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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.

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[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 –
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> (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.

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[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]

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[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

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[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.

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[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
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> > 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
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> > 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]

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[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

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[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.

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[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

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[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

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[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

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[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)."

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[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

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[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.