THE CEYLON JOURNAL OF HISTORICAL AND SOCIAL STUDIES

NEW SERIES
Vol. VII **June-December 1977** **No. 2**
(Published in 1979)

THE CONSTITUTION OF 1978

CONTENTS

REVIEWS

Annual Subscription Rs. 30-00.
Published twice a year by the Ceylon Historical and Social Studies Publication Board.

Price Rs. 15.00

THE CEYLON
HISTORICAL AND SOCIAL STUDIES
PUBLICATIONS BOARD

The Ceylon Journal of Historical and Social Studies is published twice a year by the Ceylon Historical and Social Studies Publications Board which was constituted in 1958. The months of publication are usually June and December, and copies will be sent post-free to subscribers.

The Journal is intended to cover the entire range of the social sciences—economics, political science, law, archaeology, history, geography, sociology, social psychology and anthropology. The articles will relate mainly, but not exclusively, to Ceylon.

Articles, books for review, editorial and business communications should be addressed to K. M. de Silva, Department of History, University Park, Peradeniya, Ceylon.

Back numbers, new series Vols. I to VI are available at publication prices. **Vols. I, II and V (first series) are out of print;** a few copies of Vols. III and IV and Vols. VI, to X of the first series are available at the backnumbers rate.

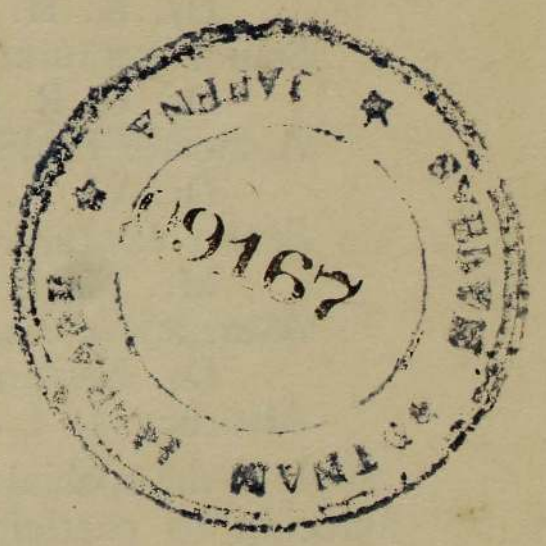
Remittances should be made payable to The Ceylon Journal of Historical and Social Studies. Rates of subscription (inclusive of postage): Annual—Rupees Thirty; U.S. Seven dollars. Single copies–Rupees Fifteen; U.S. three dollars fifty. A trade discount of 20% is allowed to booksellers in Sri Lanka. All payments from foreign countries must be made by international money order, cheques with thirty seven pence sterling or $ 0·50 cents added for collection charges, or direct to the Board's % at the Bank of Ceylon, Kandy, Ceylon.

THE CEYLON JOURNAL OF HISTORICAL AND SOCIAL STUDIES

NEW SERIES

Vol. VII June-December 1977 No. 2

(Published in 1979)



Editor
K. M. DE SILVA

19470—1

EDITORIAL NOTE

On November 25th 1978 the Sri Lanka Institute of World Affairs organised a seminar at the Hotel Taprobane in Colombo on Sri Lanka's new Constitution. Seven persons, four of them academics from Peradeniya, and three lawyers addressed the gathering on that occasion and six of them presented papers. *The Ceylon Journal of Historical and Social Studies* is pleased to publish these papers in this present issue. Most if not all the authors have revised and expanded their papers for publication.

In his speech of welcome Major-General Anton Muttukumaru, President of the Sri Lanka Institute of World Affairs stated that he did not propose "to deliver what is technically called a keynote address" but took the floor "primarily to welcome all of you to take part in the exercise for today on the subject of The Constitution of the Second Republic of Sri Lanka".

He went on to add that "the subject for discussion is not something which *prima facie*, falls within the normally accepted definition of world affairs. The justification for the venture in the context of the work of the Institute is that the constitution is the corner stone of the edifice of democracy which the Government of Sri Lanka wishes to project, which in itself assumes an importance worthy of notice not only in this country but also abroad. It has a many faceted character which has added significance for the student of foreign affairs because some of them bear comparison with facets of constitutions in other parts of the world. Indeed, if my information is correct, some comparison has been made in the process of the preparation of the draft constitution. I am certainly hoping that some such references will be made during today's discussion.

"A distinguished panel of speakers, who include historians, political scientists and lawyers, has generously accepted our invitation to speak today. They are Dr. H. H. W. Tambiah

Lawyer, Judge of the Supreme Court here and Sierra Leone and diplomat

Professor K. M. De Silva

Professor of Ceylon History, University of Sri Lanka, Peradeniya

Dr. K. H. Jayasinghe

Senior Lecturer in Politics at Peradeniya

Dr. C. R. De Silva

Associate Professor of History at Peradeniya

Dr. W. A. Warnapala

Senior Lecturer in Political Science at Peradeniya

Mr. Mark Fernando

Attorney at Law and Member, Law Commission

Dr. Neelan Tiruchelvam

Attorney at Law and member of many learned societies.

It is my special privilege to welcome them today and to thank them for agreeing to participate.

"The discussion in the pre-lunch period will be chaired by Professor A. J. Wilson, a distinguished Political Scientist now regrettably abroad, who was our first Secretary of this Institute. I am grateful to him in a special way for having assisted in the assembling of the speakers at today's seminar and in arranging the subjects to be discussed."

Major General Muttukumaru concluded his speech by inviting Professor A. J. Wilson to take the chair.

K. M. de Silva.
Editor.

THE CEYLON
JOURNAL OF HISTORICAL AND SOCIAL STUDIES

NEW SERIES **June-December 1977** No. 2
Vol. VII (Published in 1979)

CONTENTS

Contributors

C. R. de Silva, Ph.D. (London),
Associate Professor in History, and Dean of the Faculty of Arts, University of Peradeniya.

K. M. de Silva, Ph.D. (London),
Professor of Sri Lanka History, University of Peradeniya, Member of the University Grants Ccmmission.

Mark Fernando, LLB (Ceylon), Attorney-at-Law is a member of the Law Commission

H. W. Tambiah, B. Sc. LLB, LLD (London), formerly Justice of the Supreme Court of Sri Lanka, and of the Supreme Court of Sierra Leone.

N. Tiruchelvam, LLB (Ceylon), LLM (Harvard) and S. J. D. (Harvard) is a member of the Law Commission.

W. A. Wisva-Warnapala, B.A. (Ceylon), M.A. (Pittsburgh), Ph. D. (Leeds) is Senior Lecturer in Economics, University of Peradeniya.

A TALE OF THREE CONSTITUTIONS
1946-8, 1972 and 1978*

K. M. DE SILVA

Sri Lanka has had three constitutions since independence, each reflecting a distinctive style in the mechanics of constitution-making. The first, of British origin, lasted all of twenty-five years; the second, an autochthonous constitution produced by a constituent assembly barely survived the defeat of the government that introduced it; and the third, the product of a Select Committee of the National State Assembly as the legislature of the first republic was called, was introduced on 7 September 1978.

If the constitution under which the new Dominion of Ceylon began its political existence—the Soulbury constitution—was of British origin, in contrast to the autochthonous constitution drafted for India by her constituent assembly, it was also true that it was basically the constitution drafted locally for D. S. Senanayake in 1944—and subsequently overwhelmingly approved by the State Council—modified to suit the needs of the changed circumstances of 1947-8. And these modifications, as we shall presently see, were few and not very substantial.

The most striking feature of this constitution was that it came closer to the Westminster model than most other Commonwealth constitutions. The draft scheme of 1944 provided for a cabinet form of government adhering to the principles of collective responsibility, a unicameral legislature, and a governor-general as head of state. Whether or not there was to be a second chamber was left for the future legislature to decide, by a simple majority. The Soulbury constitution took over the scheme but added to it a second chamber. The draft constitution incorporated a scheme of representation which, without compromising the territorial as against the communal principle, gave weightage to minority groups and to backward and sparsely populated areas. This scheme was adopted in its entirety by the Soulbury Commission (and survived the supercession of the Soulbury constitution in 1972).

The guiding principles behind the draft scheme of 1944 (and the Soulbury constitution) were: that Sri Lanka was a multi-racial democracy; and the commitment to the maintenance of the liberal concept of a secular state in

---

*This is a revised and expanded version of the text of my talk at the seminar on the Constitution of the Second Republic of Sri Lanka organised by Ceylon Institute of World Affairs in November 1978. For further discussion of parts I and II of this paper see my chapter 'The Constitution and Constitutional Reform' in *Sri Lanka : A Survey* ed. K. M. de Silva (London, 1977) pp. 312-329.

which the lines between state power and religion were scrupulously demarcated. D. S. Senanayake placed himself in direct opposition to an influential current of opinion which viewed the Sri Lanka polity as being essentially Sinhalese and Buddhist in character, and which urged that government policies should be fashioned to accommodate a far-reaching transformation to build a new Sri Lanka on traditional 'ideal', Sinhalese-Buddhist lines. Implicit in this latter was a rejection of the concept of a multi-racial polity, as well as the concept of a secular state.

Article 8 of the draft constitution of 1944[1] imposed restrictions on legislative power as "a general protection to minorities, whether racial, social or religious". These provisions were incorporated in the Soulbury constitution (S. 29[2]), and were the only serious limitation on the powers of the new parliament. In retrospect, the rights of minorities do not appear to have received adequate protection in the Soulbury constitution, but at the time of the transfer of power the constitutional guarantees against discriminatory legislation seemed sufficiently reassuring to the minorities, largely because of the trust and confidence they reposed in D. S. Senananayake. The constitution did not incorporate a bill of rights. It was a unitary constitution, surprisingly flexible in practice despite its apparent rigidity, and the courts—as in other Dominion constitutions—could review the constitutionality of legislation and the legitimacy of the use of power.

From its inception the Soulbury constitution came under attack from the very vocal left-wing of the island's political spectrum. For two main reasons their contention that the independence achieved in 1947-8 was spurious evoked a positive response from a wider circle of the political nation than merely their own ranks and fellow-travellers.

The first and most important of these two reasons was the contrast between the two processes of transfer of power in the Indian sub-continent and Sri Lanka. The Indian experience seemed to be more emotionally satisfying than the Sri Lankan. The island's political leadership within the Board of Ministers under the Donoughmore constitution took pride in the fact that the transfer of power had been smooth and peaceful. The last British governor of the colony of Ceylon, Sir Henry Monck-Mason-Moore became the first Governor-General of the new Dominion. If there was a parallel for this in the

---

1. *Sessional Paper* XIV of 1944.

2 For a discussion of the background to these agreements see H. Duncan Hall, *Commonwealth: A History of the Britsh Commonwealth of Nations* (London, 1971), pp. 795-810. Sir Ivor Jennings, *The Constitution of Ceylon* (3rd ed., O.U.P. Bombay, 1953) pp. 252-54. See also my paper 'Sri Lanka : D. S. Senanayake and the Passage to Dominion Status, 1942-47,' read at the Commonwealth History Postgraduate Seminar of the Institute of Commonwealth Studies, University of London, on 26 May 1977.

case of India and Mountbatten, there was a notable difference between the constitutional and legal instruments which conferred independence on Sri Lanka and the cognate process in the rest of the British *raj* in South Asia—for India and Pakistan there had been Acts of Parliament, for Burma, a specially negotiated treaty, for Sri Lanka a mere Order-in-Council. Certainly there was no qualitative difference in the nature of independence achieved by Sri Lanka and that attained by India and Pakistan, and no meaningful difference in status was either intended by Britain or accepted by Sri Lanka's leaders. Yet inevitably there were disadvantages in making the process of transfer of power so bland as to be virtually imperceptible to those not directly involved.

Opposition critics focussed attention on the British origins of the new Constitution. Indeed the left wing composed of the Trotskyist Lanka Sama Samaja Party (LSSP) and the Communist Party (CP) urged the establishment of a constituent assembly on the Indian model to draft a constitution for the island. The LSSP, the most articulate exponents of this line of action argued that: "... an independent country, or rather a country achieving independence after foreign subjection required to mark its independence by the framing of a constitution for itself—and that the proper instrument for so framing a constitution was classically the constituent assembly..."

Secondly, the Agreements on Defence and External Affairs appeared to give credibility to the argument that Sri Lanka's independence was flawed. The Agreements themselves were regarded as badges of inferiority and checks on full sovereignity in external affairs. Moreover fears were expressed about secret clauses not divulged or a secret treaty even more detrimental to the island's new status as an independent nation. Events were to prove that these fears and suspicions were without foundation in fact, and certainly no secret undertaking had been given by Sri Lanka in 1946-8, but until 1956-7 suspicions on this score persisted.

It might have been expected, in these circumstances, that Sri Lanka would soon jettison the Soulbury constitutional framework, and develop instead a political style appropriate to the conditions of its own society. Yet this framework remained intact without any significant modifications till 1972.

In the period 1947 to early 1956, the years of the UNP domination of Sri Lanka's politics, there were no moves to introduce any significant amendments to the constitution, much less to replace it with another. The 1952 elections had given the UNP government an effective two-thirds majority, which might have been used for such a purpose had it been so minded, but it was not, though there were occasional murmurs about the need for republican status for Sri Lanka. The left-wing, both within and outside parliament, persisted in its opposition to the constitution but its power-base was not strong

enough or wide enough to make this opposition more than symbolic or ritualistic. The emergence of the Sri Lanka Freedom Party in 1951 did not initially strengthen the forces of constitutional reform, for the new party did not have or demonstrate the same dogmatic opposition to the Soulbury constitution as the left-wing groups.[3] The Federal Party in the meantime, had set forth its proposal for a federal constitution, but it was not much more than a voice in the wilderness; its following among the Tamils was less substantial than that of G. G. Ponnambalam, the acknowledged leader of the Tamils who for most of this period was a member of the Cabinet, and whose party the Tamil Congress was an integral unit of the government.

During the years 1956-77 the SLFP was the dominant force in Sri Lanka's politics, ruling either on its own or as the predominant influence in a coalition with left wing parties for over fifteen years. Till about 1968 the SLFP thought in terms of amendments to the Soulbury constitution rather than its replacement by an autochthonous constitution. In this it was continuing a line of policy first adopted by its founder. When S. W. R. D. Bandaranaike became Prime Minister in 1956 he was more concerned about the defence agreements signed at the time of the transfer of power than with the Soulbury constitution itself. Soon he was able to satisfy himself that these agreements were not detrimental to the country's status as a sovereign state, (and it is significant that these agreements, for all the criticism they have been subjected to ,from time to time, have never yet been abrogated). At the Commonwealth Prime Ministers conference in 1956 Bandaranaike secured the agreement of his fellow Prime Ministers for his country's transition to republican status within the Commonwealth. He was anxious at the same time to introduce amendments to the Soulbury constitution. On his initiative a Joint Parliamentary Select Committee on Constitutional Reform was set up on 2 November 1957 to prepare the basis of a new constitutional structure. But the political instability of the last phase of his tenure of office as Prime Minister put paid to any prospects of introducing amendments to the constitution.

The SLFP's manifesto for the elections of 1960 envisaged the amendment of the Soulbury constitution in regard to : '... the position of the Senate, the definition of democratic and economic rights, and the establishment of a democratic republic ....'. Its manifesto of 1965 re-iterated the theme of a republic and the need to revise the constitution "to suit the needs of the country". More significantly, this latter manifesto had the endorsement of the LSSP which had joined the SLFP in coalition in late 1964, and the C. P. (Moscow wing) prospective partners in the event of electoral success, all of whom had an

3. S. W. R. D. Bandaranaike, founder of the SLFP had been a member of the Board of Ministers and the Cabinet at the time the constitution and the transfer of power had been negotiated. Indeed he had seconded D. S. Senanayake's formal motion introduced in the State Council on 8 November 1945, accepting the Soulbury proposals

electoral agreement against the UNP. The Federal Party by this time was the main political influence among the Tamil minority, but the federal constitutional structure they advocated was not a viable proposition because all other political groups in the island were either suspicious of federalism or intuitively opposed to it as the thin edge of a separatist wedge. As for the UNP, the SLFP's main rivals for power, its policy in government and opposition had been a revision of the Soulbury constitution: in particular the UNP was in favour of Sri Lanka becoming a republic within the Commonwealth. But when in power (1965-70) it lacked the parliamentary majority (two-thirds of all members of the Lower House) necessary to secure amendment of the constitution.

The survival of the Soulbury constitution, without fundamental change, during this decade of SLFP-dominated governments can be explained on a different basis as well. The comparative flexibility of the constitution, and the lack of a bill of fundamental rights enabled the political structure to accommodate itself to a series of far-reaching changes, most if not all of which adversely affected ethnic and religious minorities. As early as 1948 the *Ceylon Citizenship Act* eliminated the vast bulk of the Indian plantation workers from the electoral registers by the simple device of defining the right to citizenship far more rigidly than under the Donoughmore constitution. It was thus demonstrated that the constitutional obstacle of Section 29 (2) (b) would not operate as long as legislation was so framed that there might be a restriction in fact but not in legal form, and the restriction was made applicable to all sections of the community and not to a specific group. When S. W. R. D. Bandaranaike's *Official Language Act* was introduced in the House of Representative in 1956, the Speaker ruled that it was not a constitutional amendment and therefore required only a simple majority. In 1960 the Roman Catholics found to their dismay that the constitution provided no protection for them in their campaign to preserve the *status quo* in education.

Equally important, nationalisation of local and foreign business ventures was facilitated by the fact that there was no provision in the constitution for just and expeditious payment of compensation. Thus there was no constitutional protection for special economic interests and property rights in general.

It could be argued that if the constitution had been more effective in protecting the interests of minorities, and such advantages if not privileges as they had acquired during colonial times and which they continued to enjoy after independence, pressures for amendment of the constitution, or for its replacement by an autochthonous one would have been impossible to resist. As it was, constitutional reform received very low priority in the 1960's from the SLFP.

Midway during the UNPs term of office in 1965-70 the constituent parties of the United Front (UF) coalition—the SLFP, LSSP and CP (Moscow wing) —made a momentous re-appraisal of their attitude to the question of constitutional reform. Abandoning their previous policy of a more revision of the Soulbury constitution they committed themselves to establishing a constituent assembly which would derive its "authority from the people of Sri Lanka and not from the powei and authority assumed and exercised by the British Crown and Parliament in establishing the present [Soulbury] constitution ...nor from the constitution they gave us." Since this was no more—and no less —than the adoption of the orthodox LSSP and CP stand on an autochthonous constitution for Sri Lanka, the question naturally arises as to how it was that the SLFP acquiesced in, and indeed enthusiastically endorsed, this line of action. The answer, one suspects, lay in an *obiter dictum* of the Judicial Committee of the Privy Council in London in 1966 in which it had held that Section 29 (2) (b) of the Soulbury constitution—the clause relating to minority safeguards—was an entrenched provision which could not be amended in any revision of the constitution. To the SLFP—as the unabashed advocates of the Sinhalese-Buddhist domination of the island—this would have been ample justification for accepting the view that a new constitution should be drafted and that a constituent assembly would be the most appropriate means of doing this.

II

Its overwhelming electoral victory in May 1970—in which the UF coalition secured 113 out of 151 elected seats, well above the number required for effecting any amendments they desired to the existing constitution—gave the new regime the opportunity it sought to put its new policy into effect. One of their first acts after assumption of office was the summoning of a constituent assembly. The intention was quite deliberately to provide for the establishment of a free, sovereign and independent republic through an autochthonous constitution. To underline the autochthonous nature of the new constitution, the constituent assembly consciously and consistently acted outside the framework of the Soulbury constitution; indeed its framers claimed that in its "essential procedures and entire functioning [it was] counterposed to the [Soulbury] constitution".

Colvin R. de Silva, the Minister of Constitutional Affairs of the new government, who had been a critic of the Soulbury constitution from the time it was introduced in 1947 now had the satisfaction of presiding over its supersession. More important, the new constitutional structure that emerged bore the imprint of his ideas, even though his was not always the main influence in this enterprise of constitution-making. In a broadcast talk on 10 September 1970 he set out the shortcomings of the Soulbury constitution as the UF government saw them: an entrenched clause (29[2][b]) which safeguarded minorities against discriminatory legislation; the right of judicial review by the courts over the constitutionality of legislation passed by parliament; colo-

nial-oriented administrative machinery; a bicameral legislature; and the in equality of the vote under the existing system of delimiting parliamentary constituencies with its weighted bias in favour of the rural areas and remoter parts of the country.

The new constitution eliminated all except the last of these—the system of delimiting constituencies passed almost unchanged into the new constitutional structure. Its survival reflected the realities of political power in Sri Lanka. Originaly designed to swamp the radical urban vote, the system of delimitation had come to form the basis of the SLFP's hold on power—the rural constituencies. The urban areas have become, by and large, more conservative in outlook, while the rural constituencies have become correspondingly less so.

The first republic of Sri Lanka (1972-78) was a centralised democracy in which the dominant element was the political executive. There were indeed few institutional checks on its use of political power. Dr. Colvin R. de Silva as the guiding spirit of the new constitution preferred to emphasise the role of the National State Assembly—an unicameral legislature—in the new constitutional structure: "It constitutes the legislature; the executive is drawn from it, and made answerable to it; and the courts are of its creation ... The legislative, the executive and the judicial functions are only three aspects of the single power of the people and that organic unity of the three aspects of power is carried into the organization of the state".

The conception of the National State Assembly as the vehicle of the sovereignty of the people found final expression in the provisions which denied to the courts the power or jurisdiction to pronounce upon the validity of laws enacted by the Assembly. The functions of the courts were confined to the interpretation of the laws. A constitutional court—strikingly similar to that under the Fifth Republic in France—was established to participate in the process of legislation as the adviser to the National State Assembly on the question of whether any provision of a bill, or a bill itself, was unconstitutional. Its advice was made binding on the National State Assembly which had to provide a special majority of two-thirds of its membership to override a decision of that court that the provisions of a bill were unconstitutional.

The 1972 constitution brought the entire administrative structure of the country under the control of the Cabinet of Ministers. The provisions relating to the bureaucracy in that constitution gave legal and constitutional form to a fundamental departure from the British concept of an independent public service and to the introduction of a version of the American spoils system.

The head of state under the first republic was the President whose position was perhaps unique in that he was nominated by the Prime Minister and not elected directly or indirectly. In so far as he was the Prime Minister's nominee there was no change from the position of the Governor-General under the Soulbury system except that it was clearly laid down that the President was appointed for a period of four years.

In two respects, both of crucial significance, the powers of the President under the new constitution were inferior to those of the Governor-General under the Soulbury sytstem. First, there was the removal of the residuary powers derived by the head of state from the Public Security Act, and the vesting of almost all these in the head of the political executive. Secondly, the new constitution incorporated as law some of the constitutional conventions relating to the powers and functions of the head of state. Under the Soulbury constitution these powers and functions had been exercised in accordance with the constitutional conventions governing their use by the Queen in the United Kingdom. These British conventions have nowhere been authoritatively laid down, and constitutional lawyers sometimes hold contradictory views about them. In Sri Lanka difficulties and doubts had arisen in the paste especially over the obligation of the Governor-General as head of state to acceed, to a Prime Minister's request for a dissolution of parliament. The 1972 constitution spelled out the circumstances in which such a dissolution may be granted or refused. The initiative and discretionary authority of the head of state were thus substantially reduced.

The 1972 constitution, unlike its predecessor, incorporated a chapter on Fundamental Rights and Freedoms, including: the equality of all persons before the law; the prohibition of discrimination in public employment on the grounds of religion, race, caste or sex; freedom of thought, conscience and religion; protection of life and personal liberty; freedom of speech, of peaceful assembly and of association; and freedom of movement and residence.

In practice, however, their effect was largely nullified by the wide-ranging scope of the restrictions on these rights and freedoms incorporated in Section 18(2) of the constitution, which read thus:

> 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 rights and freedoms of others or giving effect to the Principles of State Policy set out in Section 16.

Section 16 of the constitution set out certain Principles of State Policy, which bore the strong imprint of the government's political outlook and commitments—the realisation of the objectives of a socialist democracy. These principles are not justiciable, and the constitution in fact stated that

they confer no legal rights and are not enforceable in any court of law. The principles were set out, as in some constitutions, in order to guide the making of laws and the governance of the country.

The differences between the 1972 constitution and its predecessor were vital. On the eve of its promulgamation in May 1972 Dr. Colvin R. de Silva claimed that "the new constitution not only marks a change in the status of our land and people but also has a foundation or root which is entirely different from the foundation or root of the constitution which will be displaced today". Nevertheless though in little more than a formal way it did resemble the Soulbury constitution and, through it, the draft constitution of 1944.

The unicameral structure went back to 1944, as did the system of demarcating constituencies, and so for that matter, though to a lesser extent, did the provisions regarding the public service.[4] The constitution of 1972 incorporated two pieces of legislation which were in fact some of the most important policy formulations of D. S. Senanayake himself though they were outside the 1944 draft. Section 67 of the new constitution essentially retained the laws relating to citizenship enacted in 1948 and 1949 with their consequential amendments, while section 134 incorporated the *Public Security Act* of 1947 with the amendments to it introduced subsequently.

On 19 July 1970 when the then Prime Minister Mrs. Bandaranaike had moved a resolution that the MPs of the new Parliament proclaim themselves the constituent assembly of the people of Sri Lanka for the purpose of adopting and enacting a new constitution her resolution was unanimously accepted and there was the apperance of a national consensus on the basic elements of constitutional reform. A demoralised opposition confronting a government

4. The draft constitution of 1944 provided for a public service commission which would advise the Governor-General *only* on new appointments carrying an initial salary of at least Rs. 3,600 a year—in effect, the higher bureaucracy. The promotion, transfer, dismissal and disciplinary control of other officers was to be vested in the Governor-General, who could delegate any of these powers to any minister of state or public officer. The Soulbury constitution adopted this scheme. It was expected that progressively the Governor-General would act on ministerial advice over appointment to, and promotions in, the higher bureaucracy and disciplinary matters, or delegate powers to ministers, and in this way enable the ministers answerable to parliament to discharge their responsibilities. Section 106 of the republican constitution of 1972 followed similar principles in vesting such powers in the hands of the Council of Ministers and made them clearly answerable to the National State Assembly for their actions in these matters.

at the height of its very real popularity and prestige was too weak to do more than follow the government, even though many of them had strong reservations about the process of constitution-making adopted by the government, and the proclaimed aims of the new constitution. By 22 May 1972 when the new constitution was adopted the political situation had changed to the disadvantage of the government. The remorseless pressure of economic decline—inflation, unemployment and falling output in every sphere of activity—combined with the mini-civil war of 1971 had perceptibly eroded the popularity of the government if not its self-confidence. As a result the process of constitution making which had begun as a national endeavour with popular support ended as a party affair with lukewarm public support.

By the end of the June 1971 the Federal Party, the main political party of the indigenous Tamil minority, had made the crucial decision to boycott the constituent assembly as a protest against the failure to provide adequate protection for minority rights. The rift between the Federal Party and the government had emerged over the question of language rights. To the official resolution that "all laws shall be enacted in Sinhala. There shall be a Tamil translation of every law so enacted," the Federal Party moved an amendment that Sinhala and Tamil should be the official languages of Sri Lanka, the language of the courts, and the language in which all laws should be published. This amendment led to an acrimonious debate. The government argued that the amendment was tantamount to a total rejection of the existing position on the national language, a consensus achieved through the years since 1956, and one which the Federal Party itself had come to accept. It added that this amendment would be totally unacceptable to the people.

On 28 June 1971 the Federal Party amendment was defeated by a vote of 87 to 13, upon which its members walked out of the constituent assembly, and did not return to participate any further in its deliberations.

That there was a consensus on language to which the Federal Party among others had given its tacit acceptance is incontrovertible.[5] At the same time it is important to remember that clause 29 of the Soulbury constitution—that relating to minority rights—was an integral part in this consensus. Though the protection this clause afforded to the minorities was less comprehensive than its framers intended it to be, it nevertheless acted as a deterrent against patently discriminatory legislation. The government scarcely concealed the fact that it was resorting to the device of a new constitution in preference to a reform of the old one partly, at least, because it afforded a means of eliminating Clause 29. Once this vital clause had been removed a significant element in the consensus on language had been unilaterally discarded to the

5. The strongest evidence of this was the decision of the Federal Party to join the UNP-led coalition government in 1965.

detriment of the Tamil minority. Thus it was no longer possible to speak of a consensus on language which the Federal Party itself had come to accept, tacitly or otherwise. Even more decisive as a factor in the withdrawal of opposition support for the new constitution was the decision of the ruling coalition to give itself an extended term of office to 1977, two years beyond the five-year term for which it had been elected in May 1970.

In June 1971 the constituent assembly resolved that the National State Assembly under the new constitution would go on for a period of six years after the constituent assembly adopted the new constitution. Since this latter body was no more and no less than the House of Representatives elected in May 1970, this would have meant that MPs elected in May 1970 would have a spell of eight years. This, the opposition urged, was a breach of faith with the people who had not been given any indication in May 1970 that they were electing a parliament for any longer period than the normal five-year term provided for by the existing constitution. They argued that the government had no mandate for thus extending the life of parliament. Under strong pressure from opposition groups in the constituent assembly the government decided to reduce the term of the first National State Assembly to five years (all future ones would sit for a term of six years). But this revision, which was announced in the constituent assembly on 8 May 1972, did not satisfy the opposition. For the fact was that the government had used its overwhelming majority in the constituent assembly to give itself an extended term of life.

This action by the government is probably unprecedented in the annals of constitution-making in democratic states. In taking the decision the government demonstrated scant regard for any considerations of its own sense of public integrity. Its immediate effect was to give these proceedings a patently partisan outlook, ensuring thereby a substantial erosion of what national consensus there remained on constitutional reform. Dudley Senanayake, former Prime Minister and late leader of the UNP declared that this unilal teral extension of the government's normal term of office was one of the main reasons for his party's decision to vote against the adoption of the new constitution. Thus a national endeavour became a partisan affair, and the 1972 constitution far from bringing the people together as the Prime Minister had hoped when she inaugurated the proceedings of the constituent assembly, ensured the perpetuation of ethnic disharmony and aggravated political rivalries.

In the final phase of the constituent assembly's life it became evident that the UNP would vote against the adoption of the new constitution. On 22 May 1972 at the final sessions of the constituent assembly, Dudley Senanayake explained at length why his party was voting against the new constitution. He declared that while his party were "... clearly and unequivocally... in full accord with the government that the new constitution should declare

Ceylon a free sovereign and independent republic," the constitution contained far too many objectionable and potentially dangerous features to merit their support.

Thus the establishment of the republic of Sri Lanka was the one feature of the new constitution which attracted support extending beyond the ranks of the government. And the constitution of 1972 like its predecessor started off with a large section of the political nation (a much larger section than in the case of the Soulbury constitution) vocally opposed to it, and quite definitely committed to its supercession or modification through far-reaching amendments.

III

When the Sri Lankan electorate is in one of its not so very infrequent moods of disenchantment with a regime in power it gives vent to its displeasure with an exuberance and vehemence which all but obliterates—in terms of parliamentary seats—the object of its displeasure. No defeat in the history of Sri Lanka's volatile parliamentary history is quite as comprehensive as that suffered by the rivals of the UNP in July 1977.

High on the new government's list of priorities was a fresh and searching look at Sri Lanka's constitutional structure. The constitutional changes they had in mind had been outlined as early as 1971 when these had been moved as alternative proposals to the then government's constitutional reforms during the debates of the constituent assembly. Subsequently they had been incorporated in the election manifesto of the UNP for the 1977 general elections thus:

"Executive power will be vested in a President elected from time to time by the people ... The constitution will also preserve the Parliamentary system we are used to for the Prime Minister will be chosen by the President of the Party that commands a majority in Parliament and the Ministers of the Cabinet will also be elected Members of Parliament".

The constitutional changes envisaged in the UNP manifesto became a major point of controversy in the election campaign of 1977. This was in sharp contrast to the previous election campaign—that of 1970—where constitutional reform *per se* was not an important issue. The difference lay in the fact that the reforms set out in the UNP's election manifesto of 1977 had received much publicity from well before the commencement of the election campaign, and had been recognized for what they were, a major structural change in the country's political-constitutional structure. By focusing attention on these regularly during the election campaign the UNP's opponents hoped, at once, to erode the credibility of the UNP's commitment to democratic government—the charge was that these constitutional changes were a

blueprint for authoritarianism—and to divert attention from their own record of administration over the previous seven years. Far from serving as ammunition for the discomfiture of the UNP, it worked to its advantage. Precisely because constitutional reform had been converted by its rivals into a key election issue the UNP was able to treat its shattering electoral triumph of 1977—for the first time at a Sri Lankan general election the winning party won a clear majority of the popular vote—as an unmistakably positive endorsement by the electorate of its proposals for constitutional reform. The first step was the adoption by the National State Assembly of a constitutional amendment establishing a presidential system of government. Under the terms of this amendment the Prime Minister, J. R. Jayawardene assumed office as the first elected Executive President of the country on 4 February 1978. Next came the appointment in September 1977 of a parliamentary select committee on constitutional reform, indicative of the government's intention to effect constitutional changes within the framework of the 1972 constitution. The result of the Committee's deliberations however was not an amendment of the constitution of 1972 but its replacement by another, the second major overhaul of the island's constitutional system since independence.

While the constitution of the first republic (1972-8) concentrated on strengthening the armoury of executive power, it nevertheless maintained almost intact, the Westminster model formulated for the island in 1946-8. The second republic of 1978 has, on the other hand, inaugurated a presidential system which brings into operation new political styles. The new constitution is a unique blend of some of the functional aspects of Sri Lanka's previous constitutions and features of the American, French and British systems of government—a presidential system designed to meet Sri Lanka's own special requirements in the light of past experience in the working of previous constitutions. The new political style included referendal democracy, consultative advisory committees to Cabinet ministers, an extensive charter of fundamental rights (more meaningful than that incorporated in the previous constitution) and proportional representation on the list system in place of the 'first-past-the-post' principle of representation based on the British model.

One underlying theme was the rejection of many of the authoritarian features of the constitution of 1972; by imposing more effective restraints on the powers of the executive and the state; by sustaining the rule of law; and strengthening the independence of the judiciary, the rights of the individual *vis-a-vis* the state, and most important of all in the current crisis in relations between the Sinhalese and the Tamils—the rights of the minorities.

There is both departure and continuity in this the first realistic structural change in the constitution effected since independence. For instance the legislature remains a major and supportive centre of decision-making; prime-ministerial and cabinet government are retained; and a unicameral structure is retained.

The concessions made to the Tamil minority, in regard to the status of their language in the Sri Lankan polity were a fulfilment of a pledge given in the government's first statement of policy in the National State Assembly on 4 August 1977 well before the outbreak of the communal disturbances of that month. Two articles in the new constitution set the tone. Article 19 declares that Sinhalese and Tamil shall be the national languages of Sri Lanka (with Sinhalese remaining the sole official language) a major departure from the language policy established since the mid-1950's. Equally important Article 26 abolished the distinction between citizens by descent and citizens by registration—an irritant to the Indian Tamils—thus removing the stigma of second-class citizenship attaching to the latter. In combination with the elimination, in December 1977, of the bar in force since the 1930s on plantation workers resident on estates from voting in local government elections, this ensured that persons of Indian origin, in the main plantation workers, are treated on par with Sri Lankan citizens by descent. The position of Indians resident in Sri Lanka was further improved by affording to stateless persons the same civil rights guaranteed by the constitution to citizens of the country.

So far the Indian Tamils have responded more positively to these conciliatory gestures than the TULF. J. R. Jayawardene's success in persuading S. Thondaman, leader of the Ceylon Workers Congress, the main political party cum trade union of the Indian plantation workers to accept Cabinet office with the introduction of the new constitution marks a major breakthrough in the island's politics for it brought the Indian Tamils within 'the political nation' for first time since the 1930's. It widened the breach between the C.W.C. and their erstwhile colleagues in the TULF.

The T.U.L.F. now very much a party of the indigenous Tamils has ostentatiously dissociated themselves from the process of constitution-making in their anxiety to underline their commitment to Eelam a separate state for the indigenous Tamils. The traditional left, not represented in Parliament today has rejected the new constitution as an exercise in Bournapartism. None of its representatives gave evidence before the Select Committee. This the SLFP did, but its MPs walked out of parliament during the debate on the constitution in protest against the processes of constitution-making adopted by the government, and against some of the salient features of the new constitution especially the Executive Presidency and proportional representation. In this sense the present constitution like its predecessor has has been opposed by all major opposition groups, in brief by large and very vocal sections of the political nation.

It seems unlikely however that the present constitution will be as short-lived as that of the first republic despite the fact that a large section of the political nation is publicly committed to replacing it with another. The draft constitution placed before the National State Assembly in July 1978 incorporated two processes for amendment of the constitution: a two-thirds majority, in Parliament or a simple majority plus approval by the electorate at a referendum. [7] This latter was deleted at the committee stage, and the two-thirds majority remains, while the requirement for an extension of the life of Parliament is even more formidable, a two-thirds majority plus approval at a referendum. The island's electoral system under the Soulbury constitution and the first republic had one peculiar feature—a major shift of popular support was often magnified by the electoral system and a new regime was returned to power with a far higher proportion of seats in the legislature than was warranted by the popular vote it received. Since 1959-60 the distortions of the electoral system worked to the disadvantage of the UNP but in 1977 the SLFP found itself with just 4.8% of the seats though it obtained 29% of the vote. Proportional representation will eliminate distortions of this sort. It would take political skills of a very high order to cobble together a coalition within the legislature which could command the two-thirds majority required to amend the constitution. Given the country's multi-party political structure ideology and ethnicity are likely to pose formidable if not insurmountable obstacles in any search for common ground in amending the constitution.

Whether the constitution can be replaced by another through the device of a Constitutent Assembly as the Soulbury constitution was in 1972 is an altogether different proposition. This course of action worked successfully in 1970-72 for a number of reasons: the moral authority the UF derived from what was, up to that time, the most decisive election victory—in terms of parliamentary seats—in Sri Lanka's parliamentary history; a united front of the centrist SLFP and the traditional left; and a thoroughly demoralised UNP, its leadership sharply divided on tactics and strategy, which by participating in the proceedings of the Constituent Assembly gave it the semblance of a national consensus on constitutional reform. The most telling factor was the two-thirds majority in parliament the UF commanded (even though the parties in the UF coalition received only 48% of the votes polled nationally). Had this majority dropped to 55% or even 60% of the seats in the national legislature it is most unlikely that the UF could have pulled off the constitutional 'coup' that a Constituent Assembly represented.

The then Leader of the Opposition, J. R. Jayawardene, in a speech on the occasion of the inauguration of the Constitutuent Assembly on 19 July

6. Section 82(5) (a).
7. Section 82(5) (b).

1970[8] pointedly referred to the complex constitutional, legal and political problems involved in this process of constitution making through a Constituent Assembly. Three short extracts from his speech are quoted below:

"This government has more than two thirds of the whole number of members of the House and can pass legislation to amend or repeal any of the provisions of the constitution. The Judiciary, constitutional authorities and some members of my own party believe that the amendment or repeal of some of the clauses of the constitution, including the clause which creates and defines Parliament as consisting of "Her Majesty and two Chambers", is not legally possible even with a two-thirds majority. If the Ceylon legislature cannot replace the constitution with another of its own creation even with a two-thirds majority, how then can we establish a Republic?

"Those who accept this argument seek to get rid of this fetter by drafting a new constitution *ab initio*, by means of a Constituent Assembly which does not derive its authority from the existing constitution but from the people themselves..."

His views on constitutional reform were diametrically opposed to these.

"I am one who holds the view that our constitution can be amended and repealed, and a new constitution not rooted in the past can be enacted by our sovereign parliament with a two-thirds majority. If a Constituent Assembly composed of members of parliament can 'adopt, enact and establish' a constitution for Sri Lanka which will declare Sri Lanka to be a free sovereign and independent republic; and if the people and the Judiciary can be made to accept it as legal and valid, so can they be made to accept a similar constitution" adopted, enacted and established "by the parliament to which we have been elected by the free vote of the people."

He went on to cast doubts on this process of resorting to a Constituent Assembly to "adopt enact and establish" a new constituent. "A mandate from less than fifty per cent of the people is alone no mandate or authority to draft a constitution and replace or repeal the existing one. The authority given to the members of the House of Representatives is to work within the framework of the existing legislature, for it is an election to that legislature with all its entrenched provisions. You should not therefore asuume a power you do not have under the present fundamental law, nor should you enlarge the scope of your victory".

---

8. For this speech see J. R. Jayawardene, *Selected Speeches and Writings* 1944-1978 (Colombo, 1979, revised edition of a volume originally published in 1974), pp. 115-117.

With the Constituent Assembly of 1970-2 very much in mind the Select Committee which drafted the present constitution sought to impose (through clause 157 (1) (2) (3) (4) and (5) of the draft constitution of July 1978) severe penalties on any person or 'body of persons' 'corporate or incorporate' who advocate attempt, abet, instigate, participate or engage" in any conspiracy for the amendment, whether by way of alteration of addition or repeal or replacement of the Constitutive or any provision thereof otherwise than in accordance with the provision [sic] of Chapter XII..." But when this clause attracted heavy criticism in the National State Assembly when the draft constitution was debated, the government responded by deleting it altogether from the constitution. Despite this however, it is difficult to foresee the same combination of factors and political forces which succeeded in the constitutional coup of 1972 working toegther again so smoothly and so effectively and without legal challenge on a future occasion. On that occasion, 1970 to 1972, the novelty of a constituent assembly, and the element of surprise involved also contributed to the success of this process of constitution-making. Future attempts at establishing a constituent assembly will have neither novelty nor surprise. For all these reasons the odds are in favour of the present constitution lasting longer than its predecessor.

THE MAKING AND UNMAKING OF CONSTITUTIONS–SOME REFLECTIONS ON THE PROCESS

NEELAN TIRUCHELVAM

I

'The making of a Constitution is not an isolated event but a step in the process by which a people assert their identity, articulate their basic values and aspirations and define the instruments of government through which the sovereignty of the people can be exercised'.

There are two approaches to this process which need to be distinguished and clarified.

The first approach is directed towards the elaboration of an institutional framework which more effectively corresponds to the political style of the regime in power. Such an approach is regarded as the 'instrumental' approach to constitution making and does not envisage the constitution to be an eternal instrument embodying the highest values and aspirations of the people. There is a measure of impermanency in such instruments as their lifespan is often limited to the duration of the political regime in power. They provide the means by which those who had captured power can more effectively organize and exercise power.

The second approach to constitution making envisages the contitution to be the fundamental law, enshrining for all times the basic values, aspirations and ideals of the different components of the body politic. Such constitutions are somewhat permanent instruments, and even the process of amendment gathers inspiration and direction from the underlying philosophy of the constitution itself. The second is the 'consensual' approach.

The instrumental approach recognizes a somewhat authoritatian process of constitution-making which disregards the aspirations of groups in opposition to the regime in power. The consensual approach, on the other hand, views the constitution as a legal and political compact capturing the compromises that have been worked out between different communities and political groups: it defines the framework with which the different groups may compete for power and gain access to the resources of a society.

Is the constitutional exercise that has been recently completed of the instrumental or consensual type?

II

The resort to a Select Committee procedure meant that the political parties unrepresented in the Assembly could not enjoy direct participation in the drafting process. The non-participation of the Tamil United Liberation Front in the Select Committee further eroded the exercise of its 'consensual' elements. The conceptual basis for the TULF's withdrawal from this process has been summarised by A. Amirthalingam, Leader of the T.U.L.F.

> "The Republican Constitution of 1972 sought to sever the legal and constitutional link with the past. Once there is such a break in legal continuity, the sovereignty of the inhabitants of the Island, until then under eclipse (during a period of foreign domination or externally designed constitutional rule), resurfaced. Hence the sovereignty of the Tamil nation, which was ethnically, geographically and linguistically separately identifiable and distinct, revived. The United National Party had a clear, unequivocal mandate to assert the sovereignty of the Sinhala nation and enact a new constitution. The mandate of the majority of the Tamil nation pointed to a different duty".

The statement symbolized the major conceptual transformation in Tamil aspirations from 1972-77, which have added to a questioning of the relevance of "Constitutionalism" to the problems of a plural society. This conceptual transformation was related to the assertion of a corporate identity by the Tamil people which was shaped by their perception of a distinct history, language and culture. This identity was seen however by others to be incompatible with and antagonistic to the corporate and collective identity of the Sinhala people causing an ideological crisis in Sinhala-Tamil relations. The nature of this crisis is best understood by reviewing some of the events which signalled a shift in Tamil aspirations from the demand for equality to a desire for self determination.

We begin this exercise by taking our minds back to the 24th of May 1972, two days after the Republican Constitution was enacted. The then Federal Party, participated in the deliberations of the Constitutional Assembly, but withdrew from this process in despair after its attempts to work certain amendments into some of the basic resolutions were arrogantly disregarded. Despite the mood of pessimism within the Tamil leadership, an effort was made to formulate a programme which constituted the lowest denominator of Tamil needs and aspirations. This programme, which was later described as a Six-Point Plan, contained the following specific elements:—

The first element called for equality in constitutional status of the Tamil language and the Sinhala language. Secondly, it called for citizenship to be extended to all those who had settled in Ceylon and who had been rendered

stateless under the citizenship laws. Thirdly, it called for a commitment to a secular State, one in which the equality of all religions was assured. Fourthly, it called for constitutional guarantees of the fundamental rights and freedoms based on the equality of all persons on ethnic and cultural grounds. The fifth element of the Six-Point Plan involved the abolition of caste and untouchability. And finally, there was a call for a decentralised structure of government which would make it possible for participatory democracy to flourish and where power would be people's power rather than State power.

These demands presupposed a commitment to constitutionalism and represented a desire on the part of the Tamil leadership to work towards equality within a plural society. The stubborn refusal of the then government to seriously negotiate these proposals shattered the expectations of even the more optimistic exponents of this poolicy. The party leadership became embittered, and sought an opportunity to demonstrate to the government the complete rejection of the Republican Constitution by the Tamil people. S. J. V. Chelvanayagam, the Leader of the Federal Party, resigned his seat in the National State Assembly with a view to seeking a mandate for the six Point program.

During this period there were other forces which contributed towards a dramatic excalation in the nature of Tamil demands. The Tamils complained of a conscious policy of discrimination with regard to access to employment, education and the execution of developmental programs in the North and East. The language concessions contained in the Regulations framed under the Tamil Language (Special Provisions) Act were not implemented. In the area of land use and land settlement, the government was accused of pursuing a policy directed towards a transformation of the demographic composition of Tamil areas. When Indian estate labour displaced by the land reform policies of the government were voluntarily settled in the Eastern Province, emergency laws were mobilized to eject such persons. On the other hand, the government is alleged to have regularised the illegal settlement of thousands of Sinhala squatters in the North and the East.

Political resistance and agitation against such discrimination were further repressed through preventive detention and harassment of Tamil youths in the North. The politics of hostility, supported by repression and the arbitrary exercise of emergency powers hardened Tamil resistance to the Government.

These events had an important bearing on the emergence of a new Tamil consciousness. The Kankesanturai bye-election of 1975 became the focal point of agitation for the emerging aspirations of the Tamil people. The Federal Party fought the election on the Six-Point Plan, but it was the governmental coalition which irresponsibly contended that support for Chelva-

nayagam would accelerate the processes of separation. The overwhelming majority received by Chelvanayagam enabled the Tamil leadership to appropriate this argument. Chelvanayagam announced after the results, "I wish to announce to my people and the country that Eelam Tamil Nation should exercise the sovereignty already vested in the Tamil people and become free". By this historic statement the conceptual transformation and the demands of the Tamil people became crystalised. This statement represented a shift from the struggle for equality to an assertion of freedom; from the demand for fundamental rights to the assertion of self-determination; from the acceptance of the pluralistic experiment to the surfacing of a new corporate identity.

There are two other events which further consolidated this process. The first was the Vaddukoddai Resolution which sought to translate these vague and disconnected aspirations into a concrete political program. Secondly, the Trial-at-Bar (where three Members of Parliament and one former Member of Parliament were charged with sedition) in which a legal challenge was made to the validity of the Republican Constitution. This trial provided an opportunity for a sharpening of the juridical and historical underpinnings of the new corporate identity of the Tamil people. The TULF's refusal to participate in the deliberations of the Select Committee represented an extension of the juridical argument which was articulated at this trial.

III

The Select Committee constituted in November 3rd 1977 tabled its report on June 22nd 1978. Despite these major handicaps there was remarkable congruence between the views of the United National Party and the Sri Lanka Freedom Party as they related to some of the substantive concerns of the Select Committee. The area of agreement included fundamental rights, judicial review, language, citizenship, principles of state policy, the creation of an ombudsman. Although the SLFP has been consistent in its opposition to the Executive Presidency and some aspects of proportional representation its principal concern as reflected in its dissent appears more procedural than substantive. It protested against the total repeal of the Republican Constitution of 1972, and favoured the introduction of a Third Amendment containing substative alterations to the existing instrument. This position appears to have been further hardened by the addition of controversial provisions in the general and transitional chapters after the Committee Report had been tabled. The SLFP dissent accordingly warned ominously. "The sanctity and continuation of a Constitution depends on public acceptance of its provisions. If at the next elections the people grant us a mandate do so, we shall introduce a Constitution consistent with the views expressed (in the Dissent) and the Republican Constitution of 1972".

The problem still remains whether the constitutional exercise which appears instrumental, can nevertheless acquire the formal attributes of a consensual instrument. The system of proportional representation provides the clue to this problem, and we must now briefly examine its main elements and their implications for the process of constitution making.

IV

The rationale of proportional representation is clearly articulated in the Report of the Select Committee which states that the present system is inadequate in that it is not fairly representative of the political opinion within the country. It points out that in 1970, the Sri Lanka Freedom Party was able to secure 60.3% of the total number of seats in Parliament, although it received only 36.9% of the total vote. On the other hand, the United National Party with 37.9% of the total vote was only able to secure 11.3% of the total number of seats. In 1977 the United National Party with 50.9% of the total votes secured 83.3% of the seats, while the Sri Lanka Freedom Party with 29.7% of the total votes secured only 4.8% of the seats. It should be noted that a 13% swing for the United National Party resulted in a 72% gain in representation, while the negative swing of 7.2% for the Sri Lanka Freedom Party resulted in 55.5% loss in representation. The Report reiterates that this is not merely unfair but leads to political instability.

We must then digress to examine the main elements of proportional representation which are found in Articles 135 to 139 of the Constitution.

Firstly, the identification of the district as the basic electoral unit. A Delimitation Commission will divide the country into several electoral districts. These electoral districts shall be one or more administrative districts. They shall remain unchanged thereafter.

Secondly, the principle of allocation of seats. The total number of seats will be frozen at 196; each province would be allocated 4 seats to be distributed amongst the districts contained within that Province. The remaining 160 seats would be distributed amongst the several electoral districts according to the number of registered voters. As the population increases the number of registered electors will correspondingly increase.

Thirdly, the voting would be for political parties and not for individuals. Recognized political parties present a list of candidates and voting could be based on such lists. There will be no Independents unless they form a group and present a common list of candidates.

Fourthly, the concept of a cut off vote. This means in effect that if a political party or a group of individuals receive less than 1/8th of the total number of votes cast, these votes would be cancelled and the political party concerned would not be able to return a candidate to the National Assembly.

I have elsewhere examined the impact of each of these elements on the growth of the party system. It would be sufficient for this purpose to summarise some of the major criticisms of proportional representation.

Firstly, one of the consequences of the district being recognized as the electoral unit, would be to eliminate the parliamentary electorate and erode the relationship that has evolved between the Member of Parliament and the constituency. The parliamentary electorate has evolved into a distinct political sociological and territorial entity. Within its framework there has evolved a system of social relations between the Member of Parliament and his constituents. This includes the system of reciprocity by which constituents assert the right to make demands upon their representatives for jobs, for governmental benefits; and the corresponding duty to be responsive to these demands. The Member of Parliament influenced the allocation of resources and even mediated inter personal conflict. It is difficult to see how this system of reciprocity and the net work of social relations within which it was contained could replicate itself with a district. The choice of a district as the basic electoral unit would blur the lines of accountability, between the representative and his constituents.

The second criticism relates to that of area weightage. The issue of representation has been one of immense controversy in the political relationships between various communities. We are all aware that the formula for balanced representation was rejected by the Soulbury Commission. The Commission held that representation should be on two principles, viz. one member for every 75,000 inhabitants and an additional member for every 1,000 square mile radius. The object of area weightage was to give additional weightage to the minority communities; so that the Northern and Eastern Provinces were given eight additional seats and the remaining provinces were given 17 seats. Article 136(4) has reversed this process of weightage by providing that each province will be entitled to 4 seats which in effect means that the ratio of 8:17 has now been escalated to one of 8:28. The additional bonus of 11 seats by increasing the representation to the majority community is inconsistent with the very purpose for which area weightage was introduced.

The third problem relates to electoral lists. One of the implications of a list system is that the power of returning individual representatives effectively shifts from that of the electorate to that of the political party. The nomination of candidates and the ranking of candidates become issues of immense importance over which the political party would have control. Under the existing system of local government elections the party lists of the candidates would not even appear on the ballot paper. No doubt there are other means by which these lists can be disseminated amongst the electorate. The list system we

have adopted places a greater distance between the individual voter and the individual candidate who would ultimately be returned to the National Assembly.

It is therefore submitted that a system of proportional representation must be preceded by a democratisation process within the political party itself. The enormous power that the party leadership enjoys in the nomination of candidates, must be modulated to ensure greater accountability to and consultation with the rank and file of the party. Most political parties have an organizational structure in which decision making is delegated by the party convention to a hierarchy of Committees. But the formal organisation often conceals that the real decision making is concentrated in the higher reaches of the leadership. Democratization should find expression both in form and spirit.

Let me revert to the general theme of this article. Does proportional representation provide the answer to whether the new constitution would evolve into the 'instrumental' or 'consensual' type?

Article 82 (5) provides that a Bill for the amendment or repeal of a constitution would require a special majority of two thirds of the members of the National Assembly. Given the pattern of electoral voting that we have seen over the past three decades, it is unlikely that any of the recognized political parties would be able to capture the legislative majority necessary to enact a Constitution of the instrumental type. Proportional representation would entrench an instrumental constitution and clothe it with the permanency of the consensual type. The President further implied during the deliberations of the Select Committee that this new reality could compel the U.N.P. and the S.L.F.P. to abandon the politics of partisanship and evolve the political style of consensus. He stated "Are you not always thinking in terms of the old British system—that the two party system or the three party system will survive? Can we not go ahead of that? Can we not think of a national way?" On this reasoning proportional representation could foreshadow a transformation—in the style of electoral politics and the emergence of a new configurations of power.

On the other hand, there are some who question the validity of this theory. They contend that no formula for representation could per se lead to such transformations. Consensual politics can only emerge out of a climate of political accommodation. And unless a conscious effort is made to create such a climate, it would require little legal ingenuity to work around the entrenched procedures of constitutional change to create another "legal revolution." We would then be thrown back into the cycle of making and unmaking of instrumental constitutional constitutions from which proportional representation can provide no escape.

THE REPRESENTATIONAL SYSTEM

C. R. DE SILVA

The representational system is a key part of any modern democratic constitution because it is essentially the mechanism by which the people choose not merely their representatives in the legislature but also their rulers. The constitution of the Second Republic of Sri Lanka has in fact two distinct representational systems, one through which the people elect their legislature or parliament, and the other through which they elect an executive President. The two systems are best dealt with seperately and each has features both novel and controversial in Sri Lanka.

The arrangements relating to elections to parliament involve a system of proportional representation. For this purpose the whole country is to be divided into a number of multi-member electoral districts, each such electoral district being, as far this is practicable, identical with an existing administrative district or a combination of them. The constitution clearly states that this demarcation is to be done by a three member Delimitation Commission appointed by the President from among persons not actively engaged in politics, and that the number of electoral districts shall not be less than twenty or more than twenty four. The total number of representatives in parliament is fixed at 196. Of these 196 seats, 36 are allocated to the nine provinces on the basis of four seats per province and will be distributed within each province equitably by the Delimitation Commission.[1]

The distribution of the other 160 seats is a little more complicated and is based on a variant of what is generally known as the 'method of smallest divisors'.[2] In the first place the total number of electors (or qualified voters) in the country is determined from the electoral register on the basis of which the election is to be held. In 1977 for instance there were 6,667,589 registered voters. This total is divided by 160 and the result is brought up to the next

---

1. *The constitution of the Democratic Socialist Republic of Sri Lanka*, Colombo, Dept. of Government Printing, 1978. (hereafter 1978 *Constitution*) Articles 95, 96, 97 and 98 (1) Until such a delimitation of made the sixth schedule to Article 162 (2) of the constitution which gives a list of electoral districts determines the electoral districts and the distribution of these 36 seats amongst them. See Table II.
2. M. L. Balinski and H. P. Young, "Stability, coalitions and schisms in proportional representation systems" *The American Political Science Review*, Vol. 72 p. 850.

highest whole number (e.g. for 1977 this would be 41,673). This is termed the qualifying number of electors. Each electoral district is entitled to one member for each qualifying number of electors for the district. [3]

To illustrate, had this system been in operation in 1977 the Batticaloa district with 132,943 electors would have been entitled to a minimum of three seats out of the 160, while Kandy with 475,171 would have obtained eleven and Jaffna with 408,261 would have received nine. If the total number of seats thus assigned to the electoral districts comes to less than 160, the electoral districts with the largest residue of electors for whom seats have not been credited will be allotted the remaining seats in succession.[4] The seats allocated according to provinces would of course be added to these so that in the end Batticaloa district would have obtained four seats, Kandy thirteen seats and Jaffna also thirteen seats.

Once the election has been announced and the number of seats per electoral district known any recognised political party or any group of persons wishing to contest as independent candidates can submit a nomination paper setting out their list of candidates in order of priority.[5] Any list which does not obtain 12½ per cent of the total poll is discarded and the votes polled for that list are regarded as invalid.[6] Thus for instance if we assume that this scheme was in operation in 1977, the Ratnapura district would have been entitled to a total of ten seats. The poll according to 1977 figures would have been 151,473 votes for the United National Party (UNP), 84,632 for the Sri Lanka Freedom Party (SLFP) and 46,983 for the United Left Front (ULF). Other lists of candidates would have been eliminated as they would not have attained the 1/8 qualifying mark. The seats would then have been distributed in the following way. The total number of valid votes is first determined. In this instance it would have been 283,088. This is then divided by the number of seats (ten in this instance) and the answer is the qualifying vote per member (28,309 in this instance). On this basis the UNP would have gained five seats, the SLFP three and the ULF two.[7]

The system of proportional representation thus set up by the new constitution replaced a plurality system of the Westminster type which had existed

---

3. 1978 *constitution*, Article 99 (3), (4), (5).
4. *Ibid.* Article 98 (6) and (7). For a full table of the distribution of seats to different electoral districts on the basis of the 1977 voters registers see, C. R. de Silva, "The constitution of the Second Republic of Sri Lanka (1978) and its significance", *Journal of Commonwealth and Comparative Politics*, Vol. XVII (2), July 1979. p. 201.
5. 1978 *Constituton*, Article 99 (1), (2) and (3). A list of candidates should be one third more than the number of seats vacant. This is to provide for cases when individual candidates withdraw, die or are expelled from the party or group during the election campaign or after it.
6. *Ibid.*, Article 99 (5) a.
7. See Table III.

in Sri Lanka since the early twentieth century. The new system did not lack critics but the criticism has been from two different perspectives. The smaller parties such as those of the traditional Left and the Ceylon Workers' Congress (CWC) the last representing the interests of the plantation Tamils, have generally welcomed the introduction of the principle of proportional representation. On the other hand they have condemned the one-eighth cut-off point as being far too high. V. Thondaman, leader of the CWC stated that this requirement was undesirable in a land of political and ethnic diversity.[8] More recently K. Shinya made an eloquent plea for the removal of this restriction in favour of Leftist 'flowers yet to bloom'.[9] On the other hand it might be noted that 12½ per cent on a district basis is not much more difficult to obtain than 5 per cent on a national basis which is the minimum requirement which exists in the Federal Republic of Germany. In the 1977 General Elections for instance the ULF barely made 5 per cent of the national vote but they obtained well over 12½ per cent of the vote in five of the twenty two electoral districts. Given the 1977 figures a reduction of the district cut-off point to 10 per cent or even somewhat lower would not have helped them to win any further seats. In fact the only large groups the 12½ per cent requirement is likely to affect adversely in the near future are two ethnic groups—the plantation Tamil group in the central highlands which might find that it impedes the capture of a CWC seat in the Kandy district and the opposition to the dominant Tamil United Liberation Front (TULF) in the Jaffna district.[10]

Also against any considerably lowering of the 12½ per cent cut-off point is the fact that it is the only factor promoting the merger or coalition of parties in the new electoral system and of course checking their tendency to splinter. Other schemes of proportional representation have other factors inbuilt in them for this purpose and thus can afford to reduce or even dispense with the cut-off point. An example is the method of d'Hondt, a nineteenth century Belgian lawyer, a method also proposed by Thomas Jefferson in 1792 and ofteu known as the method of the highest average. Allocation of seats by this method is done by dividing the total number of votes by the number seats to be allocated plus one and by giving any extra seats to the party that would be worst off if every party were to get one more seat. This method currently used in Argentina, Belgium, Brazil, Finland, Israel and the Netherlands favours the

---

8. *Parliamentary series No.* 14 *of the Second National State Assembly. Report from the select committee of the National State Assembly appointed to consider revision of the constitution* (*together with the proceedings of the committee and minutes of evidence*), Colombo, Dept. of Government Printing, 1978. pp. 171.
9. *Ceylon Daily News*, 29 May 1979 and 8 June 1979.
10. Both these groups can secure a seat with 7.8% of the vote in those districts if the 12½% barrier is removed. Of course if no minimum barrier is set the ULF would win one seat in Colombo district with minimum 3.4% of the vote. The ULF actually obtained about 4.6% in Colombo district 1977.

larger parties in the allocation of seats. As Table IV will illustrate both this scheme and the one adopted in the 1978 constitution with the cut-off point encourages coalitions while this incentive disappears if the 1/8 barrier is removed or even very substantially lowered, On the contrary there will then be a tendency towards a multiplicity of small parties or factions.

The second angle from which criticism of the system of proportional representational has come is from the SLFP. The SLFP criticism is that the introduction of the new system is likely to lead to minority governments which would be weak and unstable.[11] It is true that the introduction of proportional representation makes minority government more likely but it does not make them inevitable. Had this system been applied in the 1970 elections the United Front Coalition would still have obtained a majority (99 out of 196 seats) and in 1977 the UNP would have secured a clear majority of 107 out of 196 seats. In any case with the institution of an executive President the command of a majority in the Legislature by one party becomes less important. The arguments for and against the new system seem to be dominated more by party interests than by dispassionate judgements. The 12½ per cent barrier is a useful weapon for the ruling UNP and even the main Opposition Party, the SLFP, to keep its dissidents in check. This explains why after a lone statement by Mrs. Bandaranaike in 1978[12] the SLFP made no strong criticism of the 1/8 barrier. The SLFP is more concerned that the system of proportional representation will probably deny them the ability to gain an absolute majority in Parliament in the future. To the small Leftist parties however the 1/8 barrier looks a formidable one and they have therefore marshalled a sustained attack against it.

Perhaps more important is the criticism also voiced by the SLFP that with the introduction of large electorates the member of parliament will become a remote figure with much less contact with the voter. This is a valid argument. Of course the obvious defence would be that advanced by R. Premadasa, the present Prime Minister as far back as 1971. He argued that this would make the legislators less concerned with parish-pump politics and give them more time to really weigh national policy and the merits of various pieces of legislation.[13] Such a defence would be more acceptable if there was a greater delegation of power to district and local bodies so that popular wants and individual grievances can be handled by members of those bodies.

Perhaps the most important criticism of the proportional representation system is the power given to the party hierarchy to prepare a list of candi-

---

11. *Parliamentary series, op. cit.* pp. 166-167.
12. *National State Assembly debates*, 3 August 1978, column 1061.
13. *Ibid.*, 2 August 1978, column 806.

dates. The party prepares the list and the voter has to vote for or against the total list. There is no system of primary elections such as that found in the USA to determine the more popular candidates. This is a serious problem in a situation where a truly democratic party organization has not been developed by any party in Sri Lanka. It becomes even more serious when you consider that the expulsion of a member from the party results in his losing his seat in parliament,[14] and that the party can change the priority of names in the list or substitute any other names for those in it virtually at any time.[15] Of course all these powers are limited by political reality. A party which fields too many unpopular candidates cannot really hope to do well in an election and resentment against party nominations can lead to defections of large sections of voters in subsequent elections.[16] Finally it can be argued that in any case the nomination of party candidates in Sri Lanka has not been all that democratic even under the Westminster system.

So far we have dealt with criticisms of the new system. Of course it has definite advantages. It will give a truer picture of public opinion in the legislature. Under the Westminster model it was possible in 1960 for a party with only 33.6 per cent of the vote to gain 50 per cent of the seats in the legislature. It will not of course make parliament an absolute mirror of the state of public opinion because of the 12½ percent minimum requirement and certain other provisions. But it will reflect party division in the country far more accurately than the provisions of the 1948 or the 1972 constitutions.

TABLE I

	% of votes	*Actual % of seats*	*% of seats according to PR system of the 1978 constitution.*
1970 Elections			
UNP	37.9	11.3	39.3
UF	49.0	76.8	50.5
FP	4.9	8.6	6.6
TC	2.3	2.0	3.6
1977 Elections			
UNP	50.9	83.3	54.6
SLFP	29.7	4.8	31.1
ULF	6.0 (approx.)	0.0	4.6
TULF	6.4	10.7	9.7

14. The Second Amendment to the constitution approved on 22 February 1979 stipulates that a member of the first parliament who ceases to be a member of a party or group through which he was elected would not lose his seat unless he was deemed to have vacated his seat by a majority of members of parliament. This Amendment however does not apply to future parliaments and in effect merely safeguards the seats of Opposition MP's who cross over to the government, during the lifetime of the first parliament.
15. 1978 *Constitution*, Article 99 (1r).
16 This was proved in the local government elections of May 1979 when a group of dissident UNP members successfully challenged the party machine at Panadura and won one of the nine seats.

Secondly, the new scheme greatly reduces the distortions which had crept into the representational system since 1947. In 1947 seats were allocated to each province on the basis of one for every 75,000 residents and one for every thousand square miles of area. The area weightage was introduced to give weightage to backward areas and to Muslim and Tamil communities who lived in sparsely populated regions. The disfranchisement of the bulk of the plantation workers in 1949 introduced grave distortions into the structure for while seats continued to be calculated on the same basis in some areas a large number of residents did not have the vote. Thus it was that in 1977 that 21,301 voters from Wiyaluwa elected one member while 64,190 voters from Moratuwa also elected only one.[17] The new system does not completely eliminate these disparities for it too incorporates some weightage for area but calculation of seats according to the number of registered voters in the area rather than the total population reduces dispartities. Had the scheme been applied in 1977 every 39,350 voters from the Kalutara district would have had one representative as would have every 31,404 from Jaffna district and every 28,305 from Mannar and Vavuniya. An important step had been taken towards what the former Australian Prime Minister E. G. Whitlam described as making, all men and women ... equal in making the law as they are before the law.'[18]

Let us finally turn to the TULF charge that the new system of allocation of seats actually gives the Sinhalese majority further advantages. This argument is based on the fact that while in the earlier constitution the Northern and Eastern Provinces where many Tamils are concentrated had eight out of the twenty-five seats allocated according to area under the new one they have merely eight out of a total of thirty six seats. It is thus argued that the Sinhalese majority areas have been given a gift of eleven seats. On the other hand it can be pointed out that this factor is more than outweighed by the changed basis of calculation of the other seats. Hitherto the Sinhalese majority areas of the highlands had gained extra seats as the non-citizen plantation Tamil population was also calculated in allocating seats to them. This advantage has now been eliminated and as a result had the new system been in operation in 1977 the Northern and Eastern Provinces with 13.2 per cent of registered voters would have been allotted 35 seats out of 196 (or 17,9 per cent) as against the 26 seats out of 168 (or 15.5 per cent) which they actually held under the constitution of the First Republic.

More important than these minor gains in the Legislature however is the overall impact of the system of proportional representation. The huge majo-

17. C. R. de Silva, *op. cit.* p. 204.
18. Quoted from J. F. H. Wright and E. W. Haber, "Equal electorates, unequal votes—1977 House of Representatives, election aftermath," in *The Australian Quarterly*, June 1978 p. 94· This article (pp. 93-100) deals with the problem in Australia and advocates the adoption of a system of proportional representation there.

rities gained by the victorious party in 1970 and 1977 had rendered the Tamil representatives from the North somewhat powerless in parliament. This situation is unlikely to recur again and the TULF could be in a strong bargaining position in the parliament in the future.[19]

Let us now turn to the constitutional provisions relating to the election of the President. Any person who is qualified to become a member of parliament and who is over thirty years of age can be nominated as a candidate for the Presidency by any recognised political party. Former and current members of parliament have the special concession of being able to be nominated by any registered voter. A direct nationwide election then determines which of the candidates shall be elected President and the successful candidate serves for a period of six years.[20] If three or more candidates contest every voter is expected to indicate not merely his first choice as President but his second and third choices as well. Any candidate who receives more than one half of the valid votes is declared elected but if none of the candidates obtains a majority, all candidates other than those who received the first and second highest number of votes are eliminated. The second or third preferences of the votes of the candidates who have been eliminated are then added on to the votes of one or other of the remaining candidates and the candidate who receives a majority of the votes so counted is declared elected President.[21]

Mrs. Sirimavo Bandaranaike, leader of the SLFP, argued that this system was much too complex for voters in backward areas and held that it 'amounts to a disenfranchisement of the simple rural voter'.[22] The UNP reply was that the rural voter was sophisticated enough to write 1, 2 and 3 in order of his preferences. The number of rejected votes in General Elections in Sri Lanka have been at the extremely low figure of 0.53 per cent both in 1970 and in 1977. This might rise somewhat with the operation of the single transferable vote system but hardly sufficiently to affect the result. Once again predictably it is political expediency rather than academic arguments that determines the attitude of the political parties on the question. The UNP hopes and the SLFP fears that the second and third preferences of the votes for a Tamil minority candidate would help the UNP to keep its current hold on the Presidency. This fear has been strengthened by the attraction of two senior Tamil politicians, V. Thondaman and C. Rajadurai, the latter a former Vice-President of the TULF, into the Cabinet during the past year. It is now clear that unlike in the old pluralist system it is difficult to capture executive power

19. On this and related questions see, C. R. de Silva, "The Tamil minority and the 1978 constitution of Sri Lanka", *Ceylon Studies Seminar*, 1978 series, no. 4 serial No. 75. 10 p. mimeograph.
20. 1978 *Constitution, Article* 31 *and* 92.
21. *Ibid.*, Article 94.
22. *National State Assembly debates*, 3 August 1978, columns 1037-42, 1056-60.

by appealing to sectionalist interests. In the Presidential elections neither the UNP nor the SLFP can afford to neglect the substantial Tamil minority vote. It was perhaps in recognition of this that the SLFP abandoned its 'Sinhalese only' language policy which it had adhered to since 1955 and quickly approved the acceptance of Sinhalese and Tamil as national languages. The very same factors will also push the major parties to occupy the "middle ground' of politics rather than deviate to the extreme left or right. The tendency seems to be towards moderation and consensus politics.

One other possible effect of the direct election of the President might be noted; it will enhance the prevalent tendency to focus on a leader figure in each party. With the introduction of television in Sri Lanka in 1979 and the anticipated spread of TV transmissions to cover the entire country it is likely that 'personality building' will soon achieve a degree of sophistication hitherto unknown in Sri Lanka. This is yet another factor that would strengthen the influence of the exeutive President.

The representational system of the Second Republic of Sri Lanka cannot be studied in isolation from the rest of the constitution. The success of the representational system must at least in part be judged from the point of view of the objectives it was designed to achieve. The authors of the new constitution desired to create a stronger and more effective executive, 'not subject to the whims and fancies of an elected legislature'.[23] They wished for a more representative legislature and a strong opposition element in the legislature so that no ruling government would be able to tamper with the constitution and individual rights.[24] Finally, they sought to use constitutional reform to check the development of extreme political positions and to foster consensus politics. Judged from this stand-point the new system seems well designed. In pursuing these objectives the framers of the new constitution have had to make certain compromises. The decision to continue giving weightage to area in electoral delimitation for instance runs counter to the 'one vote, one value' principle The establishment of a qualifying barrier of 1/8 of the votes might cause hardships to some small parties. But any scheme of representation has its defects as well as merits. What should be borne in mind is that the new representational system is part and parcel of a new approach to the political problems of Sri Lanka. Whether it will gain acceptance from a broad measure of opinion will be revealed within the next decade.

---

23. The view of J. R. Jayawardene, leader of the UNP and the first executive President as expressed before the Ceylon Association for the Advancement of Science, 1966 For a discussion of the motivation see also W. A. Wiswa Warnapala, "Transition to a Presidential system : The second Amendment to the constitution of Sri Lanka," *The Indian Review*, Vol. 1, no. 1, 1977 pp. 43-57.
24. *Parliamentary series*, op. cit. p. 214.

TABLE II

Sixth schedule of the Constitution of Sri Lanka

(This scheme gives the distribution of thirty six seats by electoral districts to be adhered to in case the delimitation commission had not completed the allocation of the thirty six seats given on a provincial basis before the first delection.)

	Members of Number
Colombo City and Mount Lavinia	.. 1
Colombo district (excluding Colombo city and Mount Lavinia)	.. 2
Kalutara district	.. 1
Kandy district	.. 2
Matale district	.. 1
Nuwara Eliya district	.. 1
Galle district	.. 2
Matara district	.. 1
Hambantota district	.. 1
Jaffna district	.. 3
Mannar and Vavuniya districts	.. 1
Batticaloa district	.. 1
Trincomalee district	.. 1
Amparai district	.. 2
Kurunegala district	.. 3
Puttalam district	.. 1
Anuradhapura district	.. 3
Polonnaruwa district	.. 1
Badulla district	.. 3
Moneragala district	.. 1
Kegalle district	.. 2
Ratnapura district	.. 2

TABLE III

1977 election results had new PR scheme been in operation

Electoral district	*Qualifying vote for one seat*	*UNP* votes	*UNP* seats	*SLFP* votes	*SLFP* seats	*TULF* votes	*TULF* seats	*ULF* votes	*ULF* seats
Colombo City & Mt. Lavinia ..	.. 24,664	181,380	7	65,260	3	—	—	—	—
Colombo district ..	.. 29,183	515,910	18	359,578	12	—	—	—	—
Kalutara ..	.. 34,678	206,710	6	94,168	3	—	—	80,585	2
Matale ..	.. 25,727	82,900	3	45,735	2	—	—	—	—
Kandy ..	.. 28,747	233,672	8	140,040	5	—		—	—
Nuwara Eliya ..	.. 22,456	62,520	3	49,760	2	—	—	—	—
Galle ..	.. 28,040	207,443	7	107,378	4	—	—	49,705	2
Matara ..	.. 32,316	163,101	5	75,615	2	—	—	52,128	2
Hambantota ..	.. 25,273	91,262	4	60,378	2	—	—	—	—
Jaffna ..	.. 18,390	—	—	—	—	239,070	13	—	—
Mannar & Vavuniya ..	.. 20,549	22,373	1	—	—	39,223	2	—	—
Trincomalee ..	.. 27,328	39,729	1	20,041	1	22,664	1	—	—
Batticaloa ..	.. 25,939	30,002	1	19,735	1	53,018	2	—	—
Amparai ..	.. 21,576	66,026	3	35,725	2	27,703	1	—	—
Puttalam ..	.. 29,631	104,687	4	73,099	2	—	—	—	—
Kurunegala ..	.. 28,179	298,973	11	180,072	6	—	—	—	—
Anuradhapura ..	.. 20,612	94,239	5	70,663	.. 3	—		—	—
Polonnaruwa ..	.. 24,207	43,317	2	29,303	1	—	—	—	—
Badulla ..	.. 22,847	114,042	5	68,737	3	—	—		—
Moneragala ..	.. 23,289	39,982	2	29,884	1	—	—	—	—
Kegalle ..	.. 30,544	171,003	6	93,507	3	—	—	40,934	1
Ratnapura ..	.. 28,308	151,473	5	84,632	3	—	—	46,983	2
Seats gained by each party ..			107		61		19		9

This table is based on the following assumptions:—

(*a*) That electoral districts would be those set out in the sixth schedule of the constitution.
(*b*) That voting patterns would not have changed with the introduction of PR.

TABLE IV

Incentives for coalitions/against splitting under different PR systems

Party	*Votes received*		*Seats gained Jefferson /d'Hondt method*		*seats gained 1978 const. with 1/8 requirement*		*seats gained 1978 const. without 1/8 requirement*	
	(*a*)	(*b*)	(*a*)	(*b*)	(*a*)	(*b*)	(*a*)	(*b*)
A	40,292	20,492	15	8	17	11	15	8
		10,050		3		0		4
		9,750		3		0		4
B	27,744	27,744	10	11	11	15	10	10
C	19,947	19,947	7	7	8	10	7	7
D	9,225	9,225	3	3	0	0	4	3
E	2,792	2,792	1	1	0	0	0	0
	100,000	100,000	36	36	36	36	36	36

(*a*) Party A composed of three factions contests as a unified group.
(*b*) Party A splits and contests as individual factions.

PUBLIC SERVICES AND THE NEW CONSTITUTION

W. A. Wiswa Warnapala

The constitutional changes of 1972 brought about a transformation in the status of the public bureaucracy. In their totality these changes represented a significant departure from the position which the public services enjoyed under the Soulbury Constitution. The inauguration of the Second Republc in 1978, with its Executive Presidency, has seen a continuation of this trend. The perspectives incorporated in the 'Directive Principles of State Policy' in the Constitutions of 1972 and 1978 involve new institutional changes in the area of the public bureaucracy deliberately introduced with a view to improving both the responsiveness and the responsibility of the bureaucracy.

I

The public services, a significant issue in the pre-independence period of constitution-making, assumed a diminished role in the enactment of the constitutions of 1972 and 1978. As regards the Constitution of the first Republic the Constituent Assembly had divided itself into eleven Committees of which the tenth consisting of 14 Members of Parliament examined the chapters—XII and XIV—which dealt with the public services.[1] In the debates of the Constituent Assembly, as well as the memoranda received from the public on this subject the abolition of the Public Service Commission established under the 1947 Constitution was a major demand. [2] Some of the memoranda urged a change in the composition of that body and one memorandum urged that 'the personnel should be citizens of proved integrity and honesty and who can be depended on to act impartially and justly'.[3] Sir Arthur Ranasinha, a distinguished public servant who had held most of the key positions available to a Civil Servant, argued that the Public Service Commission established under the Soulbury Constitution had 'little validity in the context of a democratic Government where the need is to foster a sense of identity of interest between the public service and the Government in the great work of developing the country'.[4] His contention was that the independence of the

---

1. *Reports of the Committees of the Constituent Assembly appointed to consider the Draft Constitution,* Government Press, 1972, p. 5.
2. *Constituent Assembly Debates*, Vol. 1, No. 35 of 10th July, 1971. Column 2994-2995.
3. J. A. L. Cooray, *A Brief Memorandum on the proposed Constitution of Ceylon*, 13 September, 1970.
4. Vide Sir Arthur Ranasinha's *Memorandum on Constitutional Reforms.*

Public Service Commission should not be permitted to interfere with the developmental processes initiated by the government. J. R. Jayawardene, the present President of the Republic of Sri Lanka, in his memorandum entitled *A few Notes for consideration on a New Constitution* declared that 'experience reveals that the Public Service Commission has not functioned in the way it has been expected to especially in regard to senior appointments in the public service'.[5] In its working the Public Service Commission had demonstrated a notable readiness to accommodate wishes of Ministers and thereby avoided the possibility of friction between itself and the Cabinet. This process of accommodation while enabling Ministers to obtain the services of officials on whom they could repose confidence, had also brought about 'some continuity between the formulation of policy and its implementation'.[6] The anomaly, however, as was pointed out in the debates of the Constituent Assembly, was that neither the Prime Minister nor the Cabinet was answerable to Parliament on the subject of the Public Service Commission.[7] It was this absence of answerability to Parliament that proved to be a major consideration in the search for a means of reconciling ministerial responsibility with the independence of the Public Service Commission when the Constitution of the first Republic was being framed.

In an attempt to establish ministerial control over the public services the authors of the 1972 Constitution introduced Section 106, wherein the responsibility for the appointment, transfer, dismissal and disciplinary control of the State Officers was placed with the Cabinet of Ministers.[8] The Cabinet of Ministers, with its answerability to the National State Assembly on all matters, including the formulation of schemes of recruitment and codes of conduct of officers, and the procedure relating to delegation of appointments, transfers, dismissal and disciplinary control was given overall control over the public bureaucracy. Section 106(5) of the 1972 Constitution laid down that 'no institution administering justice shall have the power to inquire into a decision of the Cabinet of Ministers relating to State Officers. This, one feels, was a serious limitation on the rights of State Officers because the Cabinet, individual Ministers and the two Boards—the State Services Advisory Board and the State Services Disciplinary Board which replaced the Public Service Commission—were protected from any legal action in respect of the powers incorporated in Section 106(5).[9] Significantly enough this situation persists under the Constitution of 1978.[10] Again, while the ordinary parliamentarian, who

---

5. Vide J. R. Jayawardene's Memorandumen titled '*A Few Notes for consideration on a New Constitution*'.
6. *Ibid.*
7. *Constituent Assembly Debates*, Vol. 1, No. 35 of 10th July, 1971. Columns 2992-3020.
8. Section 106 (1) of the *Constitution of Sri Lanka*, 1972.
9. A. J. Wilson, *Politics in Sri Lanka* 1947-1973, Macmillan, 1974, p. 360.
10. Section 55 (5) of the *Constitution of the Democratic Socialist Republic of Sri Lanka.*

could not discuss appointments in the public service under the Soulbury Constitution, was accorded the right under the 1972 Constitution to query appointments for which the Cabinet of Ministers was made totally responsible,the same principle has been widened in the present Constitution by vesting the Cabinet of Ministers with the power of appointment, transfer, dismissal and disciplinary control.[11] Under the previous constitution the appointment of Heads of Departments was done by the Cabinet of Ministers after obtaining the recommendation of the Minister concerned who was expected under Section 113(1) to obtain the advice of the State Services Advisory Board. The 1978 Constitution went a stage further in stating more explicitly that 'the Cabinet of Ministers shall not delegate its powers of appointment, transfer, dismissal and disciplinary control in respect of Heads of Departments'.[12] On the basis of Section 55(3) of the new Constitution the Cabinet of Ministers also obtained the right to use similar powers in respect of the categories of officers who come within the purview of the Public Service Commission. This is both an innovation and a departure from the experience of the period of the Soulbury Constitution.

The constitutions of 1972 and 1978 introduced some important institutional changes in the area of the Public Services. The former saw the establishment of the State Services Advisory Board and the State Services Disciplinary Board. The division of authority was introduced with a view to rectifying the anomalous position of the Public Service Commission of the Soulbury system which had functioned as an ultimate source of redress. The State Services Advisory Board under the 1972 Constitution which was expected to play an advisory role, has now been replaced by a Public Service Commission; the retention of the old name for this institution is likely to cause some confusion because of its association with certain traditions of the country's constitutional heritage. The innovation in the present Constitution is that the two institutions established in 1972—SSAB and SSDB—have been combined in the Public Service Commission, and the discharge of disciplinary matters, as in the Soulbury Constitution, has been handed over to the Commission. It would appear that the reasons which led to the creation of the State Services Disciplinary Board under the 1972 Constitution have not been taken into consideration. The criticism was made during the period of the operation of the Soulbury Constitution that the PSC did not have any effective machinery for holding disciplinary inquiries within the public service. As a result officers could remain under interdiction for years without disciplinary inquiries against them being conducted.[13] Trade Unions in the public

---

11. *Ibid.*
12. Section 55 (2) of the *Constitution of the Democratic Socialist Republic of Sri Lanka.*
13. Wiswa Warnapala, The New Constitution of Sri Lanka', in *Asian Survey*, Vol. XIII, No. 12, 1973, p. 118.

sector had repeatedly urged that a more suitable administrative device to deal with disciplinary matters be established. The Public Service Commission itself in its report of 1966 had drawn attention to the problem of unduly long periods of interdiction; these it urged 'are undesirable from the point of view of the administration and are detrimental to the efficient working of the Department in which such officers are employed'.[14] One other point needs to be considered; there was no appeal beyond the PSC. This was changed by Section 118 (3) of the 1972 Constitution which introduced a right to make a single appeal against an order of dismissal and the Cabinet of Ministers was given the power either to 'confirm or vary in any manner such order of dismissal'.[15] An order of dismissal imposed by an officer to whom this power has been delegated could become the subject of a single appeal to the SSDB. The question of a single appeal was discussed at the Constitutent Assembly. Some members were opposed to this idea.[16] The authors of the Constitution, however, adopted the position that more than one appeal was allowed in the context of the absence of a special body dealing with disciplinary matters.[17] Another argument advanced in support of the formula of a single appeal was the practice of making three or four appeals and still the prospect of another appeal in the context of a change of government.[18] The situation changed with the 1978 Constitution. Section 58 of the Constitution removed the limitation on the number of appeals; a public officer is given the right to appeal to the PSC against a punishment inflicted by an officer to whom the power had been delegated. Under the Soulbury system the PSC appointed committees to deal with disciplinary matters; the same technique, with a few innovations, has been incorporated in the 1978 Constitution. The Cabinet of Ministers, on the basis of Section 57 of the Constitution directs the Chairman of the PSC to appoint a committee of the Commission to deal with disciplinary inquiries against specific categories of public officers, and even appeals from among public officers could come within the purview of such a committee. The ultimate authority for altering, varying, or recinding any appointment, order of transfer, or dismissal, or any matter relating to disciplinary control is vested with the Cabinet of Ministers, which, as in the 1972 Constitution, enjoy overall control on all matters relating to the public bureaucracy. The Select Committee on the Revision of the Constitution, appointed in November 1977 had recommended that 'the Cabinet of Ministers will in general act only as an appellate body from the PSC'.[19] Dudley Senanayake, the former leader of the United National Party, had argued before the Constituent Assembly of 1970-72

---

14. *Report of The Public Service Commisson,* Sessional Paper VII, 1967, p. 6.
15. Section 118 (3) of the Constitution.
16. *Constituent Assembly Debates,* Vol. 2, No. 9 of 12th May, 1972, Column 741-744.
17. *Ibid.*, Column 745.
18. *Constituent Assembly Debates,* Vol. 1, No. 35 of 10th July, 1971, Column 3001.
19. *Select Committee Report on the Revision of the Constitution,* June, 1978, p. 148.

that if the Cabinet of Ministers had such a responsibility in regard to disciplinary inquiries it would result in the abandonment of the principle of the neutrality of the public services which had been established through many decades.[20] It was perhaps the same attitude which influenced the Select Committee in stating that 'there was general agreement that these powers should not normally be exercised by the Cabinet of Ministers, except in the case of higher grade public officers involved in the formulation of policy'.[21] The Cabinet of Ministers, irrespective of these pronouncements, is certain to maintain overall control over the public bureaucracy, and any attempt to deviate from this position will interfere with the spirit of the Constitution.

The composition of the PSC needs to be compared with that of the Boards which it replaced in 1978. The SSAB and SSDB consisted of three members respectively. They were appointed for a period of four years, and no state officer could become a member of either Board.[22] These conditions have been changed under the present Constitution and the PSC, which now consists of five members, is appointed for a period of five years. The increase in the membership of the Commission could be justified in the context of the size and expansion of the public services and, above all, it, compensates for the abolition of the two Boards which functioned under the 1972 Constitution. Also there is nothing to prevent a State Officer from being appointed a member of the PSC. Indeed Section 56 (3) of the Constitution explicitly provides for the appointment of a State Officer, who, if appointed, ceases to hold his post in the public service. In addition, he loses his eligibility for future appointments as a public officer.[23] The conditions are such that we cannot expect a public servant, unless he is a person on the verge of retirement, to become a member of the Commission.

The conditions relating to the salaries of the members of the Commission are the same as those determined in the case of the Boards under the previous Constitution and these provide a semblance of independence. Under the 1972 Constitution a category of public officers enjoyed a special status. Such officers were appointed by the President on the advice of the Prime Minister. The Constituent Assembly in the course of discussion on appointments such as Secretaries, the Auditor General and the Commissioner of Elections agreed that such appointments, for reasons of careful selection, should not be made at a delegated level.[24] The present Constitution has given a special place to Secretaries of Ministries, who, according to Section 52 (3) of the Constitu-

---

20. *Constituent Assembly Debates*, Vol 2, No. 11 of 22nd May, 1972, Column 907.
21. *Report of the Select Committee on the Revision of the Constitution*, p. 148.
22. Sections III and 112 of the 1972 Constitution.
23. Section 56 of the 1978 Constitution.
24. *Constituent Assembly Debates*, Vol. 1, No. 35 of 10th July, 1971, Column 3002.

tion, cease to hold office upon the dissolution of the Cabinet of Ministers.[25] They could be appointed to any other post in the public service, and this provides some protection against such measures as compulsory retirement. It also provided that a Secretary was entitled to revert to the service from which he was temporarily released without loss of seniority. In addition to this group of Secretaries, the President can appoint 'Secretaries and other officers and staff necessary for him to discharge his powers and functions'.[26] The disciplinary matters relating to these powers have been vested in the President. The reference to 'advisers' which appeared in the Second Amendment to the 1972 Constitution has been deleted and the term 'Secretaries' has been inserted. This, one feels, has been done in order to prevent the emergence of a group of super officials associated with the President. One other reason may be the realisation that it is better for the President to work through the Cabinet of Ministers. The Secretaries and other officers, who consitute the President's staff are likely to emerge as the 'apex officers' of the public bureaucracy.

II

It was in this context that the creation of the Select Committee on Higher Appointments needs to be briefly examined. As early as 1972 the suggestion was made by the spokesmen of the United National Party that such appointments as Ambassadors, Secretary to the Cabinet, the Solicitor General, Heads and Deputy Heads of the Air Force, Navy Army and the Police should be brought under a review scheme. J. R. Jayawardene, speaking before the Constituent Assembly in 1972 urged that 'the legislature should have the right to take up any appointment if the National State Assembly is responsible and through the NSA the Cabinet'.[27] In elaborating on this principle he stated further that 'there is no way in which we can give supremacy to an elected organisation like the NSA other than by saying that even with regard to appointments they are the ultimate authority'.[28] The establishment of the Select Committee on Higher Appointments in September, 1977 is linked with this view and J. R. Jayawardene, introducing the Second Amendment, stated that he expected the Select Committee to function on the lines of Congressional Committees in the United States.[29] This Select Committee, which is entrusted with the power of examining the suitability of candidates for appointment to the State Services and State Corporations is an all-party Committee

---

25. Section 52 (3) of the Constitution.
26. Section 41 of the Constitution of 1978.
27. *Constituent Assembly Debates,* Vol. 1, No. 35 of 10th July, 1971, Column 3002.
28. Vide J. R. Jayawardene's speech on the Second Amendment.
29. At present this Committee consists of Mr. Premadasa the Prime Minister, Mr. A. Amirthalingam Leader of the opposition, two Cabinet Ministers-Messrs. Ronnie de Mel and S. Thondaman, a senior opposition parliamentarian Mr. M. Senanayake, and two government backbenchers Messrs V. L. Wijemanne and Harendra Corea.

consisting of five members of Parliament.[30] It is expected to examine the suitability of the candidates whose names are referred to it by the Cabinet of Ministers. These candidates are summoned to appear before the Select Committee. Through newspaper advertisements the public is informed of the names of the candidates, and people are thus given the opportunity to make representations in respect of the candidates. The Committee was expected to investigate four categories of officers·

1. Secretaries to Ministries who are not from the State Services,
2. Non-career diplomats,
3. Chairmen and members of Boards of State Corporations who are not permanent members of State Services.
4. Appointments such as Consultants and Advisors.

All political appointments came under these categories and the aim, therefore, was to prevent undersirable people from being appointed on the basis of political patronage. The purpose of the Committee, according to its Second Report, was to guarantee a clean administration and to advise the Government on the suitability of appointees, especially in regard to their honesty, integrity and character.[31] The Cabinet, by its decision on 22nd March, 1978, decided to entrust the Committee with power to examine (a) all Secretaries to Ministries and (b) Chairman and members of Boards who are not members of the State and allied services. The appointments, which do not fall within the purview of the Public Service Commisson, are now screened by the Select Committee, and the procedure allows parliament to exercise some control over political appointments.

All persons subject to examination are required to furnish personal and financial details on the basis of a questionnaire sent to them. In the meantime the public is invited to send in their views on the candidates by means of memoranda, and if any memoranda are received these are sent to the candidates concerned for their observations. The Committee, in its second report which dealt with examination of nominees up to September 1978, considered the receipt of memoranda from the public as one of the important aspects of the exercise.[32] With a view to increasing the effectiveness of the Committee J. R. Jayawardene had suggested that its sittings be held in public, but Standing Orders of Parliament did not allow the adoption of this procedure. Significantly enough, the Committee has examined the qualifications and financial position of candidates and questioned each person largely on matters pertai-

---

30. *Second Report of the Select Committee on Higher Appointments*, Parliamentary Series No. 12, 1978, p. 155.
31. *Ibid.*
32. *Second Report of the Select Committee on Higher Appointments*, p. 95.

ning to the administration of the institution to which the candidate was to be appointed. For instance, Dr. W. Weerasooriya, Secretary to the Ministry of Plan Implementation was questioned on the nature of plan implementation and the Job Bank and G. V. P. Samarasinghe, Secretary to the Cabinet, was examined on the proposed scheme of District Ministers. In the process certain criticisms were made in regard to the functioning of departments and institutions. The question, therefore, could be asked as to whether the Select Committee, while examining the suitability of candidates, was not indulging in a PAC-oriented exercise. Such a role could be justified in relation to Public Corporations because Sri Lanka does not have a Special Select Committee on Public Corporations like the Select Committee on Nationalised Industries in Britain.

Several important points could be raised in regard to the functioning of this Select Committee. Though accountability of Parliament in regard to political appointments has been achieved, one wonders whether the procedure will not help the Government to protect certain nominees. Indeed fears have been expressed that this Committee can well become a device to help a Minister or the Government to cover up questionable nominees.[33] The most important point is whether this Committee will reject a nominee and thereby enter into a conflict with the Minister and through him with the Cabinet. The question was raised at the very inception of the Committee itself in regard to its ability to investigate the private lives of the nominees concerned and the Committee, by probing the connections which a nominee for a post of Secretary had with 28 different private companies demonstrated its ability in functioning as a Committee of Scrutiny.[34] The Committee, though it interferes with the principle of ministerial responsibility becomes a more effective form of political control and it is certain to be more useful than some of the traditional instruments of parliamentary control of the bureaucracy.

Consultative Committees, though not included in the Constitution are relevant to the theme of this discussion. They represent yet another bid to expand the form of legislative control over the bureaucracy. The aim has been to increase the efficiency of the public service by establishing Committees which could take a continuing interest in the execution of policy by the Ministry. J. A. L. Cooray, arguing for the establishment of such Committess, thought that they could 'scrutinise and effectively screen regulations and other forms of subordinate legislation.[35] The Select Committee on the Revision of the Standing

---

33. N. M. Perera, 'Second Amendment to the Constitution', in *Social Nation* of 21st October, 1977, p. 3.
34. Vide *Second Report of the Parliamentary Select Committee on Higher Appointments*, June, 1978.
35. J. A. L. Cooray, *Constitutional Government and Human Rights in a Developing Society*, Colombo Apothecaries, 1969, p. 54.

Orders, which was appointed in 1972, examined the possibility of establishing Consultative Committees consisting of members belonging to all political parties represented in Parliament. Some advisory committees were appointed during the regime of the United Front and they, according to the Punchi[6] Nilame Report on the Bureaucracy, became ineffective because the Ministries did not pay any attention to the advice extended by the Committees.[3] The Consultative Committees, as proposed by J. R. Jayawardene, are to be attached to Ministries and they are expected to meet twice a month to discuss both formulation and implementation of the policies of the Ministry. The Committee, in order to make its function effective, can seek the services of specialists and advisors. In the context of a deterioration in the efficacy of the traditional instruments of legislative control, the Consultative Committees could emerge as an useful device. The growth and expansion in governmental activities in the past three decades imposed a heavy burden on the administrative apparatus and the traditional modes of parliamentary control are clearly inadequate. The change in the pattern of backbench activity, which we have witnessed in the last few months, makes such Committees necessary so as to establish the legislative supremacy of Parliament. The partisan role of certain segments of the bureaucracy, as stated in the Punchi Nilame Report, was yet another reason which demanded the establishment of Consultative Committees capable of participating in the 'process of policy formulation, implementation of programmes and engage in progress control'.[37] The monthly meetings of the Consultative Committees were to be attended by the Secretary of the Ministry, all Heads of Departments and Corporations which come within the Ministry, and the purpose was to review the work of the Ministry with a view to submitting a short report to the Government Parliamentary group. According to these suggestions made by the Punchi Nilame Report, the Consultative Commmittees will emerge as policy making bodies in each Ministry and the development of this role is certain to interfere with the traditional role of the bureaucracy in the area of policy formulation. The main concern is to oversee the activities of the bureaucracy.

III

The involvement of parliamentarians in district administration assumed a special significance in the period of the Government of the United Front. A brief reference to innovations made in the area of district administration is also relevant in the light of the changes incorporated in the 1978 Constitution. Section 5 of the Constitution and the First Schedule of this latter Constitution extends constitutional recognition to the existence of 24 adminis-

---

36. *First Interim Report of the Committee of the MPs on the Bureaucracy* (Punchi Nilame Report) January, 1978 p. 3.
37. *Ibid.*, p. 3.

trative districts. The reference to both decentralisation and people's participation in administration in Section 27 (4) of the Constitution is linked with district administration. There was a similar reference in the Constitution of 1972 but no mention was made of decentralisation.[38] One can explain the constitutional status extended to administrative districts in terms of the changes proposed in the area of representation. Though the changes demonstrated the significance of the district administrative apparatus in the constitutional system, there was no reference to the District Minister in the Constitution. The impression was created before the promulgation of the Constitution that the District Ministry System would be given a constitutional status, and the questionnaire of the Select Committee referred to it.[39] The absence of this status was due to the fact that it could become a formula for devolution of power. This, in the context of the politics of the Tamil regions of the island, was perhaps politically undesirable from the government's point of view. The legal status, however, is derived through the appointment of Ministers who are not members of the Cabinet of Ministers under Section 45 of the Constitution.

Though the District Political Authority under the United Front received no constitutional status, it established a link with the Prime Minister's office, which assumed a greater 'initiative in both policy formulation and implementation'. The respective Political Authorities were made responsible to the Coordinating Secretariat of the Prime Minister, which was expected to co-ordinate and supervise the activities of the politically-directed machinery for food production.[40] The Political Authorities were either Ministers, Deputy Ministers or Members of Parliament and an attempt, in the name of both coordination and leadership, was made to impose a political leadership on the existing bureaucracy which the Government thought was an obstruction to development. The indirect political interference, which hitherto remained at district level, now come to be transformed into direct political control over the administration at district level. Its major functions-coordination, disbursement of funds, relationship with other Ministries, direct accountability to the Prime Minister—came to be associated with basic innovations such as the introduction of the decentralised budget.

The District Ministry System, which replaced the Political Authorities, was devised to perform much the same functions. District Ministers will be entrusted with both co-ordinating and agency functions at the district level; this has been done in order to avoid a situation in which there will be two Ministers having concurrent jurisdiction over the same subjects and func-

38. Section 16 (6) of the Constitution of 1972.
39. See *Questionnaire of the Select Committee on the Revision of the Constitution.*
40. Wiswa Warnapala. 'Sri Lanka in 1973. A Test for both the Rulers and the Ruled.' in *Asian Survey*, Vol. 14, No. 2p. 156.

tions.[41] The principle of delegation cannot be applied in the case of a District Minister and according to the Constitution, power could be delegated only to a Deputy Minister. The constitutional position, therefore, makes the District Minister a political head in charge of the coordinating function. There are areas of activity like rural development, social services and cultural affairs which could be conveniently handed over to the District Minister. This, again, is not possible because of the existence of Ministries with island-wide jurisdiction. This would seem to indicate that the District Ministry System will not result in the establishment of Ministries at district level even though the District Ministers will be supported by a Secretariat and a District Development Council.[42]

The District Ministers, unlike the Political Authorities whose powers varied from individual to individual, will all enjoy equal powers and they would be in charge of (1) coordination of work (2) evaluation of performance and (3) the provision of information to the centre. With this innovation, a politician with the status of a Minister, who has the power of direction and enjoys confidence and has greater accessability to Cabinet Ministers than a Government Agent, is brought inside the district administrative apparatus. Though they have a status similar to that of a Cabinet Minister, District Ministers are expected to discharge their functions in consultation with the Ministers in charge of specific subjects[43] This scheme, as in the case of District Political Authorities, has certain characteristics of popular participation in administration and the members of Parliament, in the context of the proportional system of representation which places enormous power in the hands of the central party organisation, could utilise the District Ministry scheme to maintain their sphere of influence. The question is whether the personalities presently holding office as District Ministers can give the necessary direction to the institution. The twenty two members of Parliament who have been appointed as District Ministers have entered Parliament for the first time and the lack of experience in both leadership and administration is certain to affect the working of the new scheme. The Ministry of Plan Implementation, which functions directly under the President, is expected to be the most important Ministry associated with the District Ministers and this, in addition to the enormous powers which the President enjoys under the Constitution, ensures direct control over the district administration of the island. Another effect of this is the reduction in the powers of the Ministry of Public Administration and Home Affairs under which district administration functioned in the past. The appointment of Secretaries by the President to the respective

41. *First Report of the Select Committee on Higher Appointments*. Parliamentary Series No. 7, p. 20.
42. Sun of 16th October 1978.
43. Daily News of 20th October, 1978.

District Ministers with a status equivalent to that of an Additional Secretary of a Ministry represents an extension of Presidential control over the district administrative apparatus.

IV

The transplantation of the institution of the Ombudsman in Commonwealth countries took place in the early sixties with New Zealand being the first country to introduce it in the context of a parliamentary system of Government. The creation of the office of the Parliamentary Commissioner of New Zealand in 1962 has a curious relationship with Sri Lanka. A discussion on the subject at a United Nations Seminar held at Kandy, Sri Lanka in 1959 stimulated an interest in the idea of an Ombudsman for New Zealand.[44] With the passage of the Parliamentary Commissioner for Administration Act of 1967, the United Kingdom became the second country in the Commonwealth to adopt this Scandinavian device for controlling the bureaucracy. This, like other experiments in the United Kingdom in the area of Government, attracted the attention of newly independent nations adopting the Westminster model of parliamentary government. The growth in the activities of Government and the related expansion in the governmental organisations in the past two decades after independence in Sri Lanka called for the introduction of this device as a means of safeguarding the interests of the people. The politicisation of the bureaucracy in the last two decades gave an added impetus to the need for an Ombudsman. Yet another reason has been the abuse of administrative powers by the bureaucracy. There was no response from the main political parties in the country to calls from some publicists and constitutional lawyers for an Ombudsman for Sri Lanka. This could be explained partly by the fact that MPs were content with the parliamentary devices available to them.

The Constitutional lawyers, who first examined the relevance of the institution of the Ombudsman for Sri Lanka, referred to the inadequacies of judicial forms of control of administrative decisions.[45] The examination of the relevance of the device of an Ombudsman to South Asian political systems by the South East Asian Conference of Jurists who met in Colombo in 1966 reopened the issue for discussion.[46]

The charge was made that both abuse of administrative powers and widespread corruption characterised the period of rule of the United Front Government.[47] This was perhaps the primary reason which moti-

---

44. Donald Rowatt ed. *Ombudsman*. London, Allen & Unwin, 1965, p. 7.
45. *The Constitution and Public Finance in Ceylon*. Institute of Chartered Accountants of Ceylon. 1964, p. 8.
46. J. A. L. Cooray, *op. cit.* p. 49.
47. *Vide Manifesto if the United National Party*, 1977.

vated the Government of the United National Party to incorporate the Parliamentary Commissioner for Administration in the Constitution. *The Report of the Select Committee on the Revision of the Constitution* (1978) admitted that the existing judicial remedies were inadequate to redress the grievances of people 'in respect of infringement of fundamental rights, administrative injustice and maladministration'[48] Chapter XIX of the Constitution, which includes the section on the Parliamentary Commissioner for Administration, states that the Commissioner is 'charged with the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other like institutions'.[49] Under Section 126, however it is the Supreme Court which enjoys the sole jurisdiction in regard to the infringement of fundamental and language rights by administrative action. The Parliamentary Commissioner for Administration has been given similar powers and there is scope here for conflict of authority. Though the areas subject to investigation by the Parliamentary Commissioner are to be determined by the relevant law enacted to establish the institution, both local government authorities and public corporations are to be brought under the purview of the Parliamentary Commissioner. The scope of the Commissioner's powers is therefore much more than that of his counterpart in the United Kingdom where the local government authorities have been excluded from the jurisdiction of the Parliamentary Commissioner for Administration,[50] and he was made answerable to Parliament and this constitutional requirement militated against local government institutions from being brought under the jurisdiction of the Commissioner. Similar problems are certain to arise in the case of Sri Lanka and these are to be resolved at the stage of the preparation of the relevant law and the procedure relating to the Parliamentary Commissioner for Administration.

The Report of the Select Committee on the Revision of the Constitution stated that the Constitution should enjoin Parliament to provide 'constitutional guarantees of independence and security of tenure' to the Parliamentary Commissioner. These guarantees are now incorporated in Section 156 of the Constitution. The Parliamentary Commissioner for Administration is to be appointed by the President and holds office during good behaviour. His salary will be determined by Parliament and it will not be diminished during his term of office, thus demonstrating that, in reality, he will be entirely independent of the Government, and removal is only on the basis of an address of Parliament.

---

48. *Report of the Select Committee on the Revision of the Constitution*, p. 146.
49. Chapter XIX of the Constitution.
50. The Local Government Act of 1974 in the United Kingdom brought into existence an Ombudsman for Local Administration.

The success of the office of the Ombudsman will depend to a large extent on the independence enjoyed by the Parliamentary Commissioner and things such as the remuneration and the prestige conferred on the holder of the office are, therefore, important. In case of the United Kingdom, members of Parliament act as a 'filter' for the Parliamentary Commissioner for Administration who investigate complaints and reports back to the respective member of Parliament. This procedure could have been successful in the context of a single member constituency system where the member of Parliament came to be identified with certain local interests. The introduction of the system of proportional representation will diminish 'the local role' of the member of Parliament and thus reduce his utility as a 'filter 'for the Parliamentary Commissioner for Administration in Sri Lanka. The usefulness of this institution to citizens seeking redress of their grievances is open to question for the reason that the public petitions procedure available in Parliament has not been availed much in the past. One argument advanced for the establishment of an Ombudsman in Sri Lanka was that persons of limited means', and that such persons could not incur 'expenditure by way of legal costs or other expenses'.[51] The existence of an independent office, however, is of great value to citizens who seek redress for their grievances and it, in addition, strengthens public confidence in State authorities.

Again will the citizen, who seeks redress, be satisfied with a mere admonition to the official who is at fault? Certain decisions cannot be changed without an intrusion into the area of Ministerial responsibility. The preservation of this important constitutional principle could be guaranteed by limiting the work of the Parliamentary Commissioner for Administration to matters within departments. In other words, he is not expected to have any direct power over Ministers. This, again, cannot always be so because a recommendation by the Commissioner could well contain a criticism of the action or actions of a Minister.[52] The acceptance of such a recommendation by the Minister is inconsistent with the doctrine of Ministerial responsibility. It is for this reason that some critics feel that the device of the Ombudsman is incompatible with the concept of parliamentary supremacy.

The operation of the Ombudsman has been successful in some of the smaller developed countries. The social cleavages based on ethnicity, religion and caste are more marked in Sri Lanka and these are likely to interfere with the proper functioning of this institution. The Parliamentary Commissioner for Administration, therefore, would need to build a strong tradition of effec-

---

51. J. A. L. Cooray. op. cit; p. 48.
52. It is not known whether the jurisdiction of the Parliamentary Commissioner for Administration will include Ministerial decisions.

tive and impartial criticism of Government administration, and this depends on the first holder of this office. The adoption of an Ombudsman system, in the context of a growth of political controls over the bureaucracy, as a part of the parliamentary process could well result in a loss of efficiency and an erosion of ministerial responsibility. The innovation, however, is acceptable to Sri Lanka in the context of the erosion of parliamentary opportunities hitherto enjoyed by members of Parliament.

The constitutional changes, which we have examined above, demonstrate the extent to which the public bureaucracy has been brought under political control. The constitution of 1972, while it established political control over the public services, had certain structural changes which minimised this role. The Constitution of 1978, by incorporating a number of novel features into the Constitution, has established total political control over the bureaucracy. The legislative avenues of control have been strengthened with a view to diminishing the impact of the concentration of power in the Executive President. The politicisation of the public bureaucracy by legislative fiat is likely to inject inefficiency into the ranks of the bureaucracy and create conflicts which are not in the interest of the basic objective of achieving both social and economic development.

FUNDAMENTAL RIGHTS AND THE CONSTITUTION

MARK FERNANDO

All democratic Constitutions deal with certain basic features relating to the organisation and government of people and society. They must necessarily deal with the manner in which laus are to be made, executed and interpreted, and the mode of appointment or election of the persons or bodies entrusted with these functions. While therefore a democratic Constitution must provide for the Legislature, the Executive, the Judiciary and the Franchise, it is beyond question that various States have adopted many diverse systems, which are nevertheless compatible with democracy. Thus while there can well be widely differing opinions as to the merits of competing systems—a unicameral Legislature or a bicameral one? a Presidential Executive or a Parliamentary Executive? a Single-Member constituency system of Parliamentary elections or proportional representation?—it is probably true that no system is intrinsically superior to another. One system will work in one State, being suited to its political, social, economic and other conditions, but an alternative system must necessarily be adopted in another State with different conditions.

There is however one other fundamental feature of a democratic Constitution in regard to which a like diversity of opinion is not possible, and this is the measure by which more than any other, a Constitution must be evaluated. To what extent does the Constitution recognise, entrench and protect human rights, or fundamental rights? This is certainly no rigid norm, whose context and scope is immutably fixed; the nature of the rights recognised, the manner of their entrenchment and the extent of their protection can legitimately vary, with time and place, but how democratic a Constitution is can best be judged by that measure.

A Constitution, in a democracy, deals with the organisation of the People. It would be a mockery to create a perfect system for the exercise of the Executive power, a foolproof system of free elections, or a truly independent Judiciary, if the People are oppressed and exploited, and their basic human rights denied or violated. A Constitution, like the Sabbath, must exist for the People, to fulfil their rights—People do not exist for Constitutions.

It is on this premise that our Constitution needs to be examined. How does it recognise, entrench and protect fundamental rights? Does it do so better and more effectively than before? And, finally, what lies ahead?

The 1972 Constitution

It would be easy indeed to take Chapter III of the Constitution, and to content oneself with a merely mechanical comparison with Chapter VI of the 1972 Constitution. It would not be difficult to show that Chapter III contains a more precise and more detailed enumeration of fundamental rights, that more rights have been treated as fundamental, that sweeping general restrictions have been replaced by more carefully delimited restrictions, and that for the first time a legal remedy has been constitutionally provided and guaranteed.

It would be a grave fallacy, however, to consider such an exercise as being anything more than the first step in the appreciation of the concept of fundamental rights embodied in the Constitution.

An analysis of the two Constitutions in regard to the fundamental right of freedom from arbitrary arrest, detention, trial and punishment affords the best illustration of the manner in which mere lip service to human rights has been replaced by genuine recognition, entrenchment and protection.

Section 18 (1) (b) and (c)

Section 18 (1) (b) and (c) of the 1972 Constitution enacts that no person shall be arrested, held in custody, imprisoned or deprived of life or liberty "*except in accordance with the law*". The fundamental right apparently recognised by the first part of this provision is rendered completely illusory by those last six words. That phrase empowered the Legislature by ordinary law to by-pass the Judiciary and to authorise anyone to deprive a citizen, temporarily or permanently, of liberty, and even of life. Under that provision, for instance, the Legislature could, by an ordinary law passed with a simple majority, have authorised the Secretary to the Ministry of Justice, to issue even a death warrant, in the exercise of an uncontrolled power, without trial, and subject neither to appeal nor to review. Section 18 (1) (b) and (c) therefore did not in reality embody a fundamental right of the citizen: rather it conferred on and confirmed to the Legislature a licence freely to deprive any person of life or liberty, without any of the normal safeguards recognised in a democracy. What is more, the phrase "the law" is so vague that it was even arguable that subordinate legislation would be constitutionally valid although it authorised the deprivation of life or liberty without any such safeguards.

That was not all. Section 18(2) proceeded to enumerate a host of permissible restrictions that could be prescribed "by law"—that uncertain phrase again—including restrictions in the interests of national security, and even for giving effect to "the principles of State Policy". The 1972 Constitution thus ensured that even the little which may have survived the sledgehammer forged by the phrase "except in accordance with the law", would be crushed by the steamroller fashioned by section 18(2).

A right or freedom does not become "fundamental" merely by reason of its enumeration in the Constitution, or even by its inclusion in a Chapter headed "Fundamental Rights". It becomes fundamental only if it is placed at the foundation of the Constitution, becoming an essential part of it, which no person can violate or infringe with impunity; the quality of being fundamental depends on the extent of recognition, entrenchment and protection.

Article 13

The same right is now dealt with in Article 13 of the Constitution, which contains a precise, detailed and systematic enumeration of the specific rights necessary to safeguard persons against arbitrary arrest, detention, deprivation of liberty and punishment. That article provides in successive paragraphs for (1) arrest, (2) deprivation of liberty pending investigation or trial, (3) fair trial by a competent court, with the right to legal representation, (4) punishment, (5) the presumption of innocence and (6) the prohibition of retroactive penal legislation.

The phrase "except in accordance with the law" has been replaced by language ensuring that orders resulting in deprivation of liberty (whether pending investigation or trial, or during or after trial) can only be made by regular Courts acting according to the established procedures of such Courts, and necessarily attracting all the incidents thereof including appeal and review.

The permissible restrictions on these rights are much more circumscribed than the blanket restrictions permitted by section 18 (2), and it is made clear that subordinate legislation cannot impose such restrictions (with the sole exception of emergency regulations in relation to paragraphs (1), (2), (5) and (6) of Article 13—and the drastically different character of emergency regulations under the present Constitution is referred to later).

While the rights in respect of arrest and detention pending investigation or trial (Article 13 (1) and (2)) may be subjected to somewhat wide restrictions by Act of Parliament, these restrictions are nevertheless not vague general restrictions, but broadly follow the Universal Declaration of Human Rights—restrictions in the interests of national security, public order, protection of public health or morality, recognition of the rights of others and meeting the just requirements of the general welfare of a democratic society.

The rights to a fair trial by a Court, legal representation, and the prohibition of sentences of death or imprisonment except by a competent Court (Article 13 (3) and (4)) are subject to *no* restriction whatsoever, not even in a state of public emergency.

The presumption of innocence and the prohibition of retroactive penal legislation (Article 13 (5) and (6)) are subject to restrictions *only* in the interests of national security.

That is a sufficient comparison of the vastly different attitudes of the two Constitutions, but for the sake of completeness it is necessary to mention three matters which make the recognition, entrenchment and protection of fundamental rights, not only in Article 13 but in the whole of Chapter III, more meaningful and valuable.

The first is Chapter XVIII the provisions of which drastically limit the duration of emergency rule and ensure effective Parliamentary control of emergency rule and emergency regulations: consequently, the scope of the restrictions which may be imposed by emergency regulations becomes drastically reduced, both in regard to content and duration. Such restrictions can no longer be made a permanent feature of our law by arbitrary or capricious extensions of emergency rule. The second is Article 17 which confers and guarantees a legal remedy for the protection of fundamental rights. The third, and by no means the least, is Article 156 which enjoins Parliament to establish the office of Ombudsman having jurisdiction to investigage and report on infringements of fundamental rights.

A comparison of Chapter VI of the old and Chapter III of the new Constitution reveals that the former merely paid lip service to fundamental rights with impressive provisions of uncertain import, severely circumscribed by a blanket of vague general restrictions broad enough to cover a multitude of legislative and administrative sins against fundamental rights, and bereft of any provision for enforcement by an independent tribunal. The latter, on the other hand, contains a purposeful and precise enunciation of fundamental rights, subject to limited restrictions. These fundamental rights are not only recognised, but entrenched in that these provision can be amended only with a special majority. Finally, meaningful provision has been made for infringements to be redressed by recourse to independent judicial and administrative bodies.

The Sovereignty of the People

The concern for the recognition, entrenchment and protection of the rights of the People is not confined to the provisions of the eight Articles of Chapter III. It is inextricably tied up with the fundamental concept of the Constitution, the Sovereignty of the People, referred to in Article 3, Article 3 attempts a description of the basic concept of Sovereignty as including

" . . . the powers of government, fundamental rights and the franchise".

The Sovereignty of the People is thus an aggregation of the *rights* and *powers* which the People possess. The *powers* are the powers of government which the People as a body *collectively* possess. In early societies it was possible for such powers to be directly exercised; even today in some legal systems, some

of these powers are in fact directly exercised. But in modern societies, having regard to the extent of territory and population of nations, and the complexities of modern life, these powers can no longer be directly exercised by the People, except at great expense and with serious loss of efficiency. These powers are therefore delegated. The *rights* on the other hand, are rights which the People possess *individually* or in small groups (such as the family, associations, religious groups etc.) as distinct from the People as a whole. These are rights which are not delegated but are retained and enjoyed by the People. Thus the People's powers of government, which belong to them collectively, are generally exercised through other institutions, set up by them. The People's rights, however, which belong to them otherwise than collectively, are always retained by them, and enjoyed by them.

Article 4 recognises this concept, and provides for the legislative, executive and judicial powers of the People to be exercised by the delegates of the People; it provides for the rights of the People, namely Fundamental Rights and the franchise, to be enjoyed (i.e. retained and enjoyed) by them. It must be emphasised that the new Constitution does not purport to grant or confer fundamental rights; on the contrary, it merely "declares and recognises" fundamental rights. Having recognised the Sovereignty of the People, it merely declares and recognises the rights of the People.

This recognition of the Sovereignty of the People runs right through the Constitution; it is the trunk from which every branch springs and draws sustenance. Corresponding to each paragraph of Article 4, one finds one or more Chapters in the Constitution which are refereable to that aspect of Sovereignty.

Thus Chapters II-V deal with Buddhism, Fundamental Rights, Language and Citizenship, which are basically various aspects of the Fundamental Rights referred to in Article 4 (d).

Chapter VI sets out certain principles of State Policy, applicable to all the powers of government, and Chapter VII to IX deal with the Executive, referable to Article 4 (b).

Chapter X to XII deal with the Legislature, referable to Article 4 (a).

Chapter XIII deals with the Referendum, which is a direct exercise of Sovereignty by the People, again referable to Article 4 (a).

Chapter XIV deals with the Franchise, referable to Article 4 (e).

Chapters XV to XVI deal with the Courts, referable to Article 4 (c).

Chapters XVII to XIX deal with Finance, Public Security and the Ombudsman, basically involving Parliamentary control of the Executive.

The recognition of Sovereignty does not end with the merely sequential arrangement or grouping of the Chapters of the Constitution. One principle

incompatible with, or at least constituting a grave danger to the Sovereignty of the People, is the concentration of powers in the hands of one person or institution. The characteristic of democracy is the sharing of governmental powers, whether by a formal separation of powers or by a functional separation; the essence of dictatorship is the concentration of all powers in a single person or institution.

One serious defect of the 1972 Constitution was that having paid lip service to the Sovereignty of the People, in sections 3 and 4, the rest of that Constitution simply ignored the concept and provided no protection. Indeed, the crucial section of that Constitution was section 5, and in that section one sees a totally different concept: "State Power". Not the power of the People, but the power of an impersonal, monolithic institution, the State. "State Power" owes nothing, in that Constitution, to the Sovereignty of the People. The very concept of State Power is not a democratic concept, but a totalitarian one. What one found in section 5 was thus a totalitarian concept of State Power coupled with the concentration of all power in a single institution, the National State Assembly. Such power was conferred on the National State Assembly, not as a delegation, by but an abdication; even if it appears to be in form, a delegation, it was nevertheless in effect an irrevocable delegation.

That is not a mere question of words. All of us are aware of what was possible under that Constitution and what was seriously suggested. It was constitutionally possible under the 1972 Constitution to extend the duration of the National State Assembly by one year, by two years, or by ten, or even for ever. It was also possible, by constitutional amendment or by prolonged emergency rule, for the National State Assembly to abdicate its powers in favour of some other institution or person.

A Constitution in which the National State Assembly exercised all the powers of government, and which permitted the National State Assembly, without reference to the People, to prolong its duration or to abdicate its powers, cannot be regarded as one in which the Sovereignty of the People is entrenched or protected, even though section 3 or section 4 of the 1972 Constitution gave the appearance of recognising the Sovereignty of the People.

That danger has been eliminated in the new Constitution, by means of a double safeguard. Firstly, the concentration of powers is avoided by providing for a sharing of powers between the Legislature and the Executive, which is to be directly elected by the People, (unlike the unique provision of the 1972 Constitution under which the Prime Minister appointed the President, and the President appointed the Prime Minister) and secondly, by providing that the term of office of the President and of Parliament cannot be extended, except with the direct consent of the People. The type of constitu-

tional coup that was possible under the 1972 Constitution is no longer possible. In other respects too, the new Constitution positively affirms the Sovereignty of the People—for example, the Referendum which enables the People to be consulted on important matters. These provisions thus entrench the right of the People to vote at stated periods, and this is in a sense the most basic fundamental right of all in a democracy—without that right all other rights become a hollow mockery.

To digress a moment, the possible conflict which may result from having a President of one political Party and a Parliament of another has been repeatedly adverted to by critics of the Presidential system, as being a fatal weakness. While conceding that this may indeed be a weakness, one need not be so pessimistic—such a system will encourage compromise and consensus as a means of finding national solutions, rather than confrontation and conflict. Further, what appears to be a weakness viewed from the standpoint of authoritarian efficiency, is rather an immense safeguard from the point of view of democracy. This possibility of conflict is always present in any system where power is shared, and represents one of the essential checks and balances so vital to a democracy. Such checks and balances tend to protect the Sovereignty of the People, while it is their absence which tends to erode Sovereignty.

Fundamental Rights flow from the Sovereignty of the People; the Sovereignty of the People is protected against usurpation or restriction whether by President or by Parliament. The Fundamental Rights enumerated in Chapter III can in certain circumstances be infringed or restricted by legislation or by executive acts. By guaranteeing the franchise and by preventing the extension of the terms of office of President and Parliament, the People's control over President and Parliament is ensured. To that extent, therefore, the Fundamental Rights enumerated in Chapter III receive an additional degree of entrenchment and protection.

Enforcement of Fundamental Rights

The constitutional provisions for the protection of Fundamental Rights require further analysis. Protection or enforcement has two aspects—there must be guaranteed procedures and remedies, and even more important, there must be an independent institution to enforce the constitutional provisions. Remedies and procedures are meaningless if those whose fundamental rights are infringed are compelled to seek redress only from the oppressor or from the oppressor's minions. The 1972 Constitution provided no remedy, certainly it did not constitutionally guarantee any remedy. The 1972 Constitution and the *Administration of Justice Law No.* 44 *of* 1973 passed thereafter, effectively took away the independence of the Judiciary, and made the Judi-

ciary no more than an agency of the National State Assembly; Judges were made constitutionally and legally liable to removal from office by the enactment of ordinary legislation replacing the *Administration of Justice Law.*

In the new Constitution, however, the independence of the Judiciary is guaranteed beyond any doubt—in respect of appointment, emoluments and tenure of office; the power of removal is circumscribed and the procedure for removal is carefully spelt out; the essential jurisdiction of the Superior Courts is entrenched. The Judiciary therefore has its independence entrenched as never before in our constitutional history.

A legal remedy for infringement of Fundamental Rights is constitutionally guaranteed by Article 17 and this jursidiction is vested in the highest Court, the Supreme Court (Article 126).

Enforcement of Fundamental Rights is not confined to a legal remedy and judicial enforcement. The Constitution provides also for an Ombudsman, and Parliament is enjoined to enact the necessary legislation for that purpose. Unlike the Ombudsmen of most other jurisdictions, Article 156 expressly confers on the Ombudsman the jurisdiction to investigate infringements of Fundamental Rights—thus providing a simple, expeditious and inexpensive administrative remedy as well. Article 156 also ensures the independence of the Ombudsman, in almost the same terms as Judges of the Superior Courts, the Auditor-General and the Commissioner of Elections.

Fundamental Rights in a State of Emergency

Chapter XVIII dealing with Public Security makes provisions which have a far reaching effect on the protection and enforcement of Fundamental Rights. Whatever the theory, in practice, emergency rule (under various designations) has been systematically used not only in Sri Lanka but in other countries, both near and far, so as to suspend, restrict or deny Fundamental Rights, or alternatively, and sometimes additionally, so as to suspend or take away existing remedies. In practical terms, therefore, there cannot be effective protection of Fundamental Rights unless arbitrary and capricious emergency rule is prevented. Chapter XVIII provides for Parliamentary control, both at the commencement of a period of emergency rule, and again when it is sought to extend emergency rule for more than 3 months. Indeed, since continuance of emergency rule beyond 3 months requires a two-thirds majority, it will be impossible for future governments capriciously or arbitrarily to rule by emergency for more than 3 months, as the new system of proportional representation will make it almost impossible for one Party to get a two-thirds majority.

Language Rights

The Sovereignty of the People and the Fundamental Rights of the People refer to the entire nation and not to a single community alone. Chapter IV attempts a solution of the language problem, by recognising Tamil as a National Language and by guaranteeing the legitimate use of the Tamil language in relation to the enactment of laws, in Parliament and in local authorities, as a medium of instruction, and as a language of administration and of the Courts; to that extent Fundamental Rights have thereby been advanced. Chapter IV is in a sense an elaboration of Articles 14 (1) (f) and 27 (6), which respectively give the freedom to use one's language and lays down as a principle of State Policy that no citizen shall suffer any disability by reason of language.

In the same context must be mentioned the provisions of Article 14 (2) which extended all eight Fundamental Rights enumerated in Article 14 (1) to a large category of non-citizens—the stateless Indian Tamil minority. In the 1972 Constitution, only citizens were entitled to the rights enumerated in section 18 (1) (c), (d), (e), (f), (g) and (i). Now they have been extended to all the permanent and legitimate residents of Sri Lanka for a period of time sufficient, hopefully, to resolve the vexed question of the citizenship rights of these persons.

The Future

Fundamental Rights in the new Constitution go beyond a mere matter of legal provisions in a few Articles of the Constitution, Those provisions do represent the end of a period of represssion; but also they represent only the beginning of a new era. They provide for a genuine and effective recognition, entrenchment and protection of Fundamental Rights—all three elements are necessary; recognition without entrenchment is an illusion; recognition and entrenchment without protection would be a mere deception. However, what is not express or explicit in the new Constitution is even more important to those concerned about the protection of Fundamental Rights in so far as the future is concerned. One vital feature of the new Constitution as a whole is that it irrevocably acknowledges and safeguards the Sovereignty of the People, and in consequence, it is throughout infused by a spirit of commitment to the protection of Fundamental Rights. It is a tide in the constitutional history of Sri Lanka which taken at the flood will lead to greater freedom and justice.

And that provokes a thought which is relevant for all of us today. Fundamental Rights as conceived in the new Constitution and by those whose thinking inspired it, is not a static concept. Perfection has neither been achieved nor claimed: it is probably unattainable. The Sovereignty of the People

and Fundamental Rights represent rather an ideal towards the full attainment of which we are yet striving. In a Constitution which has, in so short a time, introduced so much that is novel to our legal system, defects, omissions and inconsistencies are inevitable, and that is equally true in regard to Fundamental Rights. So much was possible in August 1978; some things were not possible or prudent having regard to political, economic, social and other conditions; some things may well have been overlooked. It is therefore very necessary that those concerned with the protection of Fundamental Rights should continue to strive for further improvements in the constitutional provisions, for we have it on high authority that the Constitution and its working will be kept under constant review.

INDEPENDENCE OF THE JUDICIARY

H. W. TAMBIAH

The independence of the Judiciary in Sri Lanka is a legacy of British rule. From the Colonial period up to the dawn of Independence the Judiciary was manned by both English and local judges who maintained a high degree of independence.

In the British system of Justice, the judge played a great part in upholding the rights of the people. The Judiciary was the bulwark of democracy. The oath of office required from them, 'Justice without fear or favour', is the watchword of the Judiciary. The emblem of justice, a pair of scales held by a blindfolded maiden, signifies the administration of even justice between man and man and the citizen and the State.

In England when a democratic form of government emerged, sovereignty was wrested from the Stuart Kings, and the courts played a great part in establishing the sovereignty of the Parliament. The early jurists upheld the independence of the Judiciary. Blackstone in his commentary said:

> 'In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty which cannot subsist long in any State unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power. Were it joined with the legislative, life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their opinions, and not by fundamental principles of law, which though legislators may depart from, yet judges are bound to preserve. Were it joined with the executive, this union might soon be an overbalance for the legislative power'.

In Ceylon from the early Colonial period Judges declared their independence. During the Kandyan invasion of the Maritime Provinces in 1803, there was friction between the judiciary and the military. During this time the Courts were housed in the old Dutch Court in the Fort. In 1804, Flower, the Sitting Magistrate of Pettah, inflicted lashes on two drunken soldiers, who had committed no crime. This incident sparked off a quarrel between the judiciary

and the military. A letter written by Flower to the irate Commandant of Colombo, Colonel Bailey, contained subversive outpourings. Lushington, the then Chief Justice, on hearing of this incident bound over the Commandant in Chief, who in turn retailated by closing the doors of the Fort. The Commander in Chief was bound over to keep the peace, but in spite of the protests of the judges the gates of the Fort were closed and the Court was ordered out of the Fort. The General's flowery, viuperative eloquence, prompted the judges to take proceedings before the King's Bench in London. The Advocate General of Ceylon, the famous Sir Alexander Johnston, challenged the old General to a duel. Fortunately the duel did not take place and both retreated gracefully. Maitland settled the dispute. Now there was confrontation between the judiciary and the executive. The fiery Lushington challenged the competence of Military Courts to try offences committed by the soldiers. After a long and heated controversy, Lushington abandoned his stand and Maitland criticised the Supreme Court and the Constitution. The outcome was the Charter of 1811 which defined the powers of the Courts, and a long and protracted struggle between the courts on the one hand and the Executive and the Military on the other, came to a happy end.

The Charter of 1833 placed the judiciary on a firm footing. The long line of distinguished Judges, who graced the Bench, upheld the independence of the Courts. Under the Donoughmore Constitution the minor judiciary came under the control of the Legal Secretary, one of the so called three policemen. But the independence of the Judiciary was still maintained and there was hardly any interference by the executive.

At the time Ceylon obtained Dominion Status, the Soulbury Constitution (*Ceylon Constitution Order in Council* and the *Courts Ordinance of* 1889) abolished the Charter of 1833 and reconstituted the Supreme Court and other courts. The provision of the Soulbury Constitution assured the independence of the Judiciary by adopting three measures:

(1) By the appointment of Judges of the Supreme Court by Letters Patent,

(2) By ensuring the security of tenure by providing that judges held office during good behaviour and could not be removed, except for incompetence or misconduct,

(3) By fixing an irreducible salary and ensuring an irreducible pension.

Thus the judges were assured of their salaries during their tenure of office.

Lord Aitken, the celebrated English Judge, in construing similar provisions, in interpreting the North America Act of 1867, called these three safeguards, the three pillars of justice. The Soulbury Constitution added a fourth

pillar, the Judicial Service Commission, consisting of three judges of the Supreme Court, responsible for the appointment, disciplinary control and dismissal of the minor judges. This has been called as the fourth pillar (Senadira *v.* Bribery Commissioner per Sansoni J.) and (Bribery Commissioner *v.* Piyadasa, per Tambiah J.).

After Independence the Supreme Court asserted its independence. A confrontation took-place between the Executive and the Judiciary, after the Bench of three Judges nominated by the late Sam P. C. Fernando, Minister of Justice, refused to hear the first coup case on the ground that they should have been nominated by the Chief Justice and not by the Minister of Justice. This decision emboldened the judiciary of the Supreme Court to assert its independence. In Senadira *v.* the Bribery Commissioner (63 NLB 313) Sansoni J. referred to the fourth pillar which sustains the pinnacle of justice, but he held that, although the Bribery Commissioner was appointed by the Minister and not by the Judicial Service Commission, he can come to a finding of fact but could not impose a sentence. But in Piyadasa *v* the Bribery Commissioner (64 NLB 385) Tambiah J. went further, and although there was no appearance for the appellant, Tambiah J. took the view that since the Bribery Commissioner was a Judge, his appointment should have been by the Judicial Service Commission and not by the Minister of Justice, and since he was apointed by the Minister he had no jurisdiction to hear a bribery case. The decision was followed in Ranasinghe *v.* Bribery Commissioner (64 NLB 440) by the late H. N. G. Fernando, J. Our views were approved by the Privy Council in the same case (66 NLB 73 P.C.). These decisions were again followed by the Privy Council in Queen *v.* Liyanage(68 W CR 265), which held that the special legislation passed by the legislature to try named persons for treason, was a legislative measure intended to punish particular persons by adopting, not the normal procedure but a special procedure prejudicial to the accused, and that the impugned legislation under which the accused were tried was *ultra vires* and constituted a grave and deliberate interference with judicial power.

The assertion by the Judiciary that there is separation of powers and judicial sovereignty was vested in the judiciary, started a hornets nest in Parliament. The Marxist leaders made a frontal attack on the Soulbury Constitution and they were followed by the coalition parties. It was debated that Sovereignty is in the People whose representatives are the members of the House of Representatives and judges who are not elected by the people were not responsible to the people and therefore cannot exercise judicial sovereignty. Acting on what was described as a mandate, the Coalition Government ushered in a New Constitution in 1972, which clipped the powers of the judiciary and placed it under the executive.

The 1972 Constitution with a Marxist touch, in many respects followed the Whitehall model, except that the Second Chamber, the Senate, which had been previously abolished, was not revived. The Court of Appeal which had been set up in 1971 to give a second right of appeal in substitution for the right of appeal to the Privy Council, was also abolished.

The three pillars of the Temple of Justice, namely, the provisions as to appointment, tenure and salary, with the age of retirement of Judges being fixed at sixty three remained, but the fourth pillar viz. the Judicial Service Commission, crumbled, and in its place was erected two new pillars. They were, a Judicial Service Advisory Board in whom was vested the responsibility of recommending persons for appointment for all judicial offices, other than the Supreme Court, Presidents of Labour Tribunals and other offices involving the performance of functions of a judiciary nature. The Cabinet of Ministers was given the power to select from a list of persons recommended by the Judicial Services Advisory Board, persons who were to be appointed judges, but the Cabinet was also given the arbitrary power to appoint an applicant who was not in the recommended list, with the provision that if such an appointment is made, the Cabinet of Ministers should table in the National State Assembly the name of the person appointed and the reasons for not accepting the recommendation of the Judicial Services Advisory Board. A list of the names proposed by the Judicial Services Advisory Board had to be tabled in the National State Assembly. This procedure would have embrassed the persons rejected by the Cabinet and placed the Cabinet on a pedestal.

This state of affairs undermined the entire judicial system by striking the Temple of Justice at its base, namely, the Judges of all the courts of this country, other than the Supreme Court, had to be subservient to the Cabinet. The Judicial Services Advisory Board consisted of five members, one of whom was the Chief Judge of the highest court with original jurisdiction, who was the Chairman (incidentally this happened to be the Chief Justice for the time being) and the rest of the members were appointed by the President of Sri Lanka and comprised of a judge of one of the minor courts, another from amongst the Presidents of the Labour Tribunals, and the other two were appointed in accordance with Article 27 of the 1972 Constitution, by the President on the advice of the Prime Minister or such other Minister to whom the Prime Minister may have given authority to advise the Government. Here too the intrusion of the executive within the sacred precincts of the Judiciary is manifest.

The second pillar that replaced the fourth pillar in the Temple of Justice, was the Judicial Services Disciplinary Board. This consisted once again of the Chief Judge of the highest court with original jurisdiction, namely, in practice, the Chief Justice, and two other judges nominated by the President, which again shows the dominance of the executive.

The Judicial Services Disciplinary Board was appointed to exercise the powers of dismissal and diciplinary control over judges. The exercise of the power of dismissal had to be reported to the Minister of Justice and the Cabinet of Ministers, and a copy of such report transmitted to the Speaker. Further the power of removal for misconduct of judges of inferior courts was vested in the President on an address in the National State Assembly. This power would be exercised only on a report being forwarded by the Judicial Services Advisory Board. There was no provision for an inquiry in respect of judges of the Supreme Court who held office during good behaviour to defend themselves before they are removed by the President upon a mere address before the National State Assembly. The principles of natural justice were violated. The Judiciary had to depend on the executive for its survival.

The power of transfer was vested in the Judicial Services Advisory Board and an appeal lay to the Minister of Justice from an order of the Judicial Services Advisory Board. The question of transfers was very important in the judicial service, and the fact that the Minister of Justice was to be the final judge of such a question, left the minor judiciary of this country in a complete state of dependence on the Minister of Justice. Further, the appointment of the judges of the Supreme Court, by the Cabinet of Ministers made the members of the minor judiciary completely dependent and subservient to the executive. The only independent person was the Chief Justice who was isolated from the membership of the Advisory Board.

From June 1972 the Judicial Services Advisory Board included the Attorney General and the Secretary to the Minister of Justice. The Attorney General was the biggest litigant in Sri Lanka, since he represents the Government and various Boards. The Secretary to the Minister of Justice gained added importance by being a member of the Judicial Services Advisory Board. His hands were strengthened when he was given the power to effect transfers. The minor judiciary, therefore, had to depend not only on the Attorney General, a litigant on whose recommendation their tenure of office depended but also on the Secretary to the Minister of Justice who with his added plumes, assummed great importance in the administration of justice. The Secretary being a representative of the Minister of Justice would keep an eye on the other two members of the Advisory Board who represented the minor judiciary, and was able also to influence the Attorney General, who was placed in order of precedence under the Secretary. The only independent person was theChief Justice who was isolated and powerless in the Advisory Board. He merely presided at meetings of persons whose views were dominated by the Secretary to the Minister of Justice.

Further, there was to be an annual judicial conference presided over by an elected president, often the Senior District Judge, but after 1972 the

Judicial Services conference was presided over by the Minister of Justice or in his absence by the Secretary to the Minister of Justice. The meeting was also attended by the police, prisons and social services, who had their own grievances against judges. The deilberations were controlled by the Minister of Justice. From what has been said the executive had complete control over the judiciary, except the Supreme Court Judges.

Independence of the Judiciary under the Constitution of 1978:

The present Constitution restored the four pillars on which the administration of justice rests. It is the President, who is elected by the people, who appoints the judges of the Supreme Court and the Court of Appeal. He is not bound to obtain the advice of anyone.

The tenure of the offices of judges is assured. The judges of the Superior Courts of Record held office during good behaviour and cannot be removed except by an address in Parliament. They are given an opportunity to defend themselves in Parliament.

The salaries of the judges of the Supreme Court and Appeal Court cannot be reduced and are chargeable on the Consolidated Fund.

The fourth pillar, the Judicial Services Commission which was abolished earlier has been restored. The members of the Commission are five judges of the Supreme Court appointed by the President. The Judicial Services Commission has the power of appointment, discipline and transfer of all judges, other than the judges of the Supreme Court and the Appellate Court.

Despite all these solemn safeguards granted by the Constitution the Judiciary is still at the mercy of the Legislature. Although there is no fear of the independence of the Judiciary being undermined by the present Government, which inaugurated this Constitution, a future Parliament may jeopardize the independence of the Judiciary by adopting three methods:

1. By amending the present Constitutio;n all the safeguards ensuring the independence of the judiciary can be taken away and some of the judges may not be re-appointed.

2. Judicial and Legislative sovereignty of the People is still exercisable in the legislature through the Courts and Tribunals. Art. 105 (2) confers the powers on the Parliament to replace, or abolish or amend the powers, duties, jurisdiction of courts, tribunals and institutions, despite the earlier assurance in the same section that 'subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the people are the courts mentioned in Art, 105 of the Constitution. To alter the jurisiction and powers confererd on the courts

by the Constitution, it is essential to change the provisions of the Constitution dealing with the judiciary. By a steam roller majority of a particular party or by a suitable coalition, the Constitution can be changed, provided the President does not take any steps. Provisions of the proposed Judicature Law, which are not inconsistent with the Constitution, can be altered by a simple majority and the jurisdiction of the Courts of First Instance, except the Supreme Court and the Court of Appeal, can be taken away and conferred on the tribunals which may have to follow the policy of the executive.

3. A third method which is frequently adapted in Africa, Asia and other countries and which was followed in Sri Lanka too, is to rely on a mandate of the People to change the Constitution and without recourse to the entrenched provisions of the Constitution governing amendments to inaugurate a new Constitution. This was adopted by the Sirimavo Bandaranaike Government by the device of a Constituent Assembly.

The present Parliament has the power to change the Constitution but the Judges lost their posts unless they were re-appointed. The assurances given by the earlier Parliament under the provisions contained in the 1972 Constitution vanished. Professor Griffiths in his works on 'the policy of the Judiciary has shown how some of the English Judges, trimmed their sails to sail the political winds'. Instances where courts were packed in U.S.A. Britain and India to get a favourable verdict are known.

The judiciary is not a sphinx-like lifeless entity; it has to be virile and independent. It must consist of independent judges who are prepared to face any contingency when they act according to the dictates of their conscience. Some judges have maintained the dignity of the Court and acted fearlessly.

The judges of the Court of Appeal of Sierra Leone, in a coup case, delivered a judgment setting aside the conviction of twelve persons who were convicted of treason and sentenced to death, despite anonymous petitions, threatening to assassinate the judges if they did not dismiss the appeal. The Government not only respected the judgment, and did not appeal to the newly constituted Supreme Court, but publicised their judgment in other countries.

In Sri Lanka despite the efforts by the executive to stifle the powers of the Supreme Court granting injunctions and writs, five of the nine judges of the Supreme Court of Sri Lanka, took the view that they had jurisdiction to issue writs and injunctions, even if a statute which has to be interpreted contained the provision that any decision of the executive or officials is final and

conclusive and cannot be questioned in a court of law. The Legislature dealt a sledge hammer blow by bringing legislation depriving the judges of the Supreme Court of jurisdiction to hear cases in such matter.

Such acts by the Legislature undermine the confidence people have in the Judiciary.

Despite the efforts made by the executive and the Legislature to clip the wings of the Judges of Sri Lanka, the Judiciary subject to a few exceptions, has maintained a sturdy independence and filthy lucre has not marred their noble career, despite the poor emoluments given by the Government. Following the foot-prints of their predecessors we have no doubt that the Judiciary of Sri Lanka will maintain its independence and its integrity.

REVIEW ARTICLE

VALENTIJN'S CEYLON

Francois Valentijn's Description of Ceylon: Translated and Edited by Sinnappah Arasaratnam. London, Hakluyt Society, 1978. xvi, 385 p £ 10.00.

In the recent past the history of seventeenth century Sri Lanka has been attracting considerable attention from scholars. In a little more than two decades five monographs (1) and a number of learned articles on this period have seen print. What is even more gratifying is that over a somewhat longer period the English speaking public have been gradually provided with access to the major Portuguese and Dutch chronicles and descriptions dealing with seventeenth century Sri Lanka.

It was in 1908 that Paul E. Pieris provided a good Engish translation of Joao Ribeiro's *Fatalidade Historia de Ceilao*. This book, written by a soldier who served for many years in Sri Lanka was completed in 1685 and although a modified version of it, edited by Abbe Le Grand, had been available in French since 1701 and in English since 1847, it was with Pieries' translation that Ribeiro's work came to be widely known as a useful contemporary source especially by those who could not use the only Portuguese edition, that of 1836. In 1930, a quarter of a century after Pieris' effort, there appeared the English translation of the voluminous *Conquista temporal e espiritual de Ceylao* of Fernao de Queyroz. This task, completed thanks to the patient scholarship of S. G. Perera, provided the English speaking world with access to the major source of Sri Lanka's history in this period. Thirty years later, Pieter Brohier's nineteenth century translation of the *Beschryving van het Eyland Ceylon* of Phillipus Baldaes was finally published in book form. Baldaeus, as is widely known, had utilized his stay as a Calvinist Minister in Sri Lanka, 1656-1665 to collect material for a description of the island and the spread of Dutch power and of Calvinism there. Although Baldaeus' account of Sri Lanka had been translated into English earlier and indeed had run into four English editions in the eighteenth century, the publication of the superior translation of Pieter Brohier did much to stimulate interest in Baldaeus' work. Finally in 1972 Edmund Pieris and Achilles Meersman produced an English translation of those parts of Paulo da Trinidade's *Conquista Espiritual do Oriente*

---

(1) K. W. Goonewardene, *The foundation of Dutch power in Ceylon*, 1638-1658. Amsterdam 1958; S. Arasaratnam, *Dutch power in Ceylon*, 1658-1687. Amsterdam, 1958 T. Abeyasinghe *Portuguese rule in Ceylon*, 1594-1612 Colombo, 1966; G. D. Winius, *The fatal history of Portuguese Ceylon* Cambridge, Mass, 1971; C. R. de Silva, *The Portuguese in Ceylon*. 1617-1638 Colombo, 1972.

which dealt with Sri Lanka, thus providing another valuable source of religious and political history in English translation. To all this must of course be added the first book written by an Englishman on Sri Lanka, Robert Knox's *An Historical relation of the Island of Ceylon in the East Indies*. The work of Knox, still the key source for conditions in the interior of the island, was first published in 1681 and went into many editions but in the present century the standard edition of James Ryan, Glasgow, 1911 was supplemented by that of S. D. Saparamadu, Dehiwala, 1958. Of the extensive writings on seventeenth century Sri Lanka only the work of Francois Valentijn remained without an English translation and at long last this gap has been filled by one of Sri Lanka's most distinguished historians, Sinnappah Arasaratnam.

The first and only complete edition of Valentijn's *Oud en Nieuw Oost-Indien* was published as a five volume work (in eight books) at Dordrecht/Amsterdam in 1724-26. The author (b. 1666) was a Calvinist Minister who after his training at the University of Leiden served in Amboina and the Banda Islands, 1685-1694 and again in Java and Amboina, 1706-1712. He apparently collected information on the East during both these periods of service but it was well after his final return to Holland in 1714 that the he began to prepare this material for print. Eventually his total work came to 4631 folio pages of print and obviously some parts of his work were ill-digested and written at speed.

The portion of Valentijn's book dealing with Sri Lanka came to about 520 folio pages of the original edition and Professor Arasaratnam has wisely not attempted to translate the whole of this. He has omitted the chapters dealing with Dutch rule in Sri Lanka, 1656-1724 which covered 211 folio pages in the original edition and also three chapters dealing with Buddhism, Hinduism and Islam covering another 155 folio pages. One can hardly quarrel with him for this decision. Most of the sections dealing with Dutch rule consisted of undigested official reports which have since been published seperately in the Dutch Records Series of the Government Archives of Sri Lanka. Nor are Valentijn's chapters on the indigenous religions of much value. His account of Hinduism is clearly inferior to that of Baldaeus who had first hand contact with that religion in northern Sri Lanka. Valentijn's information on Buddhism also cannot be compared with what is available to us today from Sinhalese sources.

On the other hand what the editor has chosen to include form the most rewarding part of Valentijn's *Description of Ceylon*. These consist of a short commentary on the caste distinctions and administrative positions in Sinhalese society (pp. 63-86), a topographical description of the island

(pp. 89-158), an account of the island's social and economic conditions (pp. 159-193) and a history of the land up to the expulsion of the Portuguese from Jaffna in 1658 (pp. 194-374). In writing these sections Valentijn had used not only the accounts of Baldaeus, Knox and Ribeiro but also the works of the Portuguese historian Diogo do Couto, the *Itinerario* of John Huyghens van Linschoten and the *Journal* of Joris van Spilbergen. Valentijn also apparently had access to a number of official letters and documents. For instance it has been pointed out that Valentijn had used the correspondence between the King of Kandy and Dutch Governors Joan Maatsuyker (1646-52) and Jacob van Kittensteyn (1652-56) some of which letters cannot be traced today. Valentijn also had personal contact with Dutch officials who had worked in Sri Lanka. Cornelius Joan Simons (Governor 1703-1706) and Rijckloff van Goens Jnr., (Governor 1675-79) are two such officials. Thus Valentijn's work despite his frequent plagiarisation of and great dependence of authors like Baldaeus and Knox has considerable new information.

For the social historian the glossary of caste names and administrative posts which prefaces Valentijn's account of Ceylon is an invaluable document. Arasaratnam himself commented that '.....so comprehensive and detailed is this list that it is far in advance of what any other western writers on Ceylon knew and has since become a standard source for all those who try to write on the Sinhalese caste system. In fact a modern sociological study of the Sinhalese caste structure relies on it to a large degree for historical perspective'. Valentijn carefully noted several sub-caste groupings which are neither found in contemporary Sinhalese society nor noted by other eighteenth and nineteenth century writers. For instance the *karava* caste, according to him, was sub-divided into nine groups entirely according to the type of fishing gear used by each group. The *goyigama* caste is classified into thirteen sub-groups according to status and occupation. While such information is indeed of great value, our inability to check on Valentijn's own sources should make us cautious in the acceptance of this evidence without independent corroboration. Less controversial but also less useful are Valentijn's descriptions of the weights and measures, coins and currency and the export products of the island.

In comparison the chapters on society, revenue and administration are in the words of the editor largely 'a rehashed version of Knox written up in the ponderous literary style for which Valentijn has become well known'. Nor is it possible to be excessively enthusiastic on the two lengthy chapters of topographical description. For some one who had never visited the island, Valentijn's chapters are very detailed.

Arasaratnam has with justice claimed that this section was one of the most difficult to edit because the multiliation of place names and the lack of specificity in the text made identification difficult. In any case much more comprehensive information on topography and settlements of the lowland area can be gained from Portuguese and Dutch *tombos* while Valentijn's coverage of the hill country does not represent any significant advances on Knox.

The picture changes somewhat when we come to the historical section. Valentijn gives a history of the island from ancient times to the sixteenth century (pp. 194-226) almost certainly by paraphrasing an old version of the Sinhalese chronicle, the *Rajavaliya*. The editor has drawn attention to several pieces of information given in Valentijn which are not found elsewhere, not even in other extant versions of the *Rajavaliya*. For example Valentijn refers to a Ceylonese expedition to Adirampattinam in retaliation for the seizure of a Ceylonese ship laden with cinnamon.

The value of Valentijn's historical account increases after 1500 when he has Portuguese and later Dutch sources with which to supplement the Sinhalese chronicle. The editor has clearly demonstrated how Valentijn has at times plagiarised the writings of do Couto. Nevertheless his use of local material has sometimes enabled Valentijn to take a more balanced picture than either do Couto or Baldaeus. An instance which the editor himself has pointed out is the assessment of the career of Vimala Dharma Suriya I, King of Kandy (1593-1604). Valentijn's work is certainly one which cannot be ignored by any historian working on the early seventeenth century. Arasaratnam's editing of Valentijn is in the best traditions of Hakluyt Society. The footnotes identify place names, comment on and clarify the text. In fact Arasaratnam with his knowledge of Dutch, Portuguese, English, Tamil and Sinhala and his background of research in this period of South Asian history for over twenty five years was perhaps an ideal choice as editor. The introduction (pp. 1-60) makes a major contribution to the literature on Valentijn. A brief biography of Valentijn (pp. 1-14) is followed by the history of the publication of Valentijn's book and of extracts from it (pp. 14-19). The bulk of the introduction (pp. 19-60) is however taken up by an evaluation of Valentijn's *Description of Ceylon* and its impact on subsequent historical writing and it is here that the editor has shown his ability to place Valentijn in the background of other sources of seventeenth century Ceylon. A comprehensive index which also serves as a glossary (giving modern place names in parenthesis) enhances the value of the work. A few errors can be found. For instance Vagoe Raja (p. 199) is not the

name of Sinhabahu's father as the editor seems to have assume, but simply the title, Raja of Vanga (Vagu) of Sinhabahu's grandfather. Similarly Arasaratnam incorrectly states (p. 37) that Valentijn is the sole source of information on an invasion of Ceylon by the king of Canara. In fact three Sinhalese sources—the *Gira Sandesaya*, the *Parakumba Siritha* and the *Kokila Sandesaya* refer to this invasion. Then again Coemene (p 173). is not listed in the index. But to harp on such minor details would be to detract from a solid and definitive contribution to the history of Sri Lanka and Dutch colonial history. The Hakluyt Society which is now based c/o The Map Library, The British Library, Great Russel Street, London WC 1B 3DG is to be congratulated for its role in the publication. The price of £ 10.00 though high by Asian standards should prove to be a worthwhile investment on this book.

C. R. de Silva

University of Peradeniya.

REVIEWS

I

Ashin Das Gupta *Indian Merchants and the Decline of Surat c*1700-1750. Wiesbaden, Franz Steiner Verlag, 1979. x, 305, [2] p. [Beitrage zur Sudasienforschung, Sudasien Institut Universitat Heidelberg Band, 40]

This book, the second major work of Ashin das Gupta who achieved international recognition with his first book *Malabar in Asian Trade* 1740-1800, Cambridge University Press, 1967, is thefruit of research and thought over a period of twelve years including three-year stay as Fellow of St. Anthony's College, Oxford. The effort has been well worth it and the product should find a place in every scholarly library interested in South Asian history and the effects of European expansion overseas. Those private collectors who can afford the price of DM 44 will also find the investment well worth it.

The author's two major achievements are reflected in the title of the book. In the first place he has given form and substance to the 'Indian merchant' of the eighteenth century. This is a much more formidable task than it would appear at first sight for the economic history of maritime India during the period from 1500 to well into the nineteenth century has to be written almost entirely from European sources. In these sources while European trading companies and their economic activity are dealt with in some detail, Indian and indeed all Asian merchants appear as shadowy figures flitting in the background. This explains why studies on Asian maritime and trading activity have been rare while analytical and descriptive works on European trade in Asia have abounded. Of course the perceptive Dutch historian Van Leur blazed a pioneering trail in the 1930's with his investigations into the nature of Asian trade and Panduronga S. S. PIssurlencar published a book entitled, *Portuguese records on Rustamji Manockji, the Parsi broker of Surat*, Nova Goa, 1932. More recently, Michael Naylor Pearson in his *Merchants and rulers in Gujerat*, University of California Press, 1976 and Genevieve Bouchon in *Mamale de Cananor un adversaire de l' Inde Portugaise* 1507-1528, Paris, 1975 have tried to recapture a picture of Asian traders in the context of early European oceanic domination. Yet it would be no injustice to these efforts to say that no scholar has yet made Indian merchants come alive as das Gupta has done in his latest work. Mulla Abdul Gafur, a Bohra merchant who had migrated to Surat probably in the late 1660's is shown at the height of his wealth and power. He had his own wharf to the south of Surat at Athwa and lived in a large house at Saudagarpura. In an instructive chapter das Gupta shows how this merchant prince astutely used his wealth and influence to persuade the local Mughal administration to support his (andon occasion the city's) trading interests in the years 1692-1704 (pp. 94-133). When Abdul Gafur died at the age of ninety six in 1718 he had been the dominant merchant at Surat for almost four decades. The limitations of merchant power are illustrated by the career of Muhammed Ali, grandson and heir of Abdul Gafur, a man who dominated Surat in the 1720's, built his own fortified castle at Athwa, played a key role in a rebellion which overthrew the Governor of Surat and at length died (poisoned ?) in prison in 1733 and had most of his wealth confiscated (pp. 197-239). Das Gupta's thesis of the great wealth and influence and yet the insecurity of the merchant princes of Surat is also illustrated by his account of Haji Ahmad Chellaby who was murdered in his bed on the night of 23rd July 1736. Das Gupta's book ably places these merchants in the political and social context of the leading Mughal port of the early eighteenth century.

Das Gupta's analysis does not stop at the merchant princes. He delineates the rivalries between the two major broker families at Surat—the Bania family of Banwalidas Parak, Laldas Vitaldas Parak and Jagannathdas Parak and the Parsi family of Manakji Rustumji, Nawroji Rustumji and Nawroji Manakji. It is in dealing these disputes not only between families but even within them that das Gupta makes the point that Indian merchants though they united occasionally at an emergency were essentially a group feuding among themselves and often not averse to sharp practice to ruin one another's credit.

Das Gupta's analysis of the decline of Surat in the first half of the eighteenth century is as perceptive and useful as his investigations on the merchants who plied their trade from Surat. The decline of Surat has been hitherto explained by one or a combination of the four following factors—the silting of the Tapi river, the sacking of Surat by Sivaji in 1664 and 1670, the pirate attacks of the late seventeenth century and the growth of Bombay. Das Gupta convincingly argues that 'the real explanation for the eclipse of Surat lay in the simultaneous weakening and collapse of the three Muslim Empires which had in the first place

brought the city to her eminence two hundred years earlier, (p. 8). The overthrow of the Safaid Empire in Persia dislocated the Persian trade. The gradual decline of the Ottoman Empire shifted the Red Sea commerce while the collapse of the Mughal Empire reduced Surat to a port city without a hinterland. The Maratha raids and the Mughal exactions of the eighteenth century, the internal conflicts within Surat, the blockade of the port by the English and the Sidi fleet in the 1730's are regarded as episodes which were not central but which merely accelerated an inevitable decline. The evidence in favour of the author's argument is overwhelming.

One of the major merits of as Gupta's work is that these two major themes are well woven together. The ironical statements for which the author is known in Indian circles have been toned down but thankfully not completely eliminated and the book as a whole can hold the reader even when recounting a petty family feud. The author has cleverly used English, Dutch and French source material from official and private collections as checks on one another and the fruitful results are most obvious in the story of the English blockade of Surat in 1734 which changes from being a tale of 'the unjust oppressions upon a hapless English company, the fiery resentment of a young Yorkshireman in support of undoubted rights and the final triumph of Anglo-Saxon virtues' to become a complicated story of how this Yorkshireman used the navy of the East India Company to shore up his own private trading interests. Indeed the author's comment on sources given in Appendix B (pp. 293-299) should be most useful to any researcher starting out to reconstruct Asian history from European source material.

Several minor criticisms can be made. It is difficult for instance to agree with the author that 'the long range effect of the Portuguese upon Gujerati commerce was the diversion of Gujerat's main trading effort towards the west of Asia'. The Gujeratis continued to trade in South-east Asia till the end of the sixteenth century and their trade in that region seems to have declined substantially only after the coming of the Dutch. Very little information is provided on the activities of Abdul Gafur in the last decades of his life, though here perhaps there was lack of documentation. The index is confined to one of names of places and persons and it thus gives no indication of the excellent account of the production and trade of indigo found on pages 57-62. It is also difficult to understand why Manakji Nawroji is filed under Manakji in the index while his father Nawroji Rustumji is filed under Rustumji. But these are minor criticisms which should not obscure the value of a work that is unlikely to be superseded in the forseeable future.

C. R. de Silva.

University of Peradeniya,
Sri Lanka.

II

DE SILVA, DAYA and DE SILVA, C. R. *Sri Lanka (Ceylon) since Independence* (1948-1976): *A bibliographical survey of the literature on Sri Lanka in the field of the social sciences.* (Asia Documentation Centre, Hamburg, 1978). pp. xix, 173.

The problems of contemporary and post-independence Sri Lanka have attracted the attention of the social scientists for two reasons: slow economic development and a population problem. There is also the question of the welfare state. Governments find it increasingly difficult to cope with social demands but welfarism is also a method of re-distributing wealth. The system, it can be argued, is a way of improving the infrastructure necessary to gear the people towards development; it is also a way of warding off social discontent and social disorder. Consequently the focus of interest and attention has been primarily on the island's politics, society and economic development with a serious concern too in its education system and religious problems. Even these—eduction and religion—have their intimate connections with politics and economics. Politics and economics lie at the heart of the Third World system.

The main thesis of this argument is that the central concern of the social scientist and journalist is post-independence Sri Lanka. We would like to know what is happening here and now. Doubtless there are scholars focussing on the past, particularly those involved in the study of the humanities but their work too can have a bearing on the present. It is the present, however, that is the focus of attention with those concerned with the modern world.

The compilers of this volume have done their work with commendable zeal. C. R. de Silva is the informed social scientist and Daya de Silva, a bibliographer of enterprising disposition. Together they have undertaken a task of considerable worth and no useful source has been left untapped. They have written an excellent introduction inviting attention to the headlines of the subject which they have dealt with in so thorough and discriminating detail in the body of their monograph. An indispensable guide to the principal libraries and centres of research has also been included for the benefit of the uninitiated. Daya de Silva's scientific knowledge of the principles of cataloguing and classification and her unrivalled acquaintance with the subjects and their authors have helped to place the wealth of detail in their proper perspective. *Sri Lanka* (*Ceylon*) *since Independence* (1948-1976) is a volume that all serious students of modern history of the island must consult. It is a *sine qua non* for both the novice and the veteran, and the world of scholars cannot but be overly grateful to the authors for the worthwhile exercise they have undertaken.

Before this review is ended, the reviewer would like to make one or two observations on the nature of scholarship that is undertaken by the Sri Lankan scholar. There are two aspects here. Both stem from the innate insularity of an island people. One is the tendency for the scholar to focus a little too narrowly on the country's problems when there is a great opportunity to examine these in comparaitve context. To mention but a few examples, Buddhism can not merely be studied in relation to Sri Lanka, but in terms of related developments in Burma and Thailand. Linguistic conflict is common in Sri Lanka, India and Malaysia and the same is true of the politics of ethnicity. Education in the national languages and the place of the English language is a matter of concern in all the post-colonial states of British vintage in South and South-east Asia. In short there is a need for the Sri Lankan researcher to look beyond our shores. The other is the failure of the state and our intellectuals to provide the scholarly leadership that the Indians failed to give at the time of the British withdrawal from South Asia. A smaller country such as ours would have been above suspicion and been in a position to do what the Indians did not do. And our scholars do have the equipment to undertake this task. We have to some extent executed the operation in the political world of nonalignment and neutralism. We can still do it in the field of academic scholarship. It is yet not too late.

A. Jeyaratnam Wilson,

University of New Brusnwick,
Fredericton, Canada.

THE UNIVERSITY OF CEYLON, HISTORY OF CEYLON
VOLUME THREE

"From many points of view ... the standards reached in Volume 3 are considerably more advanced than those in Volume 1 ... K. M. de Silva, his colleagues on the Editorial Board, and his co-contributors to this volume have done excellent work".

The Times Literary Supplement

"What is remarkable is not merely the speed with which all concerned set to work but also the unifying assumptions which inform the whole...

The greatest achievement of this volume is ... in setting a new direction to historical writing on Sri Lanka..."

Professor Kenneth **Ballhatchet** in the *South Asian Review*

"No one writing about Ceylon's affairs from now on can do without this volume. Although eleven different authors have contributed chapters, ... the volume [has] an admirable coherence of structure, sequence of thought and event, discriminating detail, and consistency of style unusual in such enterprises...

The editors are to be congratulated on an unusually successful piece of collaborative work".

Professor Howard **Wriggins** in *The Ceylon Journal of Historical and Social Studies*

"A serious difficulty in carrying on research related to modern Sri Lanka has been the lack of up-to-date sources of historical reference. This solid history substantially improves the situation ...

This is an impressive work, distinguished by expertness and sober reflection and full of new material. It could stand as a model for historians beguiled by jargon, or bewitched by Delphic utterances from computers".

Professor Charles **Blackton** in *The American Historical Review*

" ... as authoritative and definitive a history of modern Ceylon as one is likely to have for a long time.

... an excellent piece of editorship, a remarkable effort at co-ordination by all concerned...."

Professor **S. Arasaratnam** in *Modern Ceylon Studies*

The University of Ceylon, History of Ceylon, Vol. III, From the beginning of the 19th century to 1948, Edited by K. M. de Silva, Colombo Apothecaries' Co. Ltd., 1973.

All inquiries from The Assistant Registrar/Academic, University of Sri Lanka, Peradeniya, Sri Lanka; or Lake House Bookshop, Colombo. Rs. 60/- in Sri Lanka; elsewhere £5.00 or US $12.50.

PRINTED BY MERVYN MENDIS AT THE COLOMBO APOTHECARIES' CO., LTD., COLOMBO, FOR
THE CEYLON HISTORICAL AND SOCIAL STUDIES PUBLICATIONS BOARD, PERADENIYA.