18

Democracy, Nationalism and the Nation State

L.C. Arulpragasam

Introduction

Much has been written on the subject of democracy and nationalism – and it is not intended to go over all this again. It is intended instead, through historical, political and behavioural analysis, to elucidate the conceptual, historical and practical reasons of how and why the rise of nationalism in the 'emerging democracies'[1] has affected the nation state and democracy; and conversely, how and why democracy or attempts at it have fuelled the fires of rival nationalisms, so as to undermine the concept and reality of the nation-state, and stultify the achievement of true democracy. This chapter is about a worldwide problem and is worldwide in coverage. However, many of the problems and principles raised in it are illustrated by examples from Sri Lanka, although examples from other countries are also widely used.

It is well understood that democracy means much more than holding full and fair elections. Democracy requires, among others, a democratic constitution, freedom of speech and press, fair elections, the rule of law, respect for individual and human rights, and the adoption of democratic institutions and processes that will ensure all the above. The problem is that in most 'emerging democracies,' the first step of full and fair elections has often resulted in governments that are controlled by ethnic/sectarian majorities within the so-called nation state, with deleterious consequences for true democracy. This indicates that there is either a structural problem within the so-called 'nation state' or that there is a problem within the democratic process itself. Our analysis will show, first, that although the original problem is with the structure of the nation state, it is often compounded by the very first step (the electoral process) of democracy and not prevented, mitigated or resolved by it.

Before we discuss nationalism and the nation state, it is necessary to define these terms. A *nation* is a group of people, usually sharing a common ethnic origin, language, culture and/or religion and a

[1]The term 'emerging democracies' is used in this chapter to refer to countries, which have attained independence as nation states, and which have adopted democratic constitutions with the expressed intention of following them.

common historical experience, often associated with a traditional territorial base. Above all, a nation identifies itself as one people, wishing to live together and to be ruled together. Since it cannot be argued in the text whether every case referred to is actually a nation or not, the adjective 'ethnic/sectarian' is used to refer to specific 'nations' or communities, regardless of whether they are actual nations or not.

As for the concept of the *nation state*, it pertains to a stage where a nation has found a common territorial base and is ruled together as one, under a formal government. Unfortunately, many ex-colonies which were set up as new states at independence were dubbed 'nation states' although they clearly did not conform to either the concept or reality of a true 'nation state.' The application of democracy on the basis of this false foundational premise and the consequences arising therefrom, are the subject of this chapter.

1. Experience of the Developed Democracies with Democracy and the Nation State

It is customary to cite the example of the western democracies as providing lessons on democracy and nationalism for the 'emerging democracies.' It is therefore appropriate to examine how the developed democracies of Western Europe and the newly settled countries (such as the USA, Canada and Australia) dealt with the problems of national identity and national unity, using democratic means.

The actual fact, however, is that the developed democracies of Europe never settled their ethnic, religious, language or cultural differences by the vote under democracy. These differences were settled by war and violence over a period of more than 500 years. In England, it took around 400 years (roughly from 1066 to 1500) for the English to identify themselves as one nation. In France, it took the Hundred Years War to settle religious differences, even between Christians. It was only after hundreds of years of racial assimilation and willingness to tolerate linguistic and religious differences that the idea of the 'nation' emerged in Europe. It is

only after the people had accepted this national identity and accepted (or were forced to accept) being governed as one, did the *nation state* truly appear. It took more than 300 years after that for the idea of democracy (even of a limited sort) to be accepted by such nation states. Democracy was never heard of when the nation and the nation state appeared in Europe. Hence, it is passing strange that politicians and technocrats from these same countries should insist that these problems could and should be surmounted by democratic means in the newly independent countries.

The circumstances of the newly settled countries, such as the USA, Canada and Australia, were unique in that their problems of national identity and unity were really solved by the elimination of the indigenous populations, followed later, at least in their formative years, by exclusively European immigration. Moreover, the early immigrants had already accepted their new nationality and national identity as Americans or Australians even before they ever entered these countries. They had already accepted that English would be their new national language and they had already accepted to live among people of other ethnic and cultural origin (albeit all Caucasian and Christian) even before they left the shores of Europe. In other words, the American national identity and nationalism were only partly achieved in the so-called 'melting pot,' being already preconceived in the womb of European civilisation. Moreover, the settlers inherited an almost bare continent largely rid of existing populations and pre-existing political entities, which enabled them to build a democracy from the ground-up. It should be noted, however, that in cases where the native populations could not be wiped out, as in South Africa, Rhodesia and Southwest Africa, European settlement has resulted in the anathema of apartheid and not in the desired dream of democracy.

None of the luxuries of the new world were available to the emerging democracies. Nor could their people go anywhere, being trapped within their historical context of centuries. Colonialism, moreover, left them trapped again within a new 'nation state' not of their own making or of their own choice. Thus, two or more ethnic groups with major religious, ethnic, linguistic and cultural differences who may have lived alongside

each other for over 700 years, with (possibly) occasional wars against each other, were expected to become one 'nation' within a so-called nation state within colonially contrived boundaries, even though the above differences had yet to be settled. Thus, on the topic of national identity, national unity, the nation state and the development of democracy therein, neither the experience of the European democracies, nor that of the newly settled countries is of much relevance to the 'emerging democracies.'

However, in the above context, the Americans were able to build a true grass-roots democracy which was able to federate progressively upwards to higher political levels, but always with the consent of the governed. This is a valuable lesson in democracy, since the *consent to be governedis the first principle of democracy*; conversely, to be ruled against one's will is the very antithesis of democracy. But the preconditions that made this possible in the USA are not available anywhere else, which makes this valuable American experience hardly replicable elsewhere.

Theoretically, the newly emerging democracies need not repeat the European experience of 400 years of bloodshed and violence that were needed to overcome the issues of race, religion, language and culture. But unfortunately there are many factors that work against this hoped-for result. Some of these factors derive, firstly, from overhangs from colonial times which still cast their long shadow on the achievement of national unity within a given nation state. Other reasons stem, secondly, from the democratic process itself, when placed in the context of competing nationalisms within such 'nation states.' These factors are examined below in the light of the experience of the emerging democracies.

2. Colonial Boundaries and their Implications for Nationalism and Democracy

The first problem, as far as democracy is concerned, arises from the boundaries left by the colonial powers. These boundaries were drawn not on the basis of nationality, race or religion, but left by the ebb and flow of the tides of colonial fortune. While many of

the African countries are struggling to contort themselves into 'nations' within their geometrically shaped boundaries, there is even a case where the 'national' boundaries were gerrymandered so as to provide the desired political result. This is the case of Malaysia, where the boundaries of the new 'nation state' of Malaysia were actually gerrymandered by adding on Sarawak and Sabah and by contriving the secession of Singapore in order to yield the desired result. If the goal posts as well as the boundary lines can be changed during the game, one can obtain any required result. For example, is it not strange that the Shan, Karen, Kachins and other ethnic nations,' who have been fighting for their independence ever since the establishment of the 'nation state' of Burma (Myanmar) over 60 years ago are still legally and constitutionally considered part of the latter 'nation state'? On the other hand, the Tuaregs in the deserts of northwest Africa are divided among three or four different 'nation states,' making them a minority in them all. The same problem arises in many African states with their geometrically shaped boundaries. Needless to say, the holding of elections within such boundaries will produce predictable but democratically irrelevant or even dangerous results, determined more by their absurd boundaries than by the will of their people.

Democracy, among other things, involves rule by the legally elected majority. But majorities are determined by two factors: not only by the number (majority) of voters, but also by the boundaries within which they vote. If the boundaries are completely arbitrary, so are the majorities acclaimed within them. Democratic elections held in these circumstances usually enable the major ethnic/sectarian group within the fortuitous ex-colonial boundaries to gain complete control of the power of the state.

Although Sri Lanka is a small island and seemingly easily territorially defined, it nevertheless provides an example of how fortuitous colonial boundaries could determine future 'democratic' outcomes. When the first European colonisers (the Portuguese) came to Ceylon at the dawn of the 16th century, they were confronted with three kingdoms in Ceylon at that time. One of these was the northern kingdom of the Tamils of Ceylon which had already been in existence for over three hundred years. If one were to go back to this pre-colonial boundary, there would be a

different political reality today. The three existing kingdoms would have been forced to come together in the modern era due to improved communications, trade, transport and security; but this would have been under mutually agreed terms such that one would not be ruled by the other, as has happened in practice today. Later, under the British (around 1794), Ceylon was ruled for a short period by the British East India Company and later by the British Government as part of the Madras Presidency of India, till it was excised and ruled as a separate colony around 1804. If Ceylon had continued to be ruled by the Madras Presidency, its official language would now be Tamil. If on the other hand, Ceylon had continued to be part of India till the latter gained its independence, Hindi would be its official language. But because Ceylon was excised from India in 1804, Sinhala became its official language in 1956. Hence, the boundaries of the current state of Sri Lanka are purely an accident of history like those of so many other states, making their ethnic/sectarian majorities no more 'democratically' or historically legitimate than majorities obtained under any of the earlier historical boundaries outlined above.

The above scenarios are presented only to show the far-reaching effects that colonial boundaries can have on the development of nationalism and democracy, even centuries later. Theoretically the boundaries should be changed to reflect the actual national realities. If this cannot realistically be done, it is a country's duty to consider constitutional and political arrangements within those boundaries to enable the affected communities to live together in equality, dignity and peace. Otherwise, as far as the minorities are concerned, one outside ruler has only been replaced by another, the only difference being that this time they were conquered not by the bullet but by the ballot.

The ethnic/sectarian issue is actually brought to a head by the question of who will actually control the powers of the state once the colonial ruler is gone. When the external premise of colonial rule is removed, the question arises: 'who owns this house,' or who controls the power of the state? Instead of a mutual renegotiation of the terms of living together, the two or three major communities involved were bundled together in a make-believe 'nation state,' as determined by their old colonial boundaries, leaving their major ethnic, linguistic, cultural and

religious differences to be settled by the vote. The application of democratic elections based on this false premise of a nation state that never was, has led to the negation of democracy and to civil war in many countries, such as Rwanda, the countries of the Balkans, Nigeria, Sudan, Somalia, Iraq, Myanmar and Sri Lanka, among others.

It is easy to dismiss this difficulty by saying that this is a problem affecting only particular developing countries and explained away as showing only a lack of educational, political or democratic development on their part. But an example from a developed democracy in Europe serves to illustrate the universal nature of this problem. The following exchange took place in 1967 between the writer, who is from a developing country, and a French and German colleague in an international organisation in Europe. The Frenchman asked the writer why the two major communities in his country could not get over their 'tribal' differences and live together amicably as one nation within the same nation state, as the French and Germans had done in their own. The writer countered with the following question: "Suppose that another power (say, Britain) had conquered both France and Germany and ruled them together as one colony for 250 years. Suppose that at the end of that period the imperial power (Britain) says to the people in that territory: 'I am giving you Independence now. You will now vote as one nation state under your new democratic constitution and form your own government.'" The consequence of this is that the Germans who would constitute the majority in the new 'nation state' would have the power to impose their own religion and language within that territory, as has happened in many developing countries. Asked whether he would agree to this, the Frenchman replied: "Never. The Germans would always out-vote us and we will not be ruled by them. This is not democratic!" The point is that even 40 years after the above exchange, and despite their countries currently being equal partners in the European Union, the French will never agree to being ruled together with the Germans in one 'nation state,' or *vice versa.* The Frenchman objected to this *on democratic grounds*: that he would never be governed under such an undemocratic arrangement. How is it then that the post-colonial 'nation states' with two or more nations within them are expected to accept the same non-democratic result, in the very same name of democracy?

It is not that two different ethnic or religious groups cannot live together in the same state. It is just that in a context where ethnic/religious differences or rivalries have not yet been resolved, democracy in the context of a fictitious 'nation state' merely confers permanent monopolistic power to one community or 'nation' over the other, often without the latter's consent. If democracy is to survive in such a context, either the boundaries will have to be changed, or new constitutional and political accommodations will have to be made for ensuring democracy for the minorities which are trapped in the colonially created cage of the 'nation state' that never was.

3. Rise of Rival Nationalisms Within the Nation State

This section will try to examine the effects of the rise of nationalism on democracy and on the nation state in the post-colonial period. Much has been written on the so-called exploitation under colonial rule, but on balance it can well be argued that its benefits outweighed its disadvantages. From a historical perspective, however, the greatest negative effect of colonialism in our time is that *by its very presence,* it precluded any permanent accommodation between the various communities or 'nations' during the 200-400 years of its existence. These years were crucial in that they represented the last chance for these communities to come to terms with each other before the modern age: either to live together in the same polity on agreed terms, or to live separately as good (or bad) neighbours. Secondly, although there were such accommodations during colonial times, they were on the basis of the external premise of colonial rule; but the removal of this external premise some 200-400 years later has completely changed the relationship between the different communities. Thirdly, if not for the colonial period, nationalism may well have fulfilled itself or spent itself by now, as has happened in Europe, leaving the space and time for true democratic development in the period since independence. These are some of the 'opportunity-costs' of the colonial period that have usually not been counted.

The same problem of national identity is appearing belatedly in Latin America too. Although the three-part Spanish legacy of racial assimilation, Spanish language/culture and the Catholic religion provided a solid base for nation-building, the fourth unfortunate legacy was the creation of an inequitable and iniquitous agrarian structure in the feudal image of Spain in the 16th and 17thcenturies. It is now being noticed that the owners of the big *haciendas* tend to be of European descent or lighter-skinned Spanish *mestizos*, as opposed to the 'have-nots' who are usually the darker-skinned *mestizos* or indigenous *indios*. Moreover, the latter, who often have different languages and cultures, have been pushed farther into the less fertile lands in the hills or farther into the Amazonian jungles. In the Latin American countries with major indigenous populations, the co-identity of the indigenous people with near-landlessness and poverty has led to the on-going struggle between the rich and the poor being re-defined as also a struggle between two different ethno-cultural 'nations' within the same 'nation state.' The indigenous people are beginning to identify themselves as a different people, often abjuring the historic Hispanic heritage which their forebears had accepted. This recognition of ethno/linguistic/cultural differences within what were hitherto considered one-nation states has been accelerated by the democratic vote, which in turn has imported new contradictions and stresses for the nation state, as well as for democracy within it.

For the above reasons, the colonial period has been compared to a refrigerator which froze the development of rival nationalisms within its territories for around 400 years. On the other hand, states such as Thailand and Japan, which did not go under colonial rule, were able to develop into mature nations and mature nation states during the many years when other Asian countries were still under colonial rule. Whereas Japan and Thailand were ready for democracy when it came in the 20th century, countries like the Sudan and Sri Lanka have torn themselves apart (aided by the democratic electoral process) in search of a common national identity and national unity within a so-called nation state.

The above analogy of the refrigerator of the colonial period is, however, a false analogy for three reasons. First, although the refrigerator is neutral in its results, the consequences of the colonial period were not. For the minorities woke up after colonial rule to find themselves shackled to a partner who still needed to go through the turbulence and self-centeredness of its own nationalistic revival. With the onset of democracy, the minorities now find that they have only exchanged one ruler for another.

The analogy of the refrigerator is inappropriate for another reason too. Even if rival nationalisms were 'frozen' during the colonial period, they tend to emerge with renewed force after their years of animated suspension or suppression under colonial rule. Although colonialism put a lid, as it were, on the 'nationalisms' of different ethnic, religious or cultural groups, it could not suppress them altogether. The removal of the colonial 'lid' at independence caused the boiling over of these different 'nationalistic' pots. The same can be said of the countries that achieved independence from communist rule, as in the case of the former Yugoslavia, where the removal of the 'lid' of communist rule led to the boiling over of the Balkan nationalistic pots of the Serbs, Bosnians, Croats, and Kosovars, while similarly, the removal of Saddam Hussein has led to the aggravation of sectarian strife in Iraq.

The nationalistic backlash after the removal of colonialism can be seen in the contrast between Sri Lanka which went under colonial rule, and Thailand which did not. While Sri Lanka in the early 1950s was agonising over its national dress (it even appointed a Commission to find one), the Thais (around 1962) were switching from their traditional sarong to trousers, while many were busy trying to learn English. In contrast, since 1956, Sri Lanka abolished English as a national language and as a medium of instruction in its schools even though it was the only link language between the different communities, thus contriving to drive them further apart.

The analogy of the refrigerator is faulty for another reason too. For unlike the refrigerator, the colonial period was not neutral in terms of its process or outcome. In Malaysia, for example, the mass import of Chinese and Indian labourers to work in the tin

mines and rubber plantations changed the demographic dynamic to such an extent that it would continue to dominate future politics. In other countries too, the relative socio-economic positions of the different communities often changed between the beginning and the end of colonial rule. Certain communities, usually minorities, were more favoured by the colonial power than the majority, in the oft-quoted policy of 'divide and rule.' In the case of Ceylon under the British, the minority Tamils were able to access a disproportionate share of coveted government jobs in relation to their numbers, mainly because of their higher level of education and English knowledge at that time. Successive Sinhala-dominated governments have rightly sought to remedy this disparity by various means, some fair and others not. The combined result of these measures has been that 60 years after independence, the Tamil minority currently does not obtain government positions in proportion even to its reduced share in the population. Here again, the laudable effort of trying to level the playing field was taken to the opposite extreme by the force of majoritarian nationalism.

In such a context, where an ethnic/sectarian majority grows increasingly powerful and gains a growing grip on state power, it is not long before it equates its own identity with that of the sovereign state that it controls. It then uses this perceived co-identity to undertake legislative or administrative action in pursuit of its own interests, even at the cost of national unity and of the nation state that it says it wants to protect. This co-identity of the ethnic/sectarian majority with the nation state is best seen in the extreme case of civil war. In such a case, the ruling ethnic or sectarian majority, first: assumes the entire military power of the sovereign nation state to defeat the dissenting minority/minorities; second, uses state sovereignty to obtain military aid or intervention from other states; and third, uses state sovereignty to protect its own people from international inquiries into alleged human rights violations as in the Sudan and Serbia. This identification of an ethnic/sectarian majority with the state under so-called democracy leaves little hope for the development of a true nation state or of true democracy in the long run.

4. Democracy and its Effects on Nationalism and the 'Nation State'

When independence was achieved in the 1940s-1960s, the English/French educated elites in the ex-colonies worked out inter-communal problems on the basis of trust among themselves. The first ten years of independence in Sri Lanka were marked by the rule of the Sinhalese/Tamil elites, rather than by the Sinhalese/Tamil masses. But the democratic process changed all that. Armed with the right to vote, fortified by free education and led by opportunistic politicians, the masses became more politically conscious and articulate. This led, first, to a number of populist measures which benefited all sections of the people including the minorities, through programmes for free education, free health services and subsidised rice rations. However, it was not long before the two major Sinhala political parties found it expedient to play to the voters' ethnic, linguistic and religious passions with measures such as the Sinhala Only Act, politicised 'standardisation' and state-sponsored colonisation in favour of the Sinhalese. Needless to say, politicians of the minority played the same game, so that both the majority and the minority pursued the politics of polarisation rather than the politics of compromise. This led to the negation of the 'we-feeling' that is essential for the realisation of a true Sri Lankan nationality within the boundaries of the would-be nation state of Sri Lanka.

There is a further way in which the elective process of democracy works against national unity, and this is through the process of 'outbidding.' When an opposition political party from the major ethnic/religious group finds that it cannot attain a majority in Parliament, it tries to outbid the party in power by using the most divisive racial/ religious cry in order to achieve its goal. This is seen in national and state politics in India, as well as in Iraq where Moqtadr Sadr's chauvinistic appeal to the extreme Shia voters forced the ruling government party to do the same. In Sri Lanka in the 1950s, the Prime Minister, Mr S.W.R.D. Bandaranaike promised to abolish English and to enforce 'Sinhala Only' within 24 hours, thus outbidding the party in power by playing to the most extreme strains of Sinhala nationalism. Not surprisingly, this same tactic was used at subsequent elections by the other major

Sinhala party (the UNP) in a bidding race to the extreme. Likewise, there was a similar race to the extreme by the minority Tamil parties too, with requests ranging over time from special (favoured) representation in Parliament, to demands for federalism, and ultimately to demands for secession, which led to 30 years of civil war. Thus, the electoral process of democracy has often aggravated ethnic/sectarian polarisation at the cost of achieving a true nation state and ultimately of achieving true democracy itself.

The overhang of the colonial period is seen in the constitutional arena too. It is not a coincidence that the ex-British/French colonies adopted unitary constitutions with a parliamentary system of government, while those that fell under American influence adopted a presidential system of government, with federal or decentralised types of government. The first problem arising from the British/French inheritance is that unitary constitutions, especially those under parliamentary systems of government, are the least capable of safeguarding the rights of the minorities, unless effective constitutional safeguards are installed to prevent their violation. Even where such safeguards are provided, the ethnic/sectarian majorities are often able to muster the two-thirds majority needed to overcome them. All that is needed is to raise the ethno-religious cry – and the two-thirds majority will usually be forthcoming.

In the above circumstances, a federal constitution could possibly safeguard minority rights, especially in cases where the minority inhabits a fairly well defined spatial area. Federal constitutions usually include a provision that the powers and rights devolved to the constituent units of the federation cannot be abrogated by the centre without the consent of the participating units, which is considered an essential safeguard against rampant, runaway ethnic/sectarian majorities. Unlike the classic cases of 'bringing together' federations (such as the USA, Australia, Canada and Switzerland), however, the emerging democracies face quite a different reality. Since two or more ethnic groups have already been bound together within a unitary state, such unitary bonds will have to be broken before any federal solution is possible. This is unlikely to happen since the ethnic/religious majority which has complete control of state power is unlikely to agree to any such

power-sharing arrangement. This shows again how the democratic electoral process, tends to abort the only democratic solution possibly left to save a divided pluri-nation state.

In Africa, it is necessary to single out the peculiar problems of democracy that face the countries of former European settlement, such as Zimbabwe, South Africa and Namibia. In these cases, democracy has had to deal with two 'nations' within the same nation state,' with long-standing divisions between them based on ethnic, linguistic, cultural, agrarian and political lines. These divisions pre-existed in former Rhodesia (current Zimbabwe) wherein a small community of white settlers comprising only 1% of the total population (as late as the 1990s) owned roughly 70% of the arable land, usually of the best land class, while the 99% majority of the native black population owned only 30% of the arable land, and that too, of the poorest land categories. The black majority which fought for liberation and land now insists by majority vote on an equitable distribution of land. But this entails massive land redistribution programmes, which are resisted by the white landowners except against 'fair compensation,' which they deem to be the market price of land. However, it is well known that even the richest country in the world, the USA, cannot afford to buy back even 10% of its arable land at the market price. Hence these countries (Zimbabwe, South Africa and Namibia) remain frustrated in their inability to fulfil their democratically mandated programmes. This has served to perpetuate the resentment of the 99% blacks in Zimbabwe who now have 100% control of political power through universal suffrage. Thus, what is fundamentally a land problem is transformed into an ethnic confrontation, with profound negative consequences for the new nation state and for democracy. Normally, in such a confrontation the political power should be able to trump the economic power: but not in this case. For any attempt to do so would provoke a flight of capital and threats by the international financial agencies to pull the financial plug, as has already happened in Zimbabwe in the past.

But how can a government elected with a mandate for land reform survive, if it cannot fulfil its own promise and its own mandate? Not surprisingly, such a failure is usually followed by a slide towards undemocratic rule, as a means of survival by the

ruling person or political party. The latter results first, in a breakdown of national unity, with the white and the blacks ranged against each other, just as before. It results, secondly, in a breakdown of democracy and the rule of law, as in the case of Zimbabwe,[2] which has subsequently led to a large exodus of the white population. Although Zimbabwe is an extreme case, it is highly probable that in countries with the same ethnic/land fault line, the same problems of nationalism and democracy will arise in due course. For history shows that such a deep and divisive structural problem has never been resolved in any country by the democratic vote. Hopefully, South Africa and Namibia can bypass this problem by rapid growth in other sectors, such as mining, tourism and fisheries in Namibia, and many others in the case of South Africa. The question, however, is whether democracy can survive long enough to benefit from these countries' economic diversification and current one-party rule, before the land problem and its ethno-political consequences succeed in destroying it.

Our overall survey thus shows that democracy when applied through democratic elections under a democratic constitution in a state which is not truly a nation state, often has negative consequences for national unity, the nation state and for democracy itself. This is a structural problem arising from a flawed foundational premise: that two or three different 'nations' or ethnic/sectarian groups are, or can in fact become, one true nation within its former colonial boundaries. In the case of Sri Lanka, for example, it is unfair to blame only Sinhala nationalism for the deteriorating 'national' problem in the country. For it is likely that if the minority Tamils formed the majority and were invited to play by the same set of rules, their oppression of the minority, be they Sinhalese or others, would probably have been the same. This is a structural problem stemming from a false foundational premise, and not a problem attributable to any one community. Democracy when applied under the above

[2] President Mugabe's extra-legal actions by way of land invasions and attacks on white settlers led to the collapse of the rule of law, leading increasingly to corruption and the use of extra-legal paramilitaries to enforce his personal chaotic rule.

circumstances, unless mitigated by other factors (analysed in Section 5) will probably yield the same results.

It is obvious that democracy did not cause the underlying problem, which was caused by the false foundational premise on which democracy was based in most emerging democracies. Caught in the trap of the 'nation state' which is not a nation state, and overpowered by the rise of ethnic/sectarian 'nationalism', the electoral process, which is the first step of democracy, has often aggravated the problem, thus making it part of the problem rather than part of its solution. But democracy means much more than the electoral process. It involves the rule of law, equal rights in law and in fact, and equal economic and social opportunities for all. This requires that the chance majorities generated by fortuitous colonial boundaries should pay heed to the rights of their minorities in order to create a true nation state and build a true nationality based thereon. If they are not willing to do this, they should be prepared to admit that their so-called 'nation states' are a fiction, even 60 years after independence. In such a case, they should let their minorities go, whether through international arbitration as in the case of the Sudan, or through mutually agreed secession as in the case of Slovakia. For history shows that an army of occupation cannot forcibly build either a true nation or a true nation state.

5. Cases of Success: Reconciling Democracy, Nationalism and the Nation State

Contrary to our general findings above, there are some outstanding exceptions of countries which seem to be succeeding in building true nation states within their former colonial boundaries. An analysis of some of these cases in Asia will help our understanding of why democracy or other factors associated with it seem to solidify national unity in some cases, while not doing so in others. The successful countries are classified according to the different factors contributing to their success.

The first category comprises countries that did not go under colonial rule. Thailand was already a nation and *a nation state* by

the year 1947 when Sri Lanka got its independence, whereas the latter is still struggling to become one nation in one nation state even 60 years later. This enables this group of countries (comprising Thailand, Japan and South Korea) to embrace democracy without it being hijacked by any ethnic/sectarian group in the name of the sovereignty of the 'nation state' or in the name of 'democracy'. The second group consists of countries that experienced a long period of one-party rule during their formative years, enabling their people to develop the 'we-feeling' which is the psychological and emotional glue that is needed to bind them together in the larger national identity of their respective nation states. This group includes countries such as India, Thailand, Malaysia, South Korea, Indonesia and Singapore, among others. The third group comprises those countries blessed with significant natural resources and which have also succeeded in undertaking strong socio-economic development. The latter has benefited the minorities so much that they are prepared to continue to live in the same state, despite discrimination and other grievances, as in the case of Malaysia. This group includes countries such as Thailand, Malaysia, Singapore and Indonesia. The fourth group includes countries which consciously crafted *nation-building policies*, such as India, as a means of overcoming the fissiparous tendencies which would otherwise have torn their different racial/religious groups apart. Some of the cases examined are fortunate enough to fall under more than one of the above categories.

In Malaysia, the minorities still complain that the Malay majority uses its control of state power to provide preferential treatment to its own people, the *bhumiputras*. The fact that Malaysia has survived as a democracy despite its ethnocentric rule, has been mainly due to its outstanding socio-economic development made possible by its abundant natural resources and the political stability provided by one-party rule. Even the minorities have benefited greatly from this socio-economic development, giving the country more time to address its ethnic and national problems through a fairer sharing of political power with the minorities. On the other hand, there are two new developments which may still work against the emergence of a true new Malaysian nation. The first is the rise of Islam and its growing identification with Malay nationalism; this co-identity effectively excludes other minorities from a hoped-for broader *Malaysian nationalidentity*. The second is

the rising counter-current of a new Chinese self-confidence encouraged by the emergence of China as a regional/world power, which may yet undermine the uneasy accommodation between these two major communities. The problem is that the Malays still tend to think of themselves as Malays and Muslims first, before they think of themselves as Malaysians. The danger is that the Chinese are doing the same. Hence, the 'nation state' of Malaysia is still considered to be a work in progress.

India presents an example where true Indian nationalism has grown at the expense of its prevailing regional, religious and linguistic differences, although this is being challenged in territories such as Kashmir and Nagaland. Much of the idea of 'the Indian nation' is the outcome of the long struggle for independence and the idealism and inspiration of its leaders like Mahatma Gandhi and Jawaharlal Nehru. India was also blessed in its formative period by many years of one-party rule by the Indian National Congress, which provided the political stability and the time needed to infuse a new national ideology among the largely differentiated and uneducated electorate. Even so, the idea of achieving one nation out of India is daunting, given its more than 250 languages and dialects. Paradoxically, the latter fact has proved to be its strength rather than its weakness, since it is the large number of ethnic, linguistic and religious groups that has prevented any one of them from using the instrument of the state to discriminate against another. India's extreme diversity makes no other solution feasible: it has literally to hang together, or to hang separately. Its federal constitution has also played a major part in keeping the country together and in achieving an overarching Indian national identity. Moreover, it has been wise enough to adopt an *asymmetrical federation* together with other constitutional adjustments needed to keep its different 'nationalistic' groups together. It has thus adopted *nation-building policies* as opposed to *nation-state policies*, which are often based on the false premise of a nation state that does not exist.

Singapore is a unique case for many reasons. It is only a city-state where 'what is best administered is best.' The Chinese have a secure majority and hence no fear of competition from others. Moreover, it has enjoyed one-party democratic rule for many years, resulting in political stability. This has enabled the adoption

of enlightened growth policies, which together with Chinese entrepreneurial skills have made for accelerated socio-economic development, whose benefits have percolated to the minorities too. Thus, Singapore's experience is *sui generis*, and is hardly replicable by others.

6. Constitutional Considerations

Three general observations are in order. First, it is no coincidence that the ex-British and French colonies adopted parliamentary-type constitutions in imitation of their colonial masters, while those in the areas of American influence adopted constitutions of the American presidential type. Thus the Soulbury Constitution as well as Sri Lanka's Constitution of 1972 adopted a winner-take-all, Westminster-type, parliamentary constitution within a unitary state, without any arrangements for power-sharing with the minorities. As a hypothetical example, if an American federal-type constitution (despite its other known defects) had been installed in Sri Lanka at independence, it is possible that its decentralised, devolved nature together with its built-in checks and balances for protection of state/province and minority rights, may have served as a starting model that may have saved the country from its separatist threat and civil war some 30 years later.

A second general observation is that when Prime Ministers under a parliamentary system wish to extend their term in office, and when they can muster the two-thirds majority needed to amend the constitution, they usually try to graft the model of the Executive Presidency on top of the parliamentary model. In this way, they are unfettered by the checks and balances which limit the powers of an American President by bringing the Executive and Legislature together in a powerful twosome, with the pliant Parliament in the President's pocket. This has happened in Zimbabwe, the Sudan, Sri Lanka and in many ex-colonial countries in Africa. This constitutional trend has resulted in budding dictatorships in many parts of the developing world.

Thirdly, it is necessary to comment on the 1972 Constitution of Sri Lanka, if only in passing, since it is the main concern of this

publication. This will be done very briefly and only from the limited viewpoint of this chapter, namely, only with regard to its impact on democracy, nationalism and the nation state. The Constitution of 1972 is to be lauded for its complete break from the British Crown. Section 1 declared Sri Lanka to be a free, sovereign and independent Republic. Section 2 declared it to be a unitary state, which has raised problems about introducing even a semi-federal constitution in Sri Lanka. The main feature of the 1972 Constitution, however, was to make the National State Assembly "the supreme instrument of State power of the Republic" (Section 5), without any reservations or restraints. This in itself may be a good thing; but given the socio-political context of our times (as already discussed), its effects as far as national unity is concerned are highly questionable. The constitution also empowered the National State Assembly (the legislature) to amend the constitution by a two-thirds majority. Although this conforms to normal constitutional traditions, such a majority could easily be attained by the dominant ethno-religious majority (adding others, if needed, by the use of presidential patronage), as has been seen in Sri Lanka on several occasions since 1972.

As for religion, Buddhism was given "the foremost place" while it was made the duty of the State "to protect and foster Buddhism" – which goes beyond the traditional division between religion and the state in most democratic constitutions. As for language, while the Tamil (Special Provisions) Act of 1958 was maintained, important regulations made under it for the official use of the Tamil language were denied any constitutional recognition and were instead referred to as "subordinate legislation," which, while technically correct as a legal description, was politically insensitive to Tamil sentiments in the extreme. In the words of Donald Horowitz: "The Sri Lankan language and state religious provisions symbolically wrote the Sri Lankan Tamils out of the polity."[3] Meanwhile, English, which was the bridge language between all the ethno-linguistic groups and desired by them all (except the Sinhala majority) was allowed to lapse into limbo.

[3] D. Horowitz,'*Incentives and Behavior in the Ethnic Politics of Sri Lanka and Malaysia*'(1989)***Third World Quarterly*** 11:p.28.

One improvement was the inclusion of a positive section on "fundamental rights and freedoms" (Section 18), although the same section went on to provide a number of broad circumstances in which the government could suspend those rights. But the main problem was that the safeguards of minority rights which were contained in the Soulbury Constitution were repealed and not replaced. Section 29 (2) (b) of the Soulbury Constitution provided that "No law shall…make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not liable." Likewise, sub-section 2 (c) provided that "No law shall…confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions." The repeal of the latter provision enabled the Constitution of 1972 to give constitutional authority to the Sinhala Only Act, while also giving Buddhism 'the foremost place,' and while also making it the duty of the state to 'foster Buddhism.' In other words, not all communities or religions were made equal after the 1972 Constitution. This was not exactly helpful in building a true nation state with equal rights for all its citizens and minorities.

Constitutionally and otherwise, the Constitution of 1972 was an improvement on the Soulbury Constitution. Both constitutions, however, were so bound by their colonial heritage that they automatically adopted a winner-take-all, Westminster-type parliamentary model within a unitary state. However, in the socio-political context of the country, this translated in practice to the granting of complete control of state power (via the sovereign legislature) to the prevailing ethno-religious majority which, historically and understandably, was still going through the throes of its own ethno-religious resurgence. The impact of a constitution has ultimately to be judged not by what it is, or what it says, but by what it does, or does not do, or prevents from being done in the context of its time. From this point of view, although the 1972 Constitution was in many respects progressive and internally consistent, its effects on national unity and the development of a broader Sri Lankan nationalism (congruent with the 'nation state' of Sri Lanka) were largely negative. For it merely empowered the ethno-religious majority to do more of the same, under the cover of 'democracy' and the 'sovereignty of the state.' It is also not a coincidence that the enactment of this constitution was soon

followed by the Vaddukoddai Declaration (1976), whereby the Sri Lankan Tamils declared their right to self-determination, thus signalling the breakdown of national unity within the framework of the 'nation state' of Sri Lanka. Nor is it a coincidence that the constitution was soon followed by the establishment of the Executive Presidency by a pliant Parliament, thus sounding the potential death-knell of democracy.

To return to the substance of this section, it is important to recognise that there may be more than one nation caught up in an ex-colonial territory now called a 'nation state'. This section sets out to explore the policy, legal and constitutional options available to avoid the undesirable and undemocratic consequences arising therefrom. If the achievement of one nation within one nation state is not achievable, it would still be worthwhile for multinational states, instead of pretending to be one-nation 'nation states,' to encourage the pluri-nations within its boundaries, through appropriate policies to willingly accept being part of such a wider *state nation*.[4] The concept of the '*state nation*' is designed to maintain the sovereignty and territorial integrity of would-be nation states with multiple ethnic/sectarian groups within them, by the adoption of policies, laws and constitutional reforms that would encourage such communities or 'nations' to accept the broader nationality of a more accommodating '*state nation'*, while still being loyal to their own smaller 'national' groups. In fact, this may be the only way for pluri-nation states to retain their sovereignty and territorial integrity, which is the avowed goal of their governments.

It is, therefore, necessary to explore possible political, legal or constitutional arrangements that could achieve those ends within such so-called 'nation states'. Although India was confronted with more religious, ethnic and language differences than (say) Sri Lanka, it was able to overcome or alleviate these problems with more conciliatory policies towards the minorities, thus averting secession and civil war. Although Hinduism is the majority religion in India, it was not given 'the foremost place,' nor was it

[4] This terminology as well as many references in this section are taken from the work of A. Stepan, J.J. Linz & Y. Yadav (2011) ***Crafting State-Nations: India and Other Multinational Democracies*** (Baltimore: Johns Hopkins UP)

made the duty of the state to 'protect and foster' any one religion, as was done by the 1972 Constitution of Sri Lanka. Likewise, although India tried to impose Hindi as the main official language of the country in 1965, the proposal was withdrawn upon opposition and threats of secession by some of the linguistic regions. To the contrary, the Sinhala Only Act was promulgated into law in Sri Lanka, while minority protests were put down by so-called 'communal riots'. Moreover, in India, English was maintained as a link language, whereas in Sri Lanka its abolition effectively broke the main link between the communities, while also undermining the minorities' trust in the impartiality of the state. Hence, accommodative policies are needed if it is really meant to keep pluri-nations together within one sovereign state. Alternatively, an army of occupation is needed to hold them down, as in Kashmir in India, or as in Tibet under China or Dagestan under Russian rule.

In the above type of circumstance, a federal constitution could possibly safeguard minority rights. This is especially the case where the minority inhabits a fairly well defined spatial area, as in the case of the Ceylon Tamils in Sri Lanka.[5] It is equally obvious that federalism or its variations of devolution will not solve the problem of minorities when they have no geographical concentration and are scattered all over the country, as is the case with the Chinese in Malaysia. Moreover, it is important to note the different historical and political circumstances under which federal constitutions have been formed. In the USA, Australia and Switzerland, for example, the federal system was used *to bring together* different states or provinces which wanted to come together for economic, trade, security or other reasons. They were, therefore, prepared only to accept a '*symmetrical federation*' wherein all participating states were given equal rights and representation.

[5] The Ceylon Tamils claim to have inhabited well-defined areas in the north and east of the country for well over 1000 years, while it has been historically documented that there was a well-established Tamil kingdom in the north of Ceylon for the last three to four centuries before the first European colonisers (the Portuguese) came to Ceylon around 1496. This is as opposed to the Indian Tamils who were brought in by the British within the last 250 years to work in the tea plantations in the central hills of the country.

In contrast, in the emerging democracies, since two or more ethnic groups were already bound together in one unitary state within preordained ex-colonial boundaries, these unitary bonds will have to be broken before any federal solution is possible. The current options of such pluri-nations caught within the confines of a unitary state, therefore, are either full secession, or constitutional accommodations ensuring a greater degree of autonomy to the minority communities. To overcome problems of this nature, some governments have adopted '*asymmetrical federations*' which have granted special autonomy and special rights to particular minority regions (which are not necessarily applicable to all regions) either through constitutional amendments or through special Acts of Parliament. For further protection, such constitutional or legal adjustments are usually guaranteed by additional safeguards to prevent the modification or repeal of such autonomy and rights except with the consent of the participating units. Such *asymmetrical federations* include Canada with its powerful French minority, Spain with its Basque and Catalonian minorities, Belgium with its Flemish/Walloon 'nations' and India, which made special provisions to accommodate Mizoram. On the other hand, the Sri Lankan government, faced with the demand of the Tamils for federalism agreed only to a very limited devolution to newly created Provincial Councils in *all* the provinces, regardless of whether they needed or desired such devolution or not. Successive Sri Lankan governments have balked at any proposal to treat the Northern and Eastern Provinces differently from the other Sinhala Provinces despite their major ethnic, linguistic, cultural and religious differences from such other Provinces. Far from being divisive, such *asymmetrical federalism* has actually been the institutional mechanism that has held together the pluri-nation states of Canada, Spain, Belgium and India. In the concept of Stepan, Linz and Yadav, it will be necessary to craft a new '*state nation*' to make this possible. The latter concept involves pluri-nations living together within the boundaries of the former 'nation state', but with dual and complementary loyalties both to the smaller nation of which they are a part, but also to the wider national polity as represented by the *state nation*. Unfortunately, the needed constitutional and policy changes are unlikely to be made where a prevailing ethnic/sectarian majority has complete control of state power and is unwilling to agree to anything that involves a sharing of that

power through the constitutional device of federalism or through any other practicable means. After all, the ethic/sectarian majorities in most of the emerging democracies were gratuitously and fortuitously handed the power of the state on a platter by the historical processes outlined above. If it is only a question of power, and not a question of the unity of the nation state and the broader nationality that the politicians profess to love, why give up that power? This same problem, under the same historical circumstances is arising in a number of countries faced with the same problem.

The politicians of the ethnic majority in Sri Lanka object to federalism on various grounds. First it is argued that federalism would divide the country, whereas history has shown that it is the unitary constitution that has actually divided *the people of the country*, leading (among other things) to 30 years of civil war. On the other hand, other countries, such as India, Canada, Spain and Belgium have resorted to federalism in order to preserve their unity rather than to divide it. The second argument used in Sri Lanka is that the state would lose its sovereignty thereby, whereas all the politicians and journalists who make this claim know very well that the USA, the most powerful nation in the world, has not lost its sovereignty thereby. Hence, the real reasons lie elsewhere. As pointed out by Stepan et al,[6] the real reasons are two-fold. First, it is claimed that the Sinhalese are 'a majority with a minority complex,' being faced with over 40 million Tamils in South India just 22 miles across the Palk Strait. The second more dangerous reason springs from a foundational 'history' of Sri Lanka, as recounted in *the Mahavamsa*,[7] that the Buddha when passing from this world, gave Sri Lanka to the Sinhala people as the protectors of Buddhism. There are also other parts of an informational and ideological 'infrastructure' springing also from the *Mahavamsa* that has led to the widely held view, recently expressed by a presidential aspirant, that "Sri Lanka *belongs* to the Sinhala people."

Since successive governments in many emerging democracies have been unwilling to give up the unitary state which they

[6] Ibid.
[7] The *Mahavamsa* was compiled from 600-800 A.D., that is around 1000 years after the event described above.

inherited from their colonial masters, there is a need to explore possible alternative solutions within that unitary state structure. Fortunately, there are examples of countries that have succeeded in accommodating the demands of their minorities for substantial autonomy and guarantee of rights within their respective unitary constitutions. One such country is Italy where, after World War II, it gained territories with substantial concentrations of Germans in South Tyrol, French in Valle d'Aosta, and Slovenes on its eastern frontier. Many of these communities did not want to be part of Italy at that time, but Italy won them over by separate legislative Acts which gave them the status of "'regions of special statute."' These were later confirmed by constitutional laws that guaranteed substantial autonomy and special rights to these regions, which could not be taken away without their express consent. This has also been the case with Aland, a Swedish-speaking island off Finland, which agreed to return to the sovereignty of the unitary state of Finland, under conditions of autonomy guaranteed by special legislation, as embodied in the Act of the Autonomy of Aland, as amended in 1991. The same applies to the Faroe Islands and Greenland (in 1953), which re-accepted the sovereignty of Denmark after World War II on the guarantee of substantial autonomy, special rights (and even subsidies) under terms of special legislation passed by the unitary state of Denmark. Here again, these special arrangements for the minorities were made in an attempt to re-unify these countries rather than to divide them. For want of a better term, these constitutional devices within the framework of the unitary state have been appropriately named 'federacies.'

As already seen, when 'nation state policies' (usually with only the ethno-religious majority in mind) are carried out in so-called 'nation states' with deep ethnic-sectarian divides, such policies only exacerbate the tensions between the major communities, thus undermining the possibility of a true nation state ever being achieved. On the other hand, where pluri-nation 'nation states' have accepted their differences and tried to build a broader nationality despite those differences (as Catalonians in Spain or the Sikhs in India), such '*state nation*' policies have usually succeeded in saving not only the rights of the minorities but have also strengthened loyalty to the larger '*state nations*,' congruent with the broader nationality of the would-be nation state. This has,

among others, enabled the strengthening of democracy and human rights within the whole. For example, the Tamils of Tamil Nadu in India (who even burnt the Indian flag at independence to show their opposition to the newly created Indian Union) seem now more fully integrated within the latter. According to a recent survey,[8] Tamil Nadu shows more satisfaction with the constitution and institutions of the Indian government (including the Indian Army) than most other states of India. There is, thus, a politics of incorporation and association, as opposed to a politics of alienation and coercion.

Fortunately, there are two national and international trends which will hopefully help to overcome some of the problems of the nation state analysed in this chapter. First, it is probable that the fires of nationalism will ultimately die down. A time will hopefully come when the different communities will be able to live side by side with equality, dignity, tolerance and peace, as happened in Europe when their respective nationalisms matured. The nation state will then become an anachronism and national sovereignty a non-issue. Two factors are likely to be responsible for such a development. First, the concept of the nation state is dying at its own hands, and by its own logic. The fiction that the United Kingdom was comprised of only one nation within one nation state is slowly unravelling due to the rise and acceleration of Welsh and Scottish nationalisms. Faced with the prospect of these 'nations' opting for independence, the UK government seems prepared to tolerate an even greater extreme of autonomy, given the prevailing democratic culture and its compulsions. Thus the UK could very well end up with a loose confederation as means of reconciling these differences, within what would be called a '*state nation*'; alternatively, these 'nations' (the Scots and the Welsh) could opt for full independence. But in today's world, this would imply, first, that the concept of there being only one nation within the nation state of Great Britain is no longer historically correct, even if it ever was; and secondly, that such a loose confederation or even independence (to break up a hitherto unitary state) would be achieved by a democratic vote by the minority 'nations' in the UK with the positive cooperation of the

[8] SDSA Survey of 2005 by the CSDS Data Unit, Delhi, cited in Stepan, Linz & Yadav (2011): p.137, Table 4.3.

majority of the English people and not by war or an army of occupation.

The second trend is the development of supra-national regional and international bodies, which could bypass or overcome parochial nationalisms, making nation states unnecessary in the long run. The countries of the European Union, for example, have given up some of the powers and symbols of statehood by agreeing to varying degrees of political integration and currency union. Although this is the trend of the future, it is historically possible only because the nationality of these European nation states has matured. Many are also reducing their armed forces, tending to depend more on larger military alliances, such as NATO for their defence. Why maintain a separate nation state and a separate standing army when a larger regional entity can undertake the functions of the former nation state? In the case of Asia, whereas the relevant regional grouping for South East Asia (ASEAN) is seeking greater economic and political integration, the corresponding grouping for South Asia (SAARC), of which Sri Lanka is a member, seems to be politically paralysed by the political and military rivalry of India and Pakistan.

In the meantime, the pluri-nations caught in the colonially-created cage of the 'nation state,' especially when the majority is going through an ethno-religious-nationalistic revival of its own, have no hope of democracy or a just solution to their problems except by one the following means:

(i) International action to break up the fictitious 'nation states' and to divide the former colonial territories into true nation states, as was done by the United Nations in respect of the Balkans and the Sudan. However, it is clearly not practical to expect a rewriting of the political map of the world. Hence, not much can be expected from the international community except in the most egregious cases of human rights violations; even then, cries of national sovereignty and territorial integrity will be made to ward off international action, as in the case of China's actions in Tibet.

(ii) Constitutional adjustments within the countries themselves to bring about a more equitable sharing of power between the various communities and to ensure equal rights under the law and equal economic opportunities for all. This is necessary in order to generate the 'we feeling,' which is essential for the survival of a true nation and a true nation state.

(iii) In the absence of positive action under either (i) or (ii), the minority has no option except to seek secession and independence. This, however, usually leads to civil war, which usually ends in victory by the ethnic/sectarian majority which is able to use the power of the sovereign state to obtain military aid and/or actual intervention from other states, while also appealing to regional or international organisations to safeguard its sovereignty and territorial integrity.

(iv) By the minorities accepting that they are only second-class citizens, with no democracy or participation in the government, often being forced to flee their own country. Sometimes this is enforced by an army of occupation which seeks to erode the linguistic, cultural and geographic base of the minorities concerned, as is happening to the Uighurs and the Tibetan Buddhists in the name of the sovereign state of China.

Summary of Discussions

1. Theoretically it would be useful to examine how democracy helped in the evolution of the nation and the nation state in the developed democracies of Europe, since this could yield valuable lessons for the newly 'emerging democracies.' However, we find that the nation and the nation state evolved in Europe by assimilation and coercion: democracy had no hand in it, and only appeared more than 300 years later. Likewise, the experiences of the newly settled democracies (like USA and Australia) in this regard are *sui generis* and not replicable elsewhere, for reasons analysed in Section 1.

2. In the developing world before the advent of colonialism, various ethnic/sectarian groups often existed as separate political entities. However, they were bundled together in one territory during colonial rule and were declared at independence to be one 'nation state' within the former fortuitous colonial boundaries.
3. One result of this is that one ethnic/sectarian group or 'nation' came now to be ruled by another, which was not the case before the colonial period. The past colonial boundaries have now determined who will be the ruler, and who the ruled. The minorities created by such boundaries, have merely exchanged one 'foreign' ruler for another, conquered this time by the ballot and not by the bullet.
4. This violates the first principle of democracy, which is the consent or willingness to be governed. How can it be democratic to be ruled against one's will by a state which one does not wish to be ruled by?
5. The confinement of two or more nations within the colonially created cage of the 'nation state' is compounded after independence by the rise of rival ethnic/sectarian 'nationalisms' within the same 'nation state'.
6. The new nation states were established on the assumption that the pre-existing ethnic/sectarian divisions would diminish over time, leading to a new loyalty to a wider 'nationalism' that is congruent with that of the new nation state. Unfortunately, instead of mitigating the existing ethnic/sectarian divides, they have been dug deeper, due to reasons set out in points 1 to 5 above and 7 to 12 below.
7. Under the new democratic constitutions adopted at independence, these ethnic/ sectarian groups or 'nations' are expected to resolve their differences by the vote, although such differences were never resolved in any of the European democracies by such means.
8. The outcome of the vote, however, is decided not only by the counting of heads but also by the boundaries within which the heads are counted. If the boundaries are arbitrary (which they are), so will be the majorities acclaimed within them. Given this fact, why even bother to hold elections now to decide who has the majority, since this was already decided when the boundaries were drawn by the colonial powers 200-400 years ago: an outcome further guaranteed by the rise of

ethnic/sectarian 'nationalism' amidst the majority so contrived?

9. Although democracy has its obvious merits, it was historically inevitable that the ethno/ sectarian majority in such a colonially concocted 'nation state' would avail itself of the democratic electoral process to capture the power of the state.
10. Given the rise of ethno-religious nationalism and the process of 'outbidding,' which is endemic in the electoral process, this control of state power is often used to further the ethnic/sectarian agenda of the majority even at the cost of national unity within the so-called nation state. On the long run, it is also at the cost of the nation state itself and of true democracy therein.
11. It is not long before the ethnic/sectarian majority (now called a 'nation'), with its permanent monopolistic hold on state power begins to identify itself with the state, and *vice versa.*
12. This leaves little room for the minorities or for the development of a wider nationalism congruent with the nation state (e.g. a Malaysian identity – as opposed to a narrower Malay identity – within the nation state of Malaysia).
13. All the above have actually been facilitated by the electoral process of democracy, in the naïve or disingenuous belief that these differences can be settled by the vote, although this has never been done in any of the democracies of Europe nor even in the newly settled countries (such as the USA) in equivalent historical and structural conditions.
14. The same democratic electoral process also undermines the achievement of true democracy as defined by the rule of law and equal rights to all its citizens, since the same forces that overpowered the minorities are likely to overcome democracy too. This is seen in the increasing number of Executive Presidencies and budding dictatorships in the emerging democracies, starting from the same situation outlined above and achieved by the same processes.
15. There are some fortunate states that have been able to bypass or overcome the above fate. The relevant policies and factors that have contributed to this achievement and good fortune are analysed in Section 5.
16. The 1972 Constitution of Sri Lanka is examined only from the point of view of the limited concerns of this chapter, namely, its effects on democracy, nationalism and the nation

state. This constitution had many merits. However, by placing state sovereignty entirely in the hands of the supreme legislature and its anointed executive, it served only to re-confirm the permanent possession of state power by the ethno-religious majority which controls them both. This has led to 'more of the same' policies that had already divided the would-be nation and nation state. Thus, in the socio-political context of its time, the Constitution of 1972 had a negative impact both on national unity and on democracy. On the one hand, it led directly to the Vaddukoddai Declaration of 1976 whereby the Tamil community asserted its right to independence from the state of Sri Lanka, while on the other, it led to the Executive Presidency, which sounded the death knell of true democracy in Sri Lanka.

17. Although this chapter is meant to be mainly diagnostic, Section 6 seeks to identify policies and constitutional approaches which have been used successfully within countries, with both federal and unitary constitutions, as a means of overcoming some of the problems discussed above. The problem of transforming a unitary state (controlled by an ethno-religious majority) into a federal state is quite different and more difficult than that of states coming together to form a federation, as in the case of the USA. Hence an *asymmetrical federation* may be required to meet the needs of a pluri-nation unitary state rather than the usual *symmetrical federation* which proved adequate for 'coming together' federations as in the USA.
18. Since federalism in any form may not be politically acceptable in particular countries, the possibility is explored of accommodating the minorities through special constitutional arrangements within the structure of a unitary state. These constitutional alternatives are discussed on the assumption that democratic solutions are genuinely being sought rather than to rule the minority/minorities by coercion, against their will.
19. It is clear that some day the fires of nationalism will die down and that the nation state will become an anachronism, a trend that is already being seen in Europe. It is, however, unfortunate that this process will be delayed or even nullified in some emerging democracies because rival nationalistic flames will be kept alive by the ethnic majority using its

control of state power to carry out its own ethnic/sectarian agenda at the expense of other communities.

20. Since the minorities in the emerging democracies cannot so easily escape their colonially created 'nation states' or the ethnic/sectarian majorities that dominate them, their only hope lies in the growth of supra-national regional bodies (like the European Union) which can take over the functions of the nation state, ultimately making the latter almost irrelevant. Unfortunately, since the ruling ethnic/sectarian majority in any emerging democracy begins to identify itself with the state, it is very unlikely that it will accept any derogation of its 'national sovereignty' by ceding any power to any regional body. On the other hand, it is also very doubtful, due to geo-political reasons, that the relevant regional institution for South Asia (SAARC) will be able to meet this evolving need.
21. All the above implies that pluri-nations caught in the colonially-created cage of the 'nation state', especially when the majority community or 'nation' is going through its own ethno-religious-nationalistic revival, have little hope of democracy or a just solution to their problems except by one the following means:

    (i) International action to break up the fictitious 'nation states' so as to divide the former colonial territories into true nation states. Since it is not practical to rewrite the entire political map of the world, it is not likely that the international community will take action except in the most egregious cases of human rights violations.

    (ii) Constitutional adjustments within the countries themselves to bring about a more equitable sharing of power between the various communities, as well as policies to ensure equal rights under the law and equal economic opportunities for all. These are considered essential to generate the 'we feeling' which is necessary to ensure the emergence and survival of a true nation state and a genuine national identity based thereon. This too seems unlikely since the ruling ethnic/sectarian majorities are too addicted to their monopolistic power to voluntarily share it with the minorities.

(iii) In the absence of positive action under either (i) or (ii), the minority has only two options, the first of which is to seek secession and independence. This usually leads to defeat, since the ethnic/sectarian majority's control of state power enables it to use the latter's military power as well as its sovereign status to obtain diplomatic and military assistance from other sovereign states. The only remaining alternative is for the minorities to accept that they are only second-class citizens, with no democracy or participation in the government, often ruled by armies of occupation, as in the case of the Chinese in Tibet.

22. It is obvious that democracy did not cause the underlying problem, which was caused by the false foundational premise on which democracy was based in most emerging democracies. Caught in the trap of the 'nation state' which is not a nation state, and overpowered by the rise of ethnic/sectarian 'nationalism', the electoral process, which is the first step of democracy, has often aggravated the problem, thus making it part of the problem rather than part of its solution.
23. But democracy means much more than the electoral process. It involves the rule of law, equal rights in law and in fact, and equal economic and social opportunities for all. This requires that the chance majorities generated by fortuitous colonial boundaries should pay heed to the rights of their minorities in order to create a true nation state and build a true nationality based thereon. If they are not willing to do this, they should be prepared to admit that their so-called 'nation states' are a fiction, even 60 years after independence. In such a case, they should let their minorities go, whether through international arbitration as in the case of the Sudan, or through mutually agreed secession as in the case of Slovakia. For an army of occupation cannot forcibly forge either a true nation or a true nation state.

19

Fundamental Rights in the 1972 Constitution

Jayampathy Wickramaratne

The incorporation of a charter of rights is a characteristic feature of modern constitutions. It was France that first gave basic rights such constitutional recognition by including the Declaration of the Rights of Man in the preamble to its 1789 Constitution. The United States Constitution that came into effect in 1789 did not have a charter of rights; a Bill of Rights was introduced in 1791. The Weimar Constitution of Germany of 1919, the Irish Constitutions of 1922 and 1936, the constitutions of the former U.S.S.R., Switzerland, the Eastern European countries, India and Japan all contain declarations of fundamental rights. Most countries of the British Commonwealth have followed suit.

In the older constitutions such as the unwritten constitution of England, no specific guarantees are recognised. The rationale for this was that when rights are specified, they are limited or entrenched with reservations. The essence of the constitution is law, respected and enforced. A subject may say or do what he pleases, provided he does not offend the law. Thus, it is not the rights that are stated but only the limitations. Public authorities may do only what is authorised by common law or statute. Parliament is omnipotent but is expected not to interfere with the liberties of the people except in an emergency.

The conservatism or traditional restraint present in ancient polities evidenced in the unwritten constitution of Great Britain is absent in latter day systems, and therefore, constitutional guarantees are necessary to prevent arbitrary action and the tyranny of the majority. The elevation of rights to constitutional status gives them a sanctity that the state may not violate.[1]

Fundamental rights have been referred to as the "conscience of the Constitution" or the "soul of the Constitution".[2] Justice Bhagwati stated in *Maneka Gandhi v Union of India*:

> "[F]undamental rights represent the basic values cherished by the People of [India] since the Vedic times

[1] V.G. Ramachandran (1985) ***Fundamental Rights and Constitutional Remedies***, Vol. I (Lucknow: Eastern Book Co.): p.110.
[2] V.D. Mahajan (1986) ***Constitutional Law of India*** (6th Ed.) (Lucknow: Eastern Book Co.): p.65.

> and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a pattern of guarantees on the basic structure of human rights and impose negative obligations on the state not to encroach on individual liberty in its various dimensions."[3]

The special position of fundamental rights in a constitution has been universally recognised. As Lord Diplock stated for the Privy Council in *Attorney-General of The Gambia v Jobe*:

> "A Constitution, and in particular the part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction."[4]

Rights under the 1947 Constitution

It is of interest that the British-given 1947 (Soulbury) Constitution, [5] which followed the report of the Soulbury Commission, did not have a comprehensive bill of rights, although the Ceylon National Congress (CNC) was keen to have one. [6] On the advice of Sir Ivor Jennings, its unofficial constitutional advisor, the Board of Ministers decided not to incorporate a bill of rights. Sir Ivor however admitted in 1961 that, having regard to the heterogeneous nature of the Ceylonese society, it was desirable to have a comprehensive bill of rights in the constitution: "If I knew then, as much about the problems of

[3] AIR 1978 SC 597, 619.
[4] (1985) LRC (Const.) 556, 565.
[5] Contained in the Ceylon (Constitution) Order in Council, 1946, the three Ceylon (Constitution) (Amendment) Orders in Council, all of 1947, and the Ceylon (Independence) Order in Council, 1947.
[6] J.A.L. Cooray (1969) ***Constitutional Government and Human Rights in a Developing Society*** (Colombo: J.A.L. Cooray): p.34.

Ceylon, as I do now, some of the provisions would have been different."[7]

Instead of a bill of rights, the Ministers decided to include a provision designed to prevent discrimination on the ground of race or religion and infringement of religious freedom. Section 29(2) of the 1947 Constitution accordingly provided that no 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, so, however, that in any case where a religious body is incorporated by law, no such alterations shall be made except at the request of the governing authority of that body.

Section 29(3) stated that any law made in contravention of subsection (2) shall, to the extent of such contraventions, be void.

The efficacy of Section 29(2) was tested when Parliament disenfranchised hundreds of thousands of Indian Tamils who had voted at the 1947 General elections as British subjects. The disenfranchisement was done circuitously. First, the Citizenship Act No.18 of 1948 was adopted. A citizen was defined in such a manner that the vast majority of Indian Tamils would not qualify for citizenship. The Ceylon (Parliamentary Elections) Act was then amended by Act No. 48 of 1949 to provide that only a citizen of Ceylon could be an elector. The result was that over 800,000 Indian Tamils would not be entitled to vote.

---

[7] Talk over BBC Overseas Service, quoted in J.A.L. Cooray (1973) ***Constitutional and Administrative Law of Sri Lanka*** (Colombo: Hansa): p.509.

Kodakanpillai, an Indian Tamil from the Ruwanwella electoral district, applied for his name to be included in the electoral register on the basis that his exclusion violated Section 29(2). His application was refused by the Assistant Registering Officer, and he appealed to the Revising Officer. The latter held that the two Acts referred to above were invalid as offending Section 29(2). The Assistant Registering Officer and the Commissioner of Elections moved the Supreme Court for Writs of Certiorari to quash the decisions of the Revising Officer.

With regard to the Citizenship Act, the Supreme Court held that it was a perfectly natural and legitimate function of the legislature of a sovereign country to determine the composition of its nationals.[8] In the instant case, the object of the legislature was to confer the status of citizenship only on persons who were in some way intimately connected with the country for a substantial period of time. The court took the view that the language of the impugned provisions was free from ambiguity and therefore that their practical effect, and the motive for their enactment, were irrelevant. The court even doubted whether it was the intention of the constitution to make Section 29(2) a safeguard for the minorities alone, and stated that such intention has not been manifested in the words chosen by the legislature.

The matter went up to the Privy Council,[9] which took the view that there may be circumstances in which legislation, though framed so as not to offend directly against the constitutional limitations of the power of the legislature, may indirectly achieve the same result, and that in such circumstances such legislation would be *ultra vires*. But it held that it must be shown affirmatively by the party challenging the statute that it was enacted as a part of a plan to effect indirectly something which the legislature had no power to achieve directly.

Endorsing the observations of the Supreme Court regarding the right of a legislature to determine the composition of its nationals, the Privy Council held that the migratory habits of Indian Tamils, referred to in the Soulbury Commission Report, were facts which

[8] *Mudanayake v Sivagnanasunderam* (1953) 53 NLR 25 (SC).
[9] *Kodakanpillai v Mudanayake* (1953) 54 NLR 433 (PC).

were directly relevant to the question of their suitability as citizens of Ceylon and had nothing to do with them as a community.

The Official Language Act of 1956, which made Sinhala the only official language of the country, was challenged in *A.G. v Kodeeswaran*.[10] Kodeeswaran was an officer of the General Clerical Service. He did not present himself for a proficiency test in Sinhala and his increments were suspended under a Treasury Circular issued under the Official Language Act. He challenged the suspension on the ground that the Official Language Act violated Section 29(2). The District Judge held with him, but the Supreme Court allowed the appeal on the narrow ground that a public servant could not sue the Crown for a breach of the contract of employment.

The Privy Council[11] reversed the decision of the Supreme Court and sent the case back for determination on the constitutional issues without expressing an opinion on the constitutionality of the Official Language Act. However, the case was not proceeded with, presumably because the 1972 Constitution had elevated the position of Sinhala as the official language to constitutional status by that time.

1972: Constitutional Recognition for Fundamental Rights

At the general election of May 1970, the United Front (UF), made up of the Sri Lanka Freedom Party (SLFP) and its smaller Marxist allies, the Lanka Sama Samaja Party (LSSP) and the Communist Party (CP), sought a mandate from the electorate to permit members of the new Parliament to function simultaneously as a Constituent Assembly in order to draft, adopt and operate a new constitution, the primary objective of which was to make the country a free, sovereign and independent republic dedicated to the realisation of a socialist democracy that will guarantee the fundamental rights and freedoms of all citizens. At the general election, a significantly high percentage of 84.9 % of the voters

[10] (1967) 70 NLR 121 (SC).
[11] *Kodeeswaran v A.G.* (1969) 72 NLR 337 (PC).

exercised their franchise. The UF won 116 out of 151 seats on offer, obtaining 48.8 % of the total votes cast. With the support of the six nominated members and the two independent members who won their seats with its help, the UF commanded 124 seats in the 151-member Parliament.

It is a matter of great significance that all political parties represented in Parliament participated in the formation of the Constituent Assembly at the invitation of Prime Minister Sirimavo Bandaranaike. It was certainly a unique opportunity to *build* a new constitution, not just *make* one.

In the 1972 Constitution, all fundamental rights and permissible restrictions were contained in just one section, Section 18, which may be reproduced:

> 18. (1) In the Republic of Sri Lanka –
>
> (a) all persons are equal before the and are entitled to equal protection of the law;
> (b) no person shall be deprived of life, liberty or security of person except in accordance with the law;
> (c) no citizen shall be arrested, held in custody, imprisoned or detained except in accordance with the law;
> (d) every citizen shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching;
> (e) every citizen has the right by himself or in association with others, to enjoy and promote his own culture;
> (f) all citizens have the right to freedom of peaceful assembly and of association;
> (g) every citizen shall have the right to freedom of speech and expression, including publication;
> (h) no citizen otherwise qualified for appointment in the central government, local government, public corporation services and the like, shall be discriminated against in

respect of any such appointment on the ground of race, religion, caste or sex;
Provided that in the interests of such services, specified posts or classes of posts may be reserved for members of either sex:
(i) every citizen shall have the right to freedom of movement and of choosing his residence within Sri Lanka.

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

(3) All existing law shall operate notwithstanding any inconsistency with the provisions of subsection (1) of this section.

In the Constituent Assembly, the United Front government was not inclined to accept any amendments proposed to the Basic Resolution on fundamental rights submitted by it. The representatives of the Tamils (including the lone representative of the people of Indian origin, who was a nominated Member of Parliament supporting the UF) proposed that all fundamental rights be available to all 'persons' so that people of Indian origin who are not citizens would also be entitled to them.[12] The government, apparently due to pressure from the extreme Sinhala elements, was not willing to accept the proposal.

Two of the amendments proposed by the right-wing United National Party (UNP) reflected its concern for the safety of the private sector which was under assault by the United Front government. Mr J.R. Jayewardene proposed that "no person shall be deprived of his property save by law" be added.[13] He stated

[12] ***Constituent Assembly Debates***, Vol. I: Cols. 1087, 1134, 1137.
[13] Ibid: Cols.1154-1168.

that a Select Committee that included the late Mr S.W.R.D. Bandaranaike, founder of the SLFP, had in 1959 approved the inclusion of "the right to acquire, own and dispose of property according to law and the right not to be dispossessed of property save by authority of law" in the constitution. The other amendment was to delete "national economy" from the matters in the interest of which fundamental rights could be restricted and to insert the words "the maintenance of supplies and services essential to the life of the community in a state of emergency" which was much narrower in scope.[14] Both proposals were not acceptable to the government.

The rights and freedoms declared in the 1972 Constitution are mainly civil and political rights of the old natural rights tradition. The inclusion of second generation human rights, based on the principles of social justice and public obligation, would have been a huge victory for the Left. Important examples of second generation rights are the right to just and favourable conditions of work, equal work for equal pay, right to rest and leisure as an employee, right to free elementary education, right to food, clothing, housing, medical care, and necessary social services, and right to special care and assistance for mothers and children. While it is true that, as the LSSP's Dr Colvin R. de Silva, Minister of Constitutional Affairs, later said, "when Constitutions are made by Constituent Assemblies they are not made by the Minister of Constitutional Affairs," the Left, quite strong at that time, does not appear to have pressed for the inclusion of such rights.[15]

Restrictions on Fundamental Rights

A constitution that declares fundamental rights and freedoms also lays down permissible restrictions in order to maintain a balance between individual rights and freedoms, on the one hand, and the interests of the society on the other. While the rights and freedoms represent the claims of the individual, the permissible restrictions

[14] Ibid: Col.1153.
[15] C.R. de Silva (1987) ***Safeguards for the Minorities in the 1972 Constitution*** (Colombo: A Young Socialist Publication): p.10.

represent the claims of society.[16] However, certain rights are absolute, meaning that society has no claim over them.

The Universal Declaration of Human Rights recognises the need to impose limitations on fundamental rights but lays down certain guidelines. Article 29(2) declares:

> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

The International Covenant on Civil and Political Rights (ICCPR) provides in Article 4 as follows:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin."

Some of the rights recognised by the ICCPR are absolute. Accordingly, no derogation is permitted from Articles 6 (right to life), 7 (freedom from torture), 8 (freedom from slavery and servitude), 11 (freedom from imprisonment on the ground of inability to fulfil a contractual obligation), 15 (freedom from retroactive penal legislation), 16 (right to recognition as a person before law) and 18 (freedom of thought, conscience and religion) in any circumstances whatsoever.

---

[16] See *dicta* of Mukherjee J. in *A.K. Gopalan v State of Madras,* AIR 1950 SC 27, 93-4.

A negative feature of the 1972 Constitution was that all fundamental rights were subject to the same permissible restrictions. They could have all been restricted "in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy."[17]

This meant that even the freedom of thought, conscience and religion could be restricted, say, in the interests of national security, certainly a frightening thought. The right not to be deprived of life, liberty or security of person except in accordance with the law could also be restricted.

All fundamental rights were also subject to restrictions designed to give effect to the Principles of State Policy. The Principles of State Policy, declared in Section 16(2), were only a guide to the making of laws and the governance of Sri Lanka.[18] They did not confer legal rights and were not enforceable in any court of law; nor could any question of inconsistency with such provisions be raised in the Constitutional Court or any other court.[19]

Dealing with the escape clause that permitted the restriction of fundamental rights in the interest of giving effect to the Principles of State Policy, Dr Colvin R. de Silva pointed out in the Constituent Assembly that one of the said Principles is the "full realisation of all rights and freedoms of citizens including group rights." In deciding whether a particular restriction of a right is in the interests of giving effect to the Principles of State Policy, one of the objective tests of any court will be: Will this restriction help towards the full realisation of the rights and freedoms of citizens including group rights or will it have the reverse effect? "We want a Constitution to facilitate movement towards a stated and pre-determined end," Dr de Silva emphasised.[20]

---

[17] Constitution of Sri Lanka (1972): s.18(2)
[18] Ibid: s.16(1).
[19] Ibid: s.17.
[20] ***Constituent Assembly Debates***, Vol. I: Col.1330.

The inter-relation between fundamental rights and the Directive Principles of State Policy (as they are called in India and now under the 1978 Constitution in Sri Lanka) came up for discussion in several Indian cases.

In *State of Madras v Champakam Dorairajan*,[21] decided in 1951, the Indian Supreme Court, speaking through Das J., stated:

> "The directive principles…which by Art. 37 are expressly made unenforceable by a Court, cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders and directions under Art. 32. The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or Executive act or order except to the extent provided in the appropriate article in Part III. The directive principles…have to conform to and run as subsidiary to the Chapter on Fundamental Rights."[22]

In Re Kerala Education Bill, the same judge observed that while Directive Principles must subserve and not override fundamental rights, in determining the scope and ambit of fundamental rights, "the Court may not entirely ignore the Directive Principles…but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible."[23] This approach was endorsed in several cases heard by Divisional Benches, notably, *Golak Nath v State of Punjab*[24] (eleven judges), *Kesavananda Bharati v State of* Kerala[25] (thirteen judges) and *Minerva Mills v Union of India*[26] (five judges).

The issue came up before the Sri Lankan Supreme Court in *Seneviratne v U.G.C.*,[27]a case under the 1978 Constitution, where the petitioner challenged the allocation of 55% of the places for

---

[21] AIR 1951 SC 226.
[22] Ibid: p.228.
[23] AIR 1958 SC 956.
[24] AIR 1967 SC 1643.
[25] AIR 1973 SC 1461.
[26] AIR 1980 SC 1789.
[27] (1978-79-80) 1 Sri LR 182.

university admissions district-wise, in turn distributed among districts on the basis of population. The University Grants Commission contended that it had to conform to national policy and relied on the Directive Principles of State Policy, especially those relating to "the promotion of welfare of the People by securing and protecting effectively as it may, a social order in which justice (social, economic and political) shall guide all institutions of the national life" and "the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels." Wanasundera J. referred to Indian cases where the Supreme Court had considered the Directive Principles in the Indian Constitution. In *Pathumma v Kerala*,[28] the Indian court had stated that in determining the reasonableness of a restriction that is imposed on a fundamental right, it could legitimately take Directive Principles into consideration. A careful reading of the judgment shows that Wanasundera J. did not hold that fundamental rights could be restricted in the interests of Directive Principles of State Policy. Rather, the intention of the University Grants Commission to implement the relevant Directive Principles was accepted as a reasonable basis of classification.

It is thus hard to see the rationale for permitting fundamental rights, which bind all organs of government, to be restricted in the interests of Principles of State Policy which are merely for guidance in law-making and governance and are not otherwise enforceable.

1.1 Fundamental Rights and the Legislature

A constitution may, in addition to declaring fundamental rights, set up special machinery for their enforcement. In the absence of such special machinery, the common law would enforce the substantive fundamental rights. For example, the United States Constitution provides no special remedy but the Bill of Rights is enforced through courts.

[28] AIR 1978 SC 771.

A constitution that declares the powers of a legislature and lays down the limits of such power must also provide for safeguards against the abuse of such power. It is essential to ensure that the legislature exercises powers strictly within the limits and in the manner laid down by the constitution. Constitutional provisions relating to fundamental rights are not mere guidelines to the legislature. They must be enforced against the legislature as well. Most constitutions ensure this by *not* having a provision that gives finality to legislation. In the absence of such a finality clause, courts may strike down legislation for inconsistency with any provision of the constitution including fundamental rights. The Soulbury Constitution did not have such a finality clause.

The 1972 Constitution, in a radical departure from the Soulbury Constitution, provided that no institution administering justice, and likewise no other institution, person or authority, had the power or jurisdiction to inquire into, pronounce upon or in any manner call in question the validity of any law of the National State Assembly.[77] Article 80(3) of the 1978 Constitution provides similarly.

The 1972 Constitution however allowed pre-enactment judicial review, which the 1978 Constitution also permits. A Bill could be challenged for constitutionality before enactment. Under the 1972 Constitution there was a special Constitutional Court for this purpose.[29] But under the 1978 Constitution it is the Supreme Court that has sole and exclusive jurisdiction to determine any question as to whether a Bill or any provision thereof is inconsistent with the Constitution.[30]

The framers of both the 1972 and 1978 Constitutions apparently did not wish to let judges declare legislation invalid years or even decades after the elected representatives of the people enacted them. Post-enactment review of legislation admittedly introduces uncertainty. But on the other hand, is it not necessary to ensure that the legislature acts strictly within its powers of enactment? As Marshall C.J. asked: "To what purpose are powers limited, and to

[29] Constitution of Sri Lanka (1972): s.54.
[30] Constitution of Sri Lanka (1978): Art.120.

what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restricted?" [31]

It is submitted that post-enactment judicial review is an essential tool to prevent the infringement of constitutional provisions by legislative action. There have been many instances of obviously unconstitutional provisions going unchallenged. A case in point is the Code of Criminal Procedure Act No. 15 of 1979. Section 403 provided that a person alleged to have committed certain specified offences shall not be released on bail except with the sanction of the Attorney General. This provision was not challenged at the Bill stage. The Poisons, Opium and Dangerous Drugs (Amendment) Bill of 1984, which *was* referred to the Supreme Court, contained a provision that a person suspected or accused of certain offences could be released on bail only with the consent of the Attorney General. The court held that granting of bail being essentially a judicial function which could be exercised only through courts, the said provision was inconsistent with Article 4(c) (which provided for the exercise of judicial power through courts) and consequently inconsistent with sovereignty, protected by Article 3. [32] That provision was amended by Parliament in the committee stage to provide for the grant of bail by courts in exceptional circumstances. But a similar provision in the Code of Criminal Procedure continued to be the law until it was deleted in 1993. Also, in a country with a devolved structure, post-enactment judicial review is a must to prevent the centre's incursions into the domain of the devolved units. Provisions relating to urgent Bills have been abused by successive administrations. An urgent Bill is referred directly to the court concerned even without publishing it in the Gazette. Such a Bill is not tabled in Parliament before such reference and even Members of Parliament would not know the contents of such a Bill.

In an under-developed country such as Sri Lanka, it is too much to expect citizens to be vigilant and scrutinise all Bills that are published in the Gazette for possible unconstitutional provisions.

---

[31] *Marbury v Madison*, 1 Cranch 137, 176.
[32] ***Decisions of the Supreme Court on Parliamentary Bills***, Vol. III: 1.

The effect of most legislative provisions are felt only when they are being enforced. If even the Bar Association of Sri Lanka and the entire legal profession had slept while a provision that offended sovereignty was passed into the Code of Criminal Procedure, what could be expected of ordinary citizens?

An amendment proposed at the committee stage in Parliament does not come under judicial scrutiny at all. Such amendments only require the certificate of the Attorney General, in practice by an officer of the Attorney General's Department present in Parliament.

An argument against post-enactment judicial review is that there should be certainty as regards the constitutionality of legislation. However, no serious problems have arisen in jurisdictions where post-enactment judicial review is permitted. To mitigate hardships that may be caused by legal provisions being struck down years later, the Indian Supreme Court has used the tool of prospective over-ruling.' limiting the retrospective effect of a declaration of invalidity in appropriate cases.[33] Section 172 of the South African Constitution expressly permits such limitations:

> 172. (1) When deciding a constitutional matter within its power, a court
>
> > a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> > b. may make any order that is just and equitable, including
> >
> > i. an order limiting the retrospective effect of the declaration of invalidity; and
> > ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[33] *Golaknath v State of Punjab*, AIR 1967 SC 1643; *Baburam v C.C. Jacob* (1999) 3 SCC 3.

An argument in favour of post-enactment judicial review is that the people are able to get the benefit of the latest judicial interpretation of a constitutional provision. An illustration would be helpful. In the early years under the present constitution, the Supreme Court insisted that a petitioner should prove that at least one other similarly circumstanced as him has been differently treated when complaining under the equal protection clause. In *Perera v Jayawickreme*, the court refused to include non-arbitrariness *per se* as an essential requirement of equal protection as the Indian Supreme Court had done in several landmark cases.[34] Later, in *Jayasinghe v Attorney General*, considered a water-shed in Sri Lanka's fundamental rights jurisprudence, the court held that it could take judicial notice that a law or procedure is ordinarily applied and that a comparison was not essential.[35]

When the Constituent Assembly was deliberating on the Indian Constitution, it had two options in regard to protection of life and personal liberty, 'due process of law' or 'procedure established by law' in what eventually became Article 21. The Assembly took a conscious decision in favour of the latter.

It was contended before a six-member Bench of the Indian Supreme Court in *A.K. Gopalan v State of Madras*, that the phrase 'procedure established by law' in Article 21 meant 'due process of law' and that the word 'law' in Article 21 did not mean law enacted by the state but *jus naturale* or the principle of natural justice.[36] The majority held that 'procedure established by law' did not mean 'due process of law' as understood in the United States, and also that the word 'law' meant law made by the Union Parliament and by the legislatures of the states and not *jus naturale*.

But thirty years after the Constituent Assembly decided in favour of 'procedure established by law' as opposed to due process of law,' the Indian Supreme Court introduced the concept of 'procedural due process' into Article 21. In *Maneka Gandhi v Union of India*, Bhagwati J. stated that the principle of reasonableness is an essential element of equality and that non-arbitrariness

[34] (1985) 1 SLR 285 (SC).
[35] (1994) 2 SLR 74 (SC).
[36] AIR 1950 SC 27.

pervades Article 14 (equality and equal protection of the law) like a brooding omnipresence, and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14.[37] Such procedure must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.

At the first SAARCLAW Conference held in Colombo in 1991, Justice Bhagwati was asked as to how the court could have interpreted Article 21 to include 'due process,' a concept that the framers of the Indian Constitution had consciously rejected. He explained that the law kept on developing and as such, the people were entitled to the benefit of the latest developments and judicial interpretations.

Constitutional Court

The Constitutional Court under the 1972 Constitution consisted of five members appointed by the President. The qualifications for appointment were not laid down. But the practice was to appoint judges or retired judges of the appellate courts. The first Constitutional Court had a distinguished constitutional lawyer as a member.[38]

A disturbing feature of the 1972 Constitution was that while the judges of the superior courts were appointed by the President, held office during good behaviour and could be removed by the President only upon an address of the National State Assembly,[39] judges of the Constitutional Court did not enjoy such security of tenure. They were appointed by the President for a term of four years and could have been removed by the President on account of ill-health or physical or mental infirmity.[40]

---

[37] AIR 1978 SC 597.
[38] Dr J.A.L. Cooray.
[39] Constitution of Sri Lanka (1972): s.122(2).
[40] Ibid: s.56(1)(c).

Any question as to whether a Bill was inconsistent with the constitution was referred to the Constitutional Court by the Speaker.[41] The process could be initiated by the Attorney General if he was of opinion that the Speaker should so refer a Bill, or if the Speaker took the view that there was a question of inconsistency, or if the leader of a recognised political party in the National State Assembly, or such number of its members as would constitute a quorum, raised such a question. Any citizen could move the Constitutional Court within a week of the Bill being placed in the agenda of the National State Assembly. The Speaker would refer the Bill to the court if the court advised him that there was a question of inconsistency. A Bill which is, in the view of the Cabinet of Ministers, urgent in the national interest *shall* be referred to the court by the Speaker. Such a Bill is referred to as an 'urgent Bill.'

The decision of the Constitutional Court shall be given within two weeks of the reference together with the reasons for it.[42] In the case of an urgent Bill, its opinion must be given within twenty-four hours of the assembling of the court.[43] No proceedings may be taken in the National State Assembly unless the decision or opinion of the court has been given.[44] An urgent Bill is placed on the agenda only after the opinion of the court has been received.[45]

The decision of the Constitutional Court upon a reference is binding on the Speaker.[46] In the case of an urgent Bill, the special majority is required if the court advises the Speaker that it is inconsistent with the constitution or if the court entertains even a doubt whether it is consistent.[47]

The relevant provisions of the 1978 Constitution may be examined for comparative purposes. The constitutional jurisdiction of the Supreme Court may be invoked by a reference by the President or by any citizen within one week of a Bill being

[41] Ibid: s.54(2).
[42] Ibid: s.65.
[43] Ibid: s.53(2).
[44] Ibid: s.54(3).
[45] Ibid: s.55(3).
[46] Ibid: s.54(4).
[47] Ibid: s.54(4).

placed on the Order Paper of Parliament. 'Citizen' includes a body, whether incorporated or not, if not less than three-fourths of its members are citizens.[48] No proceedings shall be had in Parliament until the determination of the Supreme Court has been made or the expiration of a period of three weeks from the invocation of jurisdiction, whichever occurs first.[49] The court shall make and communicate its determination within three weeks.[50] In the case of an urgent Bill, which is referred to the Chief Justice by the President, the court shall make its determination within twenty-four hours or such longer period not exceeding three days as the President may specify.[51]

The Supreme Court is required to determine whether a Bill or any provision thereof is inconsistent with the constitution. If a provision requires approval at a referendum in addition, it should be so stated. The Court may specify the nature of the amendments which would make the Bill or any provision thereof cease to be inconsistent. In the case of an urgent Bill, if the Supreme Court entertains a doubt whether there is a question of inconsistency it shall be deemed to have determined that the relevant Bill or provision is inconsistent.[52]

The Constitutional Court was a novel institution for Sri Lanka. The manner in which it worked on several occasions and several of its decisions have been controversial. Did the Constitutional Court live up to the expectations of the framers of the constitution? If it did not, was it due to the attitudes of its members and the political environment that existed, or was the entire concept of a Constitutional Court wrong?

The framers of the 1972 Constitution appear to have regarded the Constitutional Council of France as a model. In France, all former Presidents and nine other members appointed for a nine-year term (three members each appointed by the President of the Republic, the President of the National State Assembly and the President of the Senate) constitute the Council. The Council's

[48] Ibid: s.55(4).
[49] Constitution of Sri Lanka (1978): Art.121 (2).
[50] Ibid: Art.121 (3).
[51] Ibid: Art.122 (1) (c).
[52] Ibid: Art.124.

functions, unlike those of the Constitutional Court of Sri Lanka, are not limited to determining the constitutionality of Bills. It rules on the regularity of the election of the President, in case of disagreements relating to the procedure at a referendum, and the regularity of the election of the National State Assembly and the Senate.

Dr Colvin R. de Silva, the Minister of Constitutional Affairs, reminding the Constituent Assembly that the practice of appointing persons outside the judiciary to a Constitutional Court was common, referred to the French Constitutional Council and the Constitutional Court of the Federal Republic of Germany (whose members are elected, one-half each by the two Houses, the *Bundestag* and the *Bundesrat*).[53] Mr Gamini Dissanayake, a member of the Opposition, who preferred permitting challenges to a Bill at the pre-enactment stage rather than after enactment, was of the view that such a function should not be reposed in the regular courts of law as it would be a very tedious, cumbersome and very expensive procedure.[54]

Dr N.M. Perera, writing in 1978, argued strongly for a separate Constitutional Court.

> "[T]he independence of the judiciary nor [its pre-eminence is] impaired or jeopardized, by a separate Constitutional Court consisting of eminent judges and jurists who can be expected to bring independent minds to bear on complicated constitutional issues. It is not a penal court. It punishes nobody. Its outlook is, therefore, different. The ordinary Courts of the land are soused in the mundane problems of ordinary life and can find little time or the inclination to delve into the intricacies of constitutional technical problems. These require a breadth of vision and understanding which bespeak a degree of familiarity with modern Constitutions. A separate Court devoted to the interpretation of the Constitution will over time amass a volume of expertise

[53] ***Constituent Assembly Debates***, Vol. I: Cols.2892-2894.
[54] Ibid: Cols.2882-2883.

> and produce a body of experts that can ensure a consistency of outlook and a steadiness of progress. Every Constitution must respond to the socio-economic changes of an advancing society. This can be best achieved by those specialised in and devoted to the tasks associated with the interpretation of the Constitution."[55]

The Constitutional Court was at the centre of a controversy in the very first matter referred to it: the Sri Lanka Press Council Bill.[56] At issue was whether the fourteen-day period for giving a decision was mandatory or merely directory. The Chairman of the Court expressed the view that the fourteen-day rule was only a rule of guidance. The court sat beyond the fourteen-day period provoking angry criticism in the National State Assembly. An important constitutional issue arose: Who is the ultimate interpreter of the constitution – the Constitutional Court or the National State Assembly?

To break the deadlock, a meeting was arranged between the members of the court and the President, attended, among others, by the Speaker, the Minister of Justice and the Secretary to the Ministry of Justice. The Minister suggested that the court make a request to the National State Assembly for an extension of the time limit for that particular reference. The members of the court declined. At the end of the fourteen-day period, the Minister directed the Attorney General to withdraw from the proceedings, and the Speaker informed the National State Assembly that proceedings in the Assembly would continue, as the court had not communicated its decision within two weeks. The three members of the court soon resigned. Three others were appointed in their place and the Bill was referred again to the newly constituted Constitutional Court.

The framers of the 1978 Constitution appear to have learnt a lesson from the episode. Article 121(2) provides that where the jurisdiction of the Supreme Court has been invoked in respect of a

---

[55] N.M. Perera (1978) ***Critical Analysis of the New Constitution of the Sri Lanka Government*** (Colombo: V.S. Raja): p.70.

[56] For a detailed account, see M.J.A. Cooray (1982) ***Judicial Role Under the Constitutions of Ceylon/Sri Lanka*** (Colombo: Lake House): pp.244-246.

Bill, no proceedings shall be had in Parliament until the determination of the Supreme Court has been made or the expiration of a period of three weeks from the date of the invocation of jurisdiction *whichever occurs first*. Thus if the Supreme Court fails to make its determination within three weeks, proceedings in Parliament can continue.

In the matter of the *Sri Lanka Press Council Bill*, the petitioners submitted that being a court which determined the constitutionality of a Bill, the Constitutional Court should not adopt the principles of statutory interpretation that a court of law would apply when deciding on the constitutionality of a law in operation.[57] Such a court of law presumes (i) that all laws are constitutional until the contrary is proved and (ii) that when two interpretations are equally possible, the court would lean towards the interpretation which is consistent with the constitutionality of the statute. In an apparent acceptance of the petitioners' submissions, the court stated: "[W]e take the view that the correct approach is to examine the provisions *vis-à-vis* the Constitution and thereafter decide the question without resort to presumptions and counter-presumptions."[58] But it emphasised that it would, as far as possible, interpret the constitution in a manner that will make the constitution work and not in a manner that will place impediments and obstacles to the working of the constitution.

In arriving at decisions, the Constitutional Court liberally referred to previous decisions of both local and foreign courts, sometimes relying on them. In the matter of the *Sri Lanka Press Council Bill*, the court stated that it would be useful in interpreting the constitution to take into account analogies, precedents, principles and practices in the interpretation of other constitutions, but emphasised that it would not forget that the constitution of Sri Lanka derives its power and authority solely from the people.[59] Criticising this emphasis, M.J.A. Cooray argues that where guidance is to be derived from the interpretations placed on and concepts underlying another constitution, the proper course is to inquire as to whether there are similarities between the two

[57] ***Decisions of the Constitutional Court of Sri Lanka***, Vol. I: p.1.
[58] Ibid: pp. 1,6.
[59] Ibid.

constitutions in the general design and particular details, and if so, inquire further as to the relevance of the authorities in question to the issue before the court.[60] He stresses the need to draw freely from the constitutional experience of Ceylon as well as other countries, despite the fact that due to the method of adoption of the 1972 Constitution, it had no link with the past.

During the period 1972 to May 1977, that is when the UF and later the SLFP alone was in government, fifteen Bills were referred to the Constitutional Court. Of these five were urgent Bills. One was a Private Member's Bill.

Questions of inconsistency with fundamental rights were considered in respect of nine of the fifteen Bills. Only in the matter of the *Church of Sri Lanka (Consequential Provisions) Bill*, which significantly was a Private Member's Bill, did the court hold that there was infringement of a fundamental right. There too, one member dissented, holding that the *prima facie* infringement was covered by permissible restrictions laid down in Section 18(2).[61] In the *Sri Lanka Press Council Bill*, the *Places and Objects of Worship Bill*[62] and the *Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill*,[63] the court held that there were provisions that placed restrictions on fundamental rights, but that such restrictions were permitted by Section 18(2).

It was in the matter of the *Sri Lanka Press Council Bill* that the Constitutional Court took an extremely deferential view. The Bill sought to prohibit newspapers from publishing any news relating to Cabinet decisions and Cabinet papers unless such news had been approved by the Secretary to the Cabinet. This provision was challenged as being a violation of the freedom of speech and expression. The court went to the extent of holding that a Cabinet in modern times directly or indirectly discusses practically all matters (such as national security, public order, public health, etc.) dealt with in the permissible restrictions set out in Section 18(2) and, as such, the restriction of the fundamental right of speech

[60] Cooray (1982): p.252.
[61] ***Decisions of the Constitutional Court of Sri Lanka***, Vol. 3: p.5.
[62] ***Decisions of the Constitutional Court of Sri Lanka***, Vol. I: p.27.
[63] Ibid: p.35.

and expression would be justified. It was also held that no person could claim a fundamental right to violate the secrecy of any other person or body of persons. The people's right to know about and comment on Cabinet decisions was thus extinguished. The restriction of the right to publish and criticise the monetary, fiscal, exchange control or import control polices of the government, or even to speculate upon likely measures that the government may take to deal with such subjects was also justified under Section 18(2).

Of the fifteen Bills that came before it up to May 1977, the Constitutional Court ruled that there were inconsistencies with the constitution in three Bills. One was the *Church of Sri Lanka (Consequential Provisions) Bill* referred to earlier. In the case of the *Administration of Justice Bill*,[64] the court held that certain provision relating to the appointment of judges were unconstitutional. A provision of the *National Price Commission Bill*[65] that dealt with the definition of 'Minister' was held to violate the constitution. Thus, no Bill presented by the government was held to violate fundamental rights.

During the period July 1977 to August 1978, when the United National Party was in power, twenty-two Bills came up before the Constitutional Court. Of these, as much as fifteen were urgent Bills. One of the urgent Bills was the *Second Amendment to the Constitution Bill*,[66] that introduced the Executive Presidency to Sri Lanka. This Bill was referred to the Constitutional Court on 14th September 1977. The court met the same day at 4.20 p.m. But the Speaker's certificate on this 'urgent' Bill was placed only on 20th October 1977, and the amendment came into operation four months later on 4th February 1978. As L.J.M. Cooray observes, most Bills were declared 'urgent' to circumvent the constitutional requirement that a Bill must be published in the Gazette at least seven days before it is placed on the Agenda of the National State Assembly.[67] The urgent Bill provision has been abused by all governments under the 1978 Constitution.

---

[64] Ibid: p.57.
[65] ***Decisions of the Constitutional Court of Sri Lanka***, Vol. 3: p.1.
[66] ***Decisions of the Constitutional Court of Sri Lanka***, Vol. 5: p.8.
[67] L.J.M. Cooray (1984) ***Constitutional Government in Sri Lanka*** (Colombo: Lake House): pp.321-322.

Courts have declined to inquire into the question whether a Bill is in fact urgent in the national interest. In the *Constitution of the Republic of Sri Lanka Bill* presented in 2000, the Secretary to the Cabinet of Ministers made an endorsement in terms of Article 122(1) of the 1978 Constitution that, in the view of the Cabinet of Ministers, the Bill was urgent and in the national interest. Some petitioners contended that the decision of the Cabinet had not been made *bona fide* and invited the Supreme Court to disregard the certificate. The court declined, holding that it was not within the ambit of its constitutional jurisdiction to examine the *bona fides* or the reasonableness of the decision.[68]

Questions of inconsistency with fundamental rights were raised before the court in respect of six ordinary Bills challenged by citizens. The court held with the petitioners in the *Excise (Amendment) Bill,*[69] *The Greater Colombo Economic Commission Bill,*[70] and *Local Authorities (Imposition of Civic Disabilities) (No.1)*[71] *and (No. 2)*[72] *Bills*. In the *Excise (Amendment) Bill* the court dealt with equal protection and referred to and discussed several Indian cases in coming to its conclusions.

The manner in which the Constitutional Court functioned, especially during the period from 1972 to 1977, has been criticised. The Secretary of the Civil Rights Movement, Mr Reggie Siriwardena, giving evidence before the Select Committee on the Revision of the Constitution, stated that the experience of his organisation was that the functioning of the Constitutional Court was such that it did not inspire confidence in that institution.[73] The Select Committee, noting the criticism against the Constitutional Court, saw no valid reason why a body other

---

[68] S.C. Special Determination 7/2000, Supreme Court Minutes 02.08.2000.
[69] ***Decisions of the Constitutional Court of Sri Lanka***, Vol. 5: p.14.
[70] ***Decisions of the Constitutional Court of Sri Lanka***, Vol. 6: p.5.
[71] Ibid: p.26.
[72] Ibid: p.30.
[73] ***Report of the Select Committee of the National State Assembly appointed to consider the Revision of the Constitution*** (1978) Parliamentary Series No.14 of the Second National State Assembly, 22nd June 1978: p.269.

than the superior courts should exercise jurisdiction regarding Bills.[74]

Dr N.M. Perera, once a minister in the United Front government, did not consider the abolition of the Constitutional Court a progressive move, and defended the concept of the Constitutional Court. Dr Perera stated:

> "It is not derogatory of the Supreme Court to concentrate in a special body not the ordinary law but the law-maker's law. What made the Constitutional Court so unacceptable was the disgusting interference of the Minister of Justice under Mrs Bandaranaike, who had not the competence or the capacity to set him in the right course and save an institution which was conceptually correct and eminently in accord with enlightened thinking."[75]

The majority of the panel of experts appointed by the President in 2006 to service the All Party Representative Committee (APRC) recommended in its report (popularly known as the 'Majority Report') that a Constitutional Court be set up to adjudicate on constitutional matters.[76] In this scheme, the court shall consist of eminent members of the legal community and others who have specialised knowledge in governance. It was the view of the majority that such a court should be outside the hierarchy of courts, in that it would not be a court to which judges of other courts could expect to be appointed by promotion. However, judges of other courts with specialised knowledge in constitutional law would also be eligible for appointment. The majority also recommended that the Constitutional Court should reflect the pluralistic character of the Sri Lankan people.

It was also recommended that the Constitutional Court should have the power to review central and provincial legislation for alleged inconsistency with the constitution. Questions of

[74] Ibid: p.146.
[75] Perera (1978): p.70.
[76] Report of 'Group A' of the Panel of Experts appointed by the President to service the All Party Representative Committee, December 2006 (unpublished).

inconsistency of emergency regulations with the constitution or the constitutionality of acts of the President should also be a matter for the Constitutional Court.

In a welcome development, the All Party Representative Committee (APRC) also recommended that the supremacy of the constitution shall be recognised, and protected by a Constitutional Court, which would be part of the existing court structure but separate from the Supreme Court. All acts of commission or omission of the centre and of the provinces inconsistent with the constitution shall be void. Legislation, whether national or provincial, shall be subject to post-enactment judicial review by the Supreme Court which shall have power to declare such legislation void to the extent of inconsistency with the constitution. To mitigate hardships that may be caused by legal provisions being struck down sometime after enactment, the Supreme Court shall have the power to limit the retrospective effect of a declaration of invalidity in appropriate cases.[77]

Existing Law

Section 18(3) of the 1972 Constitution provided that all existing law shall operate notwithstanding any inconsistency with fundamental rights. The effect of this provision was that there would continue to be legal provisions, many of them imposed by the British in their own interest and against the will of the people, which are inconsistent with fundamental rights. This raised a serious question relating to the supremacy of the new constitution. It also meant that a provision of a pre-1972 law that could have been challenged under section 29(2) of the Soulbury Constitution was immune from challenge under the 1972 Constitution as being inconsistent with any provision of the fundamental rights chapter. This was in sharp contrast to the Constitution of India which provides, in Article 13(1), that all laws in force before the commencement of the constitution, in so far as they are

[77] R. Yogarajan & M. N. Kariapper, '*Proposals Made By The All Party Representative Committee To Form The Basis Of A New Constitution*,' July 2010 (unpublished).

inconsistent with fundamental rights, shall, to the extent of such inconsistency, be void.

The rationale for validating all pre-1972 laws notwithstanding any inconsistency with the fundamental rights chapter is not clear. By that time, the Privy Council had reversed the decision of the Supreme Court in *A.G. v Kodeswaran* that a public servant could not sue the Crown for breach of contract of employment and sent the case back for a determination on other issues including the main issue as to whether the Official Language Act violated Section 29(2), as the District Court had originally held.[78] In the immediate aftermath of the Privy Council decision, the makers of the new constitution may have expected the Official Language Act to be challenged as being inconsistent with the equality clause. Dr de Silva did not wish the Supreme Court to re-visit the issue. "If the courts do declare this law invalid and unconstitutional, heavens alive, the chief work done from 1956 onwards will be undone. You will have to restore the egg from the omelette into which it was beaten and cooked."[79] But Section 7 of the new constitution declared that the Official Language of Sri Lanka shall be Sinhala as provided by the Official Language Act. This express constitutional recognition would have stood in the way of any such challenge. It is unfortunate that the *Kodeeswaran* case was abandoned after it was sent back by the Privy Council. Section 7 may have warded off new challenges to the Official Language Act under the new constitution, but it could not have prevented courts from going into a cause of action that allegedly arose under the 1947 Constitution.

It is submitted that there is no justification to validate existing laws notwithstanding inconsistency with the fundamental rights chapter. A sensitive issue in this regard is the concern that some personal laws may be in conflict with fundamental rights, especially with the equality clause. Some personal laws are discriminatory against women in regard to property rights, in particular succession. While some argue that personal laws too should be consistent with the basic law of the country, others

---

[78] *A.G. v Kodeeswaran* (1967) 70 NLR 121 (SC); *Kodeeswaran v A.G.* (1969) 72 NLR 337 (PC).
[79] ***Constituent Assembly Debates***, Vol. I: Col.2860.

argue that the demand for any reform should come from within the relevant community to which such laws apply.

S.C. Reference No. 01/2008 was a reference, under the 1978 Constitution, made by the President to the Supreme Court seeking the court's opinion as to whether the body of Sri Lankan law was consistent with the International Covenant on Civil and Political Rights (ICCPR) and whether the Covenant was justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka.

It was submitted before the court that the continuance in force of personal laws notwithstanding, any inconsistency with fundamental rights was inconsistent with the ICCPR. The court opined that the ICCPR should not be considered as an instrument which warrants the amendment of personal laws. If at all there should be any amendment, such a request should emerge from the particular sector governed by the particular personal law.[80]

In view of the sensitivity of the question to some communities, a *via media* would be to subject all existing law, except personal laws, to the fundamental rights chapter.

Enforcement of Fundamental Rights

The 1972 Constitution did not provide for special machinery for the enforcement of fundamental rights against the executive. But the contention that fundamental rights were not justiciable under the 1972 Constitution is not correct. What were not justiciable were the Directive Principles of State Policy contained in Section 16. [81] Appropriate judicial remedies for the enforcement of fundamental rights were available through writs, actions for damages, injunctions, declaratory actions, etc. The Interpretation (Amendment) Act No. 18 of 1972, passed just before the adoption of the 1972 Constitution, however placed serious limitations on the rights and remedies available against the acts of the executive.

[80] S.C. Reference No.01/2008, Supreme Court Minutes 17.03.2008.
[81] Constitution of Sri Lanka (1972): s.17.

Further, Section 106(5) of the constitution prohibited any institution administering justice from inquiring into any matter concerning the appointment, transfer, dismissal or disciplinary control of State Officers, even, it is submitted, when an infringement of fundamental rights was involved.

During the entire period of six years when the 1972 Constitution was in force, only one case alleging the infringement of fundamental rights is known to have been filed in the courts of Sri Lanka – *Gunaratne v People's Bank* – arising out of the bank employees' strike of the 1970s.[82] The case, a declaratory action, was filed in the District Court of Colombo in 1973. The District Court gave judgment for the plaintiff. The Court of Appeal reversed it. The Supreme Court, in April 1986, allowed the plaintiff's appeal against the judgment of the Court of Appeal. Interestingly, Dr de Silva who was a minister at the time of the strike ultimately appeared for the plaintiff in the Supreme Court. The long period taken for the final disposal of the matter emphasises the need to have a special jurisdiction in order to provide quick relief.

As noted earlier, the right to move the Supreme Court in respect of the infringement or imminent infringement of a fundamental right by executive or administrative action is itself a fundamental right under the 1978 Constitution. By virtue of Article 126(1), the fundamental rights jurisdiction of the Supreme Court is sole and exclusive. Where in the course of a hearing in the Court of Appeal into an application for a writ, it appears to the court that there is a *prima facie* case of infringement or imminent infringement of a fundamental right, such matter must be referred for determination by the Supreme Court.[83] Article 126 applies to language rights as well. But the right to apply to the Supreme Court in respect of a language right is not mentioned in the chapter on fundamental rights. It is thus only an ordinary constitutional right.

[82] (1986) 1 SLR 338.
[83] Constitution of Sri Lanka (1978): Art.126(3).

Fundamental Rights in a Majoritarian Context

Despite the limitations discussed above, the inclusion of a chapter on fundamental rights in the 1972 Constitution was certainly a laudable step, in line with modern constitution-building. However, fundamental rights need to be viewed in the broader context of the constitution as a whole.

While the break from the British Crown, the retention of the parliamentary form of government, the introduction of a fundamental rights chapter, and the declaration of principles of state policy were undoubtedly commendable, the 1972 Constitution also paved the way for majoritarianism.

The United Front government proposed Basic Resolution No. 2 in the Constituent Assembly, to the effect that the constitution should declare Sri Lanka to be a unitary State. According to Dr Nihal Jayawickrama, who played an important role in the constitutional reform process as the Secretary to the Ministry of Justice, the first draft prepared under the direction of the Minister of Constitutional Affairs did not contain any reference to a 'unitary state.' However, one of the senior ministers insisted in the Cabinet that Sri Lanka be declared 'a unitary state.'[84] Dr de Silva did not consider this to be necessary, and argued that while the proposed constitution would have a unitary structure, unitary constitutions could vary a great deal in form. "This impetuous, ill-considered, and superfluous embellishment has, for three decades thereafter, stultified every attempt at a peaceful resolution of the ethnic problem," Dr Jayawickrama later observed.[85]

The Federal Party (FP) proposed an amendment that 'unitary' be replaced by 'federal.' However, Constituent Assembly proceedings show that Tamils were clearly for a compromise. Mr V. Dharmalingam, who was the main speaker for the FP under Basic Resolution No. 2, made it clear that the FP's draft was only a basis for discussion. Stating that the party was only asking that

---

[84] Widely believed to be Mr Felix R. Dias Bandaranaike.

[85] ***The Sunday Island,*** 15th July 2007. See also in this volume, N. Jayawickrama, '*Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective*'.

the federal principle be accepted, he suggested that as an interim measure, the SLFP, LSSP and CP should implement what they had promised in the election manifesto, namely that they would abolish *Kachcheris* and replace them with elected bodies.[86] He stated:

> "If this Government thinks that it does not have a mandate to establish a federal Constitution, it can at least implement the policies of its leader, Mr. S.W.R.D. Bandaranaike, by decentralizing the administration, not in the manner it is being done now, but genuine decentralization, by removing the Kachcheris and in their place establishing elected bodies to administer those regions."[87]

Speakers from both the United Front and the United National Party opposed the FP's amendment and seemed oblivious to the FP's offer for a compromise. Basic Resolution No.2 was passed and the FP's amendment defeated in the Steering and Subjects Committee.

It is significant that the FP continued to participate in the Constituent Assembly even after its amendment was rejected. Records show that its leader, Mr S.J.V. Chelvanayakam, regularly attended the meetings of the Steering and Subjects Committee.

The UF's original Basic Resolution on religion that was passed only provided for Buddhism to be given 'its rightful place' as the religion of the majority. However, the right wing of the SLFP later pressed for Buddhism to be made the state religion. Moderates in the SLFP are said to have intervened at the request of the Minister of Constitutional Affairs and a compromise was reached. Section 6 of the 1972 Constitution read as follows: "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by section 18 (1) (d)."

---

[86] ***Constituent Assembly Debates***, Vol. I: Col.429.
[87] Ibid: Col.431.

On whether the special status accorded to Buddhism would adversely affect other religions, Dr Colvin R.de Silva stated in retrospect:

> "The section in respect of Buddhism is subject to section 18(1) (d) and I wish to say, I believe in a secular state. But you know when Constitutions are made by Constituent Assemblies they are not made by the Minister of Constitutional Affairs. I myself would have preferred (section 18 (1) (d)). But there is nothing…And I repeat, NOTHING, in section 6 which in any manner infringes upon the rights of any religion in this country."[88]

Dr Jayawickrama has been very critical: "If Buddhism had survived in the hearts and minds of the people through nearly five centuries of foreign occupation, a constitutional edict was hardly necessary to protect it now."[89]

Basic Resolution No.11 stated that all laws shall be enacted in Sinhala and that there shall be a Tamil translation of every law so enacted. Basic Resolution No.12, read as follows:

1. The Official Language of Sri Lanka shall be Sinhala as provided by the Official Language Act No. 32 of 1956.
2. The use of the Tamil Language shall be in accordance with the Tamil Language (Special Provisions) Act No. 28 of 1958.

Efforts by the FP to get the government to improve upon Basic Resolutions Nos. 11 and 12 failed. The two resolutions were passed and amendments proposed by the FP defeated. Thereafter, Mr S.J.V. Chelvanayakam informed the Constituent Assembly that that the FP would not attend future meetings. "We have come to the painful conclusion that as our language rights are not satisfactorily provided in the proposed Constitution, no useful purpose will be served in our continuing in the deliberations of

---

[88] De Silva (1987): p.10. See also in this volume, B. Schonthal, '*Buddhism and the Constitution: The Historiography and Postcolonial Politics of Section 6.*'

[89] ***The Sunday Island****,* 15th July 2007.

this Assembly…We do not wish to stage a demonstration by walking out," he stated.[90]

Basic Resolutions No. 11 and 12 became Sections 7 and 8 respectively of the 1972 Constitution. Section 8 further provided that "any regulation for the use of the Tamil language made under the Tamil Language (Special Provisions) Act, No. 28 of 1958, and in force immediately before the commencement of the Constitution shall not in any manner be interpreted as being a provision of the Constitution but shall be deemed to be subordinate legislation continuing in force as existing written law under the provisions of section 12."

The 1972 Constitution has been criticised for not having a provision equivalent to Section 29(2) of the Soulbury Constitution. While the fundamental right to equality and equal protection declared in section 18(1) (a) was a safeguard against discrimination, it was subject to wide restrictions. On the other hand, Section 29(2) was absolute. Also, Section 29(2) was in the nature of a group right. Although it was not as effective as it was expected to be, as was demonstrated by the failure to invoke it to prevent the disenfranchisement of hundreds of thousands of Tamils of Indian origin, numerically smaller ethnic and religious groups nevertheless felt comfortable that it existed, at least on paper. They saw its omission from the 1972 Constitution as a move towards majoritarianism, especially in the context that Sri Lanka was declared a unitary state, Buddhism given the foremost place, and Sinhala declared to be the only official language.

[90] ***Constituent Assembly Debates***, Vol. I: Col.2007.