

THE CONSTITUTION  
OF CEYLON

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SIR IVOR JENNINGS

*Second edition*



Oxford University Press

Ceylon obtained Dominion Status in February 1948 with a Constitution prepared mainly in Ceylon. Sir Ivor Jennings acted as constitutional adviser to Mr D. S. Senanayake, formerly Leader of the State Council and now Prime Minister, and was therefore aware of the reasons for most of the provisions. He has used that knowledge in preparing this account of the new Constitution. PART I contains a short history of the Constitution, an analysis of the new status of the Island, a description of the machinery set up, and an explanation of the manner in which it is expected to function. PART II contains the Constitutional documents, with annotations indicating sources from which the provisions were obtained, parallel provisions in other Dominions, and explanations of the intentions of the draftsmen. No attempt has been made at detailed legal exposition, though the more important legal and constitutional problems have been discussed. This method of approach will make PART II as well as PART I of interest to students of history and government as well as to lawyers and politicians.

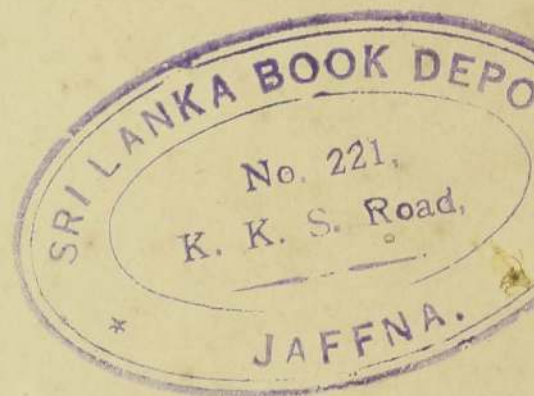
Sir Ivor Jennings is the author (in collaboration with a former student) of *Constitutional Laws of the British Empire* (new edition in preparation) and has produced, among other books on law and politics, the standard work on Cabinet Government.

T. Pararajasingham

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*THE CONSTITUTION OF CEYLON*





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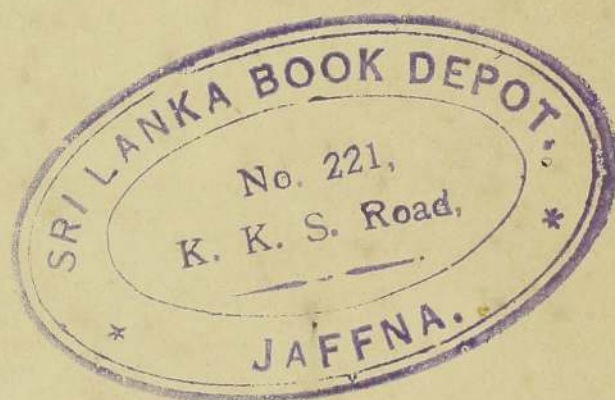
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*To*

THE RIGHT HON. D. S. SENANAYAKE M.P.

PRIME MINISTER OF CEYLON





## PREFACE TO SECOND EDITION

THIS book went out of print early in 1950 but there was then a Constitution Amendment Bill before the Parliament of Ceylon designed (i) to amend the law relating to disqualification for election ; (ii) to make the changes consequential upon the creation of Ceylon citizenship ; and (iii) to effect a redistribution of seats according to the census of 1946. It was therefore thought desirable to delay the issue of a second edition until these questions were decided. The Bill failed to obtain the necessary majority in the House of Representatives and was allowed to lapse, whereupon the preparation of a new edition became possible.

As was mentioned in the Preface to the first edition, the book was completed in 1947 and only a few amendments were made after the early months of 1948. It has therefore been necessary in this edition to correct the information up to the middle of 1950. It has been thought desirable to introduce two new chapters. Chapter III deals in general terms with the effects of the Citizenship Acts of 1949. Chapter XIV explains the temporary difficulties which have been met in converting a rather odd system of dyarchy into Cabinet government. Elsewhere, numerous incidental amendments have been made.

I am much indebted to Mr B. P. Peiris, M.B.E., Assistant Secretary to the Cabinet, who was in large measure responsible for the drafting of the Order of 1946, for a number of valuable suggestions.

W. I. J.

*University of Ceylon*  
26 August 1950

## PREFACE TO FIRST EDITION

THE process of development of the Ceylon Constitution of 1946-7 began on the 26th of May 1943, when at the request of the Board of Ministers under the Donoughmore Constitution of 1931 the Government of the United Kingdom issued a Declaration of Policy on Constitutional Reform in Ceylon. The same evening the Hon. D. S. Senanayake (now Prime Minister), Sir Oliver Goonetilleke (now High Commissioner for Ceylon in London)

and I had a discussion on the steps necessary to secure Dominion Status. At the end of it I found myself virtually enrolled as honorary constitutional adviser, and though many others were called in to assist I continued to fill that role until independence was obtained on the 4th of February 1948. The constitutional scheme, usually known as the Ministers' draft, was prepared by me on Mr Senanayake's instructions. There were two versions of it subsequent to that published in Sessional Paper XIV of 1944. The first, prepared in Cambridge in August 1945, included the modifications suggested by the Soulbury Commission but omitted the limitations on self-government. It was submitted by Mr Senanayake to the Secretary of State for the Colonies as part of his case for Dominion Status. The second was prepared in Colombo after the issue of the White Paper on Constitutional Reform in October 1945. It was designed to support the legal interpretation which Mr Senanayake was advised to make in his speech to the State Council recommending the acceptance of the offer. It could have been published if such publication was needed to convince the State Council, but publication was found to be unnecessary, and accordingly this last draft was forwarded to the Governor by Mr Senanayake in order that it might be used by the draftsmen of the Order in Council.

The Order in Council was drafted by Sir Barclay Nihill, then Legal Secretary and now Chief Justice of Kenya. He was assisted by Mr B. P. Peiris, Assistant Legal Draftsman. The variations between this draft and the final version of the Ministers' draft were discussed at various levels, Sir Oliver Goonetilleke representing Mr Senanayake at the final stage in the Colonial Office. The number of points of controversy, which was 88 before my first conference with Sir Barclay Nihill, was gradually reduced, and though the final draft contained a few provisions on which a difference of opinion still existed Mr Senanayake accepted it rather than prolong the discussion and postpone the coming into operation of the new Constitution. The final draft was then enacted as the Ceylon (Constitution) Order in Council, 1946.

This Constitution was accepted both by Mr Senanayake and by the State Council as an interim measure. In February 1947 Mr Senanayake, in a personal letter to the Secretary of State for the Colonies, reverted to his request of August 1945 that

Dominion Status be conferred. It was realized in 1945 that Dominion Status was a matter not only of legal enactment but also of the establishment of constitutional conventions, and a draft Agreement for this establishment was submitted. The Agreements negotiated by Sir Oliver Goonetilleke and signed in November, 1947, by Sir Henry Moore and Mr Senanayake were in many respects very different, but they contained some of the material of the original draft.

The Ceylon Independence Bill and the Ceylon (Independence) Order in Council, 1947, were drafted in London, the latter on material supplied by Mr Alan Rose, Attorney General, and I was consulted only on difficult points. It will be seen, however, that I am familiar with most of the details of the development of Dominion Status. The history of the negotiations has been written and will, I hope, be published at a suitable opportunity. Meanwhile I have used the knowledge to explain the new Constitution in this book. The manuscript had been completed before the decision to confer independence had been taken. It was revised early in 1948 and few amendments have been made in proof since that date.

Since I drafted many of the provisions which find a place in the Constitution, I have not attempted a legal exposition. My aim has been rather to explain the ideas which underlie the Constitution and how those ideas have been carried out. As the decision of Mr Justice Basnayake in *Kulasingham v. Thambayah* (subsequently reversed by the Supreme Court) indicated, it is possible for a Court to take a view very different from that of the draftsman; for the draftsman knows what was intended while the Court has to interpret the letter of the law.

I am indebted to the Prime Minister not only for the permission to state the above facts but also for the patience with which he bore the lectures of a constitutional lawyer for nearly five years. Some day I hope to explain in print how much Ceylon owes to Mr Senanayake and to Sir Oliver Goonetilleke. But for them Ceylon would still be a colony.

W. I. J.

*University of Ceylon*

22 November 1948



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\* This Order is printed with all amendments made by the Ceylon (Constitution) (Amendment) Order in Council, 1947, and the (Amendment No. 2) Order in Council, 1947, and by the Ceylon (Independence) Order in Council, 1947. The former Amending Orders do not need to be reproduced.



PART I  
GENERAL SURVEY

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## CHAPTER I

### THE MAKING OF THE CONSTITUTION

THE Constitution recommended by the Donoughmore Commission<sup>1</sup> came into operation in 1931. It was accepted by the Legislative Council by a small majority only, and it was at first boycotted in Jaffna on the ground that it did not go far enough in the direction of self-government. Almost immediately, and at intervals thereafter, efforts were made to secure amendments. In 1938, Sir Andrew Caldecott, on the instructions of the Secretary of State for the Colonies, produced a report on the subject,<sup>2</sup> but when his proposals were debated in the State Council in 1939 they were decisively rejected.

The next effort was made in 1941, and in October of that year His Majesty's Government issued a Declaration<sup>3</sup> (usually known as 'the Declaration of 1941') in spite of protests from the Board of Ministers that it was inadequate. The Declaration recognized the urgency and importance of constitutional reform, but considered that the position should be further examined, as soon as possible after the war, by a Commission or Conference. On the occasion of the Cripps Mission to India in 1942, the State Council<sup>4</sup> 'demanded' the conferment of Dominion Status on Ceylon and 'requested' that Sir Stafford Cripps be sent to Ceylon. These requests were refused, but in May 1943 His Majesty's Government made a Declaration<sup>5</sup> (usually known as 'the Declaration of 1943') which proved acceptable to the Ministers. It stated that the post-war examination of the reform of the Constitution would be directed towards the grant to Ceylon by Order in Council of full responsible government under the Crown in all matters of internal civil administration.

<sup>1</sup> *Report of the Special Commission on the Constitution of Ceylon.* Cmd. 3131.

<sup>2</sup> Governor's dispatch dated 13 June 1938 and Secretary of State's dispatch dated 10 November 1938 regarding the Ceylon Constitution. (*Sessional Paper XXVIII of 1938.*)

<sup>3</sup> Correspondence of the Board of Ministers with the Secretary of State and the Governor, 1941-3. (*Sessional Paper XIII of 1943, Document No. 10A, p. 6.*)

<sup>4</sup> *Ibid.* Document No. 14, p. 7.

<sup>5</sup> 'Reform of the Constitution,' p. 3 (*Sessional Paper XVII of 1943*).

Five detailed conditions, relating mainly to defence and external affairs, were laid down, but it was stated that, once victory was achieved, His Majesty's Government would proceed to the examination by a suitable Commission or Conference of 'such detailed proposals as the Ministers may in the meantime have been able to formulate in the way of a complete constitutional scheme'. Acceptance of any proposals would depend firstly upon the Government of the United Kingdom being satisfied that they were in full compliance with the preceding portions of the statement and, secondly, upon their subsequent approval by three-quarters of all the Members of the State Council.

Except in respect of the five conditions mentioned, which would have imposed limitations on full self-government, the Declaration of 1943 lacked precision. The Ministers' reply took the form of a statement made by the Leader of the State Council, Mr D. S. Senanayake, in the State Council on 8 June 1943. It set out with much greater precision of language what the Ministers understood by the Declaration and stated that the Ministers proposed to inform the Secretary of State that they were proceeding to frame a Constitution in accordance with their interpretation. This last remark was inspired by doubt as to what was really meant. While the procedure seemed clear enough, there were some who doubted whether the expressed optimism about the content of the Constitution was fully justified. Strangely enough, it appeared from subsequent events that the Ministers had correctly interpreted the content but had misunderstood the procedure. All doubts were set at rest in July 1943, however, by a statement by the Secretary of State for the Colonies that he had not found in the Ministers' statement anything which must be regarded as fundamentally irreconcilable with the conditions of the Declaration.

Experimental drafting of a Constitution had already begun and, in October 1943, Mr D. S. Senanayake laid the draft before the Ministers. Its content was determined in the main by the conditions of the Declaration. So far as form was concerned, it had to satisfy three-quarters of the State Council; so far as legislative power was concerned it had to satisfy His Majesty's Government. The latter task was easier than the former. Clearly the Governor had to be invested with powers to enact legislation and to reserve for the royal assent the classes of Bills

specified in the Declaration. The most that could be done, consistently with the Declaration, was to define these powers very closely, to impose upon them all the limitations that could be read into the Declaration on the most favourable construction, and to prevent the Governor from trenching upon the powers of his Ministers and the legislature. The result was somewhat complicated, but from the point of view of the Ministers this was no defect; for the more complicated the law became the more difficult it would be for the Governor to exercise his powers. The Soulbury Commission at a later stage accepted the scheme but added qualifications which made it even more complicated. When their qualifications were put into a draft, the dyarchy became so obviously complex that Mr Senanayake was able to assert, in his memorandum to the Secretary of State in August 1945, that the scheme would not work at all in practice.

To satisfy three-quarters of the State Council was a more difficult matter. Though a scheme for a Second Chamber (on the South African model) was prepared in case it was needed, it soon became clear that His Majesty's Government had, perhaps unwittingly, insisted upon a Single Chamber Constitution, at least at the outset. Whether there was a majority for a Second Chamber was not known; what was quite clear was that it would be impossible to devise any particular form of Second Chamber which would obtain the support of three-quarters of the Members. Even among those who favoured a bicameral system there was no agreement on the subject of composition and powers. Whatever Constitution was prepared, some would vote against it because it did not go far enough towards autonomy and some would disapprove because it did not provide for 'balanced representation'; if to these were added those who objected to a Second Chamber and those who, while favouring a Second Chamber, disliked that proposed, the chance of obtaining 43 votes out of 57 would disappear completely. On the other hand the Ministers did not wish to lose the support of those who favoured a bicameral system, and so the only proposal which promised the majority upon which His Majesty's Government had insisted was that for a unicameral legislature empowered to create a Senate. Since this arose out of the Declaration itself, it was felt to be a little hard when, in

February 1944, Sir Andrew Caldecott complained that the absence of a Second Chamber showed that the Ministers had not proposed 'a complete constitutional scheme'.

The major difficulty, however, was the minority problem. As always happens when constitutional reform is under discussion for long periods, members had pledged themselves to conflicting principles. A majority would insist upon territorial representation, but strong minorities would insist upon communal representation. That issue could not be burked, for it had to be the one or the other. Since the success of a Constitution depends in large measure on the spirit in which it is accepted, the ideal would be to obtain unanimity; but if that was impossible it had to be as large a majority as possible and in any event not less than three-quarters. Two factors helped towards a solution. One was the knowledge that most of the minority Members were as anxious for self-government as the majority Members and would not wish to hold up a real constitutional advance merely because all their claims were not met. The other was the fact that a large proportion of the minorities was concentrated in specific areas, so that increased minority representation could be accorded within the principle of territorial representation, by giving those areas representation on a higher numerical basis.

This kind of problem is not new in principle. By the Act of Union, Ireland was given a higher representation than its population warranted. In Great Britain, account was taken of area and not merely of population in delimiting constituencies. In Canada, the smaller Provinces were given higher proportionate representation. In the Australian States, a balance is struck between the rural population and the urban. In South Africa, Natal and the Orange Free State were given higher proportionate representation. Moreover, the South Africa Act contained a provision authorizing the Delimitation Commission to give consideration to (a) community or diversity of interests; (b) means of communication; (c) physical features; (d) existing electoral boundaries; (e) sparsity or density of population.

The Ministers' scheme was founded on these precedents. It was desired to have a legislature of about 100 members. Examination of the census figures of 1931 showed that if one member was given for every 75,000 inhabitants and an additional member

for every 1,000 square miles of area, there would be 95 members. Moreover, the additional members for area would number 25 divided as follows :

Low-country	...	6 seats
Kandyan areas	...	11 seats
Tamil areas	...	8 seats
		25 seats

Further, if the Delimitation Commission was empowered to take 'community or diversity of interests' into consideration, it would be possible to give seats to any substantial concentration of Tamil or Muslim voters in the Low-country, to any substantial concentration of Muslim voters in the Northern or Eastern Province, and to the Indian estate voters in the Kandyan Provinces. Even allowing for these variations the Tamils and the Kandyans would have increased representation, while the general effect of using sparsity of population as a basis for increased representation would be to benefit the backward areas. The scheme did not provide for Burgher and European representation, and so the Governor was empowered to appoint six additional members in his discretion.

Some of the minority members would not be satisfied with increased representation, since they desired parity of representation as between the majority and the minorities. It was not possible to meet this demand without losing the support of the majority ; but it was hoped to allay some at least of the minority fears by imposing limitations on the power of the legislature and transferring to an independent Public Service Commission the function of making appointments to the public service. It should be added that the scheme of representation was not decided upon until it was seen that the efforts made by Mr S. W. R. D. Bandaranaike to secure agreement among the members of the State Council had failed.

The rest of the Constitution was comparatively easy, though necessarily it involved considerable discussion about details. The Declaration of 1943 had provided for responsible government, and no substantial body of opinion desired the retention of the Executive Committees. Accordingly, it was a simple matter to adapt the provisions of the Dominion Constitutions, particularly those of Australia, South Africa and the Irish Free

State. The Australian Constitution was better drafted, while the South African and Irish (1921) Constitutions provided examples of the express enactment of constitutional conventions which were regarded as especially suitable for Ceylon, where the practice of responsible government was unknown. The opportunity was taken to remove the vestiges of the colonial system from the administrative organization and financial procedure. The Ministers completed this task in the remarkably short time of little more than three months, and the scheme was presented to the Governor on 2 February 1944.

There followed a pause of five months during which it was assumed that His Majesty's Government was examining the content of the draft Constitution. What it was apparently doing, however, was discussing the procedure. The Ministers had thought that they had followed the procedure laid down in the Declaration of 1943 with complete fidelity. It became clear from subsequent documents, however, that His Majesty's Government had thought that the requirements of a three-quarters majority would compel the Ministers to negotiate an agreed draft with the minorities, or some of them. If this had been done, the task of the 'Commission or Conference' would have been, as the Ministers had assumed, to consider whether the draft satisfied the terms of the Declaration; in fact it had not been done and nobody in Ceylon had understood this to be the intention. Not only had it not been done, but some of the minority Members protested to the Secretary of State for the Colonies that they had not been allowed to express their views on the Ministers' draft. Accordingly, His Majesty's Government decided to modify the terms of the Declaration and to appoint a Commission not merely to examine the Ministers' proposals but also to 'provide full opportunity for consultation to take place with various interests including minority communities concerned with the subject of constitutional reform and with proposals which Ministers have formulated'.<sup>1</sup>

This statement was published on 5 July 1944 without prior notice to the Ministers and was received by them with astonishment. A correspondence ensued in which the Ministers

<sup>1</sup> 'Reform of the Constitution: Further Correspondence,' p. 3 (S. P. XII of 1944).



protested against what they believed to be a breach of the Declaration of 1943, while the Secretary of State sought to prove that it was not a breach at all. It was an unsatisfactory correspondence, for the Secretary of State neglected to answer the Ministers' main contention that the terms of reference were quite inconsistent with the Ministers' published interpretation, which he had declared to contain nothing which must be regarded as fundamentally irreconcilable with the Declaration; and later the claim that the appointment of the Soulbury Commission was in strict accordance with the Declaration was not maintained.<sup>1</sup> It resulted in the Ministers withdrawing their proposals and deciding not to collaborate with the Soulbury Commission. The Ministers' draft was published with an explanatory memorandum.<sup>2</sup>

The Commissioners were Lord Soulbury, who had been a Conservative Cabinet Minister in the United Kingdom; (Sir) Frederick Rees, Principal of the University College of South Wales and Monmouthshire and Vice-Chancellor of the University of Wales; and (Sir) Frederick Burrows, President of the National Union of Railwaymen and afterwards Governor of Bengal. They arrived in the Island on 22 December 1944 and left on 9 April 1945. Though Mr D. S. Senanayake had 'a series of most valuable private discussions' with the Commissioners<sup>3</sup> and most of the other Ministers met the Commissioners socially or accompanied them on their tours of inspection, none of the Ministers gave evidence. The impressive list of witnesses<sup>4</sup> contained no representative of the Ceylon National Congress, the Sinhala Maha Sabha, or any of the extreme left-wing parties. Among the Sinhalese Members of the State Council only Mr W. Dahanayake, Mr B. H. Aluwihare (on behalf of the Kandyan National Assembly), Mr Simon Abeywickrama, Mr H. W. Amarasuriya (on behalf of the Lanka Mahajana Sabha), and Mr A. F. Molamure gave evidence. It is of course true, as the Commission remarks,<sup>5</sup> that the views of those who did

<sup>1</sup> See the correspondence analysed in Jennings, 'The Appointment of the Soulbury Commission', *University of Ceylon Review*, Vol. III (2) November 1945, pp. 11-45.

<sup>2</sup> Reform of the Constitution: Further Documents. (S. P. XIV of 1944.)

<sup>3</sup> *Ceylon: Report of the Commission on Constitutional Reform*. Cmd. 6677, p. 4.

<sup>4</sup> *Ibid.*, pp. 136-8.

<sup>5</sup> *Ibid.*, p. 4.

not give evidence became known to the Commissioners through the Press and other channels ; but it is a factor of some importance that the evidence presented to the Commission was heavily biased against the Ministers' scheme. Evidence of this kind, too, necessarily gives an impression of disparity of opinion greater than is in fact the case. In a legislature a debate is on a specific motion, and individual Members speak and vote on that motion : in oral evidence before a Commission each witness, so to speak, speaks to his own motion. The disparity is even greater in such conditions as those of Ceylon ; for the matters under discussion having been debated for many years, the disputants had convinced themselves by their own arguments and necessarily emphasized in evidence the points on which they differed rather than the points on which they agreed. Finally, the fact that none of the Ministers gave evidence was important because it relieved them from the temptation to make forceful attacks on those who differed from them and enabled them, at a later stage, to appeal for the support of the minorities.

The Commissioners' task was very different from that of the Donoughmore Commissioners seventeen years before. The latter had to create a Constitution ; the former had to approve, with or without modifications, one of the three schemes before them. These three schemes were :

1. The Donoughmore Constitution, which was supported by no section of opinion at all.
2. The Ministers' scheme, which was probably supported by at least two-thirds of the State Council.
3. A scheme submitted by the All-Ceylon Tamil Congress and published by the Commission on 22 January 1945.

It was, nevertheless, Hobson's choice. The Donoughmore Constitution was nobody's darling ; the Tamil draft might possibly get twelve votes. The Ministers' draft, suitably embellished, alone stood a chance of obtaining a three-quarters majority, or even a bare majority. Had the draft been grossly partial, it would no doubt have been possible to have drafted afresh ; but so far as was consistent with their own principles the Ministers had tried to meet the views of their critics : and no Constitution would be a success unless the majority was prepared to accept it and work it. The truth is that the essential task of the Commission was to ascertain what amendments

*+ what which is  
no choice at all*

should be made in the Ministers' draft. The Report accepted the Ministers' draft as a basis, added a Second Chamber on the Burmese model, made more flexible the powers of the Delimitation Commission, inserted an unexplained suggestion for multi-member constituencies, enlarged the powers of the Public Service Commission, and added qualifications and exceptions to the limitations on the Governor's powers inserted in the draft.

The last was the most important change. The Secretary of State had realized that the antagonism created by the appointment of the Soulbury Commission had somehow to be removed and had invited Mr D. S. Senanayake to London for consultations. Possibly he had intended to put specific proposals; but after Mr Senanayake arrived the General Election brought about a change of Government, and the new Secretary of State left Mr Senanayake to frame his own proposals. These proposals naturally ignored the Declaration of 1943 and made a strong case for Dominion Status, but met the fears which had inspired the limitations of the Declaration by an offer of an agreement about defence and external affairs. The Soulbury Report had given considerable strength to the case by adding qualifications and limitations to the qualifications and limitations in the Ministers' draft, with the result that the Governor's power had become extremely complex. Mr Senanayake was able to assert that the system would break down in time of emergency, which was just the situation which it was intended to meet. Other proposals of the Soulbury Commission were criticized, including the proposal for a Second Chamber. Mr Senanayake incorporated with his counter-proposals a revised form of the Ministers' draft and presented it to the Secretary of State.

There were further discussions and eventually it was agreed that the Soulbury Report should be published pending a decision by His Majesty's Government on the issues raised by Mr Senanayake. The Report was published in September 1945<sup>1</sup> and a White Paper,<sup>2</sup> embodying the decisions of His Majesty's Government, on 31 October 1945. The claim for Dominion Status was rejected. It was stated, however, that His Majesty's

<sup>1</sup> *Ceylon: Report of the Commission on Constitutional Reform.* Cmd. 6677.

<sup>2</sup> *Ceylon: Statement of Policy on Constitutional Reforms.* Cmd. 6690.

Government were in sympathy with the desire of the people of Ceylon to advance toward Dominion Status and were anxious to co-operate with them to that end. The hope was expressed that the new Constitution would be accepted by the people of Ceylon with a determination so to work it that in a comparatively short space of time such Dominion Status would be evolved. The contention that the complicated system of Governor's Ordinances incorporated in the Ministers' draft and amended by the Soulbury Report was incapable of being worked in practice was, however, accepted by implication, and in place of these powers it was decided to retain in the hands of the King in Council a power to legislate on defence and external affairs. Certain other modifications suggested by Mr Senanayake were accepted, but in other respects the Soulbury proposals were approved.

Mr Senanayake had a new draft prepared to give effect to these modifications and on it he based his speech to the State Council when moving that the White Paper proposals be accepted. After a two-day debate in November 1945, the Council passed the motion by 51 votes to 3, only two Indian Members and one Sinhalese (Mr W. Dahanayake) voting against it. Three Members—two Ceylon Tamils and one Indian—were absent, but one of the Ceylon Tamils stated afterwards that he would have voted for the motion. The motion was thus carried by 94.4 per cent of those present and voting or 89.5 per cent of the whole Council less the Speaker; but it was in fact supported by 91.2 per cent of the whole Council less the Speaker. His Majesty's Government had asked in the Declaration of 1943 for a 75 per cent vote of the whole Council less the Speaker but had waived this requirement by the White Paper.

The final stage was the formal drafting. None of the previous drafts had been put into strict legal form. Their purpose had been to make the intention of the Ministers, and subsequently of Mr Senanayake, quite plain so as to avoid the kind of controversy which might have arisen if a looser method of drafting proposals had been adopted. The final draft was the responsibility of the legal advisers to the Secretary of State, who were however assisted by the Legal Secretary (Sir Barclay Nihill, K.C.) and the Financial Secretary (Sir Oliver Goonetilleke). The new

Constitution was approved by the King in Council on 15 May 1946.

The new Order in Council, like that of 1931, did not deal with the franchise. The Soulbury Commission, like the Ministers' draft, had recommended that the franchise be within the exclusive jurisdiction of the Ceylon Parliament but had further advised (as the Ministers themselves had intended) that no change be made for the first elections. Detailed changes in the election procedure, designed to minimize corruption, had however been under consideration for some time. Accordingly the Ceylon (Electoral Register) (Special Provisions) Order in Council, 1946, merely authorized changes in dates so that new registers might be compiled, it being intended to produce a new Order in Council before the elections were held. The Ceylon (Parliamentary Elections) Order in Council, 1946, was issued later in the year.

Though the Ministers and the State Council had accepted the Soulbury modification of the Ministers' scheme as an interim measure, their policy remained Dominion Status. It was widely thought that the refusal of that status in the White Paper of 1945 was due not to the conditions of Ceylon but to the fact that the problem of India was still unresolved. When it became clear, early in 1947, that the problem was on the way towards a solution, Mr Senanayake decided to make another attempt to secure Dominion Status on the terms proposed by him in August 1945. In February 1947 he sent a personal letter through the Governor to the Secretary of State. It is reasonable to assume from subsequent announcements that the Governor supported his request. Sir Oliver Goonetilleke, who was about to go to the United Kingdom on leave, was authorized to discuss the matter on Mr Senanayake's behalf. Eventually, in June 1947, an announcement was made in the House of Commons by the Secretary of State and in the State Council by the Governor to the effect that, as soon as a Ceylon Government had assumed office under the new Constitution negotiations would be entered into for the making of agreements by which 'fully self-governing status' could be conferred on Ceylon. The Governor visited London in July 1947 for preliminary discussions, with which Sir Oliver Goonetilleke was associated; and on his return he announced that the heads of agreement, which

related to defence, external affairs and the position of officers appointed by the Secretary of State, had been agreed for submission to the two Governments in due course.

It was found that to provide fully self-governing status on the lines proposed five documents were necessary :

1. An Order in Council, subsequently named the Ceylon Independence Order in Council, 1947, to remove the limitations on self-government contained in the Ceylon (Constitution) Order in Council, 1946.

2. An Act of the Parliament of the United Kingdom, subsequently passed as the Ceylon Independence Act, 1947, to extend to Ceylon the powers of a Dominion under the Statute of Westminster, to deprive the Government of the United Kingdom of responsibility for the government of Ceylon, and to make consequential alterations in the laws of the United Kingdom.

3. A Defence Agreement between the Government of the United Kingdom and the Government of Ceylon to regulate the relations between the two countries in respect of defence.

4. An External Affairs Agreement similarly regulating the relations in respect of external affairs.

5. A Public Officers Agreement transferring to the Government of Ceylon the responsibilities of the Government of the United Kingdom in respect of officers in the public service appointed with the consent of the Secretary of State for the Colonies.

The two Cabinets having satisfied themselves on the terms of these documents, the Governor was authorized to sign the Agreements on behalf of the Government of the United Kingdom, and the Hon. D. S. Senanayake, Prime Minister, on behalf of Ceylon. The Agreements were signed accordingly on 11 November 1947. The Ceylon Independence Bill was introduced into the House of Commons two days later and was published in Ceylon as *Sessional Paper XXI* of 1947. On the following day a White Paper containing the Agreements was published in London ; and *Sessional Paper XXII* of 1947 was published in Colombo containing (a) a Memorandum by the Prime Minister giving a summary of the five documents, (b) the Ceylon Independence Bill, and (c) the British White Paper, including the text of the Agreements. Motions approving the action of the

Cabinet were introduced into the Ceylon Parliament in December 1947, and were passed in the House of Representatives by 59 votes to 11 and in the Senate by 21 votes to 5. The Ceylon Independence Act received the royal assent on 10 December 1947, and all five documents took effect on 4 February 1948. The Constitution of Ceylon is thus contained in two sets of documents :

1. The Ceylon Independence Act, 1947.
2. The Orders in Council of 1946 and 1947 known collectively as the Ceylon (Constitution and Independence) Orders in Council, 1947.

What the State Council had asked for in 1942 was 'Dominion Status', and accordingly the case which Mr Senanayake made in August 1945 and February 1947 was for that status. It appears, however, that in the meantime one, at least, of the 'Dominions' had made representations that the term should not be used because it was liable to be represented as a status inferior to full sovereignty or independence. Later in 1947 the Government of the United Kingdom changed the title of the Secretary of State for the Dominions to that of Secretary of State for Commonwealth Relations. There were, too, groups in India and Ceylon whose members thought that Dominion Status was inferior to independence and therefore urged that their countries should obtain the latter. Sir Oliver Goonetilleke, who was in London negotiating on behalf of Mr Senanayake between February and June 1947, was so impressed with the importance of this current of opinion that he urged the use of some different term, and the term 'fully self-governing status' was chosen as a synonym. The status was in fact Dominion Status, and this was made clear both in the correspondence and in the personal discussions between the Secretary of State for the Colonies and Sir Oliver Goonetilleke.

While these discussions were proceeding in London, however, opinion in Ceylon had changed. The Indian National Congress, which had always differentiated 'independence' from 'Dominion Status', had in fact accepted the latter and steps were being taken to create the two 'Dominions' of India and Pakistan. Accordingly, most of the sections of opinion in Ceylon which had formerly made the differentiation were by June 1947 ready to accept 'Dominion Status'. As soon as Mr Senanayake saw

the draft of the Declaration of June 1947, therefore, he realized that 'fully self-governing status' would be regarded, or at least represented, as less than 'Dominion Status'. Having ascertained from Sir Oliver Goonetilleke by telephone that Dominion Status was in fact intended, he cabled to the Secretary of State asking that 'independence' or 'Dominion Status' be substituted. The reply was that the status intended was what was usually connoted by Dominion Status, and the reasons for the decisions not to use that term were given. It was added that any change would now cause delay and that Mr Senanayake might use the text of the telegram at his discretion. Mr Senanayake did in fact use the exact language of the telegram in his reply to the Governor when the declaration was read in the State Council, though he did not indicate its origin and most members thought he was expressing a personal opinion. Both in the United Kingdom and in Ceylon, in fact, 'fully self-governing status' was thought by some to be what a news agency called 'near-Dominion status'. Even statements by the Secretary of State in the House of Commons did not altogether remove this first and misleading impression.

When the legislation designed to create the Dominions of India and Pakistan was drafted, it was decided to use the term 'independence'; and, since Ceylon was obtaining the same status, the short titles of the Act and the Order in Council used the same word. None of the Ceylon documents uses the term 'Dominion', though the status which they confer is clearly the same as that of Canada, Australia, New Zealand and the Union of South Africa. Since 1947, in fact, the word has not been used in a generic sense, though it is correctly used of Canada by reason of the British North America Acts, of New Zealand by reason of a Royal Proclamation, and of Pakistan so long as the Indian Independence Act, 1947, as amended by Pakistan legislation, so requires. The British Nationality Act, 1948, merely lists certain 'countries' and the Commonwealth Declaration of April 1949 speaks of 'countries of the Commonwealth'. Nevertheless, it is often convenient in practice to use the term 'Dominions' to mean the independent members of the Commonwealth other than the United Kingdom, and it is sometimes so used in the chapters which follow.



## CHAPTER II

### *INDEPENDENT STATUS*

THE British practice, even more than any other, draws a contrast between 'laws' and 'conventions'. The essential principles of the British Constitution were settled in 1689. Since then there has been much change by legislation, but the theory remains that the King makes laws with the assistance of the Lords and Commons in Parliament assembled, the King appoints and controls nearly all government servants, the King conducts foreign policy, the King controls the royal forces, the King administers justice through the mouths of his judges, and so on. The laws have certainly been modified and developed, but the essential legal theory has hardly changed. In practice, however, a completely different Constitution has been established, a democratic system in which powers are exercised in the name of the King but on behalf of the representatives of the people. By convention the British system is a Cabinet system, a system in which all decisions of importance are taken by the Cabinet consisting of Ministers responsible to the House of Commons. There is no inconsistency between laws and conventions, but the latter have reversed the effects of the former. Great Britain has established a democracy by convention while remaining a monarchy in legal theory.

There has been the same kind of development in relation to the colonies. In certain of the colonies the King in Council has retained complete legislative powers; in all the King in Parliament has complete legislative powers. The administration is carried on in the King's name by persons who are, theoretically, appointed and dismissible by him. In practice, however, the colony may have any sort of Constitution from complete autocracy to complete self-government by Cabinet and Parliament based upon adult franchise. Sometimes there is a progressive development from the one to the other. The colony is first governed autocratically by a Governor. The next step is to give him an Executive Council consisting of senior officials. After that he has a Legislative Council containing a majority of officials with some nominated unofficial Members. Several

kinds of development are now possible. Some of the unofficial Members may be elected while retaining an official majority ; some of the Members may be elected and there may be a non-official majority ; but the officials and the nominated non-officials may also have a majority ; one or more of the nominated or elected legislative councillors may be appointed to the Executive Council ; and so on. All these types of colony are generally spoken of as ' Crown Colonies ', but this is a term which has no legal meaning and it is occasionally used more extensively. The next step is to confer a ' representative legislature ', which is defined by law as ' any colonial legislature which shall comprise a legislative body of which one half are elected by inhabitants of the colony '. The number of official or nominated non-official members may be progressively decreased until the whole legislature becomes entirely elected. The colony has not necessarily self-government, because the Governor and his officials may still control the whole, or nearly the whole, of the Executive Council. Finally, the Governor may be instructed to choose as his executive councillors persons who have the ' confidence ' of the legislature and who are thus responsible to it. At this stage there is complete self-government in practice, though in legal theory the Governor still governs with the advice of his Executive Council or Privy Council, just as in Great Britain the King governs in legal theory with the advice of his Privy Council.

Most of these changes are effected by law. In many colonies the King has power by legislation or common law to make laws for the colony and to establish Constitutions. In establishing a Constitution he usually reserves to himself the power to make additional laws or to amend or revoke the Constitution. In other colonies an Act of Parliament is necessary. There grow up conventions in the colony, however, just as they grew up in Great Britain itself. Also, there grows up what may be called a ' convention of non-interference ', by which is meant that the Government and Parliament of the United Kingdom cease to interfere in the affairs of the colony. The result may be to enlarge the sphere of self-government without any change in the law. The development of Dominion Status was almost wholly of this character until 1931. The Canadian colonies had obtained responsible government—that is, the Governors chose Ministries which were

responsible to wholly elected legislatures—by 1850, and the colonies in Australia and New Zealand had responsible government a few years later. The King or the British Government (who are the same in practice, though not in legal theory) still had substantial powers of interference, either directly or through the Governor. Gradually they ceased to be exercised—the grant of Crown lands, the control of immigration, the disallowance of legislation, the reservation of Bills for the royal assent, the control of the armed forces, the making of commercial agreements, the control of currency, the making of political treaties, the declaration of war. Though the law remained unaltered, the powers came to be exercised not by the King on the advice of his British Ministers, but by the King or the Governor on the advice of his colonial Ministers. The development was not complete until after 1914, but by 1926 it had proceeded so far that a change in the law was considered necessary.

What Mr D. S. Senanayake asked in August 1945 was that Ceylon should become a Dominion in terms of the Statute of Westminster. In law the Island was a 'colony'. It had a representative legislature because more than half of the members of the State Council were elected. It had a large measure of self-government because, though it had not responsible government, the policy of the Island was for the most part determined by the State Council and its Executive Committees: but there were substantial limitations because the King in Council had considerable legal powers which he (or in practice the Government of the United Kingdom) did in fact exercise; the Governor had substantial powers which he exercised under the control of the Secretary of State for the Colonies; and the three major portfolios were held not by responsible Ministers or Executive Committees but by the three Officers of State who were responsible only to the Governor and through him to the Secretary of State. The Ministers' draft, which had been approved in principle by the Soulbury Commission, swept most of these limitations away. Mr Senanayake asked not only that the remainder be abolished, but that the new Ceylon Parliament be given all the powers vested in the Dominion legislatures by the Statute of Westminster, 1931. In other words, he asked not only that the Island should be given responsible government, not only

that it should become a Dominion by convention, but that it should become a Dominion in law also.

This would have been a very large step, and it was refused in 1945, but he did secure a legal situation which gave a greater measure of self-government, in law, than any colony—including the colonies which became Dominions—had obtained before 1931. The legal limitations on complete self-government which remained in the Constitution in October 1947 were as follows :

1. The King in Parliament retained power to legislate for Ceylon. This was true in the Dominions before 1931, and it is even true today. Section 4 of the Statute of Westminster provides that 'no Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof'.

2. The Parliament of Ceylon could not legislate extra-territorially. It could not, that is to say, deal with acts done outside Ceylon unless they were concerned with the 'peace, order and good government of Ceylon'. This applied equally to the Dominions before 1931, though it is now covered by section 3 of the Statute of Westminster. It is of extremely small importance in practice.

3. The King in Council had by section 30(4) of the Constitution Order in Council reserved a power to revoke, add to, suspend or amend the Order. No such power existed in the Dominions because, with the exception of Newfoundland, their Constitutions were in Acts of Parliament. On the other hand, the Ceylon Parliament had a power of constitutional amendment, while even now the Dominion of Canada has not. In Australia, New Zealand, South Africa and Eire there were limitations on the power.

4. The King in Council had by section 30(1) of the same Order retained a power to legislate on defence and external affairs. There was no such power in any of the Dominions.

5. The Governor had retained a power to reserve Bills of certain limited classes for the royal assent. In the Dominions the Governor-General had power to reserve all Bills, and even

now he possesses that power in Canada, Australia and New Zealand.

6. The King in Council might disallow a limited category of Acts under section 39. All Dominion Acts could be disallowed before 1931, except in Eire; and even now the power is retained in Canada, Australia and New Zealand.

From the legal point of view, therefore, Ceylon had a status in advance of the ordinary Dominion before 1931. The question of status is, however, determined by practice or convention rather than by law. The legal powers which might have been used by the Government of the United Kingdom in the nineteenth century had either fallen into disuse or had become the powers of the Dominion Government concerned. The power of disallowance, for instance, had fallen into disuse, though it remained in the several Constitutions. Bills were never reserved for the royal assent unless (as in the case of New Zealand) such reservation was legally necessary; and then the 'advice' tendered to the King was that of his Dominion Ministers and not that of his Ministers in the United Kingdom. Treaties were made, signed and ratified by the Dominion Governments, though in legal form they were made by the King on the advice of the Secretary of State for the Dominions. It was thus possible for the representatives of the United Kingdom and the Dominions to agree in 1926 that their respective countries were:

'Autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.'

They went on to say, however, that 'existing administrative, legislative and judicial forms' were not wholly in accord with this position. The Imperial Conferences of 1926 and 1930 were concerned to ascertain how these forms could be brought into line with the conventions, at least in those Dominions—Eire, South Africa and Canada—which desired their autonomy and equality with the United Kingdom to be expressed in law as well as in practice. The Statute of Westminster, 1931, gave some of the necessary legal powers, and Eire and South Africa have used them to the full. The Statute is in full operation in Canada, but constitutional amendments (which require formal

enactment by the Parliament of the United Kingdom) would be required to abolish the powers of disallowance and reservation, and so far Canada has not asked for them. In Australia and New Zealand no constitutional amendments (which can be effected locally) have been made.

In the case of Ceylon the legal powers of the King were few, but there was no guarantee that they would not be exercised or would be exercised only on the advice of the Government of Ceylon. It was possible for this stage to be reached—that is, for Dominion Status as defined in 1926 to be attained—by a mere growth of practice. Referring to the limitations in the Declaration of 1943, mostly swept away by the White Paper, the Ministers said in their statement of 8 June 1943 :<sup>1</sup>

‘We think that the offer should be accepted in the belief on the one hand that the qualifications are unnecessary and on the other hand that they would decay from disuse as similar qualifications have decayed elsewhere.’

The White Paper itself said :<sup>2</sup>

‘Experience of the working of parliamentary institutions in the British Commonwealth has shown that advance to Dominion Status has been effected by modification of existing Constitutions and by the establishment of conventions which have grown up in actual practice.

‘Legislation such as the Statute of Westminster has been the recognition of constitutional advances already achieved rather than the instrument by which they were secured. It is therefore the hope of His Majesty’s Government that the new Constitution will be accepted by the people of Ceylon with a determination so to work it that in a comparatively short space of time such Dominion Status will be evolved. The actual length of time occupied by this evolutionary process must depend upon the experience gained under the new Constitution by the people of Ceylon.’

The Ceylon Ministers were not satisfied with this position and Mr Senanayake pressed for full Dominion Status. So far as law is concerned, this status was achieved by the Ceylon Independence Order in Council, 1947, and the Ceylon Independence Act, 1947. If we examine the six limitations in operation in October 1947 we find that :

(1) has been altered because section 1(1) of the Ceylon Independence Act, 1947, extends to Ceylon the provision which

<sup>1</sup> *Sessional Paper XVII* of 1943, p. 5, para. 6.

<sup>2</sup> *Cmd. 6690*, p. 7, para. 10.

applies to the other Dominions by section 4 of the Statute of Westminster, 1931 ;

(2) has been abolished by section 1(3) and the First Schedule of the Ceylon Independence Act, 1947 ;

(3) has been abolished by the revocation, by the Ceylon Independence Order in Council, 1947, of section 30(4) of the Ceylon (Constitution) Order in Council, 1946 ;

(4) has been abolished by the revocation, by the Ceylon Independence Order in Council, 1947, of section 30(1) of the Ceylon (Constitution) Order in Council, 1946 ;

(5) has been abolished because sections 36 and 37 of the Ceylon (Constitution) Order in Council, 1946, which contained the power of reservation, have been revoked by the Ceylon Independence Order in Council, 1947 ;

(6) has been retained because it relates to Ceylon loans raised in London before 1939 and it was thought by the Ceylon Government to be unwise to alter the law lest the Island's credit be in any way impaired : these loans will in due course be repaid and then the section will cease to operate and become, in fact, a dead letter.

The legislative power of the Ceylon Parliament as contained in section 29 of the Ceylon (Constitution) Order in Council, 1947, is not that of a sovereign legislature because it was thought wise to limit its powers in the interest of religious and communal minorities. This limitation, though peculiar in form and substance because it relates to the social conditions of the Island, is similar in principle to that imposed by most written Constitutions. It is indeed rare to confer upon a legislature the full unrestricted or sovereign power which is possessed, by an accident of history, by the Parliament of the United Kingdom. Absolute power unrestrained by constitutional law is generally considered to be dangerous because it is in fact exercised by transient majorities which may use it to suit themselves. The limitation can, however, be altered or even abolished by the Ceylon Parliament itself by means of a constitutional amendment which satisfies section 29(4) of the Constitution. It is in fact a limitation which Ceylon chooses to impose on her legislature in the interest of her own people.

The powers conferred by section 29 of the Constitution are enlarged by the First Schedule of the Ceylon Independence Act;

1947. The effect of this enlargement is discussed in Chapter VII. Here it is enough to say that the Schedule swept away all the limitations which would have been read into section 29 of the Constitution by reason of the fact that Ceylon was legally a 'colony' possessing what is sometimes called a 'subordinate legislature'. By reason of section 4(2) of the Ceylon Independence Act, 1947, Ceylon ceased to be a 'colony' on 4 February 1948, though legislation enacted before that date and extending to 'colonies', other than the legislation amended by the Ceylon Independence Act, continues to apply to Ceylon until her Parliament chooses to amend or repeal it, as it has full power to do under the First Schedule to the Act.

By reason of section 1(1) of the Ceylon Independence Act, 1947, the Parliament of the United Kingdom retains a power to legislate for Ceylon, but only at the request and with the consent of Ceylon. This applies to Ceylon section 4 of the Statute of Westminster, 1931, which was enacted because it was thought that there might be occasions, as on matters affecting the succession to the throne or the royal style and titles, when common legislation was desirable. The power has in fact been used only to alter the succession on the abdication of Edward VIII and to change the Constitution of the Dominion of Canada, the latter being necessary because at the request of Canada the Statute of Westminster had not authorized the Dominion Parliament to amend the Dominion Constitution. The Ceylon Parliament has power under clause 1(2) of the First Schedule to the Ceylon Independence Act, 1947, to amend or repeal any legislation of the Parliament of the United Kingdom extending to Ceylon as part of the law of Ceylon, including of course any legislation enacted with the consent of Ceylon under section 1(1) of the Act.

The full law-making powers of an independent State are thus vested in Ceylon, though, like most legislatures, the Ceylon Parliament is not a sovereign body. Independent status is, however, as much a matter of convention as of law. The Ceylon Independence Act, 1947, goes as far as it can not only by vesting in Ceylon (though under the Constitution not in the Ceylon Parliament) full legislative powers but also by section 1(2) depriving the Government of the United Kingdom of responsibility for the government of Ceylon. For the consequences in



the spheres of defence and external affairs we must look at the Agreements.

Clause 1 of the External Affairs Agreement imports into the relations between Ceylon and the United Kingdom, and therefore by necessary implication into the relations between Ceylon and the other Dominions, the decisions of past Imperial Conferences. These state and assume the sovereignty of the Dominions in matters of defence and external affairs, for they include the Balfour Declaration accepted by resolution at the Imperial Conference of 1926 and the refinements added to it by the Imperial Conference of 1930. The consequences in the sphere of external relations are worked out in the remainder of the External Affairs Agreement—arrangements for the communication of information and consultation, the exchange of High Commissioners, the establishment by Ceylon of her own diplomatic service, and the application by Ceylon for membership of the United Nations and of specialized agencies described in Article 57 of the United Nations Charter. The rules laid down follow exactly the arrangements in operation affecting the other Dominions.

Nothing is said expressly in either Agreement about the right to declare war and make peace. The other Dominions have, however, interpreted the Balfour Declaration to confer individual responsibility and this interpretation has been accepted by the United Kingdom. Moreover, though the declaration of war and the making of peace are executive acts which in themselves require no legislative sanction, the consequences require immediate legislation. Indeed, such legislation in the case of war is usually kept in draft and passed through the legislature by suspension of Standing Orders. Such legislation can of course be passed only by the Parliament of Ceylon or by the Parliament of the United Kingdom at the request of Ceylon. It follows that a declaration of war is a matter for the Ceylon Government and not for the Government of the United Kingdom, and that the ending of a war is similarly a matter for the Ceylon Government. Ceylon differs from the other Dominions only because the Defence Agreement provides specifically for mutual assistance on the terms set out in clause 1, for the use of bases on the terms in clause 2, and for assistance towards the training of the Ceylon

defence forces on the terms in clause 3. These terms state specifically what is normal practice within the Commonwealth. It is however no longer customary for the United Kingdom to maintain forces and bases in a Dominion, except in time of war. The United Kingdom normally expects Dominions to provide for their own defence, but for some time at least it would be impracticable for Ceylon to do so owing on the one hand to her dangerous strategic position and on the other hand to the absence of adequate trained forces.

### CHAPTER III

## *ALLEGIANCE AND CITIZENSHIP*

CANADA, Australia, New Zealand, South Africa and Ceylon were colonies, or groups of colonies, of the United Kingdom acquired by settlement, cession or conquest. India and Pakistan include the whole of what used to be called British India and which was also obtained by cession or conquest. What is now the Republic of Ireland was for a time part of the United Kingdom. Britain, unlike Rome, extended its citizenship to all its colonies : but owing to the survival in the law of traditions derived from the feudal system, citizenship was a matter not of relationship towards a country but of relationship towards the King. Those who elsewhere would be described as 'citizens' or 'nationals' of their respective countries were in the Commonwealth referred to as 'subjects' of the King or 'British subjects'. Since there was one King throughout the Commonwealth, even after some of the colonies obtained Dominion Status or independence, there was a common citizenship implied in the phrase 'British subject'.

The relationship between the subject and the King was described as 'allegiance', so that all persons who were born in the King's dominions were said to be born 'within the King's allegiance'. Allegiance is simply the duty which a British subject owes to the King and is the same as the duty which any citizen owes to his country. Important though the duty is, the rights which accompany it are even more important. They include the right to be protected by courts, police and, if necessary, armed forces, the right to vote, the right to be elected to a legislature, the right to enter the King's dominions, the right to own property, and so on. It is however obvious that these rights might be different in different parts of the Commonwealth. Indeed, when a country became a Dominion it clearly had power to change the character of the rights altogether. Thus, Canada might give the franchise only to those British subjects who had resided in Canada for five years ; South Africa might give it only to those who were of European descent ; Ceylon might give it only to those who were born in Ceylon

of parents who were born in Ceylon; and so on. In other words, the incidents of allegiance varied throughout the Commonwealth according to the local law. What is more, in order to have a compendious legal character to which such rights might be assigned, a local nationality might be created. Thus, a person born in Australia would be a British subject, but Australian law might create the category of 'Australian nationals' who would be given rights (and perhaps have duties imposed upon them) which British subjects in general did not possess. Eire went even further while it was still within the Commonwealth. It created the category of 'Irish citizens' and said that they were not British subjects at all; though it also distinguished between British subjects and aliens, it was under no legal obligation to do so, for it had complete power to decide what rights and duties a person should possess under its own law.

Nevertheless, there was in 1926 a common allegiance throughout the Commonwealth. As the Balfour Declaration said, Great Britain and the Dominions were 'united by a common allegiance to the Crown'. This common allegiance had, however, widely varying characteristics in the various countries of the Commonwealth. In the United Kingdom a British subject from Ceylon or South Africa had almost exactly the same rights and duties as a British subject from England or Scotland. Provided that he was otherwise qualified (and the qualifications were the same for all British subjects), he had a right to enter the United Kingdom, to exercise the franchise, to be elected to the House of Commons or a local authority, to sit in the House of Lords if he was raised to the peerage, to enter the armed forces or the public service, to practise any profession in which he had a legally recognized qualification, to purchase land, to sue in the Courts, to live where he pleased, to benefit from the social services, and so on. South Africa, on the other hand, discriminated among British subjects according to race or colour; Ceylon (among other countries) made it difficult for a 'non-Ceylonese' to enter the public service; and the Irish Free State and Eire almost ignored 'British subjects' altogether.

After 1931, a Dominion could abolish the concept of British nationality, for the purposes of its own law, if it wished to do. British nationality was defined by Part I of the British

Nationality and Status of Aliens Act, 1914, as amended by subsequent legislation of the United Kingdom. This legislation applied to the Dominions as part of their law, and it could not be repealed or amended by a Dominion legislature until the necessary power was conferred by the Statute of Westminster, 1931. The Irish Free State (afterwards Eire) repealed those provisions in 1935. The tendency in the other Dominions, however, was to create their own nationality law so as to have, in addition to the category of British subjects, the category of, say, Canadian nationals. This led the United Kingdom in 1948 to summon a conference to consider the matter. Ceylon had by this time become independent and was represented by Mr L. M. D. de Silva, K.C. The report of the conference has not been published, but what it recommended to the Governments concerned is evident from the action taken by the United Kingdom. By the British Nationality Act, 1948, the British Nationality and Status of Aliens Acts, 1914 to 1943, were repealed in so far as the laws of the United Kingdom and the colonies were concerned—the repeal could not extend to the other members of the Commonwealth because of the Statute of Westminster. The Act also set up a new category, 'citizens of the United Kingdom and Colonies'. Finally, it provided that not only citizens of the United Kingdom and Colonies but also persons who were citizens of Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon, should be British subjects or Commonwealth citizens. The difference between a citizen of the United Kingdom and Colonies and any other British subject or Commonwealth citizen of course depends on the law of the United Kingdom, and in fact no difference in respect of rights and duties has yet been provided.

It was clearly contemplated that the other countries of the Commonwealth might, if they wished, follow suit. For instance, Ceylon might distinguish between citizens of Ceylon and other British subjects and give such rights and duties to each category as it thought fit.

When the Constitution was enacted in 1947 there was no legal category of 'citizens of Ceylon', though quite often a category known as 'Ceylonese' was created by administrative action for such purposes as appointments to the public service.

Following the Donoughmore Constitution, the Constitutions of 1946 and 1947 referred to 'British subjects'; and 'British subject' was defined in section 3 of the Order in Council of 1946 as 'any person who is a British subject according to the law for the time being of the United Kingdom, any person who has been naturalized under any enactment of any of His Majesty's dominions, and any person who is a citizen or subject of any of the Indian States as defined for the purposes of the Government of India Act, 1935'. The same definition appeared in the Ceylon (Parliamentary Elections) Order in Council, 1946. Accordingly, any British subject, so defined, could obtain the franchise if otherwise qualified, be elected or nominated to either House of Parliament, and become a Minister.

Exercising its power under the Constitution, the Parliament of Ceylon created the status of a 'citizen of Ceylon' by the Citizenship Act, No. 18 of 1948. Under it there are two ways of acquiring citizenship, by descent and by registration. A person born in Ceylon before the appointed day (21 Sept. 1948) is a citizen of Ceylon if his father was born in Ceylon or if both his paternal grandfather and his paternal great-grandfather were born in Ceylon. A person born outside Ceylon before the appointed day is a citizen of Ceylon if both his father and his paternal grandfather were born in Ceylon or both his paternal grandfather and his paternal great-grandfather were born in Ceylon. A person born in Ceylon after the appointed day is a citizen of Ceylon if his father was then a citizen of Ceylon, while if he was born outside Ceylon his birth must also be registered with the appropriate official. Citizenship by registration may be obtained by registration either under the Citizenship Act, No 18 of 1948, or under the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, an Act specially designed to enable persons of Indian and Pakistani origin, of long residence in the Island, to acquire citizenship.

Under Act No. 18 of 1948 an applicant for registration must :

(a) be of full age and of sound mind ; and

(b) have one of the following qualifications :

(i) be a person whose mother is or was a citizen of Ceylon by descent (or would have been a citizen by descent if she had been alive on the appointed date)

- and who, if married, has been resident for seven years, or, if unmarried, has been resident for ten years ; or
- (ii) is the husband, wife, widow or widower of a citizen by descent or registration and has been resident for one year ; or
- (iii) is a person who ceased to be a citizen by descent upon acquiring citizenship in another country in which he has been resident, and has renounced that citizenship ; and
- (c) is, and intends to continue to be, ordinarily resident in Ceylon.

In addition, not more than 25 persons may be granted citizenship because they have rendered distinguished service or are eminent in professional, commercial, industrial or agricultural life or have been naturalized as British subjects in Ceylon.

Act No. 3 of 1949 applies to Indians and Pakistanis who were resident for the minimum period before 1 January 1946 and have since continued in uninterrupted residence. The minimum period is

(a) ten years in the case of an unmarried person or person whose marriage has been dissolved by death or divorce ; and

(b) seven years in the case of a married person.

Certain other qualifications, relating to an assured income, the residence of his wife, freedom from disabilities which make it impossible to observe the laws of Ceylon (e.g. relating to marriage), and renunciation of citizenship rights elsewhere have to be satisfied.

It will be seen that the citizenship laws are extremely rigid, a fact which is no doubt to be explained by the large number of recent immigrants brought in for the cultivation of coffee, tea and rubber who have retained their connexions with their own countries.

Neither of the Acts repeals the British Nationality and Status of Aliens Acts, 1914 to 1943, in so far as they are part of the law of Ceylon. A person may therefore be a citizen of Ceylon by descent or registration and at the same time a British subject according to the law of Ceylon through birth in Ceylon or elsewhere within the King's dominions. His status as a British

subject in the United Kingdom or elsewhere is, of course, determined by the law of that country, and not by the law of Ceylon.

The creation of the status of citizen of Ceylon enabled the Constitution and the election law to be amended, if it were so desired, by the substitution of that status, instead of the status of British subject according to the law of the United Kingdom, as the qualification for the franchise and for election or appointment to either House of Parliament. The two matters are closely connected, for by section 12 of the Constitution a person who is qualified to be an elector is qualified to be elected or appointed to either Chamber. It follows that a person who is not qualified to be an elector is not qualified to be elected or appointed. It was proposed in 1950 to alter this qualification, so that a person should be qualified if he was a citizen of Ceylon or a citizen of a country within the Commonwealth which allowed citizens of Ceylon to be elected to its legislature. The Bill for this purpose did not secure the two-thirds majority required for a constitutional amendment by the proviso to section 29(4) of the Constitution, and accordingly this change of the law has not been made. Meanwhile, however, the Ceylon (Parliamentary Elections) Order in Council, 1946, had been amended by the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949. This Act provides, *inter alia*, that no person shall be qualified to have his name entered or retained in any register of electors if he is not a citizen of Ceylon. Hence persons who are not citizens of Ceylon will not be qualified for election or appointment to either Chamber. But a person who was not a citizen of Ceylon but had already been elected or appointed was not disqualified, and there is no such disqualification listed in section 13. In other words, only citizens of Ceylon can now be elected or appointed; but persons already elected or appointed who are not citizens of Ceylon can retain their seats until they fall vacant by dissolution, death, resignation or lapse of time.

It will be seen that Ceylon has deprived British subjects who are not Ceylon citizens of the right to vote, the right to be elected or appointed to either Chamber, and the right to become Ministers. It has also, by other legislation, deprived them of the right to enter Ceylon. It will be seen then that even in Ceylon the concept of 'allegiance' has become very thin.



#### CHAPTER IV

### *THE KING, THE GOVERNOR-GENERAL AND THE CONSTITUTION*

THE Commonwealth of Nations is founded partly on sentiment and partly on mutual self-interest. In some of the countries the one predominates; in others more importance is attached to the second. In some of them, in fact, the motives vary among the sections of the population. Quebec has few cultural or historical ties with Great Britain, while Ontario does not forget that it was founded, or at least developed, by the United Empire Loyalists who left the revolted American colonies because they did not wish to sever their ties with Great Britain. It may nevertheless still be true that the last hand to wave the Union Jack in North America will be that of a French-Canadian.

The Irish Free State removed several of its legal links with the United Kingdom, then in 1937 converted itself into Eire with a republican form of constitution, and finally in 1949 converted itself into the Republic of Ireland and seceded from the Commonwealth altogether. India, having become a Dominion, enacted a republican Constitution in 1949 but decided to remain within the Commonwealth, recognizing the King as 'Head of the Commonwealth'; and this arrangement was accepted at the Commonwealth Conference of 1949. Even among the rest of the Commonwealth the concept of 'common allegiance' has worn very thin, and the closeness of association of a country with the Commonwealth depends upon its local legislation and the extent to which a Commonwealth sentiment, or a sentiment of loyalty to the King, is retained.

The existence of this diversity has been fully recognized, and by no one more effectively than the King himself. The preamble to the Statute of Westminster recites that 'the Crown is the symbol of the free association of the members of the British Commonwealth of Nations'. The King's title has been changed by Act of Parliament so that he is no longer King of 'the United Kingdom of Great Britain and Ireland and the British Dominions beyond the Seas' but of 'Great Britain, Ireland and the British Dominions beyond the Seas'. Since 'Dominions' in

this sense means all territories which owe allegiance to the King, the description is geographical and not political. The King is no longer King of the United Kingdom, but he has not become King of Canada or Australia ; he is just ' the King ' for the whole Commonwealth, the ' symbol of free association '. In relation to the United Kingdom he exercises his functions on the advice of his Ministers in the United Kingdom ; in relation to the colonies he exercises them on the advice of the same Ministers ; but in relation to Canada, Australia, South Africa, New Zealand, Pakistan and Ceylon he exercises them on the advice of his Canadian, Australian, South African, New Zealand, Pakistani and Ceylonese Ministers respectively. In relation to India he exercises no functions at all, but is merely ' Head of the Commonwealth '. The greatest care is taken to see that the forms are rigidly observed, and the King himself would draw attention to any proposal from a United Kingdom Minister which trenched upon his functions elsewhere.

It is of course true that his functions are far more numerous in relation to the United Kingdom than in relation to any Dominion. He is personally present in the United Kingdom, but he is represented in a Dominion (other than India) by a Governor-General appointed by him on the advice of his Dominion Ministers. Most of his functions are delegated to the Governor-General. In all the Dominions (except India) the King is part of the legislature, but the function of assenting to Bills is exercised by the Governor-General. In all the Dominions (except India) the executive functions are vested in the King and are exercised in his name ; but executive acts are done (almost but not quite invariably) by his Dominion Ministers or the Governor-General acting on their advice. The Union of South Africa, exercising its power under the Statute of Westminster, has specifically enacted the conventions applicable :

' The Executive Government of the Union in regard to any aspect of its domestic or external affairs is vested in the King, acting on the advice of His Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as his representative.'

Elsewhere (except in India) the convention remains a convention. The office of Governor-General is created by Letters Patent and the Governor-General is authorized to act under

them by Commission. He is given formal Instructions to consult the Ministers, but no law has been passed on the subject.

The Ministers' draft sought to get as near to Dominion Status as the Declaration of 1943 permitted. Accordingly it made the King part of the legislature, vested executive functions in him, and provided that a Governor-General appointed by the King should be His Majesty's representative in the Island to exercise such powers and functions of the King as His Majesty might be pleased to assign to him. These provisions were adapted from those in the Constitution of the Commonwealth of Australia. In the Constitution of 1946 they appeared somewhat differently. Though the Ministers' suggestion for a Governor-General was supported by the Soulbury Commission, the White Paper did not accept the recommendation. Nor was any provision for the appointment of a Governor inserted in the Order in Council of 1946, apparently because the office would be constituted by Letters Patent.

In the Independence Order of 1947 the provision of the Ministers' draft was restored and appears as section 4(1) of the Constitution. Its meaning is, however, very different. Whereas under the Ministers' draft the Governor-General would have been appointed by the King on the advice of a Secretary of State, under section 4(2) of the Constitution the King will now act on the advice of the Prime Minister. In fact, section 4(2) is of fundamental importance and deserves to be quoted in full :

'4.(2) All powers, authorities and functions vested in His Majesty or the Governor-General shall, subject to the provisions of this Order and of any other law for the time being in force, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by his Majesty :

'Provided that no act or omission on the part of the Governor-General shall be called in question in any court of law or otherwise on the ground that the foregoing provisions of this subsection have not been complied with.'

It will be seen that this provides for complete responsible government, not only in respect of the functions exercisable by the Governor-General but also in respect of those exercisable by the King. These powers include the ordinary prerogatives of

appointing Ministers, assenting to legislation, summoning and dissolving Parliament, and so on, which are exercised by the Governor-General, and also the powers of declaring war and making treaties which remain vested in the King.

Other provisions of the Constitution carry out this principle. The greater part of the large number of amendments made by the Ceylon Independence Order was designed for this purpose. In the Orders in Council of 1946 there were fifteen powers to be exercised by the Governor 'in his discretion' and thirteen powers to be exercised by him on the 'recommendation' of some person or body of persons. These powers are now all exercised on 'advice'. Moreover the powers of the King in Council to make Orders in Council for Ceylon and the duty of the Governor to reserve Bills for the royal assent were abolished.

In accordance with the principle adopted in the Ministers' draft, the King is made part of the legislature and the words 'represented by the Governor' in section 7 of the Constitution were revoked. The Parliament of Ceylon now consists of the King, the Senate, and the House of Representatives. When the King is in Ceylon he may therefore open or prorogue Parliament in person, or he may empower any other person (e.g. the Duke of Gloucester on 10 February 1948) to do so on his behalf, or he may by his Commission empower the Governor-General to do so. In any case the 'King's speech' is drafted by his Ceylon Ministers, who take political responsibility for all that he or his deputy the Governor-General may do.

Further, section 45 provides, as before, that the executive power of the Island shall continue vested in the King; but instead of providing, as it did in 1946, that it *shall* be exercised by the Governor in accordance with the Order, it now provides that it *may* be exercised by the Governor-General in accordance with the Order or any other law for the time being in force. The change was necessary because there was formerly a distinction between the powers exercised by the Governor, whether in his discretion, on recommendation, or on advice, and those exercised by the King on the advice of the Secretary of State for the Colonies; now the powers, whether exercised personally by the King or on his behalf by the Governor-General, are exercised on the advice of Ceylon Ministers.

All this does not imply that the King or the Governor-General must necessarily accept the advice. The King and the Governor-General act on the advice of Ceylon Ministers in the same way as the King acts on the advice of United Kingdom Ministers: there are occasions on which he can refuse to accept the advice and many others on which he can exercise his right to warn. What is provided, in short, is constitutional monarchy of the British type; and in any case the Ministers concerned are those of Ceylon, not those of the United Kingdom.

## CHAPTER V

### *THE FRANCHISE AND THE CONSTITUENCIES*

THE franchise and election law generally are not dealt with in the Constitution because the intention was to have a separate Order in Council amending the Ceylon (State Council Election) Order in Council, 1931, as amended. The Soulbury Commission recommended that the existing franchise should be retained for the time being, and Mr Senanayake's drafts therefore incorporated the 1931 Orders by reference, with the necessary verbal changes. It was found, however, that the Legal Draftsman had a draft to give effect to the recommendations of the Select Committee of the State Council on Election Law: and, as the State Council had not the powers necessary for enacting it, a separate Order in Council was decided upon. The Ceylon (Electoral Registers) (Special Provisions) Order in Council, 1946, provided for the making of the new registers so as to bring the Constitution into operation, and the franchise was re-enacted in the Ceylon (Parliamentary Elections) Order in Council, 1946. In accordance with section 29(4) of the Constitution, however, Parliament has power to revoke or amend this Order, and the power has already been exercised in the Ceylon (Parliamentary Elections) Amendment Act, No. 19 of 1948, and the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949.

Since 1949 the franchise has been based on citizenship and residence. A person is disqualified for being an elector in a year if—

- (a) he is not a citizen of Ceylon or if he is under an acknowledgement of allegiance, etc., to a foreign State which is not a member of the Commonwealth; or
- (b) he was under 21 on the 1st of June; or
- (c) he has not, for a continuous period of six months in the eighteen months immediately prior to the 1st of June, resided in the electoral district (unless he has been absent on official duty); or
- (d) he is serving a sentence of imprisonment for an offence punishable with imprisonment for a term exceeding 12 months, or is under a sentence of death or is serving a

sentence of imprisonment awarded in lieu of execution of a sentence of death; or

- (e) he is found or declared to be of unsound mind; or
- (f) he is disqualified on account of the law relating to election offences.

All persons not otherwise disqualified are qualified to have their names entered on the register of electors.

The representation clauses were undoubtedly the most contentious clauses of the Constitution. The task of the Ministers was exceedingly difficult. They had to produce a scheme which would satisfy three-quarters of all the Members of the State Council. They were anxious to give due weightage to all sections of the population, but the only proposal which had been publicly adumbrated, that for 'balanced representation', would have required communal electorates and would not have been acceptable even to a bare majority of the State Council. The suggestion made by (Sir Arunachalam) Mahadeva, when it was found that no agreed scheme was possible, to leave the whole question to a Royal Commission, was at first sight more attractive: but it would have been a confession of failure on the part of the Ministers; and if the Royal Commission had produced an unacceptable scheme the result would have been to hold up the chance of a considerable advance in constitutional status. The Ministers therefore accepted a scheme providing weightage for sparsely populated areas. This had several advantages:

1. It avoided communal representation and so might be acceptable to the majority.

2. It gave increased representation to the sparsely-populated areas, which were also the areas where the minorities were strongest, and so might satisfy those members of the minority groups who were not pledged to 'balanced representation'.

3. It gave weightage to the Kandyan Provinces as against the Low-country Sinhalese areas.

4. It gave weightage to the backward areas as against the more populous and wealthier areas.

5. By reducing the size of constituencies in the areas where the minorities were strongest, it enabled the Delimitation Commission to form constituencies which were comparatively homogeneous without making them specifically communal.

6. It avoided constituencies which were too large to be handled, and for this reason was usual in countries where there are no communal problems.

The Soulbury Commission, which approved of the general scheme, strengthened the fifth point by widening the discretion of the Delimitation Commission.

It was intended to vary the representation after each census, but the explanatory memorandum attached to the Ministers' draft worked out an example on the basis of the census of 1931, giving a total of 95 elected Members. The Soulbury Report did not state clearly whether this was to be the number in the first House of Representatives, or whether the number was to be ascertained on the basis of the census of 1946. Since discussion had been based on the draft, it was decided that the distribution in the explanatory memorandum should be adopted. This was done in section 76, and the distribution thus effected was not altered on the basis of the census of 1946 but will be at the next census,<sup>1</sup> in accordance with section 40. The Province is the unit. Each Province has one constituency for each 75,000 of population, ascertained to the nearest 75,000, and an additional constituency for every 1,000 square miles of area. The weightage thus varies from 1 in the Western Province to 4 each in the Northern, Eastern and North-Central Provinces. The average size of constituencies, on the basis of the censuses of 1931 and 1946, is thus as follows :

<i>Province</i>	<i>Seats</i>	<i>Average 1931</i>	<i>Average 1946</i>
Western	... 20	72,432	93,320
Central	... 15	63,560	75,407
Southern	... 12	64,274	80,128
Northern	... 7	44,344	53,315
Eastern	... 7	30,569	38,878
North-Western	... 10	54,699	66,736
North-Central	... 5	19,473	27,876
Uva	... 7	43,331	53,031
Sabaragamuwa	... 10	57,837	74,464

<sup>1</sup> The Constitution Amendment Bill, to which reference has already been made, proposed that a Delimitation Commission should be appointed to take account of the census of 1946. After that Bill failed to obtain the necessary majority it was decided that there should be a census in 1951,



Taking the North-Western Province to be mainly Low-country and Uva and Sabaragamuwa to be mainly Kandyan, the Provinces may be collected as follows :

Type	Seats	Average 1931	Average 1946
Low-country	42	63,498	83,182
Kandyan	37	52,231	64,496
Tamil	16	38,317	46,993

In addition there were to be six nominated Members.

The actual distribution was to be effected by an independent Delimitation Commission appointed by the Governor acting in his discretion. The Ministers' draft provided that in dividing a Province into electoral districts the Commission should have regard to the transport facilities of the Province, its physical features and the community or diversity of its inhabitants. The Soulbury Commission accepted the recommendation<sup>1</sup> but added that 'wherever it shall appear to the Commission that there is a substantial concentration in any area of a Province of persons united by a community of interest, whether racial, religious or otherwise, but differing in one or more of these respects from the majority of the inhabitants of that area, the Commission shall be at liberty to modify the factor of numerical equality of persons in that area and make such division of the Province into electoral districts as may be necessary to render possible the representation of that interest'. This was not intended to mean that wherever there is a concentration of persons of one 'race' or religion or caste, that concentration must have separate representation. There must be a *substantial* concentration and there will be only a *modification* of the equality principle. The recommendation, which is now section 41(3) and (4) of the Constitution, may be put by saying that if  $P$  is the average population of the Province per member (e.g. 38,878 in the Eastern Province according to the census of 1946), and  $m$  is a variable factor, the size of a constituency may be  $P + m$  or  $P - m$ . It would have made the task of the Delimitation Commission easier if  $m$  had been given a maximum value as in South Africa, where  $m$  is 15 per cent

which would not only enable the decennial period (which began in 1871 but was interrupted in 1941) to be restored, but would also allow a new Delimitation Commission under section 40.

<sup>1</sup> Paragraph 278(ii).

of *P*; but this is the sort of detail which the Soulbury Commission did not work out. Eventually the matter was left to the discretion of the Delimitation Commission, subject to the last sentence in section 41(4).

The Soulbury Commission also suggested that consideration be given to the creation of multi-member constituencies. It was apparently suggested to the Commission that 'minority representation would be strengthened by the creation of multi-member constituencies on the ground that the only chance of representation for small communities depended on their concentrating all their strength on candidates of their own choice in a multi-member constituency'. A multi-member constituency as such does not, however, produce any such result: what does produce such a result is a multi-member constituency with suitable rules of voting. The following examples show how the voting system may be varied, *e* being the number of electors and *n* the number of members to be elected:

1. Each elector has *n* votes, which he may cast by giving one each to *n* of the candidates.

In such a case no candidate can be sure of election unless he obtains  $\frac{ne}{n+1} + 1$  votes, because if he obtained only  $\frac{ne}{n+1}$  votes, there might be *n*+1 candidates with that number of votes, whereas if he obtains  $\frac{ne}{n+1} + 1$  votes there cannot be more than *n* such candidates, and so he must be elected. Thus, in a three-member constituency a candidate cannot be sure of election unless he obtains the support of one more than three-quarters of the electorate. This arrangement helps the majority, not the minority, because the majority would obtain all three seats, whereas if the constituency were divided into three the minority might be concentrated in one of the constituencies and only one more than half the votes in that constituency would be needed for election.

2. Each elector has *n*-1 votes, which he may cast by giving one each to *n*-1 candidates.

This method clearly helps a large minority, for the maximum vote which any candidate need aim at is  $\frac{(n-1)e}{2n} + 1$ . That is, in a three-member constituency any person who obtains

one-third of the votes plus one is certain of being elected, and in fact he may need much less. In this case the smaller the constituency the more helpful to minorities.

3. Each elector has *one* vote which may be transferred from one candidate to another in the order of the elector's preference.

This is the simplest and the best form of proportional representation for use in small constituencies, and is that provided for the election of Senators by the House of Representatives.

Any group which can obtain  $\frac{e}{n+1} + 1$  of the preferences at any stage of the counting is certain of election. If, for instance, there are  $\frac{e}{n+1} + 1$  Pinks in the constituency, and they always vote Pink, it does not matter how many Pink candidates there are, because eventually one of them will be elected. The first preferences given to the lowest Pink will be transferred to the other Pinks; all the preferences of the next lowest Pink will be transferred to the remaining Pinks; and so on until only one Pink is left, and he will *ex hypothesi* have  $\frac{e}{n+1} + 1$  votes and will be declared to be elected. The defect of this method is, however, that it requires an electorate which can mark 1, 2, 3, etc., on its ballot papers.

4. Each elector has *n* votes which he can cast as he pleases—all of them to one candidate; or as many as he pleases less than *n* to one candidate and the rest to another candidate or other candidates; or one vote to each of *n* candidates.

This was the crude form of proportional representation selected by the Board of Ministers. Under it, as in the first case,

any candidate is sure of election if he obtains  $\frac{ne}{n+1} + 1$  votes.

But whereas in the first case  $\frac{ne}{n+1} + 1$  votes must be cast by

$\frac{ne}{n+1} + 1$  voters, in this case that number of votes can be cast

by  $\frac{e}{n+1} + 1$  voters, because each voter can give him *n* votes.

That is, in a two-member constituency he needs only the full support of one-third of the voters, and in a three-member constituency only one-quarter of the voters. A minority candidate can thus secure election in a three-member constituency if he can persuade

one-quarter of the electors to give him all their votes or, as it is called, to 'plump' for him. The system thus helps minorities, but not as much as under proportional representation with a single transferable vote. Under the latter system, if one-quarter of the electorate consists of Pinks, a Pink is certain to be elected; but under the system chosen a Pink will probably not be elected if there are two or more Pink candidates.

It must of course be realized that a minority is not necessarily a racial minority. It may be based on race, caste, religion, economic interest, or pure politics. The peculiarity of Ceylon is that, for some, race, religion and caste are of importance for election purposes, whereas in Great Britain majorities and minorities are expressed in terms of parties with different policies. It does not follow, however, that a racial minority of 25 per cent in a three-member constituency will be able to return a member of that race. In the first place, there may be two or more candidates of that race who will split the vote between them; and in the second place many of the voters of that race may vote not according to race but according to religion or political or economic interest. What is more, there will be a tendency, as under the system of proportional representation, for a large number of candidates to be nominated because *all* kinds of minorities will seek to use the opportunity presented by the multi-member constituency. In a single-member constituency with straight voting, a party or group has to aim at a 50 per cent vote; in a three-member constituency a party or group has to aim at a 25 per cent vote only. Moreover, the fact that there will be a chance for all kinds of minorities implies that the total vote will be split; hence it also implies that independent candidates, not representing organized groups, will find election easier. The votes may be so much split up among a variety of candidates that no candidate has more than a small minority of the votes. In a three-member constituency there might be three successful candidates each with less than a 20 per cent vote. In a five-member constituency a 10 per cent vote might be sufficient.

It is inevitable that, when an attempt is made to give representation to a communal minority, the emphasis of electioneering should be upon communal ideas. The Ministers' scheme was designed to minimize communalism by providing territorial

representation only, but in such a manner that the various communities were reasonably sure of some representation on a non-communal basis. Multi-member constituencies are necessarily based on communal grounds and therefore encourage communalism. This may be offset by non-communal party organizations, but even they will have to nominate candidates who have some communal influence, and they will find electioneering difficult in practice because the system favours communal candidates. A party which had the support of the majority in a three-member constituency might win only one seat. Delimitation Commissions will in fact be faced by the old dilemma. People think in communal terms, therefore communal representation must be provided; but if such representation is provided there will be an increase of communalism.

In spite of these difficulties, the Delimitation Commission was given the necessary power in section 41(5) of the Constitution, and the power is quite unfettered. They could divide the Island into multi-member constituencies, or have two multi-member constituencies only, or have none at all. They could not increase the number of Members to be returned for a Province; but in other respects they could do as they pleased.

The first delimitation was carried out by a Commission consisting of Mr L. M. D. de Silva, K.C. (Chairman), Mr N. Nadarajah, K.C., and Mr H. E. Jansz, C.M.G. Their Report,<sup>1</sup> which was unanimous, received legal effect by Proclamation. They summarized their functions as:

'(a) That each Province of the Island be divided into electoral districts, the total number of which is specified in the Order and the aggregate of which totals 95 for the whole Island.

'(b) That each electoral district of a Province shall have as nearly as may be an equal number of persons

- (i) subject to a proviso relating to transport facilities, physical features, and community or diversity of interest of the inhabitants of the Province; and
- (ii) subject further to the proviso that the rule is to give way wherever it comes into conflict with the directions in (c) and (d).

'(c) That the Commission may so divide a Province as to render possible the representation of minorities united by the

<sup>1</sup> *Report of the First Delimitation Commission. Sessional Paper XIII of 1946.*

tie of race, by the tie of religion, or by any other tie. The Commission is directed in making such division to minimize any disproportion that may arise in the population figures of the several electoral districts demarcated in the Province.

'(d) That the Commission may create electoral districts returning two or more members but in so doing shall not increase the number of members to be returned for the Province beyond that specified in the Order.'

The emphasis in the Report, as in the evidence given before the Commission, was on the aspect of 'community or diversity of interest'. Unlike some of the evidence, however, the Report starts from the principle of equality of representation within the Province and modifies it on the basis of community of interest. In other words, community of interest is not the factor on which distribution is made but a factor which renders possible a reasonable departure from equality of representation. Subject to that consideration, the Commission felt that they should, in the absence of insuperable practical difficulties, favour the representation of minority interests; and most of the discussion proceeded on that basis. It may perhaps be said that on one point the Commission did not lay sufficient emphasis. The phrase 'render possible the representation of that interest' was carefully chosen. It was not assumed that electors would necessarily vote on communal, religious or caste lines; what was assumed was that if any of these factors was dominant in the minds of the electors then that interest should be able to secure representation. The phrase 'render possible' assumes that electors can vote communally if they wish, not that they do so or ought to do so.

The Commission decided in favour of 86 single-member constituencies, three constituencies returning two members each, and one returning three members. In the Western Province, cosmopolitan Colombo Central was made a three-member seat, it being assumed that if this was done one of the members elected would be a Tamil. In the Southern Province, Ambalangoda and Balapitiya were combined into a two-member seat in the hope that the arrangement would alleviate the caste differences among the Sinhalese in those areas. The Commission were doubtful whether this could be the result, but it seemed better to put the competing castes into one constituency than to have a caste minority in each of the two constituencies. In Sabaragamuwa,

Balangoda was given two seats in the hope that the minority of Indian Tamils would be sufficiently strong to give them one seat. In the Central Province, Kadugannawa was given two seats in the hope of solving another caste problem. In Uva, two seats were given to Badulla in order to provide one seat for Indians.

The problem of enabling the Indian Tamils to secure adequate representation was, however, a difficult one, and the assistance of the Agent of the Government of India was sought. Owing to the fact that many of them were not domiciled in Ceylon and had not taken out certificates of permanent settlement, their voting strength was proportionately lower than among other communities, and this fact was taken into consideration by the Commission. The boundaries were so arranged as to enable the Indian Tamils to win Nuwara Eliya, Talawakele, Kotagala, Nawalapitiya and Maskeliya in the Central Province, and Haputale in Uva, while they had a chance of one of the seats in Colombo Central, one in Balangoda, one in Badulla, and the Maturata seat. Assuming them to vote communally and not to get Sinhalese votes, the Indian Tamils would thus get seven seats and might get ten. On an all-Island numerical basis they should get ten and on a provincial basis they should have eight. The impossibility of guaranteeing proportionate representation arose from the fact that most of the Indian Tamils lived on estates which occupy the hillsides, while the valleys between were mainly occupied by Sinhalese villagers. Thus in Sabaragamuwa, though there were nearly 100,000 Indian Tamils and 125,000 Indian and Ceylon Tamils, it was not possible to provide a single definitely 'Tamil' seat, though an effort was made at Balangoda.

It was also difficult to secure adequate representation for the Muslim community because, except in the Eastern Province, they too were scattered. In the Eastern Province there were three seats which could be won by Muslims. In the three-member Colombo Central constituency they were 33 per cent of the population and might gain one seat. A separate seat was given to Mannar in the Northern Province although on a strict population basis it should be associated with Vavuniya; and though the Muslims were only one-third, divisions among the Ceylon Tamils might enable the Muslims to win it. In the North-

Western Province the Puttalam seat was treated in the same way. Thus the Muslims should be able to gain between four and six seats. On a numerical basis they would be entitled to six.

The probabilities in their arrangement, compared with the proportionate figure calculated on an all-Island basis, were assessed by the Commission as follows :

	<i>Proportionate</i>	<i>Probable</i>
Low-country Sinhalese	... 41	32
Kandyan Sinhalese	... 25	36
Ceylon Tamils	... 12	13 or 14
Indians	... 10	7 or 8
Muslims	... 6	4

The result of the General Election of 1947<sup>1</sup> accorded remarkably closely with the Commission's forecast. There were 68 Sinhalese (though the number of Kandyans was probably lower than the Commission's estimate), 13 Ceylon Tamils, 7 Indians, 6 Muslims and one Burgher. This shows, incidentally, that the Commission's assumption that electors would vote on communal lines was justified: though in fact they usually voted on communal lines because it was rarely thought worthwhile for a candidate to put up unless his community was strong in the constituency.

The Commission was not very successful in forecasting the results of the two-member and three-member constituencies. In Ambalangoda-Balapitiya there was no caste tension in 1947, when candidates of several castes competed; but nor was there tension in 1950 when at a by-election only one seat was contested. Colombo Central, in which it was thought that a Muslim and a Tamil as well as a Sinhalese might be returned, in fact returned a Sinhalese, a Muslim and a Burgher, the nearest Tamil being far down the list: but the Burgher was a communist who obviously captured most of the anti-Government votes. The two-member seat in Balangoda was intended to give one seat in Sabaragamuwa to the Indians: but both members were Sinhalese and not a single Indian won a seat in the Province. Badulla was similarly made a two-member seat in order that

<sup>1</sup> See Jennings, 'The Ceylon General Election of 1947', *University of Ceylon Review*, Vol. VI, pp. 133-95.



the Indians might secure one, and in this respect the Commission's forecast was correct. Also, the Indians won Nuwara Eliya, Talawakele, Kotagala, Nawalapitiya and Maskeliya in the Central Province, as the Commission had forecast, but failed to win Haputale in Uva.

Speaking generally, however, the election was not fought on communal lines. The Indians voted solidly for the candidates of the Ceylon Indian Congress, and where there were no such candidates in areas where the Indian vote was strong, as in Sabaragamuwa, they generally supported left-wing (or, to use the Ceylonism, 'leftist') candidates. In seven of the nine constituencies of the Northern Province and in Trincomalee the Tamil Congress entered candidates, and won seven of these eight seats. Elsewhere, the main contest was between the United National Party and the left-wing parties, or between the former and independents. Though the parties always entered candidates of the appropriate community, and caste difference obviously played an important (though statistically unassessable) part, the conflict between them was essentially political. It may therefore be said that the Donoughmore Ministers had in the main succeeded in their aim of producing a system of representation which was at once non-communal and fair to all communities.

Section 40 provides for the appointment of a new Delimitation Commission within one year after each census other than that of 1946. On the basis of the preliminary figures of the census of 1946, the following would have been the changes if section 76 had not fixed representation on the basis of the 1931 census :

<i>Province</i>	<i>1931 Census</i>	<i>1946 Census</i>
Western	... 20	26
Central	... 15	17
Southern	... 12	15
Northern	... 9	10
Eastern	... 7	8
North-Western	... 10	12
North-Central	... 5	6
Uva	... 7	8
Sabaragamuwa	... 10	12
<i>Totals</i>	... 95	114

It will be seen that the increase of population tends towards a larger representation of the Sinhalese areas, though it does not

necessarily follow that the new voters are Sinhalese. The Soulbury Commission recommended<sup>1</sup> that before the census of 1956 it would be desirable to set up a Select Committee of the legislature to examine and report upon the working of the scheme of representation, with a view to formulating appropriate terms of reference for the Delimitation Commission. Any alteration in the terms of reference would require an amendment of section 40 and any such amendment would need a vote of two-thirds of the whole number of Members of the House of Representatives, in accordance with section 29(4).

<sup>1</sup> Paragraph 277.

## CHAPTER VI

### *THE PARLIAMENT*

IN accordance with section 7, the Parliament of Ceylon consists of the King, the Senate, and the House of Representatives. There is some confusion, even among lawyers, in the use of terms. It needs to be explained, therefore, that technically Parliament is not a permanent body. A Parliament is summoned and dissolved, and between a dissolution and the next meeting there is no Parliament. The name arose because the early Kings of England wanted occasionally to consult a wider range of interests—the burgesses of their boroughs and the knights of their shires as well as the lords of their Councils. The King was then said to hold a Council in Parliament. In course of time the King left the members of the Council in Parliament to discuss matters among themselves and himself attended only when opening or proroguing (i.e. sending away) the Parliament, or when decisions (Acts) had to be taken. These discussions in the absence of the King were informal, and the members of the Council might meet in groups. In time, however, the number of groups was limited to two, the Lords being in one group and the Commons (i.e. the knights and the burgesses) in another. These groups became formal assemblies known respectively as the House of Lords and the House of Commons. They claimed, successfully, that their concurrence was necessary for the making of laws and the approval of taxation. An 'Act' is still done by all three sections of the Parliament—the King, the Lords and the Commons—meeting together, though the King is almost invariably represented by Lords Commissioners: but the essential debates take place in the two Houses, and the amount of business is so large that there is almost always a Parliament in being. When the King 'dissolves' one Parliament, therefore, he gives orders for the summoning of another. Also a 'prorogation'—the period during which the Parliament, so to speak, stands down ready to be called up again—is of short duration, because there is a 'session' of the Parliament every year.

In the Dominion system the process of emphasizing the meetings of the two Houses has gone so far that even 'Acts' are not done by the King (or the Governor-General) in Parliament. Bills are passed by the two Houses and then submitted to the Governor-General for the royal assent. They become 'Acts' when he assents to them in the King's name. This is the process in Ceylon. Bills are passed by the House of Representatives and the Senate, or in certain circumstances by the House of Representatives alone, and then submitted to the Governor-General for the royal assent. He has power to assent in the King's name. In other respects, however, the theory is maintained, though sometimes the language is not very apt. Section 8(2), for instance, says that the Senate is a 'permanent body'. It cannot be so, for it no longer exists when a Parliament is dissolved. It is no more permanent than the House of Lords. The *Senators* are entitled to be summoned at any time during their respective terms of office, just as the *Lords* are entitled to be summoned so long as they live: but when the Parliament of Ceylon is dissolved there is no Senate, just as when the Parliament of the United Kingdom is dissolved there is no House of Lords.<sup>1</sup>

The power to summon Parliament is vested in the Governor-General by section 15(1). The State Council was dissolved under section 79 of the new Constitution of 1946. Under section 80 the Governor issued a Proclamation ordering elections for the House of Representatives. On the day fixed for the meeting of Parliament, the House of Representatives met and proceeded to the election of a Speaker, a Deputy Speaker and Chairman of Committees, and a Deputy Chairman. Then it elected 15 Senators by single transferable vote. Next, the Governor nominated 15 Senators and the Senate then met. Once the first Parliament was constituted, there was no further difficulty. It will remain in being (though not necessarily in session) until it is dissolved. Under section 15(4) a Proclamation dissolving Parliament will summon a new Parliament and fix a date for elections to the House of Representatives. Since Senators are

<sup>1</sup> The confusion was due to a partial copying of the Government of India Act, 1935, where however the whole *Parliament* was not dissolved. See now the Constitution of India, Art. 85, under which the President may summon either or both Houses, prorogue both Houses, or dissolve the House of the People.

elected for fixed periods of six years, the Senate will already be constituted (though there may be vacancies to be filled), and it will simply be reconstituted at the beginning of the new Parliament. By section 11(5), however, a House of Representatives can continue for a maximum period of five years. If Parliament is not sooner dissolved, it is dissolved automatically as soon as the House of Representatives has continued for five years. The Governor-General would then summon a new Parliament under section 15(1).

The State Council had power to adjourn from time to time ; but subject to such adjournments it remained permanently in session. This was because it had executive as well as legislative functions and its Executive Committees might be sitting at any time. The new Parliament is, however, merely a legislative body, and therefore reverted to the practice of the Parliaments of the United Kingdom and the Dominions. Its work is arranged in sessions, each ending with a prorogation by Proclamation. By section 15(3) a Proclamation proroguing Parliament must fix a date for the next session ; and by section 15(2) there must be at least one session in every year. The effect of a prorogation is to clear the order paper, for all questions and motions lapse unless they are specially carried over by resolution, and it is rare (in the United Kingdom) for such resolutions to be passed. Between summons and prorogation Parliament is in *session* ; but actual *sittings* of each House are determined by that House. Once summoned by the Governor-General, it may adjourn at its pleasure and arrange the dates and times of its meetings as it wishes.

The first Parliament was summoned by the Governor acting in his discretion, for there was no responsible Government in office until the first Parliament was constituted. In appointing Members to the House of Representatives and Senators to the Senate the Governor acted in his discretion, for it was specifically so provided in the Constitution of 1946 ; but now under section 4 of the Constitution, as amended in 1947, the Governor-General exercises all his functions in accordance with the constitutional conventions applicable to the exercise of a similar function in the United Kingdom by the King. This means that almost invariably he will accept the advice of the Prime Minister. Formerly it was the Cabinet that advised dissolution in the

United Kingdom, but in 1918 a change occurred, and since then the Prime Minister alone has advised.<sup>1</sup> The point is of some importance, for it sometimes happens that a dissolution is required owing to the break-up of the Cabinet itself. Thus in 1945 the Conservative Ministers desired an election in July while the Labour Ministers wished to postpone it until the new registers came into operation in October. Mr Churchill, as Prime Minister, did not consult the Cabinet, but advised an election in July.

It is quite plain that the Governor-General cannot dissolve Parliament without advice. In the United Kingdom it is legally impossible because certain legal formalities have to be observed. The King has to find some Ministers who will 'advise', which means that in order to secure a dissolution of Parliament against this advice he must dismiss his Ministers and obtain a new Prime Minister who will give the necessary advice. There are no such legal formalities in Ceylon, but there cannot be any doubt about the conventions in the United Kingdom, and these apply to Ceylon by law. The Governor-General cannot dissolve Parliament without first finding a Prime Minister who will advise it.

On the other hand, it seems clear that the King can refuse to accept the Prime Minister's advice, and therefore that the Governor-General can do so.<sup>2</sup> The question does not often arise in practice, because if the Cabinet has a majority in the House of Commons (or the House of Representatives) it is in a strong position. If the King (or the Governor-General) does not accept the advice, the Cabinet can resign. If their majority holds, no alternative Government having a majority can be formed, and accordingly the *new* Government has to advise a dissolution in the hope of getting a majority. Thus, the King (or the Governor-General) has to accept the dissolution. This may not happen quite so easily in Ceylon, for it is unlikely that party lines will be so strict as in the United Kingdom, and in all probability if the Governor-General refused it would be because he thought that an alternative Government could be formed. This was done in South Africa in 1939. General Hertzog as Prime

<sup>1</sup> See Jennings, *Cabinet Government* (2nd ed.), pp. 386-9.

<sup>2</sup> *Ibid.*, pp. 390-5.

Minister advised a dissolution. The Governor-General refused, whereupon the Prime Minister resigned and the Governor-General sent for General Smuts, who was able to form a Government which retained a majority in the House of Assembly. On the other hand, in Canada in 1936 Mr Mackenzie King as Prime Minister advised a dissolution. The Governor-General refused and, on the resignation of the *Cabinet*, sent for Mr Meighen, the Leader of the Opposition. He was unable to secure a majority and advised a dissolution, which the Governor-General perforce granted. It is however of some importance in Canada which Government 'goes to the country'. It may be so in Ceylon, for in the absence of rigid party lines the Prime Minister obtains some prestige merely through being Prime Minister. Also, it is commonly assumed—it is unnecessary to ascertain whether the assumption is true or false—that the supporters of a Minister are able to obtain 'favours' for *their* supporters. Accordingly, the supporters of a Government may obtain some votes because they are supporters of the Government.

The basis of all these conventions is the rule that the King (and the Governor-General) must be impartial and above politics. He is a sort of umpire who has to see that the game is played not only according to the rules but in the correct spirit. He can do much by advice, for he can point out to one set of Ministers that if they stretch the rules to their own advantage they will create precedents for their opponents to follow. The tradition of 'playing the game' is firmly fixed in the United Kingdom, and the King has a prestige which no Governor-General can ever enjoy; it is everybody's business to see that he does not get involved in politics. With a 'European' Governor-General and a Ceylonese Ministry it is unlikely that the same care will be observed: nor, indeed, will the Governor-General have advice equivalent to that which the King receives from 'Buckingham Palace'. Accordingly, it may be useful to mention certain problems which have arisen in the Dominions:

1. In Tasmania in 1914 the Governor imposed on a new Ministry the condition that it should advise a dissolution. The new Ministry, having accepted office, refused so to advise. The

Secretary of State informed the Governor that no such condition ought to be imposed.<sup>1</sup>

There cannot be any doubt that the Secretary of State was correct. The Ministry, not the Governor, is responsible for obtaining and retaining a parliamentary majority, and its advice must be governed by the political conditions prevailing.

2. In Australia in 1909 the Governor-General refused a dissolution of the House of Representatives because an alternative Government was possible owing to a coalition between two minority parties (a situation which might easily arise in Ceylon) and because the Parliament had only a year to run. There is in the documents an interesting list of circumstances in which, according to the Ministers, dissolution would probably be granted.<sup>2</sup>

3. The Governor-General of Canada in 1926 refused to ask the Secretary of State for the Dominions for his opinion.<sup>3</sup> It cannot be doubted that he was right so to refuse. The Governor-General for the purpose of this function is a constitutional monarch. He can take unofficial advice from whomsoever he pleases; but the Government of the United Kingdom ought not to interfere in what is essentially a Canadian problem. It may be noted, too, that the Secretary of State for the Dominions firmly refused to instruct the Governor of New South Wales, or even to give advice, in an almost contemporaneous dispute.<sup>4</sup> It is submitted that this must apply to Ceylon. The Governor-General has to follow the constitutional conventions of the United Kingdom, that is, he must decide the question on such advice as he can obtain locally. He ought not to cable London for it.

4. In Victoria in 1872 the Prime Minister mentioned four conditions in which a dissolution would be justifiable (in the Commonwealth in 1909 the list was extended to seven<sup>5</sup>). The Governor refused a dissolution and also refused to admit that in any of the cases mentioned the Governor must allow a dissolution without reference to the circumstances.<sup>6</sup> In other words, it is impossible to lay down in advance the circumstances

<sup>1</sup> See H. V. Evatt, *The King and his Dominion Governors*, pp. 30-6.

<sup>2</sup> *Ibid.*, pp. 50-4, especially pp. 52-3.

<sup>3</sup> *Ibid.*, p. 59.

<sup>4</sup> *Ibid.*, pp. 121-36, especially pp. 122 and 128.

<sup>6</sup> *Ibid.*, pp. 52-3.

<sup>5</sup> *Ibid.*, p. 219.



in which a dissolution will or will not be granted. There is nothing in more recent practice to justify a contrary rule.

5. In Tasmania in 1950 the Government had one supporter more than the Opposition party. There were two independent members, one of whom normally voted with the Opposition and the other was Speaker. Mr Speaker had announced on his appointment that he would normally give his casting vote for the Government. During the recess, the Opposition announced its intention of moving a motion against the Government and Mr Speaker said that he would support it. Having thus lost his majority, the Premier asked for a dissolution without meeting Parliament. The Governor asked for time to consider the matter and, sending for the Leader of the Opposition, asked him whether he would be prepared to form a Government if a dissolution was refused and the Government resigned. The Leader of the Opposition said he would not, and accordingly the dissolution was granted.<sup>1</sup>

In Ceylon (unlike Australia) the British tradition that Mr Speaker has no opinion on public policy is followed, and in the event of a tie he would presumably follow the British practice of giving a vote in the negative unless an 'aye' vote was necessary to keep the subject open. Even so, the case may arise of a Government knowing that it will be defeated asking for a dissolution without meeting Parliament. The question whether the Government ought to meet Parliament when it had lost its majority at a general election was much discussed in 1868 and 1874,<sup>2</sup> but since then it has been settled that the Government ought to resign forthwith. The Tasmanian case is a little more difficult, because the Opposition wished to censure the Government on account of an administrative decision and, no doubt, the Government did not wish to be censured lest its case be weakened at the general election. The Governor's decision to consult the Leader of the Opposition was unusual and would probably have been objected to in Britain by the Prime Minister, because the King was considering the question of a new Government before his predecessor had resigned, and by the Leader of the Opposition because the question was hypothetical. If similar conditions had arisen in Britain it is probable that the

<sup>1</sup> Private information.

<sup>2</sup> Jennings, *Cabinet Government* (2nd ed.), pp. 457-61.

King would have granted a dissolution. The Governor having ascertained that an alternative Government was not possible had of course no alternative but to dissolve Parliament.

The position may be summarized by saying that in all normal circumstances the Governor-General must accept the advice of his Prime Minister, but that there may be cases where he might feel a dissolution to be unnecessary and to be almost, if not quite, an abuse of his legal power to dissolve. It would be impossible to indicate the cases in advance; but they might occur, for instance, where a Prime Minister had lost the support of his own colleagues and of his party, so that a perfectly satisfactory Government could be formed without him and without a dissolution; or it might occur where a Government, having failed to get a majority (or an effective majority) at one election proceeded almost immediately to advise a second dissolution. These must be taken as examples only, and even as examples they might not be applicable; for instance, two elections in rapid succession might be the only means of persuading the electorate to make up its mind which Government it wanted—as in the United Kingdom in 1923 and 1924.

## CHAPTER VII

### LEGISLATIVE POWERS

#### 1. Powers

THE legislative powers of the Ceylon Parliament derive from two sources, the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947, and the Ceylon Independence Act, 1947. The basic power is contained in section 29(1) of the Ceylon (Constitution) Order in Council, 1946: 'Parliament shall have power to make laws for the peace, order and good government of the Island.'

The phrase 'peace, order and good government' is not a description of the purposes for which legislation may be enacted, nor is it necessary for a Court in relation to each Act of Parliament to decide whether it deals with 'peace', or 'order', or 'good government': the phrase is the lawyer's way of stating absolute or complete power. Power to legislate for the peace, order or good government of a country is a power to legislate on any subject whatever; it is a power 'as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed or could bestow'.<sup>1</sup>

When the provision was enacted in the Constitution Order of 1946, however, it had to be read subject to three classes of limitations. First, there were limitations in the Order itself, imported by the phrase 'subject to the provisions of this Order'. There were and still are two such limitations in section 29. There was and still is a power in section 39 for the King on the advice of a Secretary of State to disallow certain narrowly defined classes of Acts of Parliament. These limitations remain and are discussed below.

Secondly, there were limitations implied in the fact that the power was conferred by an Order in Council. Under section 30, the King in Council retained a power to legislate for the Island and there was nothing in section 29 to authorize the Ceylon Parliament to repeal or amend such Orders in Council. On the contrary, the power in section 29(4) was specifically limited

<sup>1</sup> *Hodge v. The Queen*, 9 App. Cas. 117.

to Orders in Council in force in the Island on the date of the first meeting of the House of Representatives. Section 30 was however revoked by section 4 of the Ceylon Independence Order in Council, 1947, and section 29(4) has been so amended as to enable the Ceylon Parliament to revoke or amend any provision of any Order in Council. The revocation of section 30 abolishes the power of the King in Council, for it is a well known rule of law laid down by Lord Mansfield in the famous case of *Campbell v. Hall*<sup>1</sup> that when the King has granted a Constitution to a colony he cannot 'derogate from his grant' by enacting legislation, otherwise than through the colonial legislature, unless he has reserved such a power to himself by the instrument conferring the Constitution. For that reason every Order in Council extending to Ceylon and issued before the Independence Order did in fact reserve such a power. The power reserved in the Constitution Order has however disappeared with the revocation of section 30; the similar powers in the Amendment Orders have been revoked by the Schedule to the Independence Order; and the Independence Order itself retains no power. Thus the King can no longer legislate for Ceylon by Order in Council. What he can do by section 4(1) is to appoint a Governor-General, and by reason of the definition of 'Governor-General' in section 3 he may also appoint an Officer administering the Government or a Deputy Governor-General. This may be done by Letters Patent and Commission, and these documents will continue to include a power of amendment. This is however an executive and not a legislative function, and in any case it is exercised on the advice of the Ceylon Government in accordance with section 4 of the Constitution.

Thirdly, there were limitations implicit in the sovereignty of the Parliament of the United Kingdom. These were dealt with by the Ceylon Independence Act, 1947, as follows:

1. By the mere fact that the Dutch territories in Ceylon were ceded to His Majesty by the Treaty of Amiens, 1802, and the Kandyan Kingdom by the Kandyan Convention, 1815, the Island became subject to the legislative authority of the Parliament of the United Kingdom. It is now provided by section 1(1) of the Ceylon Independence Act, 1947, that no Act of the

<sup>1</sup> (1774) Cowp. 204.

Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Ceylon as part of the law of Ceylon, unless it is expressly declared in that Act that Ceylon has requested, and consented to, the enactment thereof. This provision, which is to the same effect as section 4 of the Statute of Westminster, 1931, maintains the legislative authority of the Parliament of the United Kingdom because there may be matters, such as those relating to the descent of the Crown or British nationality, which the United Kingdom and the Dominions would prefer to have regulated by imperial legislation. In any event, certain types of constitutional legislation for Canada, Australia and New Zealand required imperial legislation, and accordingly a provision applying to all the Dominions had to make it possible for legislation to be enacted by the Parliament of the United Kingdom.

By reason of the provision next mentioned, the Ceylon Parliament can repeal or amend this section, and in particular it can define which authority is to give the request and consent of Ceylon. The Statute of Westminster itself requires that the request and consent of Australia shall be given by the Parliament as well as the Government of the Commonwealth. In South Africa the Status of the Union Act, 1934, requires that any Act of the Parliament of the United Kingdom be extended to the Union by Act of the Parliament of the Union. In India the power has been abolished altogether; and in Pakistan section 6 of the Indian Independence Act, 1947, requires the consent of the legislature. In Ceylon as in Canada the question has been left open.

2. Ceylon was a 'colony' within the meaning of the Interpretation Act, 1889, and the Colonial Laws Validity Act, 1865, applied to it. By section 2 of that Act any Ceylon law which was repugnant to any Act of the Parliament of the United Kingdom extending to the Island, or any Order or Regulation made under authority of such Act, was void and inoperative. By section 4(2) of the Ceylon Independence Act, 1947, the word 'colony' does not include Ceylon in any Act of the Parliament of the United Kingdom passed after 4 February 1948. After that date, too, clause 1(1) of the First Schedule to the Act of 1947 provides that the Colonial Laws Validity Act, 1865, will not apply to any law made after 4 February 1948 by the Parliament

of Ceylon. It is specifically provided that no law and no provision of any law made after 4 February 1948 by the Parliament of Ceylon 'shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of Ceylon shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of Ceylon'.

These provisions, which repeat section 2 of the Statute of Westminster, 1931, abolish the most serious limitations on the powers of the Ceylon Parliament as they stood at the end of 1947. There was and still is a considerable body of law, particularly in such fields as the title and powers of the King, British nationality, merchant shipping, prize courts, emergency powers, and so on, which applies to Ceylon by imperial legislation. Until 4 February 1948 this could not be amended or repealed by the Ceylon Parliament. It can now be repealed or amended by ordinary legislation, though if it requires an amendment of the Constitution the provisions of the Constitution must be observed.

The power conferred by clause 1 of the First Schedule to the Ceylon Independence Act, 1947, added to the power of constitutional amendment conferred by section 29(4) of the Ceylon (Constitution) Order in Council, 1946, gives the Ceylon Parliament power to enact the legal changes required for secession. Ceylon's place in the Commonwealth depends in law<sup>1</sup> upon :

(a) The King's prerogative powers derived from the cession in 1802 and 1815 ;

(b) the legislation of the Parliament of the United Kingdom extended as a result of the cession or applied since the cession, including the Ceylon Independence Act, 1947 ; and

(c) the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947, which derive from the King's prerogative powers.

It is clear that (a) and (b) can be changed by legislation under the First Schedule to the Ceylon Independence Act, 1947. It is equally clear that (c) can be changed under section 29(4) of the

<sup>1</sup> See Jennings and Young, *Constitutional Laws of the Commonwealth* (2nd ed.), pp. 140 ff.

Ceylon (Constitution) Order in Council, 1946, in the manner provided by that subsection. It follows that a lawful secession can be effected by an Act of the Ceylon Parliament assented to by two-thirds of all the Members of the House of Representatives.

3. The power of the Ceylon Parliament to legislate extra-territorially was a matter of some doubt in view of fairly recent decisions of the Judicial Committee of the Privy Council.<sup>1</sup> The power is now conferred expressly by paragraph 2 of the First Schedule to the Ceylon Independence Act, 1947.

Thus the only limitations on the legislative powers of the Ceylon Parliament are those in the Constitution itself. Of these there are three :

(i) Section 29(2) of the Constitution was taken from the Ministers' draft and was designed to meet the fears of some of the political leaders that there would be discrimination according to religion or race. It provides that no law enacted by the Ceylon Parliament shall

'(a) prohibit or restrict the free exercise of any religion ; or  
(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable ; or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions ; or

(d) alter the constitution of any religious body except with the consent of the governing authority of that body ;

Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.'

The insertion of 'fundamental rights' into a Constitution has been a common practice since the Bill of Rights was inserted into the Constitution of the United States of America.<sup>2</sup> The precedent for this particular provision was found in the Government of Ireland Act, 1920, which continues to apply to Northern Ireland and which sought to protect the Protestants from discriminatory legislation in Southern Ireland and the Roman Catholics from discriminatory legislation in Northern Ireland.

<sup>1</sup> *McLeod v. Attorney-General for New South Wales* [1891] A. C. 455 ; *Attorney-General for Canada v. Cain* [1906] A. C. 542 ; *Croft v. Dumphy*, [1933] A. C. 156 ; Jennings and Young, *Constitutional Laws of the Commonwealth* (2nd ed.), pp. 131 ff.

<sup>2</sup> See Constitution of India, Arts. 12 to 35.

Laws which infringe section 29(2) of the Constitution are declared by section 29(3) to be void and may therefore be declared to be void by any Court in the Island.

(ii) Section 29(4) of the Constitution, as now enacted in section 3 of the Ceylon Independence Order in Council, 1947, is not strictly a limitation on legislative power, for it deals with the exercise of the power rather than with the power itself. Once a Bill receives the royal assent and thus becomes an Act of Parliament it cannot be challenged unless it is alleged to come within section 29(2) or is disallowed under section 39. What section 29(4) provides is that a Bill amending the Constitution shall not be presented for the royal assent unless the Speaker certifies that two-thirds of the whole number of Members voted for it in the House of Representatives. Assuming that there are no vacancies among the Members, it must therefore be supported by 68 Members. In substance, though, it is a limitation on legislative power, of a kind not uncommon in democratic Constitutions, designed to protect substantial minorities. In the first Parliament, for instance, it would be impossible for the Government to secure an amendment of the Constitution without having the support of a substantial section of the Opposition. This was shown in 1950, when a Government Bill to amend the qualifications and disqualifications of Members and to provide for a new Delimitation Commission failed to secure the necessary majority in the House of Representatives.

(iii) Section 39 of the Constitution, again, is strictly not a limitation on legislative powers because an Act which comes within its terms will be valid when enacted, though it may become invalid through subsequent disallowance. The section is designed to avoid the risk of any fall in the Island's credit due to the constitutional changes and in particular to the removal of the control possessed by the Government of the United Kingdom. It applies only to laws affecting the stocks specified in the Second Schedule, though it may be extended to other stocks if the Ceylon Government so request under section 39(2). Though the King may be advised through a Secretary of State to disallow legislation, it is clear from section 4 that the advice must originate with the Ceylon Government.

These limitations on the power of the Ceylon Parliament show



that it is not a sovereign legislature in the sense in which the term is commonly used: that is, it has not complete and unlimited legislative power. This does not imply any limitation on the sovereignty of Ceylon, for it is customary, in democratic Constitutions, to impose limitations on legislative power. That power is in fact, though not in theory, vested in the majorities in the legislature for the time being, and it is considered dangerous not to limit it. The actual distribution can in any event be altered by constitutional amendment under section 29(4) of the Constitution.

## 2. *Distribution of legislative power*

The Parliament of Ceylon consists of three parts, the King, the Senate and the House of Representatives. The form is slightly different from that adopted in the United Kingdom but is the same as that adopted in the older Dominions. In the United Kingdom the legislative power is vested in the King in Parliament; that is, the Act is done in Parliament by the King, or by Lords Commissioners authorized by him, sitting with the Lords and Commons. In practice, though, the power is exercised by the Lords and Commons sitting separately, who approve the Bill which is to be enacted by the King in Parliament. In Ceylon as in the older Dominions this practice is made the law. The Bill is approved by the House of Representatives and the Senate sitting separately and becomes an Act through the assent of the King given by the Governor-General. This does not prevent the King or the Governor-General or some Commissioner on the King's behalf (e.g. the Duke of Gloucester at the opening of Parliament on 10 February 1948) sitting in Parliament, and indeed Ceylon has adopted the British practice of having a King's Speech delivered in Parliament at the opening of a session, though it has not followed the British practice of having a King's Speech at a prorogation. Nor would it be impossible to have the royal assent signified in Parliament; but it is not legally necessary to do so and in fact it is not done. There is no particular virtue in this British tradition and accordingly it has not been followed.

The royal assent is for all practical purposes a formality. It is never refused in the United Kingdom and it is commonly assumed that by convention it cannot be refused, except perhaps

if the King is so advised by his Ministers. It is possible to imagine a case in which the Ministers would so advise. For instance, if a Bill after much debate was ready for assent when the Government resigned, it is possible that the new Government would advise the refusal of assent pending reconsideration in the House of Representatives. In any event, the United Kingdom convention in this matter is the law in Ceylon by reason of section 4 of the Constitution. For all practical purposes the royal assent is a formality indicating the association of Ceylon with the Commonwealth of Nations.

In all normal cases a Bill cannot be presented for the royal assent unless it has been passed both by the House of Representatives and by the Senate. By section 31(1) a Money Bill must be introduced into the House of Representatives, but any other Bill may be introduced into either Chamber. It is 'read' three times in the one Chamber and is then passed to the other, where it may be approved, rejected or approved with amendments. If it is approved, it goes to the Governor-General for the royal assent. If it is rejected nothing further happens unless the question is taken up again in the other Chamber. If it is approved with amendments it goes back to the Chamber from which it originated, and is passed to and fro until the text of the Bill is approved or one Chamber rejects it. A Bill from the Senate always requires the concurrence of the House of Representatives, but there are cases in which a Bill from the House of Representatives can receive the royal assent without the consent of the Senate.

It should be said, first, that under section 32(2) a Bill which has been passed by the Senate with an amendment which is subsequently rejected by the House of Representatives is deemed not to have passed the Senate. This is for convenience of drafting only. A conflict between the two Chambers may arise because

(i) having been passed by the House of Representatives a Bill is rejected by the Senate: i.e. the motion that the Bill be read a first, second or third time is rejected by a majority;

(ii) having been passed by the House of Representatives it is not passed by the Senate: e.g. no motion for the first, second or third reading is put down; or the motion is amended to read (for instance) that the Bill be read a second time in six months;

(iii) having been passed by the House of Representatives it is passed with amendments by the Senate, but the House of Representatives refuses to assent to one or more of these amendments, and the Senate refuses to give way.

The normal process in all these cases is to find a compromise. The House of Commons has had power to override the House of Lords since 1911, but only four times has the power been exercised. It is the function of the Government to see that the legislative machine works smoothly and the function of each Chamber to work with and not against the other. Nevertheless, provisions to regulate a 'conflict' had to be made, and those chosen by the Soulbury Commission have been inserted in sections 33 and 34.

Section 33 applies to Money Bills. If a Money Bill (which must be introduced into the House of Representatives and not the Senate) is

- (i) passed by the House of Representatives ;
- (ii) sent to the Senate at least one month before the end of the session ;
- (iii) not passed by the Senate (as explained above) within one month after it is so sent ; it may be presented for the royal assent and, when assented to by the Governor-General, become an Act of Parliament, without the consent of the Senate.

Section 34 applies to a Bill which is not a Money Bill. If such a Bill is

- (i) passed by the House of Representatives ;
- (ii) sent to the Senate at least one month before the end of the session ;
- (iii) not passed by the Senate (as explained above) in that session ;
- (iv) passed by the House of Representatives in the next session ;
- (v) sent to the Senate at least one month before the end of that session ;
- (vi) not passed by the Senate within one month after it has been so sent, or within six months after the commencement of that session, whichever is the later ; it may be presented for the royal assent and, when assented to by the Governor-General [or the King if it comes within section 37(1)], become an Act of Parliament without the consent of the Senate.

'Money Bill' is defined by section 31(2) as :

'A Public Bill which contains only provisions dealing with all or any of the following subjects, that is to say, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt, expenses of administration or other financial purposes, of charges on the Consolidated Fund or on any other public funds or on moneys provided by Parliament, or the variation or repeal of any such charges; the grant of money to the Crown or to any authority or person, or the variation or revocation of any such grant; the appropriation, receipt, custody, investment, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof, or the establishment, alteration, administration or abolition of any sinking fund provided in connexion with any such loan; or any subordinate matter incidental to any of the aforesaid subjects.'

It is added that 'public funds', 'public money' and 'loans' 'do not include any taxation imposed, debt incurred, fund or money provided or loan raised, by any local authority'. The task of deciding whether a Bill is a Money Bill is left by section 33(2) to Mr Speaker, who must however consult the Attorney-General or the Solicitor-General. Mr Speaker will consider each Bill when it has passed its third reading in the House of Representatives. He will consult the Attorney-General and if after such consultation he considers that it is a Money Bill, he will endorse on it a certificate to that effect. By section 35 this certificate is conclusive for all purposes and must not be questioned in any court of law. He must again certify when the Bill comes back from the Senate. There is nothing in the Constitution to prevent the Senate from amending a Money Bill. In the United Kingdom it would be a breach of privilege for the House of Lords to do so, and this privilege can be acquired by the House of Representatives by legislation under section 27 : but unless and until such legislation is passed there is nothing to prevent amendments being made in the Senate. Accordingly, a Bill which is a Money Bill when it goes to the Senate is not necessarily a Money Bill when it has been amended by the Senate and, if any amendments have been accepted by the House of Representatives the Bill must again be examined to see if it can be certified. This certificate, too, is conclusive.

The definition of Money Bill has been adapted from the

Parliament Act, 1911. It is, however, considerably wider, and the precedents of the Speakers of the House of Commons are not necessarily applicable. First, emphasis must be placed on the word *only*. It is impossible to 'tack' general legislation to a Money Bill. Such a Bill must deal with one or more of the matters set out in the definition, and must deal with those matters *only*. Secondly, it is doubtful whether the administrative machinery required for one of the matters dealt with is within the definition. For instance, if a Bill authorized the levy of a 'social security contribution' on certain types of income it would be within the definition because it would deal *only* with the imposition of taxation; if it provided for the payment of that contribution to a Social Security Fund it would still be a Money Bill because it would deal with the appropriation of public money; but if the Bill further established a Social Security Commission to manage the Fund, consisting of persons having certain qualifications and acting according to specified rules, it is arguable that it would go outside the definition; and it is quite certain that if it dealt with the manner in which the Social Services Commission was to administer the Fund in the interest of the citizens it would not be a Money Bill. In all probability a distinction must be drawn according to *purpose*. If the real purpose of the Bill is to impose taxation, the provisions for raising it, including all the administrative provisions, deal with 'subordinate matter incidental' to the levying of taxation. If the purpose is to create a new social service, the levying of taxation is still within the definition, but the machinery for administering the fund so collected is not. Similarly with 'appropriation'. A mere Appropriation Act is clearly within the definition; but a Bill which appropriated money to a particular purpose and proceeded to indicate the manner in which that purpose was to be fulfilled would not be a Money Bill.

It will be seen that the House of Representatives can secure enactment of a Money Bill within one month after the date of its introduction into the Senate. In the case of a Bill other than a Money Bill, a delay of one session is required. Indeed, it may be rather more. No further proceedings can be taken in the first session, except of course to attempt to find a compromise acceptable to both Chambers. If in the second session

it is rejected by the Senate, it may at once be presented for the royal assent. If it is amended by the Senate the proceedings must continue until it is certain that the Senate insists on its amendment and the House of Representatives disagrees. That is, when the Bill is amended by the Senate it must be returned to the House of Representatives. If the House disagrees, the Bill must be sent again to the Senate. The Senate may modify its amendment and send the Bill back to the House: and so on until there is flat disagreement. Further, the action of the Senate may be to take no action: the Bill may lie on the table for one month or until the session has lasted six months, whichever is the later. It may be noted, however, that the length of a session is determined by the Governor-General on ministerial advice. Though the usual practice is to have one session in a year, there is nothing in the Constitution to prevent a second session. The Governor-General can issue a Proclamation proroguing Parliament and summoning a second session. This is one of the functions exercised on the advice of Ministers according to the constitutional conventions of the United Kingdom. So far as is known, a prorogation is never refused in the United Kingdom, the management of Parliament being so essentially the function of Ministers that the King would refuse only in a very extreme case where he thought, for instance, that the power was being abused for mere sectional ends.

## CHAPTER VIII

### THE HOUSE OF REPRESENTATIVES

THE provisions governing conflicts between the two Chambers show that the House of Representatives is the predominant partner. The Senate is a partner, for it takes part in the legislative process, but in the event of disagreement it will have to give way. Other features of the Constitution show its subordinate position. The House of Representatives derives its effective authority from election by the people. With the State Council there was a tendency to exaggerate this authority because in the absence of a strong public opinion which could bring pressure to bear on members and to remind them that, after all, they were only ordinary men whose job it was to represent the views of ordinary men, there arose a belief that the voice of the State Council was, if not *vox Dei*, at least *vox populi*. The Donoughmore Constitution helped to propagate the strange theory that politicians are always right because it vested administrative as well as legislative power in them. Under the new Constitution the Cabinet controls administration—or, rather, controls the general policy of the administration—and gives a lead to the House of Representatives. However, the question under discussion is the relation between the House of Representatives and the Senate. The former is a representative body having some claim to express the mind of the nation. The Senate has no such claim. It is a checking authority, a body whose function it is to enable the House of Representatives to think again and, perhaps, to think better. Further, though section 46 provides that the Cabinet shall be 'collectively responsible to Parliament', it is clear that 'Parliament' means the House of Representatives. The Ministers' draft specifically provided that the Cabinet should be responsible to the Council of State. The Soulbury Commission [paragraph 323(iii)] assumed that the Prime Minister would command the largest following in the House of Representatives. Nor is it possible to have a responsibility towards a body which contains three diverse elements. The word 'Parliament' was put in, no doubt, because

the Soulbury Commission, in its summary of recommendations [paragraph 330(ii)] used the loose word 'legislature'.

The manner in which the House of Representatives is to function is not specifically provided in the Constitution. It elects a Speaker, a Deputy Speaker and Chairman of Committees, and a Deputy Chairman of Committees (section 17). It decides all questions by a majority of the Members present and voting, except in case of a constitutional amendment (section 18). Its quorum is fixed at the low figure of 20, which is only one-fifth of the House, and the mere absence of a quorum will not prevent the transaction of business. There must be a 'challenge to the quorum' by a Member. For formal items of business, such as private Bills to which there is no opposition, a quorum is quite unnecessary. It is unjust to Members that even 20 of them should be compelled to listen to every speech that may be delivered. Standing Orders provide, as in the House of Commons, that if there is a challenge to the quorum the division bells will be rung, and the House again counted after two minutes. Members are thus brought in from the lobbies, the lounge and the library. Accordingly, it is not generally good tactics to challenge the quorum, and the process of chasing round the lobbies to collect a quorum has ceased to be a feature of parliamentary life. Subject to these rules, and to the rule mentioned in the next paragraph, the procedure of the House is regulated entirely by Standing Orders.

It follows from the principles of responsible government, however, that the general procedure of the House differs in many respects from that of the State Council. The Council was, at least in some measure, 'the Government'. Though it did not exercise its executive powers as the Donoughmore Commission intended, and in fact behaved much more like a legislature than a county council, its supreme authority in both realms and the absence of a Cabinet resulted in a difference of emphasis. Even when a report from an Executive Committee was discussed on a motion in legislative session and not brought up in executive session, it was treated as a formal decision binding on the executive authorities. Under the new Constitution this cannot be so, for a responsible Government must accept the burden of its responsibility. The House is able to control the Government up to the point where that Government decides to resign or, in



the alternative, to dissolve Parliament: but the House must continually face the possibility that the Government will resign or advise a dissolution. In other words, though the House controls the Government, the Government also controls the House.

The fundamental fact of the new procedure is that there is for the first time a 'Government' sitting in the House. The Prime Minister will almost certainly be there; for, though the Constitution does not prevent him from being a Senator, his essential task is the management of a majority in the House of Representatives. He would find it difficult to undertake this task by deputy, especially in a legislature where, for some time at least, parties will be so fluid. With him there is a group of Ministers and Parliamentary Secretaries forming the official bloc. In the House of Commons it is the practice of Ministers to appoint 'Parliamentary Private Secretaries' from among the Members. These appointments are unofficial and unpaid: but it is useful for a busy Minister to have somebody to represent him in the House when he is not there, to take a note of a discussion, to discuss matters with other private Members, and so on. They are not necessary in the House of Representatives, because Ministers are not so busy, the House does not sit for lengthy periods (the House of Commons sits continuously from 2 p.m. to 10-30 p.m.), and messengers are allowed on the floor. In any event, the Cabinet has its supporters and its opponents and, though the House may not always divide clearly into 'Government' and 'Opposition', there will be a tendency in that direction.

The result has been the disappearance of the casual and dangerous ways of most of the State Council. Most propositions come to the House from the Government. They have been worked out by the relevant Minister in full consultation with the officials of his Ministry, and it is the special task of the Permanent Secretary to see that all relevant sections of the Ministry have been consulted, if necessary through a Departmental Committee. The Ministry consults other Ministries where they are concerned, and the proposal passes to the Cabinet only when it has been fully prepared. There it is related to the general policy of the Government and finally laid before the House of Representatives as a Government measure on which

the Minister is adequately briefed. The House of Commons insists that in all but very exceptional cases amendments shall be put down and circulated. Such amendments should then be considered by the Minister in consultation with his officials and, if they are important, the Cabinet consulted (in case of doubt the Prime Minister would be consulted). When the amendments were moved, therefore, the Minister would be able to state whether the Government accepted them or not, and why it was prepared to accept them or insisted on their rejection. The casual procedure followed in the State Council was highly dangerous, for Members did not and could not know the implications of their own proposals until they had been fully studied in the Departments. On Government business, at least, the House must accept leadership. If it refuses to do so there are two alternatives. One is for the Government to resign and let the Governor-General find a Ministry whose leadership the House will accept. The other is to dissolve Parliament and try to get a more responsible House. Nor should there be any hesitation in using the powers of dissolution. The House must accept the consequences of its voting. If it will not support the Government there must be either a new Government or a new House. The House itself *cannot* govern the Island, and the notion that Members can, as a result of intuition or casual conversation with constituents, decide what is best for the country, is not and never has been one of the assumptions of the democratic system.

On the other hand, it is not the business of the Government to ride roughshod over Members by threats of dissolution. The House must accept leadership, not be compelled to it: and this means that serious attention should be paid to the views of private Members. The Government is not always right and Members always wrong: on the contrary, if the Government is right Members can usually be persuaded of it. One of the functions of the Government, therefore, is the 'management' of the House. A proposal should not be rejected unless it is clearly inconsistent with the Government's scheme or has been fully examined and found to be impracticable or undesirable. A casual proposal which sounds unobjectionable, or which might possibly be acceptable, should not be accepted out of hand and left to be made more or less sensible by the officials

concerned ; nor should it be rejected out of hand. The procedure is for the Minister to agree to 'consider' the matter ; and this means that it is fully examined in the Ministry and, if necessary, a Cabinet decision taken, before the Minister announces the decision in the House. There are of course some Members whose task is not to improve Government measures but to mutilate them, because those Members are not merely against the measures but against the Ministers also. In such a case there is only one solution, for the Government to use its majority. But even Opposition Members sometimes make sensible proposals : and it should be recognized that opposition does not mean opposition to everything proposed by the Government. It means that, in the opinion of the Opposition, a better Government could be formed.

The 'management' of the House is not therefore solely a question of keeping a majority. So far as possible the Government should meet criticism from whatever section of the House it comes. If, however, the House divides into Government and Opposition the main task of 'management' is the management of the Government's majority. This is partly, and perhaps in Ceylon mainly, a question of maintaining close contact between Ministers and Members. This is the primary function of the 'whips' in the House of Commons. These whips are under the control of the Prime Minister or Leader of the House. He discusses with them the arrangement of Government business, and for this purpose, clearly, they must know what points the Members wish to put, how long they are likely to take, when it would be convenient to move the closure, whether they would object strongly to giving up private Members' time, and so on. They also arrange for speakers so that the Government's case may be properly supported. One should not normally allow the Opposition to make all the speeches and then vote them down, for the general public will wonder why the House voted one way while all the arguments were the other way. It may also be desirable on occasions to induce a Member not to speak because his support or the arguments which he uses may be a liability and not an asset. It is also the duty of the whips to see that the Government always has a majority, and this becomes particularly important with a low quorum. In fact, the main function of a whip has been described as 'to make a House, to

keep a House, and to cheer the Minister'. If Government business is to go through, there must be a majority present at the commencement of business and, whatever changes there may be in its actual composition, that majority must remain so long as the House is sitting. There are, of course, ways of 'keeping the debate going' if at any time it is found that there is no majority present. Every majority has its long-winded speakers who are a nuisance when speedy action is required but valuable when dilatory tactics are employed. The suggestion that the Prime Minister would be very glad to hear his views on this important topic will usually induce such a Member to hold the floor while the whips collect their majority once more.

There is, too, a special problem of 'management' in the House of Representatives due to the existence of so many independent Members. Great Britain tends to dislike independent Members because (in the famous phrase) they 'cannot be depended upon': but all the Members of the State Council were independent in the sense that they were elected not on any party ticket but mainly on their local 'influence' (to use the euphemism current in Great Britain a century ago). For some time there will continue to be many of these Members in the House of Representatives; and even if some of them accept the party ticket they will still be independent in the sense that they can secure re-election without it. Probably, therefore, no Government in Ceylon will possess for some years the stable, disciplined majority which makes the British system work so well. If this is so, much of the time of Ministers will be spent in the process which is described bluntly as 'canvassing'. It is no doubt a waste of time for a Minister to sit in a corner trying to persuade the Member for Bandycoffa to vote for the Government, while the problems of government are piling themselves on his desk and officials are waiting for decisions: but it is an essential function in whose fulfilment the whips are able to help.

Allowing for all these variations, it is still necessary, if the Cabinet system is to operate successfully, to have a Government and an Opposition. The Government is created by the Constitution, for it consists of those Members of the Ministry who are in the House of Representatives and those Members of Parliament who are prepared to vote for them on a vote of

confidence. The Opposition will almost certainly be amorphous for some time, for it consists merely of those Members who, for diverse and often contradictory reasons, have no confidence in the Government. Accordingly, it is not yet true that the Opposition is 'His Majesty's Alternative Government', and the tradition of the House of Commons, which assumes that one Government is 'in' and the other 'out', is not capable of application. It is nevertheless necessary for somebody to take the lead against the Government, though instead of a formal Leader of the Opposition he may be one Member on one issue and another on a separate issue. The arrangement of business by agreement, which is the practice of the House of Commons, is thus difficult. It is all the more necessary that the Government should realize that they have to provide means for the Opposition to criticize, and for the Opposition to realize that they must allow the Government to govern. The great Duke of Wellington once laid down a doctrine of far wider extent than he realized: the King's service must be carried on. So, too, the government of the Island must be carried on. Opposition for the sake of opposition, obstruction, dilatory tactics, 'walk-outs', frequent votes of censure, and the rest, are justified only where the Member wishes to upset the whole system of Government: and, unless something equally good can take its place automatically, this is fundamentally unpatriotic. All will agree that there are hosts of problems requiring solution, and any reasonable solution is better than no solution at all. The function of an Opposition is not to oppose—in spite of Sir William Harcourt's dictum to the contrary—but to criticize. Such criticism may be directed towards improvement of the Government's measures; more often, however, its purpose is to persuade the electors that next time they ought to choose a different Government. Until the next election the Government of the Island must be carried on, and a Member abuses his position if he obstructs it for longer time than is necessary for him to make his criticisms effectively. The Cabinet system, in fact, assumes reasonableness and moderation on both sides. The Government governs and the Opposition opposes: but *both* sides have to realize that they have to help in the carrying on of *both* functions.

## CHAPTER IX

### *THE SENATE*

THE membership of the Senate is based on that provided for Burma by the Government of Burma Act, 1935;<sup>1</sup> that is, half is nominated by the Governor-General and half elected by the House of Representatives in accordance with the system of proportional representation by means of the single transferable vote. In Burma, however, there was a high property or income qualification, subject to certain exceptions, while there is none in Ceylon: also, the Burma Senate was to last for seven years while that of Ceylon lasts six years, one-third of the members retiring every two years. When the Ceylon Senate was first constituted it was necessary for the House of Representatives to elect 15 Senators; the Governor then nominated 15 Senators. At the first meeting of the Senate so composed lots were drawn under section 73 in such a way that 5 elected Senators and 5 nominated Senators retired after two years (1949); 5 elected Senators and 5 nominated Senators retired after four years (1951); and the remaining 5 elected Senators and 5 nominated Senators retired after six years (1953). In accordance with term of office; also, a separate election will be held for a casual vacancy will hold his seat for the remainder of his predecessor's term of office; also, a separate election will be held for a casual vacancy of any elected Senator even if there are other vacancies. The reason is that Senators filling casual vacancies and Senators filling ordinary vacancies will be elected for different periods. The latter will sit for six years; the former will sit for the remainder of the period, whatever it may be. Accordingly the House of Representatives must know for what period the seat is to be held before votes are cast. If casual vacancies are to be filled at the same time as ordinary vacancies, it will be convenient to fill the vacancies in reverse order of their duration: that is, ordinary vacancies first; then the longest casual vacancy, and so on. This is because the candidates and their supporters would obviously desire that a candidate be elected for a shorter period only if he is not elected for a longer period.

<sup>1</sup> See section 17 and the Third Schedule of that Act.

The power of appointment is in section 10. At the first appointment the Governor did not indicate the term of office, because that was determined by lot under section 73. When filling casual vacancies, however, the Governor-General must indicate for what vacancy the candidate is appointed, for this will determine his term of office. The Governor's power was entirely discretionary, but he had to attempt to secure a representation of professional interests under section 10(3), and for this purpose he could consult the professional body concerned. Since 4 February 1948, however, this power of the Governor-General, like all his powers, is exercised on advice and the wording of the section has been altered so as in effect to impose on the Prime Minister the duty of securing representation for professional interests.

The election of elected Senators is to be according to the system of proportional representation by means of the single transferable vote. The system is one in which each elector has one vote and one vote only, which is transferable in the order of his preferences. That is, if there are three candidates for one vacancy, Jones, Brown and Robinson, the elector does not vote merely for Jones or Brown or Robinson. He puts them in the order of his preference thus :

Brown	2
Jones	1
Robinson	3

Jones is his 'first preference', Brown his 'second preference' and Robinson his 'third preference'. If Jones is so unpopular that he drops out of the running, the vote is transferred to Brown. The importance of this method may be seen if we assume first preferences cast as under :

Brown	40
Jones	15
Robinson	45

Now, if these first preferences were votes, Robinson would be elected with a 'plurality' of five votes : but since they are first preferences and not votes, we must now examine the second preferences of those whose first preferences were for Jones and distribute the ballot papers accordingly. We may then find the preferences distributed as under :

Brown	51
Robinson	49

Brown is thus elected because most of those who preferred Jones while he was a candidate preferred Brown to Robinson.

The above is a very simple example of the working of the single transferable vote to fill a casual vacancy where there is only one such vacancy. Of course, if Robinson had an absolute majority at the first count (i.e. the count of first preferences) there would be no need to have a second count because, even if all the preferences cast for Jones were transferred to Brown, Robinson would still have a majority. Accordingly, Robinson would be declared elected on the first count. It should be noted, too, that Jones's ballot papers are examined because he has the lowest number of first preferences. The second preferences on the papers assigned to Brown and Robinson are not examined.

The system is more complicated where more than one vacancy has to be filled at the same time. If for instance there are four candidates, Jack, John, James and Joseph, and two vacancies have to be filled, it is not enough to eliminate those with the fewest preferences because one of the candidates may have a surplus of first preferences. For instance, if Jack and John are Government candidates and James and Joseph are Opposition candidates, most of the Government first preferences may go to Jack, while most of the second preferences would go to John. The first preferences might thus be :

Jack	55
John	5
James	30
Joseph	10

It would be unfair to eliminate John, because Jack has far too many first preferences and if the surplus were given to John it would be found that John would get more than Joseph. The solution to this problem is to find out how many preferences Jack actually requires. The answer is 34, because if two candidates have 34 each the balance is 32, whereas if two candidates have 33 each the balance is 34 and a third candidate will be elected. We have thus to distribute 21 ballot papers from Jack according to the second preferences. The problem is to select 21 papers from 55. When there is a large number of voters, it is reasonable to take the top 21 papers ; but where, as in the House of Representatives, there are only a few the result would be purely a matter of chance. The solution is,



therefore, to distribute *all* the papers but to make each worth  $21/55$  preferences each. When there are more than two vacancies, it may be necessary to do this sort of thing two or three times, so that eventually one may get large vulgar fractions like  $17/3645$ .

To meet this problem the Ceylon Regulations give each paper the value of 100 points and ignore fractions. Thus each of Jack's papers, on distribution, is worth not  $21/55$  but 38 points. In other words what really happens is that the fraction is turned into decimals, of which the first two places are taken, for  $21/55 = 0.381818$ , etc.

The rule is, then, to give each ballot paper one hundred points and to distribute any surpluses. When all the surpluses are distributed the candidate with least points is eliminated by transferring all his points according to the next preferences.

On this basis we may now work out a hypothetical example with eight candidates, Alpha, Beta, Gamma, Delta, Epsilon, Zeta, Eta, and Theta, and five seats in the Senate to be filled. If there are 100 Members of Parliament the minimum number of points required for election is 1,667, because if each of five candidates gets 1,667 the total is 8,335 and the remainder from 10,000 ( $100 \times 100$ ) is 1,665, so that a sixth person cannot be elected.

Counting the first preferences only, we get the following result :

*First count*

Alpha	$10 \times 100 = 1,000$	
Beta	$15 \times 100 = 1,500$	
Gamma	$24 \times 100 = 2,400$	elected
Delta	$2 \times 100 = 200$	
Epsilon	$6 \times 100 = 600$	
Zeta	$18 \times 100 = 1,800$	elected
Eta	$13 \times 100 = 1,300$	
Theta	$12 \times 100 = 1,200$	
	<hr/>	
	10,000	
	<hr/>	

Gamma and Zeta were elected because they have more than 1,667 points. We first distribute Gamma's surplus of 733 points, each of his 24 papers being worth 30 points. The distribution is according to the second preference except where it goes to Zeta, who needs no more points for election, and in such a case

the third preference gets the points. We thus get the second count.

*Second count*

Alpha	1,000 + 0	= 1,000	
Beta	1,500 + 210	= 1,710	elected
Gamma	2,400 - 733	= 1,667	elected
Delta	200 + 0	= 200	
Epsilon	600 + 300	= 900	
Zeta	1,800 + 0	= 1,800	elected
Eta	1,300 + 120	= 1,420	
Theta	1,200 + 90	= 1,290	
Points not distributed		13	
			<hr/>
			10,000
			<hr/>

Since Zeta was elected on the first count, we next distribute Zeta's surplus of 133, each of his 18 papers being worth 7 points, with 7 points undistributed. On the third count we get:

*Third count*

Alpha	1,000 + 0	= 1,000	
Beta	1,710 + 0	= 1,710	elected
Gamma	1,667 + 0	= 1,667	elected
Delta	200 + 0	= 200	
Epsilon	900 + 0	= 900	
Zeta	1,800 - 133	= 1,667	elected
Eta	1,420 + 84	= 1,504	
Theta	1,290 + 42	= 1,332	
Points not distributed		20	
			<hr/>
			10,000
			<hr/>

Next, we distribute Beta's surplus of 43. Here we consider only the 15 papers which gave him as first preference, and so each of those papers is worth 2 points, with 13 points not distributed

*Fourth count*

Alpha	1,000 + 0	= 1,000	
Beta	1,710 - 43	= 1,667	elected
Gamma	1,667 + 0	= 1,667	elected
Delta	200 + 0	= 200	
Epsilon	900 + 0	= 900	
Zeta	1,667 + 0	= 1,667	elected
Eta	1,504 + 16	= 1,520	
Theta	1,332 + 14	= 1,346	
Points not distributed		33	
			<hr/>
			10,000
			<hr/>

We have now exhausted all the surpluses and have to begin eliminating. Delta has the lowest number of points, and each of his two papers is worth 100 points. They both go to Epsilon, and the fifth count gives us :

*Fifth count*

Alpha	1,000 + 0	=	1,000	
Beta	1,667 + 0	=	1,667	elected
Gamma	1,667 + 0	=	1,667	elected
Delta	200 - 200	=	0	
Epsilon	900 + 200	=	1,100	
Zeta	1,667 + 0	=	1,667	elected
Eta	1,520 + 0	=	1,520	
Theta	1,346 + 0	=	1,346	
Points not distributed			33	
			10,000	

Still nobody is elected and so we eliminate Alpha who has 10 papers each worth 100 points. Hence :

*Sixth count*

Alpha	1,000 - 1,000	=	0	
Beta	1,667 + 0	=	1,667	elected
Gamma	1,667 + 0	=	1,667	elected
Delta		=	0	
Epsilon	1,100 + 600	=	1,700	elected
Zeta	1,667 + 0	=	1,667	elected
Eta	1,520 + 200	=	1,720	elected
Theta	1,346 + 200	=	1,546	
Points not distributed			33	
			10,000	

We have thus five persons elected, and it may be useful to compare the first and the last counts :

	<i>1st Count</i>	<i>6th Count</i>
Alpha	1,000	0
Beta	1,500	1,667 elected
Gamma	2,400	1,667 elected
Delta	200	0
Epsilon	600	1,700 elected
Zeta	1,800	1,667 elected
Eta	1,300	1,720 elected
Theta	1,200	1,546

The great change is in the position of Epsilon. He took most of the preferences from Alpha and much of the surplus from

Gamma, and the example was designed to show that a lowly candidate on the first count may win in the end. The reason is clear enough : if the United National Party has a majority and puts up four candidates, one of them may be at the bottom to begin with, but he will collect points from other United National Party candidates. On the other hand, if each opposition group puts up a candidate each will have few points at the beginning, but as some of them get eliminated their points will go to others.

It will be seen that roughly 17 preferences are required when there are five seats to be filled, though in 1947 only seven preferences were required because there were fifteen seats to be filled. For instance, a Tamil Congress candidate was elected in 1947 because he needed only the seven Tamil Congress preferences ; but when he retired in 1949 he was re-elected only because he was able to secure preferences from members of the Opposition who were not members of the Tamil Congress. Similarly a representative of the Ceylon Indian Congress was elected, but he will not get re-elected unless he gets outside support either at the first or at some subsequent count. If the present party system continues, the numbers of the United National Party will tell more heavily in subsequent elections. Even so, one or two minority candidates must be elected. If the Opposition has 34 or more votes in the House of Representatives it will probably win two seats.

The respective powers of the House of Representatives and the Senate have been discussed in Chapter VI. The Senate contains a higher proportion of what may be described, without intention of being offensive to anyone, as ' eminent ' people. Partly for this reason and partly because of the diversity of their origin, the actions of the Senate are less predictable. Though the Senators have not constituencies to nurse, many of them have professions to follow, and the degree of absenteeism may be high. By section 20 the quorum is fixed at six and the absence of a quorum will not interrupt business unless there is a ' challenge to the quorum '.

According to section 48, not less than two of the Ministers (one of whom must be the Minister of Justice) and not more than two of the Parliamentary Secretaries (if there are any) must be in the Senate. Since there is no limit to the number of Ministers and Parliamentary Secretaries in the House of Representatives,

it would be possible to provide the second Minister by appointing a Minister without Portfolio : so far, however, the Minister of Home Affairs as well as the Minister of Justice has been in the Senate. The four (or more) Ministers and Parliamentary Secretaries in the Senate are called upon to answer for all the Ministers. The 'management' of a Senate of 30 members is, however, a much simpler matter than that of the House of Representatives. It is unlikely that the Government will ever have a compact majority ; and the fact that the Senate's decisions can be overridden very easily will prevent firm combinations against the Government. The Senate has, by reason of its composition, no justification for regarding itself as in any way representative. Its main purpose, as indicated by the Soulbury Commission (Chapter XIV) is to prevent 'hasty and ill-considered legislation reaching the Statute Book' (paragraph 295) or to interpose delay 'for the purpose of giving time for reflection and consideration' (paragraph 304). It was considered that, *inter alia*, this would assist minorities. Further, the Senate would, by reason of the eminence of its members, 'make a valuable contribution to the political education of the general public'. These eminent individuals of high intellectual attainment and wide experience of affairs might be averse from entering political life through the hurly-burly of a parliamentary election ; but party or communal ties might be expected to rest less heavily upon them and they would be able to express their views freely and frankly without feeling themselves constrained to consider the possible repercussions upon their electoral prospects (paragraph 296). Further, the Commission thought that 'those who, rightly or wrongly, feel themselves menaced by majority action, may regard a Second Chamber not merely as an instrument for impeding precipitate legislation, but as a means of handling inflammatory issues in a cooler atmosphere' (paragraph 298). In short, the Senate has no co-ordinate authority, legal or moral, with the House of Representatives. Its essential function is to interpose delay where it considers the proposals of the House of Representatives ill considered, to bring a less controversial note into politics, and to hold debates on a high academic level so that the country may understand the fundamental issues on which its social and economic problems are based. It would help if, unlike the Members of

legislatures who have constantly to fight for their seats, the Senators would talk rarely but talk well.

It can hardly be said, however, that in the first years of its existence the Senate has fulfilled all these tasks. The Government has a huge majority, for not only does it appoint Senators who are favourable to its point of view but also it secures at least 60 per cent of the elected members. In fact, except immediately after a general election which causes a change of Government, or where a change is produced by a party split in the House of Representatives, it is impossible to imagine conditions in which the majority of the Senate, or even a large minority, would be in opposition to the Government. No revision of legislation whatever has been done in the Senate, not even that customary in the House of Lords when a Conservative Government is in office, for it is not the practice of the Government to agree in the House of Representatives to 'consider' proposals for amendment which can be moved, if thought fit, in 'another place'. What is more, when amendments have been moved in the Senate the argument has been used that they ought not to be pressed because they would compel the return of the Bill to 'the other place', though it is the main function of the Senate to send back Bills which require amendment. In fact, however, not many amendments have been moved in the Senate, other than those put forward by Opposition Senators for the sake of political demonstration—which is, of course, a proper function of Opposition Senators.

Nor have the debates been of higher quality than those in the House of Representatives. It has been proved that in Ceylon as in other places those who are eminent in their professions are not necessarily good debaters. All the leading members of the Cabinet, except Sir Oliver Goonetilleke when for a few months he led the Senate, have been in the House of Representatives, in which House, too, have been all the leaders of the Opposition parties. The chief political debates must of necessity be in that House, but there have been few debates in the Senate of real public importance even on non-political matters. In one respect only have anticipations been fulfilled. When the question of opposing this particular proposal of the Soulbury Commission was under discussion in 1945 it was decided not to oppose very strenuously because 'It won't do any harm'.

## CHAPTER X

### *CABINET GOVERNMENT*

THE core of the Constitution is contained in the provisions relating to Cabinet Government, for it needs to be emphasized that the older democratic theory, as described by John Stuart Mill and applied by the State Council, is irrelevant to modern conditions. A legislature cannot govern by passing resolutions. To one accustomed to the Cabinet system, the State Council was a terrifying body, for one never knew what was going to happen. Any Member could think up a superficially attractive resolution, give five days' notice, move to suspend Standing Orders, exhibit the meretricious attractions of his brilliant idea in a speech which said the correct things about the poor oppressed villager and the devilish work of the foreigner, and in all probability secure a majority of Members who had not paid any particular attention to the subject but thought it not a bad idea, and who considered that anyhow they had better not vote against it. The result might be to condemn the Island to a policy whose implications had never been thought out, whose feasibility had never been examined, and whose consequences could not be foreseen. A representative legislature is an excellent body for approving, rejecting, or even, under leadership, amending proposals which have been fully examined, for suggesting the lines on which further proposals might be considered, and above all for deciding what group of persons shall control the policy of the country. The Donoughmore notion that the State Council could govern was a constitutional heresy, capable of practical application only so long as the Secretary of State for the Colonies had an effective last word.

The Cabinet system implies a division between policy and administration. Administration is the function of paid officials; policy is the function of responsible Ministers. The line between them is often fine, because many administrative decisions involve policy. It is the duty of the official to put before the Minister every decision about which there may be any doubt in terms of policy; but it is equally the duty of the Minister to abstain from interfering where no question of policy is raised.

The Executive Committee system under the Donoughmore Constitution gave a false idea of the proper division of function, and most Executive Committees discussed matters which were wholly departmental. There are no doubt several explanations. In the first place, Heads of Departments were under the pre-Donoughmore scheme responsible to the Governor through the Colonial Secretary and exercised functions which under responsible government would be ministerial. It was thus not easy for the Executive Committee to decide what was implied in the 'general control' which they were given by Article 39 of the Order in Council of 1931. Secondly, and as a consequence, the Finance Committee of the Legislative Council had shown an excessive interest in administrative questions, as was inevitable where such interest was the only means of bringing a 'popular' (which was also in those days a Ceylonese) influence to bear upon administration. The State Council as such continued to show a similar interest even after the 'general control' passed to its own Executive Committees. Thirdly, Members of the State Council owed their seats not to their political views or to their recognition by a party organization, but to their local 'influence'; though under any representative system it is inevitable that elected Members should take a special interest in the efficiency of administration of the public services in their constituencies, the Members of the State Council frequently desired 'favours' of the kind which it is the duty of any Government to resist. Fourthly, there being no organized parties in the State Council itself, Ministers or Executive Committees had to keep Members 'sweet' by seeing that these 'favours' were accorded. Finally, the number of separate Departments was excessive, and there was no general administrative control over the Departments of a particular Ministry. There might be as many as fourteen Departments under an Executive Committee, with no provision for co-ordination except at the political level.

It is not possible to change a tradition by Order in Council, but the new Constitution did its best. In the first place, the most frequent source of interference was in respect of appointments, promotions, transfers, and disciplinary control of officers. In the Cabinet system these are not matters for Ministers, except in relation to the 'key' posts at the head of each Ministry. The Donoughmore Commission, however, had specifically



recommended consultation of the Executive Committees on these matters, or some of them. Under the new Constitution they are within the jurisdiction of the Public Service Commission. In the second place, a 'buffer' has been provided between the Minister and his officials. Section 51 provides :

'There shall be for each Ministry a Permanent Secretary who shall, subject to the general direction and control of his Minister, exercise supervision over the Department or Departments of Government in the charge of his Minister.'

The intention of the corresponding provision in the Ministers' draft was that so far as possible the Departments under the control of a single Officer of State or Executive Committee should, except where there was some good reason to the contrary, be fused into a single Department. In the British system the person who in Ceylon is described as 'Head of the Department' is called 'Assistant Secretary', one of several such Assistant Secretaries responsible through the Permanent Secretary to the Minister. There is, for instance, one Ministry of Agriculture and Fisheries and not, as there were in Ceylon, fourteen Departments under the Minister of Agriculture and Lands and one under the Minister of Local Administration. Whether or not there is fusion of Departments into Ministries, however, co-ordination is now effected at the administrative level by the Permanent Secretary, through whom all Departmental recommendations ought to go to the Minister.

Though the Minister must not interfere in purely administrative matters, and it is most improper for him to give 'favours' to any person or for an official to acquiesce in any such favours, he is responsible for every activity of his Ministry. This implies that every decision is taken in his name with the knowledge that it is he and not the official who will be held responsible. For an official to speak of 'my Department' or 'my policy' or 'my decision' is quite wrong. Routine matters admittedly are left to senior officials, but even in routine matters they must act in the name of the Minister. The proper formulas are: 'I am directed by the Minister of Health to refer to your letter of 15 December . . .'; and 'With reference to your application of . . . the Minister has decided that. . . .' The formulas are important; for the Minister is constitutionally responsible for the decision and even when, as in the distribution of licences,

he may not interfere, it is still his decision. It follows that the official must not 'let the Minister down'. He must consult the Minister on any question which has a tinge of 'politics' and in all his decisions he must bear in mind the Minister's and the Government's political difficulties. Nor does non-interference by the Minister mean that the official can do as he pleases: his administration must be both efficient and honest, and if the Minister suspects that it is not he has every right to insist that the Permanent Secretary hold an inquiry or make a report and that, if the contention is proved, the official should be warned or removed. Also, the official must not have any politics of his own. He is entitled to his opinion on matters of departmental policy and to express it within the Department as strongly as he pleases—the 'model' civil servant in England, Sir Robert Morant, was a man of very strong views—but when a decision has been taken it is his business to carry it out with all possible energy and skill. The fact that he agrees with the Opposition case or not is irrelevant. The most serious offence of all, of course, is to let the Opposition know, by word or behaviour, that he is not in agreement with the Minister.

These obligations on the official imply equal obligations on the Minister, who must take responsibility for his Department's acts whether he knew about them or not and whether he agrees with them or not. He must not take the easy road of blaming the official in public, no matter how heavy the weight of the blame. Nor must anybody else do so. The State Council practice of making caustic comments on officials was a gross breach of the parliamentary system. Possibly the best description of the perfect relationship between Minister and official is that given in a eulogy of Mr Philip (Viscount) Snowden as Chancellor of the Exchequer by one who was his private secretary and afterwards became successively Permanent Under-Secretary of State and Secretary of State:<sup>1</sup>

'Of all the Ministers I have ever known, he was easily the most popular with the civil servants who worked for him. . . . In the first place he was the ideal of what a Minister should be in that he gave a clear lead on all questions of policy, interfered rarely, if at all, in matters of administration, gave decisions quickly and unequivocally, and then defended his decisions against all comers with confidence and vigour—and

<sup>1</sup> Sir James Grigg, *Prejudice and Judgement*, p. 136.

nearly always with success. Civil servants, in fact, knew exactly where they stood with him and could rely absolutely on his courage and good faith to defend his actions and theirs.'

These rules are not merely tradition; they have a sound theoretical background. Government policy is evolved by the intimate co-operation of politicians and officials and administration is a product of the influence which politicians exercise over officials; but those officials have to carry on whatever sort of Government is in power and whatever sort of policy is being followed. They must give their advice fearlessly and take their decisions without favour. If they have to be publicity agents for themselves they will inevitably start window-dressing. If they have to pay attention to what is said about them in the legislature—they must certainly pay attention to what is said about the Minister—they will waste time safeguarding their own position and may be so anxious not to do the wrong things that they may not do the right ones. Official lethargy is the inevitable result of legislative criticism. There will be a tendency for them to canvass: there will be close relations between particular officials and particular Ministers. The practice of Members of the legislature calling at Government offices and interviewing officials or of sending letters or telegrams to them by name—a practice followed by State Councillors—is an infringement of all the rules. A Member may call on a Minister; he may, if the Minister so requests him, call on an official by appointment. Anything else is a fundamental breach of the parliamentary system. It may be difficult to overcome the unfortunate tradition of the State Council; but the attempt must be made if the Cabinet system is to work effectively.

Another fundamental change in the new Constitution is that all major policy is the affair of the Cabinet and not of individual Ministers. There is no question of educational policy, for instance, being laid down by the Minister of Education, or of hospital policy being laid down by the Minister of Health. It is very difficult to describe what are 'Cabinet questions' but it may perhaps be emphasized that under section 46(1) the Cabinet is charged with the general direction and control of the government of Ceylon and is collectively responsible to Parliament. This collective responsibility applies to all aspects of Government policy, whether or not there has been an express Cabinet

decision. A Minister who develops a policy without Cabinet approval therefore implicates the Cabinet. The Cabinet cannot repudiate the Minister, though of course the Prime Minister may ask him to resign, and such a request from the Prime Minister is an order. The resignation may appease the House of Representatives, but it is the Cabinet which is to blame. Accordingly, it is the duty of the Minister to submit to the Cabinet any decision which may have political implications. The Cabinet cannot evade its responsibility, as the Board of Ministers could, by allowing the Minister to submit proposals to the legislature. It must come to a formal decision, and if the House of Representatives refuses to accept the decision and it is of sufficient importance, the Cabinet must either resign or dissolve Parliament. There can be no such thing as Mr Senanayake's policy or Mr Bandaranaike's policy: there is only the policy of the Government of Ceylon.

Since the Cabinet has to take a number of decisions of major importance every week, it is unable to work effectively unless it is properly organized. It is provided by section 50 that there shall be a Secretary to the Cabinet who will have charge of the Cabinet Office and who will, in accordance with such instructions as may be given to him by the Prime Minister, arrange the business for and keep the minutes of Cabinet meetings, and convey the decisions of the Cabinet to the appropriate person or authority. 'Arranging the business' is a much more serious task than is commonly supposed.<sup>1</sup> Ceylon need not follow the British example, but the following principles may be laid down as a result of British experience:

1. Except with the special consent of the Prime Minister, no business should be raised unless five days' notice has been given. Each Minister must be properly 'briefed' by his Department if the proposal in any way affects the Department; and the implications of a proposal being usually far-reaching, it very often does so.

2. No proposal should be discussed except on the basis of a written memorandum circulated with the agenda. This is necessary in order that the implications of a proposal may be studied in each Department.

<sup>1</sup> Reference may be made to the standing Cabinet instructions referred to in *Cabinet Government* (2nd ed.), pp. 228-9.

3. No proposal affecting two or more Departments should be circulated until those Departments have been informed and their views ascertained. In fact, normally proposals affecting two or more Departments should be agreed to between those Departments before they are submitted. One reason for submitting a matter to the Cabinet, however, may be that the Departments have been unable to agree.

4. No proposal having financial implications should be submitted unless the Treasury has had an opportunity of expressing its views on the matter. In Great Britain there used to be a rule that no such proposal might be circulated except with the consent of the Chancellor of the Exchequer.

A Cabinet decision once made is binding on all Ministers. A Minister who is unable to accept responsibility for it has no alternative but to resign. Ministers who make a habit of resigning or of threatening to do so are, of course, a nuisance to everybody. A Minister who does not resign accepts the decision and must not only vote for it in the House of Representatives or the Senate, but must if called upon to do so speak for it. Unless he resigns, he is not entitled to say that he does not agree; and then, with the consent of the Prime Minister and the Governor-General he may give such explanation of his resignation as may be agreed upon. Collective responsibility means, in Viscount Melbourne's famous phrase, that 'we had better all be in the same story'. The decision is a collective decision from which no Minister can dissociate himself unless he chooses to resign. It should be added that this applies to private communications as well as to public speeches. Cabinet discussions are strictly confidential and must never be disclosed except with the consent of the Prime Minister and the Governor-General, and such consent would not be given unless the Minister had resigned. Even then, the retiring Minister must state his own views and not those of individual members of the Cabinet. When the events have passed into history they may be disclosed in memoirs, but even then (as in the case of Mr Lloyd George) the consent of the Prime Minister for the time being should be obtained.

It has been mentioned that the case should be well prepared before it is submitted to the Cabinet. The Cabinet is a place for decisions to be taken and not for debate. Accordingly it

has become the practice in Great Britain for all contentious business to be referred to committees, on which Ministers may sometimes be represented by their Parliamentary Secretaries. It is here that the effective debate takes place and competing views are reconciled. Since the Cabinet has to accept collective responsibility, it is desirable that its members should so far as possible agree. Voting in Great Britain is rare, except on comparatively trivial matters where all that is wanted is a decision one way or another. The process of compromise is essential to Cabinet government, and a Minister who cannot compromise is useless as a Minister.

A Cabinet decision once made may or may not require parliamentary approval. If legislation is needed to give effect to it, a Bill must be prepared by discussion between the appropriate Ministry and the Legal Draftsman. In the British system the legislative programme of the session is planned in advance by a Cabinet committee, though often emergency conditions require a modification of the plan before the session is ended. Bills should be circulated to the Cabinet in draft in order that all Departments likely to be affected may study their terms and secure amendments before the Bills are introduced. It has already been mentioned, however, that so far as may be possible there should be agreement among the relevant Departments before a proposal is submitted; and this applies equally to a Bill. Submission to Parliament will also be necessary if expenditure is required, either in the Estimates or by means of a Supplementary Estimate. Subject to this, it is not necessary for every Cabinet decision to be approved in Parliament. There are occasions when the Cabinet considers that proposals should be debated. In that case, a White Paper may be published and a motion put down by the Government for its approval. More often the appropriate Minister makes a statement at the end of questions. This cannot be debated, but if there is any considerable demand for a debate it is arranged through the usual channels and a motion is put down either by the Minister or by an opponent.

All this needs emphasis; for under the Donoughmore Constitution the State Council governed Ceylon subject to the overriding powers of the Governor and the King, whereas under the new Constitution the Cabinet governs the Island subject

to the power of the House of Representatives to turn it out. If there was a policy at all under the Donoughmore Constitution (which may be doubted) it was the policy of the State Council. If there is a policy under the new Constitution (which may be anticipated) it will be that of the Cabinet. A legislature (as indeed the State Council proved) cannot govern; it can do no more than criticize those who do. It is very necessary that the Cabinet should not, owing to the tradition of the Donoughmore Constitution, be utterly subservient to the House of Representatives. If it is unwilling to accept the responsibility of governing, it must resign. It will of course be dependent on its majority in the House of Representatives. If it loses that majority it must either resign or seek a new majority, by the dissolution of Parliament if necessary. Nor must it forget that its essential task is to maintain its majority. If the majority has a case, the Cabinet may have to give way—it will not always be right; sometimes amendments of value will be moved, and they should be accepted; sometimes the technique of management may require acceptance of amendments or proposals which do no harm even if they are unlikely to do good: but the Government has to govern, and if the House of Representatives does not let it do so, the House must take the consequences. The consequences are in the alternatives. One alternative is for the Cabinet to resign. The chances are small that a majority can be found to support a new Government though occasionally a slight reconstruction, by the dropping of an unpopular Minister, may do more. The other alternative is a dissolution. The Governor-General ought always to allow a dissolution where the House of Representatives has shown itself to be fractious. If an alternative Government is possible, he may perhaps refuse; but the power of dissolution is the only effective weapon in the hands of the Government and he ought in all normal cases to allow it to be used. It is not his function to judge whether the Government is wrong and the majority right: if the House has supported a Government and then refused it power to govern, the House must go back to the constituencies and justify itself to the electors.

It was realized that the process would be more difficult in Ceylon than in Britain or the older Dominions. In those countries a politically mature electorate has come to recognize

that few elected representatives have any justification for their existence save the policy that they accept. They are elected because they have been chosen by a party, and they have been chosen by the party because they are prepared to support the party policy. Deprived of their labels, most Members of Parliament are nothing, possessing no greater right to be in the House than Tom, Dick or Harry. The Ceylon electorate is not yet educated to this level of political maturity; for some time to come, at least, the average Member will be elected on his local 'influence' or that of his friends. Though in consequence he could justly claim less authority than the representative of a party, his independence of party may give him a more exaggerated notion of his own importance and induce him to claim a right to decide policy. Certainly he and his fellows will have a right to make and break Governments, and it is certainly true that his opinions must be heard with respect: but somebody has to govern the Island and, since it cannot be the House of Representatives, it must be the Cabinet. He must therefore support the Cabinet unless he is prepared to find a better. If he does not, the system will not work, for Cabinet government is government by Cabinet. If the system does work it will compel the formation of parties, though until the electorate has become more educated they may not be the broad-based popular parties of the rest of the Commonwealth. If Members work together, as the Cabinet system requires, they will coalesce into organizations at least as closely knit as the groups of Whigs and Tories in the days when Cabinet government was first invented. Cabinet government worked for a hundred years before Joseph Chamberlain laid the foundation of the modern Liberal Party and Benjamin Disraeli followed his example. It lost America, but it defeated Napoleon; it was not strong enough to prevent the development of vast slums, but it enabled Great Britain to pass successfully through the greatest economic development that the world has ever witnessed. True, it needed a Walpole, two Pitts, a Peel and a Gladstone; but it is impossible to say whether they produced Cabinet government or Cabinet government produced them. It is true, too, that British people had learned the art of government over five hundred years. Nevertheless, it is also true that



Cabinet government can be worked without popular parties : it was Cabinet government that produced the parties.

It is not necessary that the Government should resign or dissolve Parliament whenever it is defeated in the House of Representatives, and it need hardly be said that the Senate has no power to make and unmake Governments. A defeat in the House of Representatives on a matter of policy is, however, a very serious matter. If the Government has made the matter one of confidence, or if it has specifically and definitely expressed its view through the Minister in charge, a defeat is a vote of no-confidence which the Government cannot accept without a loss of prestige and a weakening of its position. Those Governments which have accepted such defeats have been weak Governments, verging upon a break-up of parties or hanging on in the hope that something would turn up to avert defeat at the polls. There are occasions when it does not matter what decision is taken, provided that there is a decision—just as it does not matter what is the rule of the road provided that there is a rule. In such a case the question can be left to a 'free vote', which means not only that the whips will be taken off but also that there is no proposition on which the Government can be defeated. In other cases the Government will have made up its mind after a long process of cogitation in which officials and Ministers have taken part and which has produced a carefully integrated proposal. It sometimes happens that public opinion will not accept it and then it may be desirable to withdraw it for further consideration. If, however, the Government is convinced that it is right it must carry it through, making such concessions as it can do without affecting the essential principle ; and then, if the House will not accept it, it must abide by the consequences. Responsibility to Parliament means that Parliament—or more properly the House of Representatives—can turn it out : it does not mean that the Government must bend to every breeze that blows through the House.

## THE PRIME MINISTER

LORD Morley described the Prime Minister as the keystone of the Cabinet arch. If anything, the remark is an understatement. The tendency in Ceylon may be, however, to exalt the office too much. The Cabinet has to be a team and not a leading actor with chorus ; and the strength of a team sometimes depends on the weakest member. The wartime Prime Ministers, Mr Lloyd George and Mr Winston Churchill, are not the examples for Ceylon to follow. Great Britain, with the vast experience of six hundred years of representative government, changes the Constitution to suit the conditions, and the conditions of war require a different type of Prime Minister : so the Asquiths and the Chamberlains go out and the Lloyd Georges and Churchills come in. It is not ingratitude but political maturity which replaces a Churchill by an Attlee when the war is over. The essential task of the Prime Minister in normal conditions is to make a Government and to keep a Government. It will be somewhat more difficult in Ceylon than in Britain, where a candidate for office who is passed over does not become a hostile critic and a Minister who is asked to resign takes himself quite cheerfully to the back benches.

The process of forming a Cabinet consists in finding a Prime Minister who can make and maintain a team. In Great Britain it is usually an easy process because the party with a majority usually has a recognized leader who *ipso facto* is invited to form a Government. There are occasions, however, when owing to the absence of a recognized leader or the fact that no party has a clear majority, the King has a genuine choice. The precedents laid down in such cases are relevant to Ceylon, and they may be stated as follows :

1. The Governor-General may, if he pleases, consult the outgoing Prime Minister, but is under no obligation to do so.

2. The Governor-General may consult whom he pleases, and especially 'elder statesmen' of long political experience. In some countries it is the practice to consult the presiding officers of the two Chambers, but in Great Britain it is not the practice

to consult the Speaker because it is undesirable that it should be known that he advised, or advised against, the appointment of a particular Member as Prime Minister.

3. It is the duty of a Member who is asked to form a Government to make the attempt or, if he knows that he has not the necessary support, to advise the Governor-General as to his next step. The fundamental rule is that 'the King's service must be carried on', and political manoeuvring which renders the task difficult is unpatriotic.

4. Where a person has succeeded in defeating a Government by a parliamentary combination, it is his duty to form a Government if he is asked to do so. 'The King's service must be carried on', and the Member or the combination of Members who accept the responsibility of destroying a Government must accept the responsibility of replacing it.<sup>1</sup>

5. If there is a formal division into Government and Opposition and the Government is defeated at the polls or in the House, the Governor-General must first send for the Leader of the Opposition: but this situation is unlikely to arise in Ceylon for some time to come.

The other Ministers are appointed by the Governor-General on the advice of the Prime Minister. Since the Prime Minister has to establish and maintain a majority, he must have a large element of discretion, and indeed the last word, in the formation of his Government; but the King—and to a smaller degree the Governor-General—from his impartial position is able to advise and to warn. The Governor-General's approval should therefore not be regarded as a formality. The Prime Minister's responsibility is a heavy one; he will have to satisfy so many competing claims with the knowledge that he may make more enemies than friends. The Governor-General, who may not be very familiar with the politics of the country, will not be able to advise with the authority of the King, who can easily make himself (as the present King has done) the most learned student of politics in his dominions. Also, the value of the advice will vary according to the personality of the Governor-General. Nevertheless, the advice of some person outside the

<sup>1</sup> There are certain qualifications of this: cf. *Cabinet Government* (2nd ed.), pp. 44-50.

political conflict can be valuable even if, in the end, the Prime Minister feels bound to reject it.

The number of Ministers is not fixed, though section 46(2) provides that there shall be a Minister of Finance and a Minister of Justice, as recommended by the Soulbury Commission. Also, the Prime Minister is in charge of the Ministry of Defence and External Affairs. The following suggestions were made by the Soulbury Commission :<sup>1</sup>

1. The functions of the Financial Secretary should be transferred to the Minister of Finance who, subject to the functions allotted to the Public Service Commission, should also be responsible for the public services. (It will of course be realized that the Minister is a Minister 'pure and simple', and that the functions are exercised by his Department under his general political control.)

2. The functions of the Legal Secretary should be transferred to the Minister of Justice.

3. The Department of Fisheries should be transferred from the Ministry of Local Administration to the Ministry of Agriculture and Fisheries.

4. The function of poor relief should be transferred from the Ministry of Labour to the Ministry of Health. (Actually, the poor law was under the control not of the Executive Committee of Labour, Industry and Commerce, but under that of Local Administration: but the poor law at present applies only to the municipalities.)

5. The control of road transport should be transferred from the Ministry of Local Administration to the Ministry of Communications and Works.

6. The control of emigration, immigration and repatriation should be transferred to the Ministry of Home Affairs.

7. Some doubt was expressed whether labour should not come within the purview of a separate Ministry.

Questions of this kind cannot, however, be determined solely on the ground of administrative convenience. The Prime Minister's problem is essentially personal: he has to create a team which can establish and maintain a majority in the House of Representatives. One odd result is that the stronger the Government, in the political sense, the smaller the Cabinet.

<sup>1</sup> Paragraph 326.

A large party contains a small group of leaders who form the Cabinet. If however the party is small a lower level has to be accepted and, since there are more people at that level a larger Cabinet has to be formed in order to include them. Further, if the party is so small that a coalition Cabinet or a Cabinet including independents has to be formed it must necessarily be large. This has been the experience of the United Kingdom and it was repeated in Ceylon in 1947. Though administrative convenience suggested a Cabinet of eleven or twelve, Mr D. S. Senanayake had to invite thirteen others to join him and for this purpose to split Ministries as follows :

Prime Minister (Defence and External Affairs)  
 Health and Local Government  
 Industries, Industrial Research and Fisheries  
 Home Affairs and Rural Development  
 Education  
 Labour and Social Services  
 Finance  
 Transport and Works  
 Justice  
 Food and Co-operative Undertakings  
 Agriculture and Lands  
 Posts and Telecommunications  
 Commerce and Trade  
 Minister without Portfolio (Chief Whip)

That this is a large Cabinet for so small a country is undoubted, but the electors are to blame for not returning a Government with a certain majority and for electing so many 'independents'. The Ministers of Home Affairs and Justice are Senators, leaving twelve Ministers in the House of Representatives. Of these, two were elected as 'independents' and were selected in order to give the Ceylon Tamils representation in the Cabinet, but one of them subsequently resigned and was replaced by the leader of the Tamil Congress, most of which had moved over from the Opposition to the Government side. It is not United Kingdom practice to have the Chief Whip in the Cabinet, but in present conditions in Ceylon the post is highly responsible and it would be difficult to obtain a good whip unless the post were of ministerial rank. Also the transitional provisions made no arrangements for the payment of a whip and if he had not been a Minister he would have

received no salary until financial provision had been made. In any case there were Australian precedents for the inclusion of the whip in the Cabinet.

By section 47, the Governor-General, who for such purposes acts on the advice of the Prime Minister, may appoint Parliamentary Secretaries to assist the Ministers in the exercise of their parliamentary and departmental duties. The number must not exceed the number of Ministers. The Soulbury Commission suggested that 'in the first instance and until further experience has been gained, Parliamentary Secretaries should be appointed to assist only those Ministers whose portfolios are particularly heavy'.<sup>1</sup> It may be pointed out, however, that Government business has to be managed in both Houses. Not less than two Ministers must be Senators, and their Departments must clearly be represented in the House of Representatives by Parliamentary Secretaries. Since two persons will be unable to answer for all Government business in the Senate, two Senators (the maximum allowed by section 48) must be Parliamentary Secretaries. Thus it was necessary to have at least four Parliamentary Secretaries at the outset. Nor must it be forgotten that one of the purposes of appointing Parliamentary Secretaries is to give training to the younger politicians in the handling of public business so that there may be some continuity in the process of government. Under the Cabinet system it may happen that a party is 'in' for five or ten years and then 'out' for five or ten more. During the period of opposition some of the leaders will become casualties at general elections, some will die, some will retire from politics. If opposition is to be at once efficient, responsible and effective, it must be carried on by people who know something of the problems of government from the inside and who can therefore adopt sensible policies instead of the superficial schemes characteristic of irresponsible legislatures. Further, there should if possible remain a nucleus of experienced persons even at the end of a long period of opposition, so that when the Opposition at last takes office it has at least a core of experience around which an administration may be built. It is not always possible to achieve these conditions. One Conservative Ministry was called the 'Who-who' Ministry because the old and deaf Duke of Wellington, the grand old man of the

<sup>1</sup> Paragraph 326 (viii).

Conservatives, had heard so few of the names before that he kept asking 'Who? Who?'. The Labour Government of 1924 necessarily contained a very high proportion of new men. Nevertheless, it is desirable to avoid this situation if possible, and the appointment of a number of Parliamentary Secretaries gives reasonable assurance of a continued supply of experienced Ministers. This aspect of the matter does not appear to have been considered by the Soulbury Commission.

The work done by a Parliamentary Secretary depends on his arrangement with his Minister. If the Minister is in the other Chamber, the Parliamentary Secretary takes charge of the Bills, Motions and Estimates sponsored by his Ministry, answers questions on matters within the jurisdiction of the Ministry, and replies to criticisms of the Ministry. If the Minister and the Parliamentary Secretary are in the same Chamber, the Minister takes charge, but the Parliamentary Secretary assists. Very often, for instance, the Minister opens the debate and the Parliamentary Secretary replies at the end. Sometimes the Parliamentary Secretary takes special charge of the Estimates so that he can answer questions of detail (which are more important in Ceylon than elsewhere owing to the interest displayed by Members in personalities) while the Minister sticks to the principles. In administrative matters, the Minister usually allots to the Parliamentary Secretary a definite share of the work—for instance, approval of items in the Estimates, the reading of petitions, or a specific branch of the service (e.g. in the Ministry of Education, technical education, museums, archaeology, or public libraries). The Parliamentary Secretary can also be useful by sitting on and perhaps presiding over Departmental Committees—the main instruments for co-ordinating policy within the Ministry. These are mere examples of what might be done, for the distribution of work between Minister and Parliamentary Secretary is always a matter of special arrangement. In any event, the Parliamentary Secretary acts for and on behalf of the Minister, and must invariably consult and take the instructions of the Minister on matters of importance.

It is the custom for Ministers in the House of Commons, though not in the House of Lords, to appoint Members as Parliamentary Private Secretaries. Such Members have no official status and receive no payment for their services. They

often see some at least of the Minister's papers so that they can keep themselves *au fait* with Government policy. Their main task is to take notes of anything that may be said in the House during the Minister's absence so that he can reply when he returns, to carry messages to other private Members and to the officials in 'the box' outside the limits of the House, to look up references in Hansard, blue books, etc., and generally to assist the Minister in his parliamentary duties. The institution would not be necessary in the House of Representatives. It does not carry on continuously like the House of Commons, but adjourns for meals. It permits messengers on the floor of the House. It allows the Legal Draftsman to sit at the Clerk's table. These are perhaps desirable innovations, though it must be confessed that the peons give an air of the market-place to an otherwise dignified assembly. If a Parliamentary Private Secretary is appointed, however, the arrangement is a private one between the Minister and the Member and is not the concern of the Prime Minister.

Parliamentary Secretaries are part of 'the Government', 'the Ministry', or 'the Administration'. Though not members of the Cabinet, they are bound by the rules of collective responsibility. If the Prime Minister or the Cabinet resigns, they resign. If they are unable to support any major item of Cabinet policy, they must resign. It is generally recognized, however, that somewhat more latitude must be given to Parliamentary Secretaries than to Ministers because, not taking part in the discussions by which decisions are reached, they cannot always be expected to agree. Accordingly, they are not necessarily expected to be present when a vote is taken with which they cannot agree. They must not ostentatiously abstain, for that is to weaken the Government. Also, on a vote of confidence or any other vote of major importance their absence would require explanation. It is, however, very difficult to describe the practice in these matters, for it depends essentially on a delicate personal relationship. All such problems can be regulated by discussion with the Minister concerned or, if necessary, with the Prime Minister. If the Cabinet is in agreement, the presumption should be that the Parliamentary Secretary would also agree if he were aware of all the facts and arguments.

This, then, is the Prime Minister's team—at least ten Ministers



and at least four Parliamentary Secretaries.<sup>1</sup> It is a more manageable team than that in Great Britain, where it numbers between sixty and eighty. His main job is to keep it together and to keep a majority in the House of Representatives. Partly, the work is done in Cabinet, where all the Ministers sit and where differences must be ironed out. It cannot be done, as was often the practice of the Board of Ministers, by giving each Minister his head, because the Cabinet and not the Minister is responsible for departmental policy. It must be done by discussion and compromise in order that a single unified policy, carried out through the respective Departments, can be evolved. The Prime Minister must in addition exercise a general supervision over all the Departments. As Mr Gladstone put it :<sup>2</sup>

‘In a perfectly organized administration, such for example as was that of Sir Robert Peel in 1841-6, nothing of great importance is matured, or would even be projected, in any Department without his personal cognizance; and any weighty business would commonly go to him before being submitted to the Cabinet.’

It is true that this practice is no longer completely followed in Great Britain : but that is because the business of government has become too vast, and not because it is undesirable. In Ceylon it is still practicable; and after the fragmentation of the Donoughmore Constitution, when Heads of Departments, Executive Committees, Officers of State, State Council, Board of Ministers, Governor and Secretary of State all took decisions with little reference to each other, it is very desirable that the threads of government should be drawn together and a unified policy adopted. This is possible only with a strong Prime Minister. The initiative should not always rest with him, however, but with individual Ministers. They should put to him their own problems before they attempt to solve them, though they ought to have all the arguments marshalled by the Permanent Secretaries. They should discuss projected reforms with him before they are even fully examined in the Department, for it would be a waste of time and energy for the Department to discuss them if in the opinion of the Prime Minister it was

<sup>1</sup> In Mr D. S. Senanayake's Administration of 1947 there were 14 Ministers and 9 Parliamentary Secretaries.

<sup>2</sup> *Gleanings*, Vol. I, pp. 24-5, quoted in *Cabinet Government* (2nd ed.), p. 163.

impracticable or politically undesirable for his Government to deal with them. Further, the Prime Minister should see any documents of major interest produced in the Department or coming from outside. Sometimes, however, the initiative will come from the Prime Minister. He may perhaps indicate a line of research which might be followed in the Department in order to solve a long-term problem, or ask for a memorandum on short-term policy, or point out to the Minister that an adverse public opinion is growing up owing to apparent deficiencies in his Department, or suggest that there is inadequate co-ordination with the work of another Department.

It is not easy to put the relationship into words, for it is an intimate political relationship varying somewhat according to the personalities involved. It is easier to illustrate than to describe, and perhaps it would help to imagine a series of educational reforms similar to those in progress in 1947 if Sir Robert Peel had been Prime Minister and Mr W. E. Gladstone Minister of Education. No criticism of the procedure actually followed is implied, for the primary purpose is to draw a contrast between the Donoughmore Constitution and the Senanayake Constitution. The first step would have been a discussion between Gladstone and Peel as to the desirability of appointing a Commission (a Departmental Committee would be appointed only for incidental or technical questions) to make recommendations on educational reform.<sup>1</sup> Perhaps Gladstone would leave a short memorandum, emphasizing the haphazard development, the conflicts of principle, the probable waste of money, the inadequacy of village education, the class division created by the use of different language media, etc. On this basis Peel would agree that a Commission was desirable, and there would be some discussion of names. If the Minister of Finance had no objection, it might not be necessary to have a Cabinet decision, and if funds were available reference to the House of Representatives would clearly be unnecessary. After a full list of members (including the chairman) had been agreed between Gladstone and Peel, the Governor-General would be advised to

<sup>1</sup> It is of course known that the Special Committee on Education was appointed with the intention that expenditure on education be reduced. Since it turned into something quite different, however, it is convenient to assume that the Commission would be appointed for producing a scheme of reforms.

appoint the Commission. It need hardly be said that Gladstone would not be chairman, for the function of the Commission would be to advise the Government (represented *pro hac vice* by Gladstone) on the policy which Gladstone should follow. A few Members of Parliament specially interested in education might be appointed to the Commission so as to prevent the experts and the interests from getting completely out of touch with public opinion, though of course the politicians would play a subordinate role.

When the Commission reported, Gladstone would consult Peel on the advisability of publishing with or without a statement of Government policy. Probably Peel would decide for immediate publication, but would request Gladstone to prepare a memorandum for submission to the Cabinet on the steps to be taken by Government. This memorandum would be prepared in the Ministry, where not only the desirability of the scheme proposed, but also its administrative practicability and (in consultation with the Treasury) its cost, would be worked out. The Department would find out, for instance, how many schools were required for compulsory education to be made compulsory, what number of additional teachers would have to be trained, what expansion there would be in the training schools, where the teachers were to be obtained, whether special training was necessary to enable teachers to use the vernaculars, what the new grant system should be, how much it would cost immediately and over the next ten years, what arrangements could be made with the Ministers of Agriculture and Industry about training in practical schools, what reorganization would be required in the Ministry of Education, and so on. These are purely administrative questions to be worked out in the Department in consultation with other Departments and with the University. There would be, however, the larger questions of policy in which the Minister would be involved. A series of memoranda would be produced and discussed by the senior officials in committee, perhaps with the Minister or Parliamentary Secretary as chairman. Out of all this would evolve a departmental memorandum stating its (or the Minister's, for it is the same thing) views on the Report. This Gladstone would take to Peel, who would discuss whether it would not be wise to enter into negotiations with the various interests (particularly

the denominational bodies) affected in order that parliamentary opposition might be minimized. It would almost certainly be agreed that such agreement was desirable, with the result that, when eventually a memorandum went to the Cabinet it would be certain that there would be no substantial opposition.

This memorandum, having been approved by the Cabinet, would be presented to Parliament as a White Paper. Peel and Gladstone would discuss whether parliamentary approval was necessary, and Peel (for this is his business) would decide that it was. Accordingly, both Chambers would be asked to approve the principles in the White Paper. There would be no question of amendments at this stage, for this would be a specific Government proposal of which either approval or disapproval was required, and disapproval might bring the usual consequences. In fact, however, approval would be almost unanimous, for it would be a reasonable compromise of the several points of view. The next step would be the preparation of the necessary legislation, which would be drafted by the Legal Draftsman in close consultation with the officials of the Ministry. Any difficult points would be discussed between Gladstone and Peel, and eventually a draft Bill would be circulated to the Cabinet, which would refer it to a Cabinet committee; and the Bill as finally approved would go before the House of Representatives as a Government measure with the whole weight of the Government behind it. It would provide a carefully considered and co-ordinated scheme of reform, with every detail worked out in advance so that, once approved, it could be brought into operation without raising consequential problems and without friction.

This hypothetical example shows how necessary it is that each Minister should keep in close touch with the Prime Minister. If there is not complete sympathy and harmony between them, Cabinet government will not work. The essential point is that the Minister of Education is responsible for education, but the Prime Minister is responsible for the general policy of his Government; and the one is merely an aspect of the other. If they cannot work together, the Minister must go. It is true that there are occasions (as with Mr Ramsay MacDonald and Mr Arthur Henderson) when a breach would be politically more dangerous than passive belligerency; but in all normal

circumstances a Minister who does not fit into a team must leave it. It is hardly necessary to ask whether the Prime Minister has power to dismiss a Minister; for Ministers are never dismissed, they always resign. By section 49(1), every Minister and every Parliamentary Secretary holds office during the King's pleasure. What that means in relation to the Prime Minister must presently be discussed; what it means in relation to every other Minister is that, if the Governor-General is advised by the Prime Minister, and if he accepts that advice, that a Minister must be dismissed, the Minister is dismissed. It is hardly possible for the Governor-General to refuse; for if the advice is rejected the Prime Minister would himself resign. In any event, subject to any advice that the Governor-General may give him—and Governor-Generals may sometimes give good advice—the Prime Minister must arrange his Government to suit himself; and in the last resort the Governor-General cannot refuse unless he is prepared to find another Prime Minister.

The Government is in fact dependent on the Prime Minister. If he resigns all are deemed to have resigned. On occasions he may resign and be immediately commissioned to form a new Government, like Mr Asquith in 1915 and Mr MacDonald in 1931. Since all the Ministers are deemed to have placed their resignations at his disposal, he can advise the appointment of new Ministers or not as he pleases. He can, in other words, 'reconstruct' his Government by using the fact that all Ministers hold office at pleasure. This device, which is common in continental Europe, is less common in Great Britain because of the firm tradition of party loyalty. If the Prime Minister wishes to change a Minister, he has only to send for him and tell him so to secure his resignation. Frequently, particularly when there has been a parliamentary squabble which may have weakened the Government, the Minister will himself place his office at the Prime Minister's disposal, i.e. offer to resign. Normally no difficulty arises if the Prime Minister wishes to take the square peg out of the round hole and put it in the square hole. The team is not a mere sporting metaphor; the team spirit is an essential part of the process of government. It is unlikely to be so easy in Ceylon, where parties as centres of loyalty have not yet developed, where to be moved from one office (except to a higher one) may be regarded as a diminution of prestige,

and where the team spirit generally is less highly developed. The attributes of the office of Prime Minister are therefore likely to be somewhat different from those in Great Britain.

One aspect of the post needs special emphasis. Under the Donoughmore Constitution the tradition has grown up of allowing a Minister to remain in the same office for a long period ; and indeed it would be difficult to change Ministers under the Executive Committee system. The practice is, however, very undesirable. The Minister tends to become somewhat of an expert in his own field, capable—or at least thinking himself capable—of competing with his experts in their own specialities. His mind ceases to be the fresh lay mind, introducing new ideas and inspiring new energy into a jaded Department. It becomes instead a pale reflex of the Department. What is more, the problem of personal relations becomes difficult. There are personalities which clash and personalities that are in harmony. Those who are able to attune themselves to the Minister's are not necessarily the abler or more useful. If a Minister is in office for four or five years only, it is possible for these personal relationships to be adjusted. If like Tennyson's brook he goes on for ever, it is the unaccommodating official who has to go. For these reasons—which are not less cogent in Ceylon—it is not the practice in Great Britain for Ministers to stay long at their posts. They ought not to be changed so frequently that they have no chance to learn the work of their Departments or to develop long-term plans ; but five years is a sufficient period, and a Minister who has done well in one office for five years should be moved on to another. His work at the former, if it is good, will last ; and he will be able to bring the experience acquired in the one to bear on the problems of another. Removal to another office is not an adverse verdict, it is a tribute.

## CHAPTER XII

### *FINANCE*

THE State Council had a very odd and inconvenient financial procedure derived partly from the colonial system, partly from the Finance Committee of the Legislative Council, and partly from suspicion of a Treasury controlled by an Officer of State responsible direct to the Governor. The establishment of Cabinet government required the introduction of a system more nearly like that of Great Britain, though there was no need to copy the intricacies of British procedure. The early drafts provided for financial procedure in full detail, but eventually the Ministers decided to have only the skeleton provisions in the Constitution, and these provisions were approved by the Soulbury Commission.

The foundation of the new system is the Consolidated Fund provided by section 66. In Great Britain the Consolidated Fund is the only Fund, save that other Funds may be created by payments out of the Consolidated Fund. It was thought more convenient in Ceylon, however, to have the Consolidated Fund as the residuary Fund, so that other Funds like the National Development Fund, the University Building and Equipment Fund, etc., could be created parallel with it. Where no special provision is made by law, however, all revenues go into the Consolidated Fund and all expenditure comes out of it. In the case of expenditure, there are two types of service, known in England as 'Consolidated Fund Services' and 'Supply Services'. These terms are not used in the Ceylon Constitution, but in substance the distinction is made. The cost of some services is 'charged on the Consolidated Fund'; the cost of other services is provided by 'moneys voted by Parliament'. Sums charged on the Consolidated Fund are payable without further legislation; other sums need an annual vote by Parliament. The cost of the following services is charged on the Consolidated Fund by the Constitution itself:

1. The salary of the Governor-General or of the Officer Administering the Government: section 6(3). The Governor-General's salary is £8,000 and that of the Officer Administering

the Government £6,000. Neither may be altered, even by constitutional amendment, during his term of office.

2. The salaries of the Judges of the Supreme Court : section 52(4). The amount is determined by Parliament, but the salary of a Judge may not be diminished during his term of office.

3. The salary of an appointed member of the Judicial Service Commission who has retired from the Supreme Court ; section 53(6). The amount is determined by Parliament but may not be diminished during his term of office.

4. The salaries of the members of the Public Service Commission : section 58(7). The amount is determined by Parliament, but the salary of a member may not be diminished during his term of office.

5. (a) Pensions or gratuities granted to officers who retire under section 63.

(b) Pensions and gratuities granted before the Order came into operation.

(c) Pensions and gratuities payable to officers in the service of the Crown in relation to Ceylon when this Order came into operation.

The above are charged on the Consolidated Fund by section 64.

6. The interest on the public debt and the costs, charges and expenses incidental to the collection, management and receipt of the Consolidated Fund : section 66(2).

7. The salary of the Auditor-General : section 20(2). The amount is determined by Parliament but may not be diminished during his term of office.

Other sums may of course be charged on the Consolidated Fund by Act of Parliament. The effect of charging is to render unnecessary an annual vote by Parliament. The amount does not appear in the Estimates and hence there is no opportunity for an annual debate to take place. Legislation to transfer a charge from the Consolidated Fund to moneys provided by Parliament is of course possible where the charge is imposed by Act of Parliament : but a constitutional amendment would be required to alter a charge imposed by the Constitution itself. Even in such a case the amount may be altered by Act of Parliament unless the Constitution itself fixes the amount (as is the case of the Governor-General's salary or of a pension or



gratuity) : if however the Constitution fixes the amount, it may be altered only by constitutional amendment. In some cases (the salaries of the Judges, the Auditor-General, and the members of the Public Service and Judicial Commissions) the amount is not fixed by the Constitution, but the salary cannot be altered during the term of office of the person concerned.

Sums which are not charged on the Consolidated Fund must (unless by law they are payable out of some other Fund) be paid out of the Consolidated Fund : and for this purpose an Act of Parliament is necessary. The Ministers' draft made it quite plain that no expenditure could be incurred except on the authority of an Appropriation Act or a Supplementary Appropriation Act. The Order in Council, however, reverted to the State Council practice and permits sums to be issued from the Consolidated Fund on the basis of a mere resolution of the House of Representatives. Presumably this provision was inserted in section 67(2) in order that money voted on Supplementary Estimates might be spent without waiting for the concurrence of the Senate. This of course encourages the bad practice of numerous Supplementary Estimates which was such a feature of State Council procedure and which prevents the Budget from being anything more than a forecast. Any difficulty caused by delay is met in Great Britain through the establishment of a (Civil) Contingencies Fund, which has been authorized by section 68. This is a useful provision which enables rapid action to be undertaken where it is necessary, and replaces the 'special warrant' system of the Donoughmore Constitution. The money may be spent from the Fund and a Supplementary Estimate produced subsequently.

The details of the procedure were not laid down in the Constitution, in order that that document might be as flexible as possible, the only other provision being that of section 69 (following Article 57(1) of the Order in Council of 1931 and British and Dominion practice) limiting proposals by private Members. The following procedure was suggested in the first edition of this work and, since it has not been wholly carried out, it is left unaltered except for a few verbal changes.

1. The Estimates should be prepared in the Ministries on the same principle as in 1945, indicating (a) expenditure under heads, (b) sub-heads under which the Ministry will account for

the expenditure under the heads, and (c) the details of the sub-heads. There should normally be one head only for each Ministry; but where a Ministry deals with several services, e.g. Transport, Post Office, Public Works, it may be convenient to have two or more heads. The number of sub-heads under the former practice was, however, quite ridiculous, and they could be cut down to a tithe of their former number. The details may be given, though it hardly seems necessary to give every post and every salary scale under 'Personal Emoluments'.

2. These Estimates should be prepared in the Finance Section of the Ministry or in some cases (e.g. the Post Office) the Finance subsection of the Section. Under the British practice no new service, no increase of staff, and no alteration in salary scales may be inserted in the Estimates without the *prior* sanction of the Treasury. If the Treasury refuses sanction the matter may of course be taken to Ministerial level; and if the Minister is unable to secure the consent of the Minister of Finance the matter must be referred to the Cabinet.

3. The estimates as approved by the Minister are submitted to the Treasury and, after scrutiny and, if need be, reference back to the Ministry they are included in a consolidated volume of Draft Estimates circulated to the Cabinet.

4. The Cabinet will examine the Draft Estimates, though the examination need be no more than cursory if (a) all proposals for new services or for substantial expansion of existing services have secured prior Cabinet sanction, and (b) the Draft Estimates have been fully scrutinized in the Treasury. The practice of including new proposals in the Estimates without prior discussion in Cabinet is strongly to be deprecated because it holds up other Government business. Thus, if the Ministry of Education wishes to start a large programme of building schools, the proposal should come up on a separate memorandum before the Estimates are compiled in order that its implications may be fully discussed. It may be that, when the total of the Estimates is seen, the Cabinet may desire to withdraw its approval or cut down the scheme; but the problem should be discussed in the first instance as a separate problem because it has implications other than the purely financial, and cannot adequately be discussed on the Estimates.

5. The Estimates having been approved by the Cabinet are

laid before the House of Representatives. The British practice is to debate the Estimates (in Committee of Supply) before the Budget is introduced (in Committee of Ways and Means). The Ceylon practice seems to be better, however, because it relates expenditure and income more closely and compels the legislature to consider the consequences in increased taxation before it is called upon to approve expenditure. Accordingly, it would seem desirable to continue the practice of making the Budget speech (which is now the function of the Minister of Finance) on the second reading of the Appropriation Bill. It is, however, quite impracticable for a House of 101 Members to follow the practice of the State Council on the Appropriation Bill. For a Member to survey all the branches of Government on the second reading of the Appropriation Bill would require some 200 hours of debate. It has very little educative effect on the general population, even those who read English newspapers, for they just get bored with the long series of long speeches. If and when a real party Opposition develops, it may be found more convenient to revert to the British practice of 'putting down' various votes in consultation with the Opposition in order that debate may take place on separate aspects of Government policy. It is possible to have a good debate on education or health or industrial development or agriculture; a series of speeches in which some forty or fifty members deal with each of these topics is not a debate but a collection of monologues. In that case, the debate on the Budget would become not a debate on the Estimates but a debate on taxation proposals, as is the practice in the House of Commons. A defeat of the Government in the Appropriation Bill would be a vote of no-confidence and would carry the usual consequences.

6. The Appropriation Bill having been approved on second reading would be debated in Committee. It may be noted that the Bill will contain only the 'heads' and not the sub-heads. It would be in order under any head to debate any matter contained in the sub-head or the detail, but it is the function of the Treasury, not the House of Representatives, to deal with minor details, and the House ought to restrict itself to broad principles of policy. The notion that Members can make useful changes in the Estimates is quite false. It never happened in the State Council. In any case, a motion to debate or reduce

a sub-head is out of order. The motion must be to reduce the amount under a head. Any such motion, if passed, would be a defeat of the Government, entailing the usual consequences. No amount can be increased, for this is forbidden by section 69. The Committee debates on the Appropriation Bill ought to be debates on major aspects of policy, led by the leaders of the Opposition.

7. The third reading of the Appropriation Bill would be an opportunity for surveying the general financial policy of the Government once more.

8. The Bill having been passed by the House of Representatives would then go to the Senate. That body must pass it within one month, for an Appropriation Bill is clearly a Money Bill. The House of Commons has a privilege to prevent the House of Lords from amending a Money Bill, but no such privilege will be possessed by the House of Representatives unless an Act of Parliament is passed for the purpose under section 27. It is suggested, however, that the Senate should follow the example of the House of Lords and discuss on the Appropriation Bill only the general principles of public finance: for it is clearly the intention of the Constitution that finance should be essentially a matter for the House of Representatives.

9. When the Appropriation Bill receives the royal assent, it authorizes expenditure on the several heads up to the amounts specified in the Act. Expenditure within a head is legal even if it is not strictly in accordance with the distribution according to sub-heads as submitted in the Estimates. The State Council regarded the sub-heads as binding on the Departments; but this produced the ludicrous situation that a Supplementary Estimate was often proposed to increase the expenditure on a sub-head although there were savings on other sub-heads and no Supplementary Estimate was legally required. The result was to increase enormously the number of Supplementary Estimates, and most of them were quite unnecessary legally. The practice arose because the Treasury was controlled by an irresponsible official. Now that it is in charge of a Minister responsible to Parliament the practice can be and should be abolished. Of course, no Department should be allowed to transfer sums between sub-heads at its pleasure; but it should be able to do so with Treasury sanction. This would reduce heavily the

number of Supplementary Estimates. Variations in detail, on the other hand, should be within the Department's discretion, though only with the sanction of the Permanent Secretary. In any event, no new service or change in emoluments would be permissible without Treasury sanction.

10. The change recommended in the previous sub-paragraph would render Supplementary Estimates much less frequent than they have been. This would enable the Treasury to enforce the rule that Supplementary Estimates are unusual and undesirable and should be resorted to only when absolutely necessary. They are in principle objectionable because they upset the Budget. When Supplementary Estimates are necessary, however, they follow the same procedure as the original Estimates and, though expenditure can be authorized at once under section 67, they should be collected into a Supplementary Appropriation Bill passed in the same way as the original Appropriation Bill. The notion common in the Departments that it is possible at any moment to go to the legislature and get more money has to be extinguished, for it is impossible to run the finances of the country on such a basis. It should be emphasized, however, that debate on a Supplementary Estimate must be strictly limited to the subject-matter of the Supplementary Estimate. If the Ministry of Health has to pay more for drugs, the Member for Bandy-cotta cannot raise the question that the hospital at Bandy-cotta has not a qualified medical officer. The State Council was extremely lax in the application of the essential rule that a debate on a proposal must be limited to the subject-matter of the proposal.

As has been mentioned above, these suggestions have not been wholly accepted. It is still the practice to bring up new proposals in the Estimates, with the result that the Cabinet has to spend many days, and under considerable pressure of time, on diverse items which ought to have been brought up and disposed of, at least tentatively, beforehand. It must of course be admitted that in Ceylon conditions there is a large number of desirable reforms which cannot be put into operation because funds are not available. The financial implications of an educational reform, for instance, are fundamental, for there would be far less disagreement among politicians as well as pundits if ample funds were available, which clearly they are not. If the

Cabinet were to discuss every desirable reform put up by every Ministry it would waste a great deal of its time, for when the cost was totalled it would probably be greater than the national income. Nevertheless, the Ministry of Finance is well aware that the Government cannot substantially increase its revenues, and if the cost of every scheme were carefully worked out—as was not done under the Donoughmore Constitution—most schemes would contain good reasons for their immediate rejection. It is quite possible that proposals which have been agreed by the Cabinet may have to be ‘pruned’ when further information is available about anticipated revenue, but if the financial implications have been fully considered earlier the number of cases should be few. In any case the discussion in the Cabinet on Estimates should be a discussion on finance and not on a variety of policies.

The number of ‘votes’ and ‘heads’ has been substantially cut down, but further examination would probably reduce their number. It is of course realized that the Ceylon Government assumes responsibility for the direct administration of services which, in the United Kingdom, are controlled by statutory authorities—for instance, the schools, the hospitals, the Ceylon Government Railway, the Government Electrical Undertakings, most of the roads, etc.—and that these services compel an increase in the number of votes in the Estimates. Also, the contemplated administrative reform, which would have fused ‘the Departments’ into ‘the Ministries’, has not taken place, so that many of the Donoughmore votes have had to be retained.

There has also been a substantial reduction in the number of sub-heads, though further consolidation would be possible. Transfers between sub-heads, too, are dealt with by the Treasury and no longer need Supplementary Estimates, the number of which is now much smaller.

The worst feature of the present system, however, is the parliamentary procedure. The number of speeches on the Appropriation Bill has been heavily reduced, and Mr Speaker has done everything possible to limit their length and to prevent the raising of ‘committee points’. On the other hand, his rulings in Committee have led to the continuation of the system of debating minor items instead of Ministerial policy. For instance,

though the educational system had been under examination from the formation of the Government in 1947, there was no debate on it until August 1950 because Members had to move amendments to individual items. Possibly this is another consequence of the failure to bring about an administrative reorganization, for it may be due to the fact that there are, oddly enough, separate votes for the Ministry of Education and the Department of Education. In any event, the result was that the academic qualifications of the Director of Education were debated at length while the policy of the Government being carried out by him was not debated. Similarly, the country was able to learn about some of the defects of the Galle Hospital, though only in the Senate (on a Private Member's motion) was health policy discussed.

Section 70 of the Constitution provides for the audit of accounts by the Auditor-General. By section 71(2) he is instructed to report annually to the House of Representatives 'on the exercise of his functions under this Order'. This is a much more limited function than is provided by Article 85 of the Order in Council of 1931, and the change is deliberate. As the Soulbury Report said :<sup>1</sup>

'It has become the custom in recent years for the Auditor-General's Report to contain general criticisms of the conduct of individual officers and the working of Departments, which are not strictly appropriate to such a Report. We consider that the inclusion in a published document of such criticisms, except where strictly justified, is not in the best interests of the public services, since the officers of Departments concerned have no means of making a public reply to the charges levelled against them and however damaging to their reputation. It would hardly be appropriate to place restrictions on the contents of the Auditor-General's Report in the Constitution, but we trust that in future the practice we have referred to will be discontinued.'

This criticism was inspired by the fact that under the Donoughmore Constitution the reports of the Auditor-General dealt not only with the question whether public funds had been spent in accordance with the law and the rules of financial procedure, but also, in some degree at least, with the policy

<sup>1</sup> Paragraph 391.

involved in the expenditure and even the results achieved by the expenditure. They also dealt in detail with matters on which the Auditor-General could not by the nature of his office be fully informed, whereas in the United Kingdom the Comptroller and Auditor-General and the Public Accounts Committee are concerned with the principles regulating the collection and expenditure of public moneys. Under the new Constitution, however, these defects have been remedied.



## CHAPTER XIII

### *THE PUBLIC SERVICES*

IT was felt by the Ministers in 1943 that the fear of administrative partiality, expressed by certain of the minority leaders, related mainly to appointments in the public service. The Ministers' draft therefore provided that new appointments to the public service carrying an initial salary of not less than Rs. 3,600 a year should be made on the recommendation of an independent Public Service Commission. The Commission might further direct that any other new appointment or class of appointment should be made on their recommendation; and where appointments were made by Heads of Departments they might be revoked on the recommendation of the Commission. Subject to these rules relating to new appointments, the promotion, transfer, dismissal and disciplinary control of persons in the public service were vested in the Governor-General and would, under Article 36 of the draft, be exercised in accordance with British constitutional conventions. The Soulbury Commission chose, however, to 'assume that it was the intention of the framers of the scheme that the Governor-General's powers as regards promotion, transfer, dismissal and disciplinary control shall also be exercised in a similar manner to the power of appointment, i.e. on the advice of the Public Service Commission, and the Report went on to recommend<sup>1</sup> that these powers should be so exercised. There was, of course, no justification whatever for their assumption. The Ministers had drawn a clear distinction between new appointments and promotions, transfers, dismissals and disciplinary control. However, the Soulbury Commission's misunderstanding became a recommendation accepted by His Majesty's Government, and accordingly it is so provided in the Constitution. Ceylon thus has a system of responsible government in which Ministers have little control over the public service. It should of course be said that the active interference of politicians in the public service, to which both the Donoughmore and the Soulbury Commission referred,

<sup>1</sup> Paragraph 379.

and which appears to be peculiar to Ceylon, would in any case have disappeared with the introduction of British constitutional conventions. In Great Britain the functions are exercised in the names of Ministers but they are in fact exercised by the Permanent Secretary to the Treasury in relation to 'Crown' appointments and by the other Permanent Secretaries in relation to departmental appointments. In exceptional cases, however, the fact that the formal approval of the Prime Minister or of the Minister concerned is required enables the 'recommendation' to be altered.

Given the tradition of interference in the public service which the Finance Committee of the Legislative Council handed down to the State Council, and which was very characteristic of the State Council, the Commission system may be a source of friction. The Soulbury Commission 'earnestly hoped' that the practices to which the Commission referred would be discontinued, and indeed it is essential to the principle of responsible government that Ministers and not public servants should be criticized in Parliament. It is the function of Mr Speaker and of the President of the Senate to prevent criticisms, whether by Ministers or others, which offend against the principle. In relation to appointments, transfers, promotions and disciplinary action, however, the Ministers themselves will have no responsibility and cannot be criticized, while the Public Service Commission will have no voice in Parliament and will be unable to reply even to unjust attacks. Experience in the United Kingdom had suggested that the experiment of handing over such wide powers to 'three bashaws'—a phrase used of the autonomous Poor Law Commission of 1834—would be somewhat dangerous. In fact, however, no serious difficulties seem to have arisen in the first three years of Cabinet Government. Possibly the working of the system has been made easier by the fact that under the Donoughmore Constitution the Governor and not the Ministers had the last word, while both politicians and public servants were accustomed to political abuse of the public service. The fact that public criticism of officials has continued may help to explain why there has been little criticism of the Public Service Commission.

The legal provisions were necessarily altered by the Independence Order because the procedure contemplated by the

Constitution Order was that the Governor should act on the recommendation of the Public Service Commission. No such procedure is possible under the Independence Order, which gives the Governor-General no functions save those which he exercises on advice. Accordingly, the functions of the Governor under the Constitution Order have been divided between the Governor-General acting on advice, on the one hand, and the Public Service Commission (or the Judicial Service Commission) on the other.

Section 57 establishes the fundamental principle, applicable throughout the Commonwealth, that persons holding office under the Crown hold such office at His Majesty's pleasure. This provision is elaborated in clause 9 of the Governor-General's Commission, which authorizes him to dismiss or suspend any officer or take disciplinary action, subject to the Constitution, in the King's name. If public officers are correctly styled 'limpets' (as they have sometimes been described in the United Kingdom), the explanation is not that they cannot legally be dismissed but that in practice it is difficult to exercise the legal power. Legally they can be dismissed without notice, and without compensation.

Secondly, there is a Public Service Commission consisting of three persons appointed by the Governor-General (i.e. on advice), one at least of whom shall be a person who has not, at any time during the period of five years immediately preceding, held any public office or judicial office. This is in substance what was recommended in the Ministers' draft. The Soulbury Commission, perhaps not realizing that in Ceylon nearly the whole of the English-educated section of the population has at some time had the honour of serving under the Government, recommended that one member only should have held Government office. This proposal having been incorporated in the Constitution Order, it became difficult to compose the Commission, and in fact a chairman had to be imported. The opportunity presented by the Independence Order was therefore taken to revert to the principle of the Ministers' draft.

By section 60 of the Constitution Order (as amended by the Independence Order) the appointment, transfer, dismissal and disciplinary control of public officers is vested in the Commission; but this is subject to the exception that the appointment

and transfer of the Attorney-General (by section 60) and the Permanent Secretaries (by section 51) is vested in the Governor-General acting on the advice of the appropriate Minister. The distinction drawn in the United Kingdom between 'Crown appointments' (made in effect by the Prime Minister) and 'departmental appointments' (made in effect by Permanent Secretaries) is thus drawn in Ceylon also, though in Ceylon the latter class of appointments is made by the Public Service Commission. The Commission may, however, delegate functions to public officers by order under section 61 and it has in fact retained direct control only over senior appointments, though an appeal may be made to the Commission where any person is dissatisfied.

Similar provisions apply to the judicial service. The offices of Chief Justice, Puisne Judge and Commissioner of Assize are 'Crown appointments' made by the Governor-General on advice, but as in England the Chief Justice and the Puisne Judges hold office during good behaviour (not at pleasure) and are not removable except by the Governor-General on an address from the Senate and the House of Representatives. Moreover their salaries are charged on the Consolidated Fund and may not be diminished during their terms of office. They are thus given as independent a status as constitutional provisions make possible.

For other appointments there is a Judicial Service Commission consisting of the Chief Justice, a Judge of the Supreme Court, and one other person who shall be, or shall have been, a Judge of the Supreme Court. The Commission is charged with the appointment, transfer, dismissal and disciplinary control of judicial officers. The Commission may, however, by order delegate to its secretary the power to authorize all transfers, other than transfers involving increase of salary, or to make acting appointments in such cases and subject to such limitation as may be specified in the order.

*TRANSITIONAL DIFFICULTIES*

It was appreciated when the new scheme of government was drawn up in 1943 that the establishment of Cabinet Government in a country which had had no experience of it but had in fact had experience of colonial autocracy, representative but irresponsible government, and finally the oddities of the Donoughmore Constitution, would not be an easy task. Nor could it be assumed that a party system, such as now operates under the more highly developed Cabinet systems, could be established in Ceylon forthwith. Indeed, it could not be guaranteed that such a party system would ever be established, for Ceylon contains a more heterogeneous population than most countries operating parliamentary government and in addition the imposition of a plantation economy on a peasant economy has created very wide class divisions.<sup>1</sup> The Constitution drafted by the Ministers was deliberately made as flexible as possible so as to meet these contingencies, for though parliamentary government follows the same principle in different countries, there are variations in detail not only in space but also in time. In any case, difficulties were to be anticipated; and indeed the present writer ventured to forecast in a contemporary document that twenty years would be required before the Constitution was fully established. The anticipation that there would be difficulties has been realized, but generally speaking the Constitution has worked in the first three years with a smoothness which even the most optimistic had not anticipated.

The United National Party was formed in 1947 by a large group of the members of the State Council, who realized that Cabinet government required a party organization. Its general tendency has been what would be called in continental Europe right-centre. It was able to gather within its fold the Ceylon National Congress, the Sinhala Maha Sabha, and the Muslim League, but those organizations were not formally dissolved. It also had the support of most of the right-wing elements,

<sup>1</sup> See generally Jennings, *The Commonwealth in Asia*.

including the commercial interests of 'the Fort' in Colombo, the landowners of the provinces, and even (though with some reluctance) the planters. It did not get much support from the Jaffna Tamils, who for the most part supported the Tamil Congress, a communal organization which maintained the opposition which it had developed to the Ministers of the Donoughmore Constitution. In 1949, however, the Tamil Congress split, the majority following their leader across the floor, the minority remaining in Opposition as a 'federalist' and communal party. This change of attitude was in accordance with political realities, for the conservatism of the Northern Province had far more in common with the right-centre views of the United National Party than with the revolutionary ideas of the communist parties which formed the bulk of the Opposition. The only qualification to the division on economic lines still outstanding in 1950 was that many of the Indian merchants, who might be expected to aline themselves with the United National Party, were supporting the Ceylon Indian Congress, a communal party whose electoral strength lies among the Indian workers of upcountry estates. This may be in substantial measure a reflection of the much more highly developed communalism of pre-independence India, but it is due also to the conflict of economic interest between the Indian immigrants as a whole and the indigenous Ceylonese as a whole. In consequence the Indian merchants, whose economic interests are in fact opposed to the communist parties in Opposition, still tend to aline themselves with the Indian labourers, whose support of the communist parties is economically intelligible.

The United National Party was in 1947 a mere organization of semi-professional politicians. It had had no time to organize itself in depth, and in some constituencies (especially where there were caste differences) it gave its 'ticket' to competing candidates. Since 1947 it has been able to create, through the enthusiasm of Senator Jayasundera, K.C., a more comprehensive organization, though like most institutions in Ceylon it depends more on its central organization in Colombo than on the patriotic enthusiasm of its local committees. In 1947, though by far the most successful of the groups, it was able to secure the return of only 42 members. On the other hand, the majority of the persons returned

as 'independents' were by ideology and economic interest supporters of the Party, though they happened not to have had the party ticket, and accordingly Mr D. S. Senanayake, as leader of the Party, had no difficulty in forming a Government with a stable majority. Its strength has been increased through the adhesion in 1949 of Mr G. G. Ponnambalam, K.C., and the main body of the Tamil Congress.

The main opposition in 1947 was provided by the three communist parties. Between the wars a Marxist party had been established, mainly by Ceylonese educated in England, which called itself the Lanka Sama Samaja Party. The ideological conflict between Stalin and Trotsky reached Ceylon rather late, in 1935, and it caused a Marxist split. The larger group, under Dr N. M. Perera and Dr Colvin R. de Silva, refused to accept the Stalinist interpretation of Marx-Leninism, and converted the L.S.S.P. into a Trotskyist party, while a smaller group, led by Dr S. A. Wickremasinghe, formed the Communist Party in full support of the Comintern and the Soviet Union. The larger group was affiliated to the Fourth International through a similar group organized in India and known as the Bolshevik-Leninist Party of India. The full title of the Party then became 'Lanka Sama Samaja Party, Branch of the Bolshevik-Leninist Party of India, Unit of the Fourth International'.

Most of the members of the L.S.S.P. were interned under Defence Regulations during the war because, even after the German invasion of the Soviet Union, they regarded the war as an imperialist war against the working class. The fact that one of them was not interned led to a personal split, with the result that two separate groups, the one led by Dr N. M. Perera and the other by Dr Colvin R. de Silva, fought the general election under the same complicated title. In fact, though, the group under Dr N. M. Perera was generally known as the L.S.S.P. and the group under Dr Colvin R. de Silva as the B.L.P. (Bolshevik-Leninist Party). The L.S.S.P., the B.L.P. and the Communist Party formed the main opposition to the United National Party in the densely-populated western section of the country. It is clear enough that the ordinary electors did not understand the varieties of Marxism, but each of the Marxist parties received substantial support in the areas where a little education (though not much) was available to ordinary people,

and also from those Indian labourers on the estates who had no candidates of the Ceylon Indian Congress whom they could support. The result was that there was almost a solid block of communist seats from Wellawatte (a lower-middle-class suburb of Colombo) to Matara in the far south. The L.S.S.P. obtained 10 seats, the B.L.P. 5 seats, and the Communist Party 3 seats (with two fellow-travellers who at first joined the party but were subsequently separated from it). In 1950 the L.S.S.P. and the B.L.P. (which had previously changed its name to Bolshevik Samaja Party) were merged with a group of the latter, under Mr Philip Gunawardena, to accept the fusion. The result was that in 1950 the L.S.S.P. had 12 seats and were led by Dr N. M. Perera and Dr Colvin R. de Silva, while there was another body which called itself the L.S.S.P. (Fourth International) under Mr Philip Gunawardena.

It follows that the two-party system had not developed by 1950. The Government was formed out of the United National Party, the solitary member of the Labour Party, the leader of the Tamil Congress, and an independent. It was supported also by other members of the United National Party, most of the members of the Tamil Congress, and most of the independent members, including the nominated (Burgher and European) members. The largest party in opposition was the L.S.S.P., more or less supported by the L.S.S.P. (Fourth International), the Communist Party, the Ceylon Indian Congress, and a number of independents. The Government could rely on at least 60 votes and had never been defeated, though it had not the two-thirds majority necessary to carry the Constitution Amendment Bill of 1950.

From the parliamentary point of view, the essential weakness of this distribution lay in the Opposition, ably led by Dr N. M. Perera, who had developed most but not all of the techniques familiar to Westminster, but which was too disorganized to operate the regular and consistent criticism which develops out of the two-party system. Moreover, the practice of debating minutiae of the Estimates, instead of the policy of the Government, had prevented the House of Representatives from organizing the sort of debate which influences opinion and keeps a Government 'on its toes'. The Government's majority was safe and it could always secure approval for its measures; but, not



being under much pressure from public opinion through parliamentary debate, it was far more dilatory than a Government would dare to be in the United Kingdom. Though educational reform had been under discussion for three years there had been no effective debate on it ; and though the Cumpston Report was a devastating criticism of the Ministry of Health (whether justified or not) there was no debate from its publication early in 1950 to the writing of this Chapter many months later.

As had been expected in 1943, there had also been defects in the working of the Cabinet system, and it may be convenient to discuss these under several headings.

### *The Ministries*

It had been assumed in 1943 that the Ministries would be reorganized administratively, and indeed one of Mr Senanayake's drafts required the Governor to effect such a reorganization before the Constitution came into operation. This provision was removed because it was feared that such a reorganization, which would necessarily be somewhat complicated, might delay the establishment of Cabinet government. The only provision left in the Constitution was that in section 51, which required the appointment of a Permanent Secretary in each Ministry.

The defect which the Donoughmore Ministers had in mind was due to the survival of the colonial system of government. Each branch of government was a separate 'Department' responsible through the Colonial Secretary to the Governor. In most cases the Donoughmore Constitution substituted an Executive Committee for the Colonial Secretary, so that the Committee took over not merely political responsibility but also administrative responsibility. Thus, the Executive Committee of Education discussed not merely educational policy, which was certainly its concern, but also the appointment, transfer, promotion, interdiction and dismissal of teachers, the award of scholarships and even the supervision of examinations. The appointment of Permanent Secretaries was designed to secure co-ordination at the administrative level, while leaving to the Ministers the determination of all political questions.

It was not intended, however, that there should be one entity known as 'the Ministry of Education', consisting of the Minister, the Permanent Secretary and Assistant Secretaries, and

separate entities known as the Education Department, the Ceylon Technical College, the Archaeological Department, and the Department of National Museums. There may be a case for giving autonomy or semi-autonomy to Museums and Archaeology. There may also be a case for giving very wide powers to the Director of the Ceylon Technical College, though usually they are given to a Board of Governors. Indeed, there is a strong case for giving wide powers to the board of governors of every school, though not to the 'manager' or the principal. But educational policy is a matter to be decided by the Cabinet on the advice of the Minister, who should be advised by his technical advisers, while educational administration is a matter for administrators acting under the authority of the Permanent Secretary, the Minister's only task being to see that the administration is efficient.

What in fact has happened has been that the Director of Education has been both a technical expert and an administrator, in both respects under the control of the Permanent Secretary; and the Permanent Secretary has been advised by Assistant Secretaries who were neither very experienced educational experts nor very experienced administrators. So long as the Director gives emphasis to administrative reorganization, reforms in educational policy have to be held up, and when he turns to educational policy administrative problems have to wait. There is of course no exact parallel in the United Kingdom because there the Ministry of Education has no direct control of schools; but if the Ministry unfortunately had to exercise that function it would presumably apply its usual administrative system—Permanent Secretary, Deputy Secretary, Under-Secretaries, Assistant Secretaries and Advisers—and there would be no Director of Education at all, though there would certainly be a bevy of Educational Advisers.

It must not be thought that the problem is limited to the Ministry of Education. It applies to all the Ministries. Indeed it has been most clearly exhibited in the Ministry of Health and Local Government. There the Minister and the Permanent Secretary, with a collection of Assistant Secretaries, control two main Departments, the Department of Medical and Sanitary Services and the Department of Local Administration. The

latter is controlled by an administrator, the former by an 'expert'. The Department of Medical and Sanitary Services is, however, itself a double-barrelled apparatus, as its name implies. The 'curative' side has a large technical staff, the 'preventive' side has a small one. The consequence has been that for the past nine years the key post of Director of Medical and Sanitary Services has been held by a health officer, to the indignation of the 'curative' side. This was one of the controversies which led to the Cumpston Report, though Dr Cumpston's remedy would make matters worse by substituting a technical expert for the Permanent Secretary and having four experts instead of one—a Director-General and three Directors—whereas under the British system there would be no Directors at all, but merely a Permanent Secretary, Under-Secretaries, Assistant Secretaries and Medical Officers.

Nor have the relations between Ministers and public servants always been happy. Some of the Ministers set out to alter the tradition and to confine themselves to questions of policy, but found the separation of policy from administration to be unworkable. Others simply accepted the Donoughmore tradition and intervened actively in matters of administration from the beginning. There are several explanations. In the first place, candidates for election to the House of Representatives still depend, or think they depend, upon their local 'influence', which in turn is thought to depend in large measure on the remedying of personal grievances and the distribution of large quantities of what the Americans call 'fat pork' in the shape of new schools, hospitals, rural development centres, milk-feeding centres, roads, bridges and even radio sets. The success of the Marxist parties, which have no 'pork' to distribute, suggests that the impression may be false and that, at least on the West Coast, the elector is more intelligent than he is thought to be. Nevertheless, the impression prevails, and the active Member, who desires to be re-elected, badgers all the Ministers in turn. If it be true that the chance of the Member being re-elected depends upon 'pork', then it is also true that the prospects of the Government depend on the same commodity, and Ministers must actively intervene in administration in order to maintain themselves in power. What is more, Ministers had to go round the country, being received under pandals, having garlands hung

round their necks, and making speeches not defending the policy of the Government but promising more and fatter 'pork' to the local electors. The logical conclusion, which was also the *reductio ad absurdum*, was reached when a Minister went round the country distributing radio sets. On his own assumption he was clearly right, for the question of the place in which a radio set is to be installed and the persons who are to benefit by it is not a matter of administration but a matter of politics. On the same assumption the determination of the places in which schools, roads, hospitals and factories are to be built and of the persons who are to have contracts, scholarships, chits for admission to hospitals, poor relief, mid-day meals, rice ration books, and the rest, are also political, and all public servants must become mere executive officers without discretionary powers.

In the second place, the tradition that public servants act on behalf of and in the name of their Ministers has taken some time to establish. 'Heads of Departments' remain as a hang-over from colonial administration and with them is the notion that they have 'policies' of their own. Some of them continue to make speeches and give interviews to the press about what they propose to do, and their memoranda to their Ministers are apt to appear in the press—though this is not necessarily due to official release. Since the Ministers, as will be seen presently, may also have their own policies, and since the Cabinet may agree neither with the officials nor the Ministers, the result is sometimes a pretty confusion. It is less important, though significant, that public servants continue to write to members of the public as if they were responsible for decisions, instead of taking the decisions and then informing the members of the public that they are directed by the Minister to inform them. The result of this attitude of mind is that the political consequences of a decision are not always considered, that the Minister may be criticized in Parliament for an act of which he had no knowledge and which was not done on his behalf at all, and accordingly that he tends to intervene in matters which he ought to be able to rely on the officials to dispose of themselves.

In the third place, for reasons which are already apparent, Members of Parliament continue to exhibit a great interest in the details of administration, to be much concerned with personal

questions, and to criticize officials by name. As has been mentioned, these difficulties are enhanced by the failure of the parliamentary machine to provide adequate opportunities for debate on general policy. The educational problem, to take that example again, may seem to be a problem not of principles of educational administration but of whether or not a Non-Ceylonese Ph.D. in Social Anthropology is better than a Ceylonese M.Sc. in Educational Psychology.

Finally the press and the public which they serve have necessarily taken longer than the Ministers and the public officials to appreciate the consequences of the new system. Nor have they been helped by the Ministers. The speech of an hour or two hours in which the Minister sets out at length the policy of the Government in his own field of responsibility is so rare a phenomenon that it is almost true to say that the Prime Minister and the Minister of Finance alone use this technique. Nor, indeed, are there many officials who have so broad an appreciation of the problems of government and sufficient freedom from the details of administration to provide the 'notes' on which such speeches can be based. Failing expositions of Government policy, the press falls back upon documents which have been allowed to 'leak', deliberately or otherwise, rumours of discussions which become, when exhibited in public, 'controversies', allegations (more or less anonymous) by disgruntled job-seekers, offhand remarks by Ministers, and other items of information which, collectively, break up the unity of Government policy.

### *The Cabinet*

The transitional difficulties which remain in the Ministries necessarily cause difficulties in the Cabinet itself. If before a proposal appears in the Cabinet agenda not only the Minister but also the 'Head of the Department' have expressed their opinions (by accident or design) in public, the newspapers have published stories and cartoons, pressure groups have passed resolutions, and generally a heated controversy has developed, it is not very easy for the Cabinet to come to a conclusion about the Government policy which will be binding on the Minister and the 'Head of the Department'. If the Cabinet disagrees with the Minister its disagreement will become in the press a

'rebuff'; if it agrees with either the Minister or the 'Head of the Department' it takes sides in a 'controversy'. The problem of formulating a Government policy becomes even more acute if Ministers have already expressed competing theses in public on issues which affect their Ministries. Expositions of general policy are so rare that disputes over them—similar to those started by Mr Joseph Chamberlain in the Balfour Government—do not arise frequently, though on one such occasion—according to a 'leakage' in the press—the Prime Minister felt it necessary to circulate a memorandum on collective responsibility.

Generally speaking, however, the Cabinet has functioned reasonably well, though it has been somewhat dilatory; and the difficulties which have arisen have been due mainly to difficulties in the Ministries. They have hindered the submission to the Cabinet of short, clear and simplified issues which have been thoroughly worked out by intra-departmental and inter-departmental discussions, and have therefore compelled the Cabinet to discuss proposals of a woolly character. Also, questions which ought to have been settled at a lower level have to be debated in the Cabinet itself, though whenever this happens other business gets delayed.

Finally, an unnecessary burden has fallen on the Prime Minister. He has had frequently to intervene in inter-departmental disputes and to listen to an unconscionable number of people who have private troubles or private ambitions. He has even had to prepare White Papers to supersede Departmental papers. Above all, he has been required to attend several 'functions' a week at which speeches were expected.

Even so, this exposition of transitional difficulties must not be taken to imply that the Constitution has not worked well on the whole. Certainly it has been a great improvement on the Donoughmore Constitution not only as an instrument of self-government but also as an instrument of government. Some of the difficulties, especially those over education and health, are in fact legacies of the Donoughmore Constitution. The relationships of Cabinet Ministers and officials are at once close and delicate, and it would be over-optimistic to assume that the correct conventions could be developed in the course of only three years. Nor could one expect a two-party system to be established in so short a time. The path of improvement lies

in consolidating the United National Party, suppressing its partisan groups, and developing a democratic Opposition party which will meet the needs of those who are not Marxists but who want to vote against the United National Party. When this fundamental requirement has been met, the Government will find it necessary to defend its policy as such and to prevent bickering in public between Ministers and inside Ministries, because the bickering will place weapons in the hands of the Opposition. Time and the logic of the parliamentary system will remove the difficulties, though they could be removed more quickly by deliberation on the part of Ministers and officials.

*DEFENCE AND EXTERNAL AFFAIRS*

DEFENCE and external affairs are branches of executive government which are vested in the King by section 45 of the Constitution. The section empowers the Governor-General to exercise these powers, though in fact there is nothing in the Letters Patent authorizing him to exercise the prerogative powers of declaring war, making peace, sending ambassadors, or entering into treaties. It may therefore be assumed that, as in the other Dominions, these remain vested in the King, though in accordance with section 4 of the Constitution the powers are exercised by the King on the advice of the Ceylon Government. By section 46(4) of the Constitution the Prime Minister is in charge of defence and external affairs and therefore the advice, whether given to the King or to the Governor-General, will be given by him, though since many of the questions involved will be important they will generally require Cabinet decisions.

The Commonwealth of Nations is primarily an organization for securing consultation and, to such extent as may be desired, co-operation in defence and external affairs. This is not a matter of law but of constitutional practice to which Ceylon has decided to conform by signing on 11 November 1947 the Defence and External Relations Agreements, which took effect on 4 February 1948 at the same moment as the other constitutional documents. These are ordinary 'agreements between Governments' of the type familiar in international relations. In fact, every independent country has a network of such agreements covering all kinds of subjects from defence to the delivery of telegrams; and were it not so international relations would be even more chaotic than they are. Like most such agreements, they contain no provision for termination or denunciation. They cannot, consistently with international law or morality, be denounced by either side. They are, however, subject to the doctrine of *rebus sic stantibus*, which means that the mutual obligations disappear once they become obsolete. The application of this doctrine is not easy and generally gives rise to controversy; but in this case there cannot be any doubt that



the Agreements are based on Ceylon's membership of the Commonwealth of Nations. This membership is postulated in both preambles and is thus a condition precedent of the Agreements. Since membership of the Commonwealth implies a power to secede from the Commonwealth, it follows that in the event of secession *rebus non sic stantibus* applies and the Agreements lapse.

Though agreements within the Commonwealth are governed by international law it is quite inconsistent with the ideas of the Commonwealth for any member to insist on its legal rights. The principle is one of mutual assistance without a nice balancing of advantages and disadvantages. The analogy of a family relationship is in this instance a good one. Law does regulate the mutual relations of members of a family, but few families ever have cause to ascertain their legal rights and duties because they base their moral obligations on a different conception, that of mutual assistance. In Ceylon there is no legal obligation on an elder brother to finance a younger brother who is capable of maintaining himself, and yet it is the common experience that the moral obligation is accepted. So in the Commonwealth neither the United Kingdom nor the Dominions pause to consider the legal situation when a member of the Commonwealth requires assistance.

The problem, much discussed in Ceylon, of the binding character of these Agreements was therefore based on the false premise that the legal situation was important. Within the Commonwealth if obligations appear to one side to be onerous or undesirable it is open to that side to ask for modifications. Indeed, the premise is false even in relation to ordinary external affairs. Nations generally do their best to live in peace and friendship and therefore do their best to accommodate each other. A nation which became noted for its inability to keep agreements would soon find itself an object of suspicion, but this does not mean that the network of agreements by which a nation is bound must forever remain static. They are constantly being amended to meet changing conditions.

The obligations on the United Kingdom under the Defence Agreement are as follows :

1. To give to Ceylon such military assistance for the security of its territory, for defence against aggression and for the

protection of essential communications as it may be in the mutual interest of the two Governments to provide. Though the United Kingdom is empowered to base naval and air forces and maintain such land forces as may be required for these purposes and as may be mutually agreed, it is under no obligation to do so, unless of course it can be shown by Ceylon that the obligation to defend Ceylon cannot be carried out without such bases and forces.

2. To furnish Ceylon with such military assistance as may from time to time be required towards the training and development of Ceylonese armed forces.

3. To establish such administrative machinery as may be agreed to be desirable for the purpose of co-operation in regard to defence matters, and to co-ordinate and determine the defence requirements of both Governments.

The obligations on Ceylon by the same Agreement are as follows :

1. To give to the United Kingdom such military assistance for the security of its territory, for defence against external aggression and for the protection of essential communications as it may be in the mutual interest of the two Governments to provide. The assistance rendered has thus to be in the interest of Ceylon and in any case the military assistance which Ceylon can give to the United Kingdom is infinitesimal in present conditions.

2. To grant to the Government of the United Kingdom all the necessary facilities for the objects mentioned in (1) as may be mutually agreed. These facilities will include the use of naval and air bases and ports and military establishments and the use of telecommunication facilities, and the right of service Courts and authorities to exercise such control and jurisdiction over members of the said forces as they exercise at present.

3. To establish such administrative machinery as may be agreed to be desirable for the purpose of co-operation in regard to defence matters, and to co-ordinate and determine the defence requirements of both Governments.

It will be seen that the obligations are not exactly mutual because, though mutual assistance is provided for, Ceylon's contributions will be mainly passive, the provision of bases and facilities, while those of the United Kingdom will be mainly

active, the provision of forces. On the other hand, the extent of the obligations is a matter for mutual agreement from time to time, and no military assistance will be provided on either side unless it is in the interest of both that it should be. What the Agreement sets out to do is to state the practice which applies between the United Kingdom and the older Dominions, the difference being that whereas now the older Dominions provide the bases at their own expense (e.g. Halifax and Esquimalt in Canada and Simonstown in South Africa), in Ceylon the United Kingdom will provide them at the expense of the United Kingdom taxpayers, thereby, incidentally, giving Ceylon a large and valuable 'invisible export'.

There is nothing in the agreement to compel Ceylon to declare war when the United Kingdom is at war. Under section 4 of the Constitution such a declaration of war must be made by the King on the advice of the Ceylon Government, and the decision to declare war will no doubt depend in large measure on the desirability or otherwise of inviting the United Kingdom to furnish military assistance for the defence of Ceylon under the Defence Agreement. At the same time, it must be remembered that though a State can declare neutrality its decision to remain neutral really depends on the belligerents. The Scandinavian countries and the Netherlands declared their neutrality in 1939 but they were nevertheless invaded by German forces in 1940. Eire declared neutrality but remained neutral only because the presence of United Kingdom forces in Northern Ireland, Wales and south-west England made invasion by the Germans in 1940 inopportune. Here again the legal situation is less important than the naked facts.

The External Affairs Agreement is designed to bring Ceylon into the system of consultation which prevails in the remainder of the Commonwealth. The basis of this system is the communication of information. The United Kingdom keeps the Dominions fully informed on all aspects of her foreign policy. Copies of all important documents are circulated as a matter of routine through the Office of Commonwealth Relations. It would be inconsistent with Commonwealth status for the United Kingdom to accept active obligations on behalf of a Dominion, but a decision by the United Kingdom may affect indirectly a

Dominion or indeed any other country. For instance, an agreement with Argentina may affect Australian trade, an agreement with Indonesia may affect Ceylon, an agreement about sterling may affect the whole sterling group. The effect of the system of communication within the Commonwealth is that the Dominions are informed while policy is in its formative stage, so that they can make suitable representations before a formal decision is taken. The information supplied is in fact that which is supplied to the Cabinet of the United Kingdom. The Dominions, like the Cabinet, know what is going on in the Foreign Office. They are brought in before the Foreign Secretary asks for Cabinet approval and, since it is the policy of the United Kingdom not to injure the Dominions in any way, it would be the duty of the Secretary for Commonwealth Affairs to bring to the notice of the Cabinet any objections received from the Dominions. Failing representation from the Dominions, however, the Cabinet and the Foreign Office are entitled to assume that they have no objections.

The traffic is technically two-way, for the Dominions assume the same obligation to keep the United Kingdom and each other informed, and the United Kingdom may similarly make representations. Since the volume of external affairs conducted by the United Kingdom is many times greater than the volume of all the external affairs of all the Dominions, the obligations though mutual are by no means equal. Clause 2 of the External Affairs Agreement, however, very correctly makes them mutual.

Co-operation is possible in another sphere. The King is represented in all foreign capitals by ambassadors, ministers or other diplomatic representatives. They are appointed on the advice of and paid by the Government of the United Kingdom. If however the Government of a Dominion finds it convenient to be represented by the same persons no constitutional difficulty arises. The British ambassador in Rio de Janeiro has credentials signed by the King and represents the King. The King at times acts on behalf of the United Kingdom and at other times on behalf of one or more of the Dominions, and so the British ambassador can at times act on behalf of the Government of the United Kingdom and at other times on behalf of one or more of the Dominions. If on the other hand a Dominion wishes to be separately represented at Rio de Janeiro this also can be

arranged. The British ambassador then informs the Brazilian Government that His Majesty desires to be represented by an additional ambassador or minister who will act on behalf of the Dominion. When the Brazilian Government agrees, the King on the advice of the Dominion Government appoints the person and issues his credentials. Thus the Dominion can be separately represented if it so desires or represented by the United Kingdom. No Dominion has in fact provided for representation throughout the world, though Canada has ambassadors in the United States, France, China, Belgium and Luxembourg, Brazil, Argentina, Chile, Peru, Mexico, and the U.S.S.R., and ministers in the Netherlands, Cuba, Sweden, Norway and Denmark, and Switzerland. Clause 4 of the External Relations Agreement extends this arrangement to Ceylon.

The United Kingdom and most of the Dominions are members of the United Nations. Australia, Canada, India, New Zealand, the Union of South Africa and the United Kingdom were original members; Pakistan was subsequently admitted to membership, and Ceylon became qualified for membership in 1948 and in accordance with Article 5 of the External Affairs Agreement the United Kingdom gave support. In fact, the whole world except the communist group gave support. In accordance with the Charter of the United Nations, however, the adverse vote of one of the permanent members, the Soviet Union, imposed its 'veto' (as on the applications of several other countries) because certain of its satellites had been unable to secure admission.

IN THE COURT OF THE DISTRICT JUDGE  
OF THE DISTRICT OF COLUMBIA  
IN AND TO THE RECORDS OF SAID COURT  
DOETHAL M. BROWN, Plaintiff,  
vs.  
THE DISTRICT OF COLUMBIA, Defendant.  
The following is a true and correct copy  
of the original of the within and foregoing  
judgment and decree of the District Judge  
of the District of Columbia, in and to the  
records of said Court, in the above  
entitled cause, and is filed for the  
purpose of being a part of the original  
of the within and foregoing judgment and  
decree of the District Judge of the  
District of Columbia, in and to the  
records of said Court, in the above  
entitled cause.  
WITNESSETH my hand and the seal of  
said Court, this 10th day of December,  
1910.  
J. M. BROWN, District Judge.  
10

PART II

CONSTITUTIONAL DOCUMENTS





CHAPTER I

THE ACT OF 1947

THE CEYLON INDEPENDENCE ACT, 1947

(11 Geo. 6, Ch. 7)

*An Act to make provision for, and in connexion with, the attainment by Ceylon of fully responsible status within the British Commonwealth of Nations.—(10th December 1947)*

THE phrase 'fully responsible status within the British Commonwealth of Nations' was used in the announcement made on 18 June 1947 in the House of Commons by the Secretary of State for the Colonies and in the State Council by the Governor of Ceylon. In a telegram to Mr D. S. Senanayake the previous day the Secretary of State explained that it meant what was usually connoted by Dominion Status, but that at Sir Oliver Goonetilleke's suggestion 'Dominion Status' was not used because it was not well understood in Ceylon. What the Act in fact does is to confer on the Ceylon Parliament the powers possessed by the legislatures of the older Dominions under the Statute of Westminster, 1931, and by the legislatures of India and Pakistan under section 6 of the Indian Independence Act, 1947.<sup>1</sup> Mr D. S. Senanayake had indeed suggested that this should be done by adding 'Ceylon' to section 1 of the Statute of Westminster. On further examination, however, it was seen that this step would not be enough. In many Acts of the United Kingdom Parliament a distinction is drawn between 'Dominions' or some other form of expression and other territories of the Crown. To equate Ceylon with the older Dominions it was necessary to amend those Acts. The Indian Independence Act, 1947, left these amendments to be made by Order in Council, and power for the same purpose has been included in section 4 of the present Act.

The present Act does not in itself confer Dominion Status because that is a composite operation requiring changes in the law of the United Kingdom, the law of Ceylon, and the relations

<sup>1</sup> In respect of India now repealed by the Constitution of India, Art. 395.

between Ceylon and the United Kingdom. It has therefore been effected by :

1. This Act, which alters the law of the United Kingdom and confers on the Ceylon Parliament those legislative powers which could not be conferred by Order in Council.

2. The Ceylon Independence Order in Council, 1947, which removes from the Ceylon Constitution all elements of subordination to the United Kingdom.

3. The Defence and External Affairs Agreements which extend to the relations between the United Kingdom and Ceylon the practices which apply to the relations between the United Kingdom and the older Dominions.

4. The Ceylon (Office of Governor-General) Letters Patent, 1947, which create the office of Governor-General and Commander-in-Chief of Ceylon.

5. The administrative decision by which Ceylon was transferred from the jurisdiction of the Colonial Office to that of the Office of Commonwealth Relations.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Provision for the fully responsible status of Ceylon 1.—(1) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Ceylon as part of the law of Ceylon, unless it is expressly declared in that Act that Ceylon has requested, and consented to, the enactment thereof.

(2) As from the appointed day His Majesty's Government in the United Kingdom shall have no responsibility for the government of Ceylon.

(3) As from the appointed day the provisions of the First Schedule to this Act shall have effect with respect to the legislative powers of Ceylon.

Subsection (1) extends to Ceylon, as from the appointed day (4 February 1948), the same provisions as applied to the older Dominions by section 4 of the Statute of Westminster. Subsection (3) similarly extends sections 2, 3, 5, and 6 of the Statute. The Statute contains no provision corresponding to subsection (2), because already in 1931 the Government of the United Kingdom had no responsibility for the government of the older

Dominions. There is, however, a corresponding provision in section 7 of the Indian Independence Act, 1947.

By reason of section 9 of the Statute of Westminster, 1931, the 'request and consent' of Australia must be given by the Parliament as well as the Government of the Commonwealth. When the Statute was re-enacted for the Union of South Africa by the Status of the Union Act, 1934, it was amended so as to make the 'request and consent' those of the Parliament of the Union. Section 6 of the Indian Independence Act, 1947, similarly requires the 'request and consent' of the legislatures of India and Pakistan. Ceylon follows the example of Canada, where the matter is left vague so that in effect the Government would make the 'request and consent'.

This limited power of legislation was retained in the Parliament of the United Kingdom because it was thought that there were matters, such as those affecting the succession to the throne, British nationality, etc., on which it would be convenient to have a single legislative authority. Also, Canada and Australia may occasionally require imperial legislation, for Canada has no power of constitutional amendment, while in Australia the Constitution Act cannot in all respects be amended by local legislation.

2.—As from the appointed day Ceylon shall be included in the definition of 'Dominion' in paragraph (23) of section one hundred and ninety of the Army Act and of the Air Force Act (which section, in each Act, relates generally to the interpretation of the Act), and accordingly in the said paragraph (23), in each Act, for the words 'and Newfoundland' there shall be substituted the words 'Newfoundland and Ceylon'.

The Army Act and the Air Force Act contain codes of rules for the discipline of the British Army and the Royal Air Force respectively. Since a distinction is drawn in those Acts between 'Dominions' and other dominions of the Crown, it was necessary to include Ceylon among the 'Dominions'.

3.—(1) No court in Ceylon shall, by virtue of the Indian Divorce and Colonial Divorce Jurisdiction Acts, 1926 and 1940, have jurisdiction in or in relation to any proceedings for a decree for the dissolution of a marriage, unless those proceedings were instituted before the appointed day, but, save as aforesaid and subject to any provision to the contrary which may hereafter be

made by any Act of the Parliament of the United Kingdom or of Ceylon, all courts in Ceylon shall have the same jurisdiction under the said Acts as they would have had if this Act had not been passed.

(2) Any rules made on or after the appointed day under subsection (4) of section one of the Indian and Colonial Divorce Jurisdiction Act, 1926, for a court in Ceylon shall, instead of being made by the Secretary of State with the concurrence of the Lord Chancellor, be made by such authority as may be determined by the law of Ceylon, and so much of the said subsection and of any rules in force thereunder immediately before the appointed day as requires the approval of the Lord Chancellor to the nomination for any purpose of any judges of any such court shall cease to have effect.

(3) The references in subsection (1) of this section to proceedings for a decree for the dissolution of a marriage include references to proceedings for such a decree of presumption of death and dissolution of a marriage as is authorized by section eight of the Matrimonial Causes Act, 1937.

The Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, gave power to courts in India and the colonies to dissolve marriages according to United Kingdom law where the parties were domiciled in a part of the United Kingdom. Since Ceylon has ceased to be a colony the power is withdrawn by this section. A similar provision is to be found in section 17 of the Indian Independence Act, 1947.

Consequential  
amendments  
not affecting  
the law of  
Ceylon

4.—(1) As from the appointed day, the Acts and Regulations referred to in the Second Schedule to this Act shall have effect subject to the amendments made by that Schedule, and His Majesty may by Order in Council make such further adaptations in any Act of the Parliament of the United Kingdom of an earlier session than this Act, or in any instrument having effect under any such Act, as appear to him necessary in consequence of section one of this Act:

Provided that this subsection shall not extend to Ceylon as part of the law thereof.

(2) Notwithstanding anything in the Interpretation Act, 1889, the expression 'colony' shall not include Ceylon in any Act of the Parliament of the United Kingdom passed on or after the appointed day or in any such Act passed before that day, but in the same session as this Act, to provide for the independence of Burma as a country not within His Majesty's dominions.

(3) Any Order in Council made under this section may be varied or revoked by a subsequent Order in Council and, though made after the appointed day, may be made so as to have effect from that day.

(4) Every Order in Council made under this section shall be laid before Parliament forthwith after it is made, and if either House of Parliament within the period of forty days beginning with the day on which any such Order is laid before it resolves that an Address be presented to His Majesty praying that the Order be annulled, no further proceedings shall be taken thereunder and His Majesty in Council may revoke the Order, so, however, that any such resolution or revocation shall be without prejudice to the validity of anything previously done under the Order or to the making of a new Order.

In reckoning any such period of forty days as aforesaid, no account shall be taken of any time during which Parliament is dissolved or prorogued, or during which both Houses are adjourned for more than four days.

(5) Notwithstanding anything in subsection (4) of section one of the Rules Publication Act, 1893, an Order in Council made under this section shall not be deemed to be or to contain a statutory rule to which that section applies.

This section is purely for the purpose of assimilating Ceylon with the older Dominions so far as the law of the United Kingdom is concerned. For instance, a certificate of naturalization granted by the Governor of Ceylon was recognized in the United Kingdom only if it was approved by a Secretary of State, whereas a certificate granted by the Governor-General of Australia required no such approval but was recognized in the United Kingdom if the law of Australia complied with certain conditions. Ceylon has now been placed in the same position as Australia, though in fact the nationality law of the United Kingdom has been changed since the section was enacted. The section has no application whatever to Ceylon, which may amend its own law, including its nationality law, as it pleases.

The Indian Independence Act, 1947, did not have a series of amendments similar to the Second Schedule because in section 18 it provided for the issue of Orders in Council. Power is also taken in section 4(1) of the present section to issue such Orders in case any amendments have been overlooked. Such Orders may not change the law of Ceylon, for that is the concern of the Ceylon Parliament. There is power in section 8 of the Ceylon Independence Order in Council, 1947, for the Governor-General to amend the laws of Ceylon by Proclamation. Thus, United Kingdom law may be amended by the King in Council and Ceylon law by the Governor-General.

The Interpretation Act, 1889, defines 'colony', but there is in United Kingdom law no general definition of 'Dominion'. Accordingly subsection (2) takes Ceylon out of the definition of 'colony', but specific legislation (contained in the Second Schedule) is necessary to include Ceylon wherever a 'Dominion' is referred to. The effect is, however, that in the law of the United Kingdom Ceylon ceases to be a 'colony' and becomes a 'Dominion'. There would have been less misrepresentation in Ceylon if it had been possible for the lawyers so to provide by express words; but it will be seen from the Second Schedule that this was not possible and that individual amendments were necessary.

The mere inclusion of Ceylon among the Dominions mentioned in Section 1 of the Statute of Westminster, 1931, was not feasible; for there was legislation in the United Kingdom both before and after 1931 which distinguished 'colonies' and 'Dominions'. Specific legislation, which is contained in the Second Schedule, was necessary to alter these provisions so that Ceylon might be transferred from the 'colonies' to the 'Dominions'. It was therefore decided not to bring Ceylon within the Statute but to re-enact the Statute, and this has been done by section 1 and the First Schedule.

Short title and  
commencement

5.—(1) This Act may be cited as the Ceylon Independence Act, 1947.

(2) In this Act the expression 'the appointed day' means such day as His Majesty may by Order in Council appoint.

The short title follows that of the Indian Independence Act, 1947, on which in fact the Ceylon Act was based. The Ceylon Government 'advised' the title, and there was no difficulty about it, for Dominion Status is a status of independence. India and Pakistan were specifically called 'Dominions' because it was necessary to distinguish the new legal entity, the Dominion of India, from the old legal entity India, which included Pakistan and the Indian States. Ceylon can call itself the Dominion of Ceylon if it so pleases.

'The appointed day' was 4 February 1948, as fixed by the Ceylon Independence (Commencement) Order in Council, 1947, the text of which is given *post*.

## SCHEDULES

## FIRST SCHEDULE

Section 1

## LEGISLATIVE POWERS OF CEYLON

1.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the appointed day by the Parliament of Ceylon.

(2) No law and no provision of any law made after the appointed day by the Parliament of Ceylon shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of Ceylon shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of Ceylon.

2. The Parliament of Ceylon shall have full power to make laws having extra-territorial operation.

3. Without prejudice to the generality of the foregoing provisions of this Schedule, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the legislature of a British possession did not include reference to the Parliament of Ceylon.

4. Without prejudice to the generality of the foregoing provisions of this Schedule, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in Ceylon.

1. This paragraph repeats verbatim section 2 of the Statute of Westminster, 1931, save that it took effect on 4 February 1948. The Act took effect at midnight on 3/4 February. It then became an 'existing' Act and so can be amended by the Parliament of Ceylon. Eire and the Union of South Africa have in fact amended the Statute of Westminster under section 2 thereof, which contained the phrase 'existing or future Act of Parliament'.

2. This paragraph repeats verbatim section 3 of the Statute of Westminster, 1931. Before 4 February 1948 the Ceylon Parliament could enact extra-territorial legislation only if it was necessary for the 'peace, order or good government' of Ceylon. An Act of Parliament cannot now be questioned on the ground that it deals with acts or persons outside Ceylon.

3. This paragraph is probably not strictly necessary, since it should be covered by paragraph 1. The provision has been inserted 'for avoidance of doubts' because a similar provision is contained in section 5 of the Statute of Westminster, 1931.

4. This paragraph similarly re-enacts section 6 of the Statute and for the same reason.

## AMENDMENTS NOT AFFECTING LAW OF CEYLON

*British Nationality*

1. The following enactments (which provide for certificates of naturalization granted and other things done under the law of one part of His Majesty's dominions to be recognized elsewhere), namely—

(a) section eight of the British Nationality and Status of Aliens Act, 1914; and

(b) paragraph (c) of section eight of the British Nationality and Status of Aliens Act, 1943;

shall apply in relation to Ceylon as they apply in relation to the Dominions specified in the First Schedule to the said Act of 1914.

*Financial*

2. As respects goods imported after such date as His Majesty may by Order in Council appoint section four of the Import Duties Act, 1932, and section two of the Isle of Man (Customs) Act, 1932 (which relate to imperial preference other than colonial preference), shall apply to Ceylon.

3. In section nineteen of the Finance Act, 1923 (which, as extended by section twenty-six of the Finance Act, 1925, provides for exemption from income tax and land tax of the High Commissioner and other officials of self-governing dominions), the expression 'self-governing dominion' shall include Ceylon.

4. In the Colonial Stock Act, 1934 (which extends the stocks which may be treated as trustee securities), the expression 'Dominion' shall include Ceylon.

*Visiting Forces*

5. The following provisions of the Visiting Forces (British Commonwealth) Act, 1933, namely—

(a) section three (which deals with deserters);

(b) section four (which deals with attachment and mutual powers of command);

(c) the definition of 'visiting force' for the purposes of that Act generally which is contained in section eight thereof;

shall apply in relation to forces raised in Ceylon as they apply in relation to forces raised in the Dominions within the meaning of the Statute of Westminster, 1931.

*Ships and Aircraft*

6.—(1) In the definition of 'Dominion ship or aircraft' contained in subsection (2) of section three of the Emergency Powers (Defence) Act, 1939, and in that contained in Regulation one hundred of the Defence (General) Regulations, 1939, the expression 'a Dominion' shall include Ceylon.

(2) Paragraph (2) of Regulation fifty-four of the Defence (General) Regulations, 1939 (which confers power by notice to requisition from certain British subjects and companies space or accommodation in ships and aircraft), shall not authorize service of a notice on a British subject resident in Ceylon or a corporation incorporated under the law of Ceylon.

7. The Ships and Aircraft (Transfer Restriction) Act, 1939, shall not apply to any ship by reason only of its being registered in, or licensed under the law of, Ceylon; and the penal provisions of that Act shall not apply to persons in Ceylon (but without prejudice to the operation with respect to any ship to which that Act does apply of the provisions thereof relating to the forfeiture of ships).

8. In the Whaling Industry (Regulation) Act, 1934, the expression 'British ship to which this Act applies' shall not include a British ship registered in Ceylon.



*Matrimonial Causes*

9. Section four of the Matrimonial Causes (War Marriages) Act, 1944 (which provides for the general recognition in British courts of decrees and orders made by virtue of that Act or of any law passed in a part of His Majesty's dominions outside the United Kingdom and declared by an Order in Council to correspond to that Act), shall, in relation to the making of any further Order in Council as respects a law of Ceylon, apply subject to the same provision for securing reciprocity as is made by proviso (ii) to subsection (1) thereof in the case of Dominions within the meaning of the Statute of Westminster, 1931.

*Copyright*

10. If the Parliament of Ceylon repeals or amends the Copyright Act, 1911, as it forms part of the law of Ceylon, then—

- (a) except by virtue of sub-paragraph (b) of this paragraph, that Act shall no longer apply in relation to Ceylon as a part of His Majesty's dominions to which the Act extends, so, however, that this provision shall not prejudicially affect any legal rights existing at the time of the repeal or amendment;
- (b) Ceylon shall be included in the expression 'self-governing dominion' for the purposes of subsection (2) of section twenty-five and subsection (3) of section twenty-six of that Act (which relate to reciprocity with self-governing dominions having their own copyright law), and the said subsection (2) shall have effect in relation to Ceylon as if that Act, so far as it remains part of the law of Ceylon, had been passed by the Parliament thereof.

Paragraph 1 has been repealed by the Parliament of the United Kingdom in the British Nationality Act, 1948, since the British Nationality and Status of Aliens Acts, 1914 to 1943, have been repealed. A citizen of Ceylon is a British subject or Commonwealth citizen in the law of the United Kingdom by virtue of section 1 of the British Nationality Act, 1948. Neither the Second Schedule nor the provisions just mentioned apply to the law of Ceylon.

THE CEYLON INDEPENDENCE (COMMENCEMENT)  
ORDER IN COUNCIL, 1947

At the Court at Buckingham Palace, the 19th day of  
December, 1947

*Present :*

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by the Ceylon Independence Act, 1947, provision is made for the attainment by Ceylon of fully responsible status within the British Commonwealth of Nations :

AND WHEREAS in the said Act the expression 'the appointed day' means such day as His Majesty may by Order in Council appoint :

AND WHEREAS it is expedient to appoint, by this Order, the appointed day for the purposes of the said Act :

NOW, THEREFORE, His Majesty, in exercise of the powers conferred on Him by the Ceylon Independence Act, 1947, and of all other powers enabling Him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered as follows :—

- Short title      1. This Order may be cited as the Ceylon Independence (Commencement) Order in Council, 1947.
- Appointed Day      2. The appointed day for the purposes of the Ceylon Independence Act shall be the fourth day of February, 1948.

The 'appointed day' for the Ceylon Independence Act, 1947, was also the date of operation of the Ceylon Independence Order in Council, 1947 : see section 1(4) of that Order. It was, too, the date on which the Agreements took effect : see clause 5 of the Defence Agreement, clause 7 of the External Affairs Agreement and clause 6 of the Public Officers Agreement.

CHAPTER II

*THE ORDERS IN COUNCIL, 1946 AND 1947*

THE CEYLON INDEPENDENCE ORDER  
IN COUNCIL, 1947

At the Court at Buckingham Palace, the 19th day of  
December, 1947

*Present :*

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by the Ceylon (Constitution) Order in Council, 1946 (hereinafter called 'the Principal Order') as amended by the Ceylon (Constitution) (Amendment) Order in Council, 1947, the Ceylon (Constitution) (Amendment No. 2) Order in Council, 1947, and the Ceylon (Constitution) (Amendment No. 3) Order in Council, 1947 (hereinafter together called 'the Amending Orders') provision is made for the Government of Ceylon and for the establishment of a Parliament in and for Ceylon :

AND WHEREAS by the Ceylon Independence Act, 1947, provision is made for the attainment by Ceylon of fully responsible status within the British Commonwealth of Nations :

AND WHEREAS it is expedient for the same purpose that the Principal Order and the Amending Orders should be amended in the manner hereinafter appearing :

NOW, THEREFORE, it is hereby ordered by His Majesty, by and with the advice of His Privy Council, as follows :—

1.—(1) This Order may be cited as the Ceylon Independence Order in Council, 1947. Short title and commencement

(2) The Principal Order, the Amending Orders and this Order may be cited together as the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947.

(3) This Order shall be construed as one with the Principal Order.

(4) This Order shall come into operation on the day appointed by His Majesty by Order in Council as the appointed day for the purposes of the Ceylon Independence Act, 1947.

The phrase 'construed as one' means that the Orders must be regarded as a single instrument which may be properly described as 'the Constitution', though the Ceylon Independence Act, 1947, was necessary to remove the limitations on independence which would have been implicit in that Constitution if

the Orders in Council had stood alone. This was the defect implicit in the so-called 'Sri Lanka Bill' which was refused the royal assent but would not have conferred independence or Dominion Status even if it had received that assent. In fact, it probably could not have been read as conferring the powers conferred by the present Orders in Council.

The date of operation was 4 February 1948: see Ceylon Independence (Commencement) Order in Council, 1947.

The Governor-General 2.—(1) (*Incorporated in the Principal Order*)  
 (2) Every reference in the Principal Order to the Governor shall be read and construed as a reference to the Governor-General.

(Accordingly, the expression 'Governor-General' has been substituted for 'Governor' in the Principal Order as printed on succeeding pages)

Power of Parliament to amend Order in Council 3.—(*Incorporated in the Principal Order*)

Cessation of Power of His Majesty in Council to legislate for Ceylon 4.—The power of His Majesty, His Heirs and Successors, with the advice of His or Their Privy Council—

(a) to make laws having effect in the Island for the purposes specified in subsection (1) of section 30 of the Principal Order; and

(b) to revoke, add to, suspend or amend the Principal Order or the Amending Orders, or any part of those Orders,

shall cease to exist.

When the King confers a Constitution on a territory and fails to reserve a power of legislation or constitutional amendment to himself he loses that power: *Campbell v. Hall*, Cowp. 204. The only instruments relating to Ceylon which he may now execute are:

Letters Patent constituting the Office of Governor-General;

The Commission appointing the Governor-General;

The Instructions to the Governor-General.

In accordance with section 4 of the Ceylon (Constitution) Order in Council, 1946, these must be issued on the advice of the Ceylon Government. The Letters Patent and the Instructions now in operation are printed *post*. The Commission is personal to the Governor-General or the Officer administering the Government.

5.—No Bill passed by both Chambers of the Legislature of the Island, or by the House of Representatives alone, in accordance with the provisions of the Principal Order shall be reserved for the signification of His Majesty's pleasure; and the provisions in that behalf contained in sections 36 and 37 of the Principal Order shall accordingly cease to have effect.

Cessation of reservation of Bills

The power of reservation, though in operation in most of the Dominions, has been abolished in Ceylon. A Bill may be given assent or refused assent by the Governor-General: see Ceylon (Constitution) Order in Council, 1946, section 36.

6.—The provisions of the Principal Order and of the Amending Orders specified in Column 1 of the Schedule to this Order are hereby revoked to the extent, or amended in the manner, specified in Column 2 of that Schedule.

Consequential and minor revocations and amendments

The revocations and amendments have been incorporated in the text of the Order as printed *post*.

7.—Nothing in this Order shall be construed as affecting—

Saving Provisions

- (a) the continuance, subject to the modifications made by this Order, of the Parliament of Ceylon as constituted immediately before the commencement of this Order;
- (b) save as expressly provided by this Order, the tenure of office of any Minister, Parliamentary Secretary, Senator, or Member of the House of Representatives, or of any person appointed to any office under the provisions of the Principal Order; or
- (c) the validity or continued operation of any Proclamation, Order, Regulation or other Instrument made under the Principal Order before the commencement of this Order, without prejudice however to any power to amend, revoke or replace any such Instrument.

The Parliament of Ceylon was prorogued at the end of January 1948 and a second session was opened with a formal ceremony by H.R.H. the Duke of Gloucester, who held a special Commission from the King and thus had power to act on the King's behalf under section 7 of the Ceylon (Constitution) Order in Council, 1946.

8.—The Governor-General may, before the expiry of a period of six months from the commencement of this Order, by Proclamation published in the *Government Gazette*, make such provision as he is satisfied is necessary or expedient, in consequence of the provisions of this order, for modifying,

Modification of existing laws

adding to or adapting any written law which refers in whatever terms to the Governor or to any public officer or authority, or otherwise for bringing any written law into accord with the provisions of this Order and of the Principal Order as amended by this Order, or for giving effect to those provisions.

The Governor-General acted on 'advice' in accordance with section 4 of the Ceylon (Constitution) Order in Council, 1946.

THE CEYLON (CONSTITUTION) ORDER  
IN COUNCIL, 1946

At the Court at Buckingham Palace, the 15th day of May, 1946

*Present :*

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by the Orders in Council set out in the First Schedule to this Order provision is made for the constitution of a State Council for the Island of Ceylon :

AND WHEREAS in the years 1944 and 1945 a Commission was appointed by His Majesty's Government under the chairmanship of the Right Honourable Herwald, Baron Soulbury, O.B.E., M.C., to visit the Island of Ceylon in order to examine and discuss proposals for constitutional reform, and the said Commission duly visited the Island and made a report to His Majesty's Government :

AND WHEREAS a Statement of Policy on Constitutional Reform in Ceylon was presented to Parliament by His Majesty's Government in the month of October, 1945 :

AND WHEREAS paragraph 10 of the said Statement of Policy contained the following decision :

' His Majesty's Government are in sympathy with the desire of the people of Ceylon to advance towards Dominion status and they are anxious to co-operate with them to that end. With this in mind, His Majesty's Government have reached the conclusion that a Constitution on the general lines proposed by the Soulbury Commission (which also conforms in broad outline, save as regards the Second Chamber, with the Constitutional scheme put forward by the Ceylon Ministers themselves) will provide a workable basis for constitutional progress in Ceylon.

' Experience of the working of Parliamentary institutions in the British Commonwealth has shown that advance to Dominion Status has been effected by modification of existing constitutions and by the establishment of conventions which have grown up in actual practice.

' Legislation such as the Statute of Westminster has been the recognition of constitutional advances already achieved rather

than the instrument by which they were secured. It is therefore the hope of His Majesty's Government that the new Constitution will be accepted by the people of Ceylon with a determination so to work it that in a comparatively short space of time such Dominion Status will be evolved. The actual length of time occupied by this evolutionary process must depend upon the experience gained under the new constitution by the people of Ceylon':

AND WHEREAS, having regard to the matters aforesaid, it is expedient to revoke the said Orders in Council and to make other provision in lieu thereof:

NOW, THEREFORE, it is hereby ordered by His Majesty, by and with the advice of His Privy Council, as follows:—

This preamble is now matter of history, since the policy of His Majesty's Government stated in October 1945 was changed in June 1947. Since a preamble is not part of an enactment, however, it has not been revoked.

The paragraph quoted was inserted because Mr D. S. Senanayake wanted some reference to Dominion Status or independence and it was not possible to agree on a form of words. It was therefore decided to insert the whole of paragraph 10 of the White Paper.

## PART I

### PRELIMINARY

- |  |                                    |
|--|------------------------------------|
| <p>1.—(1) This Order may be cited as the Ceylon (Constitution) Order in Council, 1946.</p> <p>(2) Nothing in this Order shall extend to the Maldivian Islands.</p> | <p>Short title and application</p> |
|--|------------------------------------|

Subsection (1) is identical (except for the change of date) with the first sentence of section 1 of the Ministers' draft, while subsection (2) is identical with section 2 of that draft.

The Order in Council derives its legal validity from the royal prerogative. The Maritime Provinces were ceded to the Crown by the Treaty of Amiens, 1802, and the Kandyan Provinces by the Kandyan Convention, 1815. The King thus obtained power to legislate for the whole Island. He retained that power because in each successive Constitution he reserved to himself power to enact laws, the last such reservation (except in relation to minor constitutional amendments) being in Article 98 of the Ceylon (State Council) Order in Council, 1931. A similar power

was reserved in section 30(4) of the present Order, but it has been abolished by section 4 of the Ceylon Independence Order in Council, 1947. Amendments to this Constitution must therefore be made by legislation of the Ceylon Parliament in accordance with section 29(4).

The Maldive Islands are not part of Ceylon. Indeed they are not British territory at all but an independent State under the suzerainty of the Crown. For convenience the Governor acted for the King and received the annual Maldivian tribute, but the Governor-General does not act in this capacity because he is not a representative of the Government of the United Kingdom, which is responsible for the exercise of the King's functions as suzerain. The functions have been taken over by the High Commissioner for the United Kingdom in Ceylon.

The documents refer to 'dependencies' of Ceylon, but it is not known where such dependencies are. The islands off the coasts are parts of the mainland Provinces and therefore of 'the Island'.

Dates of operation 2.—(1) This Order shall be published in the *Government Gazette*.

(17-5-46) (2) Parts I, IV and IX of this Order shall come into operation on the date on which this Order is published in the *Government Gazette*.

(5-7-47) (3) Part III of this Order shall come into operation on such date as the Governor may appoint by Proclamation, being a date not earlier than nine months from the date on which this Order is published in the *Government Gazette*.

(1-9-47) (4) Parts II, V, VI and VII of this Order shall come into operation on such date or dates as the Governor may appoint by Proclamation, being a date or dates not later than the date on which the names of Members elected to the first House of Representatives are first published in the *Government Gazette*.

(14-10-47) (5) Part VIII of this Order shall come into operation on the date of the first meeting of the House of Representatives.

Subsection (1) is taken from the Ministers' Draft, section 1. The Ministers' draft had a much simpler scheme for bringing the Constitution into operation. It had two dates, the 'date of operation' when the Constitution was published in the *Gazette* and the 'date of appointment' when the Constitution came into full operation. The several provisions indicated on



which date they were to take effect. The drafting scheme was altered, however, so as to put the transitional provisions at the end, where they could be ignored once the Constitution was in full operation. In order to effect this, it was necessary to specify a series of dates for the coming into operation of the various parts.

The scheme may be summarized as follows. Part IV, which deals with the delimitation of electoral districts, and Part IX, which deals with the transitional stage, together with the general provisions of Part I, came into operation as soon as the Order was published. So also did the Ceylon (Electoral Registers) Order in Council, 1946. Accordingly, the Delimitation Commission could be appointed immediately and could proceed with the task of determining the new constituencies. When that had been done, the Legal Secretary could have the electoral registers prepared under the old Order in Council as amended by the new one.

The next stage was the holding of elections to the House of Representatives. Accordingly, Part III, dealing with the legislature, was brought into operation by Proclamation. Nine months at least had to be allowed for the preliminary work. That is, the Proclamation could not be issued before 17 February 1947. Part III also contains all the provisions relating to the Senate, so that as soon as the House of Representatives was constituted the Senate also could be constituted. It was then possible to bring the rest of the Constitution into operation.

It was originally intended to bring Part VIII into operation on 1 October 1947 but, since it seemed likely that the elections would take longer than had been anticipated, the Order was amended to bring Part VIII into operation at the first meeting of the House of Representatives.

3.—(1) In this Order, unless the context otherwise Interpretation requires—‘adjourn’ with its grammatical variations and cognate expressions means terminate a sitting of the Senate or the House of Representatives, as the case may be ;

‘British subject’ means any person who is a British subject according to the law for the time being of the United Kingdom, any person who has been naturalized under any enactment of any of His Majesty’s dominions, and any person who is a citizen or subject of any of the Indian States as defined for the purposes of the Government of India Act, 1935 ;

'dissolve' with its grammatical variations and cognate expressions means terminate the continuance of a Parliament;

'elector' means a person entitled to vote at an election of a Member;

'the existing Orders in Council' means the Orders in Council set out in the First Schedule to this Order;

'general election' means the first general election of Members after the date on which this Part of this Order comes into operation or a general election of Members after a dissolution;

'Governor-General' means the Governor-General and Commander-in-Chief of the Island and includes the Officer for the time being Administering the Government and, to the extent to which a Deputy for the Governor-General is authorized to act, that Deputy;

'Island' means the Island of Ceylon and the dependencies thereof;

'judicial office' means any paid judicial office;

'Legislative Council' means the Legislative Council which was constituted by the Ceylon (Legislative Council) Order in Council, 1923;

'Member' or 'Member of Parliament' means a Member of the House of Representatives;

'Parliament' means the Parliament of the Island;

'President' means the President, for the time being, of the Senate and includes the Deputy President or other Senator who may for the time being be acting as President;

'Proclamation' means a Proclamation by the Governor-General published in the *Government Gazette*;

'prorogue' with its grammatical variations and cognate expressions means bring a session of Parliament to an end;

'public office' means any office the holder of which is a public officer;

'public officer' means any person who holds a paid office, other than a judicial office, as a servant of the Crown in respect of the Government of the Island, but does not include—

- (a) the Governor-General or any member of the Governor-General's office or of his personal staff,
- (b) the President, the Speaker or an officer of the Senate or the House of Representatives,
- (c) the Clerk to the Senate, the Clerk to the House of Representatives or a member of the staff of the Clerk to the Senate or the Clerk to the House of Representatives,
- (d) a Minister or Parliamentary Secretary, or a person who, having held office as a Minister under the existing Orders in Council immediately prior to the date on which Part III of this Order comes into operation, continues to hold office as a Minister at any time during the period commencing on that date and ending on

the date on which Ministers or other authorities assume charge of such functions as may be assigned to them under this Order,

- (e) a Senator or a Member of Parliament by reason only of the fact that he receives any remuneration or allowance as a Senator or Member,
- (f) a member of the Judicial Service Commission,
- (g) a member of the Public Service Commission,
- (h) the Auditor-General,
- (i) a member of the Ceylon Defence Force or of the Ceylon Naval Volunteer Force or of any other naval, military, or air force that may be raised under the provisions of any Act of Parliament, by reason only of his membership of any such force,
- (j) a Crown Advocate other than a Crown Counsel,
- (k) a Crown Proctor ;

'Secretary of State' means one of His Majesty's Principal Secretaries of State ;

'Senator' means a person who is for the time being a Member of the Senate ;

'Session' means the meetings of Parliament commencing when Parliament first meets after being constituted under this Order, or after its prorogation or dissolution at any time, and terminating when Parliament is prorogued or is dissolved without having been prorogued ;

'Sitting' means a period during which the Senate or the House of Representatives, as the case may be, is sitting continuously without adjournment, and includes any period during which the Senate or the House of Representatives is in Committee ;

'Speaker' means the Speaker for the time being of the House of Representatives and includes the Deputy Speaker or other Member who may for the time being be acting as Speaker ;

'State Council' means the State Council constituted by the Ceylon (State Council) Order in Council, 1931 ;

'United Kingdom' means the United Kingdom of Great Britain and Northern Ireland.

(2) Any reference in this Order to an Order in Council shall be construed as a reference to that Order as amended by any subsequent Order.

(3) Any reference to the holder of a particular judicial or public office shall be deemed to include a reference to a person acting in that office.

(4) In the interpretation of this Order, the provisions of the Interpretation Ordinance other than the definition of 'the Government' shall, subject to the express provisions of this Order, and notwithstanding any provision to the contrary in that Ordinance, apply as it applies for the interpretation of an Ordinance of the State Council, or of an Act of Parliament.

Most of these definitions are taken from the Ministers' draft, section 4, though in some cases with drafting amendments.

It may be convenient at this point to explain the words relating to sittings of the two Chambers. They are not normally included in Constitutions but were included in the Ministers' draft, and hence in this Constitution, because the State Council, which had executive as well as legislative functions, followed an entirely different procedure. First, it should be noted that 'Parliament is often used colloquially to describe a permanent institution. Legally and historically, however, it is not so. There is a new Parliament every time the Governor-General summons a new Parliament. A Parliament is brought into existence by a Proclamation under section 15(1), which summons a Parliament. That Parliament continues in existence until it is dissolved by Proclamation under section 15(1). The word 'dissolve' is therefore defined by the present section as meaning terminate the continuance of a Parliament. But a Parliament may be in existence without actually meeting—there have been periods in British history when Parliament did not sit for years, though this is not possible in Ceylon because by section 15(2) Parliament must be summoned to meet once at least in every year. Parliament, then, is summoned to meet under section 15(1) and then holds a 'session', which is defined in the present section. The session continues until the Parliament is dissolved or prorogued. Prorogue is defined in this section to mean bring a session to an end. The effect of a prorogation is to bring all the business to an end in both Chambers, so that anything which has not been completed has to be started anew in the new session unless the Chamber concerned has specially resolved to carry it over. This arrangement, which is in operation in the Parliament of the United Kingdom, was not in operation in the State Council because it was an executive body which had only one session during the lifetime of the Council. It has been extended to the Ceylon Parliament because it is extremely useful to have the order paper completely cleared once a year. Normally a session begins in July and ends at the beginning of the hot weather late in March or early in April. But though Parliament will be in session between summons and prorogation or dissolution, the Chambers will not always be sitting. Either Chamber may adjourn as it

pleases, or in accordance with Standing Orders, and 'adjourn' is defined to mean terminate the sitting of the Chamber concerned, while 'sitting' is defined as a period during which the Chamber concerned is sitting continuously without adjournment, including any period during which the Chamber is in committee.

The definition of 'British subject' was included because, when the Constitution was enacted in 1947, there were no citizens of Ceylon. It was not feasible to define 'Ceylonese' shortly, nor was it desired to deprive 'Europeans' and Indians of representation in the Ceylon Parliament. The definition was a little complicated because there were two classes of 'British subjects', those who were British subjects according to the law of the United Kingdom, and those who had been naturalized in a Dominion (e.g. Australia) without becoming British subjects according to the law of the United Kingdom. Also, many of the so-called 'Indians' in Ceylon were not British subjects because they were born in States, such as Travancore and Mysore.

Since the Constitution was enacted, however, the law of the United Kingdom has been altered by the British Nationality Act, 1948. It recognizes, in effect, that each country of the Commonwealth, including the United Kingdom, may have its own nationality law but that, so far as the law of the United Kingdom is concerned, a person who is a citizen of the United Kingdom and Colonies or a citizen of Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia or Ceylon, shall be a British subject or Commonwealth citizen. Certain additions and qualifications have to be made applying, for instance, to citizens of Eire (Ireland) and to persons who remain British subjects without being citizens of any of the above countries. Since the Ceylon Constitution refers specifically to 'the law of the United Kingdom for the time being', the British Nationality Act, 1948, determines who are 'British subjects' for the purposes of the Constitution. The reference to the Indian States is now unnecessary so far as India is concerned, though it may still apply to those States which have joined Pakistan, for the citizens of states annexed to India are now Indian citizens under the Constitution of India and therefore British subjects under the law of the United Kingdom.

It is immaterial whether or not an Indian citizen is a British

subject according to the law of India, for it is the law of the United Kingdom which determines the question.

An attempt was made by the Constitution Amendment Bill of 1950 to remove this definition and to substitute other provisions under which only citizens of Ceylon, and citizens of Commonwealth countries which allowed citizens of Ceylon to be elected to their legislatures, would have been entitled to sit in Parliament. This would have qualified, for instance, United Kingdom citizens and Australian nationals but not Indian citizens. The Bill did not secure the majority required by the proviso to section 29(4) of the Constitution.

The parallel bill to amend the Ceylon (Parliamentary Elections) Order in Council, 1946, required only a simple majority and was passed as the Ceylon (Parliamentary Elections) Act, No. 48 of 1949. Since it limits the franchise to citizens of Ceylon it follows from section 12 of the present Constitution that British subjects who are not citizens of Ceylon cannot be elected or nominated to either House.

The definition of 'Governor-General' replaces section 33 of the Ministers' draft. The appointment of a Governor-General was not provided for by the Constitution Order of 1946, apparently because it was thought more consonant with Ceylon's semi-subordinate status so to provide by Letters Patent. In the new section 4 inserted by the Ceylon Independence Order in Council, 1947, however, the scheme of the Ministers' draft was restored and in fact part of section 33 of the Ministers' draft was incorporated verbatim. It was however decided not to insert in the Constitution provisions for the appointment of an Officer administering the Government or a Deputy. He is brought in by the present section but the actual appointment is covered by Articles 7 and 8 of the Letters Patent. Failing a specific appointment the Chief Justice will administer the Government, as the Soulbury Commission recommended (para. 347).

The definition of 'public officer' is not free from difficulties. It may be noted first that it excludes a judicial officer, which means any person holding a paid judicial office. Secondly, it excludes all persons who are not servants of the Crown. There is a great deal of English case law on this point, and some of the difficulties might have been avoided if the apparently less exact phrase 'paid office under the Crown' in section 4 of the

Ministers' draft had been used. The person must be a servant of the Crown in respect of the Government of the Island, thus excluding persons who are servants of the Crown in respect of some other Government, such as that of the United Kingdom. Employees of the University, teachers in assisted schools, and employees of local authorities and other autonomous bodies, whether or not financed in whole or in part out of moneys provided by Parliament, would not be servants of the Crown. It is generally held (though the matter is not free from doubt) that a member or servant of a body appointed by Commission from the Crown is not a servant of the Crown.

The following notes on the classes excluded from the definition may be helpful :—

(a) The Governor-General includes his Deputy and the Officer Administering the Government : see the definition of ' Governor-General '. The Secretary to the Governor-General, the Private Secretary, and the clerical and domestic staff at Queen's House are within the sub-paragraph.

(b) There is no specific provision for the payment of these officers, except (in the case of officers of the House of Representatives) as a transitional measure under section 75. Such provision may, however, be made by law. The Ministers' draft, section 32(3), made specific provision.

(c) These officers are provided for by section 28. There is no specific provision for the payment of salaries, but such salaries may be provided by law.

(d) There is no specific provision for the payment of salaries, but salaries may be provided by law. Specific provision was made in section 49 of the Ministers' draft. It seems clear that a Minister under the Donoughmore Constitution was included, but owing to a doubt an amendment was made to make it clear.

(f) The salary of an appointed member of the Judicial Service Commission is provided for by section 53(6). He may not, however, be a Senator or a Member of Parliament.

(g) The salary of a member of the Public Service Commission is provided for by section 58(7). He may not, however, be a Senator or a Member of Parliament.

(h) The salary of the Auditor-General is provided for by section 70(2).

## PART II

## THE GOVERNOR-GENERAL

Appointment  
and Functions  
of Governor-  
General

4.—(1) The Governor-General shall be appointed by His Majesty, and shall have and may exercise in the Island during His Majesty's pleasure, but subject to the provisions of this Order, such powers, authorities and functions of His Majesty as His Majesty may be pleased to assign to him.

(2) All powers, authorities and functions vested in His Majesty or the Governor-General shall, subject to the provisions of this Order and of any other law for the time being in force, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty :

Provided that no act or omission on the part of the Governor-General shall be called in question in any court of law or otherwise on the ground that the foregoing provisions of this subsection have not been complied with.

This section is printed as provided by section 2 of the Ceylon Independence Order in Council, 1947, which replaced the section as enacted in the Constitution Order. Following the classification adopted by section 36 of the Ministers' draft and indeed using the very language of subsections (2) and (3) thereof, the Constitution as originally enacted divided the Governor's functions into three groups, (a) those exercised on advice according to British constitutional conventions, (b) those exercised on recommendation, implying a power to refer back once, and (c) those exercised at discretion. There were sixteen powers in category (b) and thirteen in category (c). Owing to the peculiar phrasing of the appropriate paragraph (para. 346) of the Soulbury Report there was a fourth category not mentioned in the section at all.

The section as now drafted has only one category, since the Governor-General has become a 'constitutional monarch', the representative of the King acting always on the advice of Ministers.

Subsection (1) was not in the Order of 1946 but is almost the same as section 35 of the Ministers' draft which in turn was adapted from the Constitution of the Commonwealth of Australia. For some reason which is not easy to understand, the draftsmen of the 1946 Order insisted on dropping this section and leaving the appointment of Governor to be regu-



lated by the Letters Patent. Since this involved no diminution of self-government, Mr D. S. Senanayake did not press the point : but since it was incongruous to have a Governor-General constantly referred to in the Constitution but not appointed under it, the provision of the Ministers' draft was restored in 1947.

The office of Governor-General is however still constituted by the Letters Patent and he is appointed by Commission. The function of the King under subsection (1) comes within subsection (2), and so the Governor-General is appointed on the advice of the Prime Minister of Ceylon, in consultation with the Cabinet if need be.

Subsection (2) is based on section 36(1) of the Ministers' draft, though the proviso comes from section 41(6) of that draft. The former provision was a residuary provision applying to all functions which were not directed by section 36(1) and (2) of the draft to be exercised on recommendation or at discretion. There is however one change of great significance. Both the Ministers' draft and the old section 4 referred only to the functions of the Governor-General. The new section applies to the functions of the King also. This change is due to three developments under the 1947 Constitution :—

1. Under section 7 as amended the King is a part of the legislature and need not be (though usually he will be) represented by the Governor-General : e.g., at the State Opening of Parliament on 10 February 1948 he was represented by his brother, the Duke of Gloucester.

2. Under section 45, as now enacted, executive power remains vested in the King and may be, but need not be, exercised by the Governor-General. If the King visited Ceylon he could do formal acts in person.

3. Certain functions including the making of treaties, the appointment of ambassadors and other diplomatic and consular agents, the issue of exequaturs to consuls, and the declaration of war, are not delegated to the Governor-General.

It follows that to give complete self-government not only the Governor-General but also the King must act on 'advice'. The King in relation to Ceylon acts on the advice of the Ceylon Government, just as the King in relation to Canada acts on the advice of the Canadian Government. What is peculiar to Ceylon is only that the Constitution specifically provides for the

application of the constitutional conventions of the United Kingdom. The older Dominions (except Eire) moved from colonial to Dominion status by a slow process of evolution and so their status is founded on convention. Ceylon's status had to be established by law. It would have been entirely satisfactory to a constitutional lawyer to have established the formal law (as in Australia) and to leave the conventions to be implied. This would have been misunderstood by some sections of opinion and misrepresented by others. Accordingly, it was politically essential to provide for full self-government by written law. Much the same problem has arisen in South Africa where, even after the Statute of Westminster, some sections of opinion had represented Dominion Status to be one of subordination to the United Kingdom or, to use the phrase commonly used in this connexion, 'British imperialism'. Accordingly, South African legislation of 1934 had put the conventions into law. It was decided by the Ceylon Ministers to follow this example, and so the United Kingdom conventions were formally incorporated as law in section 36(1) of the Ministers' draft, in section 4 of the Order of 1946, and now in section 4 of the amended Order. The last of them extended the principle to the functions of the King.

A function to be exercised on advice is not formal and automatic. The King or the Governor-General must be persuaded, and on occasions the King or the Governor-General may do the persuading. It is indeed the practice in the United Kingdom to consult the King informally so that he may make his views known without rejecting or suspending action on formal advice. In the long run he must either accept advice or find a new Government, but his views ought to carry weight and may modify the 'advice' he receives. The King may be (like George VI) a most experienced student of politics who has been at the centre of affairs for a generation. Queen Victoria once told Mr Gladstone what the Duke of Wellington had told her about advice tendered to William IV nearly a hundred years before. The Governor-General is likely to be either an experienced politician or administrator from abroad or an 'elder statesman' from Ceylon. In either case he will be remote from the controversies of current politics and may be able to take a larger view than his Ministers, whose vision is apt to be bounded by the next general election. For instance, it may help the party in

power if certain Cabinet documents are published ; but this may be to create a precedent which is in the long run contrary to the public interest. The Governor-General may realize the problem more easily than a politically harassed Prime Minister.

5.—(1) The Governor-General shall receive a salary of £8,000 a year. Salaries of Governor-General and Officer Administering the Government

(2) During any period in which the Office of Governor-General is vacant, or the Governor-General is absent from the Island, or is from any cause prevented from, or incapable of, acting in the duties of his Office, the Officer Administering the Government shall receive a salary calculated at the rate of £6,000 a year and shall not be entitled to receive during that period any salary in respect of any other office.

(3) The salary of the Governor-General or of the Officer Administering the Government shall be charged on the Consolidated Fund and shall not be altered during his continuance in office.

(4) In the assessment of any income tax which may be payable under any written law, no account shall be taken of the salaries provided by this Section for the Governor-General and for the Officer Administering the Government or of the annual value of any official residence occupied by either of them as such.

Subsection (1) and the provision in subsection (3) that the Governor-General's salary shall be charged on the Consolidated Fund are taken from section 35 of the Ministers' draft. The rest of the section is new.

In spite of the definition of 'Governor-General' in section 2(1), it is clear that in subsection (1) 'Governor-General' does not include the Officer Administering the Government. The latter is covered by subsection (2), and therefore, in the words of section 3, the context otherwise requires. It would seem also, though this is not clear, that 'Governor-General' would not include a Deputy Governor-General for whom no salary is provided in the Constitution.

The Soulbury Commission recommended that the Officer Administering the Government should be the Chief Justice (paragraph 347) unless some other appointment is made by Dormant Commission. The Letters Patent provide accordingly in Article 7.

Since subsection (3) contains the first reference to charging on the Consolidated Fund, it may be convenient to explain what is

meant. The Consolidated Fund is provided by section 66 and may be called the general fund of the Island out of which all normal expenditure will be met. There will be, however, two methods of authorizing such expenditure. Some services, called 'Consolidated Fund Services', will be provided by permanent legislation, including this Constitution. In so far as they are provided by ordinary legislation, they can be altered by ordinary legislation, but a Bill for that purpose will be passed, for they will not appear in the Annual Estimates, except for purposes of reference. In so far as they are provided by the Constitution, they can be altered only in the manner provided by the Constitution. In this particular case it is specifically provided that the salaries shall be £8,000 and £6,000 respectively, and not 'until Parliament otherwise provides'. Accordingly, the salaries can be altered only by constitutional amendment. The phrase 'shall not be altered during his continuance in office' would on its face suggest that not even a constitutional amendment could alter the salary during his continuance of his office. This is, however, not so, for a constitutional amendment could remove this phrase also: cf. *Trethowan v. Attorney-General for New South Wales*, [1932] A.C. 526 and *McCawley v. The King*, [1920] A.C. 691. Any Bill amending the Constitution in this respect, however, would require a two-thirds majority of the House of Representatives, under section 29(4).

Subsection (4) is based on a recommendation by the Soulbury Commission, paragraph 348.

Salaries of Governor-General's staff 6.—The salaries of any member of the Governor-General's office and of his personal staff shall be determined by Parliament and shall be charged on the Consolidated Fund.

This section is new, the question not having been dealt with either by the Ministers' draft or by the Soulbury Commission. Its effect is that the salaries will be provided by permanent legislation; but such legislation can, of course, be altered in the usual manner.

## PART III

## THE LEGISLATURE

*General*

7.—There shall be a Parliament of the Island which shall consist of His Majesty, and two Chambers to be known respectively as the Senate and the House of Representatives.

This section is based on section 5(1) of the Ministers' draft, which did not however refer to the Senate. It is in the form recommended by the Soulbury Commission in paragraph 321(vii). The words 'represented by the Governor' inserted in the 1946 Order have been revoked by the 1947 Order. This addition was necessary because the Constitution did not contain a provision similar to section 33 of the Ministers' draft or the present section 4(1). The Ministers preferred to make the Constitution as much like that of a Dominion as possible, and therefore followed the scheme provided by the Constitution of the Commonwealth of Australia, where section 1 creates a Parliament consisting of the Queen, a Senate, and a House of Representatives. A similar form of words is used in the South Africa Act, 1909, section 19. The change of language was quite immaterial, since the King would in any event be represented by the Governor unless the King himself were in Ceylon. The section as drafted, however, bore a somewhat 'colonial' air, and when the Constitution was amended it was decided to revoke the phrase 'represented by the Governor' and revert to the language of the Senanayake draft of October 1945.

It will be noted that a Parliament consists of the King, the Senate, and the House of Representatives. These three parts come into action only in formal matters, including the making of an Act of Parliament, which is passed by both Chambers (or in certain circumstances by the House of Representatives alone) and assented to by or on behalf of the King. There is nothing to prevent the three parts from meeting on other formal occasions. For instance, it has been decided to follow the practice of the United Kingdom and the Dominions by opening the session by means of a King's Speech drafted by the Cabinet and read by the Governor-General. There is a great deal to be said for this procedure. The King's Speech enables the Government

to give a general indication of the programme which it proposes to put before the two Chambers during the session. The debate on the King's Speech takes the form of a motion thanking the King for his Gracious Speech and can cover any subject whatsoever. In other words, it gives both Chambers an opportunity to criticize the general policy of the Government. It is a well recognized convention that a defeat on the King's Speech causes the resignation of the Government or a dissolution of the House of Representatives, for the motion for a Loyal Address is a motion of confidence in the Government, and if the motion is defeated or amended the vote is a vote of no-confidence.

It has already been pointed out in Chapter V of Part I of this book that Parliament is not a permanent body, in spite of the fact that it has to meet every year. The Parliament which met in 1947 was the first Parliament of the Island of Ceylon and will disappear when it is dissolved, so that a second Parliament will have to be summoned, and so on for as long as the Constitution remains in operation.

The Senate 8.—(1) The Senate shall consist of thirty Senators of whom fifteen (hereinafter referred to as 'elected Senators') shall be elected by the House of Representatives and fifteen (hereinafter referred to as 'appointed Senators') shall be appointed by the Governor-General.

(2) The Senate shall be a permanent body and the term of office of a Senator shall not be affected, and the seat of a Senator shall not become vacant, by reason of a dissolution of Parliament.

(3) One third of the Senators shall retire every second year.

(4) Subject to the provisions of section 73 of this Order, the term of office of a Senator shall be six years from the date of his election or appointment:

Provided that—

(a) a person who is elected or appointed a Senator to fill a casual vacancy shall be deemed to be elected or appointed to serve only for the remainder of his predecessor's term of office;

(b) a person who is elected or appointed to fill a vacancy caused by the termination of a Senator's period of office by effluxion of time shall, for the purposes of this section, be deemed to have been elected or appointed on such termination.

(5) A separate election shall be held for the filling of each casual vacancy among the elected Senators.

(6) A retiring Senator shall, if otherwise qualified, be eligible for re-election or re-appointment from time to time.

(7) In the section, the expression 'casual vacancy' means a vacancy occurring otherwise than by the termination of a Senator's period of office by effluxion of time.

This section is based on the recommendations in paragraph 310 of the Soulbury Report but the Governor's discretion has been removed by the Independence Order of 1947.

The manner of electing Senators is prescribed by section 9, but the details are prescribed by Regulations made by the Governor-General under section 72 and capable of modification by ordinary legislation.

The manner of appointing Senators is prescribed by section 10.

The language of subsection (2) is rather odd, since it is impossible to have a permanent Senate in a Parliament which is dissolved at intervals. Parliament may be dissolved by the Governor-General under section 15, and the Proclamation dissolving Parliament must summon a new Parliament. In the interval, therefore, there is no Parliament and therefore no Senate. What is clearly intended, though the language is inapt, is that the former Senate shall reassemble when the new Parliament has been summoned and shall continue as if it were a permanent body. The elected and appointed Senators will retain their seats, provided that they remain qualified; but this is specifically provided by the subsection. The President and other officers of the Senate will retain their offices, but this is implicit in section 16. It may perhaps be argued that the business of the Senate will continue without interruption, but in fact business is regulated by the session and not by the duration of Parliament, and it is therefore submitted that all Senate business is terminated by prorogation or dissolution as in the House of Representatives. In other words, the phrase 'the Senate shall be a permanent body' is merely an expression of the rules which occur in the rest of the subsection and in section 16 and has no purpose except to indicate that the composition of the Senate is not affected by a dissolution of Parliament.

The purpose of subsection (3) is carried out by subsection (4) and section 73. Under section 73 the first Senators were elected and appointed for periods of two, four and six years, in such a manner that one-third of the Senate would retire in 1949, one-third in 1951 and one-third in 1953. Under subsection (4), if

there are casual vacancies, the persons elected or appointed to fill those vacancies will sit for the remainder of the period of office of the persons whom they replace. After the first election all Senators will be elected or appointed (except in the case of a casual vacancy) for six years. Accordingly, one-third of the Senate will be re-elected or re-appointed every other year from 1949, i.e. in every odd year. The balance is always maintained as between elected and appointed Senators. That is, one-third of the elected Senators and one-third of the appointed Senators will retire every other year. In this way the Senate, though an allegedly permanent body, will continue to renew its youth, if any.

A casual vacancy occurs for the purpose of subsection (4) whenever the seat of a Senator becomes vacant under section 23 otherwise than by the termination of his term of office.

The purpose of subsection (5) is to avoid any complication over terms of office. In 1951, it will be necessary to elect five Senators to replace those whose terms of office have expired. The persons so elected will sit in the Senate for six years. At the same time, however, it may be necessary to fill a casual vacancy due to the death or voluntary retirement of a Senator who had been elected in 1947 for six years. The person elected to replace him would hold the seat for four years only. If all six newly-elected Senators were elected at the same election, it would be impossible to determine which of them was to sit for four years. Accordingly the present subsection prescribes that there shall be a separate election for each casual vacancy.

Election of Senators 9.—(1) After the first election under section 17 of this Order of the Speaker, the Deputy Speaker and Chairman of Committees and the Deputy Chairman of Committees, the House of Representatives shall, before proceeding to any other business, elect fifteen Senators; and thereafter, as soon as may be after the occurrence of a vacancy among the elected Senators, the House of Representatives shall elect a person to fill such vacancy.

(2) The election of Senators shall, whenever such election is contested, be according to the principle of proportional representation, each voter having one transferable vote.

(3) As soon as may be after the election of a Senator, the Clerk to the House of Representatives shall communicate to the Governor-General and to the Clerk to the Senate the name of the person elected.



This section derives from paragraph 310 of the Soulbury Report.

The qualifications for Senators are set out in section 12 and the disqualifications in section 13. The first Regulations prescribing the method of election were made by the Governor under section 72 but may be subsequently amended by Act of Parliament.

Each voter has only one vote, which is transferable so long as it is ineffective. Thus, if a casual vacancy is to be filled, each voter may indicate not merely his first choice (usually called his first preference), but the order of his preference among the other candidates. If there are 100 voters and any candidate secures 51 preferences at any stage, he is obviously elected. At the first count only the first preferences are counted. If no candidate has 51 or more of the first preferences, then the ballot papers of the candidate with the lowest number of first preferences are redistributed according to the second preferences. If still no candidate has more than 50 preferences, the ballot papers of the candidate who now has the lowest number of preferences are distributed among the other candidates still in the running, in accordance with the next preference shown on each paper. And so on until some candidate gets 51 of the votes.

If there were two persons to be elected, the number of preferences required for election would be 34. Here, however, a complication arises: for at the first or some later count some candidate may have more than 34. In that case, the first step will be to distribute his surplus (i.e. the number of preferences in excess of 34). Only when the surplus has been distributed will it be necessary to knock out the candidate with the lowest number of preferences and redistribute his ballot papers.

Actually, there will never be an election of two Senators, because there must be a separate election to fill each casual vacancy in accordance with section 8(5). The number to be elected was 15 on the first election, 5 at all subsequent elections, and 1 at each election to fill casual vacancies. Assuming that 101 Members vote, the number of preferences required for election is 7 when there are 15 to be elected, 17 when there are 5 to be elected, and 51 when there is only 1 to be elected. It will therefore be seen that a minority stands a far better chance at the first election than at any subsequent election, and

a much better chance at a subsequent election than at an election to fill a casual vacancy.

This is, however, a simplified version, for (as is explained in Chapter IX) in order to distribute a surplus equitably each first preference counts 100 points and what is wanted at an election of 5 Senators by 101 members is not 17 first preferences but 1684 points.

The name of the Senator elected has to be sent to the Governor-General under subsection (3) because he may (and in the case of an ordinary election will) have to appoint Senators under section 10. It will be seen from section 10(1) that an appointment of Senators is intended to follow an election of Senators and not vice versa. No doubt the Prime Minister will consider the composition of the Senate before he advises the filling of vacancies by appointment, and the sections have been carefully drafted so as to enable him to do so.

Appointment of Senators 10.—(1) As soon as may be after the first election of Senators under section 9 of this Order, the Governor-General shall appoint fifteen Senators, and thereafter, whenever there is a vacancy among the appointed Senators, the Governor-General shall appoint a person to fill the vacancy :

Provided that, if there is at the same time a vacancy among the elected Senators, the Governor-General may defer filling the vacancy among the appointed Senators until the vacancy among the elected Senators has been filled.

(2) Whenever a person is appointed a Senator under this section, the Governor-General shall cause to be sent to the Clerk to the Senate a certificate signed by the Governor-General setting out the name of the person appointed and the date of appointment. Such certificate shall be conclusive for all purposes and shall not be questioned in any court of law.

(3) In the exercise of his functions under this section the Governor-General shall endeavour to appoint persons who he is satisfied have rendered distinguished public service or are persons of eminence in professional, commercial, industrial or agricultural life, including education, law, medicine, science, engineering and banking.

Subsections (1) and (2) are consequential upon the acceptance of the recommendations of the Soulbury Report and were taken from the Senanayake draft of October 1945. Subsection (3) is based upon paragraph 310(iii) of the Soulbury Report but has been amended to this form by the Independence Order.

According to the Soulbury Report, the function of appointing Senators was to be vested in the Governor-General to be exercised in his discretion, and the consequential provision operated at the first appointment of Senators in 1947. The Independence Order of 1947, however, amended subsection (3) in order that the function should be exercised on advice in accordance with section (4). Accordingly the Prime Minister will in future advise appointments.

Subsection (1) is designed to ensure that all elected seats are filled before the appointed seats so that appointments can be made, subject to subsection (3), in such a manner as to achieve a balance of interests.

The purpose of subsection (2) is simply to have a formal record of appointments.

II.—(1) Subject to the provisions of section 74 of this Order, the House of Representatives shall consist of the Members elected by the electors of the several electoral districts constituted in accordance with the provisions of this Order, and the Members, if any, appointed by the Governor-General under subsection (2) of this section. The House of Representatives

(2) Where after any general election the Governor-General is satisfied that any important interest in the Island is not represented or is inadequately represented, he may appoint any persons not exceeding six in number, to be Members of the House of Representatives.

(3) When the seat of a Member appointed under this section falls vacant the Governor-General may appoint a person to fill the vacancy.

(4) *(Revoked).*

(5) Unless Parliament is sooner dissolved, every House of Representatives shall continue for five years from the date appointed for its first meeting and no longer, and the expiry of the said period of five years shall operate as a dissolution of Parliament.

Subsection (1) is based upon section 16(1) of the Ministers' draft. Subsections (2), (3) and (4) as originally enacted were taken almost verbatim from section 17 of the Ministers' draft, which was approved by paragraphs 314 and 315 of the Soulbury Report. These provisions vested the function in the Governor to be exercised in his discretion; but subsection (2) was redrafted and subsection (4) revoked by the Independence Order in order

that the function be vested in the Governor-General to be exercised on advice in accordance with section 4.

Subsection (5) is based on section 26(2) of the Ministers' draft as modified by paragraph 320 of the Soulbury Report. Its odd form of drafting is due to the provision of section 8(2) that the Senate shall be a 'permanent body'. Since the expiry of the House of Representatives operates as a dissolution of Parliament, it follows that the Senate expires also, though when Parliament is again summoned the Senate will have the same composition and officers as before the dissolution of Parliament.

The composition of the first House of Representatives was determined by section 74, and the House of Representatives will be so composed until after the next census, when it will be the duty of the Governor-General under section 40(1) to establish another Delimitation Commission which will redistribute the electoral districts in accordance with the remainder of that section. The Soulbury Commission recommended in paragraph 277, however, that a Select Committee of the legislature (presumably of the House of Representatives) should be appointed before the next census in order to examine and report upon the working of the scheme of representation.

It is clear from paragraph 315 of its Report that the Soulbury Commission considered that the power of nomination was intended primarily to secure representation for the Burghers and the Europeans. In paragraph 316, however, it is mentioned that if the scheme of representation in section 74 and Part IV does not produce adequate representation for the Muslims 'it will be necessary to resort to nomination as at present'. The language of subsection (2) of the present section is quite general and leaves the Prime Minister the discretion of advising the appointment of Members whenever 'any important interest in the Island' is not represented or is inadequately represented. The power of appointment need not be limited to Burghers and Europeans, therefore, nor even to Muslims also. It could, for instance, be used to appoint an Indian, a Ceylon Tamil or a Kandyan Sinhalese. Nor, indeed, is the power necessarily to be exercised on communal lines. An 'interest' may be a caste or a class or an industry, though the fact that occupations are to be represented in the Senate may dispose the Prime Minister not to appoint on the ground of occupation.

Parliament may, of course, be dissolved under section 15 before the expiry of the five years provided by subsection (5). A similar provision operates in the United Kingdom under the Septennial Act, 1715, as amended by the Parliament Act, 1911, but Parliament is never allowed to expire by lapse of time, since the Government in power invariably dissolves Parliament at a time suitable to its own party prospects. If Parliament is dissolved under this provision, it would be the duty of the Governor-General to summon a new Parliament under section 15. See, however, section 15(5), which provides for summoning the old Parliament in the event of an emergency. It would seem (though the point is not free from doubt) that this power could be exercised notwithstanding the use of the phrase 'and no longer' in the present subsection.

12.—Subject to the provisions of this Order, a person who is qualified to be an elector shall be qualified to be elected or appointed to either Chamber.

Qualification for Membership of Senate or House of Representatives

This section reproduces, except for a drafting amendment, section 18 of the Ministers' draft.

'The provisions of this Order' are the provisions relating to disqualification in section 13 and also the provisions relating to electoral districts in Parts IV and IX.

The qualifications of electors were set out not in this Order but in the Ceylon (Parliamentary Elections) Order in Council, 1946. This Order was first amended by the Ceylon (Parliamentary Elections) Act, No. 19 of 1948, which related only to appeals from election tribunals. The Act was held by the Supreme Court in *Thambiayah v. Kulasingham*<sup>1</sup> to be void in part, because it was repugnant to section 13(3)(h) of the Constitution. It was held, however, that the Elections Order could be amended by simple majority. Subsequently the Ceylon (Parliamentary Elections) Act, No. 48 of 1949, substituted a new franchise, based wholly on Ceylon citizenship and residence. A parallel Bill so to amend the Constitution as to enable a British subject to be elected or appointed to Parliament, even though not a citizen of Ceylon, provided that the country to which he belonged allowed Ceylon citizens to be elected or appointed to its

<sup>1</sup> (1949) 50 N.L.R. 25.

legislature, was unable to secure a two-thirds majority and was withdrawn.

The franchise prescribed by the Elections Order was the same as that prescribed by the Ceylon (State Council Elections) Order in Council, 1931. A person was entitled to be registered as an elector if he had one of the following qualifications :

- (i) if he was domiciled in the Island, though for this purpose a domicile of choice could not be obtained by less than five years' residence ;
- (ii) If he could read and write English, Sinhalese or Tamil and held one of the income and property qualifications set out in section 6 of the Elections Order ;
- (iii) if he had taken out a certificate of permanent settlement under the Ceylon (State Council Elections) Order in Council, 1931, or section 7 of the Elections Order.

Under section 4 of the Elections Order, however, there were certain disqualifications which may be summarized as follows. A person was disqualified if he—

- (a) was not a British subject ;
- (b) was less than 21 years of age on the 1st of June in the appropriate year ;
- (c) had not resided in the electoral district for a continuous period of 6 months before the 1st of June ;
- (d) was serving a sentence of imprisonment for an offence punishable with imprisonment for a term exceeding 12 months, or was under sentence of death, or was serving a term of imprisonment in lieu of execution of any such sentence :
- (e) was found or declared to be of unsound mind ;
- (f) was disqualified for an election offence.

The Ceylon (Parliamentary Elections) Act, No. 48 of 1949, abolished the three qualifications mentioned above, but converted the first of the disqualifications from 'is not a British subject' to 'is not a citizen of Ceylon'. It follows that the franchise is now based on residence and Ceylon citizenship and that the 'Europeans' and 'Indians', who found a place in the first Parliament as British subjects, will be excluded from the second.

It will be noted that section 12 of the Constitution qualifies a person to sit in Parliament if he is qualified to be an elector.

It does not require that his name shall be on the register of electors. The distinction was drawn deliberately because—

- (i) the administrative arrangements for registering electors are not always efficient, with the result that the names of qualified persons are sometimes omitted ;
- (ii) persons claiming under sections 6 and 7 of the Elections Order had to prove that they were qualified and sometimes they neglected to do so. It was not desired to prevent them from being elected or appointed to sit in Parliament.

Since section 12 of the Constitution requires a person to be qualified to be registered as an elector, it follows that a person who is disqualified for registration as an elector is also disqualified from being elected or appointed to Parliament. Consequently, section 13 of the Constitution must be read with section 4 of the Elections Order, and there are certain inconsistencies in the two. Thus—

- (i) a person under 21 cannot be elected or appointed because he is not qualified to be an elector ;
- (ii) a person cannot be elected or appointed unless he has resided for a continuous period of six months in the eighteen months immediately before the 1st of June in some constituency unless he was absent on duty ;
- (iii) a person who is serving any sentence punishable with imprisonment for a period exceeding 12 months is disqualified even if the term of his imprisonment was less than the three months prescribed by section 13(3)(f) ;
- (iv) a person who is incapable of being registered as an elector because of his conviction of an offence under section 52 of the Elections Order is disqualified from being elected or appointed to Parliament, though there is no such disqualification in section 13(3)(h) of the Constitution.

It should be noted, however, that these are disqualifications for being elected or appointed, not disqualifications for sitting and voting. Thus a Member of Parliament who is imprisoned for two months for an offence punishable with more than 12 months imprisonment does not lose his seat because he does not come within section 13(3)(f) and section 24(1) of the Constitution.

though he cannot be registered as an elector because of section 4(1)(d) of the Elections Order.

Disqualification  
for Membership  
of Senate or  
House of  
Representatives

13.—(1) A Senator shall be disqualified for being elected or appointed or for sitting or voting as a Member of the House of Representatives.

(2) A person shall be disqualified for being elected or appointed as a Senator or for sitting or voting in the Senate if he has not attained the age of thirty-five years.

(3) A person shall be disqualified for being elected or appointed as a Senator or a Member of the House of Representatives or for sitting or voting in the Senate or in the House of Representatives—

- (a) if he is not a British subject or is by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign Power or State ; or
- (b) if he is a public officer or a judicial officer or the Auditor-General ; or
- (c) if he, directly or indirectly, by himself or by any person on his behalf or for his use or benefit, holds, or enjoys any right or benefit under any contract made by or on behalf of the Crown in respect of the Government of the Island for the furnishing or providing of money to be remitted abroad or of goods or services to be used or employed in the service of the Crown in the Island ;
- (d) if he has received, or is a member of any incorporated or unincorporated body of less than twenty-five persons which has received, during the period of twelve months immediately preceding, from the public funds of the Island, any grant of such a nature that the award or amount thereof is within the discretion of the Crown or of a public officer ; or
- (e) if he is an undischarged bankrupt or insolvent, having been declared a bankrupt or insolvent under any law in force in any part of His Majesty's dominions or in any territory under His Majesty's protection or in any territory in which His Majesty has from time to time jurisdiction ;
- (f) if he is serving or has, during the period of seven years immediately preceding, completed the serving of a sentence of imprisonment (by whatever name called) for a term of three months or longer imposed by any court in any part of His Majesty's dominions or in any territory under His Majesty's protection or in any territory in which His Majesty has from time to time jurisdiction, for an offence punishable with imprisonment for a term exceeding twelve months, or is under sentence of death imposed by any such court, or is serving, or has during



the period of seven years immediately preceding, completed the serving of a sentence of imprisonment for a term of three months or longer awarded in lieu of execution of any such sentence :

Provided that, if any person disqualified under this paragraph is granted a free pardon, such disqualification shall cease from the date on which the pardon is granted ; or

- (g) if he is, under any law in force in the Island, found or declared to be of unsound mind ; or
  - (h) if by reason of his conviction for a corrupt or illegal practice or by reason of the report of an election judge in accordance with the law for the time being in force relating to the election of Senators or Members of Parliament, he is incapable of being registered as an elector or of being elected or appointed as a Senator or Member, as the case may be ; or
  - (i) if by reason of his conviction for a corrupt or illegal practice, he would have been incapable of being elected as a member of the Legislative Council or of the State Council if the laws relating to the election of Members to those bodies had remained in operation ; or
  - (j) if by reason of his expulsion or resignation from the State Council before the date upon which this Part of this Order comes into operation he would have been incapable of being elected or appointed a Member of the State Council if the Ceylon (State Council) Order in Council, 1931, as amended by the Ceylon (State Council) Amendment Order in Council, 1943, had remained in force ; or
  - (k) if during the preceding seven years he has been adjudged by a competent court or by a Commission appointed with the approval of the Senate or the House of Representatives or by a Committee thereof to have accepted a bribe or gratification offered with a view to influencing his judgment as a Senator or as a Member of Parliament.
- (4) The provisions of paragraphs (c) and (d) of subsection (3) of this section shall not apply to—
- (i) any contract for subscription to a loan to be issued to the public on advertised terms ;
  - (ii) any pension, gratuity, or other benefit payable from the public revenues or other funds of the Island ;
  - (iii) any grant to any municipal council, urban council or other public authority established by or under any written law ; or
  - (iv) any grant to any person or body of persons for purposes mainly religious, educational or otherwise charitable or any salary or allowance payable from the public

revenue or other funds of the Island to any person, not being a public officer, employed by or under any person or body of persons for any such purposes.

(5) For the purposes of paragraph (k) of subsection (3) of this section, the acceptance by a Senator or Member of Parliament of any allowance or other payment made to him by any trade union or other organisation solely for the purposes of his maintenance shall not be deemed to be the acceptance of a bribe or gratification.

In so far as this section applies to the Senate, it is new. In relation to the House of Representatives it is based on section 19 of the Ministers' draft, as modified to suit the recommendations of the Soulbury Commission. The details are as follows :

Subsection (1) ; The Soulbury Commission recommended in paragraph 321(v) that a Member of either Chamber should be incapable of being chosen or of sitting as a Member of the other Chamber. This would have prevented the House of Representatives from electing any of its members to the Senate and might have created difficulties in getting suitable Ministers and Parliamentary Secretaries in the Senate. Accordingly, the rule has been modified under the authority of the Secretary of State.

Subsection (2) : This is taken from the Soulbury Report, paragraph 310(iii).

Subsection (3)(a) : The provision of section 9(a) of the Order in Council of 1931 was not inserted in the Ministers' draft because only a British subject could be an elector and therefore qualified under what is now section 12. In paragraph 319, however, the Soulbury Commission recommended that the provision be retained, no doubt because the Parliament of Ceylon could alter the election law by simple majority. The 1931 provision has, however, been modified in accordance with more recent precedents in other parts of the Commonwealth.

(b) : This reproduces section 19(a) of the Ministers' draft.

(c) : This reproduces the first part of section 19(b) of the Ministers' draft.

(d) : This is based on the second part of section 19(b) of the Ministers' draft, but has been considerably amended.

(e) : This is based upon section 19(c) of the Ministers' draft, but has been expanded in accordance with recent precedents in other parts of the Commonwealth.

(f) : The Soulbury Commission did not approve of the limited disqualification inserted in section 19(d) of the Ministers' draft which would have excluded political offences, but recommended in paragraph 318(c) of its Report that the disqualification in section 9(1)(f) of the Order in Council of 1931 be reinserted, and at the same time approved of the extension of the disqualification for a period of seven years as provided by the Ministers' draft. The result, which is included in the present clause, is to tighten the provision very considerably.<sup>1</sup>

(g) : Though the Soulbury Report did not disapprove section 19(e) of the Ministers' draft, which was recommended by the Select Committee on Election Law and was based on a Canadian precedent, the draftsman has apparently disapproved of it, for this clause merely modifies slightly Article 9(g) of the Order of 1931.

(h) : This is based on section 19(f) of the Ministers' draft.

(i) : This is based on section 19(g) of the Ministers' draft.

(j) : This is based on section 19(h) of the Ministers' draft but has been considerably modified in the drafting.

(k) : This also is based on section 19(h) of the Ministers' draft, but it has been substantially modified.

Subsection (4) : This is based on the proviso to section 19(b) of the Ministers' draft. Difficulty arose over paragraph (iv) however. This was intended to prevent the disqualification of managers of assisted schools. The system of direct payment of the salaries of the teachers of assisted schools, adopted in 1945, compelled redrafting, and in the process the language was so changed as to make it doubtful whether managers of schools were qualified. The clause was therefore so amended by the Ceylon Constitution (Amendment) Order in Council, 1947, as to carry out the original intention.

Subsection (5) : This carries out the recommendation in paragraph 318(d) of the Soulbury Report.

<sup>1</sup> The allegation, which has been made in the House of Representatives, that this sub-clause was so drafted as to exclude certain opponents of the United National Party, is incorrect. There was some discussion among the lawyers as to the meaning of paragraph 318(c) of the Soulbury Report, which is not very clear, but there was never any discussion as to the individuals who would or would not be disqualified if any particular interpretation were adopted. Eventually the present draft was adopted by the lawyers as the most likely interpretation of the paragraph of the Report. Mr Senanayake was advised accordingly and the effect of the clause was never discussed by him at any stage before enactment.

Reference should be made to the notes to section 12, which point out that that section imports the disqualifications in section 4 of the Ceylon (Parliamentary Elections) Order in Council 1946. These apply, however, only to election or appointment, not to sitting or voting, and this is made plain by sections 23(1) and 24(1) of the Constitution, which provide for the vacation of a seat only where a person becomes subject to a disqualification under section 13.

It should be noted that though a Senator cannot stand for election to the House of Representatives (unless he first resigns his seat), there is nothing to prevent a Member of Parliament standing for election to the Senate. He loses his seat in the House of Representatives under section 24(1)(c) only if he is elected. The Soulbury Commission advised otherwise, but Mr D. S. Senanayake considered that it should be possible for the party in power to try to secure the election of a Member as a Senator, for instance where it was desired to give him Ministerial office in the Senate; and the Secretary of State agreed with him.

In *Thambiayah v. Kulasingham*<sup>1</sup> the Supreme Court held that section 13(3)(c) did not disqualify a person who was a shareholder in a company holding a contract with the Crown, since he did not indirectly enjoy a benefit under the contract. Basanayake J. in the Court below had held the contrary, drawing particular attention to the fact that no proviso protecting members of companies, similar to that enacted in the Ceylon (State Council) Order in Council, 1931 (following a United Kingdom Act of 1782) had been inserted. It can be said that the proviso was omitted from the Ministers' draft because it was considered unnecessary in view of the use of the phrase 'benefit under the contract' and because any proviso would have broadened the meaning of that phrase.

In 1948 the Governor-General appointed a Commission consisting of Senator the Hon. L. A. Rajapakse, K.C., Senator the Hon. E. A. P. Wijeyeratne, the Hon. G. G. Ponnambalam, K.C., M.P., H. V. Perera, K.C., Mr J. A. Maartensz, M.P., and Sir Ivor Jennings, to examine the provisions of this section and especially of section 13(3)(f).

The Commission recommended an amendment of the clause and the proposal was accepted by the Government. Provision

<sup>1</sup> (1949) 50 N.L.R. 25.

for that purpose was inserted in the Constitution Amendment Bill of 1950, but other amendments were also included and the Bill failed to obtain the necessary two-thirds majority in the House of Representatives.

14.—(1) Any person who—

Penalty for sitting or voting in Senate or House of Representatives when disqualified

(a) having been appointed or elected a Member of the Senate or House of Representatives, but not having been, at the time of such appointment or election, qualified to be so appointed or elected, shall sit or vote in the Senate or House of Representatives, or

(b) shall sit or vote in the Senate or House of Representatives after his seat therein has become vacant or he has become disqualified from sitting or voting therein, knowing, or having reasonable grounds for knowing, that he was so disqualified, or that his seat has become vacant, as the case may be, shall be liable to a penalty of five hundred rupees for every day upon which he so sits or votes.

(2) The penalty imposed by this section shall be recoverable by action in the District Court of Colombo instituted by any person who may sue for it :

Provided that no such action, having been instituted, shall proceed further unless the leave of the District Judge of the Court is obtained.

(3) Where, after the institution of any action in pursuance of the provisions of this section, no steps in pursuit of the action are taken by the person instituting the action for any period of three months the action shall be dismissed with costs.

This section is based on section 21 of the Ministers' draft but has been extended to the Senate and subsection (1) has been elaborated in the drafting in such a manner as to make it much clearer.

Subsection (3) was devised to meet difficulties which had arisen under section 11 of the Order in Council of 1931.

15.—(1) The Governor-General may, from time to time, by Proclamation summon, prorogue, or dissolve Parliament.

Sessions of Parliament

(2) Parliament shall be summoned to meet once at least in every year.

(3) A Proclamation proroguing Parliament shall fix a date for the next session, not being more than four months after the date of the Proclamation :

Provided that, at any time while Parliament stands prorogued,

(a) The Governor-General may by Proclamation summon Parliament for an earlier date (not being less than three days from the date of such Proclamation) ;

(b) the Governor-General may dissolve Parliament.

(4) A Proclamation dissolving Parliament shall fix a date or dates for the general election of Members of Parliament, and shall summon a new Parliament to meet on a date not later than four months after the date of the Proclamation.

(5) If at any time, after the dissolution of Parliament, the Governor-General is satisfied that an emergency has arisen of such a nature that an earlier meeting of Parliament is necessary, the Governor-General may by Proclamation summon the Parliament which has been dissolved for a date not less than three days from the date of such Proclamation, and such Parliament may be kept in session until the meeting of the new Parliament.

Subsection (1) is new in this form, but the powers were conferred by sections 24 and 25 of the Ministers' draft.

Subsection (2) reproduces part of section 25(1) of the Ministers' draft.

Subsection (3) is based on section 25(2) of the Ministers' draft, but has been more precisely drafted.

Subsections (4) and (5) are based on section 26(1) of the Ministers' draft. Subsection (5) was however amended by the Independence Order so as to bring it into line with section 4.

President and Deputy President of Senate 16.—(1) The Senate shall at its first meeting elect two Senators to be respectively the President and the Deputy President and Chairman of Committees (hereinafter referred to as the 'Deputy President') thereof.

(2) A Senator holding office as the President or the Deputy President of the Senate shall, unless he earlier resigns his office, vacate his office if he ceases to be a Senator.

(3) Whenever the office of President or Deputy President of the Senate becomes vacant, the Senate shall, at its first meeting after the occurrence of the vacancy, elect another Senator to be the President or the Deputy President, as the case may be.

(4) The President, or in his absence the Deputy President, or in their absence a Senator elected by the Senate for the sitting, shall preside at sittings of the Senate.

This section is new, since it is consequential on the creation of a Senate as recommended by the Soulbury Report. The election of a President was recommended in paragraph 310(v) of that Report, but it was also recommended that in the absence of the President the Senate should elect one of the Senators to preside. It was thought better to apply the practice of the State Council and the House of Representatives (as provided by section 31 of the Ministers' draft and section 17 of this Order)

by having a Senator specifically elected as Deputy President and Chairman of Committees.

It may be noted that a dissolution of Parliament does not remove the President and the Deputy President from their offices, since they continue in office so long as they are Senators and the seat of a Senator is not vacated by a dissolution because of the express provision of section 8(2).

17.—(1) The House of Representatives shall, at its first meeting after a general election, elect three Members to be respectively the Speaker, the Deputy Speaker and Chairman of Committees (hereinafter referred to as the 'Deputy Speaker') and the Deputy Chairman of Committees thereof.

(2) A Member holding office as the Speaker or the Deputy Speaker or the Deputy Chairman of Committees of the House of Representatives shall, unless he earlier resigns his office or ceases to be a Member, vacate his office on the dissolution of Parliament.

(3) Whenever the office of Speaker, Deputy Speaker or Deputy Chairman of Committees becomes vacant otherwise than as a result of a dissolution of Parliament, the House of Representatives shall at its first meeting after the occurrence of the vacancy elect another Member to be the Speaker, Deputy Speaker or Deputy Chairman of Committees as the case may be.

(4) If Parliament, after having been dissolved, is summoned under subsection (5) of section 15, each of the Members mentioned in subsection (2) of this section shall, notwithstanding anything in that subsection, resume and continue to hold his office while that Parliament is kept in session.

(5) The Speaker, or in his absence the Deputy Speaker, or in their absence the Deputy Chairman of Committees, shall preside at sittings of the House of Representatives. If none of them is present, a Member elected by the House of Representatives for the sitting shall preside at sittings of the House.

This section, other than subsection (4), reproduces subsections (1) and (2) of section 31 of the Ministers' draft with slight changes of language. Subsection (4) is new but is consequential on the proviso to section 26(1) of the Ministers' draft, which has been reproduced in section 15(5) of this Order.

It may be noted that no provision has been made for precedence as between the President and the Speaker, or indeed as between Senators and Members of Parliament.

There is nothing in the Constitution to provide that the functions of the Speaker shall, in his absence, be exercised by the

Speaker,  
Deputy  
Speaker  
and Deputy  
Chairman of  
Committees  
of the  
House of  
Representa-  
tives

Deputy Speaker; but it would seem from subsection (5) that, apart from Standing Orders, the Deputy Speaker, while presiding in the House, would have the same functions as the Speaker. In accordance with the practice of the House of Commons, a ruling of the Speaker or of the Deputy Speaker, as the case may be, may be questioned only by the House and then only on a substantive motion.

Though in other respects the Speaker follows closely the conventions of the House of Commons, there is apparently no convention in Ceylon that the Speaker shall not accept an honour from His Majesty during his term of office. Mr Speaker Molamure was made a Knight Commander of the Order of the British Empire in 1949.

**Voting** 18. Save as otherwise provided in subsection (4) of section 29, any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting. The President or Speaker or other person presiding shall not vote in the first instance but shall have and exercise a casting vote in the event of an equality of votes.

This section is based on section 21 of the Order in Council of 1931. There was no such provision in the Ministers' draft, under which voting would have been regulated by Standing Orders.

The exception in section 29(4) relates to Bills amending the Constitution, which require a vote of two-thirds of all the Members of the House of Representatives.

It may be noted that the President or Speaker is required by the section to exercise his casting vote. This was not in the Order in Council of 1931 nor, so far as is known, in any other Constitution in the Commonwealth.

**Power of either Chamber to act notwithstanding vacancies** 19. Each Chamber shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings therein shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

This section is based on the first part of section 28 of the Ministers' draft, though the second half is new.

**Quorum** 20. If at any time during a meeting of either Chamber the attention of the person presiding is drawn to the fact



that there are, in the case of a meeting of the Senate, fewer than six Senators present, or, in the case of a meeting of the House of Representatives, fewer than twenty Members present, the person presiding shall, subject to any Standing Order of the Chamber, adjourn the sitting without question put.

In so far as this section applies to the House of Representatives, it reproduces the second part of section 28 of the Ministers' draft.

It should be noted that the House of Representatives can continue sitting without a quorum unless the Speaker's attention is drawn to the absence of a quorum. It is not the practice in the House of Commons to draw attention to the absence of a quorum except for purposes of obstruction. There are almost invariably Members in the precincts, and if the Member speaking cannot obtain an audience it must be his own fault. Also, there is sometimes formal unopposed business for which an audience is quite unnecessary.

21. Subject to the provisions of this Order, each Chamber may, by resolution or Standing Order, provide for

Standing Orders

- (i) the election and retirement of the President and Deputy President, in the case of the Senate ;
- (ii) the election and retirement of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees, in the case of the House of Representatives ;
- (iii) the regulation of its business, the preservation of order at its sittings and any other matter for which provision is required or authorised to be so made by this Order.

Paragraph (iii) of this section is based on section 29(1) of the Ministers' draft. The rest is new.

The first Standing Orders were made by the Governor under section 81, but they may be amended by the Senate and the House of Representatives respectively.

22.—(1) Each Chamber may adjourn from time to time as it may determine by resolution or Standing Order until Parliament is prorogued or dissolved.

(2) During the adjournment of either Chamber for a period exceeding one month the President, or Speaker, as the case may be shall, if requested by the Prime Minister, convene, in such manner as may be prescribed by the Standing Orders of that Chamber, a meeting of the Senate or the House of Representatives for the transaction of any urgent business of public importance.

In so far as this section applies to the House of Representatives it substantially reproduces section 27 of the Ministers' draft. The reference to the Prime Minister, however, is new.

Vacation of  
Seats in the  
Senate

- 23.—(1) The seat of a Senator shall become vacant—
- (a) upon his death; or
  - (b) if, by writing under his hand, addressed to the Clerk to the Senate, he resigns his seat; or
  - (c) if he becomes subject to any of the disqualifications mentioned in section 13 of this Order; or
  - (d) if, without the leave of the Senate first obtained, he absents himself from the sittings of the Senate during a continuous period of three months; or
  - (e) upon the termination of his term of office.
- (2) As soon as may be after the seat of an elected Senator becomes vacant, the Clerk to the Senate shall inform the Clerk to the House of Representatives of the vacancy.
- (3) As soon as may be after the seat of an appointed Senator becomes vacant, the Clerk to the Senate shall inform the Governor-General of the vacancy.

This section is new, being consequential on the creation of the Senate.

The purpose of subsection (2) is to enable the House of Representatives to be informed that an election of a Senator is necessary. Similarly, the purpose of subsection (3) is to inform the Governor-General that an appointment of a Senator is necessary.

It will be noted that there is no provision to cover the case of a Senator being elected or appointed to the House of Representatives, since he is disqualified under section 13(1).

Vacation of  
Seats in the  
House of  
Representa-  
tives

- 24.—(1) The seat of a Member of Parliament shall become vacant—
- (a) upon his death; or
  - (b) if, by writing under his hand addressed to the Clerk to the House of Representatives, he resigns his seat; or
  - (c) if he is elected or appointed a Member of the Senate; or
  - (d) if he becomes subject to any of the disqualifications mentioned in section 13 of this Order; or
  - (e) if, without the leave of the House of Representatives first obtained, he absents himself from the sittings of the House during a continuous period of three months; or
  - (f) upon the dissolution of Parliament.

(2) Whenever the seat of a Member of Parliament falls vacant under this section except upon a dissolution of Parliament, the Clerk to the House of Representatives shall inform the Governor-General who shall (except in the case of a Member appointed under the provisions of subsection (2) of section 11 of this Order), within one month, by notice in the *Government Gazette*, order the holding of an election to fill the vacancy.

Subsection (1), except paragraph (c), is based upon section 22 of the Ministers' draft. Subsection (2) is new.

A Member of Parliament is not disqualified from election or appointment to the Senate, but his seat becomes vacant if he is elected or appointed. In other words, he may stand as a candidate for election without losing his seat unless he is elected.

The purpose of subsection (2) is to inform the Governor-General that an election or a new appointment is necessary. It may be noted that, though the Governor-General is under an obligation to order a new election, no time is specified within which he must do so. It would seem that the Governor-General would act on the advice of the Prime Minister. In the United Kingdom the writ is issued on the instructions of the House of Commons itself, so that there is no question of applying British conventions in this case.

25. Except for the purpose of electing the President or Oath of the Speaker, no Senator or Member of Parliament shall sit <sup>Allegiance</sup> or vote in the Senate or the House of Representatives until he has taken and subscribed before the Senate or the House of Representatives, as the case may be, the oath of allegiance in accordance with the provisions of the Promissory Oaths Ordinance or shall have made the appropriate affirmation in lieu thereof as provided in the said Ordinance.

Except in so far as it applies to the Senate, this section is based on section 20 of the Ministers' draft, but the reference to the Promissory Oaths Ordinance is new.

26. If provision is made by law for the payment to <sup>Allowances to</sup> Senators or Members of Parliament of any remuneration <sup>Senators and</sup> or allowance in their capacity as Senators or Members of <sup>Members of</sup> Parliament, the receipt by any Senator or Member of <sup>Parliament</sup> Parliament of such remuneration or allowance shall not disqualify him from sitting or voting in the Senate or the House of Representatives, as the case may be.

In so far as this applies to the House of Representatives, this section is based upon section 26 of the Ministers' draft. It is, however, put into hypothetical form, partly because Parliament has the necessary power to legislate without express enactment, and partly because it might have been decided not to make payments to Members of the Senate. It is provided in section 75 that, until Parliament otherwise provides, the remuneration and allowances paid to Members of the House of Representatives shall be the same as those paid to the Members of the State Council, but no provision is made for allowances to Senators until Parliament so provides.

Privileges of Senate and House of Representatives 27.—(1) The privileges, immunities and powers of the Senate and the House of Representatives and of Senators and Members of Parliament may be determined and regulated by Act of Parliament, but no such privileges, immunities or powers shall exceed those for the time being held or enjoyed by the Commons House of Parliament of the United Kingdom or of its Members.

(2) Until Parliament otherwise provides, the privileges of the Senate and the House of Representatives and of Senators and Members of Parliament shall be the same as the privileges of the State Council and of its Members at the date on which it is last dissolved.

Except in so far as it applies to the Senate, this section reproduces section 30 of the Ministers' draft. No legislation has so far been enacted under this section.

Staff of Parliament 28.—(1) There shall be a Clerk to the Senate who shall be appointed by the Governor-General.

(2) There shall be a Clerk to the House of Representatives who shall be appointed by the Governor-General.

(3) The members of the staff of the Clerk to the Senate shall be appointed by him in consultation with the President.

(4) The members of the staff of the Clerk to the House of Representatives shall be appointed by him in consultation with the Speaker.

(5) The Clerk to the Senate, the Clerk to the House of Representatives and the members of their staffs shall, while they hold their offices as such, be disqualified for being elected or appointed as a Senator or as a Member of Parliament or for sitting or voting in the Senate or the House of Representatives.

(6) The Clerk to the Senate and the Clerk to the House of Representatives shall not be removable except by the Governor-General on an address of the Senate, or of the House of Representatives, as the case may be.

Provided that, unless Parliament otherwise provides, the age for their retirement shall be sixty years.

Subsections (2), (4) and (5) substantially reproduce subsections (1) to (3) of section 32 of the Ministers' draft. The rest is new, but subsections (1) and (3) merely apply to the Clerks to the Senate the provisions which the Ministers' draft had applied to the Clerk to the House of Representatives. Subsections (1) and (2) are printed as amended by the Independence Order.

It was decided to separate the functions of Secretary to the Cabinet and Clerk to the Council of State (now the Clerk to the House of Representatives), since the former acts under the control of the Prime Minister and the latter under the control of the Speaker. It is therefore possible to imagine circumstances in which his functions would conflict, or circumstances in which it might be difficult for him not to reveal to the Speaker or the Prime Minister respectively information which he had obtained in his other capacity. The Speaker is not an instrument of the Government, and there may be cases where it will be necessary for him to rule against the Government. Accordingly, it was thought that the constitutional anomaly in the Order in Council of 1931, where the Clerk to the State Council was also Secretary to the Board of Ministers, should not be repeated. The Secretary of State has extended this principle to the office of Clerk to the Senate also.

#### LEGISLATIVE POWERS AND PROCEDURE

29.—(1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island. Power of Parliament to make laws

(2) No such law shall—

- (a) prohibit or restrict the free exercise of any religion; or
- (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
- (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or
- (d) alter the constitution of any religious body except with the consent of the governing authority of that body:

Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made

except at the request of the governing authority of that body.

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

(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of His Majesty in Council in its application to the Island :

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present).

Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law.

Subsection (1) substantially reproduces section 7 of the Ministers' draft.

Subsection (2) reproduces verbatim section 8 of the Ministers' draft, except for the proviso to paragraph (d), which is new. This limitation on the legislative power of the Ceylon Parliament was approved by the Soulbury Commission in paragraph 242(iii).

Subsection (3) is new, but it was implicit in section 8 of the Ministers' draft.

Subsection (4) is based upon section 10 of the Ministers' draft, but it was redrafted in 1946 and modified in 1947. Also, it omits the provision in section 10 of the draft that any amendment of the Constitution should be effected only by express words. That provision was inserted in the Ministers' draft because difficulties have arisen in the Australian States owing to what may be called incidental constitutional changes being brought about by ordinary legislation. It was therefore intended that, as in the Irish Free State, amendments should be effected by Constitution Amendment Acts specifically so defined, so that there could be no doubt of the intention to make amendments in the Constitution. However, the omission is not of great importance, since every Bill amending the Constitution must have the Speaker's certificate that two-thirds of the Members of the House of Representatives have voted for it. The whole procedure would

have been much simpler if section 10(2)(a) of the draft had been inserted.

The phrase used in subsection (1) is the widest possible and is taken from the Constitutions of other Dominions: see *R. v. Burah* (1878), 3 App. Cas. 889; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Russell v. The Queen* (1882), 7 App. Cas. 829. But for the Ceylon Independence Act, 1947, it would however have been limited, and was so limited until that Act was passed, because of the authority of the Parliament of the United Kingdom. The Act abolishes the limitations, and the only limitation now in operation is that contained in subsection (2), though reference must also be made to the procedure for constitutional amendment in subsection (4) and the narrow power of disallowance in section 39(1).

Subsection (2) was based on section 5 of the Government of Ireland Act, 1920, but has been so much amended that it now bears very little relation to it. There is no definition of 'community' in the Constitution, which must therefore be understood in the light of the general understanding of that phrase in 1946. In popular language it would seem to include not only the so-called racial communities—Sinhalese, Ceylon Tamils, Moors, Malays, Indians, Burghers, and Europeans—but also the various castes. By virtue of subsection (3), the validity of an Act may be challenged in any court of law on the ground that it infringes subsection (2). There has been no such challenge in the first three years of the Constitution.

It follows from subsection (4) that if an Act is inconsistent with the Constitution it is invalid unless it takes effect as a constitutional amendment under the subsection and it can do that only if, as a Bill, it contained Mr Speaker's certificate. It has, however, been well settled in other countries (e.g., the United States of America and Australia) that such an Act is invalid only to the extent of the repugnancy, so that an Act which is only in part repugnant is not wholly invalid if the repugnant provisions are severable from the rest. These repugnant provisions are severable if the Act can stand without them. If, on the other hand, the repugnant provisions contain the essence of the Act the whole must be invalid.

These rules were applied by the Supreme Court in

*Thambiayah v. Kulasingham*.<sup>1</sup> The Parliamentary Elections (Amendment) Act No. 19 of 1948 contained provisions in sections 82C and 82D which were held to be repugnant to section 13(3)(h) of the Constitution, but the remainder of the Act was declared to be valid.

30.—(Revoked).

The Declaration of 1943 provided that the Governor would have power to legislate on defence and external affairs. Complicated provisions were inserted in the Ministers' draft, and they were made still more complicated by the Soulbury Commission in paragraphs 337 and 349-58. The Commission also recommended that a power of constitutional amendment be retained by the King in Council. In August 1945 Mr D. S. Senanayake asked for Dominion Status; but if this could not be obtained he asked that the Governor be deprived of his power of legislation. The Government of the United Kingdom was at that time unwilling to accept the first alternative but accepted the second. Section 30 therefore reserved to the King in Council power to legislate on defence, external affairs and constitutional amendment. In consequence of the grant of Dominion Status in 1947, however, the power conferred by the section was revoked by section 4 of the Ceylon Independence Order, 1947.

Introduction of Bills 31.—(1) A Bill, other than a Money Bill, may be introduced in either Chamber. A Money Bill shall not be introduced in the Senate.

(2) In this section and in sections 33 and 34 of this Order, 'Money Bill' means a Public Bill which contains only provisions dealing with all or any of the following subjects, that is to say, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt, expenses of administration or other financial purposes, of charges on the Consolidated Fund or on any other public funds or on moneys provided by Parliament, or the variation or repeal of any such charges; the grant of money to the Crown or to any authority or person, or the variation or revocation of any such grant; the appropriation, receipt, custody, investment, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof, or the establishment, alteration, administration or abolition of any sinking fund provided in connection with any such loan; or any subordinate matter incidental to any of the aforesaid subjects.

<sup>1</sup> (1949) 50 N.L.R. 25.



In this subsection the expressions 'taxation', 'debt', 'public fund', 'public money' and 'loan' do not include any taxation imposed, debt incurred, fund or money provided or loan raised, by any local authority.

Subsection (1) is taken from paragraph 310(ix) of the Soulbury Report and subsection (2) from paragraph 310(viii) of that Report, though there has been a slight change in the drafting.

It is sometimes convenient to introduce Bills in the Second Chamber. This applies especially to Bills of a technical nature, for instance Bills reforming the ordinary civil and criminal law and the law of civil and criminal procedure. The provision of section 48 that the Minister of Justice shall be in the Senate will strengthen the case, for it would clearly be desirable for him to be in charge of the first discussions. In any case, the House of Representatives will be more concerned with Bills of a political character and will be unable to spend much time on technical matters.

In the United Kingdom Parliament no Bill which deals with finance can be introduced in the House of Lords, but such Bills are in fact introduced with the financial provisions in brackets, and the House then passes those clauses by as if they were not there. No such device will be necessary in Ceylon, for only Money Bills must first be introduced into the House of Representatives. In practice, however, it will be convenient for all Bills which impose any considerable charge upon public funds to originate in the House of Representatives.

Subsection (2) is taken almost verbatim from the Parliament Act, 1911. There are, however, some significant additions which substantially extend the definition of the Parliament Act. These are :

- (i) the addition of 'expenses of administration' in relation to charges on the Consolidated Fund or on moneys provided by Parliament ;
- (ii) the addition of the clause 'the grant of money to the Crown or to any authority or person, or the variation or revocation of any such grant' ;
- (iii) the addition of 'the establishment, alteration, administration or abolition of any sinking fund provided in connection with any such loan' ; and

(iv) the addition of the word 'investment' in relation to public money.

These additions remove most of the difficulties which have arisen in the United Kingdom and give the House of Representatives effective control over finance, though it must be remembered that the word 'only' at the beginning of the definition governs the whole, so that it will not be possible to enact as a Money Bill a Bill which changes the law in other respects. In other words, what is called 'tacking' will not be possible. A Money Bill must be a Money Bill and nothing more.

Passing of Bills 32.—(1) A Bill shall not be deemed to have been passed by both Chambers unless it has been agreed to by both Chambers, either without amendment or with such amendments only as are agreed to by both Chambers.

(2) A Bill which has been passed by the Senate with any amendment which is subsequently rejected by the House of Representatives shall be deemed not to have been passed by the Senate.

This section is consequential on the recommendations of the Soulbury Commission and is therefore new. It is in fact mainly a drafting provision to introduce sections 33 and 34. This is particularly true of subsection (2), whose purpose is to shorten the drafting of sections 33 and 34 so that it need not be specifically stated in those sections that they apply not only to Bills which have been rejected, or have not been passed, but also to Bills which have been passed with amendments unacceptable to the House of Representatives.

Restriction of powers of Senate as to Money Bills 33.—(1) If a Money Bill, having been passed by the House of Representatives and sent to the Senate at least one month before the end of the session, is not passed by the Senate within one month after it is so sent, the Bill may, notwithstanding that it has not been passed by the Senate, be presented to the Governor-General with or without any amendments which have been made by the Senate and agreed to by the House of Representatives, and shall take effect as an Act of Parliament on the Royal Assent thereto being signified.

(2) There shall be endorsed on every Money Bill when it is sent to the Senate and when it is presented to the Governor-General for Royal Assent a certificate under the hand of the Speaker that it is a Money Bill. Before giving his certificate the Speaker shall consult the Attorney-General or the Solicitor-General.

This section is based on the Parliament Act, 1911, in accordance with paragraph 310(vii) of the Soulbury Report.

The position may be stated as follows: If the Bill is sent to the Senate on 1 September 1950, it may be presented for the royal assent on 1 October 1950 if the Senate has (i) rejected it; or (ii) not passed it; or (iii) passed it with amendments which have been rejected by the House of Representatives.

The Speaker's certificate is required both when the Bill goes to the Senate and when it goes to the Governor-General because after going to the Senate it may have been amended by provisions accepted by the House of Representatives, and those provisions may have taken the Bill out of the definition of 'Money Bill'.

34.—(1) If a Bill, other than a Money Bill, is passed by the House of Representatives in two successive sessions, whether of the same Parliament or not, and, Restriction of powers of Senate as to Bills other than Money Bills

(a) having been sent to the Senate in the first of those sessions, at least one month before the end of that session, is not passed by the Senate in that session, and,

(b) having been sent to the Senate in the second of those sessions, is not passed by the Senate within one month after it has been so sent, or within six months after the commencement of that session, whichever is the later, the Bill may, notwithstanding that it has not been passed by the Senate, be presented to the Governor-General and shall take effect as an Act of Parliament on the Royal Assent thereto being signified.

(2) There shall be endorsed on every Bill, when it is presented to the Governor-General for the Royal Assent in pursuance of the provisions of subsection (1) of this section, a certificate under the hand of the Speaker that the provisions of subsection (1) have been complied with and that the Bill presented for the Royal Assent is identical with the Bill sent to the Senate in the first of the two sessions in which it was passed by the House of Representatives. Before giving his certificate the Speaker shall consult the Attorney-General or the Solicitor-General.

(3) For the purposes of subsection (2) of this section, a Bill presented for the Royal Assent shall be deemed to be the same Bill as a former Bill sent to the Senate in the preceding session, if, when it is sent to the Senate, it is identical with the former Bill or contains only such alterations as are certified by the Speaker to be necessary owing to the time which has elapsed since the date of the former Bill, or to represent any amendments which have been made by the Senate in the former Bill in the preceding sessions; and any amendments which are certified by

the Speaker to have been made by the Senate in the second session and agreed to by the House of Representatives, shall be inserted in the Bill as presented to the Governor-General in pursuance of this section :

Provided that the House of Representatives may, if they think fit, on the passage of such a Bill through the House in the second session, suggest any further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the Senate, and, if agreed to, shall be treated as amendments made by the Senate and agreed to by the House of Representatives ; but the exercise of this power by the House of Representatives shall not affect the operation of this section in the event of the rejection of the Bill by the Senate.

This section is based on the Parliament Act, 1911, reducing the period to two sessions as recommended by paragraph 310(viii) of the Soulbury Report. The drafting has, however, been much improved to meet certain difficulties in the operation of the Parliament Act when it was used for the passing of the Government of Ireland Act and the Welsh Church Act in 1914.

The purpose of subsection (1)(b) is, on the one hand, to prevent the House of Representatives from rushing the Bill through at the beginning of the second session and, on the other hand, to prevent the Senate from holding up the Bill (as the House of Lords can) for the whole session by refraining from discussing it. The minimum period in the second session is six months from the beginning of the session, though if the House of Representatives does not send it up until the session is five months old, the Senate is allowed one month only for discussion.

The purpose of subsection (3) is to enable the Bill to include agreed amendments and amendments due to the lack of time. The proviso enables the House of Representatives to suggest a compromise without losing the chance of getting the Bill through if the Senate proves obdurate.

Certificate of Speaker 35. Every certificate of the Speaker under section 33 or section 34 of this Order shall be conclusive for all purposes and shall not be questioned in any court of law.

This section is consequential and is taken from the Parliament Act, 1911.

Assent to Bills 36.—(1) No Bill shall become an Act of Parliament until His Majesty has given his consent thereto.

(2) When a Bill has been passed by both Chambers or by the House of Representatives alone in accordance with the provisions

of this Order, it shall be presented to the Governor-General, who may assent in His Majesty's name, or refuse such assent.

(3) (*Revoked*).

This section as originally enacted was based on section 37 of the Ministers' draft but it was much amended in the drafting. It is now printed as amended by the Ceylon Independence Order in Council 1947. It is customary in Dominion Constitutions to give the Governor-General three powers, to assent, to refuse assent, and to reserve for the King's assent. The Declaration of 1943 provided that Bills of certain classes must be reserved, and the Ministers' draft included the necessary provisions in sections 38 and 40. The Soulbury Commission recommended amendments, and the provisions as amended were included in section 37 of this Order. Being inconsistent with Dominion Status they had to be removed by the Ceylon Independence Order in Council and, though a power of reservation is not inconsistent with Dominion Status, it was decided to abolish it. The second part of subsection (2) and the whole of subsection (3) of this section were therefore revoked by the Independence Order. The powers under this section are of course exercised on advice under section 4.

37. (*Revoked*).

See the note to section 36.

38.—(1) In every Bill presented to the Governor-General, <sup>Enacting</sup> other than a Bill presented under section 33 or section 34 <sup>words</sup> of this Order, the words of enactment shall be as follows, that is to say :

'Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Representatives of Ceylon in this present Parliament assembled, and by the authority of the same as follows :—'

(2) In every Bill presented to the Governor-General under section 33 or section 34 of this Order, the words of enactment shall be as follows, that is to say :

'Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the House of Representatives of Ceylon in this present Parliament assembled, in accordance with the provisions of section 33 (or section 34 as the case may be) of the Ceylon (Constitution) Order in Council, 1946, and by the authority of the same, as follows :—'

(3) Any alteration in a Bill necessary to give effect to subsection (2) or this section shall not be deemed to be an amendment of the Bill.

This is based upon section 9 of the Ministers' draft, but the formula has been copied from the practice of the Parliament of the United Kingdom.

Subsection (2) is based upon the Parliament Act, 1911.

Subsection (3) is new, and is due to the fact that in Ceylon the enacting clause is deemed to be part of the Bill.

Laws  
relating to  
Ceylon  
Government  
stocks

39.—(1) Any law which has been assented to by the Governor-General and which appears to His Majesty's Government in the United Kingdom—

- (a) to alter, to the injury of the stock-holder, any of the provisions relating to any Ceylon Government stock specified in the Second Schedule to this Order; or
- (b) to involve a departure from the original contract in respect of any of the said stock

may be disallowed by His Majesty through a Secretary of State.

(2) The provisions of subsection (1) of this section shall also apply in relation to any Ceylon Government stock issued after the date upon which this Part of this Order comes into operation which, at the request of the Government of the Island, has been included in the list kept by the Treasury of the United Kingdom in conformity with the provisions of Section 2 of the Colonial Stock Act, 1900, of securities in which a trustee may invest.

(3) Whenever any such law has been disallowed by His Majesty, the Governor-General shall cause notice of such disallowance to be published in the *Government Gazette*.

(4) Every law so disallowed shall cease to have effect as soon as notice of such disallowance shall be published as aforesaid; and thereupon any enactment repealed or amended by or in pursuance of the law disallowed shall have effect as if such law had not been made. Subject as aforesaid the provisions of section 6 of the Interpretation Ordinance shall apply.

This is consequential upon the omission from the Constitution (as from the Ministers' draft) of any general power to disallow legislation, a power which has hitherto been included in all Constitutions save that of the Irish Free State (though it has also been removed from the South Africa Act, 1909). The existing sterling loans became trustee securities on the basis that any laws which interfered with the securities could be disallowed. Subsection (1) applies to such loans. Subsection (2) applies to loans subsequently raised in the United Kingdom and included

in the trustee list at the request of the Ceylon Government. That Government can, of course, issue stock in London without this disqualification, but in that case it will have to pay a higher rate of interest.

## PART IV

### DELIMITATION OF ELECTORAL DISTRICTS

40.—(1) Within one year after the completion of every general census of the Island following the general census of 1946, the Governor shall establish a Delimitation Commission. Establishment  
of Delimitation  
Commission

(2) Every Delimitation Commission established under this section shall consist of three persons appointed by the Governor-General who shall select persons who he is satisfied are not actively engaged in politics. The Governor-General shall appoint one of such persons to be the Chairman.

(3) If any member of a Delimitation Commission shall die, or resign, or if the Governor-General shall be satisfied that any such member has become incapable of discharging his functions as such, the Governor-General shall, in accordance with the provisions of subsection (2) of this section, appoint another person in his place.

(4) (*Revoked*).

This section, other than subsection (3), is taken from section 14 of the Ministers' draft. That section provided for the Chief Justice or a Judge of the Supreme Court to be chairman, but in paragraph 276 the Soulbury Report expressed some doubt on the wisdom of this proposal. Subsection (3) is consequential.

The section is printed as amended by the Ceylon Independence Order in Council, 1947. The powers of the Governor under the section as originally enacted were to be exercised in his discretion as subsection (4) provided. This being deemed inconsistent with Dominion Status subsection (4) was revoked by the Independence Order and the language of subsections (2) and (3) was amended.

It should be noted that this section will not come into operation until after the census of 1951. The first Delimitation Commission was provided for by section 76(1).

41.—(1) Every Delimitation Commission established under section 40 of this Order shall divide each Province of the Island into a number of electoral districts ascertained Duties of  
Delimitation  
Commissions

as provided in subsection (2) of this section and shall assign names thereto.

(2) The total number of persons who, according to the last preceding general census, were for the time being resident in the Province shall be ascertained to the nearest 75,000. In respect of each 75,000 of this number the Delimitation Commission shall allot one electoral district to the Province and shall add a further number of electoral districts (based on the number of square miles in the Province at the rate of one additional electoral district for each 1,000 square miles of area calculated to the nearest 1,000) as follows :

Western Province	...	1
Central Province	...	2
Southern Province	...	2
Northern Province	...	4
Eastern Province	...	4
North-western Province	...	3
North-Central Province	...	4
Province of Uva	...	3
Province of Sabaragamuwa	...	2

(3) Subject to the provisions of subsections (4) and (5) of this section, each electoral district of a province shall have as nearly as may be an equal number of persons :

Provided that, in dividing a Province into electoral districts, every Delimitation Commission shall have regard to the transport facilities of the Province, its physical features and the community or diversity of interest of its inhabitants.

(4) Where it appears to the Delimitation Commission that there is in any area of a Province a substantial concentration of persons united by a community of interest, whether racial, religious or otherwise, but differing in one or more of these respects from the majority of the inhabitants of that area, the Commission may make such division of the Province into electoral districts as may be necessary to render possible the representation of that interest. In making such division the Commission shall have due regard to the desirability of reducing to the minimum the disproportion in the number of persons resident in the several electoral districts of the Province.

(5) Notwithstanding anything in subsection (1) of this section, the Delimitation Commission shall have power to create in any Province one or more electoral districts returning two or more members :

Provided that in any such case the number of electoral districts for that Province, as ascertained in accordance with the provisions of subsection (2) of this section, shall be reduced so that the total number of Members to be returned for that Province shall not exceed the total number of electoral districts so ascertained.



Subsections (1) and (2) are taken verbatim from subsections (1) and (2) of section 13 of the Ministers' draft, and subsection (3) is taken from subsection (3) of that section with drafting amendments. Subsection (4) is taken from paragraph 278(ii) of the Soulbury Report, except for the last sentence, which is new. Subsection (5) is based upon paragraph 278(iii) of the Soulbury Report.

Subsections (1), (3), (4) and (5) applied to the first Delimitation Commission, but for the purpose of that Commission subsection (2) was replaced by section 76(2), which fixed the number of elected members at 95. The explanation is that, in the Memorandum attached to the Ministers' draft, the Ministers worked out the distribution in accordance with the Census of 1931, in order to illustrate the effect of the scheme which they proposed. They assumed, in fact, that the Constitution which they had drafted would come into operation before the next census, and that a new Delimitation Commission would be appointed after the next census. The delay due to the appointment of the Soulbury Commission, and the decision of the Board of Ministers to hold a census in 1946, altered the situation. The Soulbury Commission did not deal with the point, but seemed to assume in paragraph 275 that the census of 1946 would apply. On the other hand, their discussions were based on the census of 1931, and the discussions outside accordingly centred upon a House of Representatives of 95 elected Members distributed as recorded in the Memorandum attached to the Ministers' draft. It was therefore decided to ignore the census of 1946 and to enact the distribution given by the Ministers by way of illustration, and this has been done in section 76(2).

The scheme in subsection (2) of the present section was designed mainly to modify the strict territorial principle in favour of the minorities. It was not based, as the Soulbury Commission suggests, on the principle applied in England before 1885, whereby 'communities' in the territorial sense rather than aggregates of population—boroughs and counties as such—were given representation. Rather it was based on the practice in Great Britain, South Africa and other countries, whereby a sparse population is given a greater proportional representation than a concentrated population. The explanation in Great Britain is that if strict equality of population were applied the

constituencies would vary in size from a square mile in London to several huge counties in the north and west of Scotland. Such large constituencies would be unmanageable, and so density of population is taken into consideration. In agricultural countries like South Africa and Australia, there is the additional factor that the rural population, on whom the wealth of the country largely depends, must be given some weightage against the more concentrated and more highly organized urban population; and in the Union of South Africa there is the additional factor that the farmers are mainly Afrikaner while the townsmen contain a higher proportion of people of British origin. It was realized that if the same principle was applied in Ceylon there would be several advantages. First, and most important, it would provide increased representation for minority communities without introducing communal representation, to which the Ministers were opposed. The Tamils and Muslims are mainly in the comparatively sparsely populated Northern and Eastern Provinces, while the Indians are mainly in Uva and Sabaragamuwa Provinces. It will be seen that these four Provinces obtain 13 of the 25 additional members. Secondly, the system would give weightage to the rural population as against the urban population, who are necessarily much more highly organized and provided most of the members for the State Council even in the rural areas. Thirdly, it would give weightage to the Kandyan Sinhalese against the Low-country Sinhalese, since 11 of the additional seats, or 14 if the North-Western Province be included, would go to Kandyan Provinces. Fourthly, it would give weightage to the backward areas as against the more highly developed areas. It is therefore not entirely correct to say with the Soulbury Report (paragraph 275) that the scheme was a combination of territorial and communal representation. The communal motive was dominant: that is, the primary intention was to give a greater proportionate representation to the minorities; but the other advantages were foreseen. In any event the Ministers were looking forward, as their Memorandum makes clear, to the time when the communal factor would be quite irrelevant.

Subsection (4), which was added by the Soulbury Commission, does not add anything to the Ministers' intention, though it was not intended in the Ministers' draft to give the Commission com-

plete discretion and emphasis was therefore laid on the principle of equality within the Province. Some attempt has been made to effect this intention by the last sentence of the subsection, though possibly it would have been better if some fixed proportion of deviation (in South Africa it is 15 per cent from the normal, i.e. a maximum variation of 30 per cent) had been fixed. The phrase 'community or diversity of interest of its inhabitants', which is taken by subsection (3) from the Ministers' draft, was intended to enable the Commission to vary constituencies according to community, and this was perhaps clearer in the Ministers' draft than in the present subsection (3).

Subsection (5) was recommended by the Soulbury Commission in the following terms :

'It was suggested to us that minority representation would be strengthened by the creation of multi-member constituencies on the ground that the only chance of representation for small minorities depended on their concentrating all their strength on candidates of their own choice in a multi-member constituency. It seems to us that it might be advantageous to adopt this method of representation in certain localities, for instance, in the City of Colombo and possibly in the Jaffna peninsula, and particularly where divisions of caste in the same community are prominent. We therefore propose that the Delimitation Commission should be instructed to consider the creation of such constituencies in appropriate areas.'

It is, however, quite clear that multi-member constituencies as such enure to the benefit of the majority. They can help minorities only if some form of proportional representation is introduced or the system of 'plumping' is adopted. 'Plumping' means that in a three-member constituency any elector can cast three votes as he pleases, i.e., one for each of three candidates, or two for one candidate and one for another, or three for one candidate. Even then experience has shown (as in the former school board system in England) that a well-drilled majority can always carry off all the seats. Probably no electorate in Ceylon could be well-drilled at this stage of development, but there are other devices for preventing plumping from having its effect. Also, since this system is combined with the abolition of the coloured ballot box system there is a high proportion of spoilt ballot papers.

Decisions of  
Delimitation  
Commissions

42. In the event of a difference of opinion among the members of any Delimitation Commission, the opinion of the majority of the members thereof shall prevail and shall be deemed to be the decision of the Commission. Where each member of the Commission is of a different opinion the opinion of the Chairman shall be deemed to be the decision of the Commission.

This section is new, being consequential upon section 41.

Notification  
of Electoral  
Districts

43. The Chairman of every Delimitation Commission shall communicate the decisions of the Commission to the Governor-General who shall by Proclamation publish the names and boundaries of the electoral districts as decided by the Commission, and the number of members to be returned by each such district; and the districts specified in the Proclamation for the time being in force shall be the electoral districts of the Island for all the purposes of this Order and of any law for the time being in force relating to the election of Members of the House of Representatives.

This section is based upon section 13(4) of the Ministers' draft, but has been made much more precise in its drafting.

Re-division  
of electoral  
districts

44. Any re-division of the Provinces of the Island into electoral districts, effected by any Delimitation Commission established under section 40 of this Order, and any alteration consequent upon such re-division in the total number of the Members of the House of Representatives shall, in respect of the election of Members thereof, come into operation at the next general election held after such re-division and not earlier.

This section is new, being consequential upon section 40.

## PART V

### THE EXECUTIVE

Executive  
power

45. The executive power of the Island shall continue vested in His Majesty and may be exercised, on behalf of His Majesty, by the Governor-General in accordance with the provisions of this Order and of any other law for the time being in force.

This section is based upon section 42 of the Ministers' draft but was redrafted in the Independence Order of 1947. The theory of the law is that executive power is vested in the King throughout the Commonwealth, but in Ceylon as in the other Dominions the power is exercisable by his representative. How

the power is exercised depends upon law and practice for the time being. In the United Kingdom practice prescribes that, generally speaking, the King acts on the advice of Ministers. In Ceylon the Governor-General similarly acts in accordance with section 4. This section, like section 7, maintains the theory of the unity of the Crown—the 'common allegiance' to which the Statute of Westminster refers.

46.—(1) There shall be a Cabinet of Ministers who shall be appointed by the Governor-General and who shall be charged with the general direction and control of the government of the Island and who shall be collectively responsible to Parliament.

(2) Of the Ministers, one who shall be the head of the Cabinet, shall be styled the 'Prime Minister'; of the other Ministers one shall be styled the 'Minister of Justice' and another shall be styled the 'Minister of Finance'.

(3) (*Revoked*).

(4) The Prime Minister shall be in charge of the Ministry of Defence and External Affairs and shall administer the matters relating to that Ministry in addition to such other matters as he may determine to retain in his charge. Each Minister, other than the Prime Minister, shall be charged with the administration of such subjects and functions as may be assigned to him by the Prime Minister.

Subsection (1) is taken, with some changes of language, from section 51 of the Ministers' draft. Section 43 of the Ministers' draft provided, until Parliament had made other provision, that there should be ten Ministers, but the Soulbury Commission recommended that there should be no limitation of number.

Provision for the appointment of a Prime Minister was made in section 43 of the Ministers' draft, but the remainder of subsection (2) comes from paragraph 326 of the Soulbury Report.

Subsection (3) was revoked by the Independence Order.

Subsection (4) is taken in substance from section 44 of the Ministers' draft. The specific allocation of Defence and External Affairs comes from paragraph 325 of the Soulbury Report, though it carries out what was in fact the Ministers' intention.

The words 'general direction and control' in subsection (1) attempt to state the British constitutional convention. There is nothing in the law of the United Kingdom to give the Cabinet control over the Departments, but its power to do so has been acquired by practice over 250 years. Since the Board of

Ministers had only limited functions under the Donoughmore Constitution, it was thought by the Ministers that the British convention should be specifically enacted. The effect of the convention may be stated shortly in the assertion that no change of policy of any importance, whether or not it needs legislation or financial provision by Parliament, should be carried out without Cabinet sanction. The Cabinet, on the other hand, has full power to change the policy of any Department, and any Minister who is unwilling to accept the change has no alternative but to resign.

The phrase 'shall be collectively responsible to Parliament' is again an attempt to state the British constitutional convention. The nature of this responsibility is discussed in Part I of this book. Shortly, it may be said that every Minister accepts responsibility for every decision of the Cabinet. If he is unable to accept that responsibility, he must resign. Accepting responsibility means not only that he may be called to account politically for any defects that may appear in the policy, but also that he must actively support the policy by vote and, if necessary, by speech. On no account is he permitted to say that he disagrees or disagreed with the policy. It is his policy even if he opposed it in the Cabinet.

In addition to the recommendations which have been incorporated in the section, the Soulbury Commission advised as follows :

(i) The functions of the Financial Secretary should be transferred to a Minister of Finance who, subject to the functions allotted to the Public Services Commission, should also be responsible for the public services.

(ii) The Department of Fisheries should be transferred from the Ministry of Local Administration to the Ministry of Agriculture and Lands.

(iii) The function of poor relief should be transferred from the Ministry of Labour to the Ministry of Health.

(iv) The control of road transport should be transferred from the Ministry of Local Administration to the Ministry of Communications and Works.

(v) The control of emigration, immigration and repatriation should be transferred from the Chief Secretary to the Ministry of Home Affairs.

(vi) The Commission was doubtful whether Labour could be satisfactorily combined with Industry and Commerce. No immediate reallocation was recommended, but it was thought that subsequently it would be necessary to create separate Ministries.

On this last point the Social Services Commission recommended that a Ministry of Labour and Social Welfare be created, and that it assume control of the poor law.

47. The Governor-General may appoint Parliamentary Secretaries to assist the Ministers in the exercise of their Parliamentary and departmental duties :

Provided that the number of Parliamentary Secretaries shall not at any time exceed the number of Ministers.

This section is taken from section 45 of the Ministers' draft, with the difference that the name has been changed from 'Deputy Minister' to 'Parliamentary Secretary'. It has been amended by the Independence Order.

The Soulbury Commission recommended in paragraph 326(viii) that in the first instance Parliamentary Secretaries should be appointed in the Ministries whose portfolios are particularly heavy. It may be noted, however, that at least two Ministers must be in the Senate and that it will be necessary to have Parliamentary Secretaries to represent them in the House of Representatives. It seems clear, too, that there should be two Parliamentary Secretaries (the maximum allowed by section 48) in the Senate.

48. Not less than two Ministers, one of whom shall be the Minister of Justice, shall be Members of the Senate. If Parliamentary Secretaries are appointed in pursuance of the provisions of section 47 of this Order, not more than two of them shall be Members of the Senate.

Ministers and  
Parliamentary  
Secretaries in  
Senate

This section is taken from the Soulbury Report, paragraph 310(vi).

49.—(1) Every Minister and every Parliamentary Secretary shall hold office during His Majesty's pleasure :

Provided that any Minister or Parliamentary Secretary may at any time resign his office by writing under his hand addressed to the Governor-General.

Other  
provisions as  
to Ministers  
and  
Parliamentary  
Secretaries

(2) A Minister or Parliamentary Secretary who for any period of four consecutive months is not a member of either Chamber

shall, at the expiration of that period, cease to be a Minister or Parliamentary Secretary, as the case may be.

(3) Whenever a Minister or Parliamentary Secretary is, from any cause whatever, unable to perform any of the functions of his office, the Governor-General may appoint a person, whether or not he has already been appointed a Minister or Parliamentary Secretary, to act in the place of the said Minister or Parliamentary Secretary, as the case may be, either generally or in the performance of any particular function. For the purposes of this Order, a person so appointed shall be deemed to be a Minister or a Parliamentary Secretary, as the case may be, as long as his appointment shall subsist.

(4) A person appointed to be or to act as a Minister or Parliamentary Secretary shall, before entering on the duties of his office, take and subscribe before the Governor-General the official oath in accordance with the provisions of the Promissory Oaths Ordinance or shall make the appropriate affirmation in lieu thereof as provided in the said Ordinance.

Subsection (1) is taken from section 46 of the Ministers' draft, and subsection (2) from section 48 of that draft, the period having been extended from three to four months to cover the period of a general election. It has been amended by the Independence Order.

Subsection (3) reproduces section 47 of the Ministers' draft, and subsection (4) reproduces section 50 of that draft with a slight amendment.

The fact that each Minister and Parliamentary Secretary holds his office at the King's pleasure indicates that the office is at all times in the Prime Minister's disposal, for in these matters the King acts on the advice of the Prime Minister. The question of the dismissal of Ministers is discussed in Part I. In practice, however, the question of dismissal never arises, for when the Prime Minister wishes to make a change he requests the Minister to resign.

Secretary  
to the  
Cabinet

50. There shall be a Secretary to the Cabinet who shall be appointed by the Governor-General. The Secretary to the Cabinet shall have charge of the Cabinet Office and shall, in accordance with such instructions as may be given to him by the Prime Minister, summon meetings of the Cabinet, arrange the business for, and keep the minutes of such meetings, and convey the decisions of the Cabinet to the appropriate person or authority.



This section is based on section 52 of the Ministers' draft but has been amended by the Independence Order. The practice under the Donoughmore Constitution was for the Clerk to the State Council to be Secretary to the Board of Ministers also. This confusion of function was considered by the Ministers to be inappropriate, since there were occasions on which the Clerk would advise the Speaker of the House of Representatives on matters to be submitted to the House by the Cabinet. Accordingly, it was decided to separate the offices. The section gives effect to the practice in Great Britain.

51.—(1) There shall be for each Ministry a Permanent Secretary who shall be appointed by the Governor-General. Permanent Secretaries to Ministries

(2) Each Permanent Secretary shall, subject to the general direction and control of his Minister, exercise supervision over the department or departments of Government in the charge of his Minister.

(3) For the purpose of this section the department of the Auditor-General, the office of the Clerk to the Senate, the office of the Clerk to the House of Representatives and the Cabinet Office shall be deemed not to be departments of Government.

(4) The Governor-General may transfer any Permanent Secretary to any public office.

Subsection (1) is based upon section 53(2) of the Ministers' draft but has been amended by the Independence Order.

Subsection (2) reproduces part of section 53(2) of the Ministers' draft, and subsection (3) reproduces section 53(4) of that draft.

Subsection (4) was inserted by the Independence Order.

This is an important provision inserted by the Ministers in order to draw a clear distinction between matters of policy and matters of administration. The Donoughmore Constitution, by vesting administrative control in Executive Committees, each of which had a number of Departments under its control, encouraged the members of the State Council to involve themselves in functions which were purely administrative. Also, the functions of government were dispersed among a large number of Departments. The Permanent Secretary was intended to exercise the administrative functions which were exercised by Executive Committees and provide for co-ordination among the Departments of each Ministry. It was hoped that in due course each Ministry would come to regard itself as a single Department divided into sub-departments, as is the case in Great Britain.

This reorganization has not yet been brought about and in some degree the fragmentation of government continues. While it is not improper for Ministers to consult 'Heads of Departments' such consultation should normally take place in the presence of the Permanent Secretary in order that general administrative questions may be kept in mind. All communications should pass to and from the Minister through the Permanent Secretary. Communications of an official character with members of the public should always be sent by the Permanent Secretary or some official of lower rank, but in the name of the Ministry. The usual formula is: 'I am directed by the Minister'.

## PART VI

### THE JUDICATURE

Judges of the Supreme Court 52.—(1) The Chief Justice and Puisne Judges of the Supreme Court and Commissioners of Assize shall be appointed by the Governor-General.

(2) Every Judge of the Supreme Court shall hold office during good behaviour and shall not be removable except by the Governor-General on an address of the Senate and the House of Representatives.

(3) The age of the retirement of Judges of the Supreme Court shall be sixty-two years:

Provided that the Governor-General may permit a Judge of the Supreme Court who has reached the age of sixty-two years to continue in office for a period not exceeding twelve months.

(4) The salaries of the Judges of the Supreme Court shall be determined by Parliament and shall be charged on the Consolidated Fund.

(5) Every Judge of the Supreme Court appointed before the date on which this Part of this Order comes into operation and in office on that date shall continue in office as if he had been appointed under this Part of this Order.

(6) The salary payable to any such Judge shall not be diminished during his term of office.

Subsection (1) reproduces section 69(1) of the Ministers' draft, except that it has been extended to Commissioners of Assize, and that under the Independence Order the power has ceased to be discretionary.

Subsection (2) reproduces the major portion of section 69(2) of the Ministers' draft.

Subsection (3) is new, since the Ministers' draft left to Parliament the task of fixing an age for retirement.

Subsection (4) is taken from section 71 of the Ministers' draft. Subsection (5) also is new, being a transitional provision.

Subsection (6) is taken from section 71 of the Ministers' draft.

53.—(1) There shall be a Judicial Service Commission <sup>The Judicial Service Commission</sup> which shall consist of the Chief Justice, who shall be the Chairman, a Judge of the Supreme Court, and one other person who shall be, or shall have been, a Judge of the Supreme Court. The members of the Commission, other than the Chairman, shall be appointed by the Governor-General.

(2) No person shall be appointed as, or shall remain, a member of the Judicial Service Commission, if he is a Senator or a Member of Parliament.

(3) Subject to the provisions of subsection (5) of this section, every member of the Judicial Service Commission, other than the Chairman, shall, unless he earlier resigns his office, or is removed therefrom as hereinafter provided, or being a Judge of the Supreme Court ceases so to be, hold office for a period of five years from the date of his appointment, and shall be eligible for re-appointment.

(4) The Governor-General may for cause assigned remove any member of the Judicial Service Commission from his office.

(5) The Governor-General may grant leave from his duties to any member of the Judicial Service Commission, and may appoint a person qualified to be a member of the Judicial Service Commission to be a temporary member for the period of such leave.

(6) Where a person is appointed to be a member of the Judicial Service Commission, he may be paid such salary or allowance as may be determined by Parliament. Any salary or allowance payable to such person shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(7) (*Revoked*).

Subsection (1) is based upon section 68(1) of the Ministers' draft, but it has been modified in accordance with paragraph 398 of the Soulbury Report.

Subsection (2) is based upon section 68(2) of the Ministers' draft, but has been amended by the addition of a reference to the Senate and the omission of the exclusion of candidates for election, no doubt because it is not easy to determine when a person becomes a candidate.

Subsection (3) is based upon section 68(3) of the Ministers' draft.

The remainder of the section is new.

The Ministers decided to establish a Judicial Service Commission in order to remove judicial appointments from politics and to give some sort of guarantee to the minorities that appointments to the judicial service would not be determined on communal lines. The proposal was acceptable to the Soulbury Commission and accordingly finds a place in the Constitution. The powers of the Governor-General ceased to be discretionary through amendments made by the Independence Order.

Secretary to  
Judicial Service  
Commission

54. There shall be a Secretary to the Judicial Service Commission who shall be appointed by the Commission.

This section is based upon paragraph 399 of the Soulbury Report, though it was implicit in the Ministers' draft. The Independence Order transferred the power from 'the Governor acting on the recommendation of the Commission' to 'the Commission'.

Appointment  
to other  
judicial office

55.—(1) The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission.

(2) Any judicial officer may resign his office by writing under his hand addressed to the Governor-General.

(3) Every judicial officer appointed before the date on which this Part of this Order comes into operation and in office on that date shall continue in office as if he had been appointed under this Part of this Order.

(4) The Judicial Service Commission may, by Order published in the *Government Gazette*, delegate to the Secretary to the Commission the power to authorise all transfers, other than transfers involving increase of salary, or to make acting appointments in such cases and subject to such limitations as may be specified in the Order.

(5) In this section 'appointment' includes an acting or temporary appointment and 'judicial officer' means the holder of any judicial office but does not include a Judge of the Supreme Court or a Commissioner of Assize.

This section is based upon section 69(3) of the Ministers' draft, but the Commission's functions have been enlarged in accordance with paragraph 400 of the Soulbury Report and in order to make the provision parallel with that in section 60 of the Constitution. Subsection (1) was amended and subsection (4) redrafted by the Independence Order.

It may be noted, however, that whereas the meaning of 'transfer' is limited by section 60(2) of the Constitution, there is no such limitation in this section, so that every transfer, even if it does not involve an increase of salary, is within the jurisdiction of the Judicial Service Commission.

56. Every person who, otherwise than in the course of his duty, directly or indirectly, by himself or by any other person, in any manner whatsoever, influences or attempts to influence any decision of the Judicial Service Commission or of any member thereof shall be guilty of an offence and shall, on conviction after summary trial before a Magistrate, be liable to a fine not exceeding one thousand rupees or to imprisonment for a term not exceeding one year or to both such fine and such imprisonment :

Interference  
with  
Judicial  
Service  
Commission

Provided that nothing in this section shall prohibit any person from giving a certificate or testimonial to any applicant or candidate for any judicial office.

This section is based upon section 65 of the Ministers' draft which, however, applied only to the Public Service Commission. It was slightly amended by the Independence Order.

## PART VII

### THE PUBLIC SERVICE

57. Save as otherwise provided in this Order, every person holding office under the Crown in respect of the Government of the Island shall hold office during His Majesty's pleasure.

Tenure of  
Office in the  
Public Service

This section reproduces the substance of section 66(1) of the Ministers' draft and merely gives effect to the general principle applicable to all appointments under the Crown in all parts of the Commonwealth, including the United Kingdom. Public servants throughout the Commonwealth are servants of the King and, except where provision is specially made by law, hold office at his pleasure. The manner in which he exercises his pleasure in Ceylon is, however, determined by the Constitution.

58.—(1) There shall be a Public Service Commission which shall consist of three persons, appointed by the Governor-General, one at least of whom shall be a person who has not, at any time during the period of five years immediately preceding, held any public office or judicial office. The

The Public  
Service  
Commission

Governor-General shall nominate one of the members of the Commission to be the Chairman.

(2) No person shall be appointed as, or shall remain, a member of the Public Service Commission if he is a Senator or a Member of Parliament.

(3) Every person who, immediately before his appointment as a member of the Public Service Commission, is a public officer shall, when such appointment takes effect, cease to hold any paid office previously held by him as a servant of the Crown in respect of the Government of the Island, and shall accordingly cease to be a public officer for the purposes of this Order ; and he shall be ineligible for further appointment as a public officer :

Provided that any such person shall, until he ceases to be a member of the Public Service Commission or, while continuing to be such a member, attains the age at which he would, if he were a public officer, be required to retire be deemed to hold a pensionable office in the service of the Crown in respect of the Government of the Island for the purposes of any written law relating to the grant of pensions, gratuities or other allowances in respect of such service.

(4) Subject to the provisions of subsection (6) of this section, every person who is appointed to be a member of the Public Service Commission shall, unless he earlier resigns his office or is removed therefrom, hold office for a period of five years from the date of his appointment and shall be eligible for re-appointment.

(5) The Governor-General may for cause assigned remove any member of the Public Service Commission from his office.

(6) The Governor-General may grant leave from his duties to any member of the Public Service Commission, and may appoint a person qualified to be a member of the Public Service Commission to be a temporary member for the period of such leave.

(7) A member of the Public Service Commission may be paid such salary as may be determined by Parliament. The salary payable to any such member shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(8) For the purposes of Chapter IX of the Penal Code, a member of the Public Service Commission shall be deemed to be a public servant.

Subsection (1) was considerably amended by the Independence Order because the recommendation in paragraph 376 of the Soulbury Report was clearly based on an inadequate appreciation of local conditions. It required that only one member of the Commission should have been a public officer. In Ceylon conditions it is almost impossible to provide a balanced Com-

mission on this basis. The amended subsection above reverts, with one change, to section 62(1) of the Ministers' draft. Though made by the Independence Order, this amendment had nothing to do with Independence.

Subsection (2) is based on part of section 62(2) of the Ministers' draft, with the amendment necessitated by the establishment of a Senate. Also, the Ministers' draft attempted to exclude candidates for election, but this has been removed, no doubt owing to the difficulty of defining who is a candidate. In this respect the section fails to give effect to the recommendation in paragraph 375 of the Soulbury Report, which agreed with the Ministers' draft.

Subsection (3) gives effect to a recommendation in paragraph 376 of the Soulbury Report, though the proviso is new.

Subsection (4) is based on section 62(3) of the Ministers' draft.

Subsections (5) and (6) are new and were amended by the Independence Order.

Subsection (7) reproduces the substance of section 62(5) of the Ministers' draft.

Subsection (8) is based on section 65(2) of the Ministers' draft.

The Ministers decided to establish a Public Service Commission in furtherance of their desire to guarantee to the minorities that administration under the new Constitution would not be conducted on communal lines. They felt that appointments to the public service were particularly important in this respect, and accordingly the Public Service Commission was given all the independence that a Constitution makes possible. The Soulbury Commission approved of this intention, and the modifications made in the Ministers' draft are merely incidental.

59. There shall be a Secretary to the Public Service Commission who shall be appointed by the Commission. Secretary to the  
Public Service  
Commission

This section reproduces part of section 63 of the Ministers' draft, but the power was transferred from the Governor to the Commission by the Independence Order.

60.—(1) The appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Public Service Commission : Appointments  
in the Public  
Service

Provided that appointments and transfers to the office of Attorney-General shall be made by the Governor-General.

(2) In subsection (1) of this section the expression 'transfer' means a transfer involving an increase of salary.

In section 64 of their draft, the Ministers merely provided that new appointments carrying an initial salary of Rs. 3,600 a year should be made on the recommendation of the Public Service Commission. In paragraph 379 of the Report the Soulbury Commission assumed that this provision was intended to apply also to promotions, transfers, dismissals and disciplinary control. Why they should so have assumed is not at all clear, for the Ministers' draft did not so provide and had no such intention. However, the assumption was necessarily treated as a recommendation, and accordingly subsection (1) of the present section gives effect to that paragraph, except for the proviso, which is entirely new. Also, subsection (2), which is new, modifies the generality of the recommendation. Subsection (1) was amended by the Independence Order.

61. The Public Service Commission may, by Order published in the *Government Gazette*, delegate to any public officer, subject to such conditions as may be specified in the Order, any of the powers vested in the Commission by subsection (1) of section 60. Any person dissatisfied with any decision made by any public officer under any power delegated as aforesaid may appeal therefrom to the Commission and the decision of the Commission on such appeal shall be final.

This section was much amended by the Ceylon Constitution (Amendment) Order, 1947, and then revoked and replaced by the Ceylon Independence Order, 1947. In this form it is entirely new.

Interference with Public Service Commission 62. The provisions of section 56 of this Order shall apply in relation to the Public Service Commission as though the reference therein to the Judicial Service Commission were a reference to the Public Service Commission and the reference to judicial office were a reference to public office.

This section is based on section 65(1) of the Ministers' draft.

Retirement on pension of persons holding office at the appointed day 63.—(1) Any officer holding office in the public service on the day immediately preceding the day appointed by His Majesty by Order in Council as the appointed day for the purposes of the Ceylon Independence Act, 1947, being an officer—  
(a) who, at any time before the seventeenth day of July 1928, was appointed or selected for appointment to a



public office, appointment to which was subject to the approval of a Secretary of State, or who, at any time before that day, had entered into an agreement with the Crown Agents for the Colonies to serve in any public office for a specified period ; or

- (b) who, on or after the seventeenth day of July 1928, was appointed or selected for appointment (otherwise than on agreement for a specified period) to a public office, appointment to which was subject to the approval of a Secretary of State ; or
- (c) who, on or after the seventeenth day of July 1928, had entered into an agreement with the Crown Agents for the Colonies to serve for a special period in a public office, appointment to which was not subject to the approval of a Secretary of State, and who, on the day appointed as aforesaid, either has been confirmed in a permanent and pensionable office or is a European member of the Ceylon Police Force ;

may, if he elects to retire from the public service in accordance with the provisions of subsection (2) of this section, be granted a pension or gratuity in accordance with and subject to the provisions of Article 88 of the Ceylon (State Council) Order in Council, 1931, and the regulations made thereunder, notwithstanding the revocation of that Order by section 91 of this Order ; and those provisions shall apply accordingly subject to any proclamation made under Section 88 of this Order.

(2) Election to retire for the purposes of subsection (1) of this section may be exercised :—

- (a) in the case of an officer to whom paragraph (a) of that subsection applies, at any time after this part of this Order comes into operation ;
- (b) in the case of an officer to whom either paragraph (b) or paragraph (c) of that subsection applies, at any time within two years after the day appointed as aforesaid.

(3) In this section the expression ' public office ' shall, notwithstanding the provisions of section 3, include a judicial office.

[*Note : The Schedule to the Ceylon Independence Order in Council, 1947 (which amended section 63 of the principal Order), contains the following provision :*

In the case of a person retiring before the day appointed by His Majesty by Order in Council as the appointed day for the purposes of the Ceylon Independence Act, 1947, Section 63 shall continue to have effect as if the foregoing amendments had not been made.

*All cases of retirement under section 63 before February 4, 1948, are therefore governed by section 63 in its form as set out in section 6 of the Ceylon (Constitution) (Amendment) Order in Council, 1947, and as reproduced below :*

63.—(1) Any officer holding office in the public service on the day immediately preceding the day on which this Part of this Order comes into operation (in this section referred to as 'the material date'), being an officer—

(a) who, at any time before the seventeenth day of July 1928, was appointed or selected for appointment to a public office, appointment to which was subject to the approval of a Secretary of State, or who, at any time before that day, had entered into an agreement with the Crown Agents for the Colonies to serve in any public office for a specified period; or

(b) who, on or after the seventeenth day of July 1928, but before the ninth day of October 1945, was appointed or selected for appointment (otherwise than on agreement for a specified period) to a public office, appointment to which was subject to the approval of a Secretary of State; or

(c) who, on or after the seventeenth day of July 1928, but before the ninth day of October 1945, had entered into an agreement with the Crown Agents for the Colonies to serve for a specified period in a public office, appointment to which was not subject to approval of a Secretary of State, and who, at the material date, either has been confirmed in a permanent and pensionable office or is a European member of the Ceylon Police Force;

may, if he elects to retire from the public service in accordance with the provisions of subsection (2) of this section, be granted a pension or gratuity in accordance with and subject to the provisions of Article 88 of the Ceylon (State Council) Order in Council, 1931, and the regulations made thereunder, notwithstanding the revocation of that Order by section 91 of this Order; and those provisions shall apply accordingly subject to any proclamation made under section 88 of this Order.

(2) Election to retire for the purposes of subsection (1) of this section may be exercised—

(a) in the case of an officer to whom paragraph (a) of that subsection applies, at any time after this part of this Order comes into operation;

(b) in the case of an officer to whom either paragraph (b), or paragraph (c) of that subsection applies, at any time within two years after the first meeting of the House of Representatives.]

This section was based on the recommendation in paragraphs 369-71 of the Soulbury Report, as modified by the White Paper. Its phrasing gave rise to difficulty, however, and accordingly another section was substituted by the Ceylon Constitution (Amendment) Order in Council, 1947. This in turn gave rise to

difficulties and a new section was provided in the Ceylon Independence Order, 1947, for officers retiring after 3 February 1948. Both forms are set out above.

64.—(1) All pensions, gratuities, or other like allowances which have been, or which may be, granted to any persons who have been, and have ceased to be, in the service of the Crown in respect of the Government of the Island at any time before the date on which this Part of this Order comes into operation, or to the widows, children or dependants of such persons, shall be governed by the written law under which they were granted, or, if granted after that date, by the written law in force on that date, or, in either case, by any written law made thereafter which is not less favourable.

Preservation  
of Pensions,  
etc.

(2) Subject to the provisions of section 63 of this Order all pensions, gratuities and other like allowances which may be granted to persons who, on the date on which this Part of this Order comes into operation, are in the service of the Crown in respect of the Government of the Island, or to the widows, children or dependants of such persons, shall be governed by the written law in force on that date or by any written law made thereafter which is not less favourable.

This section is based on the recommendation in paragraph 372(iv) of the Soulbury Report.

65. All pensions and gratuities granted in accordance with the provisions of this Order shall be charged on the Consolidated Fund.

Pensions, etc.,  
charged on the  
Consolidated  
Fund

This section gives effect to the recommendation in paragraph 372(iv) of the Soulbury Report that the pensions shall be 'suitably safeguarded'.

The effect of charging the pensions and gratuities on the Consolidated Fund is that an annual vote is not required.

## PART VIII

### FINANCE

66.—(1) The funds of the Island not allocated by law to specific purposes shall form one Consolidated Fund into which shall be paid the produce of all taxes, imposts, rates and duties and all other revenues of the Island not allocated to specific purposes.

The  
Consolidated  
Fund

(2) The interest on the public debt, sinking fund payments, the costs, charges and expenses incidental to the collection, management and receipt of the Consolidated Fund and such

other expenditure as Parliament may determine shall be charged on the Consolidated Fund.

Subsection (1) reproduces section 57 of the Ministers' draft, save that the proviso to that section is not reproduced in exactly the same form. Subsection (2) reproduces section 58(1) of the Ministers' draft, except for the reference to sinking fund payments, which is new.

In the United Kingdom there is a single Fund, called the Consolidated Fund, into which all revenues are paid and out of which all expenditure is met. Where special Funds are created for special purposes, such Funds are almost invariably fed from the Consolidated Fund, though there have been exceptions. The purpose of the Consolidated Fund was to enable the Treasury and the Parliament of the United Kingdom to deal with the revenues as a whole, instead of allocating particular taxes to particular items of expenditure. Ceylon under the Donoughmore Constitution followed the same practice, though it was not described as a Consolidated Fund. The purpose of giving the Island's general fund the same name as in the United Kingdom is to enable a distinction to be drawn between expenditure which is voted annually and expenditure which is paid without annual parliamentary sanction. In certain cases under the Constitution—of which subsection (2) is an example—it was desired to remove expenditure from parliamentary control without placing it, as it had been hitherto, in the control of the Governor (who could authorize it, and in certain cases did authorize it, under his special powers). The expenditure is then 'charged on the Consolidated Fund' by the Constitution. Parliament itself can charge items to the Consolidated Fund by legislation, but then the legislation can be altered by Act of Parliament. Where the expenditure is charged on the Consolidated Fund by the Constitution it cannot be changed except by constitutional amendment, unless of course the Constitution itself authorizes Parliament to make a change. A list of items charged on the Consolidated Fund is given *ante*, pp. 111-12.

The section does not prevent Parliament from creating special funds, for instance the University Building and Equipment Fund established in 1924 and the National Development Fund established in 1945. In such cases the income is paid to the separate

fund if the law which created it so provides, or if some other law so provides.

The effect of subsection (2) is to prevent Parliament from refusing to meet the outstanding obligations and such further obligations as the Island may incur. The public debt, the sinking fund payments, etc., are charged on the Consolidated Fund and must be met on the due dates without parliamentary sanction. In other words, the section gives security to borrowers, though additional security is provided by section 39.

Expenditure which is not charged on the Consolidated Fund is said to be payable out of moneys provided by Parliament. In the language of the House of Commons, there is thus a distinction between 'Consolidated Fund Services' which are permanently charged and 'Supply Services' which are financed by annual votes.

67.—(1) Save as otherwise expressly provided in subsection (3) of this section, no sum shall be withdrawn from the Consolidated Fund except under the authority of a warrant under the hand of the Minister of Finance.

Withdrawal  
of sums  
from the  
Consolidated  
Fund

(2) No such warrant shall be issued unless the sum has been granted for specified public services for the financial year during which the withdrawal is to take place or is otherwise lawfully charged on the Consolidated Fund.

(3) Where the Governor-General dissolves Parliament before the Appropriation Bill for the financial year has received the Royal Assent, he may, unless Parliament shall have already made provision, authorise the issue from the Consolidated Fund and the expenditure of such sums as he may consider necessary for the public services until the expiry of a period of three months from the date on which the new House of Representatives is summoned to meet.

Subsections (1) and (2) are based on subsections (2) and (3) of section 58 of the Ministers' draft save that the duty of counter-signing warrants, which the Ministers placed upon the Auditor-General, has been removed. Subsection (3) is based upon section 60 of the Ministers' draft.

The purpose of the section is to make certain that no public moneys are paid out except (a) on the authority of an Act of Parliament for the financial year in question, or (b) on the authority of a resolution of the House of Representatives (e.g. in the case of a supplementary estimate) for the year in question,

or (c) where the sum is charged on the Consolidated Fund by this Constitution or by Act of Parliament, or (d) in accordance with the Governor-General's special power in subsection (3).

It is somewhat incongruous to permit the House of Representatives to authorize expenditure by mere resolution, and the Ministers' draft did not so provide. Its justification, no doubt, is that a supplementary estimate is sometimes needed for urgent expenditure. In fact, however, the case is covered by the creation of the Contingencies Fund by section 68. Moreover, the House of Representatives can secure the passing of the necessary legislation within one month under section 38. Possibly the provision was inserted because the State Council had become accustomed to this slipshod method. In the United Kingdom, annual expenditure must be authorized either by the Appropriation Act or by Consolidated Fund Acts, into which supplementary estimates are consolidated. However, no harm will be done provided that the Ceylon Parliament reverts to the British tradition that supplementary estimates are exceptional and, in principle, objectionable, because they interfere with the making of a budget which will balance at the end of the financial year as well as at the beginning.

Contingencies Fund 68.—(1) Notwithstanding any of the provisions of section 66 of this Order, Parliament may by law create a Contingencies Fund for the purpose of providing for urgent and unforeseen expenditure.

(2) The Minister of Finance, if satisfied  
 (a) that there is need for any such expenditure, and  
 (b) that no provision for such expenditure exists,  
 may, with the consent of the Prime Minister, authorise provision to be made therefor by an advance from the Contingencies Fund.

(3) As soon as possible after every such advance, a Supplementary Estimate shall be presented to Parliament for the purpose of replacing the amount so advanced.

This section is new, but is based on the practice of the United Kingdom.

As the section indicates, the purpose of the Contingencies Fund is to enable the Treasury to meet urgent and unforeseen expenditure. The process under the Donoughmore Constitution was to secure a special warrant from the Governor under the authority of the Board of Ministers. This section provides a better method which does not offend against constitutional principles.

The money is provided by law in the first place, and has to be replaced in the Fund by supplementary estimate.

69. No Bill or motion authorising the disposal of, or the imposition of charges upon, the Consolidated Fund or other funds of the Island, or the imposition of any tax or the repeal, augmentation or reduction of any tax for the time being in force shall be introduced in the House of Representatives except by a Minister, nor unless such Bill or motion has been approved either by the Cabinet or in such manner as the Cabinet may authorise.

Special provisions as to Bills, etc., affecting public revenues

This section reproduces section 59(1) of the Ministers' draft almost verbatim. This is another case where the Constitution enacts a British convention, for the appropriate provision is in Standing Orders of the House of Commons, but the approval is given on behalf of the Crown. Here it is specifically provided that the approval shall be on behalf of the Cabinet.

70.—(1) There shall be an Auditor-General who shall be appointed by the Governor-General and who shall hold office during good behaviour. The Auditor-General

(2) The salary of the Auditor-General shall be determined by Parliament, shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(3) The office of Auditor-General shall become vacant—

- (a) by his death ; or
- (b) by his attaining the age of fifty-five years or such higher age as the Governor-General may determine ; or
- (c) by his resignation in writing addressed to the Governor-General ; or
- (d) by his removal by the Governor-General on account of ill-health or physical or mental infirmity in the like circumstances and subject to the same conditions as a public officer in receipt of similar pensionable emoluments ; or
- (e) by his removal by the Governor-General upon an address from the Senate and the House of Representatives praying for his removal.

Subsection (1) reproduces section 56(1) of the Ministers' draft.

Subsection (2) reproduces the substance of section 56(2) of the Ministers' draft.

Subsection (3) reproduces section 56(3) of the Ministers' draft, except that the latter provided for the power in sub-paragraph (b) to be exercised on the recommendation of the Public Service

Commission. Also, a reference to the Senate is included in subparagraph (e).

**Audit of Accounts** 71.—(1) The accounts of all departments of Government, including the offices of the Cabinet, the Clerk to the Senate, the Clerk to the House of Representatives, the Judicial Service Commission and the Public Service Commission shall be audited by the Auditor-General who, with his deputies, shall at all times be entitled to have access to all books, records, or returns relating to such accounts.

(2) The Auditor-General shall report annually to the House of Representatives on the exercise of his functions under this Order.

This section reproduces section 61 of the Ministers' draft with some drafting amendments. It may be noted that the function given in subsection (2) is very different from that given by Article 85 of the Order in Council of 1931. The Audit Report is expected to comment on the accounts and not on the policy which the Government may be following for the time being. The Auditor-General may deal with accounting procedure and may report whether the Constitution, the legislation relating to finance for the time being in operation, and Financial Regulations, have been duly observed. It is not his business to decide whether the country is receiving value for its money.

## PART IX

### TRANSITIONAL PROVISIONS, REPEALS AND SAVINGS

**Regulations for election of Senators** 72. The Governor shall, before the first election of Senators in accordance with the provisions of section 9 of this Order, make regulations prescribing the method of voting and of transferring and counting votes in any election of Senators; and such regulations shall have effect as if enacted in this Order until Parliament shall otherwise provide.

This provision is new, being consequential upon the establishment of a Senate. It was at one time intended to include the regulations in a Schedule, but it was thought desirable to leave them to be governed by legislation. Since the legislation was required before the Parliament was in existence, however, the first rules were made by the Governor.

**Term of office of first Senators** 73. For the purpose of securing that one-third of the Senators shall retire every second year, at the first meeting of the Senate under this Order, the Senate shall by lot



divide the Senators into three classes, each class consisting of five elected Senators and five appointed Senators; and the term of office of the Senators of the first class shall terminate at the expiry of a period of two years, the term of office of the Senators of the second class shall terminate at the expiry of a period of four years, and the term of office of the Senators of the third class shall terminate at the expiry of a period of six years, from the date of election or appointment, as the case may be. For the purposes of this section, appointed Senators shall be deemed to have been appointed on the day on which elected Senators are elected.

This section is based upon paragraph 310(x) of the Soulbury Report, but has been modified because of the decision in the White Paper, requested by Mr Senanayake, that the term of office of a Senator be 6 years and not 9.

The system of drawing lots may produce some odd results, for the first Senate may be very different from subsequent Senates owing to the fact that the quota for election at the first election was about 7, while at subsequent elections it will be about 17. Accordingly, Senators elected at the first election may find re-election difficult.

74. Notwithstanding anything in section 11 of this Order, the first House of Representatives shall consist of one hundred and one Members, ninety-five of whom shall be elected in accordance with the law in force relating to the election of Members of Parliament, and six of whom shall be appointed by the Governor-General.

Number of  
Members in  
first House of  
Representa-  
tives

What the Soulbury Commission intended on this point was not at all clear. In the explanatory memorandum published with the Ministers' draft, the distribution of seats was worked out on the basis of the census of 1931, though the draft itself provided for the last census for the time being to be taken, and in 1946 this would have been the census of 1946. Public discussion centred, however, on the example, and it was assumed as the basis by those who gave evidence on the subject before the Soulbury Commission. Accordingly, though the Soulbury Commission approved of the Ministers' draft in principle, it was thought desirable to ignore the census of 1946 and to distribute seats according to the census of 1931. This was done by the present section and by section 76. The representation will therefore

change under section 41 only at the next census after that of 1946.

The law in force relating to the election of Members of Parliament is in the Ceylon (Parliamentary Elections) Order in Council, 1946 as amended by the Parliamentary Elections (Amendment) Act, No. 19 of 1948, and the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949.

Remuneration  
of Members of  
first House of  
Representatives

75. Until Parliament otherwise provides, the remuneration and allowances payable to Members of the first House of Representatives, including the Speaker, the Deputy Speaker and the Deputy Chairman of Committees, shall be the same as the remuneration and allowances paid to the Members of the State Council and the aforesaid officers thereof.

This section is new. It was assumed in the Ministers' draft that no remuneration or allowances would be paid until the necessary legislation had been passed by Parliament.

76. (*Revoked*).

This section was revoked by the Independence Order because the Delimitation Commission had completed its work and the section was thus obsolete. It is nevertheless convenient to set out the section in order to show the composition of the first House of Representatives.

76.—(1) As soon as may be after this Part of this Order comes into operation, the Governor shall establish a Delimitation Commission. The Governor shall fix a period within which the decisions of the Commission shall be reported to him :

Provided that the Governor may, at the request of the Chairman of the Commission, extend such period as he may think fit.

(2) Notwithstanding anything in subsection (2) of Section 41 of this Order, the number of electoral districts into which each Province of the Island shall be divided by the first Delimitation Commission shall be as follows :

Western Province	...	20
Central Province	...	15
Southern Province	...	12
Northern Province	...	7
Eastern Province	...	9
North-Western Province	...	10
North-Central Province	...	5
Province of Uva	...	7
Province of Sabaragamuwa	...	10

(3) Notwithstanding anything in subsection (2) of this section, the first Delimitation Commission shall have power to create in any Province one or more electoral districts returning two or more Members :

Provided that in any such case the number of electoral districts for that Province specified in subsection (2) of this section shall be reduced so that the total number of Members to be returned for that Province shall not exceed the total number of electoral districts so specified.

(4) Save as provided by this section, the provisions of Part IV of this Order shall apply to the first Delimitation Commission.

77. As soon as may be after the publication of the first Proclamation under section 43 of this Order, a register of electors shall be prepared for each electoral district in accordance with the law then in force relating to the election of Members of Parliament.

This is new in this form, since the intention of the Ministers' draft was to have the franchise and the law of elections in a separate Order in Council. This scheme was slightly modified. First, registers of electors were compiled under the Order in Council of 1931, in accordance with the Ceylon (Electoral Registers) (Special Provisions) Order in Council, 1946. Secondly, the Delimitation Commission issued its report, which was published by Proclamation under section 43. Thirdly, a new elections Order in Council was issued. Finally the registers compiled as above were modified to suit the new constituencies.

78. (*Revoked*).

79. (*Revoked*).

80. (*Revoked*).

81. The first Standing Orders of the Senate and of the House of Representatives shall be made by the Governor. Any Standing Order made by the Governor may be amended or revoked by the Chamber for which that Order is made.

First Standing Orders of the Senate and House of Representatives

The Ministers' draft applied the Standing Orders of the State Council, sitting in legislative session. It was subsequently decided, however, that they would need substantial modification before they were capable of application to the House of Representatives and the Senate. Accordingly, this section was new.

82.—(1) (*Revoked*).

First Clerks of  
Senate and House  
of Representa-  
tives and Par-  
liamentary Staff

(2) The person holding the office of clerk of the State Council and the persons on the staff of the State Council on the date immediately preceding the date on which Part III of this Order comes into operation shall, on that date, be transferred to the service of the House of Representatives and shall be deemed to have been appointed respectively as Clerk to the House of Representatives and as members of his staff under section 28 of this Order. The persons referred to in this subsection shall, until Parliament otherwise provides, hold their appointments on as nearly as may be the same terms and conditions as those on which they were employed under the State Council.

Section 32(3) of the Ministers' draft provided for the appointment of the Clerk to the State Council as the first Clerk to the new legislature. The principle is carried out by subsection (2) of this section.

83. (*Revoked*).

84.—(1) (*Revoked*).

(2) (*Revoked*).

(3) If any person ceasing to hold office under the provisions of this section, having held such office on the ninth day of October 1945, is not transferred to any public service outside the Island and is granted a pension or gratuity in respect of service under the Government of the Island, his case shall be treated in the computation of such pension or gratuity as if he had elected to retire under the provisions of subsection (2) of section 63 on the day upon which he ceased to hold office under the provisions of this section.

85. (*Revoked*).

86. (*Revoked*).

87. (*Revoked*).

88. (*Revoked*).

Construction  
of written  
law

89. Subject to the provisions of any Proclamation made under section 88 of this Order—

(a) every reference in any written law in force on the date of the first meeting of the House of Representatives under this Order to the Legislative Council or to the State Council shall, on and after that date and until Parliament otherwise provides, be read and construed as a reference to the House of Representatives ;

- (b) every reference in any written law aforesaid to an Officer of State, a Minister or an Executive Committee shall, on and after the date of the first meeting of the House of Representatives under this Order and until Parliament otherwise provides, be read and construed as a reference to the Minister or other authority to whom the particular power, authority or function is assigned under this Order.

90. Nothing contained in sections 88 and 89 of this Order shall affect the passing by Parliament of any law relating to the vesting or the exercise of any of the powers, authorities or functions to which those sections refer.

Power of Parliament to legislate on matters referred to in ss. 88 and 89 of this Order

91. The existing Orders in Council shall be revoked on the day on which Part III of this Order comes into operation :

Revocation

Provided that the preceding provisions of this section shall not prejudice or affect—

- (a) anything lawfully done under any of the Orders aforesaid or the continuance of any legal proceeding begun before the date aforesaid ;
- (b) the continued operation of any law in force in the Island immediately before the date aforesaid.

92. (*Revoked*).

#### FIRST SCHEDULE

The Ceylon (State Council) Order in Council, 1931.  
 The Ceylon (State Council) Amendment Order in Council, 1934.  
 The Ceylon (State Council) Amendment Order in Council, 1935.  
 The Ceylon (State Council) Amendment Order in Council, 1937.  
 The Ceylon (State Council) Amendment Order in Council, 1939.  
 The Ceylon (State Council) Amendment Order in Council, 1943.

#### SECOND SCHEDULE

Ceylon Government 5 per cent Inscribed Stock (1960-70).  
 Ceylon Government  $4\frac{1}{2}$  per cent Inscribed Stock (1965).  
 Ceylon Government  $3\frac{1}{2}$  per cent Inscribed Stock (1954-59).  
 Ceylon Government  $3\frac{1}{4}$  per cent Inscribed Stock (1959).  
 Ceylon Government 3 per cent Inscribed Stock (1959-64).

THE CEYLON (CONSTITUTION) (AMENDMENT No. 3)  
ORDER IN COUNCIL, 1947

At the Court at Buckingham Palace, the 26th day of  
November 1947

*Present :*

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by the Ceylon (Constitution) Order in Council, 1946, (hereinafter called 'the Principal Order') provision was made (amongst other things) for the establishing of a Parliament in and for the Island of Ceylon :

AND WHEREAS the definition 'Public Officer' in sub-section (1) of section 3 of the Principal Order was amended by the Ceylon (Constitution) (Amendment No. 2) Order in Council, 1947, (hereinafter called 'the Amending Order') :

AND WHEREAS by the Amending Order power was reserved for His Majesty, His Heirs and Successors to revoke, add to or amend the Amending Order or any part thereof, as to Him or Them should seem fit :

AND WHEREAS it is expedient for the purpose of removing doubts, to make provision as to the time at which the amendment made in the Principal Order is to be construed as having taken effect :

NOW, THEREFORE, it is hereby ordered by His Majesty, by and with the advice of His Privy Council as follows :

- 1.—(1) This Order may be cited as the Ceylon (Constitution) (Amendment No. 3) Order in Council, 1947, and shall be construed as one with the Principal Order.
- (2) This Order shall come into operation forthwith and shall be published in the *Government Gazette*.
- \* 2. For the removal of doubts, it is hereby declared that the amendment made in the Principal Order by section 2 of the Amending Order shall be construed as having taken effect as from the fifth day of July, 1947 (being the date on which Part III of the Principal Order came into operation); and any election petition or other legal proceedings pending at the date of this Order which may be affected by the provisions of this Order shall be determined accordingly subject to such orders as to costs as to the court or judge may seem just.
3. (*Revoked*).

\* The amendment referred to in Section 2 of the Order is the addition of all the words after 'Parliamentary Secretary' in paragraph (d) of the definition of 'public officer' in Section 3(1) of the Principal Order.

This Order had to be made because it was feared that the elections to the House of Representatives of persons who had been Ministers under the Donoughmore Constitution would be challenged.

## THE LETTERS PATENT, 1947

THE CEYLON (OFFICE OF GOVERNOR-GENERAL)  
LETTERS PATENT, 1947

LETTERS PATENT passed under the Great Seal of the Realm constituting the Office of Governor-General and Commander-in-Chief of the Island of Ceylon and its Dependencies.

(Dated 19th December, 1947)

GEORGE THE SIXTH, by the Grace of God of Great Britain, Ireland, and the British Dominions beyond the Seas King, Defender of the Faith. To all to whom these Presents shall come, Greeting!

WHEREAS by the Ceylon Letters Patent, 1947, we did constitute the Office of Governor and Commander-in-Chief in and over Our Island of Ceylon and its Dependencies:

AND WHEREAS We are minded to make fresh provisions as is hereinafter provided:

NOW KNOW YE THAT We do by these Presents declare Our will and pleasure as follows:

Interpretation 1.—(1) In these Letters Patent, unless the context otherwise requires:

‘the Governor-General’ means the Governor-General and Commander-in-Chief of the Island, and includes the Officer for the time being Administering the Government of the Island and, to the extent to which a Deputy for the Governor-General is authorised to act, that Deputy;

‘the Public Seal’ means the Public Seal of the Island.

(2) In the interpretation of these Letters Patent, the provisions of the Interpretation Ordinance of Ceylon shall, subject to the express provisions of these Letters Patent, and notwithstanding any provision to the contrary in that Ordinance apply as they apply for the interpretation of an Ordinance in force in the Island.

Short Title and Commencement 2. These Letters Patent may be cited as the Ceylon (Office of Governor-General) Letters Patent, 1947, and shall come into operation on the day appointed by Us by Order in Our Privy Council as the appointed day for the purposes of the Ceylon Independence Act, 1947.

Revocation of existing Letters Patent 3. The Ceylon Letters Patent, 1947, are hereby revoked but without prejudice to any appointment lawfully made, or to any other thing lawfully done, thereunder.



4. There shall be a Governor-General and Commander-in-Chief in and over Our Island of Ceylon and its Dependencies and appointments to the said Office shall be by Commission under Our Sign Manual and Signet. Office of Governor-General and Commander-in-Chief constituted

5. We do hereby authorise, empower and command the Governor-General to do all things belonging to his Office in accordance with these Letters Patent, such Commission as aforesaid, such Instructions as may from time to time be given to him by Us under Our Sign Manual and Signet, The Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947, and such other laws as may from time to time be in force in the Island. Governor-General's Authority

6. Every person appointed to fill the office of Governor-General shall, with all due solemnity, before entering on any of the duties of his Office, cause the Commission appointing him to be Governor-General to be read and published in the presence of the Chief Justice or, in his absence, some other Judge of Our Supreme Court of Ceylon and of such Members of the Cabinet of the Island as can conveniently attend; which being done, he shall then and there take before them the Oath of Allegiance and the Official Oath in the forms set out in the Promissory Oaths Ordinance, which Oaths the said Chief Justice or Judge is hereby required to administer. Publication of Governor-General's Commission and taking of Oaths

7.—(1) Whenever the Office of Governor-General is vacant, or the Governor-General is absent from the Island, or is from any cause prevented from, or incapable of, acting in the duties of his Office, then such other person as We may appoint under Our Sign Manual and Signet, or if there is no such person in the Island and capable of discharging the duties of the administration, then the person for the time being lawfully performing the functions of Chief Justice shall, during Our pleasure, administer the Government of the Island. Succession to Government

(2) Before assuming the administration of the Government of the Island any such person shall, in the form and manner prescribed in Article 6 of these Letters Patent, take the Oath of Allegiance and the Official Oath (as Governor-General); which being done, We do hereby authorise, empower and command such person, subject, if he is appointed as aforesaid under Our Sign Manual and Signet, to the terms of his appointment, during Our pleasure, to do all things that belong to the Office of Governor-General as provided in these Letters Patent.

(3) Any such person as aforesaid shall not continue to administer the Government after the Governor-General or some other person having a prior right to administer the same has notified that he has assumed or resumed or is about to assume or resume the administration.

(4) The Governor-General or any other person as aforesaid shall not be regarded as absent from the Island or prevented

from or incapable of acting in the duties of his Office for the purposes of this Article during his passage to or from any Dependency of the Island or when there is a subsisting appointment of a Deputy under the next succeeding Article of these Letters Patent.

Appointment of Deputy to Governor-General 8.—(1) Whenever the Governor-General has occasion to be absent from the seat of Government but not from the Island, or to be absent from the Island for a period which he has reason to believe will be of short duration, or whenever by reason of illness which he has reason to believe will be of short duration he considers it desirable so to do, he may, by Instrument under the Public Seal, appoint any person in the Island to be his Deputy during such absence or illness, and in that capacity to exercise and perform for and on behalf of the Governor-General during such absence or illness all such powers and functions vested in the Governor-General by these Letters Patent or otherwise as shall be specified by such Instrument.

(2) By the appointment of a Deputy as aforesaid the power and authority of the Governor-General shall not be abridged, altered, or in any way affected otherwise than as We may at any time hereafter think proper to direct; and every such Deputy shall conform to and observe all such instructions as the Governor-General shall from time to time address to him for his guidance.

(3) Any appointment under this Article may at any time be revoked by Us or by the Governor-General, and, in case of absence as aforesaid, shall cease and determine upon the return of the Governor-General to the seat of Government or to the Island, as the case may be.

Public Appointments 9. Subject to the provisions of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947, and of any other law for the time being in force, the Governor-General may constitute and appoint in Our name and on Our behalf all such Judges, Commissioners, Justices of the Peace and other officers as may lawfully be constituted or appointed by Us, and, subject as aforesaid, may, for cause shown to his satisfaction, dismiss or suspend from the exercise of his office any person in Our service in the Island, or take other disciplinary action as respects any such person.

Grant of Pardon 10. When any offence has been committed for which the offender may be tried in the Island, the Governor-General may, as he shall see fit, in Our name and on Our behalf, grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such principal offenders if more than one, and further may grant to any offender convicted of any such offence in any Court within the Island, a pardon, either free or subject to lawful conditions, or any respite, either indefinite or

for such period as the Governor-General may think fit, of the execution of any sentence passed on such offender, and may remit the whole or any part of such sentence or of any penalties or forfeitures otherwise due to Us.

11. Subject to any law for the time being in force, the Governor-General may, in Our Name and on Our behalf, make and execute, under the Public Seal, grants and dispositions of any lands or other immovable property within the Island which may be lawfully granted or disposed of by Us.

12. The Governor-General shall keep and use the Public Seal for sealing all things whatsoever that shall pass the said Seal.

13. We do hereby require and command all Our Officers, Civil and Military, and all other the inhabitants of the Island to be obedient, aiding and assisting unto the Governor-General.

14. We do hereby reserve to Ourselves, Our Heirs and Successors full power and authority to revoke, add to, or amend these Letters Patent as to Us or Them shall seem fit.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster this nineteenth day of December, 1947, in the twelfth year of Our Reign.

By Warrant under The King's Sign Manual  
NAPIER.

CHAPTER IV

*THE ROYAL INSTRUCTIONS, 1947*

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor-General and Commander-in-Chief of the Island of Ceylon and its Dependencies.

GEORGE R.

(Dated 19th December 1947)

Instructions to Our Governor-General and Commander-in-Chief in and over Our Island of Ceylon and its Dependencies or other Officer for the time being Administering the Government of Our said Island and its Dependencies.

WHEREAS by the Ceylon Letters Patent, 1947, We did constitute the Office of Governor and Commander-in-Chief in and over Our Island of Ceylon and its Dependencies :

AND WHEREAS We did issue to the Governor certain Instructions under Our Sign Manual and Signet dated the twenty-fifth day of August, 1947, (hereinafter called ' the existing Instructions ' ) :

AND WHEREAS by the Ceylon (Office of Governor-General) Letters Patent, 1947, (hereinafter called ' the Letters Patent ' ) We have revoked the Ceylon Letters Patent, 1947, and have ordered and declared that there shall be a Governor-General and Commander-in-Chief in and over the Island :

AND WHEREAS We are minded to issue fresh Instructions under Our Sign Manual and Signet for the guidance of the Governor-General or any other Officer Administering the Government of the Island :

Revocation of the existing instructions  
NOW, THEREFORE, as from the day appointed by Us by Order in Our Privy Council as the appointed day for the purposes of the Ceylon Independence Act, 1947, We do hereby revoke the existing Instructions, but without prejudice to any appointment lawfully made, or any other thing lawfully done, thereunder, and instead thereof We do hereby direct and enjoin and declare Our will and pleasure as follows :

Governor-General to administer oaths  
1. The Governor-General may, whenever he thinks fit, require any person in the public service of the Island to take the Oath of Allegiance together with such other oath or oaths as may from time to time be prescribed by any law in force in the Island, in the form prescribed by any such law. The Governor-General is to administer such oaths or cause them to be administered by any other person.

Instructions to be observed by Deputy  
2. (1) Whenever there is a subsisting appointment of a Deputy to the Governor-General under the Letters Patent, these Instructions, so far as they apply to any matter or

thing to be done, or any powers or functions to be exercised or performed, by such Deputy, shall be deemed to be addressed to, and shall be observed by, such Deputy.

(2) Any such Deputy may, if he thinks fit, apply to Us for instructions in any matters; but he shall forthwith transmit to the Governor-General a copy of every despatch or other communication so addressed to Us.

3. We do hereby direct and enjoin that the Governor-General in the exercise of the powers conferred upon him by Article 10 of the Letters Patent shall not grant a pardon, respite or remission to any offender without first receiving, in every case, the advice of one of his Ministers. Where any offender shall have been condemned to suffer death by the sentence of any Court, the Governor-General shall cause a report to be made to him by the Judge who tried the case; and he shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent, together with the Attorney-General's advice, to the Minister whose function it is to advise the Governor-General on the exercise of the said powers.

4. Except for the purpose of visiting for a short period any Dependency of the Island, the Governor-General shall not quit the Island without having first obtained leave from Us for so doing. Governor-General not to absent himself without leave

5. In these Instructions, unless the context otherwise requires: Interpretation

'the Island' means the Island of Ceylon and the Dependencies thereof;

'the Governor-General' means the Governor-General and Commander-in-Chief of the Island of Ceylon and includes the Officer for the time being Administering the Government and, to the extent to which a Deputy for the Governor-General is authorised to act, that Deputy.

Given at Our Court at St James's this Nineteenth day of December 1947, in the Twelfth year of Our Reign.

CHAPTER V

*THE AGREEMENTS*

DEFENCE AGREEMENT BETWEEN HIS MAJESTY'S  
GOVERNMENT IN THE UNITED KINGDOM AND  
THE GOVERNMENT OF CEYLON

UNITED KINGDOM—CEYLON

*Defence Agreement*

WHEREAS Ceylon has reached the stage in Constitutional development at which she is ready to assume the status of a fully responsible member of the British Commonwealth of Nations, in no way subordinate in any aspect of domestic or external affairs, freely associated and united by common allegiance to the Crown ;

AND WHEREAS it is in the mutual interest of Ceylon and the United Kingdom of Great Britain and Northern Ireland that the necessary measures should be taken for the effectual protection and defence of the territories of both and that the necessary facilities should be afforded for this purpose ;

THEREFORE the Government of the United Kingdom and the Government of Ceylon have agreed as follows :

The principles of this Agreement were negotiated in July 1947 after the Government of the United Kingdom had agreed to confer Dominion Status, though the draft was not available until the new Ceylon Cabinet was in office in October 1947, when it was approved.

The first paragraph of the preamble contains a slight modification of the phrase ' fully responsible status ' which had been approved by the United Kingdom Cabinet ; but it goes on to summarize the Balfour Declaration of 1926 in which Dominion Status had been defined. That is, it does its best to say that the status is Dominion Status without actually using those words.

The Agreement belongs to the class of instruments known as Agreements between Governments. They are distinguished from treaties by the fact that the latter are in the name of Heads of States. Since the King is the Head of each of the nations of the Commonwealth it is not customary to have treaties within the Commonwealth, except international conventions to which other

countries are parties. There is, however, nothing constitutionally objectionable in a treaty between 'the King on behalf of the United Kingdom' and 'the King on behalf of Ceylon'.

The Agreement is for an indefinite period, so that steps may be taken at any time for its modification by agreement.

1. The Government of the United Kingdom and the Government of Ceylon will give to each other such military assistance for the security of their territories, for defence against external aggression and for the protection of essential communications as it may be in their mutual interest to provide. The Government of the United Kingdom may base such naval and air forces and maintain such land forces in Ceylon as may be required for these purposes, and as may be mutually agreed.

'Military assistance' clearly includes naval and air assistance, since the forces referred to in the second sentence and 'required for these purposes' are of all three types.

The first sentence leaves each Government free to decide whether it will give military assistance and, if so, what assistance it will give.

In the second sentence the phrase 'as may be mutually agreed' seems to involve continuous agreement. Two conditions have to be satisfied :

(i) The forces must be required for the purposes mentioned in the first sentence ; and

\* (ii) Such forces must be mutually agreed.

2. The Government of Ceylon will grant to the Government of the United Kingdom all the necessary facilities for the objects mentioned in Article 1 as may be mutually agreed. These facilities will include the use of naval and air bases and ports and military establishments and the use of telecommunication facilities, and the right of service courts and authorities to exercise such control and jurisdiction over members of the said forces as they exercise at present.

The naval and air bases, ports, military establishments and telecommunication facilities are to be provided by Ceylon but used by the United Kingdom forces.

3. The Government of the United Kingdom will furnish the Government of Ceylon with such military assistance as may from time to time be required towards the training and development of Ceylonese armed forces.

4. The two Governments will establish such administrative machinery as they may agree to be desirable for the purpose of

co-operation in regard to defence matters, and to co-ordinate and determine the defence requirements of both Governments.

5. This Agreement will take effect on the day when the constitutional measures necessary for conferring on Ceylon fully responsible status within the British Commonwealth of Nations shall come into force.

Done in duplicate, at Colombo, this eleventh day of November, 1947.

Signed on behalf of the Government of the United Kingdom  
of Great Britain and Northern Ireland

HENRY MOORE

Signed on behalf of the Government of Ceylon

D. S. SENANAYAKE

The date was 4 February 1948.

EXTERNAL AFFAIRS AGREEMENT BETWEEN HIS  
MAJESTY'S GOVERNMENT IN THE UNITED KING-  
DOM AND THE GOVERNMENT OF CEYLON

UNITED KINGDOM—CEYLON

*External Affairs Agreement*

WHEREAS Ceylon has reached the stage in constitutional development at which she is ready to assume the status of a fully responsible member of the British Commonwealth of Nations in no way subordinate in any aspect of domestic or external affairs, freely associated and united by common allegiance to the Crown ;

AND WHEREAS the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ceylon are desirous of entering into an agreement to provide for certain matters relating to external affairs ;

THEREFORE the Government of the United Kingdom and the Government of Ceylon have agreed as follows :

1. The Government of Ceylon declares the readiness of Ceylon to adopt and follow the resolutions of past Imperial Conferences.

The Imperial Conferences have passed few resolutions of permanent importance. It may indeed be said that there is nothing earlier than 1923 having any relevance, and much that was discussed in 1923, 1926, 1930 and 1937 is now irrelevant. The following quotations seem still to apply, though with modifications required by changing conditions :



*Constitutional Status*

The following may be quoted from the Imperial Conference of 1926 :<sup>1</sup>

‘ The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution ; while, considered as a whole, it defies classification and bears no real resemblance to any other political organization which now exists or has ever yet been tried.

‘ There is, however, one important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

‘ A foreigner endeavouring to understand the true character of the British Empire by the aid of this formula alone would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual co-operation easy.

‘ Such a criticism, however, completely ignores the historic situation. The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy ; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.

‘ But no account, however accurate, of the negative relations in which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference ; excellent results have been thereby obtained. And though every Dominion is now, and must always remain, the sole judge of the nature and

<sup>1</sup> *Imperial Conference, 1926, Summary of Proceedings* (Cm'd. 2768), pp. 14-15.

extent of its co-operation, no common cause will, in our opinion, be thereby imperilled.

'Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity, appropriate to *status*, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can, from time to time, be adapted to the changing circumstances of the world.'

### *Position of the Governor-General*

The Conference of 1926 resolved as follows :<sup>1</sup>

'In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

'It seemed to us to follow that the practice whereby the Governor-General of a Dominion is the formal official channel of communication between His Majesty's Government in Great Britain and His Governments in the Dominions might be regarded as no longer wholly in accordance with the constitutional position of the Governor-General. It was thought that the recognized official channel of communication should be, in future, between Government and Government direct. The representatives of Great Britain readily recognized that the existing procedure might be open to criticism and accepted the proposed change in principle in relation to any of the Dominions which desired it. Details were left for settlement as soon as possible after the Conference had completed its work, but it was recognized by the Committee, as an essential feature of any change or development in the channels of communication, that a Governor-General should be supplied with copies of all documents of importance and in general should be kept as fully informed as is His Majesty the King in Great Britain of Cabinet business and public affairs.'

The Conference of 1930 resolved as follows as to the method of appointment :<sup>2</sup>

<sup>1</sup> *Ibid.*, p. 16.

<sup>2</sup> *Imperial Conference, 1930, Summary of Proceedings* (Cmd. 3717), p. 27.

'1. The parties interested in the appointment of a Governor-General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned.

'2. The constitutional practice that His Majesty acts on the advice of responsible Ministers applies also in this instance.

'3. The Ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned.

'4. The Ministers concerned tender their formal advice after informal consultation with His Majesty.

'5. The channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government. His Majesty's Government in the United Kingdom have expressed their willingness to continue to act in relation to any of His Majesty's Governments in any manner in which that Government may desire.

'6. The manner in which the instrument containing the Governor-General's appointment should reflect the principles set forth above is a matter in regard to which His Majesty is advised by His Ministers in the Dominions concerned.'

### *Treaties*

The following rules, laid down in 1923, are not wholly applicable to present conditions :<sup>1</sup>

'The Conference recommends for the acceptance of the Governments of the Empire represented that the following procedure should be observed in the negotiation, signature, and ratification of international agreements.

'The word "treaty" is used in the sense of an agreement which, in accordance with the normal practice of diplomacy, would take the form of a treaty between heads of States, signed by plenipotentiaries provided with full powers issued by the heads of the States, and authorizing the holders to conclude a treaty.

## I

### '1. *Negotiation*

'(a) It is desirable that no treaty should be negotiated by any of the Governments of the Empire without due consideration of its possible effect on other parts of the Empire, or, if circumstances so demand, on the Empire as a whole.

'(b) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other Governments of the Empire likely to be interested are informed, so that, if any such Government considers that

<sup>1</sup> *Imperial Conference, 1923, Summary of Proceedings* (Cmd. 1987), pp. 12-13.

its interests would be affected it may have an opportunity of expressing its views, or, when its interests are intimately involved, of participating in the negotiations.

‘(c) In all cases where more than one of the Governments of the Empire participates in the negotiations, there should be the fullest possible exchange of views between those Governments before and during the negotiations. In the case of treaties negotiated at international conferences, where there is a British Empire Delegation on which, in accordance with the now established practice, the Dominions and India are separately represented, such representation should also be utilized to attain this object.

‘(d) Steps should be taken to ensure that those Governments of the Empire whose representatives are not participating in the negotiations should, during their progress, be kept informed in regard to any points arising in which they may be interested.

### ‘2. *Signature*

‘(a) Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the Government of that part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.

‘(b) Where a bilateral treaty imposes obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the Governments concerned.

‘(c) As regards treaties negotiated at international conferences, the existing practice of signature by plenipotentiaries on behalf of all the Governments of the Empire represented at the Conference should be continued, and the full powers should be in the form employed at Paris and Washington.

### ‘3. *Ratification*

‘The existing practice in connexion with the ratification of treaties should be maintained.

## II

‘Apart from treaties made between heads of States it is not unusual for agreements to be made between Governments. Such agreements, which are usually of a technical or administrative character, are made in the name of the signatory Governments, and signed by representatives of those Governments, who do not act under full powers issued by the heads of the States: they are not ratified by the heads of the States, though in some cases some form of acceptance or confirmation by the Governments concerned is employed. As regards agreements of this

nature the existing practice should be continued, but before entering on negotiations the Governments of the Empire should consider whether the interests of any other part of the Empire may be affected, and, if so, steps should be taken to ensure that the Government of such part is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views.'

The Resolution was submitted to the full Conference and unanimously approved. It was thought, however, that it would be of assistance to add a short explanatory statement in connexion with part I(3), setting out the existing procedure in relation to the ratification of treaties. This procedure is as follows :

(a) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the Government of that part.

(b) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the Governments of those parts of the Empire concerned. It is for each Government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that Government.

To this the Conference of 1926 added the following :<sup>1</sup>

*'Negotiation*

'It was agreed in 1923 that any of the Governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon other Governments and should take steps to inform Governments likely to be interested of its intention.

'This rule should be understood as applying to any negotiations which any Government intends to conduct, so as to leave it to the other Governments to say whether they are likely to be interested.

'When a Government has received information of the intention of any other Government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating Government receives no adverse comments and so long as its policy involves no active obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve

<sup>1</sup> *Imperial Conference, 1926, Summary of Proceedings* (Cmd. 2768), pp. 22-4.

the other Governments in any active obligations, obtain their definite assent.

Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire, the initiating Government may assume that a Government which has had full opportunity of indicating its attitude and has made no adverse comments will concur in the ratification of the treaty. In the case of a Government that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary authorized to act on its behalf, it will advise the appointment of a plenipotentiary so to act.

#### *Form of Treaty*

Some treaties begin with a list of the contracting countries and not with a list of Heads of States. In the case of treaties negotiated under the auspices of the League of Nations, adherence to the wording of the Annex to the Covenant for the purpose of describing the contracting party has led to the use in the preamble of the term "British Empire" with an enumeration of the Dominions and India if parties to the Convention but without any mention of Great Britain and Northern Ireland and the Colonies and Protectorates. These are only included by virtue of their being covered by the term "British Empire". This practice, while suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.

As a means of overcoming this difficulty it is recommended that all treaties (other than agreements between Governments) whether negotiated under the auspices of the League [of Nations] or not should be made in the name of Heads of States, and, if the treaty is signed on behalf of any or all of the Governments of the Empire, the treaty should be made in the name of the King as the symbol of the special relationship between the different parts of the Empire. The British units on behalf of which the treaty is signed should be grouped together in the following order: Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League, Canada, Australia, New Zealand, South Africa, Irish Free State, India. A specimen form of treaty as recommended is attached as an appendix to the Committee's report.

In the case of a treaty applying to only one part of the Empire it should be stated to be made by the King on behalf of that part.

The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the

rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connexion it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the Legal Committee of that Conference laid it down that the principle to which the foregoing sentence gives expression underlies all international conventions.

' In the case of some international agreements the Governments of different parts of the Empire may be willing to apply between themselves some of the provisions as an administrative measure. In this case they should state the extent to which and the terms on which such provisions are to apply. Where international agreements are to be applied between different parts of the Empire, the form of a Treaty between Heads of States should be avoided.

#### *' Full Powers*

' The plenipotentiaries for the various British units should have full powers, issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire for which they are to sign. It will frequently be found convenient, particularly where there are some parts of the Empire on which it is not contemplated that active obligations will be imposed, but where the position of the British subjects belonging to these parts will be affected, for such Government to advise the issue of full powers on their behalf to the plenipotentiary appointed to act on behalf of the Government or Governments mainly concerned. In other cases provision might be made for accession by other parts of the Empire at a later date.

#### *' Signature*

' In the case where the names of countries are appended to the signatures in a treaty, the different parts of the Empire should be designated in the same manner as is proposed in regard to the list of plenipotentiaries in the preamble to the treaty. The signatures of the plenipotentiaries of the various parts of the Empire should be grouped together in the same order as is proposed above.

' The signature of a treaty on behalf of a part of the Empire should cover territories for which a mandate has been given to that part of the Empire, unless the contrary is stated at the time of the signature.

#### *' Coming into Force of Multilateral Treaties*

' In general, treaties contain a ratification clause and a provision that the treaty will come into force on the deposit of a certain number of ratifications. The question has sometimes

arisen in connexion with treaties negotiated under the auspices of the League whether, for the purpose of making up the number of ratifications necessary to bring the treaty into force, ratifications on behalf of different parts of the Empire which are separate Members of the League should be counted as separate ratifications. In order to avoid any difficulty in future, it is recommended that when it is thought necessary that a treaty should contain a clause of this character, it should take the form of a provision that the treaty should come into force when it has been ratified on behalf of so many separate Members of the League.

'We think that some convenient opportunity should be taken of explaining to the other Members of the League the changes which it is desired to make in the form of treaties and the reasons for which they are desired. We would also recommend that the various Governments of the Empire should make it an instruction to their representatives at International Conferences to be held in future that they should use their best endeavours to secure that effect is given to the recommendations contained in the foregoing paragraphs.'

The Conference of 1937 added :<sup>1</sup>

*'(ii) Treaty Procedure*

'As regards the nature and effect of the participation of Members of the British Commonwealth in a multilateral treaty, it was recognized :

'(1) That each Member takes part in a multilateral treaty as an individual entity, and in the absence of express provision in the treaty to the contrary, is in no way responsible for the obligations undertaken by any other Member ; and

'(2) That the form agreed upon for such treaties at the Imperial Conference of 1926 accords with this position.'

*General Conduct of Foreign Policy*

The Conference of 1926 agreed as follows :<sup>2</sup>

'We went on to examine the possibility of applying the principles underlying the Treaty Resolution of the 1923 Conference to matters arising in the conduct of foreign affairs generally. It was frankly recognized that in this sphere, as in the sphere of defence, the major share of responsibility rests now, and must for some time continue to rest, with His Majesty's Government in Great Britain. Nevertheless, practically all the Dominions are engaged to some extent, and some to a considerable extent, in the

<sup>1</sup> *Imperial Conference, 1937, Summary of Proceedings* (Cmd. 5482), p. 27.

<sup>2</sup> *Imperial Conference, 1926, Summary of Proceedings* (Cmd. 2768), pp. 25-6.



conduct of foreign relations, particularly those with foreign countries on their borders. A particular instance of this is the growing work in connexion with the relations between Canada and the United States of America which has led to the necessity for the appointment of a Minister Plenipotentiary to represent the Canadian Government in Washington. We felt that the governing consideration underlying all discussions of this problem must be that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the definite assent of their own Governments. In the light of this governing consideration, the Committee agreed that the general principle expressed in relation to Treaty negotiations in section V(a) of this Report, which is indeed already to a large extent in force, might usefully be adopted as a guide by the Governments concerned in future in all negotiations affecting foreign relations falling within their respective spheres.'

#### *Representation at International Conferences*

Certain rules were laid down on this subject in 1926,<sup>1</sup> but since the nations of the Commonwealth are now always separately represented, the rules may be regarded as obsolete.

'We also studied, in the light of the Resolution of the Imperial Conference of 1923 to which reference has already been made, the question of the representation of the different parts of the Empire at International Conferences. The conclusions which we reached may be summarized as follows:

'1. No difficulty arises as regards representation at Conferences convened by, or under the auspices of, the League of Nations. In the case of such Conferences all members of the League are invited, and if they attend are represented separately by separate delegations. Co-operation is ensured by the application of paragraph I, 1(c) of the Treaty Resolution of 1923.

'2. As regards international conferences summoned by foreign Governments, no rule of universal application can be laid down, since the nature of the representation must, in part, depend on the form of invitation issued by the convening Government.

'(a) In conferences of a technical character, it is usual and always desirable that the different parts of the Empire should (if they wish to participate) be represented separately by separate delegations, and where necessary efforts should be made to secure invitations which will render such representation possible.

'(b) Conferences of a political character called by a foreign Government must be considered on the special circumstances of each individual case.

<sup>1</sup> *Ibid.*, pp. 24-5.

‘It is for each part of the Empire to decide whether its particular interests are so involved, especially having regard to the active obligations likely to be imposed by any resulting treaty, that it desires to be represented at the conference, or whether it is content to leave the negotiation in the hands of the part or parts of the Empire more directly concerned and to accept the result.

‘If a Government desires to participate in the conclusion of a treaty, the method by which representation will be secured is a matter to be arranged with the other Governments of the Empire in the light of the invitation which has been received.

‘Where more than one part of the Empire desires to be represented, three methods of representation are possible :

‘(i) By means of a common plenipotentiary or plenipotentiaries, the issue of full powers to whom should be on the advice of all parts of the Empire participating.

‘(ii) By a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the conference. This was the form of representation employed at the Washington Disarmament Conference of 1921.

‘(iii) By separate delegations representing each part of the Empire participating in the Conference. If, as a result of consultation, this third method is desired, an effort must be made to ensure that the form of invitation from the convening Government will make this method of representation possible.

‘Certain non-technical treaties should, from their nature, be concluded in a form which will render them binding upon all parts of the Empire, and for this purpose should be ratified with the concurrence of all the Governments. It is for each Government to decide to what extent its concurrence in the ratification will be facilitated by its participation in the conclusion of the treaty, as for instance, by the appointment of a common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the Governments.’

#### *Issue of Exequaturs to Foreign Consuls*

The following rule was adopted in 1926 :<sup>1</sup>

‘The Secretary of State for Foreign Affairs informed us that His Majesty’s Government in Great Britain accepted the suggestion that in future any application by a foreign Government for the issue of an exequatur to any person who was to act as Consul in a Dominion should be referred to the Dominion Government concerned for consideration and that, if the Dominion Government agreed to the issue of the exequatur, it would be

<sup>1</sup> Ibid., p. 26.

sent to them for counter-signature by a Dominion Minister. Instructions to this effect had indeed already been given.'

### *Communications with Foreign Governments*

The rules to be adopted where a Dominion was not separately represented in a foreign country were laid down in 1930 as follows :<sup>1</sup>

'At the Imperial Conference of 1926 it was agreed that, in cases other than those where Dominion Ministers were accredited to the Heads of foreign States, it was very desirable that the existing diplomatic channels should continue to be used, as between the Dominion Governments and foreign Governments, in matters of general and political concern.

'While the Conference did not wish to suggest any variation in this practice, they felt that it was of great importance to secure that the machinery of diplomatic communication should be of a sufficiently elastic and flexible character. They appreciated that cases might arise in which, for reasons of urgency, one of His Majesty's Governments in the Dominions might consider it desirable to communicate direct with one of His Majesty's Ambassadors or Ministers appointed on the advice of His Majesty's Government in the United Kingdom on a matter falling within the category mentioned. In such cases they recommended that the procedure just described should be followed. It would be understood that the communication sent to the Ambassador or Minister would indicate to him that, if practicable, he should, before taking any action, await a telegram from His Majesty's Government in the United Kingdom, with whom the Dominion Government concerned would simultaneously communicate.

'As regards subjects not falling within the category of matters of general and political concern, the Conference felt that it would be to the general advantage if communications passed direct between His Majesty's Governments in the Dominions and the Ambassador or Minister concerned. It was thought that it would be of practical convenience to define, as far as possible, the matters falling within this arrangement ; the definition would include such matters as, for example, the negotiation of commercial arrangements affecting exclusively a Dominion Government and a foreign Power, complimentary messages, invitations to non-political conferences and requests for information of a technical or scientific character. If it appeared hereafter that the definition was not sufficiently exhaustive it could, of course, be added to at any time.

<sup>1</sup> *Imperial Conference, 1930, Summary of Proceedings* (Cmd. 3717), pp. 29-30.

'In making the above recommendations, it was understood that, in matters of the nature described in the preceding paragraph, cases might also arise in which His Majesty's Governments in the Dominions might find it convenient to adopt appropriate channels of communication other than that of diplomatic representatives.

'The Conference were informed that His Majesty's Government in the United Kingdom were willing to issue the necessary instructions to the Ambassadors and Ministers concerned to proceed in accordance with the above recommendations.'

*Communication and Consultation in Foreign Affairs*

The Conference of 1930 summarized the decisions of previous Conferences :<sup>1</sup>

'Previous Imperial Conferences have made a number of recommendations with regard to the communication of information and the system of consultation in relation to treaty negotiations and the conduct of foreign affairs generally. The main points can be summarized as follows :

'(1) Any of His Majesty's Governments conducting negotiations should inform the other Governments of His Majesty in case they should be interested and give them the opportunity of expressing their views, if they think that their interests may be affected.

'(2) Any of His Majesty's Governments on receiving such information should, if it desires to express any views, do so with reasonable promptitude.

'(3) None of His Majesty's Governments can take any steps which might involve the other Governments of His Majesty in any active obligations without their definite assent.'

The Conference desired to emphasize the importance of ensuring the effective operation of these arrangements. As regards the first two points, they made the following observations :

'(i) The first point, namely, that of informing other Governments of negotiations, is of special importance in relation to treaty negotiations in order that any Government which feels that it is likely to be interested in negotiations conducted by another Government may have the earliest possible opportunity of expressing its views. The application of this is not, however, confined to treaty negotiations. It cannot be doubted that the fullest possible interchange of information between His Majesty's Governments in relation to all aspects of foreign affairs is of the greatest value to all the Governments concerned.

<sup>1</sup> Ibid., pp. 27-9.

' In considering this aspect of the matter, the Conference have taken note of the development since the Imperial Conference of 1926 of the system of appointment of diplomatic representatives of His Majesty representing in foreign countries the interests of different Members of the British Commonwealth. They feel that such appointments furnish a most valuable opportunity for the interchange of information, not only between the representatives themselves but also between the respective Governments.

' Attention is also drawn to the resolution quoted in Section VI of the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926, with regard to the development of a system to supplement the present system of intercommunication through the official channel with reference not only to foreign affairs but to all matters of common concern. The Conference have heard with interest of the account which was given of the liaison system adopted by His Majesty's Government in the Commonwealth of Australia, and recognized its value. Their attention has also been called to the action taken by His Majesty's Government in the United Kingdom in the appointment of representatives in Canada and the Union of South Africa. They are impressed with the desirability of continuing to develop the system of personal contact between His Majesty's Governments, though, of course, they recognize that the precise arrangements to be adopted for securing this development are matters for the consideration of the individual Governments with a view to securing a system which shall be appropriate to the particular circumstances of each Government.

' (ii) As regards the second point, namely, that any of His Majesty's Governments desiring to express any views should express them with reasonable promptitude, it is clear that a negotiating Government cannot fail to be embarrassed in the conduct of negotiations if the observations of other Governments who consider that their interests may be affected are not received at the earliest possible stage in the negotiations. In the absence of comment the negotiating Government should, as indicated in the Report of the 1926 Conference, be entitled to assume that no objection will be raised to its proposed policy.'

### *Defence*

The following resolutions were adopted at the Conference of 1923 :<sup>1</sup>

' 1. The Conference affirms that it is necessary to provide for the adequate defence of the territories and trade of the several countries composing the British Empire.

<sup>1</sup> *Imperial Conference, 1923, Summary of Proceedings* (Cmd. 1987), pp. 15-16.

'2. In this connexion the Conference expressly recognizes that it is for the Parliaments of the several parts of the Empire, upon the recommendations of their respective Governments, to decide the nature and extent of any action which should be taken by them.

'3. Subject to this provision, the Conference suggests the following as guiding principles :

'(a) The primary responsibility of each portion of the Empire represented at the Conference for its own local defence.

'(b) Adequate provision for safeguarding the maritime communications of the several parts of the Empire and the routes and waterways along and through which their armed forces and trade pass.

'(c) The provision of naval bases and facilities for repair and fuel so as to ensure the mobility of the fleets.

'(d) The desirability of the maintenance of a minimum standard of naval strength, namely, equality with the naval strength of any foreign power in accordance with the provisions of the Washington Treaty on Limitation of Armaments as approved by Great Britain, all the self-governing Dominions and India.

'(e) The desirability of the development of the Air Forces in the several countries of the Empire upon such lines as will make it possible, by means of the adoption, as far as practicable, of a common system of organization and training and the use of uniform manuals, patterns of arms, equipment and stores (with the exception of the type of aircraft), for each part of the Empire as it may determine to co-operate with other parts with the least possible delay and the greatest efficiency.

'4. In the application of these principles to the several parts of the Empire concerned the Conference takes note of :

'(a) The deep interest of the Commonwealth of Australia, the Dominion of New Zealand, and India, in the provision of a naval base at Singapore, as essential for ensuring the mobility necessary to provide for the security of the territories and trade of the Empire in Eastern waters.

'(b) The necessity for the maintenance of safe passage along the great route to the East through the Mediterranean and the Red Sea.

'(c) The necessity for the maintenance by Great Britain of a Home Defence Air Force of sufficient strength to give adequate protection against air attack by the strongest air force within striking distance of her shores.

'5. The Conference, while deeply concerned for the paramount importance of providing for the safety and integrity of all parts of the Empire, earnestly desires, so far as is consistent with this consideration, the further limitation of armaments,

and trusts that no opportunity may be lost to promote this object.'

That of 1926 added the following :<sup>1</sup>

'1. The Resolutions on Defence adopted at the last session of the Conference are reaffirmed.

'2. The Imperial Conference regrets that it has not been possible to make greater progress with the international reduction and limitation of armaments referred to in these Resolutions. It is the common desire of the Governments represented at this Conference to do their utmost in pursuit of this object so far as this is consistent with the safety and integrity of all parts of the Empire and its communications.

'3. The Conference recognizes that, even after a large measure of reduction and limitation of armaments has been achieved, a considerable effort will be involved in order to maintain the minimum standard of naval strength contemplated in the Washington Treaty on Limitation of Armament, namely, equality with the naval strength of any foreign power. It has noted the statements set forth by the Admiralty as to the formidable expenditure required within coming years for the replacement of warships, as they become obsolete, by up-to-date ships.

'4. Impressed with the vital importance of ensuring the security of the world-wide trade routes upon which the safety and welfare of all parts of the Empire depend, the representatives of Australia, New Zealand, and India note with special interest the steps already taken by His Majesty's Government in Great Britain to develop the Naval Base at Singapore, with the object of facilitating the free movement of the Fleets. In view of the heavy expenditure involved, they welcome the spirit of co-operation shown in the contributions made with the object of expediting this work.

'5. The Conference observes that steady progress has been made in the direction of organizing military formations in general on similar lines; in the adoption of similar patterns of weapons; and in the interchange of Officers between different parts of the Empire; it invites the Governments concerned to consider the possibility of extending these forms of co-operation and of promoting further consultation between the respective General Staffs on defence questions adjudged of common interest.

'6. (a) The Conference takes note with satisfaction of the substantial progress that has been made since 1923 in building up the Air Forces and resources of the several parts of the Empire.

<sup>1</sup> *Imperial Conference, 1926, Summary of Proceedings* (Cmd. 2768), pp. 35-6.

'(b) Recognizing that the fullest mobility is essential to the effective and economical employment of air power, the Conference recommends, for the consideration of the several Governments, the adoption of the following principle :

'The necessity for creating and maintaining an adequate chain of air bases and refuelling stations.

'(c) Impressed with the desirability of still closer co-ordination in this as in all other spheres of common interest, and in particular with the advantages which should follow from a more general dissemination of the experience acquired in the use of this new arm under the widely varying conditions which obtain in different parts of the Empire, the Conference recommends for consideration by the Governments interested the adoption in principle of a system of mutual interchange of individual Officers for liaison and other duties, and of complete air units, so far as local requirements and resources permit.

'7. The Conference recognizes that the defence of India already throws upon the Government of India responsibilities of a specially onerous character, and takes note of their decision to create a Royal Indian Navy.

'8. The Conference notes with satisfaction that considerable progress in the direction of closer co-operation in Defence matters has been effected by the reciprocal attachment of naval, military, and air Officers to the Staff Colleges and other technical establishments maintained in various parts of the Empire, and invites the attention of the Governments represented to the facilities afforded by the new Imperial Defence College in London for the education of Officers in the broadest aspects of strategy.

'9. The Conference takes note of the developments in the organization of the Committee of Imperial Defence since the session of 1923. It invites the attention of the Governments represented at the Conference to the following resolutions adopted, with a view to consultation in questions of common defence, at a meeting of the Committee of Imperial Defence held on the 30th May 1911, in connexion with the Imperial Conference of that year :

“(1) That one or more representatives appointed by the respective Governments of the Dominions should be invited to attend meetings of the Committee of Imperial Defence when questions of naval and military<sup>1</sup> defence affecting the Overseas Dominions are under consideration.

“(2) The proposal that a Defence Committee should be established in each Dominion is accepted in principle. The Constitution of these Defence Committees is a matter for each Dominion to decide.”

<sup>1</sup> The words 'and air' would be required to bring the Resolution up to date.



*Nationality*

There was discussion about nationality at several of the Conferences, but the resolutions then taken have been superseded by those of a specialist conference in 1947, whose report has not been issued. Ceylon was separately represented at this Conference.

*Constitutional Matters*

The Statute of Westminster, 1931, was based on the Report of the Conference on the operation of Dominion Legislation and Merchant Shipping Legislation, 1929,<sup>1</sup> which was approved by and incorporated in the Summary of Proceedings of the Imperial Conference of 1930.<sup>2</sup> In so far as its resolutions required changes in the law they have been applied to Ceylon by the Ceylon Independence Act, 1947, but certain other resolutions are relevant :

1. *Legislation by the United Kingdom Parliament*

In addition to the legal provision which became section 4 of the Statute of Westminster, 1931, and section 1(1) of the Ceylon Independence Act, 1947, the Conference placed on record the following constitutional convention :<sup>3</sup>

‘It would be in accord with the established constitutional position of all members of the Commonwealth in relation to one another that no law hereafter made by the Parliament of the United Kingdom shall extend to any Dominion otherwise than at the request and with the consent of that Dominion.’

This was inserted as a recital to the Statute of Westminster, 1931, in a slightly amended form.<sup>4</sup>

2. *Succession to the Throne and the Royal Style and Titles*

The Conference placed on record the following constitutional convention :<sup>5</sup>

‘Inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it

<sup>1</sup> Cmd. 3479.

<sup>2</sup> *Imperial Conference, 1930, Summary of Proceedings* (Cmd. 3717), p. 18.

<sup>3</sup> Cmd. 3479, paragraph 54, p. 20.

<sup>4</sup> Cmd. 3717, p. 21

<sup>5</sup> Cmd. 3479, paragraph 60, p. 21.

would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.'

This convention is recited in the preamble to the Statute of Westminster, 1931.

### 3. *Nationality*

The Conference recognized<sup>1</sup> the right of the members of the Commonwealth to define their own 'nationals' and agreed that legislation to change the common status (i.e. British nationality) should be based upon common agreement.<sup>2</sup> The working out of the details was left for a subsequent Conference. The Imperial Conferences of 1930 and 1937 discussed the matter, which was however settled by a special Conference in 1947.

### 4. *Uniform Legislation*

It was agreed<sup>3</sup> that there should be consultation and, if possible, agreement for concurrent legislation on such matters as prize law, fugitive offenders, foreign enlistment and extradition. It was also agreed that agreements should be entered into for uniformity of shipping laws, reciprocal aid in the enforcement of such laws, and limitations to be observed in the exercise of legislative powers.<sup>4</sup> The details were set out in paragraphs 95 to 109 of the Report. It was further agreed that as far as possible there should be uniform jurisdiction and rules of procedure in all Admiralty Courts.<sup>5</sup>

### *Civil Aviation*

The Conference of 1937 agreed as follows :<sup>6</sup>

'1. Appreciating the many benefits, direct and indirect, immediate and potential, to be secured by nations possessing substantial and extensive civil aviation enterprises, the Conference is unanimous in its approval of the Members of the British Commonwealth of Nations pursuing a vigorous policy in

<sup>1</sup> Ibid., paragraph 74, p. 25.

<sup>2</sup> Ibid., paragraph 78, p. 25.

<sup>3</sup> Ibid., paragraph 80, p. 25.

<sup>4</sup> Ibid., paragraph 94, p. 31.

<sup>5</sup> Ibid., paragraph 117, p. 38.

<sup>6</sup> *Imperial Conference, 1937, Summary of Proceedings* (Cmd. 5482), p. 29.

regard to their air services, embracing expansion within each of their territories and interconnexion between Members.

'2. In order to promote arrangements whereby air lines of the Members of the British Commonwealth of Nations will link them together, the Conference affirms the willingness of the countries represented to co-operate with each other to the greatest possible extent.

'3. In emphasizing the importance of continued co-operation in the development of air services connecting the territories of the various Members, the Conference recognizes that the most effective method of co-operation and efficient organization can best be settled by the Governments concerned in each particular case as it arises, but any method should recognize, where desired by a Government, local control not only over services operating within its own territory, but also, by agreement with the other Governments concerned, in adjacent areas in which it is particularly interested.

'4. It is agreed that, whenever an application received by one Member for facilities for foreign air services is likely to affect another Member, there should be consultation between the respective Governments concerned before facilities are granted; and if an agreement has been reached between the Commonwealth Governments concerned as to the service to be required in return for such facilities, the Commonwealth Government to whom the foreign application has been made will use its best endeavours to secure the reciprocal facilities agreed upon.

'5. The Conference notes with approval the practice followed by Nations of the Commonwealth whereby, when operational rights are granted to a foreign air line, the concession expressly provides for reciprocal rights as and when desired; and suggests for consideration the desirability of including in such concessions a general safeguard of the right of the Government, at its option, to take over the ground organization within its territory on suitable terms.'

### *Shipping*

The Imperial Conference of 1923 agreed upon the following principles and reaffirmed them in 1937: <sup>1</sup>

'In view of the vital importance to the British Empire of safeguarding its overseas carrying trade against all forms of discrimination by foreign countries, whether open or disguised, the representatives of the Governments of the Empire declare:

'1. That it is their established practice to make no discrimination between the flags of shipping using their ports, and that they have no intention of departing from this practice as regards

<sup>1</sup> Reprinted in Cmd. 5482, pp. 30-1.

countries which treat ocean-going shipping under the British flag on a footing of equality with their own national shipping.

'2. That in the event of danger arising in future to the overseas shipping of the Empire through an attempt by a foreign country to discriminate against the British flag, the Governments of the Empire will consult together as to the best means of meeting the situation.'

The Conference also agreed<sup>1</sup> that in any case in which it may be considered by the Government of one part of the British Commonwealth that undue assistance, to the serious prejudice and danger of British shipping, is being given by any Government outside the British Commonwealth, there should be an opportunity for consultation between the Government of that part of the Commonwealth whose shipping is endangered and the Government of any other part of the Commonwealth concerned, in order to determine the validity of the complaint and the best means of meeting the situation, due regard being had to the interests of the Government of that other part of the Commonwealth.

2. In regard to external affairs generally, and in particular to the communication of information and consultation, the Government of the United Kingdom will, in relation to Ceylon observe the principles and practice now observed by the Members of the Commonwealth, and the Ceylon Government will for its part observe these same principles and practice.

See the note above under *Communication and Consultation in Foreign Affairs* (p. 260).

3. The Ceylon Government will be represented in London by a High Commissioner for Ceylon, and the Government of the United Kingdom will be represented in Colombo by a High Commissioner for the United Kingdom.

After discussion at the Imperial Conferences of 1923, 1926 and 1930 it was decided that on all ceremonial occasions (other than when Ministers of the Crown from the respective Dominions were present), the High Commissioners should rank immediately after the Secretaries of State. When a Dominion Cabinet Minister is in London, he ranks immediately before the High Commissioner from his Dominion.<sup>2</sup> It was however decided at the

<sup>1</sup> *Ibid.*, p. 30.

<sup>2</sup> *Cmd.* 3717, pp. 30-1.

Conference of Prime Ministers in 1948 that High Commissioners should rank with Ambassadors.

4. If the Government of Ceylon so requests, the Government of the United Kingdom will communicate to the Governments of the foreign countries with which Ceylon wishes to exchange diplomatic representatives, proposals for such exchange. In any foreign country where Ceylon has no diplomatic representative the Government of the United Kingdom will, if so requested by the Government of Ceylon, arrange for its representatives to act on behalf of Ceylon.

For the method of communication between the Ceylon Government and the British ambassador or minister in a foreign country, see the note to Article 2 under *Communication with Foreign Governments*.

5. The Government of the United Kingdom will lend its full support to any application by Ceylon for membership of the United Nations, or of any specialized international agency as described in Article 57 of the United Nations Charter.

Article 4 of the United Nations Charter provides that membership of the United Nations shall be open to all peace-loving States which accept the obligations of the Charter and whose admission is approved by the General Assembly upon recommendation from the Security Council. Australia, Canada, India, New Zealand, South Africa and the United Kingdom were original members. Pakistan was admitted to membership in 1947. Eire has been refused admission because the U.S.S.R. exercised its veto in the Security Council.

Article 57 of the United Nations Charter relates to specialized agencies established by inter-governmental agreement and having wide international responsibilities.

6. All obligations and responsibilities heretofore devolving on the Government of the United Kingdom which arise from any valid international instrument shall henceforth in so far as such Instrument may be held to have application to Ceylon devolve upon the Government of Ceylon. The reciprocal rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Ceylon shall henceforth be enjoyed by the Government of Ceylon.

The Instruments referred to are treaties, agreements between Governments and other international arrangements. This

Agreement between the Governments of the United Kingdom and Ceylon cannot affect the rights and obligations of the United Kingdom under the Instruments, which must in fact be the subject of negotiations between the Ceylon Government and the foreign Governments concerned so that the rights and obligations may be transferred to Ceylon. What the present Article does is to provide that Ceylon shall perform the obligations and enjoy the rights and benefits.

7. This Agreement will take effect on the day when the constitutional measures necessary for conferring on Ceylon fully responsible status within the British Commonwealth of Nations shall come into force.

Done in duplicate, at Colombo, this eleventh day of November 1947.

Signed on behalf of the Government of the United Kingdom  
of Great Britain and Northern Ireland

HENRY MOORE

Signed on behalf of the Government of Ceylon

D. S. SENANAYAKE

The date was 4 February 1948.

PUBLIC OFFICERS' AGREEMENT BETWEEN HIS  
MAJESTY'S GOVERNMENT IN THE UNITED  
KINGDOM AND THE GOVERNMENT OF CEYLON

UNITED KINGDOM—CEYLON

*Public Officers Agreement*

THE Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ceylon have agreed as follows :

1. In this Agreement :

'Officer' means a person holding office in the public service of Ceylon immediately before the appointed day, being an officer—

(a) who, at any time before the 17th day of July, 1928, was appointed or selected for appointment to an office, appointment to which was subject to the approval of a Secretary of State, or who, before that day, had entered into an agreement with the Crown Agents for the Colonies to serve in any public office for a specific period ; or

(b) who, on or after the 17th day of July 1928, has been or is appointed or selected for appointment (otherwise than on agreement for a specific period) to an office, appointment to which is subject to the approval of a Secretary of State ; or

(c) who, on or after the 17th day of July 1928, has entered or enters into an agreement with the Crown Agents for the Colonies to serve for a specific period in an office, appointment to which is not subject to the approval of a Secretary of State, and who, on the appointed day either has been confirmed in a permanent and pensionable office or is a European member of the Police Force ;

' the appointed day ' means the day when the constitutional measures necessary for conferring on Ceylon fully responsible status within the British Commonwealth of Nations shall come into force ;

' pension ' includes a gratuity and other like allowance.

2. An Officer who continues on and after the appointed day to serve in Ceylon shall be entitled to receive from the Government of Ceylon the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or, as the case may be, as respects the tenure of office, or rights as similar thereto as changed circumstances may permit, as he was entitled to immediately before the appointed day, and he shall be entitled to leave passages in accordance with the practice now followed ; but he shall not be entitled to exemption from any general revision of salaries which the Government of Ceylon may find it necessary to make.

3. Any Officer who does not wish to continue to serve in Ceylon, being an Officer described in paragraph (a) of the definition of ' Officer ' in clause 1, may retire from the service at any time ; and in any other case may retire from the service within two years of the appointed day. On such retirement he shall be entitled to receive from the Government of Ceylon a compensatory pension in accordance with the special regulations made under section 88 of the Ceylon (State Council) Order in Council, 1931, in force on the appointed day ; but an Officer who leaves the Ceylon service on transfer to the public service in any colony, protectorate or mandated or trust territory shall not be entitled to receive such a pension.

4. Pensions which have been or may be granted to any persons who have been, and have ceased to be, in the public service of Ceylon at any time before the appointed day, or to the widows, children or dependants of such persons, shall be paid in accordance with the law under which they were granted, or if granted after that day, in accordance with the law in force on that day, or in either case in accordance with any law made thereafter which is not less favourable.

5. The Government of Ceylon will comply with any reasonable request which may at any time be made by the Government of the United Kingdom for the release of a public officer for employment in the public service elsewhere.

6. This Agreement will take effect on the appointed day.  
Done in duplicate, at Colombo, this eleventh day of November 1947.

Signed on behalf of the Government of the United Kingdom  
of Great Britain and Northern Ireland

HENRY MOORE

Signed on behalf of the Government of Ceylon

D. S. SENANAYAKE

This Agreement was necessary in order to transfer to the Ceylon Government the moral obligation which the Secretary of State for the Colonies had contracted in respect of Officers appointed by him or by agreement with the Crown Agents for the Colonies. In the main it merely repeats the contents of the transitional provisions of the Constitution with slight amendments. This Agreement gives the Officers no rights. Their rights, if any, are determined by the Constitution and their contracts. So far as this Agreement is concerned the obligations are not towards the Officers but towards the United Kingdom Government; but that Government has made the Agreement for their benefit. The Officers would have cause for complaint if the Agreement were not carried out but the aggrieved party, which could state a case before an international tribunal, would be the United Kingdom Government.

The 17th of July 1928 was the date on which the Donoughmore Report was published. Officers appointed after that date were presumed to have been aware that they would come under Ceylonese control, and so the favourable conditions of retirement provided by Article 88 of the Ceylon (State Council) Order in Council, 1931, were not extended to them. The three classes of Officers referred to in Article 1 are the same as those to whom section 63 of the Constitution applies, the only difference being that the second and third classes were limited to those appointed or selected before 9 October 1945, that being the date of the publication of the Soulbury Report. An amendment consequential upon this Agreement was, however, introduced into section 63 of the Constitution by the Ceylon Independence Order in Council, 1947.

The appointed day is 4 February 1948.

Article 2 protects the conditions of service of those who elected



to continue in service after 4 February 1948, subject to any general revision of salaries.

Article 3 gives the same right of retirement with enhanced pension as section 63 of the Constitution.

Article 4 repeats the substance of section 64 of the Constitution in so far as it applies to the classes of Officers specified in Article 1.

Article 5 enables the Secretary of State for the Colonies to offer posts in the colonies to members of the Ceylon Civil Service and other public services of the Island.



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