed was inflicted the most brutal punishment. Government servants were at his beck and call and they trembled in his presence. The White Sahib lived a life of noisy debauchery in our country and the neighbouring villages were repositories of his excess sensuality and are today living monuments of European bastardy.[1]

The problems created by the importation of South Indian labour, whether social, economic or political, were equally sensitive and emotional. They survived until Independence. As Kobbekaduwa was to exclaim, as recently as 1975:

> With political agitation in 1931 and with universal franchise, the constitution makers thought that the inarticulate peasantry should have their own representatives. But unfortunately in the hill country, the change was from clay to fire. The Peri Sunderams, Vythialingams, Natesa Iyers and Fellowes-Gordons, and later the Thodamans and Jesudasans and other political adventurers, were swept into power in our areas through the Indian votes. It was a hopeless situation for us. We screamed for justice. Our appeal fell on deaf ears and our written petitions went into the dust bins.[2]

He was referring to the 1947 general election. At that election, of a total electorate of 3,048,145 (of whom, 211,915 were Indians resident on estates), 1,887,364 voted to elect 95 members to the first House of Representatives. The distribution of seats by communities was as follows:

Sinhalese	... 68
Ceylon Tamils	... 13
Indian Tamils	... 7
Muslims	... 6
Burghers	... 1

The votes polled and the candidates returned by the political

---

1.National State Assembly Debates, 10 October 1975.
2.Ibid.

parties are indicated in Table 9.[1] A closer analysis of those figures is more revealing. The 211,915 registered Indian Tamil voters constituted more than 10 per cent of the total number of voters in as many as 28 electorates. In six of them, essentially Kandyan electorates, where the Indian Tamils accounted for more than 50 per cent, all but one returned candidates of the Ceylon Indian Congress. In the remaining twenty-two Sinhalese constituencies, the Indian Tamil vote helped to elect fifteen left-wing opposition members (six LSSP, one BLP, one CP, one CIC and six Independents) as against eleven who eventually supported the UNP Government (eight UNP, one LP and two Independents):

TABLE 24

IMPACT OF INDIAN TAMIL VOTE
AT 1947 GENERAL ELECTION

Electorate	Percentage of Indian Tamil voters	Party elected
Talawakele	79.5	CIC
Maskeliya	60.6	CIC
Nuwara Eliya	59.0	CIC
Haputale	57.0	UNP
Kotagala	53.6	CIC
Mawalapitiya	51.1	CIC
Badulla	42.2	CIC/LSSP
Bandarawela	26.6	Ind.
Gampola	26.1	UNP
Minipe	25.6	Ind.
Balangoda	23.8	UNP
Maturata	22.9	UNP
Alutnuwara	21.1	Ind.
Galaha	18.4	UNP
Dehiowita	18.0	LSSP
Matale	17.9	Ind.
Niwitigala	17.7	LSSP
Ruwanwella	17.2	LSSP
Welimada	17.1	Ind.
Colombo Central	15.6	LP/UNP/CP
Dambulla	13.8	Ind.
Buttala	13.0	UNP
Agalawatte	12.2	LSSP
Kiriella	12.2	LSSP
Matugama	11.5	Ind.
Mannar	10.8	Ind.
Colombo South	10.6	UNP/BLP
Kandy	10.4	UNP

1. Supra, p.50.

It is against this background that the laws relating to citizenship and franchise were enacted.

The Citizenship Act, No.18 of 1948, which received the Royal Assent on 21 September 1948, created the status of citizen of Ceylon which could be acquired by right of descent or by virtue of registration in the following manner:

1. A person born in Ceylon before the appointed date (15 November 1948) was a citizen by descent if -
   (a) his father was born in Ceylon, or
   (b) his paternal grandfather and paternal great-grandfather were born in Ceylon.[1]
2. A person born outside Ceylon before the appointed date was a citizen by descent if -
   (a) his father and paternal grandfather were born in Ceylon, or
   (b) his paternal grandfather and paternal great-grandfather were born in Ceylon.[2]
3. A person born in or outside Ceylon on or after the appointed date was a citizen by descent if at the time of his birth his father was a citizen of Ceylon.[3]
4. A person may be registered as a citizen if -
   (a) he is of full age and of sound mind, and
   <u>either</u> (b) his mother is or was a citizen by descent or would have been if she had been alive on the appointed date, and
   (c) he, being married, has been resident in Ceylon throughout the immediately preceding seven years, or being unmarried, has been so resident for a period of ten years;[4]
   <u>or</u> (d) he is the spouse or the widow or widower of a citizen, and
   (e) he has been resident in Ceylon throughout the immediately preceding one year;[5]
   <u>or</u> (f) he is a person who ceased to be a citizen by descent upon acquiring citizenship of another country and has thereafter renounced that citizenship;[6]

---

1. S.4(1)
2. S.4(2).
3. S.5, provided that such birth is registered at the appropriate consular office or at the office of the Minister in Ceylon.
4. S.11(1)(b). For further enabling provisions, see s.4 of the amending Act, No.40 of 1950.
5. Ibid.
6. Ibid. Repealed by Act No.40 of 1950.

or (g) he is a person who has rendered distinguished public service or is eminent in professional, commercial, industrial or agricultural life, but is otherwise ineligible to apply for citizenship by registration;[1]

and (h) he is, and intends to continue to be, ordinarily resident in Ceylon.

The citizenship law was extremely rigid. Firstly, there was no provision for citizenship to be acquired by birth within the country. The Constitution of India which came into force on 26 January 1950 but which was being drafted at the same time as the Citizenship Act, contained the following provision:

> At the commencement of this Constitution, every person who has his domicile in the territory of India and -
> (a) who was born in the territory of India; or
> (b) either of whose parents was born in the territory of India; or
> (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement,
> shall be a citizen of India.[2]

Such a provision, if incorporated in the Citizenship Act, would have granted the status of citizen of Ceylon to practically everyone who enjoyed the franchise at Independence. Secondly, the concept of "Commonwealth Citizen" was not recognised as it is today in most Commonwealth Constitutions. No distinction was drawn between citizens of other Commonwealth countries, including India and Pakistan, and aliens, and an equally stringent and almost insurmountable barrier was placed in the way of such persons seeking citizenship by registration. Finally, while the status of a citizen of Ceylon was accorded to a citizen by descent as well as a citizen by registration, the latter was a less secure category than the former. For instance, a citizen by registration who had renounced his citizenship was not entitled to resume his citizenship; he also ceased to be a citizen if he resided outside Ceylon (except for certain specified purposes) for five consecutive years. Additionally, citizenship by registration might be terminated by the Minister in specified circumstances.[3]

---

1. S.12. 2. Art.5.

3. Ss.8, 23, 24. For other differences between the two categories of citizens, see L.L.T.Peiris, The Citizenship Law of the Republic of Sri Lanka (Colombo: Dept. of Govt. Printing, 1974), pp. 45-46.

W.T.Jayasinghe, who was for many years Secretary of the ministry in charge of citizenship, conceded the stringency of the qualifications for Sri Lankan citizenship, but adds:

> This was inevitable in the context of the special political situation confronting Sri Lanka. It must be kept in mind that Sri Lanka had to deal with the special problem arising from the Indian immigrant labour, who constituted as much as one-eighth of the total population of the Island.[1]

L.L.T.Peiris, a former assistant secretary in the citizenship division of the ministry, is of the same view:

> The restrictive nature of the Ceylon law is attributable to the fact that, at the time the Act was passed, nearly one million persons living in Ceylon, out of the total population of approximately ten million, were persons who had immigrated to Ceylon in recent times and their absorption would have adversely affected the interests of the indigenous population. It was apparently for this reason that no provision was made for the acquisition of citizenship by birth and acquisition by descent was restricted to persons who could show their ties with the country for at least two generations.[2]

It is clear, therefore, that the Citizenship Act was designed to exclude from its purview as many of the persons of Indian origin living and working in Sri Lanka as was possible.

The Indian and Pakistani Residents (Citizenship) Act, No.3 of 1949, received the Royal Assent on 28 February 1949 and was brought into operation on 15 August 1949. It resulted from discussions held between the Prime Ministers of Ceylon and India and was described in its long title as "An Act to make provision for granting the status of a citizen of Ceylon by registration to Indians and Pakistanis who have the qualification of past residence in Ceylon for a certain minimum period". The main requirements for the grant of citizenship under this Act were:

(a) the applicant should be of Indian or Pakistani origin and have emigrated therefrom and permanently settled in Ceylon;[3]

---

1. W.T.Jayasinghe, Tamils in Sri Lanka (Colombo: Dept. of Govt. Printing, 1976), p.14.

2. Peiris, The Citizenship Law, supra, at p.6.

3. The rigour of this requirement was to a great extent minimised by the Supreme Court which held that although the concept of "permanent settlement" involved two elements - the fact of residence and the intention permanently to remain in Ceylon - the requisite intention was satisfactorily established by the applicant's positive

(b) the applicant, if married, should have been uninterruptedly resident in Ceylon since 1 January 1939, or if married, since 1 January 1936. Resident in Ceylon, notwithstanding occasional absence, was deemed to have been uninterrupted only if such absence did not on any one occasion exceed twelve months in duration;

(c) in the case of a married male applicant, his wife and minor children, if any, should also have been ordinarily resident in Ceylon;

(d) the applicant should have possessed an assured income of a reasonable amount or had some suitable business or employment or other lawful means of livelihood; and

(e) the application should have been made within the period of two years specified, i.e. between 15 August 1949 and 14 August 1951.

Although about 90 per cent of the Indian estate population applied for registration under this Act, only 134,316 were granted citizenship; 975,000 remained "stateless".[1]

The coup de grace was administered by the Ceylon Parliamentary Elections (Amendment) Act, No.48 of 1949 (hereinafter referred to as the "Franchise Act"), which received the Royal Assent on 24 November 1949. It provided that only a citizen of Ceylon shall be entitled to the franchise. As Gratiaen J observed, this Act "had the effect of disfranchising many Indian Tamils (and indirectly their descendants) in spite of their long residence in Ceylon".[2]

In July 1951, a revising officer appointed under the Franchise Act upheld a submission made on behalf of an Indian Tamil that both the Franchise and Citizenship Acts were invalid as offending against section 29(2) of the Constitution. In September of that year, in the case of Mudannayake v. Sivagnanasunderam,[3] the Government brought before the Supreme Court the order of the revising officer

---

decision to claim registration with a "clear understanding" of its implications. Once the practical tests prescribed by the Act had been satisfied, it was not necessary to decide inferentially whether or not the applicant might be presumed to have acquired a domicil of choice in Ceylon: per Gratiaen J in Duraiswamy v. Commissioner for Registration of Indian and Pakistani Residents (1955) 56 NLR 313.

1. Jayasinghe, Tamils, supra, pp.14-15.
2. Duraiswamy, supra, at 316.
3. (1951) 53 NLR 25.

and sought, by way of certiorari, to have it quashed. As the bench of three Judges observed in their judgment, "the substantial question" to be decided was whether the Franchise Act read with the Citizenship Act, "is void as offending section 29" of the Constitution. It would be void only if it discriminated against or in favour of one community to the exclusion of the other communities in the island. It was not disputed that the Indian Tamils were a contemplated "community"; nor that the Citizenship Act conferred a "privilege" or an "advantage" on those who are or became citizens of Ceylon.

The Supreme Court rejected as irrelevant three affidavits tendered on behalf of the Indian Tamil, Kodakkan Pillai, which dealt with the history of Indian immigration into Ceylon and the position of Indian residents under the two impugned statutes. In the view of the Court, the substance or the true nature and character of a statute ought not to be searched for among State papers and other political documents when the language of the statute was clear and unambiguous and could speak for itself. Accordingly, the Court held that the two statutes in question did not upon their faces make the Indian Tamil community liable to any disability to which other communities were not liable. Jayatilleke CJ observed thus:

> When the language of sections 4 and 5 is examined it is tolerably clear that the object of the legislature was to confer the status of citizenship only on persons who were in some way intimately connected with the country for a substantial period of time. With the policy of the Act we are not concerned, but we cannot help observing thatit is a perfectly natural and legitimate function of the legislature of a sovereign country to determine the composition of its nationals. . . . Can it be said that these two provisions, the words of which cannot in any shape or form be regarded as imposing a communal restriction or conferring a communal advantage, conflict with section 29 of the Constitution ? This is the simple question for our decision. [1]

Did the Court direct itself properly when it reduced the "substantial question" for decision down to such simple terms ? The legislative power of Parliament was limited by section 29(2) of the Constitution. Therefore, if, as the Court found, the object of the Citizenship Act was to confer the privilege of citizenship

---

1. Ibid., at 44.

only on persons who were able to establish an intimate connection with the country "for a substantial period of time", it is submitted that the relevant question the Court should have asked itself was whether that requirement would result in making persons of any community already resident in the country liable to a disability to which persons of other communities were not made liable; if it did, for the reason that a particular community would not have been able to establish the specified two-generation link with the country, section 29(3) required that provision of law to be invalidated. It would be naive to expect the answer to that question to be apparent on the face of the law.

The Supreme Court asked:

> When an enactment is put into force one community may be affected by it more adversely than another. A high income or property qualification may affect more adversely the voting strength of one community than another. Would that be discrimination ?[1]

It is submitted that if the high income or property qualification had the effect of excluding persons of one community from the electoral register, it would indeed be discriminatory. In fact, in this case, the record contained an uncontradicted affidavit to the effect that:

> 9. The vast majority of the present Indian immigrant population came to Ceylon long after the year 1852 and though a large number of the members of the community have been born in Ceylon yet their parents were not born in Ceylon. In the case of the Indian community, unlike in the case of the Sinhalese and the Ceylon Tamil communities, the fathers of the persons who belong to this community have not been born in Ceylon as immigration of Indian labour commenced only in 1852. Hence the Ceylon Citizenship Act while it confers the status of a Ceylon citizen on all members of the Sinhalese and Ceylon Tamil communities fails to confer that status on by far the vast majority of the members of the Indian community settled in Ceylon,

But the Supreme Court thought that:

> To embark on an inquiry, every time the validity of an enactment is in question, into the extent of its incidence, whether for evil or for good, on the various communities tied together by race, religion or caste, would be mischievous in the extreme and throw the administration of Acts of the legislature into confusion.[2]

However inconvenient individual Judges may have found that task,

---

1. Ibid., at 46.
2. Ibid.

section 29(2) required the Supreme Court, when its jurisdiction was properly invoked, to embark on precisely such an inquiry and to determine whether a law made persons of one community liable to a disability or restriction to which persons of other communities were not made liable. For that purpose, if it was necessary to do so, the Court should have travelled outside the language of the impugned statute and taken evidence as to whether or not, in its ultimate effect, it was of a discriminatory character. But Jayatilleke CJ thought that to do so would be "a fundamental error". Instead, he simply looked at the face of the statute and concluded that:

> the facts which qualify or disqualify a person to be a citizen or voter have no relation to a community as such but they relate to his place of birth and to the place of birth of his father, grandfather or great grandfather which would equally apply to persons of any community.

On appeal, the Privy Council looked for the "pith and substance" or the "true character" of the impugned statutes. When read along with the Indian and Pakistani Residents (Citizenship) Act, the Privy Council thought that the three statutes constituted a "legislative plan", and when that plan was looked at as a whole it was evident that "the legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the Island". The Privy Council asked the question whether what was before it was legislation on citizenship or legislation intended to make and making Indian Tamils liable to discrimination to which other communities were not liable, and answered thus:

> It is . . . a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals. Standards of literacy, of poverty, of birth or of residence are as it seems to their Lordships standards which a legislature may think it right to adopt in legislation on citizenship and it is clear that such standards though they may operate to exclude the illiterate, the poor and the immigrant to a greater degree than they exclude other people do not create disabilities in a community as such since the community is not bound together as a community by its illiteracy, its poverty or its migratory character but by its race or its religion. The migratory habits of the Indian Tamils are facts which in their Lordships opinion are directly relevant to the question of their suitability as citizens of Ceylon and have nothing to do with them as a community. [1]

It is true that neither the "illiterate" nor the "poor" constitute

---

1. Kodakkan Pillai v. Sivagnanasunderam (1953) 54 NLR 433, at 439.

a community within the meaning of section 29. But a community may well be identified by its migratory character. In Ceylon, in 1948, what distinguished the Indian Tamil community from the other resident communities, were primarily its migratory habits. Yet, as the Supreme Court held, the Indian Tamils were a contemplated community, entitled to the protection of section 29, notwithstanding its migratory character. Therefore, if a law conferred a "privilege" or "advantage" only upon the existence of certain facts, and those facts were incompatible with migratory habits, would not that privilege or advantage be denied to a community which was essentially migratory in character ?

It would appear that both Courts were unduly influenced by the fact that the impugned legislation related to citizenship of a newly independent country. But it is precisely in respect of such vital matters that a community requires to be protected against discriminatory treatment. On this occasion, both Courts failed to accord that protection and thereby rendered nearly a million people stateless.

2. Immigration. The Immigrants and Emigrants Act, No.20 of 1948, which received the Royal Assent on 6 October 1948 and came into operation on 1 November 1949 (the appointed date), in effect, prohibited the entry of a non-citizen into Ceylon unless he had in his possession a passport and a visa or a residence permit. Residence permits were of two categories: permanent residence permits for indefinite periods and temporary residence permits for definite periods exceeding six months.[1] Section 14(3)(b) declared that:

> No temporary residence permit shall be refused in the case of a person who, being a British subject, was ordinarily resident in Ceylon for a period of at least five years immediately preceding the appointed date.

The Immigrants and Emigrants (Amendment) Act, No.16 of 1955, repealed the entirety of section 14 and substituted for it a new section which provided only for the issue of visas to persons seeking to enter Ceylon. A visa would ordinarily be granted for a period not exceeding two years, but could, with the approval of the Minister, be granted for up to five years. The amending Act contained no provision of any description corresponding to section 14(3)(b).

---

1. S.14.

In Meera v. Dias,[1] an Indian Tamil who, having held a temporary residence permit for several years was denied an extension in February 1956, challenged the validity of the amending Act on the ground that it imposed upon the "Indian community" a disability to which members of other communities were not made liable or conferred on members of other communities a privilege not conferred on the members of the Indian community.

H.N.G.Fernando CJ examined the "pith and substance" of the amending Act and found that:

> The Legislature has controlled the entry into Ceylon of non-citizens by a system of visas, conferring on an executive authority the discretion to refuse an entry document. The discrimination, if any, therefore, which ensues from the legislation is a discrimination between citizens and non-citizens, a feature not in any way rare in legislation of a similar type enacted by other Sovereign Legislatures. If it was proper for the Legislature of Ceylon to deny the franchise to non-citizens, it clearly follows that it was not improper for the same Legislature to deny rights of entry to non-citizens. Indeed . . . the Legislature is free to confer rights or privileges exclusively on citizens or to impose restrictions or disabilities applicable solely to non-citizens.[2]

Section 14(3)(b) of Act No.20 of 1948 must be viewed in the context of the Citizenship Act which preceded it by two weeks. Having prescribed the qualifications for citizenship, the legislature conferred a right of residence on "British subjects" who had been "ordinarily resident" in Ceylon from prior to November 1944. This meant that those ordinarily resident in the country who did not qualify for citizenship acquired the right to continued residence. In 1955, at the time of the repeal of this section, it must have been a matter of common knowledge that the beneficiaries of the right conferred by section 14(3)(b) were primarily the members of the Indian Tamil community who had failed to satisfy the stringent requirements for citizenship. Accordingly, when that section was repealed, Parliament in effect denied that community alone the right to reside in Ceylon; a right which other communities continued to enjoy by virtue of citizenship. Section 29(2) of the Constitution did not contemplate "citizens" and "non-citizens"; it

---

1. (1957) 58 NLR 571
2. Ibid., at 573.

sought to protect certain rights of "communities" and "religions", whether they be citizens or not. Therefore, it is submitted that H.N.G.Fernando J, acting within the constraints imposed by the Privy Council in Kodakkan Pillai, erred when he held that the legislature was free to impose restrictions or disabilities applicable solely to non-citizens.

3. Language. The Official Language Act, No.33 of 1956, which received the Royal Assent on 7 July 1956, provided that the Sinhala language shall be the one official language of Ceylon. Where, however, the Minister considered it impracticable to commence the use of only the Sinhala language for any official purpose immediately, the language hitherto used for that purpose, namely English, was authorised to be so used until the necessary change was effected not later than 31 December 1960. The Minister was authorised to make regulations for the purpose of giving effect to the principles and provisions of the Act. No such regulations were made, but a Treasury Circular No.560 issued on 4 November 1961 provided, on pain of suspension of increment falling due, that public officers must pass three proficiency tests in Sinhala.

Kodeeswaran, a Tamil, had been appointed to the General Clerical Service in 1952. In 1959, he was promoted to the executive class of that service on a salary scale of Rs.1,600 to Rs.3,780 per annum with annual increments of Rs.120. In terms of the relevant minute, he was required to pass a proficiency test in one national language before proceeding beyond the stage of Rs.3,180; he had the option of choosing his own language, Tamil, for this examination. An increment of Rs.10 per month fell due on 1 April 1962, but was not paid since he had not presented himself for the Sinhala examination in which he was required to qualify by the new Treasury Circular No.560. Kodeeswaran thereupon instituted an action in the District Court of Colombo seeking a declaration that the new Circular was unreasonable and/or illegal and not binding on him, and that he was entitled to payment of the increment which fell due on 1 April 1962. It was submitted on his behalf that the Official Language Act was ultra vires on the ground that in enacting it Parliament had transgressed the prohibition against discrimination contained in section 29(2) of the Constitution, and that accordingly, the Circular which was issued to implement that Act and which purported

to vary the existing terms of his appointment was also void and ineffective to disentitle him to the increment to which he would have been entitled under those terms. The Attorney-General raised a preliminary issue, viz. whether a public servant had any right of action against the Crown for salary due in respect of services which he had rendered. The District Judge decided the preliminary issue in favour of the plaintiff.

The Crown argued, as it did in respect of the Citizenship Act, that it is the legitimate exercise of the function of a State which is independent to decide what its official language should be and that it is perfectly fair in making that decision to choose the language spoken by the overall majority of persons in the country. The District Judge rightly pointed out that if that decision involved the passing of an Act, then whether the Act was valid or not in law depended on whether it did or did not offend section 29 "subject to which safeguard independence was given and received".[1]

To the submission that a community was not bound together by its literacy or illiteracy, but by its race or religion, the Judge pointed out that in Ceylon the language of the Sinhalese community was Sinhala; the language of the Tamils, Moors and Malays and Indians was Tamil; and the language of the Burghers and Europeans was English:

> Now if the members of each community were able to speak, read and write the language of each of the other communities, then it is obvious that the selection of the language of one community as the official language . . . could not cause any handicap to the members of the communities whose language was not chosen, however much they resented the fact that their own language was not given pride of place. But every community in Ceylon is not literate in the language of the other communities, and . . . the selection of the language of one community must cause at least inconvenience, if not disability, to the communities who are not literate in that particular language.

He referred to the evidence:

> We have the uncontradicted evidence of Mr.Thondman that the cases of Indian Tamils able to read and write Sinhala are so few that they may be regarded as exceptional. We have the uncontradicted evidence of Mr.Seyd Mohamed

---

1. It is interesting to note this reference by De Kretser DJ on 25 April 1964. It was on 5 May 1964 that Lord Pearce made the controversial obiter dicta (supra,p.65) that s.29(2) "represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution

> that in the Muslim communities in Batticaloa no one knows Sinhala, and we have the evidence of Mr.Sivasithamparam of the difficulties the Tamil people in the North have when a communication comes to them in Sinhala and recourse has to be had to the Sinhalese baker to understand what it is all about for no one else there is able to read or write Sinhala. Nr.Nesiah, whose evidence is uncontradicted, gives evidence that the handicap of having to use a language other than the one which is one's mother tongue is one that is never overcome . . . Where one is not a linguist, the difficulties of trying to learn a language after one has grown to man's estate in order to compete with men who have known the language all their lives is manifest.

On the face of the statute, the Official Language Act did not confer an advantage on any community which it denied to others. But, as the Privy Council pointed out in Kodakkan Pillai, there may be circumstances in which legislation though framed so as not to offend directly against a constitutional limitation, may indirectly achieve the same result. While an Act declaring an official language may seem quite innocuous, the circumstances that obtain in the country at the relevant time may operate to place one community at an advantage over the others. As De Kretser DJ noted:

> At the time it was passed one has to presume that those voting for it were aware of the numbers literate in Sinhala among the Sinhalese and among the non-Sinhalese communities. They must be presumed to know that those literate in Sinhala were going to have a tremendous advantage in at least the matter of appointments and promotions in the public service over those who were not. They had to know that overnight the hitherto efficient non-Sinhalese officer would lose his value while even the otherwise inefficient Sinhalese officer would have his utility value doubled. They had to know that Sinhala is the language of the Sinhalese community which had an overall majority in numbers over all other communities. It is hard to resist the correctness of the submission that under the cloak that it was a legitimate function for a Parliament to decide in what language the official business should be carried on and that in making that decision the language spoken by

---

and these are therefore unalterable under the Constitution". De Kretser was of the view that s.29 was included in the Constitution, on the initiative of the Board of Ministers, because, as the Soulbury Commission pointed out, "the near approach of the complete transference of power and authority from neutral British hands to the people of this country is causing in the minds of the Tamil people, in common with other minorities, much misgiving and fear".

> the largest number of people should be the choice, a legislative act has been passed which gave advantage to one community which the others did not have, for the purpose of an Act must be found in its natural operation and effect.

Accordingly, he held that the Official Language Act was ultra vires section 29(2) of the Constitution.[1]

On appeal, a bench of two Judges of the Supreme Court confined its attention to the preliminary issue and held that a public servant in Ceylon had no right to sue the Crown for the recovery of his wages.[2] The Court did not call upon the Attorney-General to submit his arguments on the question of the validity of the Official Language Act, a question of "extraordinary importance and great difficulty" which would warrant reference to a bench of five or more Judges.[3] H.N.G.Fernando CJ explained that if a case could be decided on one of two grounds, one involving a constitutional question and the other a question of statutory construction or general law, the Court will decide only the latter. On further appeal, the Privy Council reversed the Supreme Court decision on the preliminary issue.[4] But the Board too heard no argument and expressed no view upon any of the other issues raised in the action and dealt with in the judgment of the District Judge. As Lord Diplock explained, "They would not think it proper to do so without the assistance of the considered judgment of the Supreme Court".[5] Consequently, an authoritative decision on this question was never given. In May 1972, the impugned Act was incorporated in the new Constitution. Kodeeswaran himself was compensated by the new Republic, whereupon he discontinued his litigation against the State.

Right to an Independent and Impartial Tribunal

The right to an independent and impartial tribunal was protected by the provisions of Part VI of the Constitution. In particular, section 52 provided that Judges of the Supreme Court shall hold office during good behaviour; that their salaries shall not be diminished; and that they shall not be removable except by

---

1. The judgment of the District Court is not reported.
2. Attorney-General v. Kodeeswaran (1967) 70 NLR 121.
3. Ibid., at 139.
4. Kodeeswaran v. Attorney-General (1969) 72 NLR 337.
5. Ibid., at 339.

the Governor-General on an address of the Senate and the House of Representatives. In Senadheera v. Bribery Commissioner,[1] Sansoni J recalled that Lord Atkin had, with reference to the British North America Act of 1867 described provisions similar to these as "the three principal pillars in the temple of justice".[2] Sansoni J added:

> The framers of our Constitution erected a fourth pillar in that temple when the power of appointment, transfer, dismissal and disciplinary control of judicial officers was vested in the Judicial Service Commission.[3]

He was referring to section 55 which created a Judicial Service Commission consisting of the Chief Justice and two Judges of the Supreme Court. From these provisions, the Supreme Court inferred that "a division of the three main functions of government is recognised in our Constitution", or at least that "judicial power in the sense of the judicial power of the State is vested in the Judicature, i.e. the established civil courts of this country".[4] The Privy Council agreed that there existed a separate power in the judiciature which under the Constitution could not be usurped or infringed by the executive or the legislature:

> These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature.[5]

Whatever other constitutional or political purposes a separation of powers or functions may serve, it also serves as a safeguard of individual liberty. Therefore, when, beginning in 1961, the Supreme Court and the Privy Council in a series of judgments in the course of that decade sought to prevent any encroachment on, or erosion of, the powers vested in the judicature, these two Courts were also seeking to ensure, within the limits laid down by the law, the continued availability of an independent and impartial tribunal whenever judicial power was required to be exercised.

---

1. (1961) 63 NLR 313.
2. Toronto Corporation v. York Corporation [1938] AC 415.
3. Op.cit., at 318.
4. The Queen v. Liyanage (1962) 64 NLR 313, at 350.
5. Liyanage v. The Queen (1965) 68 NLR 265, at 282.

1. Meaning of "Judicial Power". In The Queen v. Liyanage,[1] T.S.Fernando J adopted a broad classification of judicial power:

a) in the sense of the essence of judicial power, the strict judicial power;
b) in the sense of the power of judicial review;
c) in a loose sense, as meaning the powers of a judge, e.g. disciplinary powers and powers ancillary to the judicial power.

He accepted a submission that where a power which would ordinarily fall into the third loose category is consistent with executive or administrative power and is consistent also with judicial power, the matter should be considered further in order to see whether that particular power falls actually within judicial power or outside it. For that purpose, it would be legitimate to adopt one or other of the following tests: (a) the historical criterion expounded by Dean Roscoe Pound, i.e. to ask whether, at the time when the Constitution was adopted, the power in question was exercised by the Crown, by Parliament or by the Judges, or (b) the Holmes test, i.e. to inquire what is the end or purpose in view. As for judicial power in the first sense, it was thought to be best described in the oft-quoted definition of Griffiths CJ in Huddart Parker Pty.Ltd v. Moorehead:

> The words 'judicial power' . . . means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[2]

This approach to the "judicial power" concept was approved by the Privy Council and was generally followed by the Supreme Court in its subsequent decisions.

2. Application of the "Judicial Power" Test. Four tribunals were held to have been constituted in contravention of section 55(1) of the Constitution, and thereby to be lacking in the essential attributes of independence and impartiality.[3] They were:

(a) Bribery Tribunals established under the Bribery Act, No.11 of 1954 as amended by Act No.40 of 1958. A Bribery Tribunal was

---

1. (1962) 64 NLR 313.
2. (1909) 8 CLR, at 357.
3. No reference will be made in this study to those tribunals which according to the Supreme Court, did not purport to exercise

composed of three members selected from a panel; the panel was composed of not more than fifteen persons appointed by the Governor-General on the advice of the Minister of Justice. A Bribery Tribunal had power to hear, try and determine any prosecution for bribery made against any person and to impose imprisonment or fine. As Sansoni J observed in Senadhira v. Bribery Commissioner:

> The 1958 amendments to the Bribery Act were designed to deprive the established Courts of their jurisdiction to try charges of bribery, and to invest permanently established Bribery Tribunals with that jurisdiction. Let me repeat that observation in different words. The Bribery Tribunals were Courts set up in substitution for the established Courts, and they were entrusted with the function of administering justice in a particular sphere.[1]

But whether the Bribery Tribunals were substitutes for the established Courts as Sansoni J thought, or the Tribunals had concurrent jurisdiction with the Courts as was argued before the Privy

---

judicial power:
Court Martial: Gunaseela v. Udugama (1966) 69 NLR 193;
Commissioner of Workmen's Compensation: Panagoda v. Budenis (1966) 68 NLR 490;
Commissioner of Inland Revenue: Xavier v. Wijekoon (1966) 69 NLR 197;
Income Tax Board of Review: Ranaweera v. Ramachandran (1969) 72 NLR 562,
nor to those tribunals which, though held by the Supreme Court to be exercising judicial power, were nevertheless held by the Privy Council not to be judicial offices:
President of a Labour Tribunal: United Engineering Workers Union v. Devanayagam (1967) 69 NLR 289;
Arbitrator under the Industrial Disputes Act: ibid;
Industrial Court: ibid.
For the overruled Supreme Court view, see Walker Sons & Co.Ltd v. Fry (1965) 68 NLR 73; Moosajees v. Fernando (1966) 68 NLR 414; Rockland Distilleries Ltd v. Wijetilleke (1966) 68 NLR 414.
For a full discussion of the "tribunal cases", see M.J.A.Cooray, Judicial Role under the Constitutions of Ceylon/Sri Lanka (Colombo: Lake House Investments Ltd, 1982), pp. 74-137.

1. (1961) 63 NLR 313.

Council in Bribery Commissioner v. Ranasinghe,[1] they were institutions seeking to exercise judicial power but not through duly appointed judicial officers.[2]

(b) The office of Quazi established under the Muslim Marriage and Divorce Act, No.13 of 1954. The Quazi was appointed by the Minister and had jurisdiction to entertain an application by a Muslim wife for a divorce and to adjudicate upon claims for the payment of Mahr as well as for the maintenance of wives and children. In Jailabdeen v. Danina Umma, H.N.G.Fernando J observed that the purpose and effect of the law "was to take away from the ordinary courts a jurisdiction previously enjoyed by those courts and to confer that jurisdiction on Quazis". But, as he emphasized:

> There is nothing illegal, in the sense of conflict with the Constitution, in a statute which establishes a new judicial tribunal with jurisdiction (whether exclusive or not) over particular charges or causes. Indeed, the legislature might well consider it necessary in the public interest to constitute such tribunals, and one can think of many reasons for the adoption of such a course, such as the need to secure quick disposal of matters considered to be deserving of special priority, or to appoint to such tribunals persons having special knowledge or experience concerning the matters to be adjudged.[3]

The essential requirement was conformity with section 55 of the Constitution.

(c) The licensing authority constituted under the Licensing of Traders Act, No.62 of 1961.[4] The licensing authority, who was appointed by the Minister, was empowered to make a "punitive order" suspending or cancelling the licence issued to a trader and requiring such trader to pay to the general revenue a sum not exceeding Rs.5,000. Two of the four grounds on which such an order could be made were:

i. that he was satisfied that such trader had contravened any provision of the Act or of any regulations made thereunder; or

ii. that he was satisfied that such trader had acted or was acting in contravention of any provision of the Control of Prices Act or the Food Control Act.

---

1. (1964) 66 NLR 73.
2. For other cases, see p.270, n.2.
3. (1962) 64 NLR 419, at 420.
4. Ibrahim v. Government Agent, Vavuniya (1966) 69 NLR 217.

That is, the act of a trader which provokes the making of a "punitive order" is that he has sold an article at a price in excess of the maximum price prescribed under the Control of Prices Act; in other words, that he has committed an offence under that Act which is triable and punishable in the ordinary course by a Magistrate. The licensing authority is exercising judicial power without having been duly appointed in the manner set out in section 55(1) of the Constitution.

(d) An arbitrator appointed under the Co-operative Societies Ordinance, No.16 of 1936.[1] The relevant law made provision for the decision of certain disputes by the Registrar of Co-operative Societies or by arbitrators nominated by him. Included within the category of such disputes were those arising:

i. among members or past members of a society;

ii. between a member on the one side and a society or its committee on the other;

iii. between a society or its committee and any officer or employee of the society.

In this instance, the dispute related to a claim made by the committee against an employee on the basis that he was liable to account for goods shown by the books of the society to have been under his control as manager. As H.N.G.Fernando noted:

> The liability of the manager arises at the least upon an implied contract, in the nature of agency. The dispute concerning the existence of this liability and the duty to perform it is an ordinary civil dispute within the traditional jurisdiction of the Courts.[1]

On 23 June 1962, the Minister of Justice, purporting to act under section 440A of the Criminal Procedure Code as amended by section 4 of the Criminal Law (Special Provisions) Act, No.1 of 1962, directed that the trial of twenty-four persons in respect of three specified offences under Chapter VI of the Penal Code be held before the Supreme Court at Bar by three Judges without a jury. Later that same day, the Attorney-General exhibited to the Court an Information that these twenty-four persons had conspired to wage war against the Queen, and conspired and/or prepared to over-

---

1. Karunatilleke v. Abeywira (1966) 68 NLR 503.
2. Ibid., at 505.

throw otherwise than by lawful means the Government of Ceylon by law established, and thereby committed offences punishable under section 115 of the Penal Code as amended by section 6(2) of the Criminal Law (Special Provisions) Act. Thereafter, the Minister of Justice, again on the same day, purporting to act under section 9 of the Criminal Law (Special Provisions) Act, nominated three Judges of the Supreme Court to preside over the trial of the persons referred to above. Section 9 read as follows:

> Where the Minister of Justice issues a direction under section 440A of the Criminal Procedure Code that the trial of any offence shall be held before the Supreme Court at Bar by three Judges without a Jury, the three Judges shall be nominated by the Minister of Justice, and the Chief Justice if so nominated or, if he is not so nominated, the most senior of the three Judges so nominated, shall be the president of the Court.
>
> The Court consisting of the three Judges so nominated shall, for all purposes, be duly constituted and accordingly the constitution of that Court, and its jurisdiction to try that offence, shall not be called in question in any Court, whether by way of writ or otherwise.

At the commencement of the trial, when the defendants were called upon to plead, certain preliminary objections were raised on their behalf. After several days of argument, the Court, upholding one of the objections, held that because:

a) the power of nomination conferred on the Minister was an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of section 52 of the Constitution, or was in derogation thereof, and

b) the power of nomination was one which had hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and could not be reposed in anyone outside the Judicature,

section 9 of the Criminal Law (Special Provisions) Act was ultra vires the Constitution.[1] T.S.Fernando J explained:

> The right of a judge to exercise judicial power is so inextricably bound up with the actual exercise of the power and is such an essential step in the exercise of the strictly judicial power that it must,

---

1. The Queen v. Liyanage (1962) 64 NLR 313.

> in our opinion, be considered part of the power itself. Unless the Legislature has vested the exercise of any strictly judicial power in the entire Supreme Court, it is necessary that a bench of Judges should be nominated to exercise that judicial power vested in the Supreme Court. If the power of nomination is completely abolished, no judicial power vested in the court can be exercised. If that power is vested in an outside authority, it will legally be open to such authority to exercise that power to prevent a particular judge or judges from exercising any part of the strictly judicial power vested in them by the Constitution as judges of the Supreme Court. The absurdity of such a possible result will be more marked if, instead of the position of a Puisne Justice of the Court, the position of the Chief Justice himself be considered. Under a provision of law of this nature it seems to us legally possible to exclude the Chief Justice himself from presiding in the Court of which he is the constitutionally appointed Head. The exercise of the power to nominate can then in practice result in a total negation of the judicial power of a judge or judges vested in them by the Constitution.[1]

Dealing with another objection "of a fundamental character", the Court observed that even had it come to a different conclusion regarding the validity of section 9, it would have been compelled to give way to a principle which "has now become ingrained in the administration of the common justice in this country", namely, that "it is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". The Court pointed out that the new legislation, passed with retrospective effect, after the commission of the offences alleged, had purported to vest in the Minister (a member of the Government which the defendants were alleged to have conspired to overthrow by unlawful means and who, it was not disputed, had participated in the investigation and interrogation of some of the defendants), the additional power to nominate the three Judges. This power had hitherto been vested in the Supreme Court as a body or in the Chief Justice, and in no person or body outside the Judicature. T.S.Fernando J conceded that a Court could not inquire into the motives of legislators. But. he observed:

> The circumstances set out above are, however, such as to put this court on enquiry as to whether the

---

1. Ibid., at 357.

> ordinary or reasonable man would feel that this court itself may be biased. What is the impression that is likely to be created in the mind of the ordinary or reasonable man by this sudden and, it must be presumed, purposeful change of the law, after the event, affecting the seelction of Judges ? Will he not be justified in asking himself, 'Why should the Minister, who must be deemed to be interested in the result of the case, be given the power to select the Judges whereas the other party to the cause has no say whatever in a selection ? Have not the ordinary canons of justice and fairplay been violated ? Will he harbour the impression, honestly though mistakenly formed, that there has been an improper interference with the course of justice ? In that situation will he not suspect even the impartiality of the Bench thus nominated ? [1]

An Assessment

The existence of a court with jurisdiction to inquire into and pronounce upon the validity of legislation is a feature common to most democratic countries today. It does not mean, as most Sri Lankan politicians tend to believe, that the country would then be governed by such a court or be ruled by its judges. It does mean that the legislature, together with the executive and the judiciary, will be subject to the supreme law of the land as declared and contained in the Constitution. The function of the court is to ensure that Parliament acts within the limits placed upon it by the Constitution. It is, of course, the privilege of Parliament, as the embodiment of the will of the people, to extend those limits, if the people have so willed by giving it the strength necessary for that purpose.

Any assessment of the Ceylonese experience of the ex post facto review of legislation must take note of the shortcomings which were inherent in the system devised in the 1946 Constitution. These were:

1. The absence of a court vested with exclusive jurisdiction. Neither the Constitution, nor any other law, vested jurisdiction in respect of such matters in any particular court. Consequently, the validity of statutes was challenged at different levels of the judicial heirarchy. Kodakkan Pillai who questioned the validity of the Citizenship Act before a revising officer in 1951 was fortunate that the Attorney-General sought by way of certiorari in

---

1. Ibid., at 360. See also Liyanage v. The Queen (1965) 68 NLR 265, where the Privy Council held that the Criminal Law (Special Provisions) Law was a "legislative plan" to secure the conviction and severe punishment of an identified group of persons.

in the Supreme Court to have the revising officer's order quashed; by 1953 the Privy Council had authoritatively pronounced upon the matter. Kodeeswaran was less fortunate. In 1962 he chose the declaratory action in the District Court to impugn the Official Language Act; in 1970, two appeals and eight years later, the matter was still pending a final determination. Neither a revising officer appointed under the Franchise Act, nor a District Judge exercising original jurisdiction in a wide variety of matters, appears to be the appropriate authority to inquire into and pronounce upon the validity of a law. While Parliament was critical of the delay involved in obtaining an authoritative pronouncement in these matters, it took no remedial action. When, in March 1971, the Ministry of Justice proposed that the new Court of Appeal, which was about to be established as the country's final appellate tribunal, should have exclusive jurisdiction to pronounce upon the validity of legislation and in regard to the interpretation of the Constitution, and that all such matters should forthwith be referred to that Court should they arise in the course of proceedings in subordinate courts, the Cabinet rejected that proposal.[1] However, this is the practice in several Commonwealth countries. For instance, the Constitution of Mauritius of 1968 provides thus:

> i. Where any question as to the interpretation of this Constitution arises in any court of law established for Mauritius (other than the Court of Appeal, the Supreme Court or a court-martial) and the court is of opinion that the question involves a substantial question of law, the court shall refer the question to the Supreme Court.
>
> ii. Where any question is referred to the Supreme Court in pursuance of this section, the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if the decision is subject to an appeal to the Court of Appeal or Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council.[2]

---

1. Ceylon Daily News, 30 March 1971.

2. Art.84. For similar provisions, see Constitutions of Antigua and Barbuda 1981, Art.120; Saint Lucia 1978, Art.106; Saint Vincent 1979, Art.97; and Grenada 1973, Art.102.

2. The absence of a uniform method of challenge.

A person wishing to question the validity of a statute was left to his own ingenuity in devising a method by which he could reach the forum of his choice. Often, the chosen method was a devious one of reaching the destination. The legality of the Official Language Act remained clouded in doubt while lawyers argued before three courts, over a period of five years, whether or not Kodeeswaran, being a public servant, was entitled to sue for his wages. Kariapper had to divide his attention between the twin questions of the validity of the Imposition of Civic Disabilities Act and whether mandamus lay against the Clerk to the House of Representatives; he must surely have been consoled by the assurance of the Privy Council that had that Court not held against him on the former, it would have been compelled to reject his application on the latter. Don Anthony was singularly unlucky: the two Supreme Court Judges who heard his appeal against a bribery conviction thought that it was not competent for him to attack as invalid the very Act of Parliament which conferred on him the right of appeal, while fellow appellants, Piyadasa and Ranasinghe encountered no such teething problem.

3. The requirement of locus standi.

The question of the validity of a statute could not be raised except by one who was adversely affected by its implementation. Even if a law bore upon its face the clear imprint of invalidity, it continued to remain in the statute book until an "aggrieved person" appeared who was ready, able and willing to canvass its enforceability. Although several other Commonwealth Constitutions also require a person to have "a relevant interest",[1] or to show that "his interests are being or are likely to be affected",[2] before he is permitted to allege that a constitutional provision has been contravened, this is not an invariable rule. In Malta, a right of action for a declaration that a law is invalid, on any ground other than inconsistency with a fundamental right (for which special provision is made) "shall appertain to all persons without distinction and a person

---

1. For instance, Constitutions of Grenada 1973, Art.101; Saint Vincent 1979, Art.96; Saint Lucia 1978, Art.105; and Antigua and Barbuda 1981, Art.119.

2. See Constitutions of Mauritius 1968, Art.83(1); Fiji 1970, Art.97(1); and Kiribati 1979, Art.88(1).

bringing such an action shall not be required to show any personal interest in support of his action".[1]

These procedural shortcomings must be viewed in perspective. The 1946 Constitution did not require the judiciary to declare invalid any legislation which was inconsistent with the Constitution. Nor did it contain a comprehensive bill of rights which a court was required to enforce. In both respects, the Supreme Court chose to perform an innovative role. On the one hand, it assumed the power to review legislation. On the other, by its interventionist approach, it sought to create an informal regime of rights. If, in so doing, it showed reluctance in entering into a confrontation with Parliament over legislation relating to fundamental issues such as citizenship and language, it was displaying a degree of prudence which was perhaps understandable, having regard to the criticism to which it was, in any event, subjected to.[2] H.N.G. Fernando CJ gave expression to this cautious policy when he quoted with approval the opinion of an American text-book writer that:

> It must be evident to anyone that the power to declare a Legislative Enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.[3]

But while it assiduously circumvented the substantive issues raised by politically sensitive legislation, the Supreme Court did not hesitate to intervene, and to do so forcefully and fearlessly on occasion, in the cause of individual liberty. On the one hand, it applied the doctrine of the separation of functions unyieldingly, and repeatedly struck down legislation which either encroached on, or eroded, judicial power. Thereby, it prevented Parliament from proceeding to:

> establish new Courts with powers as great as, or even greater than, those possessed by the established Courts, and devise a new method of appointing the judges who are to preside over them. Such substitute or parallel courts could be given unlimited power over 'the life, liberty and property of the subject' to be exercised by persons to be appointed in any manner Parliament may choose.[4]

---

1. Constitution of the Republic of Malta 1964, Art.119.
2. See criticism in the Constituent Assembly, supra, pp.114-123.
3. Attorney-General v. Kodeeswaran (1967) 70 NLR 121, at 138.
4. Senadhira v. Bribery Commissioner (1961) 63 NLR 313, at 320, per Sansoni J.

The Court believed that "such an attempt made once could well be repeated",[1] unless it was stifled immediately. It also thought that "any departure from these salutary provisions of the Order in Council, ensuring to the citizen the independence of the Judiciary, will no doubt lead to malpractices",[2] and should not, therefore, be permitted. On the other hand, the Court applied ordinary statute law in such a way as to create an informal regime of rights. Principles of criminal justice such as the right to resist unlawful arrest,[3] the right to judicial surveillance of detention,[4] the right to trial within a reasonable time,[5] the right to be defended,[6] the presumption of innocence,[7] the privilege against self-incrimination,[8] and the doctrine of double jeopardy,[9] were extracted from the law relating to criminal procedure and equated to fundamental principles which were "ingrained in the Rule of Law".[10] The Court was not willing to countenance their non-observance or contravention, however grave the provocation might have been. And, as Basnayake CJ declared:

> Under our law, everyone has the right of access to the established courts of law for relief against the infringements of his rights, and to no one will the courts deny that right if their powers are invoked in appropriate proceedings.[11]

In the final analysis, whatever criticism it might have earned in other respects, justifiably or otherwise, none could have said of the Supreme Court, particularly of the Court of the 'Sixties, that it did not possess the capacity, in appropriate circumstances, and through an effectual mechanism, to make a properly formulated, comprehensive bill of rights work.

---

1. Ibid.
2. Piyadasa v. Bribery Commissioner (1962) 64 NLR 385, at 391.
3. Muttusamy v. Kannangara (1951) 52 NLR 324; The Queen v. Corea (1954) 55 NLR 457.
4. Kolugala v. Superintendent of Prisons (1961) 66 NLR 412.
5. Premasiri v. Attorney-General (1967) 70 NLR 193.
6. Jayasinghe v. Munasinghe (1959) 62 NLR 527; The Queen v. Peter (1961) 64 NLR 120; The Queen v. Prins (1962) 61 CLW 26; Premaratne v. Guneratne (1964) 71 NLR 113; Subramaniam v. Inspector of Police, Kankesanturai (1968) 71 NLR 204.
7. The Queen v. Sumanasena (1963) 66 NLR 350.
8. De Mel v. Haniffa (1952) 53 NLR 433; The Queen v. Buddharakkita (1961) 63 NLR 43; The Queen v. Gnanaseeha (1968) 73 NLR 154.
9. The Queen v. Tennekoon (1965) 69 CLW 28.
10. This aspect is more fully examined by G.L.Peiris, "Human Rights and the System of Criminal Justice in Sri Lanka", Ceylon Journal of Historical and Social Studies, vol.VIII, no.1, pp.1-31.
11. Modera Patuwata Co-operative Fishing Society Ltd v. Gunewardene (1959) 62 NLR 192.

Review of Bills

Under the 1972 Constitution, no institution administering justice and no other institution, person or authority had the power or jurisdiction to inquire into, pronounce upon or in any manner call in question the validity of any law of the National State Assembly.[1] A similar prohibition was imposed by the 1978 Constitution in respect of Acts enacted by Parliament.[2] In regard to existing law, both Constitutions provided that such law shall continue to be valid and operative notwithstanding any inconsistency with the fundamental rights guaranteed therein.[3] Therefore, as far as legislation was concerned, it was no longer possible to impugn a statute on the ground that it was incompatible with a fundamental right. There was prescribed, however, a procedure whereby the question whether a bill or any provision thereof was inconsistent with a fundamental right or any other provision of the Constitution could be determined before such bill was taken up for discussion by the legislature. This jurisdiction was vested solely and exclusively in the Constitutional Court under the 1972 Constitution and in the Supreme Court under the 1978 Constitution.[4]

General Observations

Locus Standi

No special interest on the part of a petitioner was required in order to invoke the jurisdiction either of the Constitutional Court or of the Supreme Court. Any citizen could do so by a writing addressed to the Court. But non-citizens and corporate bodies,[5] despite the fact that they too were guaranteed certain rights under both Constitutions, were left without the right of recourse.

Of those who raised questions of inconsistency before the Constitutional Court, five were interest groups, namely:

a) the directors and shareholders of the Associated Newspapers of Ceylon Limited, with reference to the Associated Newspapers of Ceylon Ltd (Special Provisions) Bill;
b) worshippers of the different Christian denominations, with reference to the Church of Sri Lanka (Consequential Provisions) Bill;

---

1. S.48(2).
2. Art.80(3).
3. S.18(3); Art.16(1).
4. Supra, pp.124-130, 152.
3. The 1978 Constitution defined "citizen" for this purpose to

c) members of the Buddhist clergy and leading lay Buddhists, with reference to the Pirivena Education Bill;
d) trade union leaders, with reference to the Greater Colombo Economic Commission Bill; and
e) those who would be directly affected by it, with reference to the Local Authorities (Imposition of Civic Disabilities)(No.1) and (No.2) Bills.

Apart from those described above, only fourteen citizens emerged between 1972 and 1978 to raise questions of inconsistency in regard to bills. Two of them were Members of Parliament, while one was the secretary of the civil rights movement. A fourth, L.O.K.Wanigasekera, canvassed the validity of three bills. The Attorney-General exercised his right of reference on three occasions,[1] while the leaders of the UNP and the SLFP made two references each.[2] Between 1978 and 1981, only one citizen, the general secretary of the SLFP, invoked the jurisdiction of the Supreme Court.

This apparent indifference on the part of the ordinary citizen is probably due to an intrinsic weakness in the concept of anticipatory review. The publication of a bill in the Gazette does not provide the publicity that is necessary to enable interested parties to advise themselves on whether or not to raise any question of inconsistency. The Gazette is not freely available on the day of publication; nor is it widely read. Even a subscriber receives his copy nearly two or three weeks late. Therefore, a citizen will not have the ooprtunity of questioning the constitutionality of a bill unless, being particularly interested in the subject-matter of a bill, he follows its progress through the newspapers and then obtains a copy of the bill in time. Having done so, this public-spirited citizen will have to seek and obtain legal advice, have the petition prepared in proper form and with sufficient copies and then file the same in Court, all within a period of barely one week. He or his legal adviser will also have to test the constitutionality of its provisions, not with reference to its actual implementation, but on a purely hypothetical basis.

---

include an incorporated body if not less than three-fourths of its members were citizens: Art.121(1).

1. Associated Newspapers of Ceylon (Special Provisions) Bill, Administration of Justice Bill, and the Greater Colombo Economic Commission Bill.

2. J.R.Jayewardene referred the Sri Lanka Press Council Bill and the Administration of Justice Bill, while Mrs.Bandaranaike referred the two Local Authorities (Imposition of Civic Disabilities) Bills.

The 1972 Constitution required the Attorney-General to examine every bill and to inform the Speaker if, in his opinion. a question of inconsistency should be referred to the Constitutional Court. That is, if the Attorney-General had a doubt in regard to the constitutionality of a bill, or even an uneasy feeling, it was his duty to communicate that opinion to the Speaker; and the Speaker was then required to refer that bill to the Constitutional Court for a decision. The unreality of this situation, particularly in respect of a controversial bill, has already been noted.[1] On 15 November 1972, Attorney-General Tennekoon addressed the Minister of Justice in the following terms:

> I refer to your note on the Press Bill which you handed to me yesterday.
>
> I would like to say, with all respect to the Cabinet, that I still continue to hold the view that certain provisions in the Bill are inconsistent with the guarantee of equal protection of the law contained in the Court [sic]. Indeed, I would have written to Mr.Speaker to that effect and have refrained from doing so only because the objection has already been taken by others.
>
> When the matter comes up for hearing I believe it will be my duty to inform the Court of my views and the reasons therefor.
>
> You posed to me the question how the Cabinet's view may be placed before the Court.
>
> It would not be possible for a lawyer member of the Cabinet to appear because the Constitution prohibits members of the National State Assembly appearing before the Constitutional Court.
>
> A private lawyer may I think, with leave of the Court, appear and present the Government's point of view. Apart from other reasons this would be convenient for me in view of other important and time-consuming commitments.
>
> A possible course may be for me as Attorney-General to appear before the Constitutional Court and say that the Cabinet had been advised of the existence of unconstitutional provisions in the bill and that upon the Constitutional Court so holding the Government would present the bill in the House as one requiring a 2/3 majority for passing.
>
> The only other course which I can think of - though it is not one which I can commend or even contemplate with equanimity - is to find a new Attorney-General. He would have to be one who shares the Cabinet's view on the bill.

It is clear from this letter that the Attorney-General was of the opinion that certain provisions in the Press Council Bill were inconsistent with the Constitution. It was his constitutional duty to have communicated that opinion to the Speaker. He did not do so. The fact that some other person had raised the same question of inconsistency

---

1. Supra, p.128.

was no reason for the non-performance by the Attorney-General of his duty. His belief that it would be sufficient if he expressed his views on the bill after the Constitutional Court had assembled to consider objections raised by others, was a misconception of his own responsibilities. As a matter of fact, even when he did appear before the Constitutional Court, he did not publicly disclose his views on the bill.[1] He was an essential link in the constitutional process of testing the validity of bills; but if an Attorney-General were to deliberately neglect to perform his constitutional duty and yet continue to remain in office, that process could not work. The requirement in the 1978 Constitution that the Attorney-General should convey his views on a Bill to the President appears, therefore, to be a more realistic one.

If an amendment is moved to a bill in the course of its progress through the legislature, there is no opportunity available to a citizen to raise a question of inconsistency in regard to that amendment. Under both Constitutions, the Attorney-General was required to examine all amendments proposed to a bill and to communicate his opinion to the Speaker at the stage when the bill was ready to be put to the House for its acceptance. But the 1978 Constitution does not enable the Speaker to make a reference to the Supreme Court at any stage. Under the 1972 Constitution it was theoretically possible for the Speaker to refer to the Constitutional Court at any stage an opinion communicated to him by the Attorney-General. Such a reference, however, was never made. This is a serious omission as was made evident when on 17 October 1980, the following clause was moved at the committee stage discussion on the Presidential Elections Bill and the Parliamentary Elections Bill:

> 1. No person shall canvass for, or act as agent of or speak on behalf of, a candidate, or in any way participate in an election, if such person is a person on whom civic disability has been imposed by a resolution passed by Parliament in terms of Article 81 of the Constitution, and the period of such civic disability specified in such resolution has not expired.
>
> 2. Every person who contravenes the provisions of subsection (1) shall be guilty of an offence and shall, on conviction after a summary trial before a Magistrate, be liable to a fine not exceeding

---

1. Supra, pp.241-255.

> one thousand rupees, or to imprisonment of either description for a term not exceeding six months, or to both such fine and imprisonment.[1]

On the previous day, Parliament had imposed civic disability on the leader of the SLFP, Mrs.Bandaranaike. This new prohibition was , prima facie, an infringement of Article 14(1)(e) which guaranteed freedom of speech and expression to all citizens, including those on whom civic disability had been imposed. But in the absence of a challenge and, consequently, of a determination by the Supreme Court, this provision found its way into the statute book.

Jurisdiction

The Constitutional Court was required to advise the Speaker whether an impugned bill or any of its provisions was inconsistent with the Constitution. In arriving at its decision, the Court was entitled to hear the Attorney-General, who had the right to be heard on all matters before that Court, and any other person: as a matter of practice, the Court heard every petitioner or counsel appearing on behalf of such petitioner. On one occasion when the Attorney-General advised the Speaker to refer to the Court the question of the inconsistency of a bill and then declined, for personal reasons, to exercise his right of audience, the Court heard private counsel who had been retained by the State to place before it the case for constitutionality of the impugned bill.[2] The Constitutional Court was also entitled to hear witnesses and examine documents. Although no oral evidence was ever recorded, the Court had recourse to a variety of documents including a party manifesto,[3] a Speech from the Throne,[4] constituent assembly proceedings,[5] a report of a press interview given by a Minister;[6] a commentary on the constituent

---

1. Parliamentary Debates, 17 October 1980, col.1665.
2. Attorney-General Tennekoon declined to appear in respect of the Associated Newspapers of Ceylon Ltd (Special Provisions) Bill on the ground that his wife was a shareholder of the newspaper company concerned. The Government thereupon retained C.Thiagalingam,Q.C., a leading member of the Unofficial Bar, who appeared with the Secretaries for Justice and Constitutional Affairs as his juniors.
3. Sri Lanka Press Council Bill (1973) DCC, Vol.1, p.1.
4. Ibid; Companies (Special Provisions) Bill (1974) DCC, Vol.2, p.1.
5. Ibid.
6. Ibid.

assembly;[1] a government communique;[2] reports of commissions of inquiry;[3] a budget speech;[4] court proceedings;[5] and the "trend of legislation",[6] as well as to other constitutions and the decisions of foreign courts, notably those of the Supreme Courts of India and the United States. The decision of the Constitutional Court together with the reasons therefor was required to be given within two weeks of the reference; a dissentient member could if he so wished state at the same time the reasons for his dissent.

The Supreme Court's jurisdiction in respect of proposed legislation is wider in scope. Any provision of the 1978 Constitution may be amended with a special majority (i.e. by not less than two-third of the total number of members of Parliament voting in favour thereof);[7] the amendment of certain further entrenched provisions requires, in addition, approval by the people at a referendum.[8] The Constitution as a whole may not be repealed unless the bill for such repeal also seeks to enact a new Constitution to replace it.[9] The operation of the Constitution, or any part thereof, may not be suspended.[10] Accordingly, the Supreme Court may, in respect of a bill, be required to determine one or more of the following questions:

a) whether the bill or any provision thereof requires to be passed with the special majority;
b) whether the bill or any provision thereof requires to be passed with the special majority and to be approved thereafter at a referendum;
c) whether the bill seeks to repeal the Constitution without seeking to enact a new Constitution to replace it;
d) whether the bill seeks to suspend the operation of the Constitution or any part thereof;
e) whether the long title of the bill requires to be amended so as to state specifically that it is either for the amendment or for the repeal and replacement of the Constitution.

---

1. Ibid.
2. Ibid.
3. Associated Newspapers of Ceylon Ltd (Special Provisions) Bill (1973) DCC, Vol.1, p.35.
4. Companies (Special Provisions) Bill, supra; Banking Corporation of Sri Lanka Bill (1977) DCC, Vol.5, p.1.
5. Church of Sri Lanka (Consequential Provisions) Bill (1975) DCC, Vol.3, p.5.
6. Greater Colombo Economic Commission Bill (1978) DCC, Vol.6,p.5.
7. Art.82(5).
8. Art.83.
9. Art.75.
10. Ibid.

The Attorney-General as well as the petitioner (either in person or by attorney-at-law) have the right to be heard.[1] There is no specific provision for the admission of evidence, whether oral or documentary, and the Court has so far confined itself to the content of the relevant bills without proceeding to examine extraneous matter in order to gather or understand the pith and substance or true character of a proposed legislative measure. The determination, accompanied by the reasons therefor, is required to be communicated to the President and the Speaker within three weeks of the making of the reference or the filing of the petition, as the case may be.[2]

Urgent Bills

By the simple device of an endorsement under the hand of the Secretary to the Cabinet that a bill is "urgent in the national interest", it has been possible to avoid any argument in Court between contending parties on the constitutionality of such bill.[3] A bill which bears such an endorsement is not required to be gazetted.[4] Consequently, its existence is generally not known outside the Cabinet. In respect of such a bill, the Constitutional Court was required to examine it along with the Attorney-General and to communicate its opinion to the Speaker "as expeditiously as possible and in any case within 24 hours of the assembling of the Court". Its opinion could have been that the bill or any provision therein was either consistent or inconsistent with the Constitution, or that it entertained a doubt on that question; in the latter event, it was deemed that an inconsistency existed.[5] The 1978 Constitution retained this extraordinary technique and procedure, but gave the Supreme Court "twenty-four hours (or such longer period not exceeding three days as the President may specify) of the assembling of the Court" within which to communicate its determination to the President and the Speaker.[6] Neither the Constitutional Court nor the Supreme Court was required to give reasons for its opinion or determination.

---

1. Art.134.
2. Art.121(3).
3. S.55(1); Art.122(1).
4. Ibid.
5. S.55.
6. Art.122.

This procedure was justified in the Constituent Assembly on the basis that "there comes once in a way, as in the case of the demonetization law, the need for a government in the national interest to pass a law in the shortest possible time before people can make preparations against that law".[1] This is undoubtedly true; pre-emptive action can be taken to nullify the effect of a bill which seeks to impose a new tax or levy new duties if prior notice is given of such bill and its passage through Parliament is attended with delay. But none of the five bills for which this procedure was invoked by the SLFP Government between 1972 and 1977 fell into this category:

1. The Bribery (Special Jurisdiction) Bill sought to give the Minister of Justice power to nominate a district court situated anywhere in Sri Lanka for the purpose of the trial and disposal of offences under the Bribery Act irrespective of the place where such offences had been committed.[2]
2. The Associated Newspapers of Ceylon Ltd (Special Provisions) (Amendment) Bill sought to enlarge the definition of the term "members of the public" in the principal Act, being persons to whom shares in the company could be offered for sale, by including within it "public corporations".[3]
3. The Interpretation (Amendment) Bill sought to declare clearly and unequivocally the intention of the legislature in previously enacting that no court shall grant an injunction against the State or person acting on behalf of the State.[4]
4. The Banking Corporation of Sri Lanka Bill sought to establish a Banking Corporation and to vest in that Bank upon payment of compensation the existing undertakings in Sri Lanka of all foreign commercial banks which were not nationalised banks in their own countries.[5]
5. The Temple Lands (Abolition of Service Tenures) Bill sought to abolish the feudal system of service tenure of temple lands.[6]

There was no urgency which was apparent in regard to Bills (1) and (2); in fact, Bill (1) was referred to the Constitutional Court under section 55 only because the Minister of Justice thought it

---

1. Colvin R.de Silva, Constituent Assembly Debates, 4 July 1971, col.2856.
2. 14 February 1973; (1973) DCC, Vol.1, p.23.
3. 28 June 1974; (1974) DCC, Vol.2, p.7.
4. 3 September 1974; (1974) DCC, Vol.2, p.8.
5. 7 April 1977; (1977) DCC, Vol.5, p.1.
6. 15 April 1977 (1977) DCC, Vol.5, p.6.

was about time that the special procedure contemplated in that section was "tried out".[1] Bill (3) was probably considered urgent because it sought also to nullify certain court decisions granting injunctions against the State. Bills (4) and (5) were referred to the Court at a time when the National State Assembly stood prorogued. There was no secrecy involved in either proposal since they had both been announced five months previously in the budget speech of the Minister of Finance. The reference of these two bills was probably a political ploy, at a time of mounting speculation as to whether or not the National State Assembly would be dissolved; in fact, the Assembly was dissolved on 20 May without either of these bills being presented to it.

Between September 1977 and August 1978, the new UNP Government referred the following bills to the Constitutional Court as being urgent in the national interest:

i. Second Amendment to the Constitution[2]
ii. Rent (Amendment) Bill[3]
iii. Ceiling on Housing Property (Amendment) Bill[4]
iv. Criminal Justice Commissions (Repeal) Bill[5]
v. Exchange Control (Amendment)(Repeal) Bill[6]
vi. Export Duty (Special Provisions) Bill[7]
vii. Foreign Exchange Entitlement Certificate (Repeal) Bill[8]
viii. Monetary Law (Amendment) Bill[9]
ix. Budgetary Relief Allowance of Workers Bill[10]
x. Public Security (Amendment) Bill[11]
xi. Special Presidential Commissions of Inquiry Bill[12]
xii. Parliament (Powers and Privileges)(Amendment) Bill[13]
xiii. Bretton Woods Agreements (Special Provisions) Bill[14]
xiv. Criminal Procedure (Special Provisions) Bill[15]
xv. Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Bill.[16]

---

1. Private information.
2. (1977) DCC, Vol.5, p.8.
3. Ibid, p.10.
4. Ibid., p.12.
5. Ibid., p.22.
6. Ibid., p.23.
7. Ibid.
8. Ibid., p.25.
9. Ibid., p.26.
10. Ibid., p.33.
11. (1978) DCC, Vol.6, p.12.
12. Ibid., p.13.
13. Ibid., p.15.
14. Ibid., p.21.
15. Ibid., p.22.
16. Ibid., p.24.

Of them, bills (vi), (vii), (viii) and (ix) sought to implement certain budgetary proposals and could be said to have been legitimately referred under the special emergency procedure. Bill (xiii) was non-controversial, but not urgent. Bill (x) sought to provide greater parliamentary control over a state of public emergency, but was not urgent. Four other bills sought to give relief: (ii) to enable one-house owners to recover possession of such houses; (iii) to enable tenants of low-rent houses to become owners of such houses; (iv) and (v) to terminate certain controversial criminal proceedings in respect of exchange control offences. There was no element of urgency, however, in regard to any of these four bills, in the sense of the delay that might have been involved had these bills been gazetted and public notice given. The five remaining bills are worthy of a closer examination:

Bill (i): The Second Amendment to the Constitution sought to transform Sri Lanka's parliamentary executive into a presidential executive. By invoking section 55, the Government succeeded not only in avoiding any prior discussion of the bill within its own parliamentary group, but also in preventing the Opposition from raising before the Constitutional Court the fundamental question whether the National State Assembly was competent to make such a dramatic re-structuring of the Constitution. The lack of urgency in regard to this bill is evident from the fact that, upon being passed by the Assembly on 20 October 1977, the new law was not brought into operation until several months later, on 4 February 1978.

Bill (xi): The Special Presidential Commissions of Inquiry Bill sought to provide a method by which the conduct of public officers could be examined and civic disability could be imposed on those found guilty of political victimisation, misuse or abuse of power, corruption or fraud. In a cursory examination, the Constitutional Court only considered the likely impact of this bill on those provisions in the Constitution which prescribed the qualifications of voters. It did not, for instance, consider the question whether the imposition of civic disability by the legislature, which involved the deprivation of the right to vote and to stand for election as well as the right to hold public office, would amount to the infliction of a punishment by the legislature without a judicial trial. Had an opportunity been afforded for this question to be

argued, there is no reason to think that the Court might not have held, as it did six months later after a full argument in respect of another bill, that the deprivation of the right to vote:

> is more than a mere disqualification; it is a clear punishment depriving him of the right to participate in the democratic process of choosing those who will guide the destinies of his city or his town or his village;

and that the deprivation of the right to hold public office:

> is the severest punishment that could be inflicted on . . . a public officer.[1]

By invoking section 55, the Government effectively stifled any such argument.

Bill (xii): The Parliament (Powers and Privileges)(Amendment) Bill sought to grant the National State Assembly concurrent jurisdiction with the Supreme Court to punish summarily any breach of privilege. Thereby, the legislature in Sri Lanka was seeking to acquire, for the first time, the power of arrest and the power to impose sentences of fine or imprisonment. The question whether this acquisition of judicial power traditionally exercised by the courts was lawful was prevented from being argued. The Constitutional Court merely referred to section 5(c) of the Constitution and held that the bill was in accord with it.[2]

Bill (xiv): The Criminal Procedure (Special Provisions) Bill sought to prohibit the grant of bail to persons alleged to have been concerned in the commission of certain scheduled offences. The Bill also sought to take away the power of the Court to impose a suspended sentence of imprisonment on, or to order the conditional release of, such persons, and required instead the imposition on conviction of a mandatory term of imprisonment of not less than one-third of the prescribed maximum in addition to any other punishment imposed by Court. The power of the Supreme Court on appeal to revise such sentences was also sought to be removed. The Constitutional Court looked for a "permissible classification" and found it in the fact that the scheduled offences related to "(1) the State; (2) persons; (3) property; and (4) offences under the Offensive Weapons Act". The first three of these categories encompass the whole field of serious crime and can hardly form the basis for a reasonable classification. Be that as it may, the question whether the legislature

---

1. Local Authorities (Imposition of Civic Disabilities)(No.2) Bill (1978) DCC, Vol.6, p.30, at 43-44.

2. S.5(c) declared that the National State Assembly exercises

was seeking to trespass on judicial territory was not examined; nor did anyone have an opportunity to invite the Court to examine that question.

Bill (xv): The Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Bill intruded deep into the area of individual liberty. It sought, inter alia, to empower the President to proscribe any movement, society, party, association, or body or group of persons; to authorise the censorship of news; to enable the Minister to make an order of forfeiture of property; to prohibit the grant of bail; and to empower the Minister to order the detention of persons. The Constitutional Court considered that the power to make an order of forfeiture of property, being an exercise of judicial power, could only be conferred on a court, but held that none of the other provisions were inconsistent with the Constitution. No special consideration was given, for instance, to section 18(1)(a) of the Constitution which guaranteed the equal protection of the law. No opportunity was afforded to those who were likely to be affected by the operation of this bill to argue that there was no good reason why the ordinary criminal law should not have been permitted to take its course in relation to them.

Between September 1978 and December 1981, it became the invariable practice for President Jayewardene to refer to the Supreme Court for a determination within 24 hours any bill which appeared likely to raise a legal or political controversy. During this period, the Supreme Court exercised its constitutional jurisdiction in respect of the following bills. It is significant that all except one, namely, the Essential Public Services Bill, were referred under Article 122(1)(b) on the basis that they were urgent in the national interest:

Universities Bill
Tax Amnesty Bill
Special Presidential Commission of Inquiry (Special Provisions) Bill
First Amendment to the Constitution
National Housing (Amendment) Bill
Compulsory Public Service (Amendment) Bill
Local Authorities (Special Provisions) Bill
Second Amendment to the Constitution
Monetary Law (Amendment) Bill

"the judicial power of the People through courts and other institutions created by law except in the case of matters relating to its powers and privileges, wherein the judicial power of the People may be exercised directly by the National State Assembly according to law".

Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations (Amendment) Bill
Motor Traffic (Amendment) Bill
Prevention of Terrorism (Temporary Provisions) Bill
Essential Public Services Bill
Criminal Procedure (Amendment) Bill
Payment of Supplementary Allowance Bill
Passport (Regulation) and Exit Permit (Amendment) Bill
Parliament (Powers and Privileges)(Amendment) Bill
Inland Revenue (Amendment) Bill
Development Councils Bill
Third Amendment to the Constitution.

Of course, any constitutional exercise during this period was largely academic for the reason that the Government had a comfortable majority in Parliament with which it was able to secure the passage of amendments to the Constitution as well as bills which were inconsistent with any provision of the Constitution. The Government could only have been deterred if the Supreme Court held that approval at a referendum was also necessary for the passage of a bill. The Court so held on three occasions;[1] the Government deleted the offending provisions in two bills and abandoned the third altogether. But the invocation of the special procedure in Article 122 has produced two more far-reaching effects. Firstly, it has prevented the citizen from enforcing his fundamental rights in respect of legislative action. Secondly, it has resulted in the enactment of laws which have been subjected only to a hurried and perfunctory test by the Supreme Court against the fundamental rights so solemnly and ostentatiously incorporated in the Constitution.

Principles of Interpretation

The function of a court called upon to determine whether a bill is inconsistent with the Constitution is different from that of a court which has to decide whether a law enacted by Parliament is invalid. In the latter case, the court may presume that all laws are constitutional. Where two interpretations are equally possible, namely, one consistent and the other inconsistent with the Constitution, the court may lean towards the former. In the judicial review of bills, however, none of these presumptions need apply. Before making its first determination in 1973, the Constitutional Court declared that in the performance of its functions:

> the correct approach is to examine the provisions of the bill vis-a-vis the Constitution and thereafter

1. Essential Public Services Bill, Development Councils Bill, and the Third Amendment to the Constitution.

> decide the question without resort to presumptions or counter-presumptions. Secondly, we should interpret the Constitution as far as possible in a manner that will make the Constitution work and not in a manner that will place impediments and obstacles to the working of the Constitution.[1]

In applying the first of these principles, the Court had necessarily to consider the scope of the limitation clause, section 18(2) of the 1972 Constitution. In its view, the Court was entitled to determine whether the provisions of a bill which, prima facie, infringed a fundamental right, were in the interests of the several matters set out in that section. But the Court considered that the words "in the interests of" were words of great amplitude which had to be given not a restricted meaning but a wide connotation.[2] A wide connotation, of course, lessened the applicability and reduced the scope of the fundamental right concerned.

The differentia which is the basis of classification and the objects of a bill are distinct from each other. In order to ascertain the latter, the Court at first looked only at its title, preamble and provisions. In order to find out the differentia, the Court did not restrict itself to the bill, but went outside it to find some economic, political or other social interest to be secured and some relation of the classification to the objects sought to be accomplished. In doing this, the Court considered matters of common knowledge, common report, the history of the times and reports of commissions.[3] Later, however, the Court was of the view that in ascertaining the objects of a bill, its function was not merely to look at the title, preamble and provisions and assume that the matters of fact stated therein were factually true and were correctly set out; the Court was entitled to look at extraneous matter in order to determine whether the matters of fact thus stated were, in fact, true.[4]

Although the Constitutional Court declared at the outset that it will not resort to presumptions or counter-presumptions in deciding a question of alleged inconsistency, it became evident that at least one presumption consistently influenced its decisions in the early years. Dealing with an objection to the Press Council on the ground

---

1. Sri Lanka Press Council Bill (1973) DCC, Vol.1, p.1, at 6.
2. Ibid., at 15.
3. Ibid., at 42.
4. Church of Sri Lanka (Consequential Provisions) Bill (1975) DCC, Vol.3, p.5, at 15.

that its members were to be appointed by the President on the advice of the Minister who, it was argued, could pack the Council with nominees of his choice or of his own political persuasion, the Court observed that:

> The petitioners appear to see a bear behind every bush. If the Constitution enables the President to appoint on the advice of the Minister [sic] judges to the highest judicial tribunals, what is the suspicion about the Minister advising the President on the appointment of members of the Press Council ? Must we in considering this Bill presume that the Minister will act mala fide and not in the interests of the country ? To give such an interpretation and to hold that therefore this is a violation of the Constitution would be doing injustice to the Constitution.[1]

In the same case, the Court rejected a submission that the Minister might, in tendering advice to the President on another matter, sometimes act capriciously:

> Can one imagine a responsible Minister observing collective responsibility advising the constitutional President the removal of a member unless it be for good cause ?[2]

The power conferred on the Minister by the Administration of Justice Bill to prescribe by regulation the offences which may be compounded and to specify the persons by whom they may be so compounded was objected to on the ground that the Minister could make a regulation to compound a case at the instance of a person to be named in the regulation and in respect of offences normally not compoundable and thereby abuse the powers given to him. The Court observed:

> We repeat that we must not examine the Bill with the premise that a responsible Minister will act perversely and irresponsibly under the powers given to him under the Bill.[3]

In rejecting a submission that the power to exempt a company or class or category of companies from the application of the Companies (Special Provisions) Bill would amount to a delegation of the legislative power of the National State Assembly, the Court considered it relevant to note that:

> under the present Bill, the power of granting and revoking exemptions is vested not in any administrative officer, but in two responsible Ministers.[4]

---

1. Sri Lanka Press Council Bill, supra, at 17, per Pathirana J.
2. Ibid., at 17.
3. Administration of Justice Bill (1973) DCC, Vol.1, p.57. at 72, per Pathirana J.
4. Companies (Special Provisions) Bill, supra, at 72, per K.D. De Silva.

Examining the argument that the Licensing of Traders and Regulation of Internal Trade Bill sought to single out traders and manufacturers for discriminatory legislation, the Court insisted that there was an intelligible differentia which was apparent. After all:

> The Minister of Trade has presented this Bill to the National State Assembly. As an elected representative of the people in the National State Assembly and as a member of the Cabinet he would have been conscious and aware of the abuses on the part of manufacturers and traders in this connection and the Bill is directed to prevent these abuses and malpractices and thereby ensuring to the consumers articles of good quality at controlled prices.[1]

With the change of government in July 1977, the Constitutional Court's attitude towards the vesting of discretionary power in Ministers also underwent a transformation, and its approach became more realistic. In October 1977, the question arose whether the Excise (Amendment) Bill offended section 18(1)(a) of the Constitution for the reason that it sought to vest an unfettered discretionary power in the Minister if he considered it necessary to do so, without assigning any reason, to direct the authority granting a licence, to grant, renew or cancel a licence. The Court had no doubt that the Minister could "arbitrarily discriminate between persons in like circumstances". It was argued by the Attorney-General that the discretionary power being vested in a person of high standing like a Minister was an assumption that the power will not be abused and that that was a sufficient safeguard against the exercise of arbitrary power in a manner so as to discriminate between persons similarly placed and in like circumstances. The Court did not agree:

> That is quite a different thing from saying that the granting of such arbitrary powers by statute does not contravene the provision in the Constitution regarding the equal protection of the law when there is no principle or policy that should guide the exercise of such wide discretion.[2]

In January 1978, the Constitutional Court expressed the view that a provision in the Greater Colombo Economic Commission Bill which empowered the Minister, by regulation, to modify or alter the provisions of any written law in their application to the area of authority of the Commission, was likely to be abused by the

---

1. Licensing of Traders and Regulation of Trade Bill (1976) DCC, Vol.4, p.17, at 22, per Pathirana J.
2. Excise (Amendment) Bill (1977) DCC, Vol.5, p.14, at 21, per Pathirana J.

Minister:

> It would be open to the Minister to amend for instance the Trade Unions Ordinance by making regulations prohibiting the formation of trade unions and there would then be a violation of section 18(1)(f) of the Constitution whereby all citizens have the right to freedom of association.[1]

The second principle formulated by the Constitutional Court implied that the Court intended to be an active participant in the process of effecting social change. According to the Court, the 1946 Constitution had been "an obstacle to solving the problems of the people".[2] One of its principal defects was that:

> We were also not sure whether our Legislature was supreme, because time and again the Legislature was told that it had not the right to enact certain laws.[3]

The doctrine of separation of powers which the Supreme Court had read into that Constitution "has no place in our Constitution now".[4] Although a Constitution must be interpreted "in a broad way and not in a narrow and pedantic sense",[5] the concept of judicial power had been given too extensive a meaning under that Constitution:

> We are not prepared to go outside the definition of Griffiths CJ in order to find out the meaning of the term 'judicial power'.[6]

The Constitutional Court believed that to adopt the "Holmes test" or to apply the "historical criterion" expounded by Dean Roscoe Pound, as the Supreme Court had previously done, "will be in our view to put the clock back many years".[7] It had no intention of doing that since:

> We are now emerging from a colonial economy and marching towards a socialist democracy,[8]

Analogies, precedents, principles and practices of the past, however useful, should now yield, in the interpretation of a Constitution

---

1. Greater Colombo Economic Commission Bill, supra, at 8, per Wijesundera J.
2. Sri Lanka Press Council Bill, supra, at 4, per Pathirana J.
3. Ibid.
4. Associated Newspapers of Ceylon Ltd (Special Provisions) Bill, supra, at 53, per Pathirana J.
5. Sri Lanka Press Council Bill, supra, at 4, per Pathirana J.
6. Administration of Justice Bill, supra, at 69, per Pathirana J.
7. Ibid., at 63, per Pathirana J.
8. Companies (Special Provisions) Bill, supra, at 4, per K.D. de Silva.

which derives its power and authority solely from the People, to the principles set out in the Constitution itself,

> namely, the Principles of State Policy and the Fundamental Rights and Freedoms and to what extent those fundamental rights and freedoms are subject to restrictions which the Constitution itself had prescribed in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy.[1]

It is significant that in reminding itself of the principles by which it should be guided, the Constitutional Court considered that foremost among them, taking priority even over fundamental rights, were "the Principles of State Policy set out in section 16(2) which states that the Republic is pledged to carry forward the progressive advancement towards the establishment in Sri Lanka of a socialist democracy, the objectives of which are more fully set out in that section".[2]

The Supreme Court under the 1946 Constitution was not concerned with the merits or demerits of a legislative measure; nor with the policy underlying it. But not so the Constitutional Court. In its view, the Sri Lanka Press Council Bill:

> is essential for the proper and efficient functioning of the democratic process under the Constitution of Sri Lanka and to safeguard the rights of the common man and the Press.[3]

The purpose of the Bribery (Special Jurisdiction) Bill, which was the expeditious trial and disposal of bribery cases that were pending all over the island, "is indeed a laudable object".[4] The Places and Objects of Worship Bill,

> by restricting the indiscriminate construction of buildings and objects of public worship in a manner that will not promote discord and dissatisfaction among the adherents of different religions, will help promote the rights and freedoms of all religionists and will thereby give effect to one of the Principles of State Policy, namely, promoting co-operation and mutual confidence between all religious groups in this country.[5]

---

1. Sri Lanka Press Council Bill, supra, at 6, per Pathirana J.
2. Ibid.
3. Ibid., at 21.
4. (1973) DCC, Vol.1, p.23, at 25, per K.D.de Silva.
5. (1973) DCC, Vol.1, 27, at 34, per Pathirana J.

The Court was sympathetic to the policy of the Government to broad-base the Associated Newspapers of Ceylon Limited, particularly since several of its directors had been found by a Royal Commission to have contravened the Exchange Control and Inland Revenue Acts:

> Every person or company which indulges in activities which deprive a nation of vitally needed foreign exchange is in fact waging an economic war against the State. The State is therefore both morally and in the interests of the nation justified in enacting laws which will serve to curb the powers and tendencies of those who are in commanding heights from which they could deprive the country of such foreign exchange.[1]

The Administration of Justice Bill was "another milestone in the legal history as it makes far-reaching changes in the administration of justice".[2] The Companies (Special Provisions) Bill will "remove the stranglehold which foreign business interests have over the economy of the country" as we emerge from a colonial economy and march towards a socialist democracy.[3] The Constitutional Court understood why the Banking Corporation of Sri Lanka Bill exempted from its application those banks which operated in Sri Lanka which were nationalised in their own countries:

> Bilateral relations between the countries which have established these banks in Sri Lanka, in view of the expanding trade between Sri Lanka and these countries, may be affected if these banks are vested in the proposed Banking Corporation of Sri Lanka. In addition, the Comity of Nations necessitates this differentia because a foreign bank operating in Sri Lanka which has been nationalised in its own country will be more co-operative in carrying out the decisions and policies of that government and country vis-a-vis Sri Lanka rather than a private foreign-owned bank.[4]

Impugned Bills

During the ten year period under review, from May 1972 to December 1981, 499 statutes were enacted by the legislature. Between 1972 and 1977, under the SLFP administration, of the 209 bills which were placed on the agenda of the National State Assembly, the Constitutional Court examined 14 government bills (i.e. 9 per cent), namely:

Sri Lanka Press Council Bill
Bribery (Special Jurisdiction) Bill

---

1. Supra, at 48, per Pathirana J.
2. Supra, at 58, per Pathirana J.
3. Supra, at 5, per K.D.de Silva.
4. (1977) DCC, Vol.5, p.1, at 2, per Pathirana J.

Places and Objects of Worship Bill
Associated Newspapers of Ceylon Ltd (Special Provisions) Bill
Administration of Justice Bill
Companies (Special Provisions) Bill
Associated Newspapers of Ceylon Ltd (Special Provisions) (Amendment) Bill
Interpretation (Amendment) Bill
National Prices Commission Bill
Pirivena Education Bill
Licensing of Traders and Regulation of Internal Trade Bill
Parliamentary Pensions Bill
Banking Corporation of Sri Lanka Bill
Temple Land (Abolition of Service Tenures) Bill,

and one private member's bill, namely, the Church of Sri Lanka (Consequential Provisions) Bill. Only the latter was held, with one member of the Court dissenting, to be inconsistent with the Constitution. The Court agreed with the Attorney-General that three clauses of the Administration of Justice Bill were inconsistent with the Constitution, and the Minister of Justice informed the National State Assemnbly that the Government intended to amend the bill accordingly.

Between the election of the UNP Government in July 1977 and the repeal of the 1972 Constitution fourteen months later, of the 60 bills which were placed on the agenda of the National State Assembly, the Constitutional Court examined 22 bills, of which 15 had been referred under section 55 as being urgent in the national interest. The seven inter-parte applications related to:

Excise (Amendment) Bill
Local Authorities Elections (Special Provisions) Bill
Finance (Amendment) Bill
Greater Colombo Economic Commission Bill
Protection of Tenants (Special Provisions)(Amendment) Bill
Local Authorities (Imposition of Civic Disabilities)(No.1) and (No.2) Bills.

Of them, the Court held the Excise (Amendment) Bill to be inconsistent with the Constitution, but on a ground not urged by the petitioner. Four other bills, including one referred under section 55, were found to contain certain provisions which were also inconsistent with the Constitution.

Between 1978 and 1981, 230 bills were placed on the Order Paper of Parliament. Of them, the Supreme Court examined 20 bills (i.e. 8 per cent), 19 of which had been referred to the Court by the President in terms of Article 122(1)(b) on the ground that they were urgent in the national interest. The single bill, the

constitutionality of which was the subject of a full argument, namely, the Essential Public Services Bill, was found to contain one provision which could not be passed by Parliament alone, but which also required approval at a referendum. The Court was of the view that five of the bills referred to it for a special determination within 24 hours, namely,

Universities Bill
National Housing (Amendment) Bill
Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations (Amendment) Bill
Development Councils Bill
Third Amendment to the Constitution

contained provisions which either required to be passed by a special majority or by a special majority followed by approval at a referendum.

Enforcement of Fundamental Rights

At the end of ten years, only four fundamental rights had been successfully invoked in respect of proposed legislation. Only six bills were judicially found to contain provisions which infringed the protected rights and freedoms.

Freedom of Religion

The Church of Sri Lanka (Consequential Provisions) Bill was presented to the National State Assembly by a private member. Following a decision by the Church of Ceylon, the Methodist Church of Ceylon, the Churches affiliated to the Sri Lanka Baptist Sangamaya, the Presbytery of Lanka and the Jaffna Diocese of the Church of South India to surrender their separate existence (a fact asserted in the preamble to the bill) and to join together to form a united church called the Church of Sri Lanka, this bill sought to establish a Trust Association of the Church of Sri Lanka in which would vest the properties of the five uniting churches. The bill was challenged by a number of clergymen as well as laymen who disputed the claim in the preamble that the five churches had indeed decided to surrender their separate existence. On the evidence placed before it, the Constitutional Court found that at least three of the churches had not duly decided to join the Church of Sri Lanka, and that even if they had, the decisions were invalid. If, therefore, the property of those three churches, including the places of worship, vested in the proposed new trust association, those who resorted to those churches for the performance of their religious

observances would no longer have a church building of their own for the practice of their religion. Accordingly, the Court held that section 18(1)(d) was infringed. Once the churches to which they resorted for their worship were taken away, their right to freedom of peaceful assembly and association under section 18(1)(f) was also infringed.[1] The bill was withdrawn.

Freedom of Assembly and Association

The Greater Colombo Economic Commission Bill sought to establish a corporate body for the purpose of attracting foreign capital for investment in Sri Lanka. The commission would be authorised to grant certain facilities and concessions to business enterprises within its two hundred square-mile area of authority. The commission would have the power to enter into any agreement with any enterprise, and in so doing, it could grant exemptions from certain scheduled laws or modify or vary the application of such laws to such agreement in accordance with regulations made by the Minister. The bill provided, inter alia, that the Minister may by regulation: (a) determine the scope and extent of any exemption or modification of the scheduled laws which may be embodied in an agreement, and (b) modify or alter the provisions of any scheduled laws in their application to the area of authority of the commission. The Court accepted the submission that the power sought to be conferred on the Minister could be exercised for the purpose of amending the Trade Union Ordinance, which was one of the scheduled laws, by making regulations prohibiting the formation of trade unions. This would constitute an infringement of section 18(1)(f).[2] In the National State Assembly, the Prime Minister announced that the offending provision would be deleted.[3]

Right to Equal Protection of the Law

The Greater Colombo Economic Commission Bill noted above also sought to empower the commission, inter alia, to stipulate minimum wages for employees in any enterprise and to prescribe their conditions of service. Thereby, the commission would be empowered to vary the conditions of service, including minimum wages which had already been determined by law. The Constitutional Court held that

1. (1975) DCC, Vol.3, p.5.
2. (1978) DCC, Vol.6, p.5.
3. National State Assembly Debates, 19 January 1978, col.247.

this would enable the commission to discriminate between enterprises similarly placed and in like circumstances. Accordingly, this provision was inconsistent with section 18(1)(a).[1] The Government accepted this decision and moved to delete the offending provision.[2]

The Excise (Amendment) Bill sought to confer a new power on the Minister in the following terms:

> Notwithstanding anything in this Ordinance, if upon representations made or otherwise, the Minister considers it necessary to do so, he may without assigning any reason therefor, direct the authority granting a licence, to grant a licence, or to renew or cancel a licence, and such authority shall give effect to such direction.

The Constitutional Court observed that the bill made no classification of the persons or class of persons for the purpose of applying this new provision, but left it to the absolute and uncontrolled discretion of the Minister. The bill also did not lay down any principle or policy for guiding the exercise of discretion by the Minister in the matter of selection or classification. It, however, gave wide and uncontrolled power to the Minister to discriminate between persons similarly situated and therefore the discrimination was inherent in the bill itself. In the result, the bill, while giving the power to the Minister to discriminate between persons in like situations, provided no differentia which had a reasonable basis in terms of some rational view of the public interest. Accordingly, the Court held that the bill was inconsistent with section 18(1)(a).[3] The bill, however, was moved in its original form and passed with the special majority required to enact laws inconsistent with the Constitution.[4]

The Local Authorities (Imposition of Civic Disabilities) (No.2) Bill sought to impose civic disabilities on certain persons named in the schedule against whom findings had been made by a commission of inquiry "as it has become necessary to do so in the public interest". It was submitted that not only did the schedule include the names of persons against whom no specific findings had been made in the report of the commission, but that certain persons against

---

1. (1978) DCC, Vol.6, p.5.
2. National State Assembly Debates, 19 January 1978, col.247.
3. (1977) DCC, Vol.5, p.14.
4. Excise (Amendment) Law, No.14 of 1977.

whom findings had in fact been made were not so included. In order to verify this contention, the Court looked at the report of the commission and found that nine of the persons named in the schedule had no findings recorded against them, while six persons against whom findings had been made were omitted from the schedule. The Constitutional Court held that the relevant provisions of the bill were inconsistent with section 18(1)(a) for two reasons: firstly, the National State Assembly was seeking through this bill to select persons on some basis other than on the findings by the commission in its report; secondly, the classification of these persons was arbitrary and had no relation to the objects sought to be achieved by the bill.[1] The Government did not move to amend the bill, but used its two-thirds majority to pass it in its original form.[2]

Freedom from Torture

The Essential Public Services Bill sought to provide for the declaration of specified services provided by certain government departments, public corporations, local authorities and co-operative societies as "essential public services", and to make provision, including sanctions and punishments, to ensure that those services were carried out unimpeded and uninterrupted. Clause 4 of the bill sought to provide for punishment. An offender would be liable, on conviction, to imprisonment ranging from a minimum of two years to a maximum of five years, or to a fine ranging from Rs.2,000 to a maximum of Rs.5,000, or to both imprisonment and fine. Additionally, he would also be liable to a mandatory forfeiture of all movable and immovable property and, in the event the offender was registered under any law to practise any profession or vocation, the mandatory removal of his name from such register. It was argued that these punishment provisions contravened Article 11. The Attorney-General countered that all these forms of punishment were already recognised by existing law. The Court observed that "the piling of punishment on punishment indiscriminately, whether they be old forms of punishment or new, must pass the test of Article 11, if they are to be valid"; it was not a case of mere excessiveness of the punishment, but one of inhuman treatment and punishment. Accordingly, it held

---

1. (1978) DCC, Vol.6, p.30. See also p.26 for Bill No.2.
2. Local Authorities (Imposition of Civic Disabilities)(No.1) (No.2) Laws, Nos.38 and 39 of 1978. See also National State Assbly Debates, 11 August 1978, cols.1725-1952.

that:

> the compulsory forfeiture of property and the erasure of the offender's name from his professional register, in addition to compulsory imprisonment or fine, constitute excessive punishment and savours of cruelty. In our view, clause 4(2) of the Bill contravenes Article 11 of the Constitution. It is not our view that the mandatory confiscation of property or the removal from the register of a profession is inherently bad, or that all these punishments cannot be applied together in a serious and fit case. Our objection is to their mandatory nature and to their indiscriminate application ad terrorem, irrespective of the nature of the offence or the culpability of the offender.[1]

In Parliament, the government moved to amend the offending provision by making the forfeiture of property and the removal of a name from the register discretionary: the Court may impose these additional punishments if it was of the opinion that there were sufficient grounds for doing so.[2] Thereby, the Government avoided the necessity for approval of the bill by the people at a referendum.

An Assessment

The 1972 and 1978 Constitutions both offered a special forum and a special procedure whereby any citizen, irrespective of whether or not he had an "interest" in the matter, could canvass the constitutionality of proposed legislation. No longer did such a person have to concern himself with extraneous issues of a preliminary nature in order not only to acquire a locus standi, but also to vest the forum of his choice with jurisdiction. Laws achieved certainty upon enactment, in the sense that their validity was thereafter not open to question.

There were, however, inherent defects in the system devised by the Constituent Assembly and subsequently adopted, with slight modifications, in the 1978 Constitution:

1. Publication of a bill in the gazette did not provide it with sufficient publicity to enable it to be read and examined by at least a cross section of the adult population during the period within which proceedings could be initiated to test its constitutionality. This defect is one that can be remedied by requiring a bill to be published in one or more of the national

---

1. Parliamentary Debates, 2 October 1979, cols.421-422.
2. Ibid., cols.448-838. See also Essential Public Services Act No.61 of 1979.

newspapers as well.

2. The time limit of fourteen days originally precribed for the Constitutional Court to communicate its decision to the legislature was quite inadequate; the present limit of twenty-one days is more reasonable, although a period of one month would perhaps be more realistic.
3. The requirement that a bill which the Cabinet has certified as "urgent in the national interest" should be examined and reported upon by the Court within 24 hours is the very antithesis of judicial review. Apart from the entire proceedings being shrouded in secrecy, with no publicity being given either to the bill or to the fact that a Court is about to examine it, it is inconceivable that any body of men, however astute or learned, could, unaided except by the Government's lawyer, subject a bill to the scrutiny and examination that any measure which seeks to encroach upon a fundamental right deserves. Section 55 of the 1972 Constitution was originally intended to be the answer to a finance minister's pre-budget nightmare. If so, the application of the present Article 122 ought to be restricted to financial measures which are urgent in the national interest. Alternatively, any bill which is enacted without having been previously published in the gazette (and therefore not examined for inconsistency at the instance of a citizen) should be liable to be impugned within a prescribed period of such enactment.
4. The procedure relating to amendments is unsatisfactory. If the concept of the judicial review of proposed legislation is now accepted, it must surely cover not only the original bill but also any amendments that are intended to be moved in the legislature before that bill becomes a law. This is particularly important in view of an allegation which was made in 1979 by the Opposition that an entirely new clause which had not even been moved on the floor of the house had found its way into an Act of Parliament.[1]

---

1. The printed version of the Special Presidential Commissions of Inquiry (Special Provisions) Act, No.4 of 1978, contained the following section:

"8. The following new section is hereby inserted immediately after section 21 of the principal enactment and shall have

The Sri Lankan experience of the judicial review of bills demonstrates very vividly that constitutional provisions alone can achieve very little if the will and the desire to implement them in the spirit in which they were enacted, is absent. The Constitutional Court appears to have been preoccupied with the

---

effect as section 21A of that enactment:-

Effect of this law notwithstanding inconsistencies.

21A. The provisions of this Law and any warrant issued under the provisions of this Law shall be so interpreted and given full force and effect in order that any commission shall have full authority, power and jurisdiction to inquire into the conduct of any Prime Minister, Minister or other public officer including -

(a) the misuse or abuse of power, interference, fraud, corruption or nepotism,
(b) any political victimisation of any person,
(c) any irregularity -
  i. in the making of any appointment or transfer of any person,
  ii. in the granting of any promotion to any person,
  iii. in the termination of the services of any person,
(d) the contravention of any written law,

by or on the part of any Prime Minister, Minister or other public officer and the extent to which he is so responsible, notwithstanding that the conferment of the authority, power or jurisdiction on a commission to hold an inquiry into such conduct may be or may have been or may be construed to be or to have been inconsistent with the provisions of section 46(1) or any other section of the Ceylon (Constitution) Order in Council 1946, or section 92 or section 106(5) or any other section of the Constitution of Sri Lanka adopted and enacted on 22nd May 1972".

This section did not appear in the printed bill. The verbatim record of Parliamentary Debates, Hansard, of 20 November 1978, did not contain any reference to this section. The minutes of Parliament made no mention of this section. The tape recording of the proceedings of 20 November 1978 had, according to the Speaker, been erased on the following day. When, on 4 December 1978, the Leader of the Opposition raised the matter of "this rather mysterious section" in the House after having previously mentioned it to the Speaker, the latter replied that "from the information I have I gather that there have been certain precedents set in this House since 1972 where the Legal Draftsman and the Attorney-General have, subsequent to the passing of bills, included certain provisions" (col.646). Later that day, the Speaker made a further announcement:

"I have looked into this matter and find that this amendment was also handed in to me by the Minister of Trade and Shipping at the time he moved amendments to this Bill during the committee stage, stating that there were further amendments,

urgent need "to carry forward the progressive advancement towards the establishment in Sri Lanka of a socialist democracy". This was undoubtedly one of the foremost principles of state policy enunciated in the 1972 Constitution, and was intended to serve as a guide to "the making of laws and the governance of Sri Lanka". But the Constitutional Court's function was neither the making of laws nor the governance of Sri Lanka. That task had been entrusted by the people to their elected representatives sitting in the National State Assembly and functioning in the Cabinet of Ministers. The duty of the Constitutional Court was to examine the laws which these representatives intended to make in order to ensure, inter alia, that they did not encroach upon that area of individual liberty the boundaries of which had been demarcated in the Constitution. Of course, the fundamental rights were not absolute, but were subject to restrictions which the legislature was entitled to prescribe in certain defined circumstances. But those circumstances, whether it be "national security", "the protection of public health or morals", or "giving effect to the Principles of State Policy", were all exceptions to the rule. In the hands of the Constitutional Court, particularly during the SLFP administration, the scales often appeared to be tilted, but hardly ever due to the tonnage of human liberty.

---

additional copies of which, however, were not available to be distributed. (cols.754-755).

On 6 December 1978, the Prime Minister made a statement on this matter. (He had been present in the House when the Speaker made his first response two days previously). He explained that on 20 November, shortly after he had presented the bill and had retired to his room, he had received information from "a certain person known to me" that Mrs.Bandaranaike had filed a fresh application in the Supreme Court against the Special Presidential Commission of Inquiry. He was shown a copy of her application:

> "I asked the Attorney-General, who was in the Official's Box, to go through the writ application and gave him specific instructions that we must close all loopholes so that nobody could go through them."

He said that this section was then prepared by the Attorney-General. He read out a statement from Attorney-General Pasupati confirming what he had said. In his statement, the Attorney-General said that he actually recalled the Minister of Trade and Shipping reading out this new section on the floor of the House. (cols.1070-1080).

An Opposition motion for the appointment of a select committee to investigate and report on whether "a clause which had neither been moved in, nor passed by, Parliament had been interpolated" after the bill had been read a third time and passed, was not proceeded with.

If the Constitutional Court was misguided by its own enthusiastic commitment to a socialist democracy, the attitude of the Government, particularly after the general election of 1977, was indefensible. Rejecting the spirit not only of the Constitution which it inherited, but also of that which it fathered, the Cabinet misused section 55 of one and Article 122 of the other, to deprive the citizen of his right to test the constitutionality of the intended exercise of legislative power. Thereby, the Government ensured that in the complex matter of legislation, the fundamental rights of the individual, together with all the elaborate arrangements made for their protection and enforcement, would remain quite ineffective and impotent.

No assessment of the judicial review of bills would be complete without a reference to the strange phenomena of extraordinarily large majorities which the electorate offered the governments elected to office in 1970 and 1977. With a two-thirds majority readily available, the constitutional sanctions imposed on the exercise of legislative power had little or no significance. Court decisions, whether they be of the Constitutional Court or of the Supreme Court, whether they approved or condemned, were only of academic interest and value. Their relevance, insofar as influencing the course of legislative history, was minimal.

CHAPTER VI

JUDICIAL REVIEW OF EXECUTIVE ACTION

In this chapter it is proposed to examine the effectiveness of the remedies made available in Sri Lanka to persons who claimed that their fundamental rights protected by the Constitution had been, or were about to be, infringed by executive action. This will involve an examination both of the traditional remedies which were available under the 1972 Constitution and of the special remedy created by the 1978 Constitution. It must be noted that, however desirable it might have been, it was not possible for a court or tribunal under either Constitution to have inquired into or pronounced upon, or in any manner called in question, the validity of a statute if such statute was relied upon as authority for the impugned executive act.

Traditional Remedies

Section 18(1) of the 1972 Constitution declared the fundamental rights which citizens and other persons in Sri Lanka were entitled to. Neither that section nor any other provision of the Constitution assured that those rights would be justiciable, or indicated how an infringement of any of them could be prevented or redressed.[1] Therefore, in order to enforce a right, an aggrieved party had necessarily to rely upon the traditional remedies. These were the prerogative writs, the declaratory judgment, the injunction, damages and bail. It is proposed to examine whether these remedies were capable of being adapted for this purpose, particularly in the absence of any constitutional direction to that effect. This examination will be made on the basis of the law applicable when that Constitution was brought into operation.

---

1. The justiciability of the fundamental rights could perhaps have been inferred from s.17 which, unlike s.18, expressly declared that the provisions of s.16 which contained the Principles of State Policy "do not confer legal rights and are not enforceable in any court". See also the assurance given by the Minister of Constitutional Affairs in the Constituent Assembly, supra, p.130.

The Nature and Scope of the Traditional Remedies

The Prerogative Writs

The prerogative writs were discretionary remedies which originated in England many centuries before the advent of the concept of justiciable human rights.[1] Some of them were first introduced into Sri Lanka by the Charter of Justice of 1801, shortly after the British occupation of the maritime provinces. At the commencement of the 1972 Constitution, section 42 of the Courts Ordinance empowered the Supreme Court or any judge thereof "to grant and issue, according to law, mandates in the nature of writs of mandamus, quo warranto, certiorari, procedendo and prohibition against any District Judge, Commissioner, Magistrate, or other person or tribunal". The expression "according to law" had been interpreted very early to mean the English law.[2] As the Supreme Court later explained:

> That means that the writs would issue in the circumstances and under the conditions known to the English law. These would include the persons against whom the writs would issue.[3]

It also meant that along with these remedies, Ceylon had also inherited even the "pricklier parts of the historical undergrowth of the law of the remedies".[4] Principles and procedural technicalities established in the dim distant past when these remedies served purposes different from those of the present, thus continued to regulate their application. The writ of habeas corpus, which unlike the other writs was a writ of right, was introduced by the Charter of Justice of 1833. The Supreme Court or any judge thereof was authorised to issue this writ to have brought before such court or judge (a) the body of any person to be dealt with according to law, or (b) the body of any person illegally or improperly detained in public or private custody.[5]

---

1. For the historical origins of the prerogative writs, see S.A.de Smith, Judicial Review of Administrative Action, 4th ed. (London: Stevens & Sons Ltd, 1980),pp.584-603.
2. Grenier's Reports, p.125, per Creasy CJ, in 1873.
3. Wijesekera v. Assistant Government Agent, Matara (1943) 44 NLR 533, per De Kretser J. Approved by a Divisional Bench in Abdul Thassim v. Edmund Rodrigo (1947) 48 NLR 121.
4. De Smith, Judicial Review, op.cit., at p.380.
5. Courts Ord., s.45.

1. Habeas Corpus. The mandate in the nature of a writ of habeas corpus, which the Supreme Court was authorised to grant, was the equivalent of the writ of habeas corpus ad subjiciendum known to the English law.[1] This, according to Halsbury,

> is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody.[2]

In Ceylon, however, this writ had been sought more often for the determination of the custody of minor children than in aid of the liberty of the subject. The few successful applications of the latter category included the release from custody of a British subject held on a deportation order made in excess of his powers by the Governor;[3] the release of a non-citizen held on an invalid removal order made under the Immigrants and Emigrants Act;[4] the release of a prisoner at large arrested by a police officer without a warrant and confined in prison without an order of remand from a magistrate;[5] and the release of a person remanded by a magistrate following his arrest by a police officer acting under an emergency regulation but without the requisite personal knowledge of the commission of an offence required by that regulation.[6]

An applicant for a writ of habeas corpus had to satisfy the Court by affidavit that his detention was unlawful.[7] He could make successive applications to different judges, provided they were not made vexatiously or frivolously.[8] In John Nadar v. Grey,[9] T.S.Fernando J considered the production by the respondent of an order, warrant of commitment or other document valid in law justifying the detention to be a sufficient answer. But in Avaummah v. Solomons,[10] six years later, Herat J disagreed: it is not a sufficient answer to justify the alleged illegal detention to merely say that the respondent is holding the corpus under an order made by some other

---

1. In re Liyane Aratchie (1958) 60 NLR 529.
2. Vol.11, 3rd ed., p.24.
3. In re M.A.L.Bracegirdle (1937) 39 NLR 193.
4. Sellamuttu v. Solomons (1964) 66 NLR 307.
5. Kolugala v. Superintendent of Prisons (1961) 66 NLR 412.
6. Gunasekera v. De Fonseka (1972) 75 NLR 246.
7. In re Liyane Aratchie, supra.
8. In re P.C.Siriwardene (1929) 31 NLR 111; Weerasinghe v. Samarasinghe (1966) 69 NLR 262.
9. (1956) 58 NLR 85.
10. (1962) 64 NLR 167.

executive officer of the Crown; it is necessary for the respondent to satisfy the Court as to the legality of the order under which he purports to detain the corpus. By 1972, the Supreme Court, still very much under the influence of Liversidge v. Anderson,[1] was more inclined to the former view.[2]

Following a declaration of martial law, the Supreme Court had declined to issue a mandate for the production of a person who was being detained in military custody by order of the General Officer Commanding the Troops.[3] Wood Renton J explained:

> When martial law in the sense with which we have to do in the present case is involved, the function of municipal courts is limited. They have the right to inquire, and the duty of inquiring, into the question of fact, whether an'actual state of war' exists or not. But when once that question has been answered in the affirmative, the acts of the military authorities in the exercise of their martial law powers are no longer justiciable by the municipal courts.[4]

That was in 1915, when Europe was at war and the resources of the British Empire were being drawn upon in all directions for military purposes. In Ceylon, relations between the Sinhalese and Muslim communities had also erupted into violence: "domestic disturbances which present all the features of actual warfare and which justify such measures for the public security".[5] But many years later, following the assassination of a prime minister, the Governor-General purported, by a regulation made under the Public Security Ordinance, to suspend the application of section 45 of the Courts Ordinance to persons detained or held in cusotdy under any emergency regulation. The legality of the suspension was not questioned on that occasion, but when its repetition some years later was, the Supreme Court did "not think there is anything alarming or startling about the suspension of the writ".[6] Alles J explained:

> If written constitutions like those of the United States and India, which recognise the liberty of the subject as a fundamental right, can make provision for the suspension of Habeas Corpus in their constitutions in certain circumstances, I see no reason why our Sovereign Parliament [sic] cannot make such a provision by legislation and call for such a suspension in times of grave emergency.[7]

---

1. [1942] AC 206.
2. Hirdaramani v. Ratnavale (1971) 75 NLR 67.
3. In re W.A.de Silva (1915) 18 NLR 277.
4. Ibid., at 279.
5. Ibid.
6. Gunasekera v. Ratnavale (1972) 76 NLR 316.
7. Ibid., at 334.

Judicial authority, therefore, existed for the proposition that at moments when this remedy was most needed to protect the citizen from the almost absolute power arrogated to itself by the executive, it can simply be suspended or made inoperative by executive fiat.

2. Mandamus. The writ of mandamus lay to secure the performance of an existing public duty. It was essentially a discretionary remedy, and "not a writ that is to issue of course, or to be granted for asking".[1] The applicant had to satisfy the Court that he had a sufficient legal interest in the performance of the public duty, and that performance had been refused by the authority obliged to discharge it.[2] The duty to be performed had to be of a public nature. Mandamus had been successfully invoked in Sri Lanka to have a name inserted on an electoral register;[3] to have such register exhibited as required by law;[4] to compel a returning officer to hold an election in accordance with law;[5] and to compel a mayor to allow a matter to be discussed at a council meeting.[6] Where a person had been wrongfully deprived of an office, this writ lay to restore him, provided the office was of a public character.[7]

In compelling the performance of a public duty, the Court had also to consider whether the duty was of a judicial or of a merely ministerial character. In the latter case, the Court could compel the specific act to be done in the manner which to it seemed lawful. If the duty was of a judicial character, a mandamus was granted only where there had been a refusal to perform it in any way;[8] not where

---

1. Shortt on Mandamus, p.224, quoted by Howard CJ in Perera v. Sockalingam Chettiar (1946) 47 NLR 265.

2. Refusal could be inferred from continued silence or might be expressed by words: Wijesekera & Co.Ltd v. Principal Collector of Customs (1951) 53 NLR 329. In respect of duties which affected the public at large, as distinct from duties of a private nature, a literal demand and refusal might, however, not be necessary: Amugodage James v. Balasingham (1950) 52 NLR 321.

3. Peries v. Gunaratne (1946) 47 NLR 491.

4. Wijesekera v. Assistant Government Agent, Matara, supra.

5. In re Chairman, Municipal Council, Galle (1906) 5 NLR 156; In re Government Agent, Northern Province (1927) 28 NLR 323; Joseph v. Kannangara (1943) 45 NLR 63.

6. De Silva v. Schockman (1939) 41 NLR 97.

7. A municipal charity commissioner held a public office: Wijesinghe v. Mayor of Colombo (1948) 50 NLR 87, while a municipal medical officer did not: Perera v. Municipal Council of Colombo (1947) 48 NLR 66. See also Rodrigo v. Municipal Council, Galle (1947) (1947) 49 NLR 89.

8. Peries v. Gunaratne, supra.

it had been done in one way rather than another, even though the method adopted might have been erroneous.[1] The Supreme Court also intervened where an authority in whom was vested a discretion of a judicial nature had, in the exercise of his discretion, applied arbitrary or unjust rules or a wrong principle of law,[2] or had been influenced by extraneous considerations which he ought not to have taken into account.[3]

Mandamus issued only against a natural person who held a public office.[4] It did not lie against a servant of the Crown where the duty sought to be enforced was not imposed on the servant himself but was imposed on him only in the capacity of agent for the Crown.[5] Accordingly, the Supreme Court has held that mandamus did not lie to require an assistant government agent to pay compensation in respect of land acquired by the State.[6] But where the duty had been directly imposed by statute upon a Crown servant or persona designata, and the duty was to be wholly discharged by him in his own official capacity, as distinct from his capacity as a mere agent for the Crown, a writ of mandamus would issue at the instance of a person who had a direct and substantial interest in securing the performance of that duty.[7]

The remedy of mandamus was not granted by way of a prohibitory injunction requiring a person to refrain from doing something unlawful.[8] Nor was it granted to compel the performance of a duty which might arise in the future; there had to be an existing duty and an existing right in someone to have it performed.[9] The Supreme

---

1. Norman v. Perera (1900) 4 NLR 85; Fernando v. Rubber Controller (1924) 26 NLR 211; In re Government Agent, Western Province (1928) 30 NLR 81; Samynathan v. Whitehorn (1934) 35 NLR 225; In re Assistant Government Agent, Uva (1937) 39 NLR 450; De Zoysa v. Dyson (1945) 46 NLR 351; Orr v. District Judge, Kalutara (1948) 49 NLR 204.
2. Noordeen v. Chairman, Village Committee, Godapitiya (1943) 44 NLR 294.
3. Wijesuriya v. Moonesinghe (1959) 61 NLR 180.
4. Haniffa v. Chairman, Village Committee, Nawalapiyata (1963) 66 NLR 48.
5. Munasinghe v. Devarajan (1955) 57 NLR 286.
6. Ibid.
7. City Motor Transit Co.Ltd v. Wijesinghe (1961) 63 NLR 156.
8. Colombo Buddhist Theosophical Society Ltd v. De Silva (1961) 63 NLR 237.
9. Mohamadu v. De Silva (1949) 52 NLR 562.

Court has also refused to grant a mandamus to undo an act already done, or to allow the validity of an act purported to have been done under a statute to be tried: for example, the cancellation of a licence which has been irregularly issued.[1]

Since the remedy was essentially discretionary in nature, the following factors have generally militated against its issue:

a) the conduct of the applicant: Where there had been delay on the part of an applicant,[2] or where the Court had not been convinced of the propriety of his motives,[3] it has declined to issue mandamus even though the substantive complaint might have been established. A candidate at an election who had acquiesced in the method of voting adopted at a meeting was held to be estopped from applying for a writ of mandamus on the ground that the procedure was irregular.[4]

b) the availability of an alternative remedy: The existence of another and equally convenient and effectual remedy provided by law, e.g. a right of appeal or a civil action, has often led the Court to decline to exercise its writ jurisdiction.[5]

c) futility of the order: The Court will not order that to be done which either cannot be done or is already done, or would be futile to do;[6] for example, to place a motion on the agenda of a meeting which has already been held,[7] or to direct the issue of a residence visa to a person who has already been deported.[8]

---

1. Ibid.
2. Abdul Rahuman v. Mayor of Colombo (1965) 69 NLR 211.
3. Madanayake v. Schrader (1928) 29 NLR 389.
4. Inasitamby v. Government Agent, Northern Province (1932) 34 NLR 33.
5. Bank of Chettinad v. Tea Export Controller (1935) 37 NLR 190; Dankoluwa Tea Estates Ltd v. Tea Controller (1940) 42 NLR 36; Samynathan v. Whitehorn, supra; Rodrigo v. Municipal Council, Galle (1947) 49 NLR 89. The alternative remedy need not be an action at law; it may be by way of an appeal to a forum domesticum: Cooray v. Grero (1954) 56 NLR 87.
6. Wimalasuriya v. Chairman, Urban Council, Matale (1927) 28 NLR 417; Simon Silva v. Assistant Government Agent, Kalutara (1931) 33 NLR 257.
7. Goonesinghe v. Mayor of Colombo (1944) 46 NLR 85. Cf. Local Government Service Commission v. Urban Council, Panadura (1952) 55 NLR 429; Seenivasagam v. Kiripamoorthy (1954) 56 NLR 450; Samaraweera v. Balasuriya (1955) 58 NLR 118; Pathirana v. Goonesekera (1962) 66 NLR 464.
8. Sethu Ramasamy v. Moragoda (1961) 63 NLR 115.

3. Certiorari and Prohibition. The principles governing the issue of these two writs were very similar. Prohibition, however, was invoked at an earlier stage than certiorari. Prohibition did not lie unless something remained to be done that a court could prohibit. Certiorari did not lie unless something had been done that a court could quash.[1] The general principle which formed the basis of the jurisdiction of the Supreme Court to grant the remedy of certiorari is best stated in the oft-quoted words of Atkin LJ in Rex v. Electricity Commissioners; Ex parte London Electricity Joint Committee:

> Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.[2]

In other words, before a body of persons could be made amenable to this remedy, it had to be shown not only that such body had legal authority to determine questions affecting the rights of subjects, but also that such body was required to act judicially.

The circumstances in which a person or body of persons is required to act judicially have been examined by Parker J in R.v. Manchester Legal Aid Committee:

> Where the decision is that of a court then, unless, as in a case, for instance, of justices granting excise licences, it is acting is a purely ministerial capacity, it is clearly under a duty to act judicially. When on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at the decision. Thus, if, in order to arrive at the decision, the body concerned has to consider proposals and objections and consider evidence, then there is a duty to act judicially in the course of that inquiry.[3]

The following are some of the instances where the Supreme Court has held that the duty to act judicially existed:

i. an arbitration under the Co-operative Societies Ordinance;[4]

ii. the determination of the employment of an officer by the Local Government Service Commission;[5]

---

1. For a full discussion, see De Smith, Judicial Review, ch.8.
2. [1924] 1 KB at 205.
3. [1952] 1 All ER 480, at 489.
4. Illangakoon v. Bogollagama (1948) 49 NLR 403; Sirisena v. Kotawera-Udagama Co-operative Society (1949) 51 NLR 262.
5. Abeygunasekera v. LGSC (1949) 51 NLR 8; cf. Suriyaperuma v. LGSC (1947) 48 NLR 433.

iii. the cancellation of a licence by the Controller of Textiles;[1]

iv. the granting of a road service licence by the Commissioner of Motor Traffic;[2]

v. the proceedings before a prison tribunal;[3]

vi. the making of a "punitive order" by the licensing authority under the Licensing of Traders Act;[4]

vii. the proceedings of a labour tribunal, an arbitrator and an industrial court under the Industrial Disputes Act;[5]

viii. the determination of a revising officer appointed under the Franchise Act;[6]

ix. the determination of a prescribed officer appointed under the Citizenship Act;[7]

x. the exercise by the Director of Education of his power under the Education Code to remove the manager of a school;[8]

xi. the determination by the Principal Collector of Customs that a person "had been concerned" in the importation of prohibited or restricted goods;[9]

xii. the determination by a Minister of an appeal against a surcharge imposed by the Auditor-General under the Town Councils Ordinance;[10]

xiii. the dismissal of a teacher by a university on the ground of incapacity or misconduct.[11]

---

1. Abdul Thassim v. Edmund Rodrigo, supra; overruled by the Privy Council in Nakkuda Ali v. Jayaratne (1950) 51 NLR 457.
2. South Western Bus Co.Ltd v. Arumugam (1947) 48 NLR 385; Kandy Omnibus Co.Ltd v. Roberts (1954) 56 NLR 293.
3. Kolugala v. Superintendent of Prisons, supra.
4. Ibrahim v. Government Agent, Vavuniya (1966) 69 NLR 217.
5. Walker Sons & Co.Ltd v. Fry (1965) 68 NLR 73; overruled by the Privy Council in United Engineering Workers Union v. Devenayagam (1967) 69 NLR 289.
6. Mudannayake v. Sivagnanasunderam (1951) 53 NLR 25.
7. Manickam v. Permanent Secretary, Ministry of Defence and External Affairs (1960) 62 NLR 204.
8. Don Samuel v. De Silva (1959) 60 NLR 547.
9. Tennekoon v. Principal Collector of Customs (1959) 61 NLR 232.
10. Munasinghe v. Auditor-General (1961) 64 NLR 474.
11. Linus Silva v. University Council of the Vidyodaya University (1961) 64 NLR 104; overruled by the Privy Council: 66 NLR 505.

If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of lis and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty to act judicially.[1] Generally, the effect of such expressions as "if he sees no objection" and "after such inquiry as he thinks fit" is that the act contemplated is merely executive or ministerial and not judicial.[2] As a general rule, words such as "where it appears to", "if it appears to the satisfaction of", "if the . . .considers it expedient that", or "if the . . . is satisfied that", standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially.[3] These are the well-recognised forms of expression by which Parliament, to an increasing extent, entrusts the performance of various administrative functions to a Minister or other high official, relying on the sanction that the Minister will be answerable to Parliament in regard to the manner in which those duties are performed. Accordingly, it has been held that:

a) where the Controller of Textiles may cancel a licence if he "has reasonable grounds to believe" that any dealer is unfit to continue as such;[4]

b) where the Minister may remove the chairman of a village committee from office on being satisfied "that there is sufficient proof of" misconduct in the performance of his duties;[5]

c) where the Minister may dissolve a municipal council "if it appears" to him that such municipal council is not competent to perform any duty or duties imposed upon it;[6]

d) where a Government Agent "after such inquiry as he thinks fit" may "if he sees no objection" grant a licence under the Public Performances Ordinance;[7]

e) where the Minister may refuse an application for citizenship "if he is satisfied" that it is not in the public interest to grant the application,[8]

each of the functionaries concerned was not under a duty to act

---

1. R. v. Manchester Legal Aid Committee, supra.
2. Munasinghe v. Jayasinghe (1958) 61 NLR 425.
3. Sugathadasa v. Jayasinghe (1958) 59 NLR 457.
4. Nakkuda Ali v. Jayaratne, supra.
5. Gunapala v. Kannangara (1955) 57 NLR 69.
6. Sugathadasa v. Jayasinghe, supra.
7. Munasinghe v. Jayasinghe, supra.
8. Leelawathie v. Minister of Defence and External Affairs (1965) 68 NLR 487.

judicially. Additionally, a person or body of persons entrusted by law with the task of ascertaining facts is not required to act judicially in the performance of that task. Accordingly, it has been held by the Supreme Court that the function of a commission of inquiry or that of an inquirer conducting an inquest cannot be described as judicial or even quasi-judicial over which the Court could exercise any controlling jurisdiction.[1]

The grounds on which certiorari had been successfully invoked were:

(a) that the person or tribunal had acted without jurisdiction or in excess of jurisdiction;[2]

(b) that an error of law had been apparent on the face of the record;[3]

(c) that there had been a denial of natural justice: e.g. bias in the judge,[4] or a failure to observe the audi alteram partem rule.[5]

As in the case of mandamus, the Supreme Court has declined to intervene if an alternative and equally convenient remedy was available;[6] if there had been delay attributable to the petitioner;[7] if no benefit would have arisen by the grant of the writ;[8] if the conduct of the party making the application had been such as to disentitle him to relief, e.g. where he had acquiesced in the irregularity

---

1. Dias v. Abeywardene (1966) 68 NLR 409; Seneviratne v. Attorney-General (1968) 71 NLR 439.

2. Kandy Omnibus Co.Ltd v. Roberts, supra; Illangakoon v. Bogollagama, supra; Mohamed Miya v. Controller of Textiles (1947) 48 NLR 493; Simon Silva v. Debt Conciliation Board (1963) 65 NLR 139.

3. Mudannayake v. Sivagnanasunderam, supra; Manickam v. Permanent Secretary, Ministry of Defence and External Affairs, supra; Hayleys Ltd v. Crosette Thambiah (1961) 63 NLR 248; Hayleys Ltd v. De Silva (1962) 64 NLR 130; Virakesari Ltd v. Fernando (1963) 66 NLR 145.

4. Abdul Thassim v. Edmund Rodrigo, supra.

5. Munasinghe v. Auditor-General, supra; Don Samuel v.De Silva, supra; Linus Silva v. University Council of the Vidyodaya University, supra (but cf. Privy Council judgment, supra); Mohamed & Co. v. Controller of Textiles (1947) 48 NLR 461; Subramaniam v. Minister of Local Government and Cultural Affairs (1957) 59 NLR 254; Vadamaradchy Hindu Educational Society v. Minister of Education (1961) 63 NLR 322.

6. Sirisena v. Kotawera-Udagama Co-operative Society, supra.

7. Virakesari Ltd v. Fernando, supra.

8. Kiri Banda v. Government Agent, Uva (1944) 46 NLR 15.

complained of or had failed to take objection at the earliest opportunity;[1] or if the application had been made prematurely.[2] When it was argued that the House of Representatives had not been properly constituted when it purported to enact the Motor Transport Act and that consequently that legislative act was invalid, the Supreme Court observed that it was relevant to consider, in deciding whether certiorari should issue, the probable consequences of granting the writ:

> In the present case, the consequences of granting the writ can only be described as disastrous. It would result in all the legislation passed by Parliament since it came into existence and all its actions liable to be regarded as illegal and of no effect. It would affect the rights and liabilities of several thousands of people who conducted their business activities and their lives on the basis that legislation enacted by Parliament is valid; it would disturb the peace and quiet of the country; and, above all, it will bring the government of the country to a standstill. I take the view that in these circumstances, even if the grounds on which the application is made are valid, no court would exercise its discretion in favour of the petitioner.[3]

In the final analysis, therefore, the writs of certiorari and prohibition were not merely of limited application; they were also essentially discretionary remedies. To invoke the jurisdiction of the court it had to be established that the impugned tribunal was under a duty to act judicially:

> The true test to my mind of whether the writ lies is what kind of function the law has imposed upon the authority when acting within its statutory powers and not what it has actually done acting outside of its powers. If the answer to that question is that the function imposed by law is judicial in character the writ will lie to quash determinations or orders made outside or in excess of its statutory authority, or in breach of the rules of natural justice or where there is error of law on the face of the record. Where the function is not judicial in character, whatever other remedies may be available, the prerogative writs of certiorari and prohibition will not be available to question acts of such authority which are ultra vires of its legal powers.[4]

But even where that stringent test had been satisfied, the Court may yet decide not to grant the relief sought owing to extraneous factors not directly related to the actual matter in dispute.

---

1. Ibid.
2. Ceylon Mineral Waters Ltd v. DJ, Anuradhapura (1966) 70 NLR 312.
3. P.S.Bus Co.Ltd v. Members and Secretary,CTB (1958) 61 NLR 491.
4. Seneviratne v. Attorney-General, supra.

4. Quo Warranto. The writ of quo warranto was first issued by the Supreme Court for the purpose of declaring an election to a local authority null and void on the ground that the elected member was not qualified to be so elected.[1] There was at that time no statutory authority for the issue of this writ,[2] but the Court acted in the exercise of its inherent power; it believed that "there must be some means of trying title to office in such cases as the present". Thereafter, this writ has been invoked several times in order to determine whether the holder of a public office (generally a member elected to a local authority) is legally entitled to it. Two essential requirements for the issue of this writ were that the office usurped was of a public nature,[3] and the person alleged to have usurped it had assumed that office and was in actual possession of it.[4] The writ, being discretionary, was not granted where the petitioner had acquiesced;[5] where its issue would have been futile;[6] or where there had been unreasonable delay in making the application to court.[7]

5. Procedendo. The writ of procedendo was addressed by a superior to an inferior court directing the latter to proceed forthwith to deliver judgment, or remitting to an inferior court an action which had been removed on insufficient grounds to the superior court by habeas corpus, certiorari or any like writ.[8] This remedy had fallen into disuse and was of no relevance in 1972.

---

1. In re Election of a Councillor for the Galupiadda Ward of the Galle Municipality (1905) 8 NLR 300. See also Re Election of Danister Perera as Member of the Municipal Council of Galle (1906) 9 NLR 142.
2. This was provided by Ordinance No.4 of 1920.
3. Chandrasena v. De Silva (1961) 63 NLR 308.
4. Dharmaratne v. Commissioner of Elections (1950) 52 NLR 429; Punchi Singho v. Perera (1950) 53 NLR 143.
5. Givendrasinghe v. De Mel (1948) 49 NLR 422; Navaratnam v. Sabapathy (1968) 71 NLR 566.
6. Peiris v. Gunasekera (1963) 66 NLR 498.
7. Wijegoonewardene v. Kularatne (1950) 51 NLR 453.
8. Walter Pereira, Laws of Ceylon, 2nd ed. (Colombo, 1913), pp.109-110.

The Declaratory Judgment

Section 217(G) of the Civil Procedure Code provided that a decree or order of a civil court may, without affording any substantive relief or remedy, declare a right or status. Upon this provision was founded the declaratory judgment. Such a judgment could not be enforced, but, as Gratiaen J has observed:

> Courts of justice have always assumed, so far without disillusionment, that their declaratory decrees against the Crown will be respected.[1]

Denning LJ knew of "no limit to the power of the court to grant a declaration except such power as it may in its discretion impose upon itself".[2] The declaratory jurisdiction in Ceylon was not quite so wide as it was in England.[3] It was confined to the declaration of a "right or status". It has been held, moreover, that in the exercise of this jurisdiction:

> a court should not permit itself to be converted into a forum for the discussion of purely academic problems and ought therefore to be satisfied that the declaratory decree asked for in any particular action relates to a concrete and genuine dispute and would, if passed, serve some real purpose in the event of future litigation between the same parties.[4]

Yet, the declaratory judgment was much wider in scope than any of the other traditional remedies, and had a distinct advantage over the prerogative writs in that it was free of the technicalities of procedure that circumscribed the operation of the latter, and since no question of enforceability arose, the court was not restricted or inhibited by the probable consequences attendant upon its order.

The Injunction

Section 20 of the Courts Ordinance authorised the Supreme Court or any judge thereof to grant and issue injunctions to prevent any irremediable mischief which might ensue before the party making application for such injunction could prevent the same by bringing an action in any original court. Therefore, the Supreme Court's power to grant an injunction was a strictly limited one, to be exercised only on special grounds and in special circumstances:

---

1. Attorney-General v. Sabaratnam (1955) 57 NLR 481, at 485.
2. Barnard v. National Dock Labour Board [1953] 2 WLR 995, at 1009.
3. For the scope of this remedy in England, see I.Zamir, The Declaratory Judgment (1962: London).
4. Naganathan v. Velautham (1953) 55 NLR 319, at 321, per Gratiaen J.

(a) where irremediable mischief would ensue from the act sought to be restrained;
(b) an action would lie for an injunction in some court of original jurisdiction; and
(c) the plaintiff is prevented by some substantial cause from applying to that court.

Such an injunction was usually sought after a prospective plaintiff had given the required statutory thirty-days' notice to the Crown of his intention to institute an action in an original court. In a fit case, the Supreme Court would grant the injunction after only ex parte hearing and without notice to the opposite party.[1] In order that an injunction may issue, the Supreme Court did not consider it necessary that it should be satisfied that a case existed which would entitle the plaintiff to relief at all costs; it was quite sufficient if the court found a case which showed that there was a substantial question to be investigated and that matters ought to be preserved in statu quo until that question could be finally disposed of.[2]

Section 86 of the Courts Ordinance empowered a District Court or a Court of Requests to grant an interim injunction, as an incidental step in a proceeding instituted in such court:

(a) where it appeared from the plaint that the plaintiff is entitled to a judgment against the defendant restraining the commission or continuance of an act which would produce injury to the plaintiff;
(b) where it appeared that the defendant during the pendency of the action is doing or is about to do an act which would render the judgment ineffectual: or
(c) where it appeared that the defendant during the pendency of the action is about to dispose of his property with intent to defraud the plaintiff.

Such an injunction was granted on the basis of evidence tendered in affidavit form, and was usually issued to accompany the summons. Where, however, the court was of the view that the object of granting the injunction would not be defeated by delay, and in

---

1. Mahamado v. Ibrahim (1895) 2 NLR 36; Buddhadasa v. Nadaraja (1955) 56 NLR 537; Arnolis Silva v. Tambiah (1961) 63 NLR 228.
2. Ratwatte v. Minister of Lands (1969) 72 NLR 60. See also Yakkaduwa Sri Pragnarama Thero v. Minister of Education (1969) 71 NLR 506, where H.N.G.Fernando CJ applied the "balance of convenience" rule.

every case where the application was made after the defendant had answered, notice of application was first issued on the party sought to be restrained.[1] The proper question for decision upon such an application was "whether there is a serious matter to be tried at the hearing". If it appeared from the pleadings already filed that such a matter did exist, the further question was whether the circumstances were such that a decree which might ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction was not issued.[2] The fact that the judge thought on the evidence then available that the plaintiff could not succeed in his substantive action was not, by itself, a ground for refusing an interim injunction.[3] The Supreme Court has, however, emphasized that the fact that that Court had already issued an injunction under section 20 did not absolve the original court from the duty of considering the matter and of forming its own view, particularly where it came to consider the matter after the defendant had placed before it such material as he was permitted to place before it by law in support of his objection to the grant of the injunction.[4]

An application under section 86 usually accompanied a plaint in which was sought either a declaration of a right or status, or a decree or order of court enjoining a person "not to do a specified act, or to abstain from specified conduct or behaviour".[5]

Damages

A decree or order of court could command the person against whom it operated to pay money.[6] Accordingly, an action for damages in tort or for breach of contract were also remedies which were available for the vindication of rights. However, this remedy, which was available even against the Crown,[7] could be invoked only after the alleged injustice had been suffered.

Bail

The courts in Ceylon had no common law power to admit persons to bail. Its power and jurisdiction to do so was regulated by

---

1. Civil Procedure Code, s.664.
2. Dissanayake v. Agricultural and Industrial Credit Corporation (1962) 64 NLR 283.
3. Ibid.
4. Ratwatte v. Minister of Lands, supra.
5. Civil Procedure Code, s.217(E).
6. Ibid., s.217(A).
7. Crown (Liability in Delict) Act, No.22 of 1969.

statute, namely, the Criminal Procedure Code and the Courts Ordinance.[1] The former required a person accused of a bailable offence to be released on bail if at any stage of a criminal proceeding he was prepared to give bail; the court having a discretion whether or not to discharge him on his simply executing a bond without sureties.[2] A magistrate or a district judge could, in his discretion, release any person accused of a non-bailable offence, except where reasonable grounds existed for believing that such person had been guilty of treason, fabricating false evidence to procure conviction of a capital offence, or of murder.[3] The Supreme Court had an unfettered discretion to direct that any person, whether accused of a bailable or non-bailable offence, be admitted to bail, as well as to reduce or increase the quantum of bail required by a magistrate.[4] In exercising this discretion, the main question which the Court usually considered was whether it was possible that the accused would appear to stand his trial and not abscond. In answering that question, three considerations have been taken into account:

1. What is the nature of the crime ? Is it grave or trifling ?
2. The severity of the punishment upon conviction.
3. The probability of a conviction or the nature of the evidence to be offered by the prosecution.[5]

The Supreme Court has, however, stressed that while "the favour shown to freedom" will always influence Judges who approach questions affecting the liberty of the subject, it must not be thought that the grant of bail should be the rule and the refusal of bail should be the exception where serious non-bailable offences were concerned.[6]

This has not been the approach of the Supreme Court in interpreting and applying section 31 of the Courts Ordinance which contained a statutory right to bail, however serious the offence might have been. That section provided that if any prisoner committed for trial before the Supreme Court for any offence was not brought to trial at the first criminal sessions after the date of his commitment at which he might properly have been tried (provided twenty-one days had elapsed between the date of commitment and the

---

1. In re Ganapathipillai (1920) 21 NLR 490; Kannusamy v. Minister of Defence and External Affairs (1961) 63 NLR 214.
2. S.394.
3. S.395.
4. S.396.
5. The Queen v. Liyanage (1963) 65 NLR 289.
6. Ibid.

first day of such criminal sessions), the Supreme Court or any judge thereof shall admit him to bail, unless good cause be shown to the contrary, or unless the trial shall have been postponed on the application of such prisoner. The Supreme Court understood this provision to contain "an important principle safeguarding the liberty of the subject who has a right to be brought to trial with reasonable despatch".[1] It emphasized that:

> The liberty of the subject is an important personal right enjoyed in democratic countries observing the Rule of Law, and custody pending trial being an infringement of that liberty, the courts must be vigilant in ensuring that the infringement is restricted to the limits spelled out by the legislature.[2]

Accordingly, the Court rejected the submission that since the indictment was the foundation of a trial and no person could be tried unless an indictment had in fact been presented, the criminal sessions at which an accused "might properly be tried" would be a sessions held after indictment had been served.[3] If this submission had been accepted, the Attorney-General could, by delaying to present an indictment, have ensured that an accused person continued to remain incarcerated. The preparation and service of the indictment was a step involved in bringing a prisoner to trial, and by omitting to take that step the State could have denied a prsioner his right to liberty. T.S.Fernando ACJ expressed the attitude of the Court in such matters thus:

> The liberty of the subject is not a slogan as was suggested, cynically so it appeared to us, during the argument, but is a valuable right of a citizen and the courts must be vigilant in ensuring that it is not unprofitably thwarted.[4]

Such then were the imperfections, shortcomings and inherent limitations of the traditional remedies. The citizen was now expected, by displaying sufficient ingenuity, to convince the court of the urgent need to adapt them in order that they may serve to realise the laudable aspirations of the new Constitution, despite the fact that the Constitution itself did not require the courts to so adapt them.

---

1. De Mel v. Attorney-General (1940) 47 NLR 136, at 137, per Nihill J.
2. Premasiri v. Attorney-General (1967) 70 NLR 193, at 195, per T.S.Fernando ACJ.
3. Ibid.
4. Ibid., at 199.

The Erosion of Traditional Remedies

The 1972 Constitution

Section 121(3) provided that the powers of the highest court with original jurisdiction established by law for the administration of justice (which was then the Supreme Court) shall include the power to issue mandates in the nature of writs. Ostensibly, the writ jurisdiction had, for the first time, been entrenched in a Constitution. But having so provided, the same section proceeded to state an exception, namely, "except in matters expressly excluded by existing law or laws enacted by the National State Assembly". The Assembly was further empowered to enact such laws by a simple majority of the members present and voting. Therefore, in effect, what section 121(3) guaranteed was that whatever was left of the writ jurisdiction, after giving effect to existing law which sought to exclude it and any laws enacted in the future which may seek to exclude it, will continue to be vested in the highest original court. Had this section not been included in the Constitution, the writ jurisdiction would not have been less secured. Indeed, by specifically stating the exception, constitutional authority was being given, for the first time, to the legislature to deny the writ jurisdiction in respect of such "matters" as the legislature may consider fit. Examining the Administration of Justice Bill, the Constitutional Court held that the word "matters" in this context "is a word of great amplitude", and would include not only subject matter but also persons and bodies.[1]

The Constitution itself prohibited certain matters of an executive or administrative nature from being inquired into, or being pronounced upon, by a court, namely:

i. anything done or omitted to be done by the President in his official or private capacity;[2]

ii. the question whether the President had, as required, acted on the advice of the appropriate Minister or had omitted to do so or had disregarded such advice;[3]

iii. anything done, purported to be done or omitted to be done by or in the National State Assembly, whether in the course of its proceedings or otherwise;[4]

---

1. (1973) DCC, Vol.1, p.57, at 65.
2. S.23(1).
3. S.27(2).
4. S.39(1), except as otherwise expressly provided in the Constitution.

iv. any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory and Disciplinary Boards, or a state officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary control of state officers;[1]

v. any decision by the Cabinet on the question whether or not the principal duty or duties of a state officer was the performance of functions of a judicial nature.[2]

Existing Law

1. "Final and conclusive" clauses. A few pre-Independence enactments contained provisions which sought to oust the jurisdiction of the courts in respect of executive action. For instance, section 9 of the Service Tenures Ordinance, No.4 of 1870, provided that the determination made by commissioners appointed to inquire into claims made under that Ordinance:

> shall be final and conclusive in that or any future proceeding, whether before the said commissioners or any other judicial tribunal, as to the tenure of the pangus in such village, whether it be praveni or maruwena, the nature of the service due for and in respect of each praveni pangu, and the annual amount of money payment for which the services due for each praveni pangu may be fairly commuted at the time those registries are made.

In an 1884 decision, the Supreme Court upheld the submission that the finality and conclusiveness conferred on the determination of commissioners by section 9 did not extend to a determination made outside the scope of their authority.[3] In that case, it appeared that the service tenure commissioners had travelled outside their powers and entered in the register they were authorised to make under the Ordinance particulars which they were not required to determine or enter.

This restrictive approach to finality clauses was confirmed by a Divisional Bench in Ladamuttu v. Attorney-General.[4] In that case, the Supreme Court examined the scope of section 3(4) of the Land Redemption Ordinance, No.61 of 1942, which provided that the question whether any land which the Land Commissioner was authorised

---

1. S.106(5).
2. S.110(2).
3. Bogolle Punchirala v. Kadapatwehera Ding (1884) 6 SCC 157.
4. (1957) 59 NLR 313.

to acquire under that Ordinance should or should not be acquired:

> shall, subject to any regulations made in that behalf, be determined by the Land Commissioner in the exercise of his individual judgment and every such determination of the Land Commissioner shall be final.

Did section 3(4) preclude a person from questioning the Land Commissioner's determination by way of a regular action ? Basnayake CJ explained:

> In the first place . . . it is necessary to consider what it is that the subsection declares shall be final. It is the determination that any land which the Land Commissioner is authorised to acquire under subsection (1) should or should not be acquired. Therefore, if the Land commissioner determines that he should acquire any land which he is not authorised to acquire under subsection (1) the requirements of subsection (4) are not satisfied and the determination will not be final.[1]

The Crown argued that finality attached to the Land Commissioner's decision whether he was or was not authorised by subsection (1) to acquire the lands. Basnayake CJ thought this was "an astounding proposition" to which he could not assent:

> Now, when an Ordinance or an Act provides that a decision made by a statutory functionary to whom the task of making a decision under the enactment is entrusted shall be final, the Legislature assumes that the functionary will arrive at his decision in accordance with law and the rules of natural justice and after all the prescribed conditions precedent to the making of his decision have been fulfilled, and that where his jurisdiction depends on a true construction of an enactment he will construe it correctly. The Legislature also assumes that the functionary will keep to the limits of the authority committed to him and will not act in bad faith or from corrupt motives or exercise his powers for purposes other than those specified in the statute or be influenced by grounds alien or irrelevant to the powers taken by the statute or act unreasonably. To say that the word 'final' has the effect of giving statutory sanction to a decision however wrong, however contrary to the statute, however unreasonable or influenced by bad faith or corrupt motives, is to give the word a meaning which it is incapable of bearing and which the Legislature could never have contemplated.[2]

He added:

> To read the word 'final' in the sense which the learned counsel for the Crown seeks to place upon it would amount to giving the public functionary authority to act as he

---

1. Ibid., at 328.
2. Ibid., at 329.

> pleases. It is unthinkable that the Legislature would give such a blank authority to a functionary however highly placed. Such powers are rarely given even when the country is at war or is facing a crisis. It must be presumed that the Legislature does not sanction illegal acts on the part of functionaries. If it intends to sanction unauthorised and illegal acts it should say so in plain and unmistakable terms and not use a word of such doubtful import as 'final'. That the subject should not be harassed by unauthorised action on the part of statutory functionaries is as much the concern of the Legislature as of the Courts and once a piece of legislation has been put on the statute book the Legislature as well as the public looks to the Courts to exercise their controlling authority against illegal and unjust use of the powers conferred thereby, and the Courts will be failing in their legitimate duty if they denied relief against illegal action on the part of statutory functionaries.[1]

2. "Shall not be called in question in any court" clauses.

By the late 'Forties, the legislature was experimenting with a more explicit formula to oust the jurisdiction of courts. Section 8 of the Public Security Ordinance, No.25 of 1947, provided that:

> No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.

Section 12(3) of the Citizenship Act, No.18 of 1948, stated that the refusal by the Minister to allow the application of any person for registration as a citizen of Ceylon "shall be final and shall not be contested in any court".

The former provision was relied upon by the Attorney-General in Hirdaramani v. Ratnavale.[2] in support of his argument that the Court had no jurisdiction to inquire into the validity or good faith of a detention order made by the Permanent Secretary which was valid on its face and applicable to a particular detainee. In view of the apparent conflict between two decisions of the House of Lords,[3] H.N.G.Fernando CJ found himself "unable to reach with certainty a firm opinion as to the scope of section 8". G.P.A.Silva J,

---

1. Ibid., at 329. This point was not argued before the Privy Council when the matter went up in appeal, but the Judicial Committee expressed its agreement with the Supreme Court's view: Land Commissioner v. Ladamuttu (1960) 62 NLR 169, at 180. See also Wijerama v. Paul (1973) 76 NLR 241, where T.S.Fernando P, interpreting s.18(1) of the Medical Ordinance, No.26 of 1927, came to the same conclusion.

2. (1971) 75 NLR 67.

3. Smith v. East Elloe Rural District Council [1956] AC 736; and Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147.

however, chose to express his view on the matter, having regard to the well-established rule of construction that statutes which have the effect of infringing on the liberty of the subject must be strictly construed:

> It is beyond argument that the Courts can inquire into a complaint by an aggrieved party, in the first instance, that any particular rule, regulation or by-law is ultra vires or that an enactment or rule has been misapplied in his case. It is also the undoubted duty of the Court, after such inquiry, either to pronounce on the validity of the rule or regulation, or, where the validity is not in doubt, to decide, inter alia, whether any power conferred on the executive by such rule or regulation has been exercised in terms of such provision strictly construed.[1]

He conceded that an incorrect decision by the Permanent Secretary would not be justiciable by reason of the provision of section 8:

> If of course he acts in bad faith in making an order . . the provisions taking away the right of the Court to call the order in question would not apply. On a very simple analysis of the language involved in the regulation, it seems to me that in such an event the Court's jurisdiction to interfere remains untouched because, when the Permanent Secretary acts in bad faith, he has obviously not made the order of detention because he is of opinion that the person in respect of whom the order is made is likely to act in a manner prejudicial to the public safety and that he should be prevented from so acting, but because the Permanent Secretary has some other obvious reason. Many such reasons can be imagined, the simplest of which is that the officer is actuated by a personal motive.[2]

According to G.P.A.Silva J, therefore, mala fide was an implied exception to any exclusionary provision which on the face of it precluded a court from questioning the validity of an order made thereunder. Samarawickrema J agreed with him:

> It is however open to a party challenging a detention order to show, if he can do so, that the Permanent Secretary never had the opinion that it was necessary to make an order for the detention of the person named and that the detention order was not made because he had formed an opinion as required by the regulation but for an ulterior object. For example, the order would not be in terms of the regulation and would be a sham if the Permanent Secretary were to make it for a purely private purpose such as the detention of the rival to the woman he loved. Again, if there is overwhelming

---

1. Hirdaramani v. Ratnavale, supra, at 104.
2. Ibid., at 107.

> ground for believing that no reasonable Permanent Secretary could form the opinion that it was necessary to make a detention order in respect of the person affected, it might show that the Permanent Secretary was acting in bad faith and that the detention order was not made on the basis of an opinion required by the regulation but for an improper purpose.[1]

A different view of the effect of section 8 was taken by the majority in Gunasekera v. Ratnavale.[2] Wijetilleke J considered that section 8 "can only apply to emergency regulations duly made" and to order, rules or directions "validly made" under such regulation:

> If such orders are not validly given they would not be 'orders' within the meaning of section 5; so that in effect this Court has the power and jurisdiction to question the legality and/or propriety of an order purported to have been made male fide.[3]

The other two Judges did not agree. Alles J, following the East Elloe case, thought that:

> If plain words have to be given their plain meaning, the effect of section 8 must necessarily be intended to oust the jurisdiction of the Court in regard to the right to question the validity of a detention order . . .In such event, the issue of good faith also will not be justiciable.[4]

He conceded that the language used in section 8, while making the intention of Parliament manifestly clear "must necessarily shock the conscience of the Court and disturb any legal mind who has respect for the Rule of Law". Thamotheram J distinguished the Anisminic case on the ground that it did not deal with executive discretion but with a tribunal, and held that in the face of section 8, it was not open to the Court to inquire into an allegation of mala fide where the determination or order was prima facie valid. The reasoning of the majority in East Elloe commended itself to him; particularly the observations of Viscount Simon:

> But no one can suppose that an order bears upon its face the evidence of bad faith. It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test which paragraph 16 (equivalent to section 8) bars. How, then, can it be said that any qualification can be introduced to limit the meaning of the words ?

---

1. Ibid., at 112.
2. (1972) 76 NLR 316.
3. Ibid., at 347.
4. Ibid., at 334.

He did not share Alles J's distaste for the language of section 8. The Court must accept the supremacy of Parliament and "should not be carried away by any feeling of outrage it may justifiably or otherwise have of the restrictions of personal freedom by Parliament".[1]

This, then, was the uncertain state of the law in 1972. The two cases cited above both arose out of the turbulent events following Ceylon's first armed insurrection. Having regard to the Supreme Court's attitude to earlier attempts at ousting the jurisdiction of courts, it seemed probable that, "when the battle flags were furled and the war drums throbbed no longer", when peace returned to the countryside and the normal tempo of life was restored, the Courts too would revert to their traditional concern for individual liberty. But that was not to be. In May 1972, barely ten days before the new Constitution came into operation, Parliament amended the Interpretation Ordinance with devastating effect on many of the traditional remedies.

Interpretation (Amendment) Act, No.18 of 1972.

The Governments headed by Mrs.Bandaranaike appeared to have a deep and abiding suspicion of the judiciary.[2] It was not merely that a traditionally conservative judiciary was looked upon warily by a socialist government. Following the abortive coup d'etat of January 1962, her first Government believed that at least two Judges of the Supreme Court had actively participated in formulating a scheme for the transfer of power; hence the need for a new law which would vest the Minister of Justice with the power to nominate the Judges who would preside at the trial of the alleged conspirators.[3] Her second Government elected to office in 1970

---

1. Ibid., at 360.

2. See, for instance, the memorandum entitled "Independence of the Judiciary or Supremacy of the Judiciary", submitted to the Constituent Assembly by the SLFP Lawyers' Association, in which it was argued that "the talk of the need for an independent judiciary which will guarantee that the Rule of Law will be observed and the fundamental rights preserved is to ensure the setting up of a fortress or bastion to make it easy for the anti-socialist elements to launch their counter-attack when the time is opportune": The Nation, 19 November 1970.

3. Criminal Law (Special Provisions) Act, No.1 of 1962.

was committed to an extensive programme of social and economic reform, but feared that the Judges would use their powers to stultify this programme. Pre-emptive action in the legislative sphere took the form of a prohibition of the judicial review of legislation.[1] In respect of executive action, particularly in regard to the acquisition of land for public purposes, the Government decided that the power of Judges, by the issue of injunctions, to delay, if not to prevent altogether, acquisitions determined by the Minister to be necessary, should be curbed. The draft bill prepared by the Minister of Justice for this purpose, however, went much further than this; it also sought to replace the prerogative writs, including habeas corpus, with orders of court. The Minister sent a copy of this draft bill to the President of the Court of Appeal for his observations; the latter thought that the Minister was attempting to use "nuclear weapons" in a situation which called only for the use of "small arms".[2] The Judge had in mind an appropriate amendment to the Land Acquisition Act which would be sufficient to prevent any abuse of the courts' injunction jurisdiction. The Cabinet, however, endorsed the Minister's draft with certain modifications.[3] The Interpretation (Amendment) Bill was passed unamended despite protests from civic and public interest groups in the country. The bill was attacked both in the legislature and outside principally as granting a licence to the executive to abuse its powers at will. None expressed any apprehension of the impact which it was likely to have on the procedures which the new Constitution contemplated for the enforcement of the much-awaited fundamental rights.

---

1. 1972 Constitution, s.48(2).

2. This was an unusual practice which Minister Felix Dias Bandaranaike initiated upon assuming office in January 1972. Copies of bills prepared by him were sent to a number of judges and lawyers for their observations. Those judges who responded were generally careful to explain that their comments were expressed in a purely private capacity and without prejudice to any views which they might express in court after hearing arguments should their jurisdiction be properly invoked in respect of such matters.

3. The proposal to replace the prerogative writs with orders of court was not approved.

Act No.18 of 1972, which received the Governor-General's assent on 11 May 1972, added three new sections to the Interpretation Ordinance, No.21 of 1901. The new section 22 provided that:

> Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression 'shall not be called in question in any court', or any other expression of similar import whether or not accompanied by the words 'whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal.

If, therefore, in addition to those instances where the legislature had already used the expression "shall not be called in question in any court" or words of similar import, the new National State Assembly were to exercise the power expressly conferred on it by section 121(3) of the Constitution to exclude the application of writs to any executive act, the effect would be that the proposed new fundamental rights may not be invoked in respect of such act:

i. in any proceeding, i.e. whether by way of writ, declaratory judgment, action for damages or injunction;

ii. upon any ground whatsoever, i.e. whether made allegedly in bad faith, unreasonably, or upon irrelevant grounds, in breach of the rules of natural justice, fraudulently, or in excess or in the absence of jurisdiction; and

iii. whether performed in the exercise or the appearent exercise of power, i.e. regardless of whether the act had been performed for the purpose intended by the legislature or not.

A proviso to section 22, however, sought to provide two exceptions to this sweeping exclusion of judicial supervision. Firstly, section 22 would have no application to the Supreme Court in the exercise of its power to issue mandates in the nature of writs of habeas corpus. Both the National State Assembly[1] and the executive[2] nevertheless retained the power to exclude the application of that remedy, and it would only be in those situations where its application

---

1. 1972 Constitution, s.121(3).
2. Gunasekera v. Ratnavale, supra, at 334.

was not so excluded that this proviso would keep it alive. Secondly, the power of the Supreme Court to issue other writs would also be preserved, even in the face of an exclusion clause, in respect of the following matters:

a) where such order, etc., is ex facie not within the power conferred on the person, authority or tribunal making it;
b) where the person, authority or tribunal upon whom the power to make or issue such order, etc., is conferred is bound to conform to the rules of natural justice and the Supreme Court is satisfied that he has not done so; or
c) where the compliance with any mandatory provision of any law is a condition precedent to the making or issuing of such order, etc., and the Supreme Court is satisfied that there has been no such compliance.

An aggrieved person, therefore, had to satisfy the Court of the existence of at least one of these conditions in order to maintain his application for a writ. In regard to requirement (c), he had to satisfy the Court not only that there had been a failure to comply with a provision of law, but also that such provision of law was mandatory and not directory. The question whether a provision of law is mandatory or directory is in itself not one capable of easy resolution. As Sharvananda J observed recently:

> When Parliament prescribes the manner or form in which a duty is to be performed, or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The Courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done. Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act.[1]

But Judges sometimes disagree in regard to the application of the rules which they themselves have formulated. For instance, in regard to whether paragraph (b) of section 2(7) of the Heavy Oil

---

1. Nagalingam v. De Mel (1975) 78 NLR 231.

Motor Vehicles Taxation Ordinance which required the Minister to lay before the House of Representatives within a specified period any Order made by him under that subsection, was mandatory or directory, the Supreme Court expressed diametrically opposite views within an year of each other. In Illeperuma Sons Ltd v. Government Agent, Galle,[1] H.N.G.Fernando CJ held that the provision was mandatory and must be complied with to give validity to the Taxation Order. But in the previous year, Alles J in Podi Appuhamy v. Government Agent, Kegalle,[2] was equally certain in his own mind that a Taxation Order which had been laid before the House on a date subsequent to the expiry of the specified period, was valid and enforceable since section 2(7)(b) was not mandatory but merely directory in nature.

In regard to requirement (b), the Court had to be satisfied not only that there had been no conformity with the rules of natural justice, but that the authority concerned was under a duty to conform to such rules. But "the rules of natural justice are not rigid norms of unchanging content, and their ambit may vary according to the context".[3] The need to observe them is not governed by any general principle and their applicability depends on various factors. "The nature of the power exercisable by the administrative authority, the nature of the interest or rights interfered with or affected, the intent of the legislature, the urgency of the situation, public policy and public interest are some of the factors which have deprived this concept of uniformity of application and content. The vacillating attitude of the courts and the varying meaning given by the judges to the rules of natural justice have contributed to uncertainty and unpredictability as to their application".[4] In Linus Silva v. University Council of Vidyodaya University,[5] the Supreme Court was of the view that when the University Council sought to exercise its power to suspend or dismiss a teacher on the grounds of incapacity or misconduct, it was "under a duty to act judicially at the stage of ascertaining objectively the facts as to incapacity or misconduct", and accordingly to observe the rules of natural justice. On appeal, the Privy Council disagreed:

---

1. (1968) 70 NLR 549.
2. (1967) 70 NLR 544.
3. De Smith, Judicial Review, op.cit., at p.163.
4. G.L.Peiris, Essays on Administrative Law (Colombo: Lake House Investments Ltd, 1980), p.298. For a full discussion of the effect of the Interpretation (Amendment) Act, see pp.271-310.
5. (1961) 64 NLR 104.

the University was not bound to act judicially and therefore was not obliged to give the teacher an opportunity to be heard after being made aware of the grounds upon which the termination of his appointment was to be considered.[1]

Requirement (a) was very limited in scope. An applicant for a writ had to satisfy the Court that the act complained of was "ex facie not within the power" conferred on the person who had performed that act. That is, an aggrieved person had to establish firstly, that the act was in excess of the powers of the officer concerned, and secondly, that such invalidity was apparent on the face of the act. In other words, if the stamp of invalidity was not apparent on the face of the order, such order could not be challenged. Therefore, this paragraph of the proviso effectively excluded any challenge being made on the basis that an executive act had been performed by an officer in abuse of his powers. By 1972 it was well established that abuse of powers formed part of the doctrine of ultra vires. The principles governing the exercise of discretionary power, as explained by De Smith, had generally been adopted and applied by Courts in Ceylon:

> In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts.[2]

The effect of requirement (a) of the proviso was to withdraw from the reach of judicial review the entire field of administrative discretion, and to offer the executive immunity in respect of the exercise, abuse or misuse of discretionary power.

---

1. (1964) 66 NLR 505.
2. De Smith, Judicial Review, op.cit., at p.285.

The new section 23 stated that:

> Subject to the provisions of section 24, where a court of original civil jurisdiction is empowered by any enactment . . . to declare a right or status, such enactment shall not be construed to empower such court to entertain or enter decree or make any order in any action for a declaration of a right or status upon any ground whatsoever, arising out of or in respect of or in derogation of any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under any written law:
>
> Provided, however, that the provisions of this section shall not be deemed to affect the power of such court to make an order or decree relating to the payment of damages.

This section removed the jurisdiction of the original courts to grant a declaration against the executive in respect of the exercise or the intended exercise of statutory power. It kept alive the action for damages; a remedy which could be invoked only after an executive act had been performed, and which was capable of offering redress only in monetary terms. In the United Kingdom, Denning LJ had only recently emphasized the relevance of the declaratory judgment:

> Just as the pick and shovel is no longer suitable for the mining of coal, so also the procedure of mandamus and certiorari and action on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and claims for negligence.[1]

The declaration was no less relevant in Sri Lanka. The employee who is dismissed for resorting to strike action needed a declaration that he was still in employment; not a few months wages as damages. The citizen who was mistaken for an illegal immigrant and ordered to leave the country needed a declaration and an injunction; he would not be around to make a claim for damages.

The new section 24 stated that:

> (1) Nothing in any enactment . . . shall be construed to confer on any court, in any action or other civil proceedings, the power to grant an injunction or make an order for specific performance against the Crown, a Minister, a Parliamentary Secretary, the Judicial Service Commission, the Public Service Commission, or any member or officer of such Commission, in respect of any act done or

---

1. Sir Alfred Denning, Freedom under the Law (London: Stevens & Sons Ltd, 1949), p.126.

> intended or about to be done by any such person or authority in the exercise of any power or authority vested by law in any such person or authority:
>
> Provided, however, that the preceding provisions of this subsection shall not be deemed to affect the power of such court to make, in lieu thereof, an order declaratory of the rights of parties.
>
> (2) No court shall in any civil proceedings grant any injunction or make an order against an officer of the Crown if the granting of the injunction or the making of the order would be to give relief against the Crown which could not have been obtained in proceedings against the Crown.

This section was intended to bring to an end the proliferating applications for injunctions to restrain the Minister of Lands from proceeding with proposed acquisitions. It did not have that desired effect. On 3 September 1974, a bench of nine Judges of the Supreme Court, by a majority of five to four, referred to the key words in the limitation clause: "in the exercise of any power or authority", and held that for the preclusive clause to take effect, "the exercise of a power by the Minister must be real or genuine as opposed to a purported exercise of power".[1] In a series of cases instituted in original courts it had been alleged that acquisition orders had been made by the Minister to victimise political opponents of the Government. The Supreme Court upheld the injunctions issued in these cases.[2] The reaction of the Government was both predictable and instantaneous. Within minutes of the delivery of the judgment, a bill "to declare clearly and unequivocally the intention of the Legislature in enacting section 24" was submitted to the Constitutional Court as being urgent in the national interest. It was approved by that Court on the same day as being not inconsistent with the Constitution, and was tabled in the National State Assembly that afternoon and passed before the day was over. The new section 24 introduced by the Interpretation (Amendment) Law, No.29 of 1974, declared, inter alia, that:

> (1) Nothing in any enactment . . . shall be deemed to confer upon any court jurisdiction to grant injunctions or to make orders for specific performance

---

1. This judgment is still unreported. Extracts from it were published in Ceylon Daily News, 4 September 1974.

2. For a discussion of this judgment, see L.J.M.Cooray, "The Twilight of Judicial Control of Executive Action in Sri Lanka", (1976) 18 Mal.L.R. 230.

against the State, a Minister or a Deputy Minister, upon any ground whatsoever.

(2) No court shall upon any ground whatsoever grant any injunction or make any order against a state officer if the effect of the granting of such injunction or the making of such order would be, whether directly or indirectly, to restrain the State, a Minister or a Deputy Minister from proceeding with, or to compel the performance by the State, a Minister or a Deputy Minister of,any matter or thing.[1]

This language was explicit enough to withdraw yet another remedy, not merely in respect of land acquisition orders, but over the whole range of executive action, whether such action be taken for the purpose authorised by law or mala fide. The new section also contained the following subsection:

(5) The preceding provisions of this section shall not be deemed to affect the power of any court to make an order declaratory of the rights of parties.

This subsection was in conflict with the previously enacted section 23 referred to above. But since the new section 24 was to have effect "notwithstanding . . . any other provisions of this Ordinance", it probably meant that the declaratory judgment was restored even in respect of the exercise of statutory power. Assuming that such was the intention of this hastily conceived legislation, it does not appear to have caught the eye of any aggrieved person.

Laws Enacted by the National State Assembly

The largest number of exclusion clauses enacted in any single period of Sri Lanka's legislative history was sandwiched into the six and a quarter years during which the 1972 Constitution operated. Although expressions such as "shall be final",[2] and "final and conclusive",[3] were occasionally used, the emphasis was clearly on the

---

1. This section also provided that any injunction which had already been granted by any court, "which injunction such court would not have had the jurisdiction to grant if this section had then been in operation", shall for all purposes be deemed to have been and to be null and void and of no force or effect in law: s.24(3).

2. Janawasa Law, No.25 of 1976, s.57.

3. University of Ceylon Act, No.1 of 1972, s.40; Rent Act, No.7 of 1972, s.40; Co-operative Societies Law, No.5 of 1972, s.36; National Archives Law, No.48 of 1973, s.14; Shop and Office Employees (Regulation of Employment and Remuneration)(Amendment) Law, No.7 of 1975, s.2; Janawasa Law, supra, s.10.

more explicitly worded exclusion clause. There was a lack of uniformity in the phraseology used, but no doubt at all as to its intention:

TABLE 25

EXCLUSION CLAUSES USED BY THE NATIONAL STATE ASSEMBLY 1972-1978

Clause	Statute
No court shall entertain any such application	State Mortgage and Investment Bank Law, No.13 of 1975, s.50.
Shall not be questioned in any court or tribunal	Common Amenities Board Law, No.10 of 1973, s.4. Requisitioning and Acquisitioning of Lorries Law, No.45 of 1973,s.2. Resumption of State Land (Anuradhapura Preservation Board) Law, No.3 of 1975, s.3.
Shall not be called in question in any court of law, whether by way of writ, mandate or otherwise	*University of Ceylon Act, No.1 of 1972, s.73. Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, No.16 of 1978, s.13. Payment of Gratuities and Other Monetary Benefits to Indian Repatriates (Special Provisions) Law, No.34 of 1978, s.7.
Shall be final and shall not be called in question in any court	Agricultural Productivity Law, No.2 of 1972, s.35. Co-operative Societies Law, No.5 of 1972, s.58. National Water Supply and Drainage Board Law, No.2 of 1974, s.20. Tea Control (Amendment) Law, No.39 of 1974, s.11E. Sri Lanka Tea Board Law, No.14 of 1975, s.19. Ceiling on Housing Property Law, No.1 of 1973, s.39.
Final and conclusive and shall not be called in question in any court	*University of Ceylon Act, No.1 of 1972, s.65. Agricultural Insurance Law, No.27 of 1973, s.15. Requisitioning and Acquisitioning of Lorries Law, No.45 of 1973, s.11.

	National Water Supply and Drainage Board Law, No.2 of 1974, ss.65, 86, 87. Local Government Service Law, No.16 of 1974, s.4. Companies (Special Provisions) Law, No.19 of 1974, ss.3,4,6. Silkworm Seed Law, No.36 of 1974, s.10. Licensing of Clubs Law, No.17 of 1975, s.13. Land Betterment Charges Law, No.28 of 1976, s.10. Health Services (Amendment) Law, No.3 of 1977, s.2. Extradition Law, No.8 of 1977, ss.2,3. Local Authorities (Special Provisions) Law, No.24 of 1977, s.32. Co-operative Societies (Special Provisions) Law, No.12 of 1978, s.2. Local Authority Quarters (Recovery of Possession) Law, No.42 of 1978, s.4.
Final and conclusive and shall not be called in question in any court, whether by way of writ or otherwise	Land Reform Law, No.1 of 1972, ss.13,14, 24,38. Agricultural Productivity Law, No.2 of 1972, s.19. Mines and Minerals Law, No.4 of 1973, s.7. Termination of Employment of Workmen (Special Provisions) Law, No.4 of 1976, s.2. Special Presidential Commissions of Inquiry Law, No.7 of 1978, s.2,9.
Shall be final and conclusive for all purposes whatsoever and shall not be called in question in any court or tribunal, whether by way of appeal or writ, or in any other manner whatsoever	*Licensing of Shipping Agents Act, No.10 of 1972, s.6.
Shall be final and conclusive and shall not be called in question in any court or tribunal, whether by way of action, application in revision, appeal, writ or otherwise	*Criminal Justice Commissions Act, No.14 of 1972, ss.2,25. Criminal Justice Commission (Amendment) Law, No.10 of 1972, s.5. Associated Newspapers of Ceylon Ltd (Special Provisions) Law, No.28 28 of 1973, ss.3,5,10,13.

* Enacted shortly before the National State Assembly was constituted.

Thirty-two statutes contained exclusion clauses protecting from judicial review a wide variety of executive acts, including:

i. requisitioning of movable property;
ii. vesting of land;
iii. detention of persons;
iv. dispossession orders in respect of immovable property;
v. restrictive or prohibitory orders in respect of trades or businesses;
vi. rejection of indemnity claims made by insured persons;
vii. award of compensation;
viii. determination of rates and charges;
ix. removal of members of statutory boards;
x. refusal, cancellation and suspension of licences;
xi. refusal to register societies;
xii. refusal to recognise political parties;
xiii. dissolution of co-operative societies;
xiv. quit notices in respect of residential premises;
xv. invalidation of the alienation of agricultural land;
xvi. reports, findings, orders, determinations, rulings and recommendations of commissions of inquiry.

Administration of Justice Law, No.44 of 1973.

This law, inter alia, abolished non-summary proceedings. Consequently, it made radical changes in the field of criminal procdure. In one such change, section 31 of the Courts Ordinance, which for nearly a century contained "an important principle safeguarding the liberty of the subject who has a right to be brought to trial with reasonable despatch",[1] was repealed. In fact, the question whether or not bail ought to be granted to a person accused of a serious offence was withdrawn altogether from the trial court, and left in the discretion of the Director of Public Prosecutions, a public officer who functioned in the Ministry of Justice.[2] The remedy of bail was further restricted by two other statutes. The Criminal Procedure (Special Provisions) Law, No.15 of 1978, and the Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, No.16 of 1978, required any person "who is produced on arrest on an allegation that he has committed or has been concerned in committing or is suspected to have committed or to have been so concerned in committing" a scheduled offence, to be kept on

1. Supra, p.354.
2. S.103(4).

remand until the conclusion of his trial and, in the event of his being eventually tried and convicted, until the determination of his appeal.

An Assessment

In April 1969, Mrs.Mallika Ratwatte, the SLFP Member of Parliament for Balangoda, applied to the Supreme Court for an injunction to restrain the UNP Minister of Lands from proceeding to acquire certain lands belonging to her family. Her husband, who had been the Member of Parliament before her, was the younger brother of Mrs.Bandaranaike, then Leader of the Opposition. Both at the election at which she was elected and at the election at which her husband was returned, the opposing candidate was one Aboosally, who now held the office of Chairman of the Urban Council of Balangoda. According to Mrs.Ratwatte, Aboosally had informed her that instead of widening the existing main road which passed through the bazaar in Balangoda, an old circuitous road, which had hitherto been hardly used by motorists, would be widened by 34 feet. The main road which was at most places about 40 feet wide was at the centre of the bazaar only about 20 feet wide and the land and buildings adjacent to that spot were owned and occupied by Aboosally and several of his relatives. The land and premises on either side of the old circuitous road belonged to Mrs.Ratwatte's family. When the Permanent Secretary inspected the old circuitous road, Mrs.Ratwatte's husband had appealed to him not to pursue the proposed road-widening project as it was nothing but an attempt to take political revenge. According to Mrs.Ratwatte, the Permanent Secretary rejected this appeal, apparently for the reason that it did not lie in the mouth of the Ratwattes to raise such an objection because the previous Government of Mrs.Bandaranaike had arbitrarily acquired lands, including a land belonging to a relative of his, upon false pretexts. Mrs.Ratwatte also alleged that Aboosally, who was present at the inspection, stated that the previous Government had acquired a land belonging to him about ten years previously, allegedly for a housing scheme, but had failed to pay him compensation. The Supreme Court issued an injunction as prayed for. Samarawickrema J observed that:

> It is remarkable how often over the years it has turned out by some extraordinary coincidence that the public interest appeared to require the acquisition of lands belonging to persons politically opposed to the party

> in power at the time. It is, therefore, necessary that Courts, while discouraging frivolous and groundless objections to acquisitions, should be vigilant, if it is open to them to do so, to scrutinise acquisition proceedings where it is alleged that they are done mala fide and from an ulterior motive.[1]

Had these events taken place three years later, Mrs.Ratwatte would probably have been entitled to argue that, due to her political views, she was being denied the equal protection of the law, guaranteed to all citizens by section 18(1)(a) of the Constitution. But to whom, and how, could she have taken her grievance ? The Courts were prohibited from granting injunctions against Ministers. An action to obtain an order declaratory of Mrs.Ratwatte's rights would not have stopped either the acquisition proceedings or the construction of the proposed new roadway, and would have brought her neither relief nor redress. Mandamus was not available by way of a prohibitory injunction. Certiorari to quash the proceedings already taken, or Prohibition to prevent the Minister from making further orders necessary to complete the acquisition could have been invoked only if the Minister was under a duty to act judicially in exercising his powers under the Land Acquisition Act. But even assuming that such a duty existed, the Minister's opinion that a particular land was required for a public purpose was "conclusive" for all purposes and could not be questioned in a court of law, unless it was possible to bring it within one of the grounds referred to in the proviso to section 22 of the Interpretation Ordinance. Mrs.Ratwatte's complaint was not that the Minister had failed to comply with the provisions of the statute, but that he was exercising his powers for an ulterior purpose; in other words, that the Minister was acting mala fide. But the Minister's mala fide, if any, was not apparent on the face of his orders, and the proviso to section 22 was, therefore, of no avail. Therefore, Mrs.Ratwatte would have had no remedy.

It does not appear to be necessary to examine other hypothetical situations. The most eloquent testimony to the ineffectiveness of the traditional remedies for the enforcement of the fundamental rights protected and guaranteed by the 1972 Constitution must surely be the fact that no record exists of any of these remedies ever having been invoked for that purpose.

---

1. (1969) 72 NLR 60, at 63.

The Special Remedy

Article 17 of the 1978 Constitution states that:

> Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.

Article 126 is to the following effect:

(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognised by Chapter III or Chapter IV.

(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief and redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.

(3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

(4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.

(5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.

A special remedy has, therefore, been created for the enforcement of the fundamental rights declared and recognised in Chapter III of the Constitution. Since the Supreme Court has "sole and exclusive jurisdiction" in respect of such matters, it would appear that the question of the infringement of a fundamental right may not now be raised by way of any of the traditional remedies discussed earlier in this chapter and which could now be invoked only in one or other of the subordinate courts.

The Nature and Scope of the Special Remedy

The power of the Supreme Court to "grant such relief or make such directions as it may deem just and equitable" is no less extensive than that enjoyed by the superior courts of other Commonwealth countries vested with jurisdiction to enforce fundamental rights. Indeed, the power thus conferred is as extensive a power as a constitution could possibly have conferred on a court. It has so far been understood by those called upon to exercise it as including the power to restrain, to quash, and to direct the performance of executive action;[1] to order the payment of compensation;[2] and to require the institution of disciplinary proceedings against an errant officer.[3]

This special remedy is available notwithstanding any limitations contained in existing law on the judicial review of executive action. It is significant that while Article 16 of the Constitution subjects the exercise and operation of the fundamental rights declared in Articles 10 to 15 to "all existing written law and unwritten law", which continues to be "valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter", this remedy is provided by the immediately succeeding Article 17. The right to a remedy conferred by Article 17 is, therefore, not subject to existing law. One such existing law, which is now superseded by this Article, is section 22 of the Interpretation Ordinance.[4]

In terms of Article 168(1), "existing law" is mutatis mutandis and except as otherwise expressly provided in the Constitution, continued in force. Therefore, the question arises whether section 22 of the Interpretation Ordinance can co-exist with Article 17. Such co-existence will be possible only if the constitutional prov-

---

1. Perera v. University Grants Commission, S.C.M. of 4 August 1980.
2. Velmurugu v. Attorney-General, S.C.M. of 9 November 1981, per dissenting opinion of Sharvananda J.
3. Ibid.
4. Supra, p.364.

ision is not in conflict with existing law. Section 22 states that when a law contains the expression "shall not be called in question in any court" in relation to any executive act which any person is empowered to perform under such law: (a) no court shall, (b) in any proceedings, (c) upon any ground whatsoever, (d) in respect of that act, whether made in the exercise or the apparent exercise of power, (e) have jurisdiction to pronounce upon its validity or legality. Article 17, read with Article 126, states that: (a) the Supreme Court, (b) in proceedings under Article 126, (c) on the ground that a fundamental right has been or is about to be infringed, (d) by executive or administrative action, (e) have sole and exclusive jurisdiction to grant such relief or make such directions as it may deem just and equitable. It appears, therefore, that in every respect Article 17 is in conflict with section 22. Article 17 contains a special remedy; it is "otherwise expressly provided" in the Constitution, in the face of which section 22 does not continue in force, in respect of the matters referred to in that Article. So it must be with all exclusion clauses too, contained in existing law, since Article 17 expressly provides that executive and administrative action may be questioned in a particular court, on a particular ground, in a particular manner.

The remedy thus provided is not in any way limited in its scope by the constraints of existing law. It is also non-derogable. However, that is not to say that the special remedy is an absolute one. Inherent in the constitutional provisions which have created it are the following clearly expressed limitations.

1. The remedy may be invoked only by an aggrieved person.

An aggrieved person is one in relation to whom a fundamental right has been, or is about to be, infringed. He may invoke the remedy himself or by an attorney-at-law on his behalf; such attorney-at-law would require to be authorised by proxy to act. In many Commonwealth jurisdictions, there is provision for a remedy such as this to be invoked in the case of a detained person by any other person.[1] This is a very necessary provision, particularly if the detained person is being held incommunicado. In Sri Lanka, therefore, if a person is held in custody for one month and denied access

1. Supra, p.131.

to any visitors during that period, this special remedy will not be available to him.

The requirement of an infringement or imminent infringement of a fundamental right also raises the question of locus standii. The Court may be satisfied that an executive or administrative act is in conflict with a fundamental right, but unless the petitioner is able to satisfy the Court that such right has been infringed in relation to him, the Court would refrain from making any directions in respect of such act. For example, in Palihawadana v. Attorney-General,[1] it was alleged that the Government's scheme for the placement of the unemployed in the State and public sector institutions, popularly known as the Job Bank Scheme, violated the equality postulated by Article 12, in that the petitioner had been excluded from access to State employment by the refusal of his Member of Parliament to give him a Job Bank application form. It was his submission that he had been discriminated against for the reason that he belonged to a political party opposed to that to which the Member of Parliament belonged. The Job Bank Scheme envisaged the nomination of one thousand unemployed persons by each Member of Parliament from his electorate. The criteria for nomination was that each person so nominated was between the ages of 18 and 40 years; was resident in the electorate; was unemployed; and in his family there was no income-earner or the income was so low that it was inadequate to sustain him and the other members. The Cabinet had decided that all non-staff grade vacancies in the ministries, government departments, corporations, statutory boards and local government institutions should be filled only through the Job Bank. As the Supreme Court noted:

> Unless one applies in the employment-registration form issued to the MP, one has no chance of being considered for employment in government institutions. The MP thus stands at the gateway, and unless he opens the gate, one is completely shut out from the prospect of government employment. The MP's discretion in the selection of potential employees is absolute.[2]

But the class of persons who satisfied the aforesaid criteria far exceeded in number the one thousand who were required to be nominated,

---

1. S.C.M. of 27 April 1979.
2. Ibid.

and the scheme did not lay down any guidelines for selection, but left it to the Member's uncontrolled and arbitrary discretion to make the selection of the thousand. Accordingly, in the view of the Supreme Court, discrimination was inherent in that part of the scheme which conferred power on the Member of Parliament to select one thousand persons who should be issued Job Bank forms:

> Vesting of such naked and arbitrary power in an MP, the exercise of which will deprive large numbers of citizens of their opportunity to enter State Service militates against the concept of equality. The Scheme lays down no rules by which its impartial execution is assured, or partiality or bias prevented. The excluded persons may legitimately attribute the non-issue of the application forms to them by the MP to improper influences and motives such as favouritism, partisanship, animosity or bias which are easy of concealment and difficult to be detected and exposed.[1]

In fact, the Supreme Court found that the Member of Parliament concerned had even selected persons from families owning substantial properties and in receipt of incomes and pensions. In regard to the petitioner, it appeared that the Member had not addressed his mind to the question of his eligibility; he had exhausted the application forms by the time the petitioner requested one for himself. In the course of the proceedings, however, Counsel for the State tendered an affidavit according to which the petitioner was a member of a family which owned both house property and agricultural land. Although the State had not originally pleaded a lack of locus standi, it now argued that the petitioner did not satisfy the eligibility criteria stipulated in the Job Bank Scheme and was therefore not entitled to maintain the application before Court. One of the Judges saw "no significant difference" between the position of the petitioner's family and the position of most of the families from which persons had been nominated to the Job Bank. Nevertheless, the Supreme court held that since the petitioner "can, in no objective view, claim to come in the class of persons who satisfy the eligibility criteria, whatever the MP's bias against him be", he had no locus standi and the application must be dismissed.

---

1. Ibid.

2. The remedy must be invoked within one month of the executive or administrative action complained of.

A thirty-day time limit for the invocation of a remedy presupposes not only the existence of a vigilant community conscious of its rights, but also easy access to professional expertise. Neither of these factors can be said to generally characterise contemporary Sri Lanka, and for that reason, a more realistic period of six months would have been preferable. On the other hand, the prompt assertion of individual rights may serve not only to provide early relief to an aggrieved person, but also to alert the executive to the probable consequences of a continuing course of action. Be that as it may, this requirement does operate to limit the applicability of the remedy. During the period under review, 25 per cent of the applications which were argued were rejected on the ground that they were out of time.[1]

3. The remedy is available only in respect of executive or administrative action.

Article 4(d) requires "all the organs of government" to respect, secure and advance the fundamental rights declared and recognised by the Constitution. But any infringement of the rights by legislative or judicial action may not be the subject of a complaint to Court under Article 126. In fact, Article 80(3) quite explicitly declares that no court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of an Act of Parliament on any ground whatsoever.[2] The protection which Article 80(3) provides is not confined to the statute simpliciter; it also extends to an executive or administrative act which derives its authority from such statute. For instance, if a public officer, exercising an unfettered discretion vested in him by law, orders the closure of a printing press without adducing any reasons therefor, the Court is precluded from inquiring into the validity of his action by reference to any of the fundamental rights which may appear thereby to have been infringed. So it is with judicial acts. A person who believes that he has been discriminated against in the matter of a bail application or in the imposition of sentence, does not have the benefit of this special remedy.

---

1. Infra, p.389.
2. A resolution of Parliament imposing civic disability on a person is also given the same effect by Article 81(3).

The scope of governmental activity has expanded considerably during the past few decades. Apart from maintaining law and order and administering justice, the government is also directly involved in the provision of community services. For instance, it provides a transport service throughout the island through the Railways Department. It helps in the distribution of certain agricultural products through the Marketing Department. For reasons of political and economic expediency, including that of better management, the government may sometimes decide that a particular service should be provided not by a government department but through some other agency such as a public corporation. The State Industrial Corporations Act, No.49 of 1957, enables the establishment of corporations with capital provided by the government for setting up and carrying on industrial undertakings on a commercial footing. In terms of that Act, as well as under special statutes, several corporate bodies have been created for the performance of a multitude of functions. These include the Ceylon Transport Board, the Ceylon Petroleum Corporation, the Insurance Corporation, the State Trading Corporation, the Ceylon Shipping Corporation, the Milk Board, the Paddy Marketing Board and the Co-operative Wholesale Establishment. The directors and chief executives of these bodies are usually appointed by the Minister; the latter also has the power to give general or special directions on matters of policy. The question will, therefore, arise whether the acts of such corporate bodies constitute "executive or administrative action".

In Dahanayake v. De Silva,[1] which was an election petition, Samarakone CJ examined the question whether the Ceylon Petroleum Corporation established by Act No.28 of 1961, and with which the respondent was alleged to have held a contract, was an agent of the State:

> It is a legal hybrid bred by the Government to enable it to engage in a commercial business - tailor made to suit its style of business. It is a government creation clothed with juristic personality so as to give it an aura of independence but in reality it is just a business house doing only the State's business for and on behalf of the State. Such a legal entity carrying on monopolistic commercial transactions for the State must necessarily be the agent of the State.

---

1. [1978/79] 1 SLR 41.

He was probably influenced by the fact that:

> The Minister has the power to fix prices at which petroleum products shall be sold and also prescribe other conditions of sale. In short, the Corporation does not act like other corporations who engage in business. Its business is merely, if not wholly, controlled by the Minister and therefore the State. It does not have the independence in matters of business which is enjoyed by the companies formed under the Companies Ordinance. It is a well known fact that this is a monopoly business acquired by the State which is also compelled to subsidise some part of its business for the welfare of the community.[1]

These observations of the Chief Justice do not necessarily apply to every state corporation. Where ministerial control is less apparent and managerial independence more conspicuous, a Court may well hold that the actions of that corporate body do not attract the provisions of Article 126. In Perera v. University Grants Commission,[2] the Supreme Court thought that "it is idle to contend that the respondent is not an organ or delegate of the government and that its action in the matter of admission of students to the universities under it does not have the character of executive or administrative action". That was the first occasion on which this question was raised in relation to an alleged infringement of a fundamental right, but it is not likely to be the last.

4. The requirement of an "administrative practice".

A fourth limitation has been sought to be placed on this remedy by the Supreme Court by requiring, in respect of certain allegations of torture, evidence of an administrative practice. In Thadchanamoorthi v. Attorney-General,[3] the petitioner complained of police brutality following his arrest on charges of robbery and murder. The Court rejected the application on the ground that the material placed before it "is neither clear nor cogent and falls far short of even the minimum proof necessary for that purpose". Having done so, Wanasundera J proceeded to examine whether when an allegation of torture was made against a law enforcement officer, since such conduct was both unlawful and ultra vires the powers of such officer, it would be necessary for the petitioner to prove the existence of "an administrative practice" before he could obtain relief or redress against the State. Citing the jurisprudence of Strasbourg

---

1. Ibid.
2. S.C.M. of 4 August 1980.
3. S.C.M. of 14 August 1980.

that an administrative practice could be established by the presence of two elements, namely, repetition of acts and official tolerance, he expressed the view that "those principles, with suitable modifications, can profitably be adopted by us in the exercise of our powers under Article 126", since he saw "more than a superficial similarity" between Sri Lanka's Supreme Court and the European Court of Human Rights. In that case, he found that an on-going police inquiry into the complaint of the petitioner and the provisions of the Penal Code, Criminal Procedure Code and the Police Ordinance which prohibited and outlawed violence and unlawful practices by the law enforcement authorities, negatived the existence of an administrative practice of torture or ill-treatment.

In Velmurugu v. Attorney-General,[1] the petitioner alleged that he had been subjected to acts of torture, cruelty and degrading treatment by army personnel to whom he had been handed over by a senior police officer who had said: "Take him and do as you like". A majority of a five-Judge bench held that this allegation had not been proved to their satisfaction.[2] Wanasundera J, who was one of the majority, proceeded to explain in greater detail the relevance of "an administrative practice" to Article 126. In his view, that Article had drawn a distinction between high state officers and subordinate personnel. The former constituted the executive, while the latter acted for and on behalf of the State:

> The State should be held strictly liable for any acts of its high state officials . . . The liability in respect of subordinate officers should apply to all acts done under colour of office, i.e. within the scope of their authority, express or implied, and should also extend to such other acts that may be ultra vires and even in disregard of a prohibition or special directions provided that they are done in the furtherance or supposed furtherance of their authority or done at least with the intention of benefiting the State.

In the instant case, Wanasundera J was of the view that:

> All in all the acts complained of, if they had taken place as alleged, seem to be in the nature of individual and personal acts due to some aberration or idiosyncracy. They are also suggestive of the venting of some grievance of a personal and private nature or in consequence of some strong passion, prejudice or malice.

---

1. S.C.M. of 9 November 1981.

He considered it relevant that the instruction to, and the responsibility of, the army to whom the petitioner had been temporarily handed over, was only to transport him, and that in the absence of the declaration of a state of public emergency, the army personnel had no more powers over the petitioner than any civilian. Accordingly, he explained that the application of the concept of "administrative practice" could help to extend State liability to cases such as this if it can be shown that "the occurence of the acts complained of can be attributed to the existence of a general situation created or brought about by the negligence and indifference of those in authority". Of course, he was quite satisfied that in that case, no such situation existed:

> The alleged acts have not been authorised, encouraged or countenanced or performed for the benefit of the State. The material before us shows that they would also not have been tolerated by the authorities.

Wanasundera J's attempts to draw a distinction between the acts of "high state officers" and "subordinate personnel", and a further classification of the acts of the latter category, does not appear to be warranted by the provisions of Article 126. Where an allegation of torture is made against a law enforcement officer, the question must surely be whether that act had been committed in the exercise of the coercive power vested by the State in that officer. The motive for his act should be irrelevant. Does it matter whether it was for the purpose of extracting vital information or for the purpose of satisfying a very personal desire ? If the officer had utilised the authority with which he was clothed in order to place himself in a position to commit that act, the State, which provided him with that authority, must accept liability. In his dissenting opinion in Velmurugu, Sharvananda J expressed similar sentiments, but then went on to say:

> This sweep of State action, however, will not cover acts of officers in the ambit of their personal pursuits, such as rape by a police officer of a woman in custody; such act has no relation to the exercise of the State power vested in him. The officer had taken advantage of the occasion, but not his office, for the satisfaction of a personal vagary.

If a person, who happens to be a police officer, commits rape in some private place, it would not have been the fact of his public office that facilitated the commission of that act. But if a police

officer rapes a woman who is held in custody within the confines of a police station, he would surely have taken advantage, not only of the occasion, but also of his office. The potential victim has not the same freedom to resist and rush out screaming for help when she is held in a police cell that she would have if the officer in mufti had intruded into the privacy of her living room. It is submitted, therefore, that the unwarranted introduction of the concept of "an administrative practice" has further limited the scope of the remedy provided by Article 126.

In this connection, it is perhaps relevant to note that Wanasundera J appears to have misunderstood, perhaps due to the non-availability of the relevant reports, the context in which the Strasbourg institutions formulated and applied the concept of "an administrative practice". It was not intended to limit the scope or the applicability of the Article which prohibited torture. It was intended for an altogether different purpose. ECHR, Article 26, requires an applicant to exhaust the domestic remedies available to him under national law before proceeding to the European Commission. But where an applicant raises the issue of an administrative practice of non-observance of certain Convention provisions, the Commission has agreed not to insist on strict compliance with Article 26 on the basis that in such circumstances, the domestic remedies are likely to be side-stepped or rendered inadequate by the difficulty of securing probative evidence and administrative inquiries would either not be instituted, or, if they were, would be likely to be half-hearted and incomplete.[1]

Exclusion of the Special Remedy

No proceedings under Article 126 may be instituted in respect of anything done or omitted to be done by the President in his official capacity.[2] This immunity, however, does not extend to the exercise by the President of any power pertaining to any subject or function of government which he has retained in his charge without assigning to a Minister;[3] in other words, to any act in his capacity of a Minister of the Government.

---

1. Denmark, Norway, Sweden and Netherlands v. Greece (3321-23/67 and 3344/67), YB 12, 502 et seq; Ireland v. United Kingdom (5310/71) YB 15, 76, at 242; Donnelly v. United Kingdom (5577-83/72), CD 43, 122, at 147.

2. Art.35(1).

2. Art.35(3).

The provision of a special remedy in the Constitution for examining the validity of executive and administrative action has not deterred Parliament from seeking, on occasion, to exclude the application of that remedy. Several subsequent statutes contain the familiar phraseology which was very effectively resorted to under the 1972 Constitution to oust the jurisdiction of courts. The injunction of Parliament that a particular executive act "shall not be called in question in any court" means that the validity of such act may not be examined by the Supreme Court even in the exercise of its Article 126 jurisdiction.[1] Executive acts thus protected include:

i. a detention or restriction of movement order made by a Minister;[2]

ii. a vesting order made by the Minister in respect of agricultural or estate land;[3]

iii. the decision of an official whether or not a tenant cultivator has been evicted contrary to law;[4]

iv. the decision of the Monetary Board refusing to register a finance company;[5]

v. the decision of the Minister on appeal against the suspension or cancellation of a licence;[6]

vi. the confirmation by the Minister of a disciplinary order made by a local authority;[7]

vii. the refusal of the Ombudsman to investigate a complaint made to him;[8]

viii. the determination of the Commissioner of Elections as to which one of rival sections of a recognised political party is that party.[9]

---

1. This is made clear by two other statutory provisions. S.6 of the Urban Development Projects (Special Provisions) Act, No.2 of 1979, states that an exclusion clause contained therein shall not affect the powers of the Supreme Court under Art.126. S.10 of the Parliamentary Commissioner for Administration Act, No.17 of 1981, states that the Ombudsman may investigate any matter notwithstanding the presence of any exclusion clause.

2. Prevention of Terrorism (Temporary Provisions) Act, No.48 of 1979, ss.10,11(5).

3. Land Grants (Special Provisions) Act, No.43 of 1979, s.2(3).

4. Agrarian Services Act, No.58 of 1979, s.5(6).

5. Control of Finance Companies Act, No.27 of 1979, ss.5,9,16.

6. Licensing of Produce Brokers Act, No.9 of 1979, s.5(6).

7. Local Authorities (Special Provisions) Act,No.3 of 1979,ss.3,4.

8. Parliamentary Commissioner for Administration Act, supra,s.14.

9. Presidential Elections Act, No.15 of 1981, s.10; Parliamentary Elections Act, No.1 of 1981, s.13.

Application of the Special Remedy

Between the commencement of the Constitution in September 1978 and the end of December 1981, thirteen applications under Article 126 had been determined by the Supreme Court. Of these, in only one did the Court hold that the petitioner was entitled to relief or redress, namely, Perera v. University Grants Commission.[1] The State agency concerned was a statutory body and the impugned decision related to the selection of students for admission to the universities. The petitioner was a prospective medical student from Colombo, the daughter of a medical practitioner.

The minimum requirement for university admission in 1980 was that a candidate should have, on one and the same occasion, at the GCE (Advanced Level) Examination, passed in at least three approved subjects and obtained a mark of not less than 25 per cent in the fourth approved subject, and should also have obtained an aggregate of not less than 160 marks for the four subjects. Two Advanced Level examinations had been held in 1979: in April, 18,753 students had sat offering subjects in the Bio-Science group, of whom 4863 attained the minimum standard for university admission; in August, 12,857 sat, of whom 1887 reached the required standard. The universities had only 995 places in the Bio-Science group of courses (of which 400 were set apart for medicine) but 6750 had attained the minimum standard. The University Grants Commission decided that admission should be in the ratio of the number of students who attained the minimum requirement in each examination. This meant, in respect of medicine, 7.2:2.5 or 288:112. Of this number, 55 per cent of the places were reserved for admission on a district basis and 15 per cent for the "educationally under-privileged areas". The Supreme Court very properly held that this formula violated Article 12 of the Constitution. All those who qualified for admission at each examination had been integrated into one class of qualified candidates. Once the qualified candidates were absorbed into one class, they could not, by reference to their original source,

---

1. S.C.M. of 4 August 1980.

be discriminated:

> Allocation of places in the Universities on the basis of the ratio . . . will result in candidates of an inferior calibre from the April batch being selected, while candidates of a superior calibre from the August batch not being selected.

Accordingly, the Supreme Court directed the University Grants Commission to make the selection of candidates on the basis of the highest aggregate of marks in an integrated or consolidated list of successful candidates. In so doing, the Court rejected an objection raised in limine that the Commission was not a body exercising executive or administrative action. It pointed out that education was one of the most important functions of the State:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity where the State undertakes to provide it, is a right which must be made available to all on equal terms.

With this pronouncement on a subject of general concern to all parents, particularly those with intelligent children of school-leaving age, may be contrasted the dozen unsuccessful applications.

Seven applications were made on the basis that the right to equality had been violated. Four of them related to employment, while the rest concerned the possession of land. All of them had political overtones and each was referable to the intervention of the Cabinet, a Minister or a Member of Parliament of the ruling party. In three applications, allegations of torture were made against law enforcement officers. The other two concerned an alleged violation of the freedom to form and join a trade union and of a language right. In these twelve applications, the Supreme Court avoided a consideration of the constitutional issues raised by either declining to exercise jurisdiction, or after having done so, dismissing them, on one or other of the following grounds.

1. Procedural Deficiency

In Palihawadana v. Attorney-General,[1] the Supreme Court upheld two objections raised by the State, at the close of the argument, that the petitioner lacked locus standi, and was also out of time. Neither of these pleas had been taken in the statement of objections which the respondents were required, by rules of court, to file within

---

1. S.C.M. of 27 April 1979.

one week of the service on them of notice of application. Sharvananda J (with Ismail J agreeing) based his order on the lack of locus standi, but made no reference to the time factor. The petitioner's complaint was that his Member of Parliament had refused to give him a Job Bank application form. The Member concerned confessed that that he had not directed his mind to the question whether or not the petitioner satisfied the stipulated eligibility criteria, since by the time the petitioner applied, he had exhausted all the application forms. Wanasundera J found as a fact that the Member of Parliament had selected several persons who lacked the eligibility criteria, in that they were from families owning substantial properties and in receipt of incomes and pensions. He saw "no significant differences" between the petitioner's family and most of those families. Therefore, for whatever reason, the eligibility criteria was regarded as irrelevant by this particular Member of Parliament. That was not the basis on which he chose the thousand persons; indeed, he declined to disclose to Court the guidelines he adopted for the selection. Sharvananda J, delivering the judgment of the Court, chose to ignore that aspect of the matter and proceeding on the theoretical basis that an eligibility criteria existed, rigidly enforced it and ruled the petitioner out of court. Wanasundera J, who agreed that the application should be rejected, preferred to do so on the ground that the impugned act had been done prior to the enactment of the Constitution and was, therefore, beyond the reach of the constitutional guarantees.

Also rejected by Wanasundera J (with Thamotheram J and Ismail J agreeing), as being out of time were acts of torture, cruel, inhuman or degrading treatment or punishment alleged in Mahenthiran v. Attorney-General;[1] the application to Court was late by one week. In Ranatunge v. Jayawardene,[2] where an acting sub-postmaster of ten years' standing alleged that the UNP Member of Parliament for the area had instigated his removal in consequence of which, after repeated advertisements the permanent appointment had been given to an unqualified person, Samarakone CJ (with Ismail J and Wanasundera J

1. S.C.M. of 14 August 1980.
2. S.C.M. of 3 August 1979.

agreeing) upheld the objection taken on behalf of the State that the petition which should have been made within one month of 7 September 1978 (when the Constitution came into force) had in fact been filed on 4 June 1979. On the facts, however, the Chief Justice was:

> unable to state that the allegation made by the petitioner of wrong doing on the part of one or more of the respondents for political reasons is unjustified.

Ranasinghe v. Ceylon Plywoods Corporation[1] was rejected on a procedural deficiency of an altogether different character. After the petitioner had made his application to Court complaining that three of his fellow workmen had been promoted on purely political considerations, the impugned promotions had, on the directions of the Minister, been cancelled. In fact, the Minister informed the Court that he had so directed because the promotions had been made "otherwise than in accordance with the scheme of promotions". The Court believed that it thereupon became functus:

> The cancellation of the promotions complained of has given the relief or redress sought under Article 126 of the Constitution. The petitioner can have now no grievance or cause for complaint and therefore cannot invoke our jurisdiction under Article 126 of the Constitution.

When counsel insisted that the Court do consider whether or not there had been a breach of a fundamental right, Thamotheram J (with Ismail J and Weeraratne J agreeing) had only this to say:

> We are of opinion that Article 126 of the Constitution does not give us the power to investigate a grievance which does not exist and give a relief which the circumstances do not require.

If this is a correct statement of the law, it is within the reach of the executive to perform an act which violates a person's fundamental right; restore the status quo in the event of such person making an application to Court within the prescribed time limit; and thus prevent any relief being granted in respect of its wrongful act. It is submitted that once the jurisdiction of the Supreme Court is invoked in terms of Article 126 in respect of an executive or administrative act, it is incumbent on the Court to determine whether that act infringed a fundamental right or not. If it did, the fact that the executive has since taken steps to conform to the Constitution may make it unnecessary for the Court to make any directions

---

1. S.C.M. of 17 September 1979.

in respect of that act, but will not deprive it of jurisdiction to grant "such relief . . . as it may deem just and equitable" in respect of that infringement. It is only by granting such relief and by demonstrating its readiness to do so, that the Supreme Court can perform its constitutional duty of exercising its jurisdiction for the "protection of fundamental rights".

2. Evidential Deficiency

In Thadchanamoorthi v. Attorney-General[1] and Mahenthiran v. Attorney-General,[2] which related to the same transaction, it was alleged by the two petitioners, who were Tamils and were murder and robbery suspects, that after they had been taken into police custody, they had been severely assaulted with hands, shod feet, batons, an axe handle, fence sticks and the muzzle of a gun. The petitioners identified the officer-in-charge of the Eravur police station and two constables as the alleged assailants. Having disposed of Mahenthiran on the ground that that application had been made one week too late, Wanasundera J (with Thamotheram J and Ismail J agreeing) was of the view that:

> The corroborative evidence of the other petitioner's affidavit in the connected case would now be no longer available to him in view of our ruling. There now remains only the petitioner's affidavit and the medical evidence.

The fact that the connected petition had been filed out of time could not have deprived the accompanying affidavit of any evidential worth. It had been affirmed to by a person who claimed he was present when Thadchanamoorthi was assaulted by the police. It was, therefore, relevant. But the Court not only disregarded Mahenthiran's affidavit; it declined to call for a report from the magistrate as to the circumstances in which two medical reports were filed in his record:

> Mr.Pullenayagum suggested that the Court should call for this information from the magistrate. It seems to me that this is a matter on which the petitioner himself would have been in a position to enlighten us and ought to have done so.

Consequently, in the view of the Court:

> There seems to be considerable doubt as to how or when these injuries came to be suffered by the petitioner.

The case of Velmurugu v. Attorney-General[3] was also one in which Article 11 was invoked: alleged assault by army personnel. The petitioner, a prominent TULF politician in Amparai, complained that he

---

1. Supra. 2. Supra. 3. Supra.

had been arrested by a Sinhalese assistant superintendent of police at a time of communal violence, and handed over to army personnel to "take him and do as you like", and that the latter had thereupon, while transporting him, subjected him to acts of torture, cruelty, and degrading treatment. According to medical evidence, the petitioner had ten injuries, nine of them contusions and abrasions and one a fracture of the neck at the left side of the mandible which was described as grievous. These injuries were alleged to have been inflicted late in the evening of 9 August 1981, shortly after the petitioner had been taken into custody. At 11 p.m., when the petitioner was taken before the magistrate, who released him on bail, he did not complain of the alleged torture, but told the magistrate that he found it difficult to walk. On 10 August, with the permission of court, he was examined at home by a doctor. This medical report contained a complaint of assault by army personnel. On 12 August, the petitioner appeared in court and sought permission to enter hospital. The hospital report of 13 August also contained a complaint of assault by army personnel. In his statement to the police on 14 August, he explained that he did not tell the magistrate of the assault because he feared that he would be attacked again when he was handed back to the assistant superintendent's custody; in fact, "when I was put into the jeep again, he showed me his revolver and said that he would one day or other shoot me".

Unlike in Thadchanamoorthi, the Court decided in this case, on its own initiative, to call for a report from the magistrate. The magistrate denied that the petitioner had told him that he found it difficult to walk. Attaching great significance to this report, and much less to the actual sequence of events which made it appear most improbable that the injuries were self-inflicted, the Supreme Court dismissed the application.[1] As Wanasundera J (with whom Ismail J and Weeraratne J agreed) explained:

> In all the circumstances of this case, I am unable to say that the petitioner had proved these matters to my satisfaction.

---

1. Sharvananda J (with whom Ratwatte J agreed) thought that the facts disclosed "a shocking and revolting episode in law enforcement". He awarded Rs.10,000 as compensation and directed that appropriate disciplinary action be taken against the senior police officers for misconduct.

In Denmark, Norway, Sweden and Netherlands v. Greece,[1] the European Commission commented on the "inherent difficulties" in the proof of allegations of torture and ill-treatment:

> First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the police or armed services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, where allegations of torture or ill-treatment are made, the authorities, whether the police or armed services or the ministries concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence, there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognisable, even by medical experts, particularly where the forms of torture itself leaves . . . few external marks.

The Supreme Court, which relied on the authority of Strasbourg to require evidence of "an administrative practice" in both Thadchanamoorthi and Velmurugu, paid no heed at all to the caution thus expressed.

3. Restrictive Interpretation

In Wijesinghe v. Attorney-General,[2] the petitioner who was admittedly not a supporter of the ruling party was stripped, by order of the Cabinet, of her office of sub-post mistress which she had held for four years, and replaced by a government supporter. The apparent reason for her removal and replacement was the recommendation of a political victimisation committee appointed by the new Government following its election to office. There was no hearing before this committee; the petitioner was not specifically told why her services were being terminated, nor was she given an opportunity of defending herself. The committee was of the view that the previous government had shown a preference for the petitioner because of her political views. Be that as it may, the simple question for

---

1. YB 12.
2. S.C.M. of 30 April 1979.

the Supreme Court was whether the petitioner had, by being removed from her job, been discriminated against on political grounds in violation of Article 12. The power of appointment and dismissal of public officers, including sub-post mistresses, was vested in the Cabinet and, subject to one exception, no court or tribunal had the power to inquire into, pronounce upon, or in any manner call in question any decision of the Cabinet in regard to the appointment or dismissal of a public officer. That single exception was the jurisdiction vested in the Supreme Court by Article 126.[1] In the exercise of that jurisdiction, the Court was entitled, and indeed required, to inquire whether the petitioner's fundamental right to equality had been infringed by her summary removal without any charges or a hearing. However, in the view of Wanasundera J (with whom Ismail J and Sharvananda J agreed):

> considering the extent and the width of the powers of the Cabinet, no limitations . . . on its powers can be lightly assumed.

The Court recognised that:

> The Cabinet cannot be expected, in the course of its multifarious duties, to give its mind to intricate and technical questions of law in the same manner as a court of law.

Even assuming that there was a duty on the Cabinet to hear every intricate legal issue with the same meticulous care and knowledge as a court of law:

> would not such an omission still constitute just a mere error on the part of the Cabinet ?

As the Court was quick to point out:

> Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights. Where a transgression of the law takes place, due solely to some corruption, negligence or error of judgment, I do not think a person can be allowed to come under Article 126 and allege that there has been a violation of the constitutional guarantee.

It is submitted that Article 55(5) intended to place the Cabinet, in respect of matters relating to the appointment, transfer, dismissal or disciplinary control of public officers, in the same position as any other repository of executive power. But by introducing a different standard by which to judge the actions of the Cabinet, the Supreme Court has considerably restricted the scope and effect of that Article.

---

1. Art.55(5).

In Gnanatilleke v. Attorney-General[1] and Sirimanne v. Attorney-General[2], the impugned acts were those of a Government Agent. It was alleged that, by a wrong determination of facts, namely, that they owned land when they in fact did not own, possess or occupy any land, the petitioners had been "treated unequally" in the matter of the allocation of state land. In the view of Samarakone CJ (with whom Ismail J and Sharvananda J agreed):

> This is not a decision of law but a decision on disputed facts. The bona fides of the 2nd Respondent [the Government Agent] in making the finding of fact is not in question. In the circumstances, though the petitioners may have a grievance, I fail to see how a wrong decision bona fide made on a question of fact could constitute a breach of the fundamental right of equality in the eye of the law.

The Court was not inclined to investigate whether or not the petitioners had been wrongly excluded from the class of persons who would have been entitled to receive land grants, and to give an appropriate direction even for the future. In its view, the fact that a public officer had acted in good faith was a sufficient answer to an allegation of an infringement of a fundamental right. In Dawesius Perera v. Attorney-General,[3] in which it was alleged that a land acquisition order had been made "as a measure of revenge and harassment on account of the petitioner having opposed the present Member of Parliament and having openly expressed his political convictions as pro Sri Lanka Freedom Party", the Court stressed that discrimination on the ground of political opinion must be proved to be deliberate. Additionally:

> in order to prove that he was discriminated against on the ground of political opinion he had to show that the decision to take his land was "for the sole purpose of taking political revenge". This he has miserably failed to do.[4]

In Adiapathan v. Attorney-General,[5] the language right alleged to have been infringed was that which entitled a person "to receive communications from, and to communicate and transact business with, any official in his official capacity, in either of the national languages". The petitioner refused to accept a payment due to him from the Employees Provident Fund by way of a cheque written in the

---

1. S.C.M. of 17 October 1979.
2. Ibid.
3. S.C.M. of 25 July 1979.
4. Per Thamotheram J (with Samarawickrema J and Ismail J agreeing). The emphasis appears in the original judgment.
5. S.C.M. of 19 June 1979.

Sinhala language; he insisted that the cheque be written in his mother tongue, which was Tamil. Samarakone CJ (with Thamotheram J and Ismail J agreeing) held that a cheque was not a "communication". He distinguished an addendum or appendix which may be added to a letter and which is read as part and parcel of it; a cheque was nothing more than an enclosure. By thus taking away an "enclosure" or an "annexure" from the ambit of a communication, the content of the latter expression was appreciably shrunk. The Chief Justice also pointed out that the receipt of a cheque is on a par with the receipt of currency. It is interesting to note that coins and notes which are legal tender in Sri Lanka bear the value thereof in both national languages. Be that as it may, payment is ordinarily made by legal tender in the absence of any legal provision or any express or implied agreement for payment to be made by cheque. Therefore, the petitioner was within his rights in insisting that if payment was being made by cheque, such cheque should be written in the Tamil language. But the Supreme Court distinguished that right, to which a person was entitled "by reason of the civil law of the country" from a fundamental right guaranteed by the Constitution which alone was enforceable by the remedy provided by Article 126.

In Yasapala v. Wickremasinghe,[1] the Court was called upon, for the first time, to determine the content of a specific right, namely, the right of a citizen to form and join a trade union. In that case, the petitioner, a teacher who absented himself from work on account of strike action launched by the trade union to which he belonged, was treated as having vacated his post. Sharvananda J (with Ismail J and Wanasundera J agreeing) held that the right to form and join a trade union did not include the right to strike. When Article 14 guaranteed not merely the freedom of association, but more specifically, the freedom to form and join a trade union, it must have had in mind the need for employees to combine for the purpose of protecting their interests. Why would a citizen form or join a trade union except to protect his interests ? It is the mutual need for the protection of their individual and common interests that bring together a group of citizens engaged in a particular enterprise or occupation. The Strasbourg institutions

1. S.C.M. of 8 December 1980.

have held that the words "for the protection of his interests" in ECHR, Article 11, clearly denoting purpose, safeguards the freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the State must both permit and make possible. It follows that members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Consultations, collective bargaining and the conclusion of collective agreements are some of the means by which this is accomplished; strike action is another almost universally accepted method.[1] Without it, a trade union cannot effectively function as an instrument for agitating, negotiating and bargaining in respect of wages or conditions of work. Without it, the right to form and join a trade union is lacking in any content.

An Assessment

The UDHR states that:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.[2]

According to the ICCPR:

> Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[3]

The ECHR guarantees that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.[4]

---

1. National Union of Belgian Police v. Belgium (4464/70), Report: 27 May 1974; Judgment: 1 EHRR 578; Schmidt v. Dahlstrom (5589/72), Judgment: 1 EHRR 637; Swenska Lokmannaforbundet v. Sweden (5614/72), Report: 27 May 1974, Judgment: 1 EHRR 617; Trade Union X v. Belgium (7361/76), DR 14, 40.

2. Art.8. 3. Art.2. 3. Art.13.

What is deducible from these instruments is that the State is now under an obligation to provide an "effective remedy". It has been suggested[1] that the factors which go to establish whether a remedy is "effective" are as follows:

i. the remedy must be accessible, i.e. the individual must be in a position to start a procedure which will result in a decision from the relevant authority;

ii. the remedy must be sufficient, i.e. the relevant authority must have the power to redress the alleged violation if it is, in fact, established;

iii. the remedy must have some likelihood of being accepted, e.g. there must not be established precedents against its availability;

iv. the remedy must not be the mere repetition of a remedy which has already been used.

To these perhaps ought to be added:

v. the remedy must be expeditious, i.e. the individual must be able to obtain a decision without any unreasonable delay;

vi. the remedy must be inexpensive, i.e. it must be within the means of the alleged victim of executive action.

Despite its inherent limitations, the special remedy offered by Article 126 appears to conform to the standards laid down by international law. In the hands of an activist or assertive court, it is capable of providing relief or redress, expeditiously and in adequate measure, to a person whose fundamental rights have been or are about to be infringed. It is perhaps too early to evaluate fairly its actual performance. It has not been sufficiently invoked. On the few occasions that it has, relief or redress has not been easily forthcoming. On the one hand, some of the applications may not have been properly constituted with all the necessary and relevant material or made in time. Counsel too must have had their own teething problems in what to them is a comparatively new field of law. On the other hand, the Court has so far tended to approach the exercise of its new and potentially powerful jurisdiction with considerable caution. The circumstances in which the present Court was constituted

---

1. J.Raymond, "A Contribution to the Interpretation of Article 13 of the European Convention on Human Rights", 5 Human Rights Review, 161.

and the nature of its composition may perhaps have contributed to this obvious self-restraint. But if the Judges are able to approach their constitutional duty of protecting fundamental rights without being excessively deferential to the executive or being too astute to seek a rationale for its every act; if they are willing to show the same degree of understanding of the individual's bewilderment in a maze of rules, regulations, laws and other manifestations of state power, as it has already done of the functions of the police, the armed forces and the public service, the machinery now exists for them to make a significant contribution to the assertion of individual liberty.

CHAPTER VII

HUMAN RIGHTS UNDER A STATE OF EMERGENCY

A state of public emergency is usually accompanied by the violation of human rights. Yet, it is the existence of machinery for the declaration of a state of emergency that enables extraordinary measures to be taken in a democratic society within the framework of the law to deal effectively with a critical situation which affects the continued existence of that society itself. Therefore, the problem, in so far as its impact on human rights is concerned, is one of ensuring that a state of emergency is not abused.

The provisions of the law relating to public security have been invoked in Sri Lanka with increasing frequency. Between August 1953, when the Government first assumed the power to rule by emergency regulations, and the end of 1981, a state of emergency has been in force during the following periods. The immediate cause for setting it in motion, in respect of each continuous period, is also set out below.

TABLE 26

STATES OF EMERGENCY, 1947-1981

From	To	Length y. m. d.	Immediate Cause
12. 8.53	11. 9.53	1	The Hartal
27. 5.58	26. 3.59	10	Communal riots
25. 9.59	3.12.59	2 9	Assassination of the Prime Prime Minister
17. 4.61	4. 4.63	1 11 19	Civil disobedience campaign in the northern provinces
5. 3.64	4. 4.64	1	Electricity Department strike
8. 1.66	7.12.66	11	Agitation in Colombo against the proposed Tamil Language Regulations
19.12.66	18. 1.69	2 1	Reduction of the rice ration

From	To	Length y. m. d.	Immediate Cause
26.10.70	25.11.70	1	Demonetization of high denomination currency notes
16. 3.71	15. 2.77	5 11	Insurgent activity in the country
29.11.78	28. 5.79	6	Cyclone relief operations
3. 7.79	27.12.79	5 24	Terrorist activity in the northern provinces
16. 7.80	15. 8.80	1	General strike
3. 6.81	-	)	Police rampage in Jaffna
17. 8.81	-	) 6 28)	Communal riots

The shortest single continuous state of public emergency has been the then statutory month, while the longest has extended to five years and eleven months. From August 1953, during a period of twenty-eight years, Sri Lanka has been governed under the provisions of the Public Security Ordinance for a period of thirteen years, nine months and twenty days. During the latter half of the twenty-eight year period, a state of emergency was in existence for over nine years. Between 1970 and 1977, the executive enjoyed for a period of six years the uninhibited power to make instant laws, without notice, scrutiny or discussion, and regardless of whether such laws contravened fundamental rights.

History of Public Security Legislation

The Public Security Ordinance, No.25 of 1947, was enacted at a time when both the private and public sectors of the country were virtually crippled by strike action. Demanding better living and working conditions, higher wages, and trade union and political rights for government employees, nearly 50,000 workers had come out in what was then the biggest ever strike organised in the country. On 5 June 1947, the police opened fire on a demonstration in Colombo, killing a government clerk, V.Kandasamy. Five days later, the Minister of Home Affairs, Arunachalam Mahadeva, presented the Public Security Bill in the State Council. He did not even attempt to disguise the fact that the bill he was presenting was motivated by

the general strike:

> Government have one function which they cannot abdicate, and that is, if there is a threat to orderly government which would place the lives and fortunes of the people at the mercy of trouble makers and law breakers, which would place in jeopardy distribution of food, which would place in jeopardy all road and rail transport, and if they are of the view that attempts are being made to create a general strike which would paralyse the life of the community, any Government worth the name will have to take up the challenge and arm themselves with the necessary powers to meet that situation.[1]

Part II of the Ordinance empowered the Governor to make emergency regulations "as appear to him to be necessary in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community".[2] More specifically, the Governor could by regulation provide for the detention of persons.[3] An emergency regulation prevailed over all other law, whether or not it expressly purported to amend, modify or suspend the operation of such law.[4] This overriding effect was extended even to orders or rules made under an emergency regulation.[5] An emergency regulation came into force forthwith upon its being made by the Governor, without the need for its publication.[6] The power to make emergency regulations, however, was activated only when the Governor proclaimed under Part I of the Ordinance that he was "of opinion that, by reason of the existence in Ceylon of a state of public emergency, it is expedient so to do in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community".[7] When a proclamation was made, it remained in force until it was revoked by the Governor.[8] Neither the fact of the existence of a state of public emergency, nor an emergency regulation or any order, rule or direction made or given thereunder, could be called in question in any court.[9]

---

1. State Council Debates, 10 June 1947, col.1936. See also speeches of J.R.Jayewardene, ibid., col.1969; and National State Assembly Debates, 31 January 1978, col.673.

2. S.5(1). 3. S.5(2)(a). 4. S.7.
5. S.6. 6. S.11. 7. S.2(1).
8. S.2(2). 9. Ss.3,8.

In 1949, one year after Independence, and following considerable agitation by opposition political groups, the Government sought to liberalise this law. The Public Security (Amendment) Act, No.22 of 1949, made four significant changes: (1) a proclamation under Part I was limited in duration to one month at a time;[1] (2) the making of such proclamation was required to be communicated forthwith to Parliament;[2] (3) the specific reference to "detention of persons" in the provision enabling emergency regulations to be made was deleted;[3] and (4) the House of Representatives was empowered to add to, alter or revoke any emergency regulation.[4] This amending Act introduced an element of parliamentary control over executive action. The extent of executive power, however, remained undiminished and, so long as a government commanded a majority in the House, parliamentary control over the exercise of that power would be purely formal.

In 1953, the Government removed the subsidy on rice, increased postal rates and railway fares, and abandoned the free midday meal which was being provided to school children. To protest against these measures, the trade unions and left-wing political parties organised a "hartal" (a general stoppage of work) on 12 August 1953. On the same day, a state of emergency was declared. Six days later, a bill to amend the law relating to public security was rushed through all its stages at one sitting. The Public Security (Amendment) Act, No.34 of 1953, which had retrospective effect from 11 August 1953, enabled the Governor-General to bring Part II into operation whenever he considered it expedient to do so in view of the imminence of a state of public emergency.[5] Also restored to the principal enactment was the specific power, by emergency regulation, to "authorise and provide for the detention of persons".[6]

---

1. S.2(1).
2. S.2(2). If Parliament at the relevant time stood adjourned or prorogued, it was required to be summoned within ten days for this purpose.
3. S.4(1)(i). This deletion would, however, not have affected the generality of the power conferred on the Governor-General, and his power to make a regulation on this subject probably remained unfettered.
4. S.4(2).
5. S.3.
6. S.5(1)(b).

The law relating to public security had been severely criticised in Parliament by the leaders of the left movement. In 1947, W.Dahanayake (LSSP) expressed himself in hyperbolical language:

> This Bill will go down to history as the meanest and dirtiest law . . . I describe it as the most dastardly, the most cruel, the most brutal law that has been inflicted upon the working classes of any country, not excepting Nazi Germany or Italy under Mussolini. Here, under the provisions of this Bill, there is complete and hundred percent annihilation of civil liberties. . . . I say that this Bill is something which no civilized society should consent to.[1]

In 1949, P.H.W.Silva (LSSP) did not find it possible even to subscribe to a bill the avowed object of which was to extract from the principal enactment some of its fangs:

> The basic,fundamental, repulsive and reactionary nature of the Public Security Ordinance remains. . . . And as the amending Bill does not repeal the Public Security Ordinance but instead tries to show up the present Bill as amended [sic] as a piece of harmless democratic legislation, on behalf of our Party I wish to state that we cannot support the amendment suggested by this amending Bill.[2]

In 1953, S.W.R.D.Bandaranaike (SLFP) vehemently objected to the reintroduction of the concept of preventive detention:

> The only purpose of this so-called preventive detention is to cause an injustice owing to the fear and panic, on the one hand, of the authorities, and on the other, owing to their incompetence. In other words, when such an occasion arises, if they feel that A, B, C, D, and so on, five hundred or a thousand people all over the place, may conceivably give trouble, the easiest thing to do is to collar them all and lock them up, no matter how many, fifty, five hundred or five thousand. That easy way of dealing with matters is neither in keeping with those principles of personal liberty inculcated by democracy nor indeed necessary.[3]

It was not surprising, therefore, that when in 1956 the Mahajana Eksath Peramuna was formed under the leadership of Bandaranaike, its manifesto, to which both W.Dahanayake and P.H.W.Silva subscribed, should promise that:

> We shall repeal the Public Security Ordinance . . . and similar restrictions and invasions of public and personal rights, particularly those affecting freedom of association, assembly and speech.[4]

---

1. State Council Debates, 11 June 1947, col.2024.
2. Parliamentary Debates (House of Representatives), 29 March 1949, col.2018.
3. Ibid., 18 August 1953, col.882.
4. MEP Programme, s.18.

But the Bandaranaike Government, in which both W.Dahanayake and P.H.W.Silva were Cabinet Ministers, did not repeal the law relating to public security. Instead, it took steps to refine that law and to add a new dimension to it. In March 1959, ten months after a state of emergency had been declared in the wake of communal disturbances on an unprecedented scale, the Public Security (Amendment) Act, No.8 of 1959, was enacted by a Parliament from which every single Opposition member had either walked out or been carried out on the orders of the Speaker.[1] Prime Minister Bandaranaike explained his volte face:

> It is true that our Government Party before the elections felt that the Public Security Ordinance may be safely repealed. But what has happened in recent times has convinced us . . . that any Government needs legislation of this type as a safeguard for the people.[2]

The amending Act provided for a declaration of a state of emergency in a limited area.[3] It also enabled the armed forces to be called out by the Prime Minister whenever "circumstances endangering the public security in any area have arisen or are imminent and the Prime Minister is of the opinion that the police are inadequate to deal with such situation in that area";[4] the imposition of a curfew in any area whenever "the Prime Minister considers it necessary to do so for the maintenance of public order" in such area;[5] and the declaration of a service to be an "essential service" whenever "the Prime Minister considers it necessary in the public interest to do so for the maintenance of any service which, in his opinion, is essential to the life of the community".[6] Any cessation of work, or any act committed with a view to securing a cessation of work, in an essential service, other than "in consequence of a strike commenced by a registered trade union solely in pursuance of an industrial dispute" was declared to be an offence.[7] These provisions were contained in a new Part III which could be invoked without the declaration of a state of public emergency. When invoked, however, the orders made thereunder were required to be communicated to Parliament, and they would remain in force only for a month at a time.[8]

---

1. For events leading to the exclusion of the Opposition, see Parliamentary Debates (House of Representatives), 12 February 1959, col.819 et seq.

2. Broadcast speech of 14 February 1959, reported in the Observer, 15 February 1959.

3. S.3. 4. S.12. 5. S.16.
6. S.17. 7. Ibid. 8. S.21.

As with Parts I and II, orders made under Part III, and the circumstances necessitating the making of such orders were declared to be non-justiciable.[1]

The drafting of the 1972 Constitution was undertaken on the premise that legislative power would be vested exclusively in the National State Assembly, which would be the "supreme instrument of state power" under that Constitution, and that the Assembly would not be free to delegate or in any manner alienate its legislative power to any other person or institution. The provisions of the Public Security Ordinance clearly ran counter to this scheme. Accordingly, the Minister of Constitutional Affairs, Dr.Colvin R.de Silva, who throughout his political career had consistently opposed the grant of emergency powers to the executive, made the following alternate proposals:[2]

a) A new Public Security Act to be passed by Parliament before the new Constitution came into operation.
b) A full and classified set of emergency regulations to be passed by Parliament as a schedule to the new Act.
c) The new Act to provide that, upon proclamation of an emergency by the Governor-General, the entire schedule of emergency regulations, or such parts of them as the Governor-General decides, shall come into operation either throughout the country or in any part of the country which the Governor-General will indicate in the proclamation.
d) The proclamation will operate as a summoning of Parliament to meet within a specified period.
e) When Parliament meets it will consider a resolution approving the proclamation of the emergency.
f) Parliament will be given special power to pass regulations having the effect of law in a summary way, i.e. without the need of giving notice or of following the bill procedure. Any special regulation designed to meet a special need could be made ready during the period between the making of the proclamation and the meeting of Parliament.

These proposals were rejected by the Ministry of Defence which

---

1. Public Security: A paper for consideration by the Security Council, prepared by the Ministry of Constitutional Affairs, 14 February 1971.

expressed the view that "any variation of the present position is not in the interests of public security and order".[1] Having regard to the fact that one month after the Minister had made his proposals, the Government found it necessary to invoke the provisions of the Public Security Ordinance, it was inevitable that the existing position would remain unaltered. Accordingly, the 1972 Constitution only succeeded in protecting itself from the overriding effects of emergency regulations.[2]

The state of emergency declared in March 1971 to deal with a rapidly developing insurrectionary situation was thereafter renewed every month for the next six years. In 1978, following a general election and a change of government, priority was given to the amendment of the Public Security Ordinance for the purpose of ensuring greater parliamentary control over executive action. As the new Prime Minister, J.R.Jayewardene, explained:

> On several occasions, we in the Opposition tried to commence a debate on the Emergency, but we were not successful. We gave notice of several motions dealing with specific regulations, but they were treated as private members' motions and they never came up for discussion.[3]

The Public Security (Amendment) Law, No.6 of 1978, provided that: (1) the longest period that a state of emergency will remain in force without parliamentary approval is fourteen days;[4] (2) if a state of emergency is revoked within a period of fourteen days, or if it expires on the fourteenth day, a fresh state of emergency declared within fourteen days of such revocation or expiry will not take effect without parliamentary approval;[5] and (3) if a state of emergency has been in operation for a period of ninety consecutive days, or a period of ninety days in the aggregate during six consecutive calendar months, no further extension nor a fresh declaration made at any time during the succeeding six calendar months, will be effective for more than ten days without parliamentary approval by a two-thirds majority.[6] The Jayewardene Government was, of course, not seeking to inhibit itself since it then commanded a comfortable five-sixth majority in the National State Assembly. Additionally, it caused the legislature to give it an extensive armoury of powers

---

1. Views of the Security Council on the Paper submitted by the Ministry of Constitutional Affairs, (undated).
2. See ss. 45(4), 134.
3. National State Assembly Debates, 31 January 1978, col.612.
4. S.2(2). 5. S.2(5). 6. S.2(6).

which no government had previously enjoyed in normal times, and which could be utilised without the need to declare a state of emergency:

1. The Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, No.16 of 1978, provided for:
   a) the proscription of any movement, society, party, association or body or group of persons "if the President is of opinion" that such organisation "advocates the use of violence and is either directly or indirectly concerned in or engaged in any unlawful activity;
   b) the detention of any person for an aggregate period of one year "where the Minister has reason to believe or suspect that" such person "has committed or been concerned in the commission of any offence under any law and that such offence was committed in pursuance of or in furtherance of or in relation to the aims or objects or the apparent or ostensible aims or objects" of a proscribed organisation;
   c) the prohibition of the publication of any matter relating to any activity of a proscribed organisation, including news concerning any act alleged to have been committed by such organisation and of any investigation undertaken in respect of such act.

   The penalties prescribed by this law included mandatory remand, imprisonment for a period not exceeding seven years, the closure of printing establishments, and the forfeiture of property; the last-mentioned penalty being at the discretion, not of a court, but of a Minister. Neither a proscription order made by the President, nor a detention order made by the Minister, was justiciable in a court. This law was in force for a period of fourteen months, from 23 May 1978 to 20 July 1979.
2. The Prevention of Terrorism (Temporary Provisions) Act, No.48 of 1979, defines twelve different "acts of terrorism" and provides, inter alia, for:
   a) any police officer not below the rank of sub-inspector to arrest any person, enter and search any premises, stop and search any individual or vehicle, and seize any document or thing, without a warrant, if he "reasonably suspected" such person, premises, vehicle or thing to be connected with or

concerned in any act of terrorism;

b) the retention by the police in custody, without producing before a magistrate, of a person arrested without a warrant, for a period of three days, and his mandatory remand thereafter until the conclusion of his trial;

c) the admissibility in evidence of confessions made to the police while in police custody, not only against the maker thereof, but also against any other person who is jointly charged;

d) the prohibition, upon pain of punishment, of any retraction or contradiction at the trial, of any statement made by a witness to a magistrate;

e) the detention of any person for an aggregate period of eighteen months if "the Minister has reason to believe or suspect that" such person "is connected with or concerned in" any act of terrorism;

f) the prohibition of the publication of any matter relating to the commission of any act of terrorism or the investigation into any such act.

Minimum periods of imprisonment which are mandatory, the forfeiture of all movable and immovable property, and the closure of printing establishments, are among the penalties prescribed by this Act. A detention order made by the Minister is final and cannot be called in question in any court or tribunal by way of writ or otherwise. This Act came into force on 20 July 1979 and, though originally intended only for a period of three years, is still operative.

3. The Essential Public Services Act, No.61 of 1979, empowers the President to declare any service provided by certain government departments, public corporations, local authorities and co-operative societies, to be an essential public service. Thereupon, the failure by any employee to report for work at such establishment, and any attempt to induce an employee to refrain from so reporting, whether or not in pursuance of a strike commenced by a trade union, are offences which are punishable with imprisonment, fine, forfeiture of property and, in the case of a person who is registered to practise any profession or vocation, by the removal of the name of such person from such register. Each order made by the President under this Act remains in force for one month. subject to approval by resolution of Parliament before the expiry of the first fourteen days.

Concept of a State of Public Emergency

Justiciability

Section 2(1) of the Public Security Ordinance provides that:

> Where, in view of the existence or imminence of a state of public emergency, the President is of the opinion that it is expedient so to do in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, the President may, by Proclamation published in the Gazette, declare that the provisions of Part II of this Ordinance shall come into operation forthwith or on such date as may be specified in the proclamation.

Section 3 provides that:

> Where the provisions of Part II of this Ordinance are or have been in operation during any period by virtue of a Proclamation under section 2, the fact of the existence or imminence, during that period, of a state of public emergency shall not be called in question in any court.

Therefore, in unequivocal language, the legislature has excluded the jurisdiction of the court to inquire into and pronounce upon the question whether or not a state of public emergency exists or is imminent. That question is left to the sole determination of the President. Under the 1946 and 1972 Constitutions, the determination was made by the Prime Minister on whose advice the President (and previously, the Governor-General) acted. In fact, the latter Constitution specifically provided that:

> Upon the Prime Minister advising the President of the existence of a state of public emergency, the President shall declare a state of emergency.[1]

A parliamentarian has expressed his understanding of the extent of this power in the following terms:

> This so-called state of emergency is not defined in the Ordinance. It can be something imaginary. It may be that the Governor-General can get up one morning - he might have had a bad dream - and declare a state of emergency. If in the opinion of the Governor-General there is a state of emergency, he makes a declaration.[2]

Under section 2(1), the President may bring into operation the extraordinary law-making power contained in Part II only after he has formed the view that a state of public emergency is in existence or is imminent. That view must necessarily be formed on the

---

1. S.134(2).
2. Parliamentary Debates (House of Representatives), 8 January 1959, col.2848, per E.P.Samarakkody (LSSP).

basis of information within his knowledge as Head of the Government, and in the exercise of his own judgment as the person ultimately charged with the direction and control of that Government. It is as much a matter of commonsense as it is of intuition and conscience. He may act on reports submitted by his security staff; he may have regard to advice given by Cabinet and Parliamentary colleagues; or he may simply apply his own political experience and his knowledge of men and matters to what he perceives to be portentous trends. Section 72 of the Ninth Schedule to the Government of India Act 1935 provided that:

> The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof.

In King Emperor v. Benoari Lal Sarma,[1] the Privy Council observed that the question whether an emergency existed at the time when an ordinance was made and promulgated was a matter of which the Governor-General was the sole judge.[2]

If then the President is the sole judge of the question whether a state of public emergency exists or is imminent, is he entitled to determine that question mala fide ? If, for instance, he anticipates a parliamentary defeat due to the temporary absence of certain members of his party, can he invoke, until their return, the regulation-making power provided for in the Public Security Ordinance by falsely determining that a state of public emergency exists or is imminent ? In Benoari Lal Sarma, the Privy Council made the following observation:

> Assuming that he acts bona fide and in accordance with his statutory powers, it cannot rest with the courts to challenge his view that the emergency exists.[3]

This dictum seems to suggest that the absence of good faith would vitiate a determination made by the President. But the absence of good faith, or mala fides, will not be apparent on the face of a proclamation made under section 2(1). Such proclamation:

> . . . bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get in quashed, or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.[4]

---

1. [1945] 1 All ER 210.
2. See also Bhagat Singh v. King Emperor [1931] LR Ind.App.169; Uganda v. Comm. of Prisons, ex p.Matovu [1966] EA 514.
3. At p.212.
4. Smith v. East Elloe Rural District Council [1956] 1 All ER 855, at 871.

Unlike the Government of India Act 1935, which was being interpreted in Benoari Lal Sarma, the Public Security Ordinance states that "the fact of the existence or imminence of a state of public emergency shall not be questioned in any court". If the premise upon which the proclamation is made cannot be questioned in any court, it does not appear to be possible to establish that that premise is tainted by mala fides.

In Smith v. East Elloe Rural District Council, Lord Reid, expressing the minority view, observed that "cases involving mala fides are in a special position in that mere general words will not deprive the court of jurisdiction to deal with them".[1] In Anisminic v. The Foreign Compensation Commission,[2] the House of Lords held that the words "shall not be called in question in any court of law" appearing in section 4(4) of the Foreign Compensation Act 1950 did not operate to debar any enquiry that may be necessary to decide whether a tribunal had acted within its authority or jurisdiction. Lord Reid, expressing the majority view in that case, observed[2]

> If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination but which is in fact no determination at all.[3]

He explained what he meant by "nullity":

> It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.[4]

---

1. Op.cit., at 867.
2. [1969] 1 All ER 208.
3. Ibid., at 213.
4. Ibid.

The "determination" in Anisminic, however, is distinguishable from the "view" required in section 3. In Anisminic, a commission established by statute had enquired into and decided a matter which they had no right to consider. The commission was clearly acting outside its statutory jurisdiction. Its "determination" was therefore not "real", but "purported". On the other hand, the "view" formed by the President that a state of public emergency exists or is imminent is quite different in character and content. It is formed on the basis of information which he will normally not be able to disclose to a court. It is not an assessment that a court, with no responsibility for the governance of the country, will ordinarily be able to make, and is fraught with consequences which a court is not, and will not be, called upon to face. It is a decision which, in the words of Lord Macmillan, "can manifestly be taken only by one who has both knowledge and responsibility which no court can share".[1] As Lord Parker has observed:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.[2]

Accordingly, when Parliament invests the President with extraordinary power which could be utilised whenever "a state of public emergency exists or is imminent", he is under a duty to exercise that power cautiously, wisely and well whenever in his judgment he considers it necessary and appropriate to do so. The power is held in trust, and in determining if and when he should use it, the President is guided by purely subjective factors, and is then accountable only to Parliament and to the people of the country to whose political judgment of his actions he must ultimately bow. His judgment of the state of the nation is essentially political in nature and is, therefore, incapable of review by a court.

Section 3 contains an irrebuttable presumption of fact. During any period when the provisions of Part II are, or have been, in operation by virtue of a proclamation under section 2, it is presumed that a state of public emergency exists or has existed, or is imminent or had been imminent. By denying a court jurisdiction to question the fact of the existence or imminence, during that period,

---

1. Liversidge v. Anderson [1941] 3 All ER 338, at 367.
2. The Zamora [1916] 2 AC 77, at 107.

of a state of public emergency, the presumption is made irrebuttable. Section 3 is, therefore, neither a "finality clause" nor an "ouster clause", in the sense in which those terms are commonly understood. Perhaps it is more akin to a "conclusive evidence clause". As De Smith has observed:

> The courts will also accept the conclusiveness of a certificate entered by a responsible Minister on certain matters of State into which they are not prepared to conduct any independent inquiry - e.g. whether another State is independent, whether the Crown is at war with it, whether its government is recognised de jure or de facto or not at all, whether a defendant in legal proceedings is entitled to sovereign immunity or to diplomatic status. These questions are not, however, strictly matters of discretion but rather matters of law or fact.[1]

The marginal note to section 3 describes it as "Presumption as to existence or imminence of public emergency". Although a marginal note has little relevance in the interpretation of a provision in a statute, it suffices to state that, in this instance, the marginal note accurately describes the content of that section.

No attempt has yet been made in Sri Lanka with any degree of success to invoke the jurisdiction of a court to examine the question whether or not a state of public emergency existed or was imminent at any particular point of time.[2] In December 1980, Sharvananda J offered the only rational explanation for this:

> The existence of a state of emergency is not a justiciable matter which the Court could be called upon to determine by applying an objective test.[3]

He stressed that:

> The President is not bound as a matter of law to disclose the reasons for the Proclamation. A proclamation of emergency is thus conclusive and is not assailable on any ground.

If this is a correct statement of the law (which it is), it is difficult to understand the action of the same Judge who, as a member of a special presidential commission of inquiry in February of the same year, noticed Mrs.Bandaranaike, Prime Minister from

---

1. De Smith, Judicial Review, op.cit., at p.290.
2. In Republic of Sri Lanka v. Amirthalingam (Trial at Bar No.1 of 1976), the High Court held that a proclamation purported to have been made by the President to bring Part II into operation did not satisfy the requirements of s.134(2) of the Constitution; consequently, there had been no valid declaration of emergency. Acting in revision, the Supreme Court set aside this decision: S.C.Application No.658/76.
3. Yasapala v. Wickremasinghe, S.C.M. of 8 December 1980.

1970 to 1977, to explain, inter alia, why:

> Even after the conditions precedent for the continuance of a state of emergency had ceased to exist, you did continue to recommend to the President that such conditions did in fact exist and that you did thereby cause the state of emergency to continue until it lapsed on 16 February 1977.[1]

The reference was to the state of emergency which was declared on 16 March 1971 to deal with insurgent activity, and which was renewed every month until 15 February 1977.

Before the commission served its notice on Mrs.Bandaranaike, it had recorded, at an ex parte inquiry, the evidence of three police officers who testified that, in their view, there was no justification for the continuance of the state of emergency after about August/November 1971. Each of them had served as a member of the Security Council of the Ministry of Defence which met regularly under the chairmanship of the Secretary to that Ministry; but, according to them, they had not been individually consulted by the Prime Minister at any stage as to the need for the continuance of the state of emergency. The commission had also recorded the evidence of two insurgent leaders. One of them had been in prison custody from March 1971 till December 1976. Nevertheless, he had testified on oath to events which according to him had taken place in the country during that period, and he concluded that owing to the relative strength of the insurgents and the police, the former having been "decimated and destroyed" and the latter having been "fully equipped with generators, aircraft and lorries", there was no threat to public security after August 1971. The other insurgent, who had been arrested in March 1973, had testified that by the end of August 1971, the insurgent movement "was decimated and only a few hundred remained outside".[2]

Mrs.Bandaranaike appeared before the commission, but declined "to explain, be answerable or be accountable in respect of the acts of my Government to any non-sovereign body or tribunal which has no constitutional authority to override or supersede the sovereign legislature, which alone had power and authority to question my actions or that of my Government and to which alone I was responsible".[3] With regard to the specific charge relating to the state

---

1. Third Interim Report, SPCI, op cit.
2. Ibid., at 125-136.
3. Ibid., at 160.

of emergency, she said:

> The Public Security Act has provided Parliament as the only body which has cognizance over the question of an emergency and expressly declares that the fact of the existence or imminence of a state of public emergency shall not be called in question in any court. How can this commission presume to inquire into the question of the declaration of the emergency when the law says it is not justiciable and that law remains unamended ?

After further ex parte proceedings, the commission reported to the President that:

> On the material placed before us and for the reasons given in considerable detail, we are amply satisfied that a continuance of a state of emergency recommended by the respondent as Prime Minister to the President, promulgated after the end of December 1972 from month to month until the Emergency lapsed on the 16th February 1977, constitutes abuse or misuse of power.[1]

Thereupon, the President caused a resolution to be passed by Parliament imposing civic disability on Mrs.Bandaranaike for a period of seven years, thereby disqualifying her, during that period, from seeking election either to the office of President or to Parliament or from voting or holding public office.[2]

The commission's finding was based on the conclusion reached by the three commissioners that, in their view, a state of public emergency was neither in existence nor was imminent during the period 1 January 1973 to 16 February 1977. In other words, contrary to the provisions of section 3, they had questioned the fact of the existence or imminence of a state of public emergency during the periods when the provisions of Part II had been in operation by virtue of a proclamation made under section 2. The commission was not unaware of section 3. In fact, it asked itself the question whether the language of section 3 precluded them from inquiring into the propriety of the Prime Minister's conduct, and answered that question in the negative. The commission's reasoning appeared to be on the following lines:

1. The law under which the commission had been constituted authorised it to proceed with any inquiry into the conduct of any public officer.

---

1. Ibid., at 136.

2. Supra, p.

2. There was ample authority for the proposition that the finality clauses in sections 3 and 8 did not preclude a person from invoking the assistance of the courts where the exercise of discretionary power was mala fide or done for improper or collateral reasons.
3. The denial of an opportunity to exercise the power vested in Parliament to discuss the Emergency by way of debate invalidated the purposes of sections 3 and 8 in barring judicial review.

It is now proposed to examine the validity of each of these reasons.

The commission believed that it had received clearance by law to question the "fact of the existence or imminence of a state of public emergency" by reason of the following provision in the Special Presidential Commissions of Inquiry (Special Provisions) Act:

> . . . and notwithstanding that under the Constitution in force during the relevant period, no court, tribunal or other institution has, or had the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any such conduct . . .

This enabling provision was inserted into section 22 of the principal enactment which sought to define the expression "conduct of any public officer". Therefore, what this provision sought to do was to enable the commission to inquire into the conduct of a public officer despite the fact that the Constitution might have expressly prohibited such conduct from being called in question by a court. The 1972 Constitution contained several such "ouster clauses";[1] but there was none which prevented a court from inquiring into the conduct of a prime minister in relation to a state of emergency. On the other hand, section 3 of the Public Security Ordinance contained an irrebutable presumption that, during any period when the provisions of Part II of that Ordinance were in operation by virtue of a proclamation made under section 2, a state of public emergency was in existence or was imminent. That section was neither repealed nor made inoperative by the Special Presidential Commissions of Inquiry Law. Therefore, the law on which the commissioners relied could not have given them the authority to

---

1. Supra, p.356.

embark on an investigation to ascertain whether the state of the nation was, at the relevant time, different to that which the law irrebuttably presumed it to have been.

The second reason given by the commission was that "there is ample authority for the proposition that the finality clauses in sections 3 and 8, 'shall not be called in question in any court', does not preclude a person from invoking the assistance of courts where the exercise of discretionary power is mala fide or done for improper or collateral reasons". Unfortunately, not even one authority was actually cited in the report. A "finality clause" is different from an "ouster clause". Section 8, which provides that:

> No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court,

contains an "ouster clause". Section 3 contains neither a "finality clause" nor an "ouster clause". That section contains an irrebuttable presumption of fact, and while that section remained operative, it was not open to any court or tribunal to canvass the fact stated therein.

Finally, the commission appears to have accepted a submission made by State Counsel that "the provisions of sections 3 and 8 were based on the premise that the excesses or abuses of power vested in the executive by the Public Security Ordinance are within parliamentary control by the process of debate and discussion in Parliament, on the proclamation sought to be made". The commission noted that:

> Arising from what has been just said is the question whether the denial of an opportunity to exercise the power vested in Parliament, referred to above, by way of debate invalidates the purposes of section 3 and 8 in barring judicial review.

By reference to Hansard, the commission observed that several requests for debate on the renewal of the Emergency made by members of the Opposition in the National State Assembly had been met with the same reply, namely, that this would be possible only by way of a substantive motion.[1] State Counsel submitted that the "technical

---

1. The commission omitted to refer to a number of occasions when the Emergency had in fact been debated in the National State Assembly; e.g. (i) motion of no-confidence in the Government for misuse of emergency powers: Parliamentary Debates (House of Representatives), 2 May 1972, c.868; 3 May 1972, col.102; (ii) motion

objection" that a substantive motion must be moved in regard to so important a matter as the continuation of a state of emergency from month to month "is an indication of a lack of good faith", particularly since the Government "knew fully well that such a motion would require a longer period than one month during which the proclamation is in force". Although there is no acceptance of it in express terms, the commission appears to have adopted this submission. Therefore, it needs to be noted that:

a) Standing Orders of the National State Assembly permitted a debate to be held only on a substantive motion.

b) On previous occasions, the Emergency had been debated by way of substantive motions. For instance, in 1958, the Leader of the Opposition, Dr.N.M.Perera, moved:

> That this House expresses its lack of confidence in the Government in view of its failure to end the Emergency and restore normal democratic rights and civil liberties.[1]

On 1 November 1961, the Senate began a debate on an Opposition motion calling for the withdrawal of a proclamation under section 2 made on 11 October 1961. When the debate was resumed on 14 November 1961, the motion was amended to read:

> and as further amended by Proclamation in Government Gazette Extraordinary No.12747 of 11 November 1961,

and the debate continued.[2] On 17 May 1961, the House of Representatives debated the following motion, although on that very day a fresh proclamation and fresh regulations had been made by the

---

of no-confidence in the Government for misuse of emergency powers: National State Assembly Debates, 8 March 1973, col.1117; (iii) discussion on adjournment motion of the emergency regulation relating to the ban on meetings of the United National Party: National State Assembly Debates, 8 May 1974, col.1623; (iv) debate on motion calling for the repeal of the emergency regulation relating to the closure of the Sun and Davasa newspapers: National State Assembly Debates, 4 September 1974, col.1730; (v) appointment of a parliamentary committee to examine emergency regulations, and debate on adjournment motion on the release of persons on detention under emergency regulations: National State Assembly Debates, 23 December 1976, col.2281.

1. Parliamentary Debates (House of Representatives), 21 November 1958, col.1898. See also ibid., 29 September 1961, col.863; 23 November 1961, col.1792; and 26 January 1966, col.1048.

2. Parliamentary Debates (Senate), 14 November 1961, col.1070.

Governor-General:

> That this House is of opinion that any directions given under paragraph 1 of Regulation 22 of the Emergency (Miscellaneous Provisions and Powers) Regulation 1961, should be restricted to the Administrative Districts of Jaffna, Vavuniya, Mannar, Trincomalee and Batticaloa, and that directions given by the Competent Authority published in Government Gazette No. 12,366 of 17 April 1961 should be amended accordingly, thereby affording complete freedom of publication in the other administrative areas.[1]

Thus, the fact that a proclamation made under section 2 remained in force for only a month has not prevented Parliament from debating the subject of the Emergency by way of a substantive motion.

c) The Public Security Ordinance, in the original form in which it was enacted in 1947, did not provide for any form of parliamentary control. There was no requirement that Parliament should even be notified of a proclamation made under that Ordinance. The concept of parliamentary control was first introduced by the amending Act, No.22 of 1949. Nevertheless, both sections 3 and 8 were in the original Ordinance. Therefore, there is no basis for the argument that the provisions of sections 3 and 8 "were based on the premise that the excesses or abuses of power vested in the executive . . . are within parliamentary control by the process of debate and discussion". Consequently, there is no basis for State Counsel's submission, which the commission appears to have accepted, that "the denial of an opportunity to exercise the power vested in Parliament . . . invalidates the purposes of sections 3 and 8 in barring judicial review".

Therefore, in determining that, notwithstanding the provisions of section 3 of the Public Security Ordinance, it was entitled to examine whether a state of public emergency existed or was imminent during the period March 1971 to February 1977, the commission had clearly misdirected itself on the law. The correct position has always been, as stated by Sharvananda J in Yasapala v. Wickremasinghe,[2] that the existence or imminence of a state of public emergency is not a justiciable issue.

---

1. Parliamentary Debates (Senate), 17 May 1961, c.6069.
2. Supra, p.415.

Definition

A state of public emergency is not defined in the statute. Since the existence or imminence of a state of public emergency is not justiciable, the expression has not been judicially defined either. In the circumstances, the meaning to be given to this expression has to be sought by reference to State practice.

The immediate cause for making a proclamation under section 2, in respect of each of the fourteen continuous periods has already been noted. A proclamation remains in force only for a month, and when that month comes to an end, so do all the regulations and orders made by virtue of that proclamation. A fresh proclamation, even though made on the day following that on which the previous proclamation expired, is a separate and distinct act which may well have been motivated by altogether different considerations. Sometimes the Government has indicated that the "nature" or "character" of the emergency has undergone a change. At other times, the Government has not thought it necessary to take the public into its confidence, and has preferred to let both Parliament and the people speculate as to why a state of public emergency is considered to exist.

An examination of the reasons officially stated for invoking the Public Security Ordinance from time to time indicates that Governments have considered it proper and legitimate to use the extraordinary law-making powers contained in that Ordinance for the following purposes or for dealing with the following situations.

Threat to Security

1. Abortive coup d'etat. On 28 January 1962, the Ministry of Defence and External Affairs issued the following communique:

> On the night of Saturday the 27th January the Government received reliable information that certain senior Officers of the Police and Armed Forces had conspired to arrest some Ministers and other political leaders and to overthrow the Government. The arrests were scheduled to be made shortly after midnight on Saturday.
>
> On receipt of the information the Government took immediate action and the plots of the conspirators were completely foiled. Several officers were questioned in this connection and the investigations made have revealed a carefully planned coup d'etat.[1]

---

1. Ceylon Daily News, 29 January 1962.

Having then mentioned the names of certain persons who had been taken into custody and were being detained under emergency regulations, the communique added that:

> The Government wishes to assure the public that the situation is well under control.

On the date of this communique, a state of emergency was already in existence, precipitated some nine months previously by a civil disobedience campaign in the North. However, this abortive coup d'etat was clearly the dominant reason for its renewal on 8 February 1962. Authority for the detention of the suspects and for their questioning, as well as for the general conduct of the investigation, was provided by a series of new regulations.

On 13 February, in a statement made on behalf of the Cabinet, Parliament was informed of the details of the alleged attempted coup d'etat.[1] Two days later, the Government tabled the Criminal Law (Special Provisions) Bill which contained special provisions for the trial of the persons accused of complicity in the attempted coup d'etat. This bill was passed in the House of Representatives on 2 March, and by the Senate on 16 March. Meanwhile, an announcement was made on 26 February that the Governor-General, Sir Oliver Goonetilleke, was being replaced,[2] and on 2 March, his successor, William Gopallawa, a kinsman of the Prime Minister, assumed office. On 23 June, the Minister of Justice directed that the trial of the twenty-four persons accused of having attempted to overthrow the Government be held before the Supreme Court at Bar by three Judges without a jury, and nominated a bench comprising T.S.Fernando J, L.B.de Silva J and Sri Skanda Rajah J.[3] On 3 October, after twenty-one days of argument, the Court upheld a defence contention that section 9 of the Criminal Law (Special Provisions) Act which empowered the Minister to nominate the Court was ultra vires the Constitution, and that, accordingly, that Court, having been nominated by the Minister, had no jurisdiction to proceed with the trial.[4]

---

1. Supra, p.62.
2. In the Cabinet statement of 14 February, it was disclosed that certain suspects had alleged that the Governor-General had prior knowledge of the planned overthrow of the Government. Sir Oliver Goonetilleke was in fact questioned by the CID before he vacated office.
3. The document nominating the Judges is published as an appendix to the judgment in The Queen v. Liyanage (1962) 64 NLR 313.
4. Ibid.

Meanwhile, on 30 August, in the House of Representatives, the Parliamentary Secretary to the Prime Minister, Felix Dias Bandaranaike, declared that the Emergency will continue in force "as long as the coup case lasted". He explained that the fact that there was an Emergency on in January helped the Government to take immediate action to crush the attempted coup; "that action could not have been taken without the Emergency".[1]

No appeal was taken to the Privy Council against the judgment of the Supreme Court; instead, the power to constitute the Court was restored to the Chief Justice by the Criminal Law Act, No.31 of 1962, which was passed in the House of Representatives on 9 November and by the Senate on 14 November. On the president of the former Court, T.S.Fernando J, declining to serve,[2] the Chief Justice nominated a bench of three Judges comprising L.B.de Silva J, Herat J and Abeysundera J.[3] This Court dissolved itself within half an hour of assembling when the Attorney-General brought it to their notice that one of the Judges, Abeysundera J, had as acting Attorney-General in March 1962 approved certain documents and tendered legal advice in connection with the investigation.[4] A third bench was constituted by the Chief Justice comprising Sansoni J, H.N.G.Fernando J and L.B.de Silva J, and after a month of preliminary arguments, the trial proper commenced in April 1963.[5] On 30 April 1963, the state of emergency was allowed to lapse.

---

1. Times of Ceylon, 31 August 1962.

2. It is understood that his decision was due to certain references made in the House of Representatives by an Opposition member, after judgment had been delivered, that the three Judges and the Minister all belonged to the same caste, and that the whole episode was a "fishy business", being also a reference to this caste. There was no response to these allegations from the Government front bench.

3. The third member of the original bench, Sri Skanda Rajah J, is believed to have been excluded by the Chief Justice since his appointment as a Judge of the Supreme Court was made consequent to an amendment to the Courts Ordinance increasing the strength of the Court from nine to eleven, made by the impugned Criminal Law (Special Provisions) Act.

4. With the dissolution of each bench, the accused ceased to be in fiscal's custody, and were therefore held on detention orders made under emergency regulations made by the Permanent Secretary to the Ministry of Defence and External Affairs.

5. For preliminary orders, see 65 NLR 289, 73, and 337.

2. "A conspiracy to overthrow the government". On 17 February 1966, the chairman of a state corporation, former civil servant M.Chandrasoma, had disclosed to the Inspector General of Police that he had information of an attempt by "Rev. Gnanaseeha's boys and Mr.N.Q.Dias' boys"[1] to overthrow the Government by violence between then and the 22nd. Chandrasoma did not disclose the source of this information, but had later told the acting Head of the Government, J.R.Jayewardene, that he had received the information from LSSP Senator Doric de Souza. Chandrasoma's statement was recorded on 24 February, and De Souza's on 26 February.[2] In the Senate, a few days later, De Souza denied that he had conveyed any information in regard to a planned coup d'etat:

> According to the CID officers who questioned me, the basis of their interrogation was a conversation at a club. This conversation took place between four persons - myself, the public servant referred to, and another gentleman and his wife. It took place while two persons were playing a game of chess and the other two - if I remember right - were trying to solve a crossword puzzle. The talk ranged, as it is apt to do under such circumstances, over a wide range of subjects and was desultory. I am not absolutely certain now about the sequence in which different topics were discussed.
>
> However, at one stage the matter of a coup d'etat taking place at the rate of about two a week in Africa and other places came up for comment. Again, I chose to show off some recently acquired and ill-digested knowledge about astrology. I said that the sun had entered a new constellation on the 14th of February and that a number of planets were about to have a dog-fight as a result and that, accordingly as the phrase goes, it was a 'bad time'. I added - this is not to be taken as a serious view - that no doubt the sudden departure of the Prime Minister to America was connected with the bad time, and that he would probably not return to Ceylon until the bad time was over. I said that it was a funny thing that in Ceylon predictions about 'bad times' came true because bad people chose bad times to do bad things. I remember citing the case of Somarama who chose a 'bad time' for his criminal act.

---

1. These two persons, the former a politically active monk, and the latter a former Permanent Secretary to the Ministry of Defence and External Affairs, were known at that time to be taking much interest in Buddhist activities among public servants and service personnel.

2. Report of the Commission of Inquiry appointed to inquire into and report on the circumstances and causes which led to the deaths of L.V.P.Podiappuhamy alias Dodampe Mudalali and Corporal S.K.P. Tillekewardene, S.P.IV - 1977, at p.3.

> At some stage of the conversation I said that Emergencies were very dangerous things for the country, and that I had no doubt that certain persons, and notably the Honourable Minister of State, had various sinister plans to carry through during the Emergency if it went on much longer. I said that it was quite possible that if the Emergency went on, not only would democracy be destroyed completely, but that we of the Opposition might be bumped off.[1]

De Souza allged that he saw "one clear motive in this wanton action", namely, "to drive a wedge between the Opposition parties". The suggestion was that pro-SLFP elements had planned a coup and that LSSP members had secretly denounced the plans in advance to the Government.

A state of emergency had been declared on 8 January 1966 to deal with public agitation against the presentation in Parliament of regulations made under the Tamil Language (Special Provisions) Act. It had been renewed on 8 February. Despite strict censorship of the press, the pro-Government "Ceylon Daily News" gave wide publicity in its issue of 24 February to what was described as a "Dramatic Army Coup Plot". On the same day, Jayewardene confirmed that "the Government had reliable information that violence was to be committed against members of the Government and some members of the Opposition".[2] On 4 March, the Special Branch of the CID was placed in charge of the investigation. On the same night, eight Army non-commissioned officers were brought to the Special Branch and, after being questioned, were served with detention orders made under emergency regulations.[3] In the next few weeks, several other NCOs and civilians were placed on detention. They were all prevented from having access to friends and relations or lawyers and were held in solitary confinement under emergency regulations.[4] It was clear, therefore, that the disturbances of 8 January having receded, the provisions of Part II were now being invoked for the purpose of facilitating the investigation into the alleged conspiracy to overthrow the Government. The proclamations under section 2 continued

---

1. Ceylon Observer, March 1966 (date not available).
2. Ceylon Daily News, 25 February 1966.
3. The Queen v. Gnanaseeha Thero (1969) 73 NLR 154, at 163.
4. Ibid. See also letter from the Ceylon Branch of the International Commission of Jurists to the Prime Minister, The Sun, June 1966 (date not available).

to be made until November 1966; the final one was allowed to lapse on 7 December 1966, five months after the magisterial inquiry into charges laid against twenty-eight persons in connection with this alleged conspiracy had begun.[1]

3. Insurgent Activity. On 17 March 1971, in a broadcast to the nation, the Prime Minister, Mrs.Bandaranaike, explained why she had advised the Governor-General to bring into operation the provisions of Part II on the previous day. She said:

> We have received and are receiving information from various sources, many of which have been on checking found to be correct, that a small minority of our population have banded themselves together in secret cells, and are making preparations to cause bloodshed and chaos in this country.
>
> We are also aware that in several village areas where these secret cells have been formed, the local population have been terrorised and terrified into passive acquiescence of the preparations for violence. The Government is also aware that those belonging to this Movement have been manufacturing as well as collecting arms, ammunition, and other deadly weapons such as hand bombs, in order to create chaos and confusion in the country, and to try and capture power, if possible, in the ensuing situation.
>
> We have reason to believe that attempts are being made to cause destruction to communications and supplies and to spread terror by persons and groups of persons whose object is to thwart the will of the people as expressed in the outcome of the General Election of May 27, 1970. [2]

The Prime Minister referred,in particular, to recent events such as the accidental explosion of a large cache of hand bombs in a hut in Nelundeniya in the Dedigama electorate which killed five youths; the discovery in a shrub jungle at Pindeniya of nine crates containing hand bombs; and the carefully planned attack on the United States

---

1. Of the twenty-eight persons, six were discharged in the course of the proceedings. Twenty-two were committed for trial, and these persons who included a Buddhist monk, a former army commander, one captain and nineteen non-commissioned officers, were tried before three Judges of the Supreme Court by a Sinhala-speaking jury (An attempt by the Crown to replace the Sinhala-speaking jury for which the accused had opted with a Special Jury which was necessarily English-speaking, was rejected by the Supreme Court). When the Crown closed its case, several accused including the monk, the army commander and the single officer among them, were acquitted. At the end of the 374-day trial, the rest of the accused were all acquitted on a unanimous verdict of the jury.

2. Sunday Observer, 18 March 1971.

Embassy in Colombo which resulted in considerable damage to property and the death of a police inspector. Six days later, she told the House of Representatives that:

> Consequent to the declaration of the Emergency and the searching of various premises by the Police and the Armed Services, large quantities of explosives, firearms, uniforms and subversive literature, were traced. In some cases, even after the Emergency was declared, persons were caught in the act of manufacturing hand bombs. Explosives from governmental stores have been stolen. Sabotage to the high tension lines caused a power failure in Badulla. An explosion in the Peradeniya campus, damaging the roof of the Marrs Hall, brought the police into the premises and led to the discovery of hand bombs and large quantities of explosive material used in the manufacture of hand bombs. These and other revelations have amply justified the steps taken by my Government to prevent a violent attack on the organs of public life and the disruption of the life of the community.[1]

Despite the pre-emptive action which the Government had attempted to take, like a whiplash in all its fury, the storm broke upon the country on 5 April 1971. In the early hours of that day, the police station at Wellawaya, a remote fastness in the Uva mountain ranges, was subjected to an insurgent attack in which two police officers lost their lives. That night, armed with shot guns, hand bombs and locally made hand grenades, a massive attack was launched by insurgent groups on police stations throughout the country.[2] Between 5 April and 11 April, a total of ninety-three police stations were attacked and overrun; thirty-five police station areas went under insurgent control and in these provincial towns and villages revolutionary government replaced the civil administration completely. As the Prime Minister confessed:

> On the 5th of April, the Government was militarily unprepared for the kind of concentrated armed attack that the terrorists launched . . . The Police and our Armed Services have been constituted and equipped to deal with basic internal security and to act to restore order in instances such as cases of riot and sporadic outbursts of civil commotion. They were not geared with the men and equipment to handle situations of such organised thoroughness and surprise in execution as the attacks launched by these insurgents. In fact, what

---

1. Statement made by the Prime Minister in the House of Representatives , 23 March 1971, reported in Ceylon Today, Vol.xx, Nos.3 & 4, at p.9.

2. Inquiry No.1/1977, Judgment of the Criminal Justice Commission (Insurgency), at p.407.

> was deliberately done over the years was to minimise expenditures on defence and divert resources from that sector to other sectors such as industry and agriculture. . . Therefore, on the 5th of April, we found that we had inadequate weapons, ammunition and aircraft to meet a sustained threat over a long period of time by these terrorist insurgents.[1]

However, urgent purchases of military equipment and the assistance of several foreign governments helped the security forces to re-arm themselves within a few weeks. Soon, they were able to move from purely defensive action into the offensive. As the Prime Minister explained:

> Today, the whole country knows not only that the so-called one-day revolution has failed, but that it cannot hope to succeed. The terrorists have, by and large, run out of sources of supplies, ammunition, weapons and fuel. Even the vehicles that they managed to steal or capture in the first few days are now being left abandoned on the roads. In the Southern Province and in some villages in the North Western Province, terrorist insurgents who had made attempts to raid the food stocks of farmers have been dealt with by the farmers themselves. In a military sense now, the Government is in a position to launch an offensive, area by area, to clear up the pockets of insurgents who have taken to the hills and jungles and are now living by banditry.[2]

Before it launched a concerted offensive which "would mean that many young people, on the threshold of their lives, will be killed or maimed fighting for a cause that is already lost",[3] the Prime Minister called upon them to lay down their arms and surrender. Arrangements were made at kachcheris, divisional revenue offices, police stations and army stations throughout the country for insurgents to hand themselves in, alone or in groups of less than five, without carrying any weapons, between 8 a.m. and 3 p.m., from 1 May to 4 May, and from 7 June to 9 June, two periods that coincided with the Buddhist religious festivals of Wesak and Poson. This appeal was broadcast and also made known in thousands of pamphlets, signed by the Prime Minister, which were airdropped in the affected areas. "No violence will be suffered by those who surrender", promised the Prime Minister; "once the insurrection is ended, as your Prime Minister, I can assure you I know how to be reasonable".[4]

After the process of surrender had been completed, the security forces conducted a mopping-up operation. On 20 July 1971, it was

---

1. Broadcast speech by the Prime Minister, reported in Ceylon Today, Vol.xx, Nos.3 and 4, at p.5.
2. Ibid., at 7. 3. Ibid. 4. Ibid.

possible for the Prime Minister to inform Parliament that:

> I am now satisfied that the insurgency is broken and that, given the alertness on the part of the Security Services, it will not be possible for these insurgents to launch any concerted attack on Government authority. However, there could be for sometime a possibility of isolated attacks on institutions and individuals by certain desperate terrorist elements who have not yet been apprehended, so that we will have to continue to be vigilant. [1]

When it was all over, it was not merely that a text-book plan for the overthrow of a government had failed. Over 1200 people had been killed;[2] twenty million rupees worth of property had been destroyed;[3] and a developing economy had been set back several years.

With the end of the combat phase, the Government continued to utilise the provisions of Part II to deal with another problem arising from the insurrection. On 5 April 1971, the total prison population in Ceylon, including remand prisoners, was 8228. This was more than double the number that could have been conveniently accommodated in the old, existing prisons. A new Government, barely ten months in office, was still devising ways in which to expedite the disposal of criminal trials and seeking alternatives to custodial treatment for first offenders and persons who had defaulted in the payment of fines; this latter category accounted for nearly one half of the total number of convicted prisoners. With the outbreak of the insurgency, the prison population nearly trebled. On 17 July 1971, there were 14,446 suspected insurgents and 7,456 ordinary prisoners. Of the former, approximately 4200 had surrendered in response to the Prime Minister's appeal in May and June, and 77 were being held on detention orders. The total prison population was, therefore, 21,902. In anticipation of this problem, and to face it and deal with it in all its varied aspects, emergency regulations had been made in April and May 1971 empowering the Permanent Secretary to the Ministry of Justice:

a) to designate any place to be a prison;[4]

---

1. State made by the Prime Minister in the House of Representatives on 20 July 1971, reported in Ceylon Today, Vol.xx, Nos.7 & 8, at pp.6-7.

2. Ibid., at 5. The Prime Minister admitted that this figure is not "absolutely accurate", but was "based on the best available information as it is today".

3. Inquiry No.1/1977, op.cit., at 436.

4. On 15 May 1977, Fort Hammen Heil in Jaffna and the Vidyodaya

b) to make rules on all or any of the matters on which under the Prisons Ordinance the Minister was authorised to make rules, and on any other matter relating to prisons or prisoners in respect of which the Permanent Secretary considered that rules were necessary or expedient;[1]

c) to direct that all or any of the provisions of the Prisons Ordinance, or all or any of the rules made thereunder, shall not apply, or shall apply subject to modifications, to all or any categories of prisoners;[2]

d) to give special or general directions to a superintendent of a prison to release from prison any person who is accused of a bailable offence and is either remanded by court or ordered bail but owing to his inability or otherwise to furnish bail, is remanded by court;[3]

e) to suspend, or remit the remaining portion of, the sentence of a convicted prisoner who has served a part of a sentence of imprisonment imposed by a court.[4]

---

and Vidyalankara Universities were designated as prisons. On 26 August 1971, certain land and premises adjoining the Malwatu Oya in Anuradhapura, the Rajakiya Maha Vidyalaya in Polonnaruwa, the State Home for the Aged at Koggala, the Army Camp at Ridiyagama, and the Certified School at Senapura were designated as prisons. On 6 November 1971, the former Tuberculosis Sanatorium at Wirawila, the former Malwatte Farm in Amparai and the Certified School at Keppitipola were designated as prisons. On 23 April 1972, the Government School in Karachchi in the Jaffna District was designated a prison.

1. The temporary conversion of schools, universities and other public buildings into prisons required new arrangements for administration, accommodation, feeding, exercise, etc., and accordingly, new rules in respect of these matters.

2. This power was exercised, for instance, to regulate visits to prisoners. A remand prisoner was ordinarily entitled to receive one visit each day. But having regard to the numbers of suspected insurgents in custody, it was impossible to arrange for even one visit each week or, in the early stages, for one visit each month. Accordingly, the normal rule was applied only to ordinary prisoners awaiting trial. For security reasons, it also became necessary at a certain stage to suspend the activities of Boards of Prison Visitors as well as visits to prisons by Members of Parliament.

3. As a rule, every person remanded in respect of a bailable offence was released from prison upon admission, on his entering into a bond with the superintendent of the prison to appear in court when required to do so. Failure to comply with this term of the bond was a non-bailable offence.

4. In order to make room in regular prisons, sentences on all categories of prisoners serving terms of imprisonment were, from time to time, remitted. For instance, a long term prisoner would be released upon his entering the final year of his normal term of imprisonment.

The presence of 14,000 young men and women in custody, many of whom were university students or graduates, was an investigator's nightmare. They fell broadly into two categories: those who had been arrested in combat and those who had surrendered to the authorities. The names and addresses of many of the arrested persons were not known even to the prison authorities, while less was known of those who had chosen to surrender. Many of the persons who had been arrested in combat had been taken in by the armed forces who had handed them over to the police who in turn had had them remanded by local magistrates. Many of these persons had given false names and addresses. Many of the army personnel who arrested them were later killed in action or wounded or transferred for action elsewhere and were therefore not available for the purpose of making any statements. In regard to those who had surrendered, it was not even known why they had done so. On 1 May 1971, the Government established a special investigation unit under a retired Inspector General of Police who was recalled to service in the Ministry of Defence. The unit was manned by Crown Counsel and senior public servants who were assisted by officers of the regular police.[1] Under an emergency regulation which enabled the powers of a police officer to be exercised by any person authorised by the Prime Minister in that behalf, police powers were conferred on these public officers to enable them to record statements and conduct other investigations. About two hundred other public officers of staff rank were briefed on 11 May and sent out to all the prisons in order to obtain information and statements (on a printed questionnaire) from persons in custody. After this exercise was over and the prisoners had been identified, the special investigation unit began its laborious task of isolating the prisoners into different categories on the basis of their degree of involvement as disclosed by them. Meanwhile, it became quite impracticable, by reason of the magnitude of the numbers, the lack of adequate transport facilities,

---

1. The public officers who were originally co-opted to this unit were the Additional Secretary to the Ministry of Constitutional Affairs, the Public Trustee, four Crown Counsel, the Director of Establishments, the Director of Combined Services, the Commissioner of Local Government, and the senior assistant secretary of the Ministry of Public Administration.

the likelihood of the resulting confusion, and the then prevailing security situation, to produce the persons held in custody before the appropriate magistrates at intervals of fourteen days, as required by the Criminal Procedure Code. Accordingly, another emergency regulation was made:

a) providing that every such person shall continue to remain in prison custody until he is released upon an order made by the Permanent Secretary to the Ministry of Justice;
b) requiring each magistrate to visit prisons, if any, situated within his jurisdictional area, at intervals of not more than fourteen days, to record any representations that may be made to him by any person held in custody in such prison, and to forward such record together with any observations that he may make thereon, to the Permanent Secretary.

On the material gathered, the prisoners were identified into the following five categories: (1) those who had been arrested on suspicion and against whom there was no evidence; (2) those who had attended lectures for the purpose of joining the insurgent movement, but who claimed not to have participated in any other insurgent activity; (3) those who admitted to participating in insurgent activity but claimed they had done so involuntarily or on compulsion; (4) those against whom there was evidence of serious involvement in the insurgency; and (5) those who constituted the leadership of the insurgent movement, the Janatha Vimukthi Peramuna (the Peoples' Liberation Front). It was decided by the Government that persons belonging to the first three categories should be released progressively, subject to surveillance, and in such numbers at a time as not to create any security problems in the areas to which they returned. To enable their executive release, an emergency regulation was made empowering the Permanent Secretary to the Ministry of Justice to release from custody, subject to such terms or conditions as the Permanent Secretary may specify, any person held in custody in any prison (whether upon an order of remand made by a magistrate or by reason of his having surrendered voluntarily) and suspected or accused of an offence under the Explosives Act, the Offensive Weapons Act, the Firearms Ordinance, or under chapters VI, VII or VIII of the Penal Code (offences against the State), or under any

emergency regulation.[1] By July 1971, 6,251 of the prisoners had been processed and 2,020 had been recommended for release.[2] By August 1971, 8,763 had been processed and 3,127 recommended for release.[3] By October 1971, 2,271 of those recommended for release had in fact been released.[4] By May 1972, 2,726 had been released.[5] By March 1973, 14,470 had been released; of them 12,103 were reporting regularly either to the local police or the divisional revenue officer. By August 1973, the total number of insurgent suspects held in custody had come down to 1201.[6] On 15 September 1973, only 119 remained to be processed.[7]

---

1. The conditions usually attached to release orders were:

i. that he shall report immediately after his release to the Divisional Revenue Officer (who was also the chairman of the local rehabilitation vigilance committee), and continue to so report once every week on a date and at a time specified by the DRO;

ii. that he shall, if so required by the DRO, give a full and true account of his activities for the period required by the DRO;

iii. that he shall keep the DRO informed of his residence, whether permanent or temporary, and every change thereof;

iv. that he shall abstain from any violation of the law;

v. that he shall not associate with persons belonging to any proscribed organisation or with persons involved in any form of subversive activity against the duly constituted Government of Ceylon or with persons of notoriously bad character;

vi. that he shall appear in court whenever he may be required to do so by or upon the order of a judicial officer.

In the case of certain categories of prisoners released, the officer-in-charge of the nearest police station was substituted for the DRO. A further condition was that "he shall not leave or attempt to leave the police area in which he resides without the permission of the OIC".

The release was made subject to the person concerned entering into a bond without sureties for the performance of the terms and conditions set out above. Under emeregency regulations, the failure to conform to or comply with the above terms and conditions was an offence punishable with rigorous imprisonment for a term not less than three months and not exceeding five years and with a fine not less than Rs.500 and not exceeding Rs.5,000.

2. Minutes of the discussion held at Temple Trees on 12 July 1971 relating to the investigation of insurgent activities and allied security matters.

3. Letter dated 1 August 1971 from the Minister of Public Administration to the Prime Minister.

4. Letter dated 9 October 1971 from the Permanent Secretary to the Ministry of Justice to the Permanent Secretary to the Ministry of Defence and External Affairs.

5. Letter dated 3 May 1972 from the Commissioner of Prisons to the Permanent Secretary to the Ministry of Justice.

6. Letters dated 20 August and 27 August 1973 from the Asst. Addl. Secretary, Ministry of Defence to the Permanent Secretary to the Ministry of Justice.

7. Ibid., 13 September 1973.

In regard to the trial of persons classified into (4) and (5) above, the Attorney-General advised the Government that:[1]

> A large scale conspiracy was afoot between 1968 and 1971 for the overthrow of the legally constituted government by use of criminal force. This conspiracy culminated in widespread overt acts of violence which commenced on 5 April 1971. The conspiracy itself consisted of plans -
>
> i. to launch simultaneous attacks on police stations in all or nearly all parts of the island;
> ii. to take into custody all Ministers, including the Prime Minister, the Service Chiefs and the IGP;
> iii. to set up their own administration in various parts of the island;
> iv. to disable Navy personnel and to attack Panagoda Cantonment, Katunayake Air Force Base, and Naval Headquarters in Colombo.
>
> The overt acts consisted largely of -
>
> i. attacks on police stations;
> ii. an attempt to rescue one Rohana Wijeweera, suspected to be the leader of the movement, from the Jaffna Prison;
> iii. damaging or destroying or attempting to damage public property such as government or semi-government buildings, bridges, culverts, telephone communications, postal services, etc;
> iv. actual instalment of rebel administration in certain areas of the country, namely, Elpitiya, Deniyaya, Anuradhapura and Kegalle.

Of the 16,000 then in custody, the Attorney-General was of the view that the material gathered in the course of the investigations pointed to only about 8,000 of them having been involved in the commission of offences. In regard to the balance, he was of the view that there was no material on which any court could have been invited to hold them guilty of any offence. The offences committed appeared to be:

> i. waging war against the Queen or attempting to wage war against the Queen (s.114 of the Penal Code, punishable with death, imprisonment up to twenty years and forfeiture of property);
> ii. conspiracy to wage war against the Queen (s.115 of the Penal Code, punishable with imprisonment up to twenty years);
> iii. preparing to wage war against the Queen (s.116 of the Penal Code, punishable with imprisonment up to twenty years and forfeiture of property);
> iv. murder, robbery, mischief, trespass, unlawful assembly and offences against persons and property or incidental to the main design of waging war against the Queen.

---

1. Report dated 1 February 1972 from the Attorney-General to the Minister of Justice.

In the Attorney-General's view, having regard to the nature of the evidence available, "it [was] impossible to proceed under the ordinary law to secure the conviction of the guilty". Having considered whether "new tribunals governed by new rules of procedure and new rules of evidence" should be set up, the Attorney-General concluded that this too would be impractical since "the factual position is that we have here one conspiracy, one common design which was put into execution. Logically, there must be one joint prosecution. However, that is out of the question in view of the large numbers involved". The third alternative which the Attorney-General invited the Government to consider was the constitution of a judicial commission with punitive powers:

> What is contemplated is a commission acting in much the same way as a commission of inquiry untrammeled by strict codified rules of procedure and evidence. Such a commission will have the power to look at all material of probative value and even to question a person whose conduct is under investigation. It will have power, after serving a set of charges on a particular person and giving him every opportunity of defending himself, as required by rules of natural justice, to acquit him or to convict him of the charges and to pronounce appropriate sentence on him if convicted. The standard of proof will of course remain, viz., proof beyond reasonable doubt. The main endeavour should, of course, be to render impossible the conviction of any possibly innocent person.

On 2 February 1972, on the recommendation of the Minister of Justice, the Cabinet adopted in principle the third alternative suggested by the Attorney-General. On 15 March, the Cabinet approved the draft Criminal Justice Commissions Bill. It was passed by Parliament on 5 April.

The Criminal Justice Commissions Act, No.14 of 1972, provided that the Governor-General may, whenever he was of opinion that the practice and procedure of the ordinary courts were inadequate for the trial of offences committed in connection with a rebellion or insurrection or in relation to currency or foreign exchange, appoint a commission with "power and jurisdiction for the inquiry into crimes and offences committed throughout Ceylon of the description or character set out in the warrant establishing the commission, and for determining whether any person is or is not guilty of any offence

and to pass sentence on any person so found guilty".[1] Such a commission, which was deemed to be a superior court of record whose findings were final and conclusive and not subject to review, would consist of at least three Judges of the Supreme Court nominated by the Chief Justice. The proceedings at any inquiry before a commission were to be free of the formalities and technicalities of the rules of procedure and evidence ordinarily or normally applicable to a court of law, and were to be conducted in any manner not inconsistent with the principles of natural justice, which to the commission seemed best adapted to elicit proof concerning the matters that were being investigated. On the subject of custody, the Act provided, inter alia, that:

1. Any person held in custody in any prison upon the order of a magistrate at the time of the establishment of a Commission and suspected or accused of any offence which may be the subject of any inquiry before the Commission under this Act shall continue to remain in such custody, until he is released upon an order made by the Permanent Secretary to the Ministry of Justice.

2. Where a person is in custody by reason of his having surrendered himself into the custody of any authority, at the time of the establishment of a Commission or thereafter, such person shall continue to remain in custody, until he is released upon an order made by the Permanent Secretary to the Ministry of Justice.[2]

These two provisions, therefore, made the emergency regulations unnecessary or irrelevant, in so far as the custody of persons who were likely to be brought to trial in connection with the insurrection were concerned.[3]

On 16 May 1972, the Governor-General established a Criminal Justice Commission to inquire into offences committed in connection with the insurrection of April 1971. This commission which consisted of five Judges of the Supreme Court, commenced its public sittings on 12 June 1972, and concluded its first inquiry relating to the politbureau of the insurgent movement on 20 December 1974. On 11 September 1975, this commission was replaced by two other commissions consisting of three Judges each. On 24 March 1976, a

---

1. S.5. The commission could not, however, impose sentence of death.

2. Ss. 14(2)(a), 14(3).

3. For a criticism of the concept of a criminal justice commission, see Report of an Amnesty International Mission to Sri Lanka, 9-15 January 1975, 2nd ed. (London, 1975).

a third commission consisting of three Judges was established. By November 1976, the tasks assigned to the Criminal Justice Commissions were practically over. 140 inquiries had been held at which 3,014 suspects were tried,[1] and dealt with in the following manner:

Convicted and sentenced to rigorous imprisonment	... 390[2]
Convicted and sentenced to simple imprisonment	... 3
Convicted and released on suspended sentences of imprisonment	... 2492
Acquitted / Discharged	... 104
Charges withdrawn	... 25

Having regard to the fact that "the insurgency was broken" by July 1971, and that the appropriate legislation for the detention and trial of persons concerned with the insurgency had been enacted by April 1972, was it necessary to have kept bringing Part II into operation, month after month, until February 1977 ? The executive release of arrested and surrendered suspects, which was effected by emergency regulations, was also virtually over by September 1973; in any event, there was no legal impediment to their release being regulated by statute rather than by emergency regulations, particularly since the Government then commanded a sufficient majority in the legislature to pass laws which were inconsistent with the Constitution. No explanation was offered by the Government for the continued state of public emergency. However, emergency regulations were utilised in 1974 to deal with political agitation, coupled with a threat of a civil disobedience campaign, by the United National Party.[3] They were also extensively applied to the "liberation

---

1. 3,908 suspects had been summoned to appear before the commission, but owing to premature executive releases, 894 did not present themselves for trial.

2. The sentences imposed were as follows:

One year	... 2	Seven years	... 24
Two "	...156	Eight "	... 9
Three "	... 80	Ten "	... 3
Four "	... 53	Twelve "	... 4
Five "	... 39	Twenty "	... 1
Six "	... 14	Life	... 5

3. Infra, p.481.

struggle" in the North, "a part of the island where there prevailed a brazen disregard of the law and public property was wilfully destroyed by the enemies of peace and order".[1] The Sansoni Commission, which was appointed by the UNP Government in 1977, described the "steady growth of lawlessness which appeared to be leading to something approaching anarchy" in the Northern Province in the years 1972-1977 in the following terms:

> Hand bombs were being manufactured and used to cause destruction; firearms were used for the murder or attempted murder of political opponents and inconvenient witnesses of crimes; burglaries were committed in order to collect the weapons and ammunition; public property was attacked and damaged merely because the Government was unpopular with a certain section of the community, although it was a lawfully and constitutionally appointed government of the entire island; youths in their twenties wielded arms to dispose of persons whose views did not coincide with their own, and robbed banks to obtain funds to buy such arms; inflammatory and abusive speeches were made on public platforms against the Government and the police; hunger strikes scheduled to last a few hours were staged even in the premises of the courts of law, disrupting the work of the judges; and school children were mobilised to join these law breaking crowds who staged their frequent hartals, and were thus inducted into politics under compulsion.[2]

Assuming then that the state of emergency was continued in order to deal with the violent separatist demands which were being made in the North, its continued existence was nevertheless availed of by the Government for a number of non-emergency purposes. In other words, it had become a convenient form of government. The regulations which are classified below are often self-explanatory.

TABLE 27

USE OF EMERGENCY REGULATIONS
FOR NON-EMERGENCY PURPOSES
1971-1977

Purpose	Regulation
Law enforcement	Emergency (Protection of Public Property Regulation Emergency (Release on Bail) Regulation Emergency (Protection of State Officers) Regulation

1. Report of the Presidential Commission of Inquiry into the incidents which took place between 13 August and 15 September 1977, S.P.VII-1980, at p.39.

2. Ibid., at p.274.

Purpose	Regulation
Public administration	Food Control Regulations Firearms Ordinance (Amendment) Regulation Emergency (Protection of Company Estates) Regulation Emergency (Paddy Lands) Regulation Emergency (Coconut Products) Regulation Holidays Act (Amendment) Regulation Emergency (Requisitioning of Bakeries) Regulation Emergency (Weights and Measures) Regulation Maha Jana Pola (Colombo) Regulation[1] Emergency (Fuel Conservation-Five Day Week) Regulation Emergency (Ceylon Broadcasting Corporation) Regulation Suspension of Employees of Public Corporations Regulation Emergency (Stoppage of Emoluments to Service Personnel) Regulation
Conduct of elections	Local Authorities (Postponement of Elections) Regulation
Relief to workers	Emergency (Plantation Workers' Additional Special Allowance) Regulation Emergency (Estate Workers Guaranteed Minimum Wage) Regulation Emergency (Tea Estate Workers' Wage Supplement) Regulation Emergency (Private Sector) Additional Allowance Regulation Emergency (Payment of Gratuities and Other Monetary Benefits to Indian Repatriates) Regulation Emergency (Private Sector) Special Allowance Regulation Emergency (Textile Manufacturing Trade Workers' Minimum Monthly Rate of Wage) Regulation
Economic Development	Emergency (Cultivation of Food Crops) Regulation Prohibition of Slaughter of Buffaloes Regulation Animals Act (Amendment) Regulation Emergency (Animal Trespass) Regulation Essential Services Order

1. Maha Jana Pola was a weekend bazaar.

Public Disorder

1. Communal Riots. By proclamation dated 27 May 1958, the provisions of Part II were brought into operation. A week later, M.W.H.de Silva,Q.C., Minister of Justice, read out in the Senate a "statement from the police" on the facts and circumstances leading to the declaration of a state of emergency. The following portions of that statement describe the state of public disorder that preceded the proclamation:

> Hon.Senators are all aware of the anti-Sri campaign which had been started in the Northern and Eastern Provinces. Hon.Senators are also aware of the steps taken by some people in the South, by the Sinhalese particularly, with regard to the anti-anti-Sri campaign where they obliterated Tamil lettering on buses with tar. No actual violence to persons took place in those campaigns. They were conducted undoubtedly with a certain amount of bitterness, but without harm to persons.
>
> This campaign led to an attack by certain Tamil persons on a Sri bus at Bogawantalawa. The bus was brought to the police station on which an attack was made, and as a result the police opened fire and two Tamils were shot dead. This was followed by two Tamils at Kahawatte stabbing and killing two Sinhalese, with the result that looting and burning of Tamil boutiques took place in Sinhalese areas.
>
> Subsequently, on 3 April, a Sinhalese man was killed by stoning in Hatton, and the anti-Sri campaign was launched in the Eastern Province. Unfortunately, at this time, a leaflet was published and distributed by the 'Action Committee of Campaign of National Freedom'. These leaflets were distributed by Buddhist monks, and Tamils were given three months to leave Sinhalese areas. On 6 April, a public meeting was held at which Rev. Mirisse Chandrajothi presided. That public meeting demanded the abrogation of the Pact between the Prime Minister and Mr.Chelvanayakam, and urged the Sinhalese to fight the Federal Party and the anti-Sri campaign. On 9 April, the Prime Minister declared in the House of Representatives that the implementation of the Pact was not possible due to these various activities.
>
> On 10 April, one Sirisoma Ranasinghe, with the encouragement of the United National Party, formed what is called the Sinhala Arakshaka Hamudawa [Army for the Protection of the Sinhalese]. Leaflets were printed and distributed by this organisation to rise and fight the Tamils. From that date onwards, police started taking action against persons for tarring buses in the Northern and Eastern Provinces.

On 11 April, a public meeting was held at Nugegoda presided over by the Chairman of the Urban Council, Kotte. The object of that meeting was to boycott Tamil boutiques and to get Sinhalese landlords to eject Tamil tenants. Also, K.M.P.Rajaratna started his Jatika Vimukti Peramuna [National Liberation Front], an organisation of extremists to fight Tamils. In the meantime, the anti-Sri campaign continued, while the tarring campaign by the Sinhalese was dying down.

On 14 April, a Sinhalese man was murdered by Tamils in Trincomalee. The motive was communal. This led to tension and to two or three incidents at Trincomalee. After this, there was constant agitation for the boycott of Tamils by Sinhalese. Several meetings were held in all parts of the Island, predominantly Sinhalese, but there was no trouble or violence.

On 24 April, K.M.P.Rajaratna started the anti-anti-Sri campaign in Welimada. This led to trouble and a case of unlawful assembly and rioting in Welimada town. Repercussions were evident in the looting of Tamil line rooms in two estates in the area. After these events, the situation eased considerably and everything was, more or less, normal.

On 15 May, a Sinhalese boutique keeper was shot dead by Tamils at Chenkaladi in Eravur area: tension rose.

On 18 May, Sirisoma Ranasinghe visited Vavuniya, Padaviya and Polonnaruwa with five others to enrol volunteers in the Sinhala Arakshaka Hamudawa and to organise a counter march to Vavuniya against the Federal Party Convention fixed for 23, 24, and 25 May at Vavuniya.

On 20 May, there was unrest in Giritale area. Tamils complained of threats by Sinhalese.

On the night of 22 May, the night train from Batticaloa was attacked by a large crowd of Sinhalese at Kaduruwela. The object was to prevent the Federal Party volunteers from travelling to Vavuniya. Only one Muslim and one Tamil were in the train; both of them were assaulted. The police party was stoned.

On 23 May, the Batticaloa train was derailed two miles out of Batticaloa. Police Sergeant Appuhamy and Constable Paramasingham died; one Sinhalese civilian also died.

On 24 May, the Sinhalese in Polonnaruwa and Giritale were active against the Tamils. Vehicles on roads were stopped and Tamils were assaulted. ASP Mr.John Pillai, travelling to Batticaloa by car, was assaulted and stabbed seriously at Giritale. At 10.30 pm., D.A.Seneviratne, ex-Mayor of Nuwara Eliya, was shot dead at Eravur. The road was obstructed and the police party was shot at when going for inquiry.

On 25 May, a lorry and car were dynamited at Eravur. Constable 1899, Perera, of Depot Police, who was on leave, and two other Sinhalese were killed. Trouble broke out in Colombo at about 10 am, when the news of the deaths of

> Mr.Seneviratne and Sergeant Appuhamy appeared in the papers. Tamils were attacked all over, and rioting, looting and murder spread rapidly in Colombo and outstations.
>
> On 26 May, the situation in Polonnaruwa, Hingurakgoda and vicinity was getting out of hand. Police opened fire and four died in all. Police in Colombo were also compelled to open fire on this day but there were no casualties. The position in the Ratmalana and the Kalutara areas deteriorated rapidly. Police opened fire at Panadura. Batticaloa district reported many incidents of attacks on Sinhalese. The Police and the Army were also fired on in that area. Looting, arson and murder were rampant and the situation was getting out of control.
>
> On 27 May, a state of emergency was declared. Subsequent to the state of emergency being declared, there was further rioting and further murders. [1]

That the Government should have invoked the provisions of Part II to deal with the state of public disorder which then existed, was not disputed by anyone. Indeed, the complaint made by many at that time was that Prime Minister Bandaranaike had hesitated for too long, and was at least twenty-four hours too late, in declaring a state of emergency.

Once declared, the Emergency was availed of for another purpose. On 4 June 1958, as they left the Parliament building after attending a special session which had been convened following the declaration of the state of emergency, detention orders were served on Members of Parliament belonging to the Federal Party and the Jatika Vimukti Peramuna. On 17 July, the Tamil Language (Special Provisions) Bill was presented by the Prime Minister in the House of Representatives. On 5 August, after the remaining Opposition members had refused to participate in the debate, the Bill was read a second and third time and passed. After a two-day debate, it was passed by the Senate on 3 September. On 4 September, the detention orders were revoked. The conclusion is irresistible that the Public Security Ordinance, having been validly invoked, had then been utilised for a wholly questionable purpose.

2. Assassination of the Prime Minister. On 25 September 1959, at about 10 a.m., at his residence in Colombo, Prime Minister Bandaranaike was shot at repeatedly by a Buddhist monk. He was rushed to the General Hospital where an emergency operation was performed

---

1. Parliamentary Debates (Senate), 4 June 1958, col.5.

on him. The Governor-General, Sir Oliver Goonetilleke, who at that time was at Queen's House accepting the credentials of a new ambassador, hurried to the hospital as soon as he heard the news of the shooting.

> Donning a surgeon's mask, he went into the theatre. Bandaranaike, though in great pain, was cheerful and greeted him with the words: 'How interesting you look, Sir, in that disguise'. He was a brave man indeed, says Sir Oliver, so to jest in the face of death. He bent over him and in a whisper suggested that he should advise the proclamation of a 'state of emergency', since the most stringent measures would be necessary to prevent violent reaction in a land where Buddhist monks were many and one of them had shot and wounded a very popular Prime Minister. Bandaranaike readily accepted the suggestion and Sir Oliver went off to see to the preparation of the necessary legal instruments. He knew that the Prime Minister, even in his agony, would be afraid that his vast multitude of followers might in their anger embark on reprisals against Buddhist monks in general.[1]

This account written ten years later by Sir Charles Jeffries, the biographer of Sir Oliver Goonetilleke, is the only record available of the circumstances in which a state of emergency was declared on that day. Before his operation, Bandaranaike issued the following statement from the General Hospital. In it he made no reference to the state of emergency:

> A foolish man, dressed in the robes of a bhikku, fired some shots at me at my bungalow this morning. I appeal to all concerned to show compassion to this man and not to try to wreak vengeance on him. I appeal to the people of my country to be restrained and to be patient at this time. With the assistance of my doctors I shall make every endeavour to be able to continue such services as I am able to render my people. I appeal to all to be calm, patient and do nothing that will cause trouble to the people. To those closely connected with me, to Mrs. Bandaranaike and my children, to the members of the Government and all my friends and well-wishers I make a particular appeal to be calm and to face the present situation with courage and fortitude.[2]

Sir Oliver's biographer has, however, quoted further Sir Oliver's own words on this matter:

> The wide publicity given to that appeal on the government radio and in the press and the swift declaration of a state of emergency prevented any kind of public

---

1. Sir Charles Jeffries, OEG - A biography of Sir Oliver Ernest Goonetilleke (London: Pall Mall Press, 1969), at p.142.
2. Ibid., at 143. See also Times of Ceylon, 25 September 1959.

> disturbance. But the declaration of an emergency had a piquant sequel. One cabinet minister had seen in the declaration a deep-laid plot for me to take over the government and introduce a dictatorial Governor-General's rule. So he had hurried to the hospital and approached the operating table carrying a placard containing the query: 'Did you advise an Emergency ?' The Prime Minister, still conscious, had nodded an affirmation to this peculiar Doubting Thomas.[1]

Bandaranaike died early next morning. A few hours after his death, W.Dahanayake, Minister of Education and acting Leader of the House, was appointed Prime Minister. In one of the first emergency regulations made, the death penalty for murder which had been suspended for three years by Act of Parliament only in the previous year, was restored. A series of bizarre events took place thereafter.[2] As speculation about the identity of Bandaranaike's assassins reached fever pitch, and it was openly insinuated that people in very high places were privy to the conspiracy,[3] a rigorous press censorship was introduced by emergency regulation, covering a variety of subjects including news of the murder probe. Two weeks later, under heavy pressure from the government parliamentary group, the censorship regulation was revoked and a woman Cabinet Minister who was a close associate of two suspects already in custody, was removed from office.[4] Four weeks later, this ex-Minister and the brother of another Minister were arrested in connection with the assassination conspiracy.[5] Finally, left with no alternative but to dissolve Parliament due to a rapid erosion of support in both Houses, Prime Minister Dahanayake revoked the state of emergency on 3 December 1959.

---

1. Ibid., at 144.

2. For instance, the Prime Minister sacked ten of his Ministers; the government parliamentary party expelled the Prime Minister; a new Ministry of Internal Security was established with the brother of a suspect already in custody as Permanent Secretary; and a former Attorney-General was brought down from London to advise on the assassination investigation, and on his advice the ex-Minister and the brother of a Minister were both discharged.

3. See, for example, speech of Senator A.T.A.De Souza, Parliamentary Debates (Senate), 2 October 1959, cols.328-340.

4. Mrs Vimala Wijewardene, Minister of Health: Ceylon Daily News, 21 October 1959.

5. 'Dicky' de Zoysa, brother of Stanley de Zoysa, Minister of Finance: Observer, 19 November 1959.

3. Terrorist Activity. On 3 July 1979, President Jayewardene briefed his parliamentary group on the action which the Government intended to take with regard to the movement for the division of the country and the terrorist activities directed towards the achievement of a separate Tamil State, and announced that special legislation to combat terrorism would be intriduced.[1] On 12 July, the Government declared a state of emergency in the Jaffna district and the precincts of the Ratmalana and Katunayake airports in Colombo. According to Trade Minister Athulathmudali, the reason for this step was "terrorist activity":

> Frightful murders were committed there, especially of police officers. . . One could not get a witness to speak because witnesses were frightened of the terrorists. Terrorism was more than a crime. It was frightening people into silence.[2]

By emergency regulations, arson was made punishable with death. Provisions in the law requiring arrested persons to be produced before a magistrate within twenty-four hours, and an inquest to be held before the burial or cremation of a person who had died suddenly, were suspended. Censorship was introduced, public meetings and the distribution of leaflets banned, and civil disobedience in any form prohibited.[3] On 19 July, the Prevention of Terrorism Bill was introduced in Parliament and passed as legislation urgent in the national interest. Meanwhile, the commander of the security forces in the Jaffna district was authorised by the President:

> to eliminate in accordance with the laws of the land the menace of terrorism in all its forms . . . I will place at your disposal all resources of the State. . . . This task has to be performed by you and completed before the 31st December 1979.[4]

The task was presumably completed to the President's satisfaction because the emergency was withdrawn on 27 December.

4. Police Rampage. Elections to District Development Councils were scheduled to be held in seventeen districts, including Jaffna, on 3 June 1981. On 2 June, a state of emergency was declared in the Jaffna district, with press censorship and a curfew from 5 p.m. to 6 a.m.[5] On the previous night, a section of the police had "gone

---

1. Ceylon Daily News, 4 July 1979.
2. Ibid., 13 July 1979.
3. Ibid.
4. Special Direction to Brigadier T.I.Weeratunge from J.R.Jayewardene, President of the Republic: Weekend, 15 July 1979.
5. Ceylon Daily News, 3 June 1981.

on the rampage in Jaffna, looting, setting fire and destroying the Public Library, the party headquarters of the TULF, the house of the MP for Jaffna, a number of shops, buildings and vehicles".[1] At the close of the poll, the returning officer reported to the Commissioner of Elections that "the election had not been properly conducted" : the senior polling officers had been replaced by government party supporters; ballot boxes had been tampered with; one polling station had no ballot box at all; six ballot boxes were missing; a ballot box was found in a hotel room occupied by two Ministers.[2] The counting of the votes was delayed by over a fortnight, yet when the results were eventually announced, the TULF had polled 263,369 as against 23,302 by the UNP.[3]

5. Communal Disturbances. On 17 August 1981, a state of emergency was declared. According to a government communique:

> This decision is a sequel to a large number of incidents in several parts of the island, particularly in Ratnapura and Negombo. Within the last ten days, seven deaths by violence, 196 incidents of arson, and 35 incidents of looting have been reported by the police. . . . It has also been reported that there has been damage to estates and estate property, particularly in the Ratnapura district.[4]

The Government also released a letter addressed to the President by the Leader of the Opposition, TULF leader Amirthalingam, in which he requested the former "to take immediate action to put a stop to attacks on Tamil people and to safeguard their life, limbs and property".[5] Previously, on 12 August, the President had invoked Part III and called out the armed services for the maintenance of order, and imposed curfews in Kelaniya, Ragama and Negombo. It was believed that these incidents had been sparked off by a debate in Parliament on a strange and unusual motion expressing no-confidence in the Leader of the Opposition, and the subsequent widespread distribution throughout Sinhalese areas of inflammatory speeches made on that

---

1. Motion of no-confidence in the Government, introduced by the Leader of the Opposition, dated 12 June 1981: Ceylon Daily News, 2 July 1981.
2. Ibid.
3. Ceylon Daily News, 17 June 1981.
4. Ibid., 18 August 1981.
5. Ibid., 17 August 1981.

occasion by Cyril Mathew, Minister of Industries, and other government members. In fact, the President himself later made a pointed reference to this:

> I regret that some members of my party have spoken in Parliament and outside, words that encourage violence and the murders, rapes and arson that have been committed. [1]

The death penalty was prescribed by emergency regulations, not only for arson and looting, but also for the unauthorised possession of arms, ammunition, explosives and offensive weapons in the districts of the Northern Province.[2]

While the declaration of the Emergency appeared to have been justified, the same cannot be said of its subsequent use for unrelated purposes. For instance, on 19 August, acting under an emergency regulation, the Government requisitioned the six-storeyed headquarters of the Sri Lanka Freedom Party. The Secretary to the Cabinet explained that:

> The Government intervention was intended to prevent a breach of the peace, and took into consideration two government concerns, the CWE and the People's Bank, who were tenants in the building.[3]

The requisition order also covered the building where the opposition party's official organ, "Dinakara", was being printed. The allusion to a possible breach of the peace was a reference to a dispute within the SLFP between its leader, Mrs.Bandaranaike, and its deputy leader, Maithripala Senanayake, who had been suspended from membership of the party. In Parliament, the Prime Minister denied that the Government was seeking to create further confusion within the SLFP by its action: "The main purpose of the requisitioning order was to let the CWE and the Bank function normally", he asserted.[4] It had not been suggested publicly by either of these institutions that its ordinary commercial activities in the building were in any way affected by the dispute in the upper echelons of the SLFP; nor were any signs of interference evident. In any event, both institutions were corporate bodies with the capacity and the resources

---

1. Address to the UNP All-Island Executive Committee, reported in The Sun, 5 September 1981.
2. Ceylon Daily News, 26 August 1981.
3. Sun, 20 August 1981.
4. Ibid., 22 August 1981.

to look after their own interests. On 9 December, nearly three months later, the Government revoked the requisitioning order and handed over the party headquarters to Senanayake, who had by then been expelled from the party.[1] This last act demonstrated the Government's lack of good faith in this whole episode.

Meanwhile, on 21 October, the Queen arrived in Sri Lanka on a four-day state visit to participate in celebrations organised by the Government to mark the 50th anniversary of universal adult franchise. It was suggested in Parliament by Opposition members that the emergency had been extended to avoid disturbances during the Queen's visit, particularly following Mrs.Bandaranaike's disfranchisement and expulsion from Parliament. Indeed, by emergency regulations made on the eve of the Queen's visit, political and trade union meetings, processions, demonstrations and the distribution of leaflets were prohibited. The Prime Minister, while denying this allegation, said that he was not in a position to reveal the information which necessitated the continuance of the emergency.[2] On 15 December, the emergency was further extended; the reason given being "the moves by a group of expatriate Tamils to pass a declaration unilaterally declaring the establishment of Eelam".[3] This was a threat which neither materialised, nor appeared to have been made with any degree of seriousness.

Political Agitation

1. The Hartal. In April 1952, on the eve of a general election, Prime Minister Dudley Senanayake announced the reduction of the price of a measure of rationed rice to 25 cents. Fifteen months later, after a comfortable re-election, his Finance Minister, J.R.Jayewardene, announced in the course of his budget speech, amidst angry scenes outside and to empty galleries inside, the removal of the subsidy on rice. The price of a measure shot up to 70 cents. As part of island-wide agitation for a reduction in the price of rice, a "hartal" or general stoppage of work in all sectors, was organised by the left-wing political groups and trade unions on 12 August 1953. At about 3 p.m. on that day, the Government invoked the provisions of the Public Security Ordinance. Speaking in the

1. Ceylon Daily News, 10 December 1981.
2. Ibid., 22 October 1981.
3. Sun, 16 December 1981.

House of Representatives shortly thereafter, Senanayake explained:

> Hon.Members will be aware of the mischief, damage and inconvenience caused in Colombo as well as in other parts of Ceylon by persons inimical to the State, who have been induced by unscrupulous leaders to resort to strikes and violence, in defiance of established law and order . . .
>
> The persons responsible for today's strike have not contented themselves with that demonstration. They have incited and intimidated others to strike and, in their desire to achieve their unscrupulous purposes, they have obstructed buses and railway trains, held them up and, in some cases in the suburbs of Colombo, have destroyed or attempted to destroy them. Telephone and telegraph communications have been disrupted by sabotage, railway lines have been removed with a view to causing derailment of trains and fires have been caused in various buildings and other places.
>
> Persons engaged in driving public transport have been intimidated, molested and assaulted. Crowds have been incited to collect in public places, obstruct the police in the preservation of public order, pelt stones at buses and public buildings and intimidate shop-keepers to close down their establishments and so deprive the public of essential supplies. Incidents of mischief, assault and arson have been reported throughout the day in Colombo, in south coast towns like Moratuwa and Ambalangoda, and further inland in places like Hanwella, Maharagama and Boralesgamuwa, and they have been dealt with promptly and effectively.[1]

Five days later, discussing the state of emergency on the adjournment motion in the House of Representatives, different views were expressed by leaders of the two left-wing parties. According to Pieter Keuneman, leader of the Communist Party:

> There is no justification whatsoever for this Government invoking the Public Security Ordinance, declaring a state of emergency and imposing a curfew at a time when the 24-hour hartal was almost reaching its end. . . . A state of public emergency was declared between 2 pm and 3 pm on August 12 when the Government was thrown into a panic at the overwhelming success of the hartal which would have ended a few hours later. I accuse the Government of declaring a state of emergency not in order to maintain peace, but in order to cover up their bankruptcy and panic by giving the armed forces legal powers to join the police in shooting down the people.[2]

Keuneman revealed that on the night of the hartal, the offices of all the Opposition parties had been raided, their printing presses sealed, and issues of their party newspapers of the following day

---

1. Parliamentary Debates (House of Representatives), 12 August 1953, col.278.
2. Ibid., 17 August 1953, col.560.

seized. Dr.N.M.Perera, leader of the Lanka Sama Samaj Party had this to say:

> I ask whether any democratic Government worthy of the name, knowing the temper of the people, should not have, with its ordinary laws and its normal police force, been prepared for incidents of this nature and been ready to deal with such incidents. . . . It should have seen to it that the police did not interfere with the hartal, but if there were any hooligan elements or rowdies or thugs who utilised the opportunity for the purpose of hurling stones or stopping transport, or for committing various acts of violence, it should have concentrated all its energy in preventing such incidents.[1]

Senator S.Nadesan,Q.C., speaking in "the other place" pointed out that:

> It is the democratic right of a people to express their protest. It is the weapon they have of expressing their protest against this huge iniquity of the removal of the subsidy . . . Do you seriously believe that any amount of agitation by me or a handful of people could have roused the people if they did not genuinely feel about it ? [2]

2. Civil Disobedience in the North. On 1 January 1961, the Official Language Act, No.33 of 1956, became fully operative. Prior to that date, the Act had permitted the languages previously in use to be continued in use. During 1960, the Federal Party had made several unsuccessful attempts to reach accord with the two major political parties on the use of the Tamil language and on allied matters.[3] After the Government of Mrs.Bandaranaike was elected in July 1960, the Federal Party leader, S.J.V.Chelvanayakam,Q.C., had addressed several communications to, and attended two conferences with, the Prime Minister and members of her Cabinet, none of which produced any tangible results. On 18 January 1961, a final letter had been addressed by him to the Prime Minister protesting against certain Treasury Circulars issued in implementation of the Official Language Act; no reply was received. Consequently, on 20 February 1961, the Federal Party commenced a "satyagraha" in five centres - Jaffna, Mannar, Vavuniya, Batticaloa and Trincomalee. It was described as a non-violent demonstration in the Northern and Eastern Provinces against the language policy of the Government.

---

1. Ibid., col.571.
2. Parliamentary Debates (Senate), 18 August 1953, col.299.
3. For an account of these negotiations, see S.J.V.Chelvanayakam, Parliamentary Debates (House of Representatives), 23 November 1961, cols.1792-1805.

In the House of Representatives, a few days later, the Minister of Finance, Felix R.Dias Bandaranaike, described the first day of Satyagraha in Jaffna:

> At about 8 am, Mr.S.J.V.Chelvanayakam,Q.C.,M.P. for Kankesanturai, came and stood at the centre of the main entrance to the Kachcheri facing the road. In a couple of minutes some others, including some MPs, joined him. They then seated themselves on the ground at the gate in five or six rows, blocking the entrance. Soon, thereafter, the small entrance on to the left of the main entrance was also similarly blocked. Thereafter, the main entrance to the Residency was also blocked.
>
> At about 9 am, the S.P. asked whether any clerk would like a passage cleared for them to enter the Kachcheri. Some replied in the affrimative, and the police cleared a passage by lifting some of the squatters to a side.

Bandaranaike added that he did not for a moment think that this "lifting" was a gentle process; it was quite possible that the "lifting" might very well be described as "dragging". He continued:

> At about 10.15 am, the Government Agent attempted to leave his Residency for the Supreme Court to hand over the mandate in his capacity as Fiscal, Northern Province, in a jeep driven by the S.P. The satyagrahis who were lying at the gate refused to make way for the jeep, and the police attempted to carry them away to clear a passage. As some were carried away, others took their places and still others, who were seated at the time at the other gates, rushed to this particular gate and squatted on the ground in the way of the jeep. Police made further attempts to clear a passage, and when these attempts failed. they were compelled to resort to a baton charge.

The Minister admitted that two persons sustained grievous injuries in the course of this baton charge. But, he said:

> A baton charge is a baton charge. We cannot expect a baton charge to be conducted lightly, or with the object of not using sufficient force. One either conducts a baton charge or one does not.[1]

On 2 March 1961, the Prime Minister announced in the Senate that Part III of the Public Security Ordinance had been invoked:

> We have sent troops to Jaffna and Batticaloa, as you may be aware. There is no government in those areas today. The Kachcheris are not functioning, the offices are not functioning, as a result of the satyagraha, and I cannot allow that to continue any further. The

---

1. Parliamentary Debates (House of Representatives), 28 February 1961, cols.2291-2292.

police we have there are not enough. Therefore, we have sent troops to assist them to maintain law and order and carry on the essential services in those two areas.[1]

On 14 March, the Leader of the House, C.P.de Silva, described three weeks of Satyagraha in the two provinces:

> In Jaffna district, the campaign has completed its third week. Large numbers of persons have been picketing the Kachcheri, Education Office, District Agricultural Office, Excise Warehouse and a few other offices . . . The uniformed staff of the Postal Department in Jaffna went on strike for a period of a week. There have been token one-day strikes in the Government Hospital, the Paranthan Chemical Works and the Cement Works at Kankesanturai. In other parts of Jaffna district there have been token strikes and closure of offices.
>
> In Batticaloa district, until two days ago, large numbers of men, women and children were picketing the Kachcheri . . . Since yesterday, the Excise Warehouse, the Agricultural Office and the Labour Office are also being picketed.
>
> At Trincomalee, the Kachcheri is being picketed by a large number of men and women.
>
> At Vavuniya, the Excise Warehouse is being picketed. Federal Party leaders have announced that the Kachcheri at Mannar will be picketed from the 20th onwards.[2]

On 7 April, the Leader of the House made the following statement:

> Representations were made to the Hon.Minister of Justice by several leading citizens, both Sinhalese and Tamil, that an opportunity be given to Mr.Chelvanayakam to see him.
>
> Last Wednesday night, the Minister, who is in charge of implementation of the Language Acts of the Government, met Mr.Chelvanayakam and certain members of the Federal Party who placed before the Minister their demands on the following matters -
>
> 1. The Tamil Language as the language of the Northern and Eastern Provinces for all administrative purposes.
> 2. The Tamil Language as the language of the courts in these parts.
> 3. The setting up of Regional Councils.
> 4. The position of Tamil public servants in relation to the implementation of the Official Language Act.
> 5. The rights of Tamil-speaking persons outside the Northern and Eastern Provinces.
>
> The Hon.Minister of Justice last night placed before the Cabinet these demands. The Government is unable to

---

1. Parliamentary Debates (Senate), 2 March 1961, col.759.
2. Parliamentary Debates (House of Representaives), 14 March 1961, col.2879.

> consider the demands as they are in conflict with the provisions of the Official Language Act and of the Tamil Language (Special Provisions) Act.[1]

On 18 April, a state of public emergency was declared. Explaining the reasons for this step, the Leader of the House stated:

> It has become patently clear that language has been used merely as a convenient weapon for the building up of popular support for the real aim of the Federal Party which is the establishment of a separate State . . .
>
> The Federal Party last week began what they called a postal service and established their own police force. They also decided to set up land kachcheris of their own and to allot Crown land to their supporters. It was thus quite clear to us that the Federal Party had challenged the lawfully established Government of the country and had sought to establish a separate administration . . .
>
> The Government made every attempt, short of the use of force, to maintain essential services, to distribute rice rations to the people of the Northern and Eastern Provinces, to pay salaries to public servants, to pay pensions, to give public assistance allowances and to pay T.B.allowances. The Government has not been able to perform these essential services owing to the activities of the Federal Party . . .
>
> The Cabinet, therefore, at its meeting yesterday, unanimously decided that a state of emergency be declared to enable the Government to take effective measures to deal with the situation that has arisen in the Northern and Eastern Provinces. Last night, shortly after midnight, the Armed Forces took charge of the situation . . . By early morning, the Military were successful in clearing the roads and entrances to all public offices which were being picketed by satyagrahis. The operation was conducted with care and at no stage did it become necessary to use firearms.
>
> The Federal Party has been proscribed. Detention Orders were issued yesterday in respect of 68 persons. . . . A curfew has been imposed . . . Law and order now prevails in all parts of the country.[2]

Senator Nadesan, however, charged the Government with having failed to discharge its primary duty of maintaining law and order. He argued that the word "Satyagraha" could not disguise the obvious fact that those who participated in it were breaking the law:

> In this state of affairs what was the duty of the Government ? Its obvious duty was to enforce the law of the land, to clear the passages to the Kachcheris

---

1. Ibid., 7 April 1961, col.3946; cf. this intransigent attitude with terms of Bandaranaike-Chelvanayakam Pact of 1957 (supra, p.99) and the SLFP's position in 1978 (supra, p.137).
2. Ibid., 18 April 1961, col.4046.

> and other government offices by dispersing the satyagrahis by all lawful means, so that government administration may be carried on. The ordinary laws of the land gave the Government ample powers to achieve these results. It is absurd to imagine that in any civilized country, whether it is Ceylon or elsewhere, the ordinary laws can be insufficient to prevent the administration from collapse merely because a large number of unarmed people, singing devotional songs, blocked the entrances to Government offices.[1]

He referred in particular to sections 332, 343 and 344 of the Penal Code; sections 99, 100, 101 and 102 of the Criminal Procedure Code; and the provisions of the Post Office Ordinance.

> But instead of acting as any normal civilized administration should, it resorted to what may be described as counter satyagraha. It decided to permit the satyagrahis to break the law of the land with impunity so that the unfortunate people who were deprived of their rice rations, their salaries, pensions and other services, may force the Federal Party in course of time to call off the satyagraha.[2]

Nadesan's contention was that the Government, presumably having failed in that exercise, had invoked the provisions of the Public Security Ordinance in order to intimidate the Tamil people of the Northern and Eastern Provinces into abandoning, at least for the time being, their agitation for their language rights:

> Why are the farmers of Jaffna, who ordinarily go to their fields in these hot days at 4 o'clock in the morning, prevented from doing so till well after 6 am ? Why have the military been beating and thrashing innocent passers-by on the streets of Jaffna ? Why have some of them been helping themselves to goods and articles in shops and asking the owners to send the bills to the FP leader ? Why have cars been comandeered as if a great military campaign was afoot ? Why has petrol been issued on permits in Jaffna when there is enough petrol for everybody ? Why have car owners been made to queue up for petrol at the Kachcheri and subjected to humiliating remarks by army sentries ? Why have the military prevented people from having their lights on at night ? Because they have been asked not to shoot, why have they indulged in the pastime of throwing stones at houses ? Why have they set fire to

---

1. Parliamentary Debates (Senate), 2 May 1961, col.1171.
2. Ibid., col.1174.

> fences and madams and put the blame on the people ? Are these acts of organised terrorism and lawlessness the result of any orders given to the Army to strike terror into the inhabitants of Jaffna so that they might give up their agitation for their language rights ? [1]

3. Protests against the Tamil Language Regulations. On 8 January 1966, when Parliament first met after the Christmas recess, regulations made by the Minister of Justice under the Tamil Language (Special Provisions) Act, No.28 of 1958, were presented for approval.[2] In anticipation of demonstrations by Opposition parties against the motion relating to these regulations, the Prime Minister, Dudley Senanayake, had directed the Inspector-General of Police that no processions or demonstrations should be permitted on that day and that Galle Face Green and the vicinity of the House of Representatives should be kept free of crowds.[3] On the night of 7 January, the armed services had been called out under the provisions of Part III of the Public Security Ordinance. On the morning of the 8th, a large crowd, including several Buddhist monks and Opposition politicians, led by Mrs.Bandaranaike, assembled at Vihara Maha Devi Park for a much publicised oath-taking ceremony. Shortly after noon, a procession of nearly ten thousand persons, led by Buddhist monks, left the Park in the direction of the House of Representatives. At 1.30 p.m., at Kollupitiya, on Galle Road, barely a mile away from Parliament, the police attempted to stop the procession by using tear gas and by baton-charging. At this stage, the crowd became very disorderly and considerable damage was caused to nearby commercial buildings. At 1.45 p.m., the police opened fire, killing one Buddhist monk and injuring several others. A few hours later, a state of emergency was declared and a curfew was imposed in Colombo and its suburbs.

Two weeks later, the Minister of State, J.R.Jayewardene, explained why the Government had invoked the provisions of Part II:

> Black flags were to be put up on January 8th; fasts were the order of the day, and January 8th was to be

---

1. Ibid., at col.1188.
2. Parliamentary Debates (House of Representatives), 8 January 1966, col.41.
3. Report of the Special Committee appointed to inquire into and report on the police arrangements on the 8th of January 1966 in connection with the motion in the House of Representatives on the Regulations under the Tamil Language (Special Provisions) Act, S.P.V-1966.

> a 'D-day'. Then, evidence came to the Government that there was to be a combined movement to prevent the Regulations being moved; that the Prime Minister, the Speaker of the House, and myself as the person moving the Resolution, may even be coerced from coming to this House; that the House would be surrounded; and there would be a general strike of employees in the private and public sectors to request the Government not to proceed with these Regulations. Notices were issued, signed not only by members of the private and public sectors but also by political leaders of the Coalition, asking members of the public service to come out on strike on a purely political matter which had nothing to do with trade union activities. Pamphlets criticising the Government were distributed by public servants calling upon their colleagues to stage a general strike protesting against the introduction of these Regulations. From all these it became clear that in various ways - by meetings, by processions, by strikes - there was to be an attempt not to persuade but to force the Government not to proceed with these Regulations on January 8th.[1]

Referring to the events of the 8th, Jayewardene said:

> About 10 am in the morning, buses were stopped at Ward Place, opposite the Cinnamon Gardens police station, on Alexandra Road, Flower Road, by groups of people. Drivers were pulled out, passengers were manhandled and buses were wrecked. Cars were stopped right round the Vihara Maha Devi Park and the occupants were pulled out and assaulted . . . The Hon.Leader of the House was returning from a parliamentary group meeting. His car was stopped. They made violent remarks. They attempted to touch him. His security officer got out and brandished his revolver and said he would shoot . . . The Hon.Minister of Public Works who was also coming that way early in the morning was heckled and hooted opposite the Town Hall at 9.15 . . . So, Sir, it became quite clear that the pattern on the 8th was to incite the people to violence.[2]

Speaking on the same occasion, the leader of the Communist Party, Pieter Keuneman, gave his own explanation for the declaration of a state of public emergency:

> The Emergency has been declared not to preserve public order, or to maintain supplies and services essential to the life of the community, but to gag and silence the Opposition parties. That is one of the first reasons for this Emergency. Secondly, it

---

1. Parliamentary Debates (House of Representatives), 26 January 1966, col.1052.

2. Ibid., col.1058.

> has been declared to use emergency laws and armed force to suppress and silence public opposition to the now not-so-secret UNP-FP Agreement, which we say and manypeople believe will lay the foundation for the division of the country.[1]

Keuneman also had an explanation for the curfew, different from that which the Government had offered:

> The curfew was extended from 6 pm to 6 am, and a special regulation was introduced allowing the police to take charge of dead bodies and making it necessary to get the permission of the police even to attend funerals . . .
>
> This is the first time, I think, that a Buddhist priest has been shot as a result of police firing. This is also the first time that a Buddhist priest has been cremated with full military honours. it was a most farcical thing: one would have thought that Kanatte Cemetery was a fort under seige with over three hundred armed soldiers together with scout cars and armed cars and our gallant lads of the Gemunu Watch standing there fully armed just in case somebody would come and claim the priest's body. From 6 pm to 6 am, for six days, there was curfew because the Government did not know how to dispose of the dead priest's body. The cremation was at about 4 am during the curfew. It was only after the cremation that they reverted to the hours 10 pm to 4 am. So, one million people or more were kept in virtual house arrest for half-a-day for six days because the Government did not know how to dispose of the priest's body. [2]

Keuneman predicted that the Emergency would be kept in force to meet other contingencies as well:

> I want to say, and I will establish, that one of the reasons for the continuation of this Emergency is that the Government wants time to perfect its apparatus of intimidation and repression in preparation for carrying out other measures demanded from them by their imperialist backers as a pre-condition for so-called 'aid'. Is this Emergency to be used, to be kept on, till such time as you can implement the World Bank demand regarding removal of the rice subsidy ? We would like to know, and we have reason to think so on the evidence before us. [3]

4. Reduction of the Rice Ration. The state of emergency which had been declared on 8 January 1966 lapsed on 7 December of that year. Eleven days later, at midnight on 18 December 1966, the Government again declared a state of emergency. By regulations, all

---

1. Ibid., at col.1158.
2. Ibid., at col.1182.
3. Ibid., at col.1159.

public meetings were banned, local authority elections were postponed and demonstrations and processions could only be held with the approval of the competent authority in each district. Then, in a broadcast to the nation, Prime Minister Dudley Senanayake announced that owing to a world shortage of rice,

> supplies are not available to the extent that we need to maintain the ration of two measures, and we can only give one measure of rice on the quota.[1]

That one measure, however, would be issued free of charge.

Matured by experience and conscious of the fact that 'rice' was then the most sensitive and explosive political issue in the country,[2] the Government on this occasion struck what was obviously a pre-emptive blow. Other measures such as devaluation were to follow, but the Government embarked on these with confidence and a sense of security since it was well insulated from any form of protest. A popular Opposition daily newspaper, "Jana Dina", was sealed up for over five months under emergency regulations because it had published what was alleged to be a false report of a private social function which the Prime Minister had attended.[3] Another, which dared to expose corruption in high places, was threatened with closure.[4]

As the weeks dragged on and soon gave way to months, and then an year, and another, even the Government's own supporters began to be embarrassed by the monotonous regularity with which proclamations under section 2 were churned out by the Government Press. The Times group of newspapers was committed politically to the Government. But, in an editorial comment, early in 1967, it asked:

> Has the Government, we wonder, forgotten that the nation is in a State of Emergency ? The country is as quiet and as peaceful as it can be. So far as we are aware, there are no riots or revolutions in progress and nobody really fears that an insurrection will be set in motion tomorrow. But the country continues to be in a State of Emergency, and democracy is shackled.[5]

---

1. Weekend, 19 December 1966.
2. In 1963, the SLFP Minister of Finance resigned when his own parliamentary group rejected his budget proposal to remove the rice subsidy.
3. Ceylon Daily News, 10 February 1967.
4. The Aththa, the pro-communist Sinhala daily, reported the smuggling detection in which a Minister's daughter was alleged to have been involved.
5. Sunday Times, March 1967 (date not available).

In April 1967, the Times of Ceylon noted that as the Government completed two years in office, 446 of those days had been spent in a state of emergency:

> Why does it do it ? We wish we knew. We wish the Government would tell us and the general public, because we cannot see any purpose in having the country in a State of Emergency when in fact there is no emergency to be seen anywhere on the horizon.[1]

In June 1967, as 512 days of emergency rule was recorded, the Times observed:

> Why does the Government go through this elaborate pretence month after month ? . . . There is no civil commotion anywhere. There is no threat of revolution. We are not about to be invaded by a foreign enemy. The country is so quiet that the Prime Minister did not need to think twice about taking plane yesterday on a journey which will take him to the other end of the world. Perhaps he has forgotten there is a State of Emergency on paper. Mr.J.R.Jayewardene, his locum tenens, might, we suggest, telephone the Prime Minister and remind him that the proclamation is due again on Saturday.[2]

In July 1967, the Times affirmed that:

> We are all for strong action in a real emergency, but this is an entirely unreal 'emergency', and it does no good to the prestige of an avowedly democratic regime to continue in this semi-dictatorical fashion.[3]

In August 1967, the Times referred to the Prime Minister's statement in Parliament that he will not allow the life of the community to be endangered by a strike, and that not only will the Emergency be continued, but that other steps will also be taken in regard to food and petrol stocks. But, as that newspaper pointed out:

> What the Government seems to have forgotten is that a State of Emergency can be declared in a matter of minutes by the Governor-General's proclamation, and even if it should be necessary to declare Emergencies repeatedly, that would be far better than having an Emergency in operation for months on end when the country is peaceful.[4]

Seven months later, in March 1968, the Times recorded 882 days of emergency rule:

> It is no excuse to say that the country suffers in no way as a result of the continued state of emer-

---

1. Times of Ceylon, 27 April 1967.
2. Ibid., 15 June 1967.
3. Ibid., 24 July 1967.
4. Ibid., 22 August 1967.

> gency. As well might we say that a state of emergency is quite all right for a democracy, quite all right in perpetuity.[1]

In August 1968, the Times asked again:

> Where is the 'Public Emergency' the unfortunate Governor-General is made to declare again and again ? . . . Is there one good reason why the State of Emergency is continued ? I can't think of any. If the Government can, let it tell the public what it is.[2]

Finally, in October 1968, in an editorial entitled "Emergency Scandal", the Times recorded one thousand days of emergency rule:

> The Government's attempts to justify the continuation of the state of emergency have been both feeble and ridiculous. One argument advanced is that the payment of devaluation allowance to certain categories of workers continues under an emergency decree and, if the emergency lapses, payment would cease to be obligatory. The other has to do with co-operative crooks.
>
> The devaluation took place in November last year. If a whole year later, the Government has been unable to regularise the payment in the ordinary way, it must be even more incompetent than its strongest critics say it is. The same thing might well be said of the other 'reason'. Certainly the voters will not be impressed with the competence the Government has shown in this respect. It is no argument either, to claim, as the Government's apologists do, that the state of emergency does not interefere with the democratic rights of the people.
>
> There was justification for declaring a state of emergency when it was done. It might be necessary to do so again. But the Thousand Days are a black mark against the Government and the Government will save itself from further ridicule (if no worse) by allowing the state of emergency to lapse when the time comes for its next extension.[3]

Three more months were to elapse before the Emergency was eventually permitted to lapse.

Strike Situations

1. Strike in the Electricity Department. On 5 March 1964, the Government declared a state of emergency and announced that:

> The reason for the declaration of a state of emergency is the strike in the Electrical Departemnt -

---

1. Ibid., 24 March 1968.
2. Sunday Times, 27 August 1968.
3. Times of Ceylon, 19 October 1968.

> all the trade unions - which has brought the electricity industry to a halt. The power stations at Laxapana and Grandpass are not working and even the 9000 kilowatts of power which normally comes from Gal Oya has failed to come. We do not know whether the Gal Oya power plant has stopped working.
>
> Many essential services have come to a halt. The sewerage system of Colombo, oil, telecommunications, the loading and unloading of ships in the harbour - all are at a standstill. Many factories - the Textile Factory at Veyangoda - have come to a halt. In order to meet this situation a state of emergency was declared.[1]

Irrigation and Power Minister, C.P.de Silva, who made this statement in Parliament also explained:

> What we really want to do is to declare this an essential service and make it work. We found that in order to do so, a state of emergency had to be declared.[2]

On the following day, Food Minister Felix Dias Bandaranaike disclosed in Parliament that:

> I am informed that after the declaration of the electric services as essential services, personal service orders were served upon certain electrical engineers. Personal service orders constitute something new. I think that is a technique that has not been adopted before in the course of any Emergency. By law, by the declaration of the Prime Minister, three persons were placed in virtual custody; they were taken to their places of work and compelled to work. The consequence of these personal service orders has been, that the electrical engineers, after consultation, have called off their strike and restored the services.[3]

2. General Strike. The Joint Trade Union Action Committee (JTUAC) called a general strike, beginning 16 July 1980. Among its demands were the reinstatement of twelve railway employees and a wage increase. On that day, the Government declared a state of emergency. The services provided by any government department, public corporation, bank, co-operative society, local authority, or by any mercantile or commercial undertaking engaged in the importation, exportation, sale, supply or distribution of goods - virtually

---

1. Parliamentary Debates (House of Representatives), 5 March 1964, col.3478. The Minister was in error, however, when he said that all the trade unions were on strike. In fact only the engineers had struck work: Ceylon Daily News, 6 March 1964.
2. Ibid., at col.3515.
3. Ibid., 6 March 1964, col.3683.

all public and private sectors - were declared essential services in which strikes were prohibited.[1] Press censorship was imposed.[2] A Government communique announced "three mass rallies at which the President and the Prime Minister will explain the folly of causing a stoppage of work"; public meetings convened by the striking unions were banned.[3] The Government announced that any person who kept away from work will be deemed to have vacated his post and the vacancy will be filled immediately, while those who reported for work will receive a special cash allowance for the duration of the Emergency.[4] The strike was called out as planned, and 40,000 state employees and several thousands more in the private sector were dismissed.[5] The bank accounts of the striking unions were frozen by emergency regulation, and monies lying to the credit were appropriated by the Government "to create a fund to help suffering dependants of strikers who have lost their jobs".[6] On 15 August, the Emergency lapsed.

Administrative Convenience

1. Demonetization of Currency. On 25 October 1970, in the course of his budget speech in the House of Representatives, the Minister of Finance, Dr.N.M.Perera, announced that:

> It is common knowledge that there is a considerable amount of hoarding of currency in this country. Both traders and industrialists and other enterprising people have amassed a considerable amount of wealth which they have not disclosed. Various efforts that have been made to disgorge these ill-gotten gains have not been successful. I have, therefore, decided to take the only measure that will bring all this hoarded money to the surface. I have decided that the Rs.100 and Rs.50 notes shall cease to be legal tender with effect from 3 November 1970.[7]

While the Finance Minister was announcing this budget proposal, the Government declared a state of emergency. A government spokesman announced that the purpose of the Emergency "is to protect the people who will call at banks and post offices throughout the island to exchange their Rs.50 and Rs.100 notes for new ones".[8] The real

---

1. Ceylon Daily News, 17 July 1980.
2. Ibid.
3. Ibid; Sun, 18 July 1980.
4. Ibid.
5. Ibid., 15 August 1980; Sun, 15 August 1980. The Opposition disputed this figure and placed it at above 100,000.
6. Ibid., 22 July 1980.
7. Ibid., 26 October 1970.
8. Times of Ceylon, 26 October 1970.

reason, probably, was that the Government wished to give immediate legal effect to the demonetization proposal: one of the regulations made was the Prevention of the Avoidance of Tax Regulation, which was identical in terms to the Bill of the same name which was introduced in Parliament on the following day.[1]

2. Cyclone Relief Operation. Following the devastation of the Eastern Province by one of the worst cyclones to hit the country, a state of emergency was declared on 29 November 1978, operative in the districts of Batticaloa, Amparai, Polonnaruwa, and the precincts of the Colombo port and airport. President Jayewardene explained that extraordinary powers and extraordinary organisation were required for rehabilitation to be effectively and adequately undertaken.

> There was no time to call for tenders and adopt normal procedures. Large consignments of food, clothing and other aid were arriving by ship and air. They had to be quickly and properly collected and distributed. These matters needed attention on a war footing.[2]

Accordingly, the Emergency (Cyclone Affected Areas - Reconstruction and Rehabilitation) Regulation provided that "nothing in any written law or in the Establishments Code or any other administrative regulations will apply to the construction, reconstruction or repair of any buildings, roads or installations, rehabilitation of persons or the restoration of services" in certain specified areas. Also made inapplicable were several statutes including the Housing and Town Improvement Ordinance, Town and Country Planning Ordinance, Municipal Councils Ordinance, Telecommunications Ordinance and the Ceylon Electricity Ordinance. The state of emergency remained in force until 28 May 1979.

To Facilitate Passage of Legislation

1. Public Security (Amendment) Bill 1959. A state of public emergency had been in existence for nearly four months in 1958 when Prime Minister Bandaranaike told the House of Representatives that:

> Our Public Security Ordinance is very antiquated. If I can suitably amend it, I can lift the state of emergency tomorrow; but as it stands now, where

---

1. The Prevention of the Avoidance of Tax Act, No.26 of 1970, received the Governor-General's assent on 1 November 1970. It was deemed to have come into force on 26 October 1970.
2. Sun, 20 November 1978.

> for the least action it may be necessary to have a state of emergency right throughout the country, it is not possible to lift the Emergency at the moment, and permit another state of affairs like that which took place to arise in a month or two.[1]

On 21 November 1958, the Prime Minister expressed the same sentiments.[2] The amending bill was passed by the House of Representatives on 12 February, and by the Senate on 12 March 1959. The state of emergency was allowed to lapse on 25 March 1959.

2. Suspension of Capital Punishment (Repeal) Bill 1959.

On dissolving Parliament on 5 December 1959, Prime Minister Dahanayake, in a speech broadcast to the nation, explained:

> You will thus see that the State of Emergency had to be lifted only after certain national requisites had been met - not a day too soon and not a day too late. I took the step of withdrawing the State of Emergency three days ago, after the passage of the Death Penalty Bill in the Senate.[3]

On the day following the death of Prime Minister Bandaranaike, the following emergency regulation had been made:

> During the continuance in force of this regulation the operation of the Suspension of Capital Punishment Act, No.20 of 1958 shall be suspended.

On 29 October 1959, the Suspension of Capital Punishment (Repeal) Bill was introduced in the House of Representatives. It concluded its passage through the legislature on 2 December. On the next day, the state of emergency was revoked.

---

1. Parliamentary Debates (House of Representatives), 23 September 1958, col.585.
2. Ibid., 21 November 1958, col.1997.
3. "Why Parliament was Dissolved", Ceylon Today, Vol.VIII, No.12, p.1.

Emergency Regulations

Section 5 of the Public Security Ordinance empowers the President to:

> make such regulations as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.

An emergency regulation comes into force forthwith upon its being made by the President, and is deemed to be as valid and effective as if it were enacted in the principal Ordinance.[1] Section 6 states that:

> Emergency regulations may provide for empowering such authorities or persons as may be specified in the regulations to make orders and rules for any of the purposes for which regulations are authorised by this Ordinance to be made . . . .

Section 7 defines the extensive scope of emergency regulations and orders made thereunder:

> An emergency regulation or any order or rule made in pursuance of such regulation shall have effect notwithstanding anything inconsistent therewith contained in any law; and any provision of a law which may be inconsistent with any such regulation or any such order or rule shall, whether that provision shall or shall not have been amended, modified or suspended in its operation under section 5 of this Ordinance, to the extent of such inconsistency have no effect so long as such regulation shall remain in force.

Finally, section 8 provides that:

> No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.

Unlike parliamentary legislation, emergency regulations come into force as soon as they are made without any prior or subsequent publication, and without any scrutiny either by Parliament or by a Court. No problem of construction or interpretation arises when an emergency regulation conflicts with an existing law: the emergency regulation simply supersedes that law.

---

1. S.11.

The 1946 Constitution was not saved from the overriding effects of emergency regulations. But the 1972 Constitution provided that:

> The power to make such emergency regulations shall include the power to make regulations having the legal effect of overriding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution.[1]

A provision in almost identical terms is to be found in the 1978 Constitution.[2] Therefore, if an emergency regulation today has the legal effect of overriding, amending or suspending a provision of the Constitution, it will be ultra vires and, to that extent at least, void.[3] To have it declared ultra vires, it must first be called in question in a court, a proceeding which is expressly prohibited by section 8 of the Public Security Ordinance. However, the all-pervasive effect of the Interpretation (Amendment) Ordinance notwithstanding, it ought to be possible to question the validity of an emergency regulation on this ground by means of the special remedy provided in Articles 17 and 126 for the enforcement of fundamental rights.[4] Whether such an exercise is worth the effort is quite another matter, since Article 15 now permits the exercise and operation of several fundamental rights to be restricted, not only by legislation, but by means of emergency regulations as well. These include at least one right which under international law is strictly non-derogable even during a state of emergency.

Interpretation of Regulations

In 1971, in Hirdaramani v. Ratnavale,[5] G.P.A.Silva J gave expression to the approach which the Supreme Court would adopt in the interpretation of emergency regulations:

> Even during a war or a state of emergency, no less than in normal times, it is in these courts that the subject will seek refuge against any unjustifiable

---

1. S.45(4).
2. Art. 155(2).
3. This principle will be equally valid and applicable to an order, rule or direction made under an emergency regulation which seeks to override, amend or suspend the provisions of any law since it is clear from Art.155(2) that only an emergency regulation made by the President can now have that effect.
4. For a discussion of this remedy, see pp.376-400.
5. (1971) 75 NLR 67.

> encroachments on his liberty and it is the duty of the courts to entertain his complaint and inquire into it with meticulous care. In the determination of the problem, however, the extraordinary conditions of a varied character that prevail during times of emergency compel the court to steer a course which preserves the fundamental freedom of the subject without overlooking at the same time the paramount consideration of the safety of the State. The latter consideration imposes on a court the unusual burden of maintaining an impeccable balance between the liberty of the citizen and possible danger to the State often involving the court's entry into areas of uncertainty due to lack of information which the court well knows is available to the executive but cannot for obvious reasons be given publicity in a court of law. These considerations have given rise to judicial pronouncements by eminent judges that are even conflicting in appearance but are reconcilable on reflection and tend to tilt the balance in favour of the executive when in doubt. This principle is based on the implied condition that the officer to whom the power to restrict the liberty of the subject is confided in the interests of the security of the State acts in good faith. [1]

A liberal approach

Even before its general approach was enunciated in the words set out above, the Supreme Court had been inclined to give a strict interpretation to emergency regulations.

In The Queen v. Fernando,[2] the Court of Criminal Appeal had before it an emergency regulation gazetted on 2 October 1959 in the following terms:

> During the continuance in force of this regulation the operation of the Suspension of Capital Punishment Act, No.29 of 1958, shall be suspended.

The Act referred to therein had come into force on 9 May 1958 and was intended to remain in force for three years. It provided that during the operative period, life imprisonment and not death shall be the punishment for the commission of murder or for the abetment of suicide. Following the shooting of the Prime Minister by a Buddhist monk on 25 September 1959, and the declaration of a state of emergency, the death penalty was sought to be reintroduced by this regulation. The Court held that this regulation cannot be construed as being retroactive and that it applied only to those who committed murder while the regulation was in force and were also tried and convicted during that time.

---

1. Ibid., at 94.

2. (1960) 61 NLR 395.

In De Saram v. Ratnayake,[1] the Supreme Court had before it an order purported to have been made by the Permanent Secretary to the Ministry of Defence and External Affairs under an emergency regulation which required detainees to be treated as though they were civil prisoners within the meaning of the Prisons Ordinance and the rules made thereunder:

> Provided that the Permanent Secretary may direct that any such rule shall not apply or shall apply subject to such amendments or modifications as may be specified in such direction.

Three days after the petitioner and sevarl others had been placed under detention following an alleged attempt to overthrow the Government, the Commission or Prisons received a confidential letter, signed by an assistant secretary, to the effect that the relevant rules had been made inapplicable to the detainees. It was argued by petitioner's counsel that a document must purport to be made or issued in pursuance of an emergency regulation before it can be given the effect claimed for it under the proviso to the regulation. It was also argued that a confidential communication, not published at any time, passing from an assistant of the Permanent Secretary to the Commissioner of Prisons, was not the proper method of giving a direction under the proviso. Accepting both submissions, the Court observed that:

> When the Permanent Secretary acts under that proviso, he is in effect exercising legislative power . . . One must therefore scrutinise with great care any document which, assuming that if issued in due form it would have legal validity, is said to have been issued under that proviso . . . In a matter which concerns personal rights and privileges, it is the duty of the Court to construe the relevant provisions strictly, and to see that the prescribed conditions are observed.[2]

In Gunasekera v. De Fonseka,[3] the Supreme Court examined an emergency regulation which empowered, inter alia, any police officer to search, detain for purposes of such search, or arrest without warrant, any person -

(a) who is committing an offence under any emergency regulation;
(b) who has committed an offence under any emergency regulation; or
(c) whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any

---

1. (1962) 63 NLR 522.
2. Ibid., at 525.
3. (1972) 75 NLR 246.

emergency regulation. The petitioner was arrested by an assistant superintendent of police who had orders to do so from his superior officer. He admitted that he was not personally aware of the actual offence of which the petitioner was suspected by the superintendent. Directing the issue of a writ of habeas corpus, G.P.A.Silva J observed that:

> The wording of regulation 19 to my mind permits of only one construction, namely, that the person taking another into custody must himself have reasonable grounds for suspecting the person arrested to be concerned in or to be committing or to have committed an offence under any emergency regulation.[1]

Noting that the regulation conferred the power of arrest on "literally thousands of members of the police, prisons and the armed services", the Court stated that:

> It is reasonable to think that when such a large number is vested with the power of arresting or detaining a person, the law would provide the additional safeguard that the person arresting should be personally satisfied that he has reasonable grounds of suspicion and that he should not merely be guided by the satisfaction of a third party with whose judgment in the matter the person who actually arrests may not agree if he is apprised of the facts.[2]

A literal approach

On the other hand, there have been occasions when the Supreme Court has been inclined to "tilt the balance in favour of the executive".

In Hirdaramani v. Ratnavale,[3] the Court construed a regulation which authorised the Permanent Secretary to the Ministry of Defence and External Affairs to make an order for the taking into custody and detention of a person if the Permanent Secretary was of opinion that such order was necessary with a view to preventing that person from acting in any manner prejudicial to the public safety and to the maintenance of public order. In the absence of any dispute as to the authenticity of the detention order, or as to its application to the detainee, H.N.G.Fernando CJ observed that the only question that arose was whether the petitioner had proved facts necessary to controvert the matter stated in the detention order itself, namely, that the Permanent Secretary was of opinion that it was necessary

1. Ibid., at 254.
2. Ibid., at 255.
3. (1971) 75 NLR 67.

to make the detention order for the purpose specified in the order itself. But, as Viscount Maugham had stated in Liversidge v. Anderson:

> It would be useless to attempt to examine the truth of the facts alleged in the order in a case where the fact relates to the personal belief of the Secretary of State, formed partly at least on grounds which he is not bound to disclose.[1]

Or as Lord Atkin had observed in the same case:

> The meaning, however, which for the first time was adopted by the Court of Appeal in the Greene case and appears to have found favour with some of your Lordships is that there is no condition, for the words "if the Secretary of State has 'reasonable cause' " merely mean if the Secretary of State "thinks that he has reasonable cause". The result is that the only implied condition is that the Secretary of State acts in good faith. If he does that - and who could dispute it or disputing it prove the opposite - the Minister has been given complete discretion whether he should detain a subject or not.[2]

The Chief Justice emphasized that the observation of Lord Atkin - "who could dispute the good faith of the Secretary of State or disputing it prove the opposite ?" - pointed forcefully to the difficulty or even to the futility of a challenge that a person who had stated an opinion did not in truth hold it. In the present case, said the Chief Justice:

> It will not by any means suffice for the petitioner to establish that the Permanent Secretary was mistaken in thinking that the detention was necessary for the stated purposes. Even a mistaken opinion will not invalidate a detention order, and want of good faith can be established only by proof positive that the Permanent Secretary did not indeed form that opinion.[3]

Setting out his own views as to the nature of the facts, proof of which may perhaps justify the Court in investigating an allegation that an executive order had not been made in good faith, the Chief Justice explained:

> If it is prima facie shown that an official who makes a particular executive order had an antecedent motive against the person affected by the order, or had an antecedent bias in favour of a person benefitted by

---

1. [1942] AC 206, at 296.
2. Ibid., at 226.
3. Op.cit., at 77.

> the order, then I think the Court may call upon the official to disprove the existence of bias or to establish that his action was not influenced by bias. But even if such antecedent bias was to be shown in the circumstances of the instant case, the special feature of the Permanent Secretary's inability to disclose facts leading to the formation of his opinion might well be a reason why a proper investigation cannot be held.[1]

Samarawickrema J, who with G.P.A.Silva J expressed the majority view in that case, observed that "it is not an objective test but the subjective opinion of the Permanent Secretary that is the condition of the exercise of the power".[2] Therefore, "this Court cannot substitute its own opinion for that of the Permanent Secretary, nor can it examine the sufficiency or the weight or the logical relevance of the reasons for which the Permanent Secretary formed his opinion".[3] He explained that:

> It is however open to a party challenging a detention order to show, if he can do so, that the Permanent Secretary never had the opinion that it was necessary to make an order for the detention of the person named and that the detention order was not made because he had formed an opinion as required by the regulation but for an ulterior object. For example, the order would not be in terms of the regulation and would be a sham if the Permanent Secretary were to make it for a purely private purpose such as the detention of the rival to the woman he loved. Again, if there is overwhelming ground for believing that no reasonable Permanent Secretary could form the opinion that it was necessary to make a detention order in respect of the person affected, it might show that the Permanent Secretary was acting in bad faith and that the detention order was not made on the basis of an opinion required by the regulation but from an improper purpose.[4]

In Gunasekera v. Ratnavale,[5] the majority of the Court preferred the restrictive approach of H.N.G.Fernando CJ to an impugned detention order . Alles J, who stressed that "even a dishonest or wrong opinion is not justiciable"[6] explained:

> If the detention is ex facie valid, it is presumed to be honestly made. Then arises the almost impossible burden for the detainee to establish that the satisfaction or the opinion could not have been present due to other reasons.[7]

---

1. Ibid., at 79.
2. Ibid., at 118.
3. Ibid., at 116.
4. Ibid., at 112.
5. (1972) 76 NLR 316.
6. Ibid., at 323.
7. Ibid., at 326.

Thamotheram J, who agreed that challenging a detention order successfully "is almost impossible", expressed his view that:

> I am of the view that there is a burden on the respondent to establish prima facie that the detention order in question was under an emergency regulation. Bona fides will be presumed unless the respondent's case itself shows mala fides or raises reasonable doubts as to the bona fides of executive action. Sometimes the respondent's case may contain two contradictory affidavits or some admission made by some official and the like. If the respondent's case speaks with one voice that the Permanent Secretary had the required opinion, it is thereafter not open to the petitioner to challenge the prima facie case so established. In many cases it might suffice to produce the detention order alone. There may be cases where something more will be required. The burden on the respondent is only to show that the order was made under an emergency regulation.[1]

Validity of Regulations

Section 5 is the source of the President's regulation-making power. Is it open to a Court to examine the question whether a regulation made by the President under that section is in fact referable to one of the purposes enumerated therein ? It would appear not.

In Yasapala v. Wickremasinghe,[2] it was argued that the teaching service cannot reasonably be regarded as a service essential, during a period of emergency, to the life of the community, and that the President cannot, therefore, make an emergency regulation for the maintenance of such service. The Court did not agree. In its view, section 5 does not contain words of limitation defining and descriptive of the powers of the President. Instead,

> The enumeration of the purposes outlined in section 5 is a compendious means of delegating full power of making emergency regulations. The power to make emergency regulations for the purposes indicated in section 5 is a power to enact any kind of regulation to deal with the exigencies of the emergency. Section 5 confers on the President plenary powers of making emergency regulations . . . co-extensive with that of Parliament.

Sharvananda J emphasized that the words used are "as appear to him to be necessary or expedient" which is subjective, and not "as may be necessary" which is objective. Accordingly,

> The President's belief in the necessity or expediency of emergency regulations is conclusive of its validity.

---

1. Ibid., at 369.
2. S.C.M., 8 December 1980.

> The steps taken by him may be founded on information or apprehensions which are not known or communicated to the public. He is not compellable to disclose his mental process. His belief that the emergency regulations will achieve the object of counteracting the emergency is sufficient justification for the regulation.

There appears to be, however, one exception to this rule:

> The President having deemed necessary or expedient to make the said regulations, it is not for this Court, in the absence of evidence of bad faith, to review what the President has done.

The clear implication, therefore, is that if mala fide is alleged, the regulation becomes reviewable.

No petitioner has yet undertaken the burden of proving that an emergency regulation has been made mala fide. But if and when he does, section 8 will undoubtedly be placed across his path. In 1971, in Hirdaramani v. Ratnavale,[1] H.N.G.Fernando CJ drew a curious distinction between a detention order made by the Permanent Secretary and an arrest made by a police or service officer. In regard to the former, in his view, there was:

> a presumption that the Permanent Secretary will act in good faith when he makes a detention order, and [that] accordingly there would be no need to permit the courts to consider the only possible issue which can be raised when a detention order valid on its face is produced before the courts, namely, the issue of good faith.

In regard to the latter, he believed that:

> a court must hesitate to attribute to the Prime Minister and to the Governor-General the manifestly unreasonable intention that any and every arrest by any member of the police or armed services must necessarily be accepted as valid by the courts if such member merely claimed that he acted under regulation 19.

Accordingly, the Court held that an ouster clause was effectual in regard to the former, but not the latter. Any action taken under an emergency regulation being administrative or executive in character, this issue is unlikely to arise now in view of the extensive nature of the special remedy available under the 1978 Constitution in respect of the infringement of fundamental rights. But the issue nevertheless remains open in regard to emergency regulations made by the President which are, of course, legislative in character and therefore outside the purview of the special remedy.

---

1. Op.cit.

Regulations and Orders Inconsistent with Fundamental Rights

Under section 45(4) of the 1972 Constitution, the power to make emergency regulations did not include the power to override, amend or suspend the operation of any provision of the Constitution. But section 18 of the Constitution which contained the statement of fundamental rights provided that: (1) all "existing law" shall operate notwithstanding any inconsistency with a fundamental right, and (2) the exercise and operation of the fundamental rights may in certain circumstances be restricted by "law". The term "existing law" was defined by the Constitution to mean: "all laws, written and unwritten, in force immediately before the commencement of the Constitution".[1] "Existing written law" was defined to mean: "all written laws including subordinate legislation".[2]

The term "law" was nowhere defined. It obviously included a bill passed in the National State Assembly by a majority of votes of the members present and voting and certified by the Speaker.[3] Did it also include subordinate legislation ? Section 45(4) made it clear that when the President made emergency regulations, he was exercising legislative power delegated to him by the National State Assembly. If "existing law" to which all the protected rights were subject included subordinate legislation, there was nothing intrinsically illogical in inferring that "law" in the prospective sense also contemplated subordinate legislation, and therefore included emergency regulations made by the President. Therefore, despite section 45(4), it would appear to have been lawful for the President to have made emergency regulations which had the effect of overriding, amending or suspending the exercise and operation of the fundamental rights protected by section 18(1). The 1978 Constitution, of course, puts this matter beyond any doubt. For the purpose of restricting the exercise and operation of a large number of fundamental rights, law is defined to include regulations made by the President under the Public Security Ordinance.[4]

It is now proposed to examine the extent to which the executive infringed on fundamental rights by means of emergency regulations during the six year period from 1971 to 1977. Many of these regulations had been made on previous occasions too; they have also been

---

1. S.12(1).
2. Ibid.
3. Ss.47, 48.
4. Arts.15(1), 15(7).

re-imposed in subsequent years. They represent therefore, as nearly as one can possibly reach, the norm which had guided successive government in making emergency regulations, whatever the nature or seriousness of the crisis facing the executive might have been.

Right to Life

By emergency regulations, the death penalty was extended to the following offences:

i. destroying or damaging property with fire, any combustible matter, explosive or corrosive substance, missile, weapon or instrument;

ii. causing or attempting to cause death or injury with fire, any combustible matter, explosive or corrosive substance, missile, weapon or instrument;

iii. committing theft from vacant or unprotected premises;

iv. impairing the efficiency or impeding the working of any vehicle, machinery, apparatus, or other thing used or intended to be used in the performance of essential services;

v. committing criminal trespass or illegally removing or attempting to remove any goods or articles from any premises;

vi. being a member of an unlawful assembly with the object of doing any of the aforesaid acts.

The circumstances in which death may be caused to a wrongdoer in the exercise of the right of private defence of property were also extended by emergency regulations to include all the offences referred to above. These emergency regulations were first made in 1958, and have always been repeated whenever a state of emergency was thereafter declared. They were in force even when the death penalty stood suspended for murder. The written sanction of the Attorney-General was required for a prosecution for any of these offences; such sanction being granted only if he was satisfied that the offence was committed in furtherance of, or in connection with or in the course of, a civil disturbance prevailing at or about the time of its commission.[1]

In 1953, a regulation empowered any police officer not below the rank of assistant superintendent or the officer-in-charge of a

---

1. There is no record of sentence of death having been actually imposed in respect of any of these offences.

police station or any other officer or person authorised by him "to take all such measures as may be necessary for the burial or cremation of any dead body, and to determine in his discretion the persons who may be permitted to be present at any assembly for the purpose of or in connection with any such burial or cremation". This regulation was later amended by the addition of the following paragraph:

> It shall not be necessary for any officer or person taking measures relating to the possession and burial or cremation of a dead body under this regulation to comply with the provisions of any other written law relating to the inquest of death or to burial or cremation.

The superseded provisions of written law included those which required a magistrate to inquire into all cases of sudden, violent or accidental death,[1] a medical practitioner to certify the cause of every death,[2] and a burial or cremation to be held only in accordance with the provisions of the Cemeteries and Burials Ordinance. In other words, a police officer was empowered to have the body of any man buried or cremated without reporting either the fact, or the cause, of his death to any other person or authority, whether before or after such burial or cremation. To put it shortly, whatever reasons of administrative convenience may have motivated this regulation, it was a licence to kill and dispose.

Right to Liberty

1. Arrest. Under a regulation of general application, the power to arrest without a warrant was granted to:

> any police officer, any member of the Sri Lanka Army, Sri Lanka Navy or Sri Lanka Air Force, or the Commissioner of Prisons or any Superintendent, Assistant Superintendent or Probationary Superintendent of a Prison, or any Jailor or Deputy Jailor, or any Prison Guard or Prison Overseer, or any other person authorised by the Prime Minister to do so.

A regulation intended to deter persons of Indian origin from encroaching upon state lands in the Eastern Province, empowered Government Agents and other state officers authorised in that behalf by the Prime Minister to direct the arrest of alleged encroachers.[3] Under every state of emergency, the Secretary to the Ministry of Defence has enjoyed the power to make order that any person be taken

---

1. Criminal Procedure Code, s.9, ch.XXXII.
2. Births and Deaths Registration Act, Part IV.
3. The Emergency (Encroachment Upon State Lands) Regulation.

into custody and detained in custody for an indefinite period.[1] He could do so if he was of opinion that it was necessary to do so "with a view to preventing such person from acting in any manner prejudicial to the public safety, or to the maintenance of public order, or to the maintenance of essential services".

2. Police Custody. Neither a person arrested in connection with an offence under any emergency regulation, nor a person on whom a detention order had been served, was required to be produced before a judicial officer. Instead, such person could be detained in any place specified by the Inspector-General of Police. Invariably, arrested persons were held in police custody for as long as the police considered it necessary to do so. Later, the period of detention of an arrested person in a place authorised by the Inspector-General was restricted to fifteen days, after which such person was required to be produced before a court. Whenever the Secretary for Defence banned a public demonstration under the Emergency (Preservation of Public Order) Regulation,[2] any police officer could "take any action he deems necessary to prohibit such public demonstration and may for that purpose arrest any person without warrant". A person so arrested could be held in custody in a police station for three days. At the end of that period, the Secretary for Defence, to whom the fact of the arrest was required to be communicated, could authorise that such person be kept in detention for a period of one month in any place nominated by him. In 1975, the Exchange Control Act was amended by emergency regulation to enable the Secretary for Defence to determine where a person remanded by a court under that Act should be detained, and to make rules in respect of such detention; with that amendment of the law, prison custody was transformed into police custody.

3. Mandatory Remand. Several emergency regulations took away the discretion vested in a judge to determine whether or not a person produced before him should be remanded. For instance, whenever a person arrested in connection with an offence under any emergency regulation was produced before a court after a period in police custody, it was provided that "such court shall order that such person be detained in the custody of the fiscal in a prison

---

1. The Emergency (Miscellaneous Provisions and Powers) Regulation.
2. Infra, p. 480.

established under the Prisons Ordinance". The Emergency (Encroachment Upon State Lands) Regulation provided that whenever a police officer produced a person arrested on the direction of a Government Agent or authorised officer before a judge before whom proceedings had been instituted against such person, "it shall thereupon be the duty of such judge, notwithstanding anything in any other law, to remand the encroacher until the conclusion of the proceedings before such judge".[1] The Emergency (Protection of State Officers) Regulation provided that where any person suspected or accused of having caused hurt to, or used criminal force on, a state officer was produced before a magistrate, "the magistrate shall remand such person unless for reasons to be recorded by him he considers the complaint to be frivolous or vexatious or of a trivial nature".[2]

4. Release. Executive order replaced judicial discretion in the matter of the release of persons arrested under emergency regulations. Initially, it was provided that no court shall release on bail any person accused of any offence under chapters VI, VII or VIII of the Penal Code, or any offence under any emergency regulation, "unless the Attorney-General has consented in writing to the release of that person on bail, or a police officer of a rank not below that of Assistant Superintendent informs the court orally or in writing that he does not object to the release of that person on bail". Thereafter, it was provided that any person held in custody in any prison upon the order of a magistrate and suspected or accused of an offence under the Explosives Act, the Offensive Weapons Act, the Firearms Ordinance, or under chapters VI, VII or VIII of the Penal Code, or under any emergency regulation, as well as any person who had surrendered to the authorities in connection with any of these offences and was consequently in prison custody, "shall continue to remain in such custody until he is released upon an order made by the Secretary to the Ministry of Justice". The Emergency (Protection of State Officers) Regulation required any person remanded under that regulation to "remain in the custody of the Commissioner of Prisons until the conclusion of the proceedings against him, unless the Secretary to the Ministry of Justice in his

---

1. With the implementation of land reform and the alienation of former tea estates for purposes of village expansion, etc., a widespread movement of Indian labour towards the Eastern Province began. Hence this regulation.

2. This regulation was made at the insistence of government

discretion by order in writing addressed to the Commissioner of Prisons directs that such person be released subject to such terms or conditions, if any, as the Secretary may specify in such order". Emergency regulations first made in 1974 further restricted judicial discretion in the matter of release in respect of ordinary crime. The Emergency (Encroachment Upon State Lands) Regulation provided that a person on remand in connection with an offence under the Land Development Ordinance, the Forest Ordinance, the Crown Lands Ordinance or the Crown Lands Encroachments Ordinance, may be released on bail by a magistrate only "if the Attorney-General gives his written consent to such release". Another regulation provided that no court shall, except with the written consent of the Attorney-General, order the release on bail of any person suspected or accused of the offence of theft, misappropriation, or criminal breach of trust, committed in relation to any property belonging to a co-operative society, bank, government department or state corporation.

Right to Freedom of Peaceful Assembly.

The power conferred on the Prime Minister by emergency regulation to declare a curfew in any area in Sri Lanka was capable of being used to interfere with a person's right to freedom of peaceful assembly. So too the authority which the Prime Minister acquired by regulation: (1) to prohibit generally the holding of public processions or public meetings in any area in Sri Lanka, and (2) to give directions prohibiting the holding of any particular procession or meeting if, in the opinion of the Prime Minister, such procession or meeting was likely to cause a disturbance of public order or to promote disaffection. Two other regulations also considerably encroached on the exercise of this right. The Emergency (Preservation of Public Order) Regulation, first made in 1973, provided that if any person takes part in, organises, incites or encourages another person to take part in, any public demonstration in such circumstances that the Secretary for Defence apprehends that there is a likelihood -

i. of a disturbance of public order, or

ii. that the Government Food Production Campaign may be hampered; or

iii. that the freedom of movement or assembly of any section of the

---

medical practitioners who complained that persons charged with attacks on them were being released on bail by magistrates pending investigation and trial.

public may be interfered with; or

iv. that any disturbance to persons engaged in the observance or practice of their religion may occur,

the Secretary may issue a notice to the Inspector-General of Police and to any person known or suspected to be organising or encouraging the organisation of, or likely to organise or to encourage the organisation of, such public demonstration, to the effect that he has banned such demonstration. Any defiance of such notice was punishable with fine, imprisonment and the forfeiture of all property. The Emergency (Prevention of Incitement) Regulation, first made in 1974, declared it to be an offence for any person, at a public meeting or in the course of a public procession, by words, signs, visible representations or by conduct, to incite or attempt to incite another to use any form of physical force or violence, commit a breach of the peace, or disobey or obstruct the execution of the law. It was also an offence for any person: (1) to assist, whether by financial contributions or otherwise, in the organisation of any meeting or procession; or (2) to participate in or attend a procession or meeting at which the aforesaid offence is committed. The penalties for violation of this regulation also included the forfeiture of all property. Where an offence was committed at a meeting or in the course of a procession organised by a political party, every member of the governing body of that political party was deemed to be guilty of that offence.

In mid-1973, the United National Party announced that it would perform "satyagraha" around Parliament House "for rain, food and justice". As marchers converged from many directions in the city, barricades erected by the police prevented them from reaching their destination. The next satyagraha was scheduled to be performed in the Prime Minister's constituency of Attanagalla between 2 p.m. and 4 p.m. on 9 December 1973. It was a day of religious significance, being the Unduwap Full Moon Day, and satyagraha was to be performed at the Attanagalla Raja Maha Vihare, the principal temple in the district. According to the Ceylon Daily News:

> The people of Attanagalla and surrounding areas prevented UNP satyagrahis from entering Attanagalla yesterday. They formed human barricades on all approach roads, and at some points trees and other obstacles were placed

> across roads. Large banners, black flags and posters denouncing the satyagraha were up all over Attanagalla and the surrounding areas.[1]

Two days later, the Prime Minister told the National State Assembly that the people of Attanagalla had a democratic right to block the road, as they were opposed to the satyagraha campaign. She added: "I am proud that the people of Attanagalla could put up such a courageous fight".[2] The next satyagraha was fixed for 8 January 1974 - the Duruthu Full Moon Day - at the historic Maha Mevuna Uyana in Anuradhapura. On 4 January, the Secretary for Defence, acting in terms of the Emergency (Preservation of Public Order) Regulation, banned the proposed satyagraha.[3] In a communique issued on the same day, the Government announced that it had decided to prohibit the holding of this satyagraha for the following reasons:

1. The promotion of political agitation in a sacred city is inappropriate.
2. The Duruthu Full Moon Day, when a large body of pilgrims will congregate from all over the island at Anuradhapura to observe ata-sil and to engage themselves in other religious activities, is not a suitable date for political activities, agitations and demonstrations.
3. The possibility that there would be breaches of the peace, particularly in view of the likelihood that persons who are opposed to the satyagraha campaign would attempt to organise counter-demonstrations.
4. The leader of the UNP had written to the President expressing his own apprehension of a possible breach of the peace.
5. Recent rains has led to an increased enthusiasm on the part of the farmers for food production activities. The holding of the satyagraha would seriously disrupt these activities and divert the attention of the people to essentially non-productive and even counter-productive fields.
6. It is the responsibility of the Government on behalf of the people to take all effective measures to maintain law and order.[4]

---

1. Ceylon Daily News, 10 December 1973. For the UNP version of the events at Attanagalla, see T.D.S.A.Dissanayake, J.R.Jayewardene, op.cit., at pp.53-54; Kariyakarawana, The People's President, op.cit., at pp.135-137. See also Sun, 10 December 1973.
2. Sun, 12 December 1973.
3. Ibid., 5 January 1974.
4. For the full text of the communique, see Sun, 5 January 1974. For an account of the events at Anuradhapura, see ibid., 9 January 1974.

On 20 March 1974, the Opposition parties announced a new programme "to compel the Government to resign and hold a general election".[1] Having regard to the fact that the Government had not even completed serving the fourth year of the five-year term for which it was initially elected,[2] this campaign appeared to be somewhat premature. The proposed strategy, which was set out in a statement issued on that day, appeared to be calculated to create public disorder. That statement called for:

i. the holding of at least one hundred meetings all over the country, if possible on one day;[3]

ii. the people to meet their respective Members of Parliament and represent their grievances;

iii. all members belonging to the political parties of the Opposition in those local bodies whose terms had been extended by emergency regulations to resign their seats;

iv. a boycott of state organisations such as District Political Authorities;[4]

v. officials in the public sector to refrain from carrying out illegal orders of the Government, with a promise of adequate compensation by the next government for any resulting injustice;

vi. an island-wide "protest day" of travel by bus and train without payment of fares, as a protest against the rise in bus and train fares;[5]

vii. an island-wide "protest day" of transporting a token quantity of rice, as a protest against the emergency regulation which prohibited the transport of rice.[6]

---

1. Sun, 21 March 1974.

2. The 1972 Constitution provided for a five-year term for this Government, commencing in May 1972.

3. It might not have been unusual to have such a number of meetings on a single day in the course of a general election campaign. But on this occasion, the Government feared that item (i) would be followed up by item (ii), and that those present at each meeting would be urged, if not incited, to storm the residence of the local Member of Parliament immediately thereafter in order to intimidate him to resign.

4. The Government was at this time attempting to decentralise the budget and to establish a political authority at the district level to assume responsibility for the utilisation of capital expenditure. The "political authority" was the precursor of the "district minister" introduced by the UNP Government in 1978.

5. The increase in bus and train fares in January 1974 was consequent to the sudden and unexpected rise in world oil prices.

6. This emergency regulation was made at the request of the

The UNP made preparations to hold 140 protest meetings - one in each electorate - on 21 April 1974, which was the first death anniversary of its former leader and Prime Minister, Dudley Senanayake. Through the newspapers of the Independent Newspapers Limited Group - the Sun, Davasa and Dinapathi - considerable publicity was given to the arrangements being made for these meetings, while counter propaganda was set in motion by the pro-government newspapers and the state-controlled radio. Eventually, on the afternoon of Saturday 20 April, the following Order was made by the Prime Minister under emergency powers which she enjoyed:

> 2. The holding in any part of Sri Lanka of any public procession or meeting whatsoever organised directly or indirectly by the United National Party or by any of its members or by any other organsiation or person or body or group of persons at the instance of or in association with the United National Party or any of its members or in which any member of the United National Party participates, is hereby prohibited:
>
> Provided, however, that the preceding provisions of this paragraph shall not prevent the holding of any procession or meeting in the case of which the following conditions are satisfied:
>
> (a) that the Inspector-General of Police, being satisfied that the holding of such procession or meeting is not likely to be prejudicial to the public safety or to the maintenance of public order or to the maintenance of essential services, has in his absolute discretion granted a permit authorising the procession or meeting;
> (b) that the total number of persons taking part in such procession or meeting does not exceed such number as may be specified in the permit so granted; and
> (c) that such procession or meeting commences or disperses within such period as may be specified in the permit authorising the procession or meeting.
>
> 3. Where in the course of any procession or meeting held on the authority of a permit granted under the proviso to paragraph 2 of this Order, any person incites or attempts to incite the inhabitants of Sri Lanka or any section, class or group of them to the use of any form of physical force or violence, breaches of the peace, disobedience of the law or obstruction of the execution of the law, such procession or meeting shall be deemed to be a procession or meeting, as the case may be, held in contravention of paragraph 2 of this Order.

Minister of Agriculture in the hope that it would prevent the hoarding of rice at a time when stocks were scarce. A lorry used to transport any quantity of rice was automatically forfeited to the State. This was an ill-conceived regulation which caused considerable hardship

> 4. For the purposes of this Order, a certificate from the officer-in-charge of the Police Station of the area in which a procession or meeting is held to the effect that any person is a member of the United National Party shall be conclusive proof thereof.[1]

The Emergency (Prevention of Incitement) Regulation, referred to above, was also made on the same day. Perhaps in anticipation of such measures, the UNP leader, J.R.Jayewardene announced that a Government ban on the meetings would amount to "stifling the voice of the Opposition and restricting the monopoly of speech, writing and assembly to the Government Party only". He asserted that:

> The Opposition cannot and will not submit to this method. Undemocratic laws we need not obey.[2]

At a meeting of the Security Council held on 20 April, the Inspector-General of Police informed the Prime Minister that, in the event of the Opposition defying the ban on meetings, the police had neither the resources nor the capacity to enforce it.[3] Thereupon, again acting under emergency regulations, the Prime Minister imposed a twenty-four hour curfew throughout the country on Sunday 21 April. Explaining her action in a broadcast to the nation, Mrs. Bandaranaike said:

> The Government has been watching with concern during the past few weeks, the escalation of activities by the United National Party and its allies which were designed and executed to result in mass breach of peace and civil commotion. The country too could not have been unaware of the mounting tension which would have culminated in an imminent threat to law and order and in inevitable chaos . . .
>
> We are literally fighting to survive and needed the fullest mobilisation of our natural resources and the energies of our people to overcome our difficulties. It is in such a situation that frustrated politicians and notorious agents of the propertied classes and vested interests have chosen to abuse the freedoms of parliamentary democracy which we have cherished and protected at all times, to sabotage the production effort, incite the people against the Government and if possible bring down the Government by violence and civil commotion . . .

She referred to economic and social changes effected by her Government:

> Their efforts to foment civil disorder have an element of desperation: for they are aware that the land reform,

---

and injustice. It was revoked after some months on the insistence of the Cabinet.

1. Times of Ceylon, 22 April 1974; Ceylon Daily News, 20 April 1974.
2. Sun, 20 April 1974.
3. Private information.

> the housing reform, income tax reforms, the legal reforms and other reforms this Government has introduced and is implementing are now reaching the people and are hitting their own supporters where it hurts them most . . .

Referring specifically to the ban on UNP meetings, she said:

> As a first step, therefore, I have decided to prohibit all public meetings and demonstrations of the UNP, beginning with the so-called 150 meetings being planned for 21 April in various parts of the country. I am satisfied that the purpose of these meetings is aimed at incitement and organisation of law-breaking, sabotage and commotion on an unprecedented scale.
>
> I should like to say right now that if and when I am satisfied that the UNP and its leaders have abandoned their campaign to foment civil disorder, breaches of the law and violence, I shall not hesitate to remove the restrictions on their activity which they themselves by their efforts to foment and organise civil disorder have compelled me to impose today. They will then be able to function with no less freedom than any other political party now in Opposition.[1]

The Ceylon Federation of Labour, which was organised under the aegis of the Lanka Sama Samaj Party, then a constituent part of the Government, convened its annual conference for 15 and 16 November 1974. Its programme was to conclude with a procession from Campbell Park to Hyde Park, where a public meeting was due to be held. These events were to commemmorate the 39th anniversary of the LSSP. In response to an application made to the police for a route permit from Campbell Park to Hyde Park, the Prime Minister informed the General Secretary of the LSSP by letter that since "demonstrations divert personnel and material from the current production effort", it was not desirable that they should be encouraged.[2] Refusing to be "forced to production through denial of the right of demonstration",[3] the delegates' conference of the CFL decided to defy the order and hold the demonstration as planned. At 1 p.m. on Saturday 16 November, while CFL delegates were assembling at Campbell Park for the start of the procession, the acting Prime Minister, Maithripala Senanayake, imposed a curfew throughout the Colombo district. The curfew was operative until 6 a.m. on the

---

1. Ceylon Daily News, 22 April 1974. This Order was revoked on 31 August 1974 after an exchange of letters between the leader of the UNP and the Prime Minister.

2. Statement of the Ceylon Federation of Labour, Ceylon Daily News, 18 November 1974.

3. Ibid.

following morning, and Prime Minister Mrs.Bandaranaike who flew into curfew-bound Colombo at the end of a state visit to the Soviet Union announced that it was she who had telephoned instructions to Senanayake from Georgia to take steps to prevent the trade union procession from being held. The Prime Minister explained that, in view of the large amount of money which would be incurred on transport and batta for police and service personnel required to maintain law and order at such processions, she had decided to disallow processions in general, other than: (1) religious and funeral processions which will be allowed by the officer-in-charge of a police station, subject to normal security considerations; and (2) May Day processions, processions connected with the annual sessions of recognised political parties, Bandaranaike Commemmoration Day processions, and United Front processions held at the district level and organised by the three coalition parties jointly.[1]

Right to Freedom of Association

Having a direct bearing on this right was the emergency regulation which empowered the Prime Minister to proscribe any organisation if she "is of opinion that there is a danger of action by, or of the utilisation of, the organisation or its members or adherents" for a purpose prejudicial to the public safety, the maintenance of public order, or the maintenance of essential services. Upon proscription, every act performed in connection with, or in relation to, such organisation, became a prohibited act. In other words, a proscribed organisation ceased to have any legal existence. During the six year period of emergency from 1971 to 1977, the Janatha Vimukthi Peramuna stood proscribed.

The Emergency (Prohibition of Para Military Exercises) Regulation prohibited persons from organising themselves for the purpose of drilling or exercise, except upon a permit issued in that behalf by the superintendent of police of the area. Exempted from the operation of this regulation were members of the police and armed

---

1. Letter from Mrs.Bandaranaike to Bernard Soysa, General Secretary, LSSP: Daily Mirror, January 1975 (date not available). By allowing only processions held to commemmorate the founder of the SLFP and those organised by the constituent parties of the Government, the Prime Minister was clearly discriminating against the Opposition political parties. The question whether, and to what extent, civil and political rights may be suppressed in order to secure economic development is not examined in this study. For a recent examination of this subject, see Alan McChesney, "Promoting

services, and drilling or exercise organised in schools. "Drilling" was defined to include marching in groups or formations, and training persons in armed or unarmed combat. A number of left-wing trade unions were affected by this regulation. The Government explained that the regulation was necessitated by "the probable growth of private armies".[1]

Right to Freedom of Movement

Three emergency regulations were capable of being applied to restrict the exercise and operation of this right. The first of these empowered "any police officer of a rank not below that of a sergeant, any member of the Sri Lanka Army of a rank not below that of a corporal, any member of the Sri Lanka Navy of a rank not below that of a leading seaman, or any member of the Sri Lanka Air Force of a rank not below that of a corporal" to:

> order any person or persons in or about any public road, railway, public park, public recreation ground or other public ground, seashore, or in or about, or in the vicinity of, the premises of any public building or goverment department, to remove himself or themselves from that place.

The order was enforceable by the use of force, including armed force. The second, which related to the curfew, empowered the Prime Minister to direct that no person in any area in Sri Lanka shall, between such hours or during such period as may be specified, be on any public road, railway, public park, public recreation ground or other public ground, or the seashore, or any other building or premises or place, except under the authority of a written permit granted by the competent authority. The third, the Emergency (Control of Exit of Citizens of Sri Lanka) Regulation provided that no citizen of Sri Lanka shall leave the country except with the authority of an exit permit issued in that behalf by the Controller of Immigration and Emigration. The regulation also empowered the Minister of Defence, on the ground of public security or in the national interest, to direct the Controller not to issue an exit permit to any citizen. To enforce this regulation, an extensive bureaucratic network was erected, and a prospective traveller experienced considerable delay while his application was examined and processed by the immigration authorities, the CID, the special investigation unit probing the

---

the general welfare in a democratic society: Balancing human rights and development" (Unpublished, 1980).

1. Madras Hindu, 21 December 1974.

insurgency, and the special branch of the police investigating exchange control and currency offences. Any one of these State agencies could, and sometimes did, apply an embargo on the proposed travel.[1]

Right to Freedom of Speech and Expression

Several emergency regulations either restricted, or facilitated the restriction of, the exercise and operation of this right.

The offence of sedition, which is ordinarily punishable with a maximum sentence of two years simple imprisonment, was made punishable with a minimum term of three months and a maximum term of twenty years rigorous imprisonment. Its definition was also extended to include, inter alia, any attempt to bring the Government or the Constitution into hatred or contempt. The Emergency (Prevention of Subversion) Regulation made it an offence for any person:

(a) otherwise than in proceedings in the National State Assembly or before a court of law, to deny or in any manner defy, challenge or question the validity of the Constitution or of any provision thereof;

(b) to incite, encourage, or induce any person to defy in any manner, or to act in derogation of, the Constitution or of the authority of any institution or office established, appointed or recognised thereunder or in defiance of the laws made, enacted or recognised thereunder.

Where an offence under this regulation was committed by a recognised political party, such party forfeited its status under the law as a recognised political party as well as all its movable and immovable property.

The printing and publication of newspapers, journals, magazines and pamphlets was sought to be controlled in the following manner:

1. The competent authority was empowered to give directions preventing or restricting the publication in Sri Lanka of matter which might be prejudicial to the interests of public security or the preservation of public order or the maintenance of supplies and services essential to the life of the community, or of matter inciting or encouraging persons to mutiny, riot or civil commotion. For the purpose of exercising this power, the competent

---

1. For details, see the evidence of Nihal Jayawickrama, Proceedings of the Special Presidential Commission of Inquiry, January-July, 1979.

authority could require that any material be submitted or exhibited to him before publication. The contravention of a direction could be dealt with in one of the following ways:

a) a newspaper publisher who had been convicted of the offence of contravening a direction may be directed by the Prime Minister not to publish a newspaper in Sri Lanka for a specified period;

b) a newspaper publisher may be directed by the competent authority not to print, publish or distribute, or in any way be concerned in the printing, publication or distribution of such newspaper for a specified period;

c) the competent authority may direct that the printing press in which such newspaper was published shall, for a specified period, not be used for any purpose whatsoever, compliance being secured by authorising a specified person to take possession of such printing press or the premises in which it is situated.

2. The competent authority was empowered, if he was of opinion that there is or has been or is likely to be published in any newspaper matter which is, in his opinion, calculated to be prejudicial to the interests of public security or the preservation of public order or the maintenance of supplies and services essential to the life of the community, or matter inciting or encouraging persons to mutiny, riot or civil commotion, to:

a) direct that no person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of such newspaper for a specified period; and

b) direct that the printing press in which such newspaper was printed not be used, for a specified period, for any purpose whatsoever, and for the purpose of securing compliance with that direction, authorise any specified person to take possession of such printing press or of the premises in which it is situated.

3. The competent authority was empowered, if he was of opinion that any printing press, or the printing press under the control of any person, has been or is likely to be used for the production of any document containing matter which is in his opinion calculated to prejudice the interests of public

> security or the preservation of public order or the maintenance of essential services and supplies, or matter inciting or encouraging persons to mutiny, riot or civil commotion, to direct that such printing press, or all or any of the printing presses under the control of such person, not be used, for a specified period, for any purpose whatsoever, and, for the purpose of securing compliance with such directions, authorise any specified person to take possession of such printing press or of the premises in which it is situated.

An emergency regulation which amended the Newspapers Ordinance provided that no person shall print or publish any new newspaper except on the authority of a permit issued in that behalf by the competent authority. It was declared to be an offence to affix in any place visible to the public or to distribute among the public, any posters, handbills or leaflets, except with the permission of the Inspector-General of Police or of any police officer authorised in that behalf by him. Whoever without lawful authority or reasonable cause had in his possession, custody or control, any book, document or paper:

> containing any writing or representation which is likely to be prejudicial to the interests of public security or to the preservation of public order or which is likely to arouse, encourage or promote feelings of hatred or contempt to the Government or which is likely to incite any person directly or indirectly to take any step towards the overthrowing of the Government,

was guilty of an offence.

On the afternoon of Friday 19 April 1974, at a meeting of the government parliamentary group which had been convened to discuss the threatened civil disobedience campaign of the Opposition and, in particular, the 140 meetings scheduled to be held two days later, it was decided that action should be taken to stop the publication of the newspapers of the Independent Newspapers Limited Group.[1] Accordingly, later that night, the appropriate orders were made under the relevant emergency regulation by the competent authority,

---

1. The subject had previously been discussed by the Ministers and the service chiefs earlier in the week. On Friday morning, the Prime Minister decided to seek the views of the government parliamentary group. On the advice of the Attorney-General, an amendment to the relevant emergency regulation was made that night by the President to enable the appropriate order to be made by the competent authority. The unamended regulation required a warning prior to closure.

Ridgeway Tillekeratne, and served on the publishers. With the assistance of the Government Printer and the police, the presses were then sealed.[1] In a speech broadcast to the nation, the Prime Minister explained that:

> Government has already announced measures that are being taken to prevent the circulation of false and malicious rumours that have been made a fine art by these interested circles. In a small country like our's, where most people know most other people, the invention and circulation of malicious stories is a remarkably effective political and social weapon. This pernicious practice has to be brought to an end.
>
> In this connection, I have also had to pay serious attention to the criminal irresponsibility of certain newspaper magnates who refuse to learn from the experience of others and insist on abusing the trust that people repose in the profession of journalism. Our patience with these people has been monumental, but they refuse to show any higher sense of responsibility.
>
> I am satisfied that these journals have played no small part in the organisation and promotion of the campaign for civil disorder. They have continuously published falsehoods, distortions, and above all, given prominence to the UNP's campaign for civil disorder.
>
> I have no alternative but to seal their press and thus prevent them from spreading their invented or deliberately distorted untruths and half-truths which they mistake for journalistic enterprise and the promotion of the so-called public good. This action is being taken against the 'Davasa' and 'Sun' newspaper business in the hope that the opportunity of reflecting on their misdeeds will offer them the means of self-correction.
>
> We have no desire to convert the newspapers into state enterprises. At the same time, no Government can allow the immense power of the press to be prostituted for narrow and selfish ends. I am always mindful of the sorry treatment extended to the Opposition press by the UNP Government of 1965-70. The 'Jana Dina' and 'Aththa' were not newspapers with great resources such as that Government had. But the UNP Government banned their transport in CTB buses, sealing the presses at which they were being printed, and harassed them in various other ways, including vexatious prosecutions. What was worse, these presses were closed down for petty personal considerations connected with some potentate. We have refused to be motivated in this way.[2]

---

1. Tillekeratne then held the substantive offices of Director of Information, Director-General of Broadcasting, Chairman of the Sri Lanka Broadcasting Corporation and Secretary to the Ministry of Information. He was, however, not present at any of the meetings at which the question of the closure of this newspaper group was discussed.

2. Ceylon Daily News, 22 April 1974.

A few days later, in the National State Assembly, the Prime Minister reiterated that:

> The Davasa press was sealed for more serious reasons. It gave support to a civil disobedience campaign, flouting of emergency regulations preventing the transport of rice, and other reasons. It had also tried to incite people. In 1958, the Lake House set the country on fire during the communal riots. The Davasa group had attempted a similar task. If the Davasa group was prepared to act in a peaceful manner, a request for them to publish papers will be considered.[1]

Two years later, Independent Newspapers Limited instituted an action for damages in the District Court of Colombo. When notice of action was received by the Attorney-General, he called for the observations of the competent authority. In a statement setting out the grounds upon which he formed his "opinion" when he made the first Order on 19 April 1974, Tillekeratne set out reasons which were totally different from those asserted repeatedly by the Prime Minister. According to his statement, his "opinion" was as follows:

> The world at this time was undergoing a severe food shortage and its effect naturally was felt in our country. Therefore, the Prime Minister, a few months prior to action being taken against the Independent Newspapers Limited, declared a Production War and geared the entire machinery of government to the production of more food as the survival of people in this country, as it was in the rest of the world, was critically dependent on it. The people of this country immediately took to the production of various types of food, especially yams. Even among the various types of yams, a very large extent was to be under manioc, especially in homesteads. One of the major policy aims of this group of newspapers apeared to be to dissuade people from eating these yams. Death due to manioc poisoning is common at any time in this country. This group of newspapers, not taking into account the fact that such deaths were reported over the years and get scant attention, if at all, in the press, continued to highlight deaths of this type. This would have had an adverse effect on the cultivation and therefore brought about a shortage in supplies. This also brought about or may have brought about, a fear in the minds of people to cultivate this yam which would have negated the attempt of the people to grow their own food for survival.[2]

The order of closure served on the newspaper company was renewed

---

1. Ceylon Daily News, 29 April 1974. For a journalist's account of the trauma of the closure, see Iqbal Athas, "Midnight Drama at the SUN", Sun, 31 March 1977.

2. Special Presidential Commission, Third Interim Report, op. cit., at p.141.

every month until January 1977. For thirty-three months, the competent authority had regularly signed orders of closure in respect of a national newspaper group on the basis of an "opinion" that it was necessary to do so because that newspaper group was discouraging people from cultivating a particular subsidiary crop. His opinion did not appear to have been shared by the political authority responsible for invoking the state of public emergency. But whether or not it was, neither that "opinion" nor the reason offered by the Prime Minister in April 1974, appears to justify in any way the denial, for such an unconscionably long period of time, of the freedom of speech and expression, not only of the newspapers' proprietors and editors, but also of the large section ofthe population who had the right to receive the information and ideas which that newspaper group was seeking to disseminate.

Right to Free, Fair and Periodic Elections

On 3 October 1972, the 74-year old leader of the Federal Party, S.J.V.Chelvanayakam,Q.C., Member of Parliament for Kankesanturai, resigned his seat in the National State Assembly. In a statement to the Assembly on the same day, he said:

> It is claimed by the Government that a sizeable section of the Tamil people accept the Constitution. We deny this and want to give an opportunity to the Government to prove that claim. The best way in which that can be done is for me, as the leader of the Tamil United Front, to resign my seat in this Honourable House and recontest it on my policy and ask the Government to oppose me on its policy. Of course, the decision will be that of the Tamil people. My policy will be that in view of the events that have taken place the Tamil people of Ceylon should have the right to determine their future, whether they are to be a subject race in Ceylon or they are to be a free people. I shall ask the people to vote for me on the second of these alternatives. Let the Government contest me on that position. If I lose, I give up my policy. If the Government loses, let it not say that the Tamil people support its policy and its Constitution.[1]

The Constitution required the Clerk to the National State Assembly to inform the President that the seat of a member had fallen vacant; the President was thereupon required within one month, by notice in the Gazette, to order the holding of an election to fill the vacancy. The Ceylon (Parliamentary Elections) Order in Council 1946 provided that in every notice ordering the holding of an election, the

---

1. Ceylon Daily News, 4 October 1972.

President shall specify the day of nomination, not being less than sixteen days nor more than one month after the publication of the notice, and the place of nomination. These steps were duly taken in respect of the vacancy created by the resignation of Chelvanayakam. However, an emergency regulation made in November 1972 provided that:

> The nomination of candidates for the purpose of the election to be held to fill the vacancy for the Electoral District of Kankesanturai in the National State Assembly shall not take place for so long, and so long only, as Part II of the Public Security Ordinance is in operation in the area comprising that Electoral District or any part thereof, and accordingly that part of the notice published in Gazette Extraordinary No.31/8 of November 1, 1972, fixing the date and place of nomination of candidates for such election shall be deemed for all purposes to be of no effect.

This regulation was renewed every month until January 1975, and the impending by-election, which was intended by the Constitution to be held at least within a reasonable time, was thereby postponed for over two years. When it was eventually held on 6 February 1975, Chelvanayakam was re-elected by a majority which was treble that by which he had initially won that seat in 1970.[1]

An Assessment

International law recognises the right of a State to derogate from its obligation to protect human rights during times of public emergency. To describe the exceptional circumstances in which this may be done, the ICCPR uses the words "in time of public emergency which threatens the life of the nation".[2] ECHR has clarified the meaning to be given to this phrase by referring to "in time of war or other public emergency threatening the life of the nation".[3] ACHR has sought to qualify it further by referring to "in time of war, public danger, or other emergency that threatens the independence or security of a State Party".[4] Therefore, the internationally accepted minimum pre-requisite for any derogation by a State from its obligation to respect the fundamental rights of its citizens at

---

1. Times of Ceylon, 7 February 1975.
2. Art.4(1).
3. Art. 15(1).
4. Art. 27(1).

all times is the existence or imminence of a state of public emergency which actually threatens the life of the nation. In Lawless v. Ireland,[1] the European Court observed that the natural and customary meaning of these words is sufficiently clear: they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed. In Denmark, Norway, Sweden and Netherlands v. Greece,[2] the European Commission distinguished four separate elements in this definition, namely:

1. The public emergency must be actual and imminent.
2. Its effects must involve the whole nation.
3. The continuance of the organised life of the community must be threatened.
4. The crisis or danger must be exceptional in that the normal measures or restrictions permitted for the maintenance of public safety, health and order are plainly inadequate.

In Sri Lanka, however, any situation, whether localised or otherwise, which appeared to be incapable of being dealt with by or under the existing law, has been viewed as a state of public emergency. The threshold has also been lowered to meet a challenge to or criticism of the Government, to stifle political agitation, to frustrate strike action, and even to interfere with the election process. The use of the public security law to facilitate the Central Bank to substitute new currency notes for the old shows the extent to which the Government has been prepared to disregard the norms whose observance is vital to maintain the proper balance between State security and individual rights.

---

1. 3227/57, Judgment: 1 EHRR 15. In applying these principles, the European Court held that the existence on 5 July 1957 of a "public emergency threatening the life of the nation" had been reasonably deduced by the respondent Government from a combination of several factors, namely, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; the fact that this army was also operating outside the territory of the State, thus jeopardising the relations of the Republic of Ireland with its neighbour; and the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.

2. 3321-23/67 and 3347/67, Report: YB 12.

International law requires that any derogation from a State's obligation to respect human rights, following the declaration of a state of emergency, must be limited "to the extent strictly required by the exigencies of the situation".[1] In Ireland v. United Kingdom,[2] the European Commission observed that the justification for a measure does not follow automatically from a high level of violence: there must be a link between the facts of the emergency on the one hand, and the measure chosen to deal with it on the other. In this respect too, the Sri Lankan law and experience fall short of international standards. While the question whether a state of emergency exists or is imminent may, by its very nature, be incapable of being reviewed by a court, there is no reason why the validity of, or necessity for, an emergency regulation or an order made thereunder, should be non-justiciable. A court does not lack the competence to determine, on an objective examination of the material available to the State, in camera if need be, whether the detention of a person is warranted in terms of the law; or whether the closure of a group of newspapers, or the banning of a series of public meetings, or the postponement of a scheduled election, is "strictly required by the exigencies of the situation". The fact that proceedings are taken in a court in respect of such a matter is unlikely to impede governmental action to deal with the actual "emergency", and any inconvenience such proceedings may cause to the State authorities is simply the price which must be paid for keeping in rhythm the hearbeats of democracy.

However critical the "emergency" may be, international law insists that action be not taken in derogation of certain fundamental rights.[3] These are the right to life, freedom from torture, freedom from slavery and servitude, the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation, the right not to be punished on the basis of a retroactive law, the right to recognition as a person before the law, and freedom of thought, conscience and religion. Even in this regard, the Sri Lankan experience is in conflict with international standards. Emergency regulations have, on many occasions, extended the application of the death penalty for offences of comparative triviality

1. ICCPR, Art.4(1); ECHR, Art.15(1); ACHR, Art.27(1).
2. 5310/71, Report: 25 January 1976.
3. ICCPR, Art.4(1); ECHR, Art.15(2); ACHR, Art.27(2).

such as trespass and theft; while the inapplicability of the Prisons Ordinance to detainees and other prisoners has, in effect, deprived them of the protection which the law affords against inhuman or degrading treatment while in custody. The 1978 Constitution now expressly authorises derogation during a state of public emergency from the rule which prohibits the retroactivity of the criminal law.

CHAPTER VIII

A BILL OF RIGHTS

When in 1948 Jennings expressed the view that because in Britain "we do the job better" without a bill of rights, Ceylon too did not need to have one, he was, no doubt, expressing the hope that the standard bearer of the New Commonwealth would, in most respects, do its own job as well as the mother country. There was reason for him to be optimistic. It was an optimism which could have been rationally explained and which was shared by many in Ceylon at that time: few countries had emerged into Independence with such solid foundations of freedom.

History, unfortunately, has taken a different course. The informal constraints that operate in Britain are now virtually non-existent in Sri Lanka. The constitutional conventions of Westminster are rarely observed. A consensus between different competing forces is no longer in evidence. For instance, a unifying figure in the form of a constitutional Head of State does not now exist.[1] The second chamber has been abolished.[2] The elected legislature has extended its own life without recourse to a general election.[3] When a poll is held, it is usually accompanied by violence, intimidation and impersonation on a massive scale.[4] The Government has used its parliamentary majority to immobilise the leader of the largest political party in opposition to it by disfranchising her and then expelling her from the legislature.[5] Some years ago, Parliament even attempted

---

1. Under the 1978 Constitution, the President is both Head of State and Head of Government, as well as Chairman of the Cabinet and Commander-in-Chief of the Armed Services. The incumbent President is also the leader of the ruling political party.

2. The Senate was abolished in 1971. Other safeguards for minorities such as section 29 of the 1946 Constitution and an independent Public Service Commission ceased to exist in 1972.

3. The Fourth Amendment to the Constitution, passed by Parliament and approved at a referendum by 38 per cent of the registered voters, provided that the Parliament elected in 1977 shall continue for twelve years instead of six as previously provided in the Constitution.

4. Civil Rights Movement, Was the Referendum Free and Fair ? (Colombo: 1983).

5. Supra, pp.226-229.

to compel the execution of two prisoners despite their death sentences having been set aside by the appellate court.[1] The Government holds seventy-five per cent of the shares in one national newspaper group, controls another under the Business Acquisition Act, and kept a third sealed up for nearly three years under emergency regulations.[2] Judges have frequently been removed from office without cause or compensation or resort to the constitutional procedure.[3] Relations between the two major communities have seriously deteriorated, and new generations, educated separately in Sinhala or Tamil, are unable to communicate with each other even if they wish to. Indeed, for nearly half of its independent existence, Sri Lanka has been in a state of emergency, with its attendant censorship, preventive detention and police excesses. Therefore, while the United Kingdom may yet indulge in debate on whether or not it requires a bill of rights, the circumstances peculiar to Sri Lanka are such that a constitutional affirmation of fundamental rights appears to be vitally necessary to stem the tide which is moving rapidly from intolerance and authoritarianism towards absolutism.

Content, Form and Scope

According to John P.Humphrey, who was Director of the United Nations Human Rights Division from 1946 to 1966, there are few instruments which are more representative of the will and aspirations of the international community than is the Universal Declaration of Human Rights:

> The Universal Declaration of Human Rights reflects many different political philosophies. It had no father in the sense that Jefferson was the father of the American Declaration of Independence. Not even the Commission on Human Rights or the Third Committee of the General Assembly or the two combined can claim sole authorship. The Declaration is the work of literally thousands of people representing many points of view who contributed to the drafting through various United Nations bodies, the specialised agencies, and non-governmental organisations; and, although Western influences were undoubtedly the strongest, both Marxist-Leninist theory and

---

1. Supra, pp.68-71.
2. In August 1977, the Times of Ceylon Ltd was compulsorily acquired by the Government under this Act on the ground that it was in serious financial difficulties. It has since continued to function as an institution of government under the direction and supervision of the President.
3. Supra, Ch.IV.

> Communist practice were important, as were the claims of the politically and economically dependent countries.[1]

The content, form and scope of each subsequent bill of rights has been determined largely by circumstances attendant upon its birth. The omission in ICCPR of certain rights declared to be universal eighteen years earlier in UDHR reflects the collision of interests which resulted in its final form.[2] Similarly, the ECHR and its progressive expansion by subsequent protocols, reflects the changing priorities of contemporary European societies.[3] Many of the comprehensive statements of fundamental rights in Commonwealth constitutions were virtually imposed upon the about-to-be-independent territories by the British Government in constitutional settlements agreed upon for the protection of minority communities and for other equally relevant considerations;[4] a few resulted from the recommendations of post-independence constitutional commissions, as in Trinidad and Tobago,[5] from a combination of idealism and hard bargaining within a constituent assembly as in India, or as a reaction to colonial repression in the euphoria of newly-won independence as in Kenya. The Sri Lankan experience has been different. Both statements of fundamental rights were drafted and adopted by the very persons whose power and authority they were supposed to delimit. Neither was submitted for approval to the people whose rights they were seeking to assert. Additionally, the 1972 formulation was determined by reference to a particular political ideology and was intended not to obstruct, rather than to facilitate, the realisation of those political goals.

Sri Lanka embarked on the time consuming and impractical exercise of constructing a new set of fundamental principles. The

---

1. John P.Humphrey, "The World Revolution and Human Rights", Human Rights, Federalism and Minorities (Toronto: Canadian Institute of International Affairs, 1970), p.148, at 155.

2. Among the significant omissions are the right to own property and the prior right of parents to choose the kind of education that should be given to their children.

3. The protocols have introduced the right to the peaceful enjoyment of one's possessions, the right to education, the right to free elections at reasonable intervals by free ballot, the right not to be deprived of one's liberty merely on the ground of inability to fulfil a contractual obligation, the right to liberty of movement, and the freedom from expulsion, whether individually in the case of a national or collectively in the case of aliens.

4. For instance, the Constitutions of newly independent States in the Pacific and the Caribbean.

5. Report of the Constitutional Commission of Trinidad and

procedures in both the Constituent Assembly of 1970 and the Select Committee of 1977 were designed to ensure that these fundamental principles were limited in content and subject to restrictions which the particular government then in office considered to be desirable and necessary. In the result, both statements fell short of international standards. The ICCPR today represents the minimum standard acceptable to the international community. It is a reasonably adequate base for a national bill of rights. It can be improved upon, as for instance the ECHR has already done by specifying the grounds upon which a person may be deprived of his liberty. But there appears to be no justification for derogating from its contents.

ICCPR, Article 2, in fact, requires each State Party "to adopt such legislative or other measures as may be necessary" to give effect to the rights recognised therein, and "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy". Therefore, a State which accedes to it, as Sri Lanka has now done, undertakes to abide by the guarantees contained therein and to provide an effective national remedy for their violation. The obligation is not only to make available a national remedy, but also to incorporate in the national law the principles contained in the ICCPR. This is an additional reason why a bill of rights ought to be in conformity, at least, with the provisions of the ICCPR.

To whom should a bill of rights be addressed ? The 1978 Constitution provides a remedy against the executive and, to a limited extent, against the legislature. There is no sufficient reason why, like other statutory provisions which regulate the exercise of its jurisdiction, the statement of fundamental rights should not bind the judiciary and be enforceable in respect of judicial acts as well. While traditionally, a bill of rights seeks to protect the individual from unjustified interference by the State or its agencies, the changing patterns of organisation of modern society would appear to require that such protection be afforded against the non-governmental sector too. Corporations, trade unions, educational establishments, political parties and other such conglomerations of power, and even individual citizens, are as capable of infringing the rights and freedoms of others as any public authority and ought, therefore, to be restrained from doing so.

Tobago (Chairman: Sir Hugh Wooding, Chief Justice), 1974. For fundamental rights, see pp.18-27.

Constitutional Status

The Sri Lankan statement of fundamental rights is already entrenched in a written constitution which is the supreme law of the country. To that extent, its constitutional status is settled as it properly ought to be. The rights declared and recognised therein are required to be "respected, secured and advanced by all the organs of government".[1] Parliament, whose function is to make law, is one such organ. But when Parliament makes a law, "no court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of such Act on any ground whatsoever".[2] Therein lies its inherent weakness. The provisions which enable a bill to be examined for constitutionality by the Supreme Court are capable of being, and have often been, circumvented by the Cabinet by the simple manoeuvre of labelling a bill as "urgent in the national interest". This would not matter so long as this procedure of pre-enactment or anticipatory review is regarded only as an independent scrutiny, a monitor, or a warning device for the legislature, and not as a substitute for the judicial review of a legislative act which is alleged to infringe a fundamental right.

Pre-enactment review and post-enactment review are not mutually exclusive concepts. The former enables a bill to be examined in order to determine whether any of its provisions conflict with the Constitution in any respect. If they do, such provision may be struck out and Parliament may not vote thereon. By resort to the latter, a Court does not examine a legislative act in the abstract, but only in relation to an impugned executive act which claims legitimacy by reference thereto. Having done so, the Court may adopt one of two possible courses. It may hold that, having regard to the bill of rights, the statute has been wrongly relied upon as authority for the impugned executive act. It will conclude thus by construing and applying the statute so as not to abrogate, abridge or infringe the bill of rights. Thereupon, it will strike down the executive act, but not the statute or any of its provisions. Alternatively, in the face of an irreconcilable conflict between the bill of rights and a statute, it may declare the latter to be, to the extent necessary, void ab initio. It would be unfortunate if when a Court does so, Parliament were to regard it as an infringement of its own

---

1. Art.4(d).
2. Art.80(3).

"Sovereignty".[1] Parliament is itself the creature of the Constitution and it is from the Constitution alone that Parliament derives its own authority. When a Court determines that Parliament has stepped outside the parameters of that authority, it is only perfo-rming its own legitimate function of applying the supreme law. Parliament's status as the sovereign law-making body is not in issue.

Article 16 of the 1978 Constitution provides that all existing law shall be valid and operative notwithstanding any inconsistency with fundamental rights. This is another provision which is incompatible with the constitutional status of a bill of rights. No question of parliamentary supremacy arises here since existing law is the creation of other legislatures, some of which functioned under a colonial governor and never laid claim to sovereignty. An existing law ought, therefore, to be construed and applied so as not to abrogate, abridge or infringe the bill of rights. But where such law is incapable of such construction, it ought to that extent cease to have effect. It is, of course, not contrary to constitutional practice or equity, that any determination that a provision of a statute is void ab initio should operate only from the date of such determination.

Interpretation, Enforcement and Implementation

An independent and impartial judiciary is essential for the effective protection of human rights. This cannot be achieved by merely including safeguards in a Constitution which superficially offer the Judges security of tenure. There must be a desire on the part of the executive to respect that independence, and a manifestation of that desire in appropriate form. There must be an effort on the part of the judiciary to assert and maintain that independence, as well as a consciousness of its own responsibilities. Finally, there must be a genuine belief among the people that such independence actually exists, a confidence in the ability and the integrity of the institution.

The interpretation and enforcement of a bill of rights is the function of the judiciary. The 1978 Constitution has vested this jurisdiction exclusively in the Supreme Court by providing not only

---

1. See O.Hood Phillips, "Self-Limitation by the United Kingdom Parliament", (1975) 2 Hastings Constitutional Law Quarterly, 443, where it is argued that "self-limitation" rather than "sovereignty" is the relevant concept in this matter.

a special remedy, but also a procedure of reference by subordinate courts. While not criticising these arrangements, an argument can be adduced for allowing human rights issues to be decided in the original courts and in the Court of Appeal as and when they arise in the course of ordinary litigation. Such issues, should they arise, would probably be collateral to other issues, all of which would require to be determined upon findings of fact reached on the evidence led in such proceedings. Apart from probably reducing the cost of litigation, a broadening of the available forum would also serve an educative purpose by making human rights issues part of the ordinary, everyday process of adjudication in courts throughout the country.

In this respect, a commission charged with promoting the protection of human rights can play a valuable role in their implementation.[1] Such a commission should have the resources to conduct research and engage in educational activities, as well as the power to investigate, and institute proceedings in respect of, infringements of human rights. In a country where legal expertise is available only at a price which few can afford to pay, and human rights consciousness has not yet been seriously inculcated in the people, such a commission would have considerable potential.

Derogation

Judicial review during a state of emergency is essential if such state of emergency is to be maintained as an exceptional state within the normal legal order. The 1978 Constitution now defines the procedure for declaring a state of emergency, specifies its ordinary duration, and requires extraordinary legislative authority for any extension. Nevertheless, the Sri Lankan experience shows that Emergencies can quite easily acquire a state of hard durability, particularly when a government begins to find it a more convenient alternative legal order, and emergency regulations made "in terrorem" prove more effective than ordinary statutes in dealing with political challenges to its own authority. Accordingly, it appears to be necessary that the Constitution should define the situations which justify the declaration of a state of emergency and specify which rights should remain non-derogable under any circumstances, and which may be derogated from and when: a threat of civil disorder being clearly distinguishable from a natural disaster. It is also neces-

1. See, for example, the Human Rights Commissions in Canada, and the Commission for Racial Equality (Race Relations Act, 1976)

sary that the regular courts should have jurisdiction, not only to examine whether detention orders and other executive action infringing on an individual's rights formally comply with the procedural requirements of an emergency regulation, but also the question of the adequacy of the reasons offered for such action.

International Enforcement Machinery

It is desirable that a bill of rights should be complemented by enforcement machinery at the international or regional level. Incompatibility with state sovereignty is no longer an issue. International human rights law, in a radical departure from traditional international law, now recognises the individual as a subject, rather than an object, of international law. Accordingly, under several recent human rights treaties, the individual is regarded as having rights which are directly enforceable at the international plane, and is accorded the right to seek a remedy from an international tribunal in respect of an act or omission of his own Government.

1. International Covenant on Civil and Political Rights. When Sri Lanka acceded to the ICCPR, it also made a declaration under Article 41, recognising the competence of the Human Rights Committee established under that Covenant to receive and consider communications from other States Parties, who had made similar declarations, to the effect that Sri Lanka "is not fulfilling its obligations" under the Covenant. Upon receiving such a communication, the Committee is required to "bring the matter to the attention" of the Sri Lanka Government, whereupon that Government "shall afford the State Party which sent the communication an explanation or other statement in writing clarifying the matter". If the matter is not "adjusted to the satisfaction of both States Parties", the Committee may, upon a reference to it by either State Party, "make available its good offices to the States' Parties concerned with a view to a friendly solution of the matter on the basis of respect of human rights and fundamental freedoms". Failing to reach such a solution, the Committee is required to prepare a report containing "a brief statement of the facts", and to communicate that report to the States Parties concerned. When making the Article 41 declaration, the Sri Lanka Government must have known that, apart from the fact that the

---

and the Equal Opportunities Commission (Sex Discrimination Act, 1975) in the United Kingdom.

procedure contemplated was likely to be expensive, protracted and very ineffective, a Sri Lankan citizen was unlikely to succeed in activating another State to come to his aid, which it would have done at the cost not only of jeopardising its own relations with Sri Lanka, but also of exposing itself to a retaliatory attack in the same forum.

What the Sri Lanka Government could, and ought to, have done was to have acceded to the Optional Protocol to the ICCPR, and thereby recognised the competence of the Human Rights Committee "to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation . . . of any of the rights set forth in the Covenant". Had that been done, and an individual complaint was in fact made, the Government's only obligation would have been to submit to the Committee, within six months of being required, a written explanation or statement clarifying the matter and the remedy, if any, that may have been taken by it. The Committee is required to consider the communications and then "forward its views to the State Party concerned and to the individual". The Committee does not function as a tribunal; it does not hear the complainant, nor does it examine witnesses. Yet the fact that there exists an international body to which a citizen can ultimately take his grievance after he has exhausted all his domestic remedies, is a matter that would probably operate, in some measure at least, in the minds of those who constitute the Government as well as the Court. According to H.W.Jayewardene,Q.C., the brother of the Sri Lankan President, who is now the country's chief spokesman on human rights matters, the Government is considering the question of accession to this protocol; "but in view of the fact that there is an express remedy given in the Constitution, there is no immediate urgency in this regard".[1] It must be noted, however, that the Optional Protocol is not, and was not intended to be, a substitute for a domestic remedy.

2. Commonwealth Commission of Human Rights. At the Commonwealth Heads of Government Meeting in Lusaka in 1979, the Government of The Gambia proposed the establishment of a Commonwealth Commission of Human Rights which would, inter alia, investigate and pronounce upon complaints made by individuals of alleged human rights

1. Ceylon Daily News, 29 May 1980.

violations. A working committee appointed by the secretary-general to examine this proposal recommended the establishment of a special unit within the Commonwealth Secretariat, charged with the "promotion" of human rights, and the appointment of a Commonwealth Advisory Committee on Human Rights, with authority to inquire into and report to Heads of Governments on "situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms". The working committee, which included a Sri Lankan representative, H.W. Jayewardene,Q.C., emphasized that, in order not to "duplicate the work of other global or regional bodies in the field of human rights", the proposed advisory committee "would not be empowered to consider any communication submitted by an individual claiming that he or she was the victim of a violation of human rights". Indeed, the Sri Lanka Government, in its response to the Gambian proposal, also stressed the need not to duplicate the functions of existing international machinery.[1] The Gambian proposal is therefore unlikely to materialise in the form in which it was originally presented. But the reason urged against it, both by the Sri Lanka Government and by Jayewardene, makes it all the more necessary for Sri Lanka to accede to the Optional Protocol.

3. Asian Convention on Human Rights. An Asian Convention on Human Rights has been discussed over many years, beginning at the 1966 Colloquium on the Rule of Law convened by the International Commission of Jurists and held in Colombo.[2] These discussions have been confined to non-governmental organisations. Today, Asia (including the Pacific) remains the only region in the world where the principle of collective enforcement has not been found acceptable to governments. This has been attributed to a lack of a common consciousness on the question of human rights; the absence of a discernible common identity among Asian countries; and the non-existence of the conditions which stimulate regional strategies in this field.[3] These factors are probably true if what is expected

---

1. Commonwealth Secretariat: Report of the Commonwealth Working Party on Human Rights (London:1981). See also Interim Report (1980).

2. A more concrete proposal came from the Conference of South Asian and Pacific Jurists on the Freedom of Movement held in Bangalore in 1967. More recently, the subject has been revived at a Lawasia Conference: Ceylon Daily News, 14 January 1980. See also Nihal Jayawickrama, "A Council of Asia", Ceylon Daily News, 26 January 1967.

3. Daniel Rowland, "The Establishment of Appropriate Internat-

to materialise is a regional convention applicable from Syria and Iraq in the west to Japan and the Philippines in the east, from China and Korea in the north to Singapore and the Seychelles in the south. That appears to be an unreal expectation, at least for the time being. An Asian Convention should aim to have a much less ambitious beginning. The Association of South East Asian Nations (ASEAN), which seeks primarily to create political stability in the region, might have served as a nucleus if not for the fact that its member States - Indonesia, Malaysia, Philippines, Singapore and Thailand - have so far shown very little concern for individual liberty. On the other hand, a respect for human rights based upon a common cultural heritage, such as Buddhism, which is still the dominant spiritual influence not only in Sri Lanka, but also in Burma, Thailand, Nepal, Bhutan, Laos, Japan and in parts of India, could well form the basis for a regional understanding on human rights.

Just as the outlawing of murder has not prevented man from killing his fellowmen, a bill of rights will not prevent him from violating the rights of others. But if the Penal Code has succeeded in establishing norms which most men of good sense and conscience now strive to observe, a bill of rights must surely, in due course, create a consciousness in man, whether his role in society be that of making, applying or enforcing the law, or of simply living his own life, that there are higher standards and more exalted values, to which all men, be they meek or mighty, must eventually conform. That consciousness will follow when it is realised that rights are always accompanied by duties, and that it is only the concern of man for the rights of others that will ensure the continued observance of, and respect for, his own inalienable rights. For, as the poet foresaw many centuries ago:

> No man is an island; entire of itself;
> every man is a piece of the continent,
> a part of the main; if a clod be washed away
> by the sea, Europe is the less, as well as if
> a promontory were, as well as if a manor of
> thy friends or of thine own were; any man's
> death diminishes me, because I am involved in
> Mankind; And therefore never send to know
> for whom the bell tolls; It tolls for thee.[1]

---

ional Machinery for the Enforcement and Protection of Human Rights in the Lawasia Region: Working Paper, 6th Lawasia Conference, 1979.

1. John Donne (1571-1631), Meditation XVII.

APPENDIX 1

Prime Minister
Ceylon

9th December 1970.

My dear Minister,

I have been able during the last few weeks to devote some time to a study of the set of basic resolutions which have been prepared by you. I have also discussed them with some of the senior Ministers in my Party. The observations that follow represent not only my own thinking, but also that of my Party.

2. According to the basic resolutions proposed by you, the power of the State is concentrated in one body, namely, the National Assembly. Consequently, there will come into existence not a fundamental law under which all authorities will have to function, but a National Assembly which will exercise or at least control the exercise of every power of the State including judicial power. I should like to say that I am averse to a concentration of power of this kind.

3. The resolution adopted by the Constituent Assembly contemplates the establishing of a Constitution which will be the fundamental law of Sri Lanka. To give effect and meaning to this resolution, the new Constitution should provide that even the Legislature should be bound by this fundamental law. There appears to be no better way of securing this result than by giving power to an independent body like an established Court to examine whether any piece of legislation is contrary to such fundamental law. The arrangements contemplated for this purpose in the basic resolutions proposed by you do not appear to be satisfactory. To give the power of judicial review to the Courts is not to establish the superiority of the Courts over the Legislature. It only proceeds on the assumption that the power of the people is superior to both the Judiciary and the Legislature; it means that where a law conflicts with the will of the people as enshrined in the Constitution, the Courts ought to give effect to the Constitution rather than to the law which is in breach of it. If, however, the will of the people as contained in the Constitution subsequently undergoes a change, the provisions for amendment of the Constitution should be sufficient to meet such a situation.

4. We are also committed to include fundamental rights and freedoms in the new Constitution. The concept of fundamental rights as I understand it when incorporated in a Constitution is intended primarily to be a limitation on legislative and executive abuses of power. Here again I think that the new Constitution should give a sufficient assurance to the citizens of this country that legislatures and governments of the future will be bound to observe the fundamental rights written into the Constitution, and that they will

not remain mere declarations of intent which can be departed from by any future legislature if it were so minded. I am myself of the view that there should be no impediment in the new Constitution to the realisation of socialistic objectives. If it is anticipated that the inclusion of any particular fundamental rights will stand in the way of implementing socialistic policies, decisions should be taken in regard to each one of such fundamental rights, that is, as to whether a particular right should find a place in the Constitution, and if so whether it should be circumscribed in any way.

5. In regard to the basic resolution which refers to elections on "an equal and universal suffrage on a territorial basis", I think the present arrangements which require delimitation to be based on a number of factors such as the total number of residents, the area and the number of citizens in a province, and the transport facilities, the physical features and community or diversity of interests of the inhabitants, are satisfactory and require no substantial change.

6. Passing on to some matters of detail, I can see no objection to a President who as the Head of State would assent to legislation, to a parliamentary executive which would be in charge of the government, to a system of courts, and to a body having powers of appointment and disciplinary control over public and judicial officers, except perhaps at the higher levels of the public service.

7. I have glanced through a summary of representations received by your Ministry from the public. I find from these and other sources that there appears to be a considerable demand in the country for Buddhism as a State Religion, and for the protection of its institutions and traditional places of worship. Some provision will have to be made in the new Constitution regarding these matters without, at the same time, derogating from the freedom of worship that should be guaranteed to all other religions.

8. I note that the proposed basic resolutions deal with the language question in considerable detail. There is already ordinary legislation covering this topic and I doubt whether it would be wise for us to open this matter for debate again at this stage. The better course would appear to be to let those laws operate in the form in which they are.

9. For convenience of discussion, I have had some of the ideas which I have set out above put into the form of brief propositions. They are not exhaustive. A copy of these propositions is annexed.

Yours sincerely,

Sirima R.D.Bandaranaike

Prime Minister.

The Hon. Colvin R.de Silva,
Minister of Plantation Industry
and Constitutional Affairs,
Colombo.

Appendix 1 (continued)

Sovereignty of the National Assembly

The Constitution envisaged by the Minister proceeds upon the basis that the people have abdicated the totality of State power to the National Assembly. A feature of any democratic Constitution, however, is the delegation by the people of State power to different institutions. For example, legislative power is delegated to a legislature elected by the people. Executive power is delegated to persons who are responsible to the elected Legislature. Judicial power is entrusted to Judges whose independence is ensured, but who are in the ultimate analysis responsible to the elected representatives. This is a feature which is common to all Constitutions in the democratic world which have been prepared with the free participation of the people. On the other hand, in Constitutions which have been imposed on people as a result of political revolutions, one finds this total concentration of power in a single authority whether it be a National Assembly, a junta or a sole Leader.

It would be wrong to assume that a political revolution has taken place in this country. What happened in 1956 was that the late Mr.S.W.R.D.Bandaranaike set in motion, within the existing political framework, a social revolution. In 1960 and in 1970 this social revolution has been carried further, also within the existing political framework. Therefore, it would be seen that it has been possible for us within the existing political framework to effect changes which in other countries have been achieved only by a complete overthrow of that political framework. There appears to be, therefore, no real need to make drastic and radical changes in the present political framework.

The virtue in a system based upon a division of powers is that there is a built in system of checks and balances which prevents any one organ of Government from acting contrary to the wishes of the people which are expressed in the fundamental law - the Constitution. If the Legislature were to exceed its powers and legislate contrary to the Constitution the Courts will declare such legislation invalid. If the Judges misconduct themselves the Legislature has the power to remove them from office. If the Executive acts contrary to the wishes of the Legislature, the Legislature has the power to replace it with another Executive. A separation of powers, therefore, constitutes the surest guarantee that the rights of the people remain with the people.

The Fundamental Rights and Freedoms

We have so far not had any guarantee of Fundamental Rights in either our present or previous Constitutions, but if it is intended to provide for fundamental rights in the new Constitution such provision must be genuine and meaningful and not be a fraud on the people.

Res.5(i) - (ix) set out several fundamental rights and freedoms. Res.(x) makes it possible for a National Assembly to pass legislation which infringes these fundamental rights. Such legislation could be passed by a simple majority. There is no provision

Appendix 1 (continued)

either in Res.5 or elsewhere which permits a citizen to enforce any of these fundamental rights. Without the power to enforce, the Chapter on Fundamental Rights will merely serve as an adornment in the Constitution without any meaning whatsoever to the citizen.

In 1959 when the revision of the Constitution was being considered by the then Parliament, Mr.S.W.R.D.Bandaranaike approved of, for inclusion in the new Constitution, the following provision in regard to fundamental rights: Right to enforce Fundamental Rights. The right to move the highest tribunal by appropriate proceedings for the enforcement of fundamental rights and to obtain suitable redress for which purpose such tribunal shall be vested with the power to issue the necessary directions or orders or rights requisite for the enforcement of fundamental rights.

The Constitutional Court

The new Constitution seeks to remove the right of the highest Court to declare a law invalid if such law is in conflict with the Constitution. The reason for doing this appears to be a fear that the Court would prevent the implementation of socialist legislation.

It must be noted at the outset that our Courts have never stood in the way of social legislation. Our Courts have consistently refrained from striking down legislation except where they considered that such legislation resulted in an erosion of their own powers. It is possible without much difficulty to provide in the Constitution for the creation by Parliament of tribunals other than Courts for the purposes of exercising judicial or quasi-judicial power whenever it becomes necessary to do so for the fulfilment of economic and social needs, while at the same time ensuring that the Courts will not be in a position to declare such action invalid. If it has been possible under the present Constitution for the Courts to strike down such legislation, it was only because adequate provision did not exist in the Constitution to prevent this happening.

Reference has been made in the Ministry note to the Official Language Act and the view has been expressed that owing to a District Court judgment of 1964 it is not yet certain whether this Act is good law or not. It must be noted that the District Court judgment of 1964 did not have the effect of nullifying the Official Language Act or of preventing its implementation. It is not correct, therefore, to say that uncertainty exists in regard to the validity of this law. A simple solution to this problem would be to deprive all lesser Courts of the power to express their views on the validity of legislation and to vest that power exclusively in the highest Court. In this way the question whether a legislative Act violates the Constitution or not could be decided by the highest Court without any delay whatsoever.

The Constitutional Court which is contemplated does not appear to be an effective instrument. Only four classes of persons are permitted to invoke the Constitutional Court, namely, the Attorney-General, the Leader of a recognised Party in the National Assembly, a prescribed number of members of the National Assembly, and the Speaker. The duty of the Attorney-General is to advise the

Appendix 1 (continued)

Government in regard to the validity of legislation and one could hardly expect him to initiate action thereafter to have such legislation tested in another forum. If a prescribed number of members of the National Assembly wish to question the validity of legislation there would be no difficulty in their persuading a Party Leader to take the initiative. The Speaker is most unlikely to have any firm views on proposed legislation especially if such legislation had been approved by his own legal advisor who is the Attorney-General. Therefore, one is left with the position that only Party Leaders in the Assembly have the right to question the validity of the proposed legislation. If the Party Leaders, for example, agree among themselves to extend the life of the National Assembly indefinitely, or to set themselves up as a Junta in place of the President and Council of Ministers, there is little that anybody could do about it. It is significant that the citizen, the voter, the common man, on whose behalf after all legislators are said to be acting, is deprived completely of the power to ensure that such legislators do not act in excess of or in abuse of their mandate.

It is relevant to note that when the revision of the Constitution was being contemplated in 1955 [sic] the Select committee headed by Mr.S.W.R.D.Bandaranaike expressed its views on this matter as follows:

> The Committee considered the question of the Privy Council as a final Court of Appeal, arising from Question No.A6 of the Questionnaire. They were of the opinion that appeals to the Privy Council should be discontinued, but that a new Judicial Tribunal should be set up to adjudiciate on Constitutional issues as well as to entertain appeals from the Supreme Court.

APPENDIX 2

TABLE 28

PUISNE JUSTICES OF THE SUPREME COURT
1948 - 1973

Judge	Previous Appointment
E.F.N.Gratiaen,K.C.	Member of Parliament (Nominated)
E.H.T.Gunesekera	Permanent Secretary to the Ministry of Justice
M.F.S.Pulle,K.C.	Solicitor-General
V.L.St.C.Swan	Permanent Secretary to the Ministry of Justice
H.A.de Silva	District Judge
N.K.Choksy (acting)	
L.M.D.de Silva,K.C.[1]	
H.W.R.Weerasuriya	Acting Solicitor-General
K.D.de Silva	District Judge
M.C.Sansoni	District Judge
H.N.G.Fernando	Legal Draftsman
L.W.de Silva (acting)	District Judge
T.S.Fernando,Q.C.	Acting Attorney-General
N.Sinnetamby	District Judge
L.B.de Silva	Permanent Secretary to the Ministry of Justice
H.W.Tambiah,Q.C.	
K.Herat	
A.W.H.Abeysundera,Q.C.	Legal Draftsman
P.Sri Skanda Rajah	District Judge
G.P.A.Silva	Permanent Secretary to the Ministry of Justice
A.L.S.Sirimanne	District Judge
V.Manicavasagar	District Judge
A.A.A.Alles	Solicitor-General
V.Siva Supramaniam	District Judge
G.T.Samarawickrema,Q.C.	
V.Tennekoon,Q.C.	Solicitor-General
C.G.Weeramantry	
O.L.de Kretser	District Judge
S.R.Wijetilleke	District Judge

Appendix 2 (continued)

Judge	Previous Appointment
V.T.Pandita Gunewardene	Bribery Commissioner
V.T.Thamotheram	Solicitor-General
H.Deheragoda	Solicitor-General
C.B.Walgampaya	District Judge
J.Pathirana	
D.Wimalaratne	District Judge
T.W.Rajaratnam	
D.Q.M.Sirimanne	District Judge

1. This was an appointment of limited duration made in order to enable him to qualify for appointment to the Judicial Committee of the Privy Council. He had previously acted as a Puisne Justice.

ABBREVIATIONS

ACHR	...	American Convention on Human Rights.
AIR	...	All India Reporter.
ALJ	...	Australian Law Journal.
All E.R.	...	All England Law Reports.
BLP	...	Bolshevik Leninist Party.
CD	...	Collection of Decisions, European Commission on on Human Rights (1966-1974).
CIC	...	Ceylon Indian Congress.
CILSA	...	Comparative and International Law Journal of Southern Africa.
CJHSS	...	Ceylon Journal of Historical and Social Studies.
CJJ	...	Commonwealth Judicial Journal.
CLB	...	Commonwealth Law Bulletin.
CLR	...	Commonwealth Law Reports.
CLW	...	Ceylon Law Weekly.
CP	...	Communist Party.
DCC	...	Decisions of the Constitutional Court.
DR	...	Decisions and Reports, European Commission on Human Rights (1975-1981).
EA	...	East African Reports.
ECHR	...	European Convention on Human Rights and Fundamental Freedoms.
EHRR	...	European Human Rights Reports.
FP	...	Federal Party.
HCLQ	...	Hastings Constitutional Law Quarterly.
HMSO	...	Her Majesty's Stationary Office.
HRJ	...	Human Rights Journal.

HRR	...	Human Rights Review.
ICCPR	...	International Covenant on Civil and Political Rights.
ISESCR	...	International Covenant on Economic, Social and Cultural Rights.
ICJ	...	International Commission of Jurists.
ICLQ	...	International and Comparative Law Quarterly.
Ind.	...	Independent.
JAL	...	Journal of African Law.
JB	...	Juristische Blatter (Austria).
Judgment	...	Judgment of the European Court of Human Rights.
LP	...	Labour Party.
LQR	...	Law Quarterly Review.
LSSP	...	Lanka Sama Samaj Party.
Mal.L.R.	...	Malaya Law Review.
NJ	...	Netherlands Jurisprudentie (Netherlands).
NJW	...	Neue Juristische Wochenschrift (Federal Republic of Germany).
NLR	...	New Law Reports.
OUP	...	Oxford University Press.
Report	...	Report of the European Commission of Human Rights.
SCC	...	Supreme Court Circular.
S.C.M.	...	Supreme Court Minutes.
SCR	...	Supreme Court Reports (Canada: when preceded by square brackets; and India: when preceded by round brackets).
SLFP	...	Sri Lanka Freedom Party.
SLR	...	Sri Lanka Reports.
S.P.	...	Sessional Paper.
TC	...	All Ceylon Tamil Congress.
UDHR	...	Universal Declaration of Human Rights.

UHR	...	Universal Human Rights.
UNP	...	United National Party.
US	...	United States Reports.
VRU	...	Verfassung und Recht in Ubersee.
YB	...	Yearbook of the European Convention on Human Rights (1966-1978).

SOURCES CONSULTED

Abram, Morris B. "Freedom of Thought, Conscience and Religion" (1962) ICJ Journal, Vol.VIII, 43.

Aguda A, "Judicial Protection of some of the Fundamental Rights in Nigeria and in the Sudan before and during military rule", (1972) 16 JAL, 130.

Aiko, D.O. "Fundamental Human Rights and the military regime in Nigeria: What did the Courts say ?", (1971) 15 JAL, 213.

Alexis, Francis. "When is An Existing Law Saved ?", (1976) Public Law, 246.

Amerasinghe, C.F. "Recent Retrospective Legislation in Ceylon and the Rule of Law", (1964) CJHSS, 112.

- "The Legal Sovereignty of the Ceylon Parliament", (1966) Public Law, 65.

Defamation and other aspects of the action iniurarum in Roman Dutch Law. Colombo: Lake House Investments Ltd, 1968.

- The Doctrines of Sovereignty and Separation of Powers in the Law of Ceylon. Colombo: Lake House Investments Ltd, 1970.

Amnesty International. Report of a Mission to Sri Lanka: 9-15 January, 1975, 2nd ed. London,1975.

Ancel, Marc. "Capital Punishment Today", (1969) 2 ICJ Review, 33.

Arran, Earl of. Bill of Rights.

Athas, Iqbal. "Midnight Drama at the SUN", Sun, 31 March 1977.

Athulathmudali, L.W. "Constitutional Interpretation - the Sri Lanka Experiment", (1975) Mal.L.R.Legal Essays, 188.

Balasuriya, Tissa, ed. Logos, Vol.16: Race Relations in Sri Lanka. Colombo: Centre for Society and Religion, 1977.

Bandaranaike, Felix R.D. Cabinet Memorandum No.117/72 of 20 March 1972: Restructuring the Courts System.

- Coup d'etat: Statement read on behalf of the Government in the House of Representatives on 13 February 1962. Colombo: Government Press, 1962.

- Letter dated 4 November 1970 to Colvin R.de Silva.

- Letter dated 1 August 1971 to Sirima R.D.Bandaranaike.

- Letter dated 4 September 1972 to T.S.Fernando.

- Letter dated 15 September 1973 to Colvin R.de Silva.

- Letter dated 25 September 1972 to M.D.D.Peries.

- Letter dated 27 November 1972 to Colvin R.de Silva.

- Letter dated 17 December 1972 to Colvin R.de Silva.

- Letter dated 8 January 1973 to Sirima R.D.Bandaranaike.

Bandaranaike, S.W.R.D. Speeches and Writings. Colombo: Govt.Press, 1963.

- Towards a New Era: Selected Speeches made in the Legislatures of Ceylon, 1931-1959. Colombo: Govt.Press, 1961.

Bandaranaike, Sirima R.D. Letter dated 9 December 1970 to Colvin R.de Silva.

- Statement made in the House of Representatives on 23 March 1971. Ceylon Today, Vol.XX, Nos.3-4, p.9.

- Speech broadcast in April 1971. Ceylon Today, Vol.XX, Nos.3-4, p.5.

- Statement made in the House of Representatives on 20 July 1971. Ceylon Today, Vol.XX, Nos.7-8, p.6.

- Minutes of Discussion with, on 12 July 1971.

- Minutes of Discussion with, in January 1973.

Basu, Durga Das. "Constitutional Protection of Civil Rights in India", (1958) ICJ Journal, 157.

Black, Jnr, Charles L. "Is There a British Bill of Rights ?" (1973) 89 LQR, 173.

Boston, Lord. "Arguments against a Bill of Rights", Do We Need a Bill of Rights ?, ed. Colin Campbell. London:Temple Smith, 1980, p,23.

Brinkman, Gisbert. "The West German Federal Constitutional Court: Political Control Through Judges", (1981) Public Law, 83.

British Institute of Human Rights. Report of a Symposium on Guarantees for Human Rights in the United Kingdom, 1976.

- Memorandum submitted to the Select Committee of the House of Lords on a Bill of Rights.(1977).

Barwick, Sir Garfield. The Use of Judges to Chair Commissions of Inquiry and Tribunals. A Paper submitted to the meeting of Commonwealth Chief Justices, Canberra, 1980.

Brownlie, I. Basic Documents on Human Rights. 2nd ed. Oxford,1981.

Carnegie, A.R. "Judicial Review of Legislation in the West Indian Constitutions", (1971) Public Law, 276.

Census and Statistics, Department of. Statistical Abstract of the Democratic Socialist Republic of Sri Lanka - 1977. Colombo: Dept. of Govt.Printing, 1979.

Ceylon, Government of. Civil List, 1954. Colombo: Govt.Press, 1954.

- Civil List, 1955. Colombo: Govt.Press, 1955.

- Civil List, 1959. Colombo: Govt.Press, 1959.

- Sessional Papers:

S.P.XVII-1943: Declaration by His Majesty's Government, 26 May, 1943; Statement by the Ministers on the Reform Declaration by His Majesty's Government, 8 June 1943.

S.P.XII-1944: Statement made by the Secretary of State in the House of Commons on 5 July 1944.

S.P.XIV-1944: Reform of the Constitution: Explanatory Memorandum dated 11 September 1944 on the Constitutional Scheme formulated by the Ministers in accordance with His Majesty's Government's Declaration of 26 May 1943 and subsequently withdrawn.

S.P.XXII-1953: Final Report of the Official Languages Commission.

S.P.XXI-1954: Interim Report of the Commission on Higher Education in the National Languages.

S.P.XI-1964: Final Report of the Press Commission.

S.P.V-1964: Report of the Special Committee appointed to inquire into and report on the police arrangements on the 8th of January 1966 in connection with the motion in the House of Representatives on the Regulations under the Tamil Language (Special Provisions) Act.

S.P.XXI-1970: Final Report of the Police Commission.

S.P.IV-1977: Report of the Commission of Inquiry appointed to inquire into and report on the circumstances and causes which led to the deaths of L.V.P.Podiappuhamy alias Dodampe Mudalali and Corporal S.K.P.Tillekewardene.

S.P.VII-1980: Report of the Presidential Commission of Inquiry into incidents which took place between 13 August and 15 September 1977.

Civil Rights Movement. The Peoples' Rights, 1971-1978. Colombo,1979.

- Was the Referendum Free and Fair ? Colombo, 1983.

Commonwealth Secretariat. Report of the Commonwealth Working Party on Human Rights. London, 1981.

Connelly, A.M. "The Protection of the Rights of Others", (1980) 5 HRR, 117.

Constitutions:

Antigua and Barbuda, 1981.

Barbados, 1966.

Belize, 1981.

Botswana, 1966.

Cyprus, 1960.

Fiji, 1970.

France, 1958.

The Gambia, 1970.

Federal Republic of Germany, 1949.

Ghana, 1979.

Grenada, 1973.

Guyana, 1966, 1980.

India, 1949.

Jamaica, 1962.

Kenya, 1969.

Kiribati, 1979.

Lesotho, 1966.

Malta, 1964.

Mauritius, 1968.

Nauru, 1968.

Nigeria, 1960, 1979.

Saint Lucia, 1978.

Saint Vincent, 1979.

Seychelles, 1979.

Sierra Leone, 1978.

Swaziland, 1968.

Tanzania, 1977.

Tonga, 1875.

Uganda, 1967.

Zambia, 1964.

Zimbabwe, 1980.

Constitutional Affairs, Ministry of. Comments on Basic Resolutions submitted to the Steering and Subjects Committee, 3 February 1971.

Public Security: A Paper for consideration by the Security Council, 14 February 1971.

Constituent Assembly. Proceedings of a Meeting of Members of the House of Representatives, 19 and 20 July 1970. Colombo: Dept. of Govt.Printing, 1970.

- Debates, July 1970-May 1972. (Colombo: Dept. of Govt.Printing, 1970-72.

- Reports of the Committees appointed to consider the draft Constitution. Colombo: Dept. of Govt.Printing, 1972.

Cooray, J.A.L. "The Supreme Court of Ceylon", (1968) ICJ Journal,96.

- Constitutional Government and Human Rights in a Developing Society. Colombo Apothecaries Ltd, 1969.

- Constitutional and Administrative Law of Sri Lanka. Colombo: Hansa Publishers Ltd, 1973.

- Letter dated 13 December 1972 to W.Gopallawa, President of the Republic.

Cooray, L.J.M. "Operation of Conventions in the Constitutional History of Ceylon", (1970) 1 Modern Ceylon Studies, 1.

- Reflections on the Constitution and Constituent Assembly. Colombo: Hansa Publishers Ltd, 1971.

- An Introduction to the Legal System of Ceylon. Colombo: Lake House Investments Ltd, 1972.

- "The Twilight of Judicial Control of Executive Action in Sri Lanka", (1976) 18 Mal.L.R., 230.

- "Fundamental Rights, Judicial Review and The Constitutional Court of Sri Lanka", (1979) Lawasia, 24.

Cooray, M.J.A. Judicial Role under the Constitution of Ceylon/ Sri Lanka. Colombo: Lake House Investments Ltd, 1982.

Cowen, D.V. The Foundations of Freedom. Cape Town, UOP, 1961.

De Alwis, O.M. Letter dated 15 January 1973 to the Registrar of the Constitutional Court.

De Merieux, Margaret. "The Delineation of the Right to Freedom of Expression", (1980) Public Law, 359.

De Silva, A.A. Letter dated 3 May 1972 to Nihal Jayawickrama.

De Silva, C.R. "The Constitution of the Second Republic of Sri Lanka (1978) and its Significance", XVII Journal of Commonwealth and Comparative Politics, 192.

De Silva, Colvin R. "The Right to Rule till 1977", Ceylon Observer, 21 May 1974.

- "JR and the Constitution", Ceylon Daily News, 20 May 1975.

- Monkeying with the Judiciary. Colombo: M.Austin Perera, 1978.

- Letter dated 16 November 1970 to Felix R.Dias Bandaranaike.

- Letter dated 30 August 1972 to Felix R.Dias Bandaranaike.

- Letter dated 18 September 1972 to Felix R.Dias Bandaranaike.

- Letter dated 8 December 1972 to Felix R.Dias Bandaranaike.

- Letter dated 25 January 1973 to Felix R.Dias Bandaranaike.

- Letter dated 30 January 1973 to Felix R.Dias Bandaranaike.

De Silva, G.P.S.H. A Statistical Survey of Elections to the Legislatures of Sri Lanka, 1911-1977. Colombo: Marga Institute, 1979.

De Silva, H.L. "Some Reflections on the Interpretation of the Constitution of Ceylon and its Amendment", (1970) Journal of Ceylon Law, 238.

De Silva, K.D. Letter dated 19 July 1972 to W.Gopallawa, President of the Republic.

De Silva, K.M. "Sri Lanka (Ceylon) - The New Republican Constitution", (1972) VRU, 239.

- "The Legislative Council in the Nineteenth Century", History of Ceylon Colombo: University of Ceylon, 1973.

- "The History and Politics of the Transfer of Power", History of Ceylon Colombo, University of Ceylon, 1973.

- "The Reform and Nationalist Movements in the Early Twentieth Century", History of Ceylon, Colombo: University of Ceylon, 1973.

- "Sri Lanka's First Decade of Independence: Phase II in the Transfer of Power", (1975) VRU, 331.

De Smith, S.A."Westminster's Export Models: the Legal Framework of Responsible Government", (1961) Journal of Commonwealth Political Studies, 2.

- The New Commonwealth and its Constitutions. London: Stevens, 1964.

- Judicial Review of Administrative Action, 4th ed. London: Stevens, 1980.

Denning, Sir Alfred. Freedom under the Law. London: Stevens, 1949.

Deheragoda, H. Letter dated 13 December 1972 to W.Gopallawa, President of the Republic.

Dike, Chijioke. "The Case against Parliamentary Sovereignty", (1976) Public Law, 283.

Dissanayake, S.A. Letter dated 20 August 1972 to Nihal Jayawickrama.

- Letter dated 27 August 1972 to Nihal Jayawickrama.

Dissanayake, T.D.S.A. J.R.Jayewardene of Sri Lanka. Colombo: Swastika Press, 1977.

Dowrick, F.E., ed. Human Rights: Problems, Perspectives and Texts. Saxon House, 1979.

Duncanson, Ian W. "Balloonists, Bills of Rights and Dinosaurs", (1978) Public Law, 391.

ECOSOC. Principles on freedom and non-discrimination in respect of the right of everyone to return to his country. Res.No.1788 (LIV) of 18 March 1973.

Elections, Department of. Results of Parliamentary General Elections in Ceylon, 1947-1970. Colombo: Dept. of Govt.Printing, 1971.

Elias, T.O. "The New Constitution of Nigeria and the Protection of Human Rights and Fundamental Freedoms", (1959) ICJ Journal,30.

- "Freedom of Assembly and Association", (1967) ICJ Journal,60.

Fadlalla, A.S. "Fundamental Rights and the Nigerian Draft Constitution", (1977) VRU, 543.

Falk, Richard. "Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries", (1979) UHR, 3.

Fawcett, J.E.S. "A Bill of Rights for the United Kingdom ?" (1976) 1 HRR, 57.

- "Bills of Rights: Some Alternatives", Do We Need a Bill of Rights ? ed. Colin Campbell. London: Temple Smith, 1980.

Fazal, M.A. "Entrenched Rights and Parliamentary Sovereignty", (1974) Public Law, 295.

Fernando, J.L. Three Prime Ministers of Ceylon. Colombo, Gunasena, 1963.

Fernando, T.S. "Human Rights: A Tradition of the East", Ceylon Daily News, 10 December 1964.

- Letter dated 27 August 1965 to W.Gopallawa, Governor-General.

- Letter dated 20 September 1965 to W.Gopallawa, Governor-General.

- Letter dated 22 November 1965 to W.Gopallawa, Governor-General.

- Letter dated 19 July 1972 to W.Gopallawa, President of the Republic.

- Letter dated 7 September 1972 to Felix R.Dias Bandaranaike.

- Letter dated 13 December 1972 to W.Gopallawa, President of the Republic.

Gilmour, D.R. "The Sovereignty of Parliament and the European Commission of Human Rights", (1968) Public Law, 62.

Gopallawa, W. Letter dated 16 September 1965 to T.S.Fernando.

- Letter dated 17 November 1965 to T.S.Fernando.

Government Gazette, The Ceylon/ Sri Lanka

Griffiths, J.A.G. The Politics of the Judiciary. London: Fontana/ Collins, 1977.

- Administrative Law and the Judges. London: Haldane Society, 1978.

Groves, Harry E. "Emergency Powers", (1961) ICJ Journal, 1.

Henkin, Louis, ed. The International Bill of Rights. New York: Columbia University Press, 1981.

Horner, I.B., trans. The Book of the Discipline (Vinaya-Pitaka), Vol.IV: Mahavagga. London: Luzac & Co.Ltd, 1962.

House of Lords. Report of the Select Committee on a Bill of Rights. London, HMSO, 1978.

Hulugalle, H.A.J. The Life and Times of D.R.Wijewardene. Colombo: Associated Newspapers of Ceylon Ltd, 1960.

Humphrey, John P. "International Procedures for the Implementation of Human Rights Law", ICJ Working Paper.

- "The World Revolution and Human Rights", Human Rights, Federalism and Minorities. Toronto: Canadian Institute of International Affairs, 1970.

- "The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society", The Practice of Freedom, ed. R.St.J.Macdonald and John P.Humphrey. Toronto: Butterworths, 1979.

Independence of the Judiciary. Draft Principles submitted for the consideration of the UN Sub-Commission on the Protection of Minorities and the Prevention of Discrimination. (1982) 8 CLB, 715.

Information, Department of. Ceylon Today, Vols. VIII to XX. Colombo: Govt.Press.

- Birth of a Republic. Colombo: Dept. of Govt. Printing, 1972.

International Commission of Jurists. The Rule of Law in a Free Society. Geneva, 1959.

- Executive Action and the Rule of Law. Geneva, 1962.

- "The Right of Arrested Persons to Communicate with those whom it is necessary for them to consult in order to ensure their defence or to protect their interests". (1964) ICJ Journal,85.

- The Dynamic Aspects of the Rule of Law in the Modern Age. Geneva, 1965.

- "Conclusions of the Nordic Conference on the Right to Privacy", ICJ Bulletin, No.31 (September 1967), 1.

- Civil and Political Rights. A Working Paper prepared for the Geneva Conference of Non-Governmental Organsiations, 1968.

- The Rule of Law and Human Rights: Principles and Definitions. Geneva, 1968.

- Letter from the Ceylon Section to Dudley Senanayake, Prime Minister, June 1966.

Jacobs, F.G. The European Convention on Human Rights. Oxford,1975.

Jaconelli, J. "The European Convention on Human Rights - The text of a British Bill of Rights ?", (1976) Public Law, 226.

- Enacting a Bill of Rights. Oxford: Clarendon Press, 1980.

Jayakumar, S. "Singapore's Presidential Council: An Advisory Group for Parliament on Human Rights", (1971) HRJ, 477.

Jayasinghe, W.T. Tamils in Sri Lanka. Colombo: Dept. of Govt. Printing, 1976.

Jayasuriya, D.C. Mechanics of Constitutional Change - the Sri Lankan Style. Colombo: Asian Pathfinder Publishers, 1982.

Jayewardene, J.R."Special Direction to Brigadier T.I.Weeratunge", July 1979, Weekend, 15 July 1979.

Jayawickrama, Nihal. "A Council of Asia", Ceylon Daily News, 26 January 1967.

- Human Rights in Sri Lanka. Colombo: Dept. of Govt.Printing, 1976.

- "Security of Tenure of Judicial Officers - the Sri Lankan Experience", (1980) CJJ, 137.

- Letter dated 9 October 1971 to A.R.Ratnavale, Permanent Secretary to the Ministry of Defence and External Affairs.

- Minute dated 15 March 1972 to Sirima R.D.Bandaranaike, Prime Minister.

- Letter dated 20 June 1972 to Sirima R.D.Bandaranaike, Prime Minister.

- Minute dated 21 August 1972 to Felix R.Dias Bandaranaike, Minister of Justice.

- Letter dated 23 January 1973 to Sirima R.D.Bandaranaike, Prime Minister.

- Minute dated 30 January 1973 to Sirima R.D.Bandaranaike, Prime Minister.

- Letter dated 17 February 1975 to M.D.D.Peries, Secretary to the Prime Minister.

Jeffries, Sir Charles. Ceylon - The Path to Independence. London: Pall Mall Press, 1962.

- OEG - A Biography of Sir Oliver Ernest Goonetilleke. London: Pall Mall Press, 1969.

Jennings, Sir Ivor. The Constitution of Ceylon, 2nd ed. Bombay: OUP, 1951.

- Approach to Self-Government. OUP, 1958.

Jiggins, Janice. Caste and Family in the Politics of the Sinhalese, 1947-1976. Cambridge University Press, 1979.

Jupp, James. Sri Lanka - Third World Democracy. 1978.

JUSTICE. Privacy and the Law. A Report. London: Stevens, 1970.

Kagzi, M.C.J. "Unamendability of a Bill of Rights: A Norm of the Indian Constitutional Jurisprudence". (1971) Public Law, 205.

Kariyakarawana, Eamon. JR: The Peoples' President. Colombo: State Printing Corporation, 1981.

Kearney, Robert N. Communalism and Language in the Politics of Ceylon. North Carolina: Duke University Press, 1967.

Kotelawela, Sir John. An Asian Prime Minister's Story. London: Harrap & Co.Ltd, 1956.

La Van Grove, D. "The Sentinels of Liberty ? The Nigerian Judiciary and Fundamental Rights", (1963) 7 JAL, 152.

Lawrence, R.J. "Rights and Remedies", The Practice of Freedom, ed. R.St.J.Macdonald and John P.Humphrey. Toronto: Butterworths, 1979.

Leary, Virginia A. Ethnic Conflict and Violence in Sri Lanka. Geneva, ICJ, 1981.

Lester, Anthony. "Fundamental Rights in the United Kingdom: The Law and the British Constitution". (1977) 11 HRR, 49.

Lillich, Richard B. International Human Rights Instruments. New York: William S.Hein Co., 1983.

Lloyd, Lord. "Do We Need a Bill of Rights ?", (1976) 39 MLR, 121.

McChesney, Alan. "Promoting the general welfare in a democratic society: Balancing human rights and development". A Paper, 1981.

MacDermot, Niall. "How to enforce the Torture Convention: A Draft Optional Protocol", (1979) 22 ICJ Review, 31.

MacDonald R.St.J; Humphrey, John P, ed. The Practice of Freedom. Toronto: Butterworths, 1979.

McInerney, Sir Robert. "The Appointment of Judges to Commissions of Inquiry and Other Extra Judicial Activities", 52 ALJ, 540.

Mann, F.A. "Britains's Bill of Rights", (1978) 94 LQR, 512.

Marasinghe, M.L. "Ceylon - A Conflict of Constitutions", (1971) 20 ICLQ, 645.

Marcic, Rene. "Duties and Limitations Upon Rights", (1968), ICJ Journal, 59.

Marshall, Geoffrey. Parliamentary Sovereignty and the Commonwealth. Oxford: Clarendon Press, 1957.

Mendis, G.C. The Colebrooke-Cameron Papers: Documents on British Colonial Policy, 1796-1833. OUP, 1956.

Milne, A.J.M. "Should We Have a British Bill of Rights ?", (1977) 40 MLR, 389.

Morgan, D.J. The Official History of Colonial Development, Vol.5. London: Macmillans, 1980.

Morris, Gillian S. "The Emergency Powers Act 1920", (1979) Public Law, 317.

Nadaraja, T. The Legal System of Ceylon in its Historical Setting. Leiden: E.J.Brill, 1972.

Nadesan, S. Some Comments on the Constituent Assembly and the Draft Basic Resolutions. Colombo: Nadaraja Press, 1971.

Narada Maha Thero, trans. The Dhammapada. Colombo Apothecaries Ltd, 1972.

- The Buddha and His Teachings. Colombo: Associated Newspapers of Ceylon Ltd, 1972.

National State Assembly. Debates. May 1972-August 1978. Colombo: Dept. of Govt. Printing.

- Report of a Select Committee appointed to consider the revision the revision of the Constitution. Parliamentary Series,No.14, 22 June 1978. Colombo: Dept. of Govt. Printing, 1978.

Nottheim, Garth. "Legislative Interference with the Judiciary", (1966) 40 ALJ, 221.

Newspapers:

- Ceylon Daily Mirror. Colombo: Times of Ceylon Ltd.

- Ceylon Daily News. Colombo: Associated Newspapers of Ceylon Ltd.

- Ceylon Observer. Colombo: Associated Newspapers of Ceylon Ltd.

- The Guardian (Ceylon). Colombo: Swadeshi Newspapers Ltd.

-Morning Times (Ceylon). Colombo: Times of Ceylon Ltd.

- Sun. Colombo: Independent Newspapers Ltd.

- Times of Ceylon. Colombo: Times of Ceylon Ltd.

- Weekend. Colombo: Independent Newspapers Ltd.

Nicholas, Barry. "Fundamental Rights and Judicial Review in France", (1978) Public Law, 82.

Nigeria. Report of the Commission appointed to enquire into the fears of Minorities and the means of allaying them. 1958: Cmnd.505.

Noorani, A.G. "The Indian Judiciary under the Constitution", (1976) VRU, 335.

- "The Judiciary and the Bar in India during the Emergency", (1978) VRU, 403.

Oluyeda, Peter. "Redress of Grievances in Tanzania", (1975) Public Law, 8.

Panditaratne, B.L., and Selvanayagam, S. "The Demography of Ceylon - An Introductory Survey", History of Ceylon. Colombo: University of Ceylon, 1973.

Parliament. Debates. September 1978 - December 1981. Colombo: Dept. of Govt. Printing.

- Debates (House of Representatives). 1947-1972. Colombo: Govt.Press.

- Debates (Senate). 1947-1971. Colombo: Govt.Press.

- Reports of the Joint Select Committee of the Senate and the House of Representatives appointed to consider the Revision of the Constitution. Parliamentary Series, No.15 of the Third Parliament, No.16 of the Sixth Parliament, and No.30 of the Sixth Parliament. Colombo: Govt.Press.

Perera, N.M. Critical Analysis of the New Constitution of the Sri Lanka Government. Colombo: V.S.Raja, 1978.

Pereira, Walter. Laws of Ceylon, 2nd ed. Colombo, 1913.

Peries, G.L. "Human Rights and the System of Criminal Justice in Sri Lanka", CJHSS, Vol.VIII, No.1, p.1.

- Essays on Administrative Law. Colombo: Lake House Investments Ltd, 1980.

Peries, L.L.T. The Citizenship Law of the Republic of Sri Lanka. Colombo: Dept. of Govt. Printing, 1974.

Peries, M.D.D. Letter dated 9 October 1972 to Felix R.Dias Bandaranaike, Minister of Justice.

Phadnis, V. Religion and Politics in Sri Lanka. London: Hurst, 1976.

Phillips, O.Hood. "Self-Limitation by the United Kingdom Parliament", (1975) 2 Hastings Constitutional Law Quarterly, 443.

- Constitutional and Administrative Law, 6th ed. London: Sweet & Maxwell, 1978.

Public Administration, Ministry of. Establishments Code. Colombo: Dept. of Govt. Printing, 1971.

- Circular No.197, 29 December 1981.

Raeburn, Walter. "The Right to an Effective Remedy and a Fair Trial under Common Law", (1968) ICJ Journal, 19.

Ranasinghe, A.G. Census of Ceylon, 1946. Colombo: Govt.Press, 1951.

Raymond, J. "A Contribution to the Interpretation of Article 13 of the European Convention on Human Rights", 5 HRR, 61.

Read, James S. "Bills of Rights in the Third World: Some Commonwealth Experiences", (1973) VRU, 21.

- "The Protection of Human Rights in Municipal Law", Human Rights: The Cape Town Conference, ed. C.F.Forsyth and J.E.Schiller. Cape Town: Juta & Co. Ltd, 1979.

Rhys David, Mrs. The Book of Kindred Sayings (Sanyutta Nikaya). London: OUP, 1917.

Roberts, Michael. "Elite Formation and Elites, 1832-1931", History of Ceylon. Colombo, University of Ceylon, 1973, p.263.

- "Land Problems and Policies, c.1832 - c.1900", History of Ceylon. Colombo: University of Ceylon, 1973, p.119.

- ed. Documents of the Ceylon National Congress and Nationalist Politics in Ceylon. Colombo: Department of National Archives, 1977.

Robertson, A.H. Human Rights in Europe, 2nd ed. Manchester University Press, 1977.

Rowland, Daniel. "The Establishment of Appropriate International Machinery for the Enforcement and Protection of Human Rights in the Lawasia Region". A Working Paper submitted to the 6th Lawasia Conference, 1979.

Scarman, Sir Leslie. English Law - The New Dimension. London: Stevens, 1975.

Seminar on the Administration of Justice. Fundamental Rights and Freedoms: Report of the Proceedings. Organised by the Ministry of Justice, Colombo, 28 December 1977.

Sen, S.C. "Constitutional Storm in India", (1974) VRU, 33.

Sieghart, Paul. The International Law of Human Rights. Oxford: Clarendon Press, 1983.

Sohn L, and Buergenthal, T. International Protection of Human of Human Rights: Basic Documents. Indianapolis, 1973.

Sornarajah, M. "Bills of Rights: the Commonwealth debate", (1976) IX CILSA, 161.

Special Presidential Commission of Inquiry. Proceedings. 1978-1980.

- Second Interim Report. Colombo: Dept. of Govt. Printing, 1979.

- Third Interim Report. Colombo: Dept. of Govt. Printing, 1980.

Sri Lanka Freedom Party Lawyers Association. "Independence of the Judiciary or Supremacy of the Judiciary", The Nation, Colombo, 19 November 1970.

Standing Advisory Committee on Human Rights. Bill of Rights: A Discussion Paper. Belfast, HMSO, 1976.

- The Protection of Human Rights by law in Northern Ireland. London, HMSO, 1977.

State Council. Debates. Colombo: Govt.Press.

Tambiah, H.W. The Law and Customs of the Tamils of Ceylon. Colombo: Tamil Cultural Society of Ceylon, 1954.

Tanzania, The United Republic of. Report of the Presidential Commission on the Establishment of a Democratic One Party State. Dar Es Salaam: Govt. Printer, 1965.

Tennekoon, V. Letter dated 30 June 1970 to W.Gopallawa, Governor-General.

- Report dated 1 February 1972 to the Minister of Justice.

- Letter dated 15 November 1972 to the Minister of Justice.

- Letter dated 27 June 1973 to the Minister of Justice.

- Letter dated 27 June 1973 to the Secretary for Justice.

Tillekeratne, Stanley. Letter dated 14 February 1975 to Sirima R.D. Bandaranaike, Prime Minister.

Torovsky, Rudolf. "Freedom of Movement: Right of Exit", (1962) ICJ Journal, 63.

Trinidad and Tobago. Report of the Constitutional Commission, 1974. T & T, P & P Ltd, 1974.

United Front. Joint Election Manifesto, 1970. Colombo: M.D.Gunasena & Co. Ltd, 1970.

United Kingdom, Government of. Command Papers.

- 1928: Cmd 3131 - Ceylon: Report of the Special Commission on the Constitution.

- 1945: Cmd 6677 - Ceylon: Report of the Commission on Constitutional Reform.

- 1945: Cmd 6690 - Ceylon: Statement of Policy on Constitutional Reform.

- 1958: Cmnd 505 - Nigeria: Report of the Commission appointed to enquire into the fears of Minorities and the means of allaying them.

- 1972: Cmnd 5012 - Report of the Committee on Privacy.

United National Party. Programme of Action to Create a Just and Free Society. Colombo, 1977.

United Nations. Human Rights - A Compilation of International Instruments of the United Nations. New York: United Nations, 1973.

United Nations Association of Ceylon. Seminar on "Fundamental Rights in the Ceylon Constitution". Royal College Hall, 26 June 1968. Tape Recording of the Proceedings.

University of Ceylon. History of Ceylon, ed. K.M.de Silva. Colombo: 1973.

Vallat, Sir Francis, ed. An Introduction to the Study of Human Rights. London: Europa Publications, 1970.

Verhelst, Thierry G. "Legislation on the Judiciary: Fantasy Law or Programmed Expectation ?", (1973) VRU, 137.

Wade, H.W.R. Constitutional Fundamentals. London: Stevens, 1980.

Wade, Lord. Bill of Rights Act, 1976. London, HMSO, 1976.

- "Introducing a Bill of Rights". Do We Need a Bill of Rights ? ed. Colin Campbell. London: Temple Smith, 1980, p.17.

Wanasundera, R.S. Letter dated 17 February 1975 to Sirima R.D. Bandaranaike, Prime Minister.

Warnapala, Wisva. "Bureaucratic Transformation, c.1910-1948", History of Ceylon. Colombo: University of Ceylon, 1973, p.408.

Weerasooria, N.E. Administration of Justice in Ceylon. Colombo: Govt.Press, 1952.

Wilson, A.J. "The Tamil Federal Party in Ceylon Politics", (1966) 14 Journal of Commonwealth Political Studies, 117.

- "The Development of the Constitution, c.1910-1948", History of Ceylon. Colombo: University of Ceylon, 1973.

- Politics in Sri Lanka, 1947-1978, 2nd ed. London: Macmillans, 1978.

- The Gaullist System in Asia. London: Macmillans, 1980.

Wolf-Phillips, Leslie. Comparative Constitutions. London: Macmillans, 1972.

Woodward, Calvin A. The Growth of a Party System in Ceylon. Providence, U.S.A.: Brown University Press, 1969.

Zafrullah, H.M. "The Judicial Power and the Separation of Powers Doctrine in Sri Lanka", (1980) 1 Lawasia, N.S., 177.

- Sri Lanka's Hybrid Presidential and Parliamentary System and the Separation of Powers Doctrine. Kuala Lumpur: University of Malaya Press, 1981.

Zamir, I. The Declaratory Judgment. London, 1962.

Zander, Michael. A Bill of Rights ? London: Barry Rose (Publishers) Ltd, 1975.

CASES

STATUTES

Abolition of Slavery Ordinance, No.20 of 1944.

Administration of Justice Law, No.44 of 1973.

Administration of Justice Ordinance, 1868.

Adoption of Roman Dutch Law Ordinance, No.5 of 1835.

Agrarian Services Act, No.58 of 1979.

Agricultural Insurance Law, No.27 of 1973.

Agricultural Productivity Law, No.2 of 1972.

Air Navigation Act, No.15 of 1950.

Army Act, No.17 of 1949.

Associated Newspapers of Ceylon Limited (Special Provisions) Law, No.28 of 1973.

Assisted Schools and Training Colleges (Supplementary Provisions) Act, No.8 of 1961.

Births and Deaths Registration Act, No.17 of 1951.

Bribery Act, No.11 of 1954.

Bribery (Amendment) Act, No.40 of 1958.

Boats Ordinance, No.4 of 1900.

Ceiling on Housing Property Law, No.1 of 1973.

Ceylon Broadcasting Corporation Act, No.37 of 1966.

Ceylon (Constitution) Order in Council, 1946.

Ceylon Independence Act, 1947.

Ceylon (Independence) Order in Council, 1947.

Ceylon (Legislative Council) Order in Council, 1923

Ceylon (Parliamentary Elections) Order in Council, 1946

Ceylon (Parliamentary Elections) (Amendment) Act, No.19 of 1948.

Ceylon (Parliamentary Elections) (Amendment) Act, No.48 of 1949.

Ceylon (Parliamentary Elections) (Amendment) Act, No.11 of 1959.

Ceylon (Parliamentary Elections) (Amendment) Act, No.72 of 1961.

Ceylon Petroleum Corporation (Amendment) Act, No.5 of 1963.

Ceylon (State Council) Order in Council, 1931.

Ceylon University Ordinance, No.20 of 1942.

Charter of Justice, 18 April 1801.
Charter of Justice, 6 August 1810.
Charter of Justice, 30 October 1811.
Charter of Justice, 18 February 1833.
Children and Young Persons (Harmful Publications) Act, No.48 of 1956.
Children and Young Persons Ordinance, No.48 of 1939.
Citizenship Act, No.18 of 1948.
Citizenship (Amendment) Act, No.40 of 1950.
Civil Procedure Code, No.2 of 1889.
Colonial Laws Validity Act, 1865.
Commissions of Inquiry Act, No.17 of 1948.
Common Amenities Board Law, No.10 of 1973.
Companies (Special Provisions) Law, No.19 of 1974.
Compulsory Public Services Act, No.70 of 1961.
Constitution of the Republic of Sri Lanka, 1972.
Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.
Control of Finance Companies Act, No.27 of 1979.
Control of Publications on Horse Racing Act, No.44 of 1961.
Co-operative Societies Law, No.5 of 1972.
Co-operative Societies (Special Provisions) Law, No.12 of 1978.
Corporal Punishment Ordinance, No.16 of 1889.
Court of Appeal Act, No.44 of 1971.
Court of Criminal Appeal Ordinance, No.23 of 1938.
Courts Ordinance, No.1 of 1889.
Courts (Amendment) Ordinance, No.4 of 1920.
Criminal Justice Commissions Act, No.14 of 1972.
Criminal Justice Commissions (Amendment) Law, No.10 of 1972.
Criminal Law Act, No.31 of 1962.
Criminal Law (Special Provisions) Act, No.1 of 1962.
Criminal Procedure Code, No.15 of 1898.
Criminal Procedure (Special Provisions) Law, No.15 of 1978.
Crown (Liability in Delict) Act, No.22 of 1969.
Customs Ordinance, No.17 of 1869.

Education Ordinance, No.1 of 1920.
Essential Public Services Act, No.61 of 1979.
Estate Labour (Indian) Ordinance, No.13 of 1889.

Evidence Ordinance, No.14 of 1895.
Excise Ordinance, No.8 of 1912.
Excise (Amendment) Law, No.14 of 1977.
Extradition Law, No.8 of 1977.

Firearms Ordinance, No.33 of 1916.
Forests Ordinance, No.16 of 1907.

Health Services (Amendment) Law, No.3 of 1977.
Holidays Ordinance, No.1 of 1928.
Houses of Detention Ordinance, No.5 of 1907.

Immigrants and Emigrants Act, No.20 of 1948.
Immigrants and Emigrants (Amendment) Act, No.16 of 1955.
Imports and Exports (Control) Act, No.1 of 1969.
Imposition of Civic Disabilities (Special Provisions) Act, No.14 of 1965.
Income Tax Ordinance, No.2 of 1932.
Indian and Pakistani Residents (Citizenship) Act, No.3 of 1949.
Industrial Disputes Act, No.43 of 1950.
Industrial Disputes (Amendment) Act, No.62 of 1957.
Industrial Disputes (Special Provisions) Act, No.37 of 1968.
Insurance Corporation Act, No.2 of 1961.
Interpretation (Amendment) Act, No.18 of 1972.
Interpretation (Amendment) Law, No.29 of 1974.

Janawasa Law, No.25 of 1976.

Kandyan Convention, 2 March 1815.
Knives Ordinance, No.28 of 1906.

Land Acquisition Act, No.9 of 1950.
Land Betterment Charges Law, No.28 of 1976.
Land Grants (Special Provisions) Act, No.43 of 1979.
Land Redemption Ordinance, No.61 of 1942.
Land Reform Law, No.1 of 1972.
Licensing of Clubs Law, No.17 of 1975.

Licensing of Produce Brokers Act, No.9 of 1979.

Licensing of Shipping Agents Act, No.10 of 1972.

Licensing of Traders Act, No.62 of 1961.

Local Authorities (Imposition of Civic Disabilities) (No.1) Law, No.38 of 1978.

Local Authorities (Imposition of Civic Disabilities) (No.2) Law, No.39 of 1978.

Local Authority Quarters (Recovery of Possession) Law, No.42 of 1978.

Local Authorities (Special Provisions) Law, No.24 of 1977.

Local Authorities (Special Provisions) Act, No.3 of 1979.

Local Government Service Law, No.16 of 1974.

Marriage Registration Ordinance, No.19 of 1907.

Married Women's Property Ordinance, No.18 of 1923.

Maternity Benefits Ordinance, No.32 of 1939.

Matrimonial Rights and Inheritance Ordinance, No.15 of 1876.

Medical Ordinance, No.26 of 1927.

Mines and Minerals Law, No.4 of 1973.

Minimum Wages Ordinance, No.27 of 1927.

Motor Transport Act, No.48 of 1957.

Muslim Marriage and Divorce Act, No.13 of 1954.

Motor Traffic Act, No.14 of 1951.

Mental Diseases Act.

National Archives Law, No.48 of 1973.

National Water Supply and Drainage Board Law, No.2 of 1974.

Newspapers Ordinance, No.5 of 1839.

Offensive Weapons Act, No.18 of 1966.

Official Language Act, No.33 of 1956.

Official Secrets Act.

Order in Council, 13 August 1920.

Parliamentary Commissioner for Administration Act, No.17 of 1981.

Parliamentary Elections Act, No.1 of 1981.

Parliament (Powers and Privileges) Act, No.21 of 1953.

Parliament (Powers and Privileges) (Amendment) Act, No.5 of 1978.

Passport (Regulation) and Exit Permit Act, No.53 of 1971.

Payment of Gratuities and Other Monetary Benefits to Indian Repatriates (Special Provisions) Law, No.34 of 1978.

Penal Code, No.2 of 1883.

Petrol (Control of Supplies) Ordinance, No.52 of 1939.

Pilgrimages Ordinance, No.13 of 1896.

Police Ordinance, No.10 of 1865.

Post Office Ordinance, No.11 of 1908.

Presidential Elections Act, No.15 of 1981.

Prevention of the Avoidance of Tax Act, No.26 of 1970.

Prevention of Social Disabilities Act, No.21 of 1957.

Prevention of Terrorism (Temporary Provisions) Act, No.48 of 1979.

Printers and Publishers Ordinance, No.1 of 1885.

Prisons Ordinance, No.16 of 1877.

Profane Publications Act, No.41 of 1958.

Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organisations Law, No.16 of 1978.

Public Performances Ordinance, No.7 of 1912.

Public Security Ordinance, No.25 of 1947.

Public Security (Amendment) Act, No.22 of 1949.

Public Security (Amendment) Act, No.34 of 1953.

Public Security (Amendment) Act, No.8 of 1959.

Public Security (Amendment) Law, No.6 of 1978.

Railways Ordinance, No.9 of 1902.

Rent Act, No.7 of 1972.

Rent Restriction (Amendment) Act, No.12 of 1966.

Requisitioning and Acquisitioning of Lorries Law, No.45 of 1973.

Resumption of State Land (Anuradhapura Preservation Board) Law, No.3 of 1975.

Royal Instructions, 1910.

Rural Courts Ordinance, No.12 of 1945.

Salt Ordinance, No.6 of 1890.

Service Tenures Ordinance, No.4 of 1870.

Shop and Office Employees (Regulation of Employment and Remuneration) (Amendment) Law, No.7 of 1975.

Special Presidential Commissions of Inquiry Law, No.7 of 1978.

Special Presidential Commissions of Inquiry (Special Provisions) Act, No.4 of 1978.

Sri Lanka Press Council Law, No.5 of 1973.

Sri Lanka Tea Board Law, No.14 of 1975.

State Mortgage and Investment Bank Law, No.13 of 1975.

Stay-in Strikes Act, No.12 of 1955.

Silkworm Seed Law, No.36 of 1974.

Suspension of Capital Punishment Act, No.29 of 1958.

Tamil Language (Special Provisions) Act, No.28 of 1958.

Tea Control (Amendment) Law, No.39 of 1974.

Telecommunication Ordinance, No.50 of 1944.

Termination of Employment of Workmen (Special Provision) Law, No.4 of 1976.

Tolls Ordinance, No.3 of 1896.

Trade Unions Ordinance, No.14 of 1935.

University of Ceylon Act, No.1 of 1972.

Urban Development Projects (Special Provisions) Act, No.2 of 1979.

Vehicles Ordinance, No.4 of 1916.

Workmen's Compensation Ordinance, No.19 of 1934.

HUMAN RIGHTS INSTRUMENTS

Slavery Convention, 1926.

ILO Convention concerning Forced Labour, 1930.

United Nations Charter, 1945.

Universal Declaration of Human Rights, 1948.

American Declaration of the Rights and Duties of Man, 1948.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

ILO Convention concerning Freedom of Association and Protection of the Right to Organise, 1948.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

ILO Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

- First Protocol, 1952.
- Second Protocol, 1963.
- Third Protocol, 1963.
- Fourth Protocol, 1963.
- Fifth Protocol, 1966.

Convention relating to the Status of Refugees, 1951.

ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951.

Convention on the International Right of Correction, 1952.

Convention on the Political Rights of Women, 1953.

Convention relating to the Status of Stateless Persons, 1954.

ICJ Act of Athens, 1955.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.

Convention on the Nationality of Married Women, 1957.

ILO Convention concerning the Abolition of Forced Labour, 1957.

ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958.

Declaration on the Rights of the Child, 1959.

ICJ Declaration of Delhi, 1959.

UNESCO Convention Against Discrimination in Education, 1960.

- Protocol, 1962.

European Social Charter, 1961.

Convention on the Reduction of Statelessness, 1961.

ICJ Law of Lagos, 1961.

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962.

ILO Convention concerning Equality of Treatment (Social Security), 1962.

ILO Convention concerning Social Policy (Basic Aims and Standards), 1962.

ICJ Resolution of Rio, 1962.

ILO Convention concerning Employment Policy, 1964.

Convention on the Elimination of All Forms of Racial Discrimination, 1965.

ICJ Declaration of Bangkok, 1965.

International Covenant on Economic, Social and Cultural Rights, 1966.

International Covenant on Civil and Political Rights, 1966.

- Optional Protocol, 1966.

ICJ Declaration of Colombo, 1966.

Proclamation of Teheran, 1968.

American Convention on Human Rights, 1968.

ILO Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 1971.

International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973.

Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1975.

Final Act of the Conference on Security and Co-operation in Europe, 1975.

Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981.

African Charter on Human and Peoples' Rights, 1981.