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**Reflections on the Making and Content  
of the 1972 Constitution:  
An Insider's Perspective**



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My involvement with the drafting of the 1972 Constitution commenced with my unexpected appointment as Permanent Secretary to the Ministry of Justice shortly after the May 1970 general election. When I was invited by the new Prime Minister, Mrs Sirimavo Bandaranaike, to leave the Bar and become a public servant for the next five years, she assured me it would not be to appoint justices of the peace, but to formulate and implement a comprehensive programme of legal and judicial reform about the lack of which I had been complaining to her for some time. At the age of 32, that was a challenge. I was not a member of her political party, or indeed of any other. However, my association with her while she was in Opposition, as a lawyer whom she consulted on legal matters, and sometimes on political matters with legal implications, provided me with sufficient confidence to venture into the wholly unknown world of public administration and political intrigue.

While it was common knowledge that a United Front government would take steps to declare Ceylon to be a republic through an exercise in autochthony, I had not, in any way, been involved with the political discussions that had previously taken place between the three parties that constituted the United Front. Although I appeared in court from time to time as a junior to Dr Colvin R. de Silva, and even shared the services of his illustrious clerk, Mr Perera, we had never discussed his work as chair of the three-party committee on constitutional reform set up in 1968 by the United Front of the Sri Lanka Freedom Party (SLFP), the Lanka Sama Samaja Party (LSSP) and the Communist Party (CP). Two weeks after I had commenced work in the Ministry of Justice (while I was serving briefly in the office of Attorney General), I learnt that a committee had been appointed in the Ministry of Constitutional Affairs to prepare the draft constitution. I spoke with Dr de Silva and informed him that I thought the Ministry of Justice ought to be represented on that committee. "Of course, it should, Mr Attorney, so please do come and join our committee," was his extremely cordial response. When I attended the first meeting of the drafting committee, I found that two members of the Attorney General's Department were already on it. At that first meeting, we were provided with an attractively printed version of the Constitution of the Federal Republic of Yugoslavia.

# 1. THE BACKDROP TO THE CONSTITUTION

## The 1946 Constitution

It is argued by some that an alien system of government was imposed on this country by the British colonial administration at or shortly before independence. I do not subscribe to that view. A long period of constitutional development spread out over a century preceded the 1946 Constitution. That constitution was substantially based on a draft prepared by the Board of Ministers<sup>1</sup> and approved in the State Council by 51 votes to 3, including the affirmative votes of members belonging to the Tamil, Muslim and Burgher communities. It was therefore home-grown in essence, though perhaps not in form. It was, however, drafted in Ceylon by a Ceylonese.<sup>2</sup>

The 1946 Constitution had no ideological base, and professed no economic or social objectives. It merely established the essential framework for government by creating the principal institutions and defining their powers. Under that constitution it was possible for both right-wing and centrist or left-of-centre political parties to be elected to office, and for them to implement their respective programmes unhindered. It was possible for both free market and regulated economies to be practised. The parliamentary executive system of government it provided was flexible enough to withstand the tremors caused by the attempted military *coup d'état* of 1962, and strong enough to survive the whiplash of the 1971 insurgency. In seven successive general elections held under that constitution, the electorate demonstrated a growing political maturity when it voted in increasing numbers to change governments on five occasions, and the politicians demonstrated

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<sup>1</sup> The Ministers' Draft was the basic document on which the Soulbury Commission on Constitutional Reform held consultations in Ceylon for three and a half months with various interests, recorded evidence at public sessions and gathered information in private discussions before submitting its report to Parliament. See *CEYLON: Report of the Commission on Constitutional Reform*, Cmd.6677, September 1945 (London: HMSO).

<sup>2</sup> See B. P. Peiris (2007) *Memoirs of a Cabinet Secretary* (Colombo: Sarasavi Publishers). Peiris describes how the 1946 Constitution was drafted by him on the basis of three constitutional documents and under the direction of D.S. Senanayake, Chairman of the Board of Ministers.

their ability to accept the popular will when they effected peaceful transfers of power on each of those occasions.

The provisions of the 1946 Constitution were successfully invoked to challenge the language legislation of 1956, as well as the attempts made in the next decade by Parliament, perhaps unwittingly, to encroach on the powers vested by the Constitution in the judiciary. The *Theja Gunawardene Trial-at-Bar*,<sup>3</sup> the *Kodeswaran Case*,<sup>4</sup> the *Senadheera Case*,<sup>5</sup> the *Aseerwatham Case*,<sup>6</sup> the *Liyanage Case*,<sup>7</sup> the *Ratwalle Bribery Trial*<sup>8</sup> and the *Gnanaseeha Trial-at-Bar*,<sup>9</sup> raised the stature of the judiciary to its high-water mark.

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<sup>3</sup> *The Queen v. Theja Gunawardene* was the 1954 Trial-at-Bar of the editor of the *Trine*, a left-wing weekly newspaper, on a charge of criminal defamation of the Governor-General Designate, Sir Oliver Goonetilleke. The Supreme Court acquitted the accused, having held that the Crown had failed to prove that the defendant published the issue of the newspaper in question with the necessary knowledge of its contents. See *Ceylon Daily News*, 4<sup>th</sup> December 1954.

<sup>4</sup> In 1964, in *Kodeswaran v. The Attorney General*, D.C. Colombo 1026/Z, the District Court of Colombo held that the Official Language Act, No.33 of 1956, was inconsistent with the constitution and was therefore void.

<sup>5</sup> In *Senadheera v. The Queen* (1961) 63 NLR 313, the Supreme Court held that a clear division of the three main functions of government was recognised in the constitution, and that accordingly a Bribery Tribunal was a 'court' whose members must be appointed by the Judicial Service Commission.

<sup>6</sup> In 1964, in *Aseerwatham v. Permanent Secretary to the Ministry of Defence and External Affairs*, reported in VI *Journal of the International Commission of Jurists* 319, the Supreme Court directed that the requirement of 'clearance' from the Ministry of Defence and External Affairs which a person wishing to travel abroad was required to obtain, being unknown to the law, and being an executive device applied without any legal authority, should be forthwith discontinued.

<sup>7</sup> In *The Queen v. Liyanage* (1962) 64 NLR 313, a bench of three judges of the Supreme Court nominated by the Minister of Justice to preside over the Trial-at-Bar of military and police personnel accused of conspiring to overthrow the government held that the power of nominating judges conferred on the Minister by the Criminal Law (Special Provisions) Act, No.5 of 1962, was an interference with the exercise of judicial power, which could not be reposed on anyone outside the judicature, and that the statute was to that extent void and the judges so nominated had no jurisdiction to proceed with the trial.

<sup>8</sup> In this 1966 case, the private secretary to (and brother of) the former Prime Minister was charged under the Bribery Act. He was acquitted by the District Court at the close of the prosecution case. On appeal by the Attorney General, the Supreme Court dismissed the appeal after Queen's Counsel who appeared for the appellants concluded his submissions.

<sup>9</sup> In this 1966 case, a prominent Buddhist priest, the former Army Commander, and several low ranking military personnel were charged with having conspired

The Parliament was the acknowledged forum for great debates on policy. The civil service possessed both the integrity and the capacity to help formulate, and then to implement, policy, whatever the complexion of the government in office. Despite the tradition of street agitation introduced by the Marxist parties, and the belief insidiously inculcated among several thousand young idealistic men and women by the Janatha Vimukthi Peramuna (JVP) that political power could be wrested from the establishment by the simple technique of attacking all the police stations in the country on a single night, the dominant political culture of the times was based on a widespread acceptance of the rule of law.

The 1946 Constitution, of course, had its shortcomings, both in conception and implementation. For example, in the absence of a comprehensive bill of rights, Section 29<sup>10</sup> alone could not prevent Parliament from enacting a stringent citizenship law designed to exclude from its purview as many of the persons of Indian origin living and working in Ceylon as was possible, and an equally stringent franchise law that had the effect of disenfranchising the overwhelming majority of Tamil persons of Indian origin in spite of their long residence in the country.<sup>11</sup> Moreover, only the law-making process was sought to be regulated by Section 29. Neither executive nor administrative action, or the acts of private individuals or bodies, fell within its control. The constitution could not prevent the Senate from being transformed into a haven for unsuccessful politicians or a substitute for a national honours system. It also proved incapable of restraining the executive from resorting to long periods of convenient rule by emergency regulations.

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to overthrow the government. The three judges of the Supreme Court who constituted the bench for the Trial-at-Bar acquitted all the accused persons at the close of the prosecution case. See *The Queen v. Gnanaseeha Thero et al* (1968) 73 NLR 154.

<sup>10</sup> For the text, see fn. 23.

<sup>11</sup> See Citizenship Act, No.18 of 1948; Indian and Pakistani Residents (Citizenship) Act, No.3 of 1949; and Ceylon Parliamentary Elections (Amendment) Act, No.48 of 1949.

## **Abortive Attempts at Constitutional Reform**

Since independence, the only serious attempt at constitutional reform was in the period 1957-59. In April 1957, on the initiative of Prime Minister S.W.R.D. Bandaranaike and his Minister of Justice, Senator M.W.H. de Silva, Q.C., a Joint Select Committee of the Senate and the House of Representatives was appointed to consider the revision of the Ceylon (Constitution and Independence) Orders in Council 1946 and 1947, and other written law, with reference, in particular, to the following matters:

- (a) the establishment of a Republic;
- (b) the guaranteeing of fundamental rights;
- (c) the position of the Senate and Appointed Members of the House of Representatives; and
- (d) the Public Service Commission and the Judicial Service Commission.

Represented on the Joint Select Committee that was appointed in February 1958 were all the political parties in Parliament; the four major communities (and within the Sinhalese community, the four major caste groups and the two divisions of Kandyan and Low-country Sinhalese); and the four major religious groups (including the different Christian denominations).<sup>12</sup> Of its eighteen members, only seven belonged to the ruling party, and only eight to the dominant Sinhalese-Buddhist-*Goyigama* group. It was evident, therefore, that in this exercise in constitutional reform what was intended was not that the pre-conceived views of any particular political party or interest group should prevail, but that a general consensus should be achieved. That consensus would have more than compensated for the Government's lack of a two-third majority in the House of Representatives.

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<sup>12</sup> The members appointed to serve on the Joint Select Committee were: S.W.R.D. Bandaranaike (SLFP/MEP), Stanley de Zoysa (SLFP/MEP), D.P.R. Gunewardene (VLSSP/MEP), T.B. Ilangaratne (SLFP/MEP), M.D. Banda (UNP), S.J.V. Chelvanayakam Q.C. (FP), Dr Colvin R. de Silva (LSSP), M.S. Kariapper (Ind.), P.G.B. Keuneman (CP), Dr N.M. Perera (LSSP), R.S.V. Poulter (Appointed MP), Senator M.W.H. de Silva QC (SLFP/MEP), Senator E.B. Wikramanayake Q.C. (UNP), Senator C. Wijesinghe (SLFP/MEP), Senator S. Nadesan Q.C. (Ind.), Senator A.P. Jayasuriya (SLFP/MEP), Senator E.J. Cooray (UNP), and Senator N.U. Jayawardena (Ind.).

In the first year, on the nine occasions it met between two prorogations of Parliament, apart from causing a questionnaire to be published in the national newspapers seeking the views of the public, the Joint Select Committee unanimously agreed:

- (i) that the number of persons to be taken into account in the demarcation of an electoral district should be only those residents who are citizens; and
- (ii) that appeals to the Privy Council should be discontinued and a new judicial tribunal should be set up to adjudicate on constitutional issues as well as to entertain appeals from the Supreme Court.

In respect of fundamental rights, the following were generally approved of for inclusion in the constitution, to be considered further in detail in the form of draft legislation:

(a) Political Rights

- i. Equality before the law (cf. Articles 14 and 15 of the Indian Constitution).
- ii. Protection of life and personal liberty (cf. Article 21 of the Indian Constitution).
- iii. Right to freedom of speech and expression (cf. Article 19 of the Indian Constitution).
- iv. Right to assemble peaceably and without arms (cf. Article 19 of the Indian Constitution).
- v. Right to form associations or unions (cf. Article 19 of the Indian Constitution).

The rights (ii) to (v) are to be exercised subject to any reasonable restrictions imposed by law in the public interest.

(b) Economic Rights

- i. Equality of opportunity in matters of public employment.
- ii. The right to acquire, own and dispose of property according to law and the right not to

be dispossessed of property save by authority of law (cf. Article 31 of the Indian Constitution).

- iii. The right to reside and carry on any lawful occupation, trade or profession, in any part of the territory of Ceylon (cf. Article 19 of the Indian Constitution).

(c) Right to Freedom of Religion

- i. Freedom of conscience and worship and the free profession and practice of religion.
- ii. Freedom to manage religious affairs.

(d) Cultural and Educational Rights of Minorities

- i. Right of any section of the citizens of Ceylon having a distinct language, script or culture of its own to conserve and develop the same.
- ii. Right of any section of the citizens of Ceylon to establish and administer educational institutions provided: (1) such institutions conform to the educational requirements of the state, and (2) such institutions do not have the right to claim assistance from the state except as provided by law.
- iii. The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether religious or linguistic.

(e) Right to Enforce Fundamental Rights

The right to move the highest tribunal by appropriate proceedings for the enforcement of fundamental rights and to obtain suitable redress, for which purpose such tribunal shall be vested with the power to issue the necessary directions or orders or writs requisite for the enforcement of fundamental rights. For purposes of fundamental rights, the expression 'State' shall be

defined to include the government and Parliament of Ceylon and all local and other authorities in Ceylon.<sup>13</sup>

The Joint Select Committee were also “generally of the view that it would be useful at this stage of their proceedings to obtain the services of officers possessing the necessary knowledge of constitutional law and practice to prepare detailed material necessary in the future deliberations.”<sup>14</sup>

This pioneering effort, however, came to an untimely end. In April 1959, Bandaranaike was faced with a Cabinet crisis: a confrontation between the right and left wings of his Mahajana Eksath Peramuna (MEP) coalition Cabinet which he attempted to resolve by reshuffling the subjects and functions allocated to the Ministers. This led to the resignation from the Cabinet in May 1959 of his left-wing Ministers, including two members of the Joint Select Committee, D.P.R. Gunawardene and M.W.H. de Silva Q.C., the vice-chairman of the Committee. The Government lost its vitality; its spiritual base became questionable, and Bandaranaike himself was very much a prisoner of the right-wing. On 25<sup>th</sup> September 1959, the Prime Minister was assassinated in furtherance of a conspiracy in which several prominent right-wingers of the SLFP were later found to have been implicated.<sup>15</sup> He was succeeded by W. Dahanayake who had led the right-wing revolt six months previously. A series of bizarre events, including the dismissal of ten Cabinet Ministers and the

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<sup>13</sup> *First Report of the Joint Select Committee of the Senate and the House of Representatives appointed to consider the Revision of the Constitution* (1958) Parliamentary Series No.15 of the Third Parliament.

<sup>14</sup> In an interview which the author had with the late Dr J.A.L. Cooray in September 1981, Dr Cooray mentioned that, in this connection, Prime Minister Bandaranaike had had preliminary discussions with him and with Justice T.S. Fernando Q.C., a former Attorney General who was then an active member of the International Commission of Jurists. Dr Cooray, who was then a lecturer in constitutional law at the Ceylon Law College, had in 1943 prepared a comprehensive bill of rights for the Ceylon National Congress (CNC).

<sup>15</sup> See *Report of the Commission Appointed to Inquire into and Report on Certain Matters Connected with the Assassination of the Late Prime Minister Solomon West Ridgeway Bandaranaike* (1965) Sessional Paper III; L.G. Weeramantry (1969) *Assassination of a Prime Minister* (Geneva); A.C. Alles (1979) *The Assassination of Prime Minister S.W.R.D. Bandaranaike* (Colombo).

survival of the government on a no-confidence vote through the single vote of an Appointed Member, culminated in the dissolution of Parliament barely two months later. The government had survived for only three and a half years and produced no tangible reform of the constitution, but it left behind a valuable blueprint for the future.

### **An Unproductive Decade**

In the next ten years there appeared to be no real interest in constitutional reform.<sup>16</sup> Following the general election of March 1960, the minority United National Party (UNP) government of Dudley Senanayake presented a Throne Speech that promised, *inter alia*, “early steps for the revision of the Constitution for the purpose of establishing a Republic of Ceylon within the Commonwealth and for providing a guarantee of fundamental rights to the minorities.” However, the government was defeated on the Address of Thanks, and Ceylon prepared to poll a second time in one year. For the July 1960 general election, the SLFP was led by 41-year old Sirimavo Bandaranaike who, though lacking any previous political experience, had agreed to provide a symbolic, and undoubtedly charismatic, leadership to a fragmented party in the hope of restoring the credibility which it enjoyed in the heady days of her husband’s administration. A cleverly crafted no-contest pact with the LSSP and the CP helped the SLFP to secure 75 seats in the 151-member House of Representatives. Assured of an absolute, though tenuous, majority, Mrs Bandaranaike formed an exclusively SLFP government in the knowledge, no doubt, that for the radical programme of change in the social, cultural and economic spheres to which her government was committed, the support of the left-wing parties would be forthcoming. Her government did not show any inclination to resume the task of constitutional revision. A willingness to consider an amendment to the constitution to make

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<sup>16</sup> The flexibility of the 1946 Constitution enabled Mrs Bandaranaike, who had not sought election to the House of Representatives at the July 1960 general election, to be appointed to the Senate and to be appointed Prime Minister immediately thereafter.

Ceylon a republic, if Parliament so desired, was expressed in the Throne Speech of July 1961, but was not followed up.

The general election of March 1965 saw the re-emergence of Dudley Senanayake as the head of a 'national government' comprising several political parties including the two Tamil communal parties, the Federal Party (FP) and the Tamil Congress (TC), and with the combined support of at least 88 members in the 151-member House of Representatives. The government took steps to reactivate the Joint Select Committee on the Revision of the Constitution with the same terms of reference. However, at its first meeting on 19<sup>th</sup> May 1967, a letter signed by Mrs Bandaranaike and Maithripala Senanayake (SLFP), Dr N.M. Perera and Leslie Goonewardene (LSSP) and Pieter Keuneman (CP), requesting the Speaker to accept their resignations, was tabled. The reasons why these representatives of the three opposition parties declined to participate are discussed below. Their withdrawal meant that the chances of securing a two-third majority, which was necessary to amend the constitution in any respect, became quite remote. Nevertheless, the committee proceeded with its work, but not from the point at which an interruption had occurred in 1959. It prepared, as its predecessor had done nearly ten years previously, a questionnaire to be sent to parliamentarians and recognised public organisations.<sup>17</sup> It held nine sittings at which, apart from considering the written replies received in response to the questionnaire, a number of witnesses who wished to give evidence were examined. In its report, presented to Parliament on 13<sup>th</sup> June 1968, the committee recommended that a chapter on fundamental rights be incorporated in the constitution.<sup>18</sup> There is no record of the committee having met again; nor was any action taken to implement that recommendation.

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<sup>17</sup> *Report of the Joint Select Committee of the Senate and the House of Representatives* (1967) Parliamentary Series No.16 of the Sixth Parliament.

<sup>18</sup> *Report of the Joint Select Committee of the Senate and the House of Representatives* (1968) Parliamentary Series No.30 of the Sixth Parliament.

## **An Academic Discourse**

Shortly after the defeat of the SLFP-LSSP coalition government<sup>19</sup> at the general election of March 1965, these two parties, together with the Communist Party, decided to formalise their relationship and to prepare a programme of work which they would agree to implement in the event of victory at the next general election. Accordingly, joint committees were appointed to examine and report on several areas of governmental activity, including constitutional reform. On this subject, the three parties decided against attempting any patch-work revision of the 1946 Constitution; they resolved to have a new republican constitution drafted and enacted by a Constituent Assembly. This decision appears to have been motivated by several factors.

First, the LSSP, which was proscribed in 1942 and its leaders detained during the war years under Defence Regulations, had played no part in the discussions and consultations that preceded the 1946 Constitution which, in any event, it regarded as a fraud perpetrated to keep Ceylon in a continuous state of subjection. Moreover, the LSSP had throughout agitated for a complete break with the British Crown, and its co-founder and first chairman, Dr Colvin R. de Silva, had consistently declined to 'take silk' and thereby be regarded as one of 'Her Majesty's Counsel' learned in the law. Although the LSSP had been willing to go along with Bandaranaike's proposals for constitutional reform in the late fifties, it now advocated a deliberate break in legal continuity or a legal revolution so that the new constitution would have no links whatsoever with the British Crown or Westminster.

Second, in academic circles the question had been raised whether in the exercise of the power of Parliament to amend or repeal any of the provisions of the constitution, Parliament (i.e. the Queen, the Senate and the House of Representatives) could legally divest itself of one of its constituent parts; and in particular that part

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<sup>19</sup> In 1964 the LSSP joined the SLFP government, with three of its members, Dr N.M. Perera, Cholmondeley de F. Goonewardene and Anil Moonesinghe, being appointed to the Cabinet.

from which it actually derived its legal authority. Parliament was shortly to attempt, successfully as it turned out, the abolition of the Senate and of the right of appeal to the sovereign. Yet, without the benefit of hindsight, before the Joint Select Committee itself, it had been argued by a senior academic that Parliament as defined in the constitution could not be organically changed except by the substitution of a totally new constitution.<sup>20</sup>

Third, in 1964, in the case of *Bribery Commissioner v. Ranasinghe*, Lord Pearce, delivering the judgment of the Judicial Committee of the Privy Council, had referred to section 29(2) of the constitution as one which “entrenched religious and racial matters which shall not be the subject of legislation”, and expressed the opinion that:

“They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution; and these are therefore unalterable under the Constitution.”<sup>21</sup>

Previously, the Privy Council had referred to this subsection as containing ‘fundamental reservations,’ subject to which Parliament enjoyed the power to make laws for the peace, order and good government of Ceylon.<sup>22</sup> These *obiter dicta* of the highest court of appeal provoked a spirited controversy in Ceylon.<sup>23</sup> For

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<sup>20</sup> Dr C.F. Amerasinghe. See *Report of the Joint Select Committee of the Senate and the House of Representatives* (1967) Parliamentary Series No.16 of the Sixth Parliament: p.102.

<sup>21</sup> (1964) 66 NLR 73 at 78.

<sup>22</sup> *Ibralebbe v. The Queen* (1963) 65 NLR 433, at 443.

<sup>23</sup> The relevant portions of Section 29 of the constitution read as follows:

- 29 (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.
- (2) No such law shall –
  - (a) prohibit or restrict the free exercise of any religion; or
  - (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not make 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

example, H.L.de Silva, then a leading constitutional lawyer in the Attorney General's Department, asserted that whenever it is intended to erect a theory of unalterability of a constitution, "words of crystal clarity" are used.<sup>24</sup> He cited, as an example, Article 11 of the constitution of Japan which stated that:

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

Section 29, however, was not lacking in clarity. The legislative power of Parliament described in Section 29(1) was restricted by Section 29(2) so unequivocally that any law made in contravention of that subsection was declared by Section 29(3) to be void. Section 29(4) stated that Parliament 'in the exercise of its powers under this section' may amend or repeal any provision of the constitution with the prescribed majority; '*its powers under this section*' being clearly defined by the preceding subsections (1), (2) and (3).

The *obiter dicta* of the Privy Council also appeared to be borne out by historical fact. The provision of 'lasting safeguards for the interests of minorities' was the predominant factor in the negotiations that preceded the 1946 Constitution and, indeed, independence.<sup>25</sup> The intention expressed in the 1943 Declaration<sup>26</sup> to reserve Bills which "have evoked serious opposition by any racial or religious community and which in the

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- (d) alter the constitution of any religious body except with the consent of the governing authority of that body.  
Provided that in any case where a religious body is incorporated by law, no such alternation shall be made except at the request of the governing authority of that body.
  - (3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.
  - (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order . . .

<sup>24</sup> H.L.de Silva, '*Some Reflections on the Interpretation of the Constitution of Ceylon and its Amendment*' (1970) *Journal of Ceylon Law* 238: p.249.

<sup>25</sup> D.J. Morgan (1980) *The Official History of Colonial Development* Vol.5 (London: Macmillan): pp. 68-77.

<sup>26</sup> Declaration by His Majesty's Government, 26<sup>th</sup> May 1943, Sessional Paper XVII of 1943.

Governor's opinion are likely to involve oppression or unfairness to any community"; the requirement that any constitutional scheme prepared by the Ministers should be approved by three-quarters of all the members of the State Council;<sup>27</sup> the specific direction to the Soulbury Commission to hold discussions with minority groups; and the view expressed by the Colonial Affairs Committee even after the Soulbury Report had been presented that "the Sinhalese majority, whose power under a completely self-governing constitution would be predominant, has yet to prove their willingness and capacity to operate self-governing institutions in collaboration with the minorities, with due regard to their rights and susceptibilities," underlie the importance attached to this factor.

According to D.J. Morgan, who was provided with full access to all official documents, minority safeguards were to be included in the subjects specified for formal Agreements between the two governments as a condition precedent to independence; an insistence which the British government agreed to drop upon being satisfied that "the rights of minority groups were safeguarded in the Constitution."<sup>28</sup> Two of these safeguards were the Senate which was intended to impede precipitate legislation and to handle inflammatory issues in a cooler atmosphere, and the Public Service Commission which was designed as an impartial and authoritative body, free from partisanship. The most important safeguard was undoubtedly Section 29(2). It was clearly the basis upon which independence was sought and obtained.<sup>29</sup>

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<sup>27</sup> To secure an affirmative vote of 44 (three quarters of all the members), the total Sinhalese membership of 39 would have to be supplemented by some at least of those who belonged to the minority communities (Ceylon Tamils: 8, Indian Tamils: 3, Europeans: 5; Muslims: 2; and Burghers: 1).

<sup>28</sup> Morgan (1980): pp. 68-77.

<sup>29</sup> Cf. A. Welikala, in this volume, '*The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' led to Constitutional Revolution.*'

## **The Common Programme**

The end of the debate on the revision of the 1946 Constitution was confirmed when the Common Programme drawn up by the SLFP, LSSP and CP in early 1968, in anticipation of their forming a government following the next general election, stated quite explicitly that:

“A Constituent Assembly will be established and a new Constitution will be introduced. This Constitution will declare Ceylon to be a free, sovereign and independent Republic pledged to realise our objective of a socialist democracy; and will also secure fundamental rights and freedoms to all citizens, including their right to work and to personal property.”

## **2. THE MAKING OF THE CONSTITUTION**

### **The Mandate**

The manifesto of the United Front of the SLFP, LSSP and the CP stated, *inter alia*:

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

Neither the Common Programme nor the manifesto offered any indication of the content of the proposed new constitution, except that it will “secure fundamental rights and freedoms to all citizens” in a Republic “pledged to realise the objectives of a socialist democracy.” The latter expression was not defined or clarified. However, since the SLFP was the dominant partner in the United Front, there was reason to assume that the ‘socialist democracy’ referred to was that which had been expounded by S.W.R.D.

Bandaranaike who founded the party and whose policies the United Front government professed to follow. Addressing the Convocation of the University of Ceylon on 8<sup>th</sup> November 1957, Bandaranaike had said:

“There are experiments going on all over the world, experiments in government: here a fascist state; there a communist state; here a semi-fascist state; there a semi-communist state, and various varieties of democracies ranging from capitalist democracies such as that of the United States to liberal democracies such as that of England to socialist democracies such as those of the countries of northern Europe.”<sup>30</sup>

His concept of a ‘socialist democracy’ was, therefore, based on the concept of socialism as understood in the welfare states of northern Europe, and not the Marxist concept of socialism adopted in eastern Europe. Addressing the Indian Council of World Affairs on 4<sup>th</sup> December 1957, he clarified his thoughts further:

“Coming to the modern conception of democracy (democracy is defined in various ways today), even the totalitarian regimes of the communist countries claim that their’s is the true democracy; they claim that democracy as we know it, is not true democracy, that their’s is the true democracy because the people really rule. But if I may say so, our conception of democracy is somewhat different. Perhaps the most comprehensive description of modern democracy in effect would be that it consists of the combination or the agglomeration of a number of individual liberties and collective liberties.”<sup>31</sup>

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<sup>30</sup> S.W.R.D. Bandaranaike (1963) *Speeches and Writings* (Colombo: Department of Broadcasting and Information): p.333.

<sup>31</sup> Ibid: p.407. This subject is comprehensively discussed in S. Nadesan Q.C. (1970) *Some Comments on the Constituent Assembly and the Draft Basic Resolutions* (Colombo, Nadaraja Press): pp.17-24.

## **The General Election**

The general election held on 27<sup>th</sup> May 1970 saw a remarkably high poll of 85.2 per cent. The United Front won 116 seats with 48.7 per cent of the total votes polled, and became entitled to nominate six more in the 157-member House of Representatives. Within the United Front, the SLFP won 90 seats (1,812,849 votes), the LSSP won 19 seats (433,224 votes), and the CP won 6 seats (169,229 votes). The UNP polled 1,876,956 votes, but won only 17 seats on the first-past-the-post basis. In the Northern and Eastern Provinces, the Federal Party (FP) won 13 seats (245,747 votes), while the Tamil Congress (TC) won 3 seats (115,567 votes).

On 29<sup>th</sup> May, Mrs Bandaranaike was sworn-in as Prime Minister, and on 31<sup>st</sup> May, a 20-member Cabinet of Ministers was formed. The only Tamil member was the newly appointed Senator, Chelliah Kumarasuriar, a chartered engineer and industrial consultant who had, in the past five years, served as the secretary of the Socialist Study Circle, the research wing of the United Front. The only Muslim member was Badi-ud-din Mahmud, a former school principal who was an Appointed Member of the House of Representatives. The subject of constitutional reform was not assigned to anyone. On 14<sup>th</sup> June, the Governor-General in his Speech from the Throne reminded members that:

“By their vote democratically cast the people have given you a clear mandate to function as a Constituent Assembly to draft, adopt and operate a new Constitution which will declare Ceylon to be a free, sovereign and independent Republic pledged to realise the objectives of a socialist democracy including the securing of the fundamental rights and freedoms of all citizens. My Government calls upon you to draft and adopt a new Constitution which will become the fundamental law of this country, superseding both the existing Constitution in the drafting of which the people of Sri Lanka had no share and also other laws that may conflict with the new Constitution you will adopt.”

On 24<sup>th</sup> June, the Address of Thanks was passed in the House of Representatives without a division.

On 27<sup>th</sup> June a Ministry of Constitutional Affairs was established. The 1946 Constitution required the Minister of Justice, to whom logically the subject of constitutional reform ought to have been assigned, to sit in the Senate. However, not being a member of the House of Representatives, he would have had no seat in the Constituent Assembly. There were several other lawyers in the Cabinet, at least three of whom had been in active practice until they accepted ministerial portfolios: George Rajapakse, the SLFP Minister of Fisheries; Felix R. Dias Bandaranaike, the SLFP Minister of Public Administration, Home Affairs and Local Government; and Dr Colvin R. de Silva, the LSSP Minister of Plantation Industries. It was the last named who was appointed, in addition to his other duties, to be Minister of Constitutional Affairs.

Colvin R. de Silva, who held a doctoral degree in history from the University of London for his thesis on Ceylon under the British, was one of the country's most eminent and versatile lawyers. He was also an avowed Trotskyite, having pioneered the left movement in Ceylon in the 1930s. This doctrinaire politician had chaired the three-party committee on constitutional reform that had held 32 meetings before the United Front manifesto was issued in 1970.<sup>32</sup> As he disclosed to the press sometime after his appointment, "the ideas and principles enunciated by that committee had been reported to the highest coordinating committee of the parties of the United Front chaired by Mrs Bandaranaike, and there discussed and reshaped where necessary." Accordingly, the stage of convening the Constituent Assembly had been reached by the Cabinet "with broad ideas in reasonable shape."<sup>33</sup>

## **The Constituent Assembly**

On 11<sup>th</sup> July 1970, the Prime Minister addressed a letter to each of the 157 members of the House of Representatives inviting them

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<sup>32</sup> This committee consisted of five lawyers: Somasara Dassanayake, M.S. Alif and S.W. Walpita (SLFP); Dr Colvin R. de Silva (LSSP) and G.D.C. Weerasinghe (CP).

<sup>33</sup> *Ceylon Daily News*, 14<sup>th</sup> July 1970.

to attend a meeting at Navarangahala, Royal Junior School, Colombo, on 19<sup>th</sup> July to consider and adopt a resolution constituting, declaring and proclaiming themselves the Constituent Assembly of the People of Sri Lanka for the purpose of adopting, enacting and establishing a constitution for Sri Lanka. After some hesitation, the opposition parties, UNP, FP and TC, decided to respond to the Prime Minister's invitation. The latter were perhaps influenced to do so by an appeal which the Prime Minister broadcast on 15<sup>th</sup> July in which she promised that the new constitution would:

“...serve to build a nation ever more strongly conscious of its oneness amidst the diversity imposed on it by history. Though there are among us several races such as Sinhalese, Tamils, Moors, Burghers, Malays and others, and several religious groups such as the Buddhists, Hindus, Christians and Muslims, we are one nation.”<sup>34</sup>

The UNP was concerned that the new constitution would be seeking to commit itself to the objectives of a socialist democracy, which it equated with increasing state control and governmental interference in the private sector. The UNP also questioned the validity of the mandate which, it argued, was from less than 50 per cent of the electorate.<sup>35</sup> Finally, the Leader of the Opposition, J.R. Jayewardene, despite a reported divergence of opinion between him and the party leader, former Prime Minister Dudley Senanayake, expressed himself thus in the discussion on the resolution:

“If, however, the victors and the vanquished – the vanquished on this side – in a Legislature powerless to replace the source of its own authority agree to make common cause in enacting a new basic law by means of a ‘legal revolution,’ there is no law that says you cannot do so. The law we create today, if accepted by the people, will become the full expression of the hopes, desires and aspirations of the present generation.”

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<sup>34</sup> *Ceylon Daily News*, 16<sup>th</sup> July 1970.

<sup>35</sup> The United Front polled 2,415,302 out of a total of 4,949,616 votes, i.e. 48.7 per cent.

A romantic adventure conceived by left-wing ideologues had caught the imagination of a right-wing realist. However, he entered a caveat:

“What is more important is to see that the new Constitution that emerges from the proceedings of the Constituent Assembly enshrines the basic liberties of democracy, secures the fundamental rights and freedoms of all citizens, and recognizes the independence of the judiciary by vesting judicial power only in the judicature, free from political, legislative and executive control. Let us, therefore, enact a Constitution closer to our hearts’ desire.”<sup>36</sup>

The Tamil Congress was very optimistic. Speaking on behalf of his party, V. Ananthasangare (Kilinochchi) said:

“I need not remind this House that the minorities look upon the proposed Constituent Assembly with great hope, and I plead that nothing be done to destroy their hopes.”<sup>37</sup>

His colleague, C. Arulampalam (Nallur) had earlier assured the House that “we affirm our faith in a united Ceylonese nation.”

“We also understand that it is an important principle of socialism to regard all nationalities as equal in status. We are, therefore, confident that in a Democratic Socialist Ceylon the Tamils will enjoy a status of equality and that Tamils as a distinctive nationality will be recognized in the future Socialist and Republican Constitution of Ceylon. We are hopeful that the assurances given by the Hon. Prime Minister will be fulfilled. It is for these reasons as well, that we have decided to support the motion.”<sup>38</sup>

On behalf of the Federal Party, V. Dharmalingam (Uduvil) reminded the House that the mandate which the Tamil people

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<sup>36</sup> *Proceedings of a Meeting of Members of the House of Representatives*, 19<sup>th</sup> July 1970 (Colombo, Department. of Government Printing): Col.57.

<sup>37</sup> *Ibid*: 21<sup>st</sup> July 1970: Col.380.

<sup>38</sup> *Ibid*: 20<sup>th</sup> July 1970: Col.257.

had given them was “to fight for the establishment of a Constitution under which the Tamils in this country will be able to live forever as Tamils in Ceylon.”

“We are making common cause with you in enacting a new Constitution not as a vanquished people but as the representatives of a people who have consistently, at five successive elections since 1956, given us a mandate to change the present constitution, which has been the source of all evil to the Tamil people of this country.”<sup>39</sup>

Responding on behalf of the Government to these expressions of support, Felix Dias Bandaranaike assured the House that they were not there as members of parties whose task was to oppose each other or to criticise each other’s proposals.

“We meet here as friends not committed to any one particular point of view, and I think I should at this stage pay a tribute to the members of the Federal Party for their presence here today. We are aware that they have certain views in regard to constitutions. Their point of view is built into the very name of their party. Yet they have come here, I take it, knowing that their point of view will be received with respect, even if not with acceptance...But that does not mean that we have made up our minds, not on the question of federalism but certainly on the question of behaving fairly and decently to the members of the community whom they represent. There is no question about that at all. We are not here to force down your throats a constitution inimical to your interests or calculated to cause damage. That is not the spirit in which we are here.”<sup>40</sup>

If the government was so inclined, the opportunity was about to present itself to address and to finally resolve the grievances of the Tamil minority community.

The ceremonial meeting that commenced shortly before noon on Sunday 19<sup>th</sup> July in a packed theatre hall in Colombo heard two

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<sup>39</sup> Ibid: Col.265.

<sup>40</sup> Ibid: 21<sup>st</sup> July 1970: Col.471.

very emotional speeches from the Prime Minister and Dr N.M. Perera, the proposer and seconder respectively of the resolution. The symbolic 'illegality' of the exercise having been established in the presence of foreign diplomats, judges of the Supreme Court, senior government officials, the clergy, and chairpersons of local authorities representing the public, proceedings were adjourned to the chamber of the House of Representatives. There, business was conducted as usual. The standing orders of the House were adopted as the rules of procedure, and the Speaker and Deputy Speaker continued to perform the same roles, but under different titles.

After forty more members had spoken in support, the resolution was adopted unanimously on the next day, and it was resolved that the Constituent Assembly would meet for the first time on 29<sup>th</sup> July. The resolution asserted that the new constitution which will become 'the fundamental law of Sri Lanka' will derive its authority from the 'People of Sri Lanka' and "not from the power and authority assumed and exercised by the British Crown and the Parliament of the United Kingdom in the grant of the present Constitution of Ceylon nor from the said Constitution."

### **Reasons for Concern**

The goodwill and unanimity displayed at this meeting, and the sentiments expressed by the representatives of all the political parties, were most heartening as the business of constitution-making got under way. There were, however, reasons for concern. In the first place, the Constituent Assembly assumed the authority not only to draft and adopt a new constitution, but also to operate it. In other words, the draftsmen were also to be the beneficiaries. It was not intended that the constitution drafted by the Constituent Assembly should be submitted to the people for approval; nor was it intended that once the constitution had been drafted and adopted by the Constituent Assembly, it would be brought into operation following a general election held in terms of that constitution. In either of these eventualities, the people would have had an opportunity of pronouncing judgment upon the work of their delegates, and the delegates, in turn, would hardly have failed to consider that prospect.

Second, the resolution stated explicitly that the Constituent Assembly would “consider business introduced by or on behalf of the Minister of Constitutional Affairs.” In other words, the government would take the initiative at all times in guiding the Assembly in its deliberations, and it would do so through a Minister appointed for that purpose. The constitutional proposals would be government proposals approved by the Cabinet and therefore in accord with its own political philosophy and imperatives. In fact, it was asserted by an opposition member during the discussion on fundamental rights that the party whip had been applied on a government backbencher who had wanted to move certain amendments, and this was not contradicted either by the member concerned or by the party leadership.<sup>41</sup>

Third, it was inevitable that the remarkable sense of goodwill and amity demonstrated by members of all political parties would begin to evaporate as the government and the opposition clashed in Parliament on other political issues. This commenced almost immediately when the Minister of Constitutional Affairs presented a controversial, hastily drafted, Bill to amend the 1946 Constitution to restrict the disqualification of a person from being elected to the House of Representatives if he or she had previously served a term of three months imprisonment, to those convicted of offences involving ‘moral turpitude.’ It was designed to counter a petition that had been filed challenging the election of an SLFP member. Despite the efforts of the Leader of the Opposition, J.R. Jayewardene, to avoid a confrontation, a majority of the UNP members in the Senate voted to reject the Bill. The government retaliated by introducing a Bill to abolish the Senate, and as that Bill progressed through the legislative process in both Houses of Parliament, tensions between the government and opposition were further exacerbated.

Fourth, a suggestion that when the Constituent Assembly met, the members should not sit in their usual seats in the House of Representatives, but that they should sit in alphabetical order, so

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<sup>41</sup> Gamini Dissanayake (UNP) made this reference to certain amendments which were sought to be introduced by Prins Gunasekera (SLFP): *Constituent Assembly Debates*, 10<sup>th</sup> June 1971: Col.1298.

that by their sitting together the necessary psychological climate may be created for compromise and rapport, was not accepted.<sup>42</sup> Instead, they sat facing each other as government and opposition members, shackled by their party whips. Between them lay an unbridgeable gap that was particularly evident when the highly charged and emotional issue of language rights was taken up for discussion. This was in sharp contrast to the attitude adopted by Jawaharlal Nehru, then Prime Minister of India, who, in inviting members to participate in the Indian Constituent Assembly said:

“I would like to make it clear, on behalf of my colleagues and myself, that we do not look upon the Constituent Assembly as an arena for conflict or for the forcible imposition of one viewpoint over another. That would not be the way to build up a contented and united India. We seek agreed and integrated solutions with the largest measure of goodwill behind them. We shall go to the Constituent Assembly with the fixed determination of finding a common basis for agreement on all controversial matters.”<sup>43</sup>

### **The Filtering System**

At the inaugural meeting of the Constituent Assembly, on 29<sup>th</sup> July 1970, the Minister of Constitutional Affairs described the constitution-making procedure. A Steering and Subjects Committee will formulate a series of resolutions which will determine the basic principles in accordance with which the constitution will be drafted. These will be published, and the public will be invited to send to that Committee any further resolutions they wish to be considered. Thereafter, the Assembly will consider and dispose of the resolutions. The Steering and Subjects Committee will then prepare a draft constitution in accordance with the basic principles adopted by the Assembly. If the Assembly agrees that the draft constitution is in accordance with the basic principles, the Assembly will divide into several committees to examine appropriate portions of the draft

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<sup>42</sup> Referred to by Nadesan (1970): p.7.

<sup>43</sup> Ibid: p.9.

constitution and, after considering any memoranda received from, or evidence given by, the public, and having themselves scrutinised the document, the committees will report to the Steering and Subjects Committee with proposed amendments, if any. A revised draft constitution, together with the reports of the committees, will be placed before the Assembly which will then go into Committee for a detailed consideration of the revised draft. A draft as amended by the Committee of the Whole Assembly will be placed before the Assembly for adoption. The draft so adopted will be the constitution of the free, sovereign and independent people of Sri Lanka. What the Minister omitted to state was that, at every stage of this process, he will be its driving force.

On 12<sup>th</sup> August 1970, a 17 member Steering and Subjects Committee was established, comprising representatives of all the political groups in the Assembly, but with an overwhelming government majority; only three of its members being from the opposition.<sup>44</sup> Twelve of its members were Ministers of the Cabinet.<sup>45</sup> The Tamil Congress and Independent representatives were also members of the government parliamentary group.<sup>46</sup> In sharp contrast to the Joint Select Committee of 1958, this Committee was most unrepresentative of the people on whose behalf it was seeking to act. It was a predominantly Sinhalese-Buddhist-*Goyigama* body (10 of its members belonging to this dominant social group), with more Kandyans than Low Country Sinhalese. Only two caste groups among the Sinhalese were represented: *Goyigama* and *Salagama*; there was no Catholic member at all. The Indian Tamil community was not represented although A. Aziz, the leader of the Ceylon Workers Congress, was an Appointed Member representing their interests in Parliament. It was no surprise, therefore, that when the Steering and Subjects Committee assembled for the first time on 28<sup>th</sup> August 1970, on opposite sides in the Chamber of the House of Representatives, its

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<sup>44</sup> J.R. Jayewardene and Dudley Senanayake (UNP); S.J.V. Chelvanayakam, Q.C. (FP).

<sup>45</sup> Sirimavo Bandaranaike, Maithripala Senanayake, T.B. Illangaratne, Badi-uddin Mahmud, Felix R. Dias Bandaranaike, H. Kobbekaduwa, T.B. Subasinghe, George Rajapakse, T.B. Tennekoon (SLFP); Dr N.M. Perera and Dr Colvin R. de Silva (LSSP); and Pieter Keuneman (CP).

<sup>46</sup> C. Arulampalam (TC) and C.X. Martyn (Ind.).

members unanimously resolved that the Minister of Constitutional Affairs should initially draft the basic resolutions.

The draft basic resolutions were prepared by a Drafting Committee of twelve which functioned in the Ministry of Constitutional Affairs under the chairmanship of the Minister. Three of its members were from the Bar: H.L. de Silva, a former Senior Crown Counsel whose speciality was constitutional and administrative law; J.A.L. Cooray, an academic lawyer and lecturer in constitutional law, and M. Sanmuganathan, a constitutional lawyer and international civil servant.<sup>47</sup> Three were from the legal departments: R.S. Wanasundera, Senior Crown Counsel and in-house expert on constitutional law in the Attorney-General's Department; Noel Tittawela, Senior Crown Counsel whose expertise was criminal law; and O.M. de Alwis, deputy legal draftsman.<sup>48</sup> Three were Permanent Secretaries: Somasara Dassanayake (Information), a lawyer who had represented the SLFP in the three-party committee on constitutional affairs prior to the general election; Doric de Souza (Plantation Industries), an academic and former LSSP Senator; and Nihal Jayawickrama (Justice). The other two were M.S. Alif, Director of Cabinet Affairs, a lawyer who had also represented the SLFP in the three-party committee on constitutional affairs; and Dr Shelton Kodikara, a lecturer in political science at the University of Ceylon.<sup>49</sup> The committee was coordinated by Walter Jayawardene, Q.C., Permanent Secretary to the Ministry of Constitutional Affairs. Extremely proficient in Sinhala, he was believed to have successfully combined Marxist ideology with an abiding faith in Catholicism. He had recently reverted to the Bar after having served as Solicitor General. His colourful career as a lawyer and diplomat included a spell as the Attorney General of Buganda.

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<sup>47</sup> M. Sanmuganathan was later appointed Additional Secretary (November 1970), and then Secretary to the Ministry of Constitutional Affairs from September 1972 after the Constitution had been adopted.

<sup>48</sup> Noel Tittawela succeeded Walter Jayawardene as Permanent Secretary in December 1971 on the latter's appointment as Ambassador to Yugoslavia.

<sup>49</sup> Professor P.E.E. Fernando was later co-opted to the Committee with responsibility for the Sinhala version of the draft constitution.

An informal filtering process was also established, requiring the draft basic resolutions prepared by the Drafting Committee to be vetted by a group of senior SLFP Ministers and by the leadership of the LSSP and the CP, prior to being channelled through a twelve-member Ministerial Sub-Committee<sup>50</sup> to the Cabinet for formal approval before being tabled at a meeting of the Steering and Subjects Committee.<sup>51</sup> After a few months of attending meetings of the Drafting Committee, usually on poya or pre-poya days or after office hours, I sensed a degree of inflexibility on the part of the Ministry of Constitutional Affairs in regard to the form and content of the new constitution. Although the framework of government being proposed was not, in any significant manner, different from that which existed at the time, it was becoming apparent that some institutions, such as the proposed National Assembly and the Council of Ministers,<sup>52</sup> were being strengthened to the detriment of others, especially the role and powers of the judiciary and of the Prime Minister respectively. On one occasion, when I inquired from the Prime Minister why (as I had been informed) a proposal that I had made relating to the draft basic resolution on fundamental rights had been rejected by the ‘top committee’ (since I assumed she would be on such a body), her reply was that if there was such a committee, she was certainly not a member of it!

### **The Prime Minister’s Intervention**

In late November 1970, I wrote a confidential letter to the Prime Minister expressing my concerns. In it, I stated, *inter alia*,

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<sup>50</sup> This sub-committee consisted of the 12 Ministers who were members of the Steering and Subjects Committee.

<sup>51</sup> According to M.S. Alif ‘Towards a Free Sri Lanka’ in (1972) *Birth of a Republic* (Colombo, Government Information Department), there were in all 46 meetings of the Constituent Assembly, 21 meetings of the Steering and Subjects Committee, 114 meetings of eleven Committees of the Assembly at which nearly 3000 memoranda from the public were considered, 18 meetings of the Cabinet, 22 meetings of the Cabinet Sub-Committee on the Constitution, and 278 meetings of the Drafting Committee.

<sup>52</sup> These terms were used in all the earlier drafts, but were replaced by ‘National State Assembly’ and ‘Cabinet of Ministers’ in the final draft that was adopted.

“The Constitution, unlike any other law, is expected to survive the lifetime of many generations and the vicissitudes of political thought. It must therefore be a Constitution of the People in which and through which their basic rights which are not delegated to their representatives are protected and preserved. It should be possible for a parliamentarian of today, if he were to find himself a private citizen two years hence, to be able to say that the Constitution affords him the same protection which he received from it in the days when he ruled under it. I am sorry to say that in my view, the Basic Resolutions envisage the creation of a very rigid Constitution of People’s Representatives which will afford them absolute protection while they continue to wield absolute power. To me, this is a frightening prospect.”

To this letter I attached my detailed comments on the draft basic resolutions and my suggestions for their amendment. The Prime Minister responded immediately. She asked me to convene a meeting with the Attorney General, Victor Tennekoon Q.C., on the following morning, 1<sup>st</sup> December 1970, at Temple Trees.

At that meeting, which was also attended by Rajah Wanasundera and Noel Tittewela from the Attorney-General’s Department, and which extended over several hours, the Prime Minister was briefed on the implications of the draft basic resolutions. She also made known her own views on constitution-making. Finally, she requested the Attorney General and me to prepare a draft letter setting out her views, as made known to us, which she wished to address to the Minister of Constitutional Affairs. In the next few days, the Attorney General and I exchanged drafts of this letter, and on 9<sup>th</sup> December I was informed by the Prime Minister that the letter was required by that evening. Because of the urgency, her Secretary, M.D.D. Peries, informed me that he would be sending several sheets of the Prime Minister’s official notepaper to enable the letter to be typed in my office, and that a car and driver would be on stand-by from 6 p.m. onwards at the House of Representatives.

Victor Tennekoon and I, together with Rajah Wanasundera, worked for several hours on a draft that was initially prepared by the Attorney General. The final draft had three attachments

elaborating some of the ideas expressed in the letter. These were on (i) Sovereignty of the National State Assembly; (ii) Fundamental Rights and Freedoms; and (iii) the Constitutional Court. The letter and attachments were then typed on the Prime Minister's official notepaper and sent direct to her. We remained in office in the event that she desired changes to be made in her letter. It was fortunate that we did, because the letter was returned within the hour. She did not wish to begin it in the form we had proposed. The instructions were clear. Please re-type page one, substituting "My dear Minister" for "My dear Colvin." The Prime Minister's letter is reproduced below because of its significance.

9<sup>th</sup> December 1970

My dear Minister,

1. I have been able during the last few weeks to devote some time to a study of the set of basic resolutions which have been prepared by you. I have also discussed these with some of the senior Ministers in my Party. The observations that follow represent not only my own thinking, but also that of my Party.
2. According to the basic resolutions proposed by you, the power of the State is concentrated in one body, namely, the National Assembly. Consequently, there will come into existence not a fundamental law under which all authorities will have to function, but a National Assembly which will exercise or at least control the exercise of every power of the State including judicial power. I should like to say that I am averse to a concentration of power of this kind.
3. The resolution adopted by the Constituent Assembly contemplates the establishing of a Constitution which will be the fundamental law of Sri Lanka. To give effect and meaning to this resolution, the new Constitution should provide that even the Legislature should be bound by this fundamental law. There appears to be no better way

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

4. We are also committed to include fundamental rights and freedoms in the new Constitution. The concept of fundamental rights as I understand it when incorporated in a Constitution is intended primarily to be a limitation on legislative and executive abuses of power. Here again I think that the new Constitution should give a sufficient assurance to the citizens of this country that legislatures and governments of the future will be bound to observe the fundamental rights written into the Constitution, and that they will not remain mere declarations of intent which can be departed from by any future legislature if it were so minded. I am myself of the view that there should be no impediment in the new Constitution to the realisation of socialistic objectives. If it is anticipated that the inclusion of any particular fundamental right will stand in the way of implementing socialistic policies, decisions should be taken in regard to each one of such fundamental rights, that is, as to whether a particular right should find a

place in the Constitution, and if so, whether it should be circumscribed in any way.

5. In regard to the basic resolution which refers to elections on “an equal and universal suffrage on a territorial basis”, I think the present arrangements which require delimitation to be based on a number of factors such as the total number of residents, the area and the number of citizens in a province, and the transport facilities, the physical features and community or diversity of interests of the inhabitants, are satisfactory and require no substantial change.
6. Passing on to some matters of detail, I can see no objection to a President who as the Head of State would assent to legislation, to a parliamentary executive which would be in charge of the government, to a system of courts, and to a body having powers of appointment and disciplinary control over public and judicial officers, except perhaps at the higher levels of the public service.
7. I have glanced through a summary of representations received by your Ministry from the public. I find from these and other sources that there appears to be a considerable demand in the Country for Buddhism as a State Religion, and for the protection of its institutions and traditional places of worship. Some provision will have to be made in the new Constitution regarding these matters without, at the same time, derogating from the freedom of worship that should be guaranteed to all other religions.
8. I note that the proposed basic resolutions deal with the language question in considerable detail. There is already ordinary legislation covering this topic and I doubt whether it would be wise for us to open this matter for debate again at this stage. The better

course would appear to be to let these laws operate in the form in which they are.

9. For convenience of discussion, I have had some of the ideas which I have set out above put into the form of brief propositions. They are not exhaustive. A copy of these propositions is annexed.

Yours sincerely,

Sirima R. D.  
Bandaranaike  
Prime Minister

The Hon. Colvin R. De Silva,  
Minister of Plantation Industry and Constitutional  
Affairs,  
Colombo.

I am not aware whether a reply to this letter was received or not. No reference was ever made to it at any meeting of the Drafting Committee that I attended.<sup>53</sup> However, in February 1971, the Ministry of Constitutional Affairs circulated several 'Comments' in explanation of the basic resolutions on subjects such as 'Sovereignty of the National Assembly,' 'The Constitution is against Dictatorship,' 'Socialism and the Constitution,' 'Fundamental Rights and Freedoms,' 'Independence of the Judiciary,' 'The Constitutional Court' and 'Appointment of Judges.' Some of these 'comments' appeared to be a response to the issues raised by the Prime Minister. Meanwhile, on 17<sup>th</sup> January 1971, 38 Draft Basic Resolutions submitted by the Minister to the Steering and Subjects Committee were published. In the following month, these resolutions were unanimously adopted by the Steering and Subjects Committee, and on 14<sup>th</sup> March 1971 the Constituent Assembly began discussing them.

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<sup>53</sup> I subsequently learnt from a reliable source that while Doric de Souza had suggested that the letter be tabled, Walter Jayawardene was not in favour of doing so.

The Minister claimed that the basic resolutions were “completely in accord with the United Front and Government policy.”<sup>54</sup>

The Prime Minister’s assertion that the views she expressed in her letter were “not only my own thinking but also that of my Party” was open to question. They were certainly her views and reflected her late husband’s policies. But were they also shared by all the others now in her party? The SLFP had become a broad-based political party, drawing together many who would probably have been more comfortable in one of the other constituent parties of the United Front. For example, when a delegation of the Ceylon Section of the International Commission of Jurists<sup>55</sup> argued for an independent judicial authority to enforce fundamental rights whenever they were infringed by law or executive or administrative action, a group of SLFP lawyers<sup>56</sup> reacted very aggressively. In a statement, they alleged that:

“The talk of a need for an independent Judiciary which will guarantee that the Rule of Law will be observed and the fundamental rights preserved is to ensure the setting-up of a fortress or bastion to make it easy for the anti-socialist elements to launch their counter-attack when the time is opportune. The new Constitution must make certain that this will never happen and that the will of the people will always prevail.”

In fact, a very representative Citizens Committee chaired by Sir Cyril de Zoysa, a former President of the Senate, reminded the United Front government that it had been returned to power with an overwhelming majority because the voters believed that it had committed itself irrevocably to the implementation of the policies laid down by the late S.W.R.D. Bandaranaike, which policies the Prime Minister and her party had assured the public would be duly implemented by them. The committee pointed out that some of the basic resolutions presented by the Minister were a violation and negation of the principles underlying the draft constitution

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<sup>54</sup> *Ceylon Daily News*, 18<sup>th</sup> January 1971.

<sup>55</sup> The delegation included H.H. Basnayake Q.C., T.S. Fernando Q.C., G.G. Ponnambalam Q.C., H.W. Jayewardene Q.C., and E.A.G. de Silva.

<sup>56</sup> S.W. Walpita, A.K. Premadasa and K. Shinya.

prepared by the late Mr Bandaranaike for the creation of an independent and democratic socialist state. A copy of that draft was reportedly handed over to the Minister.<sup>57</sup>

## **Two Problems**

At this stage, two problems surfaced. The first was anticipated. Mr C. Suntheralingam, former MP and member of the first Cabinet of Ceylon, applied to the Supreme Court for a writ of *quo warranto* and interim and permanent injunctions to restrain the Prime Minister and the twenty members of her Cabinet from continuing with the proceedings of the Constituent Assembly. He argued that irreparable mischief would be caused to his rights and privileges as an 'Eylom Tamil,' i.e. a pre-1948 Ceylon Tamil born a British subject under the British Nationality Act 1914, if certain people who had met at a certain place outside Parliament were to proceed to adopt a new constitution for the country. The Chief Justice, H.N.G. Fernando, with Justice Wijayatilake agreeing, held that unless and until the proposed new constitution was established, or purported to be established, the question whether the petitioner's rights and privileges had been infringed or prejudiced did not arise for decision. His application to court was, therefore, premature. Mr Suntheralingam announced that he would appeal to the Privy Council. Meanwhile, on 29<sup>th</sup> March 1971, I made a public statement that the Cabinet had decided that legislation to abolish the right of appeal to the Privy Council and to establish our own court of final appeal would be presented very shortly to Parliament.<sup>58</sup>

The second was more serious. It diverted attention away from constitution-making for several months. It also compelled the

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<sup>57</sup> The Citizens Committee included former Chief Justice M.C. Sansoni; former Supreme Court Justices V. Manicavasagar, V. Sivasubramaniam, and H.A. de Silva; former Permanent Secretaries V.L. Wirasinghe and V.S.M. de Mel; former Commissioner of Inland Revenue L. Gunasekera; P. Navaratnarajah Q.C., A.H.C. de Silva Q.C., N.K. Choksy Q.C., Professor G.P. Malalasekera, D.B. Ellepola, and T. Sri Ramanathan, President of the Law Society.

<sup>58</sup> *Ceylon Daily News*, 30<sup>th</sup> March 1971. Since the Court of Appeal commenced functioning only an year later, Suntheralingam was not prevented from pursuing an appeal to the Judicial Committee of the Privy Council, if he so desired.

government to shift its principal focus to the perceived grievances of the militant youth of the south. Information had been trickling in since about August 1970 of unusual activities in and around jungles, and of secret classes on how to stage a revolution in 24 hours. Posters exhorting the ‘wealthless mass’ to rise against the government next appeared with a chilling suddenness. In early 1971, the police began reporting the discovery in large quantities of gunpowder and potassium nitrate, detonators, dynamite coils and thousands of empty condensed milk tins. The police were handicapped in confronting what was apparently a clandestine movement under laws that had been designed to deal with normal peacetime crime. At the request of the Ministry of Defence and External Affairs, I prepared the draft of a new law that would grant the police wider powers of investigation: the Prevention of Violent Insurrection Bill. It was tabled in Cabinet on two occasions – in December 1970 and again in March 1971 – and on each occasion it was opposed by the left-wing Ministers who argued that such powers could be used by the police against trade unions and other segments of the working class. In about March 1971, bombs began exploding on the university campus in Peradeniya and elsewhere. On 7<sup>th</sup> March, the Public Security Ordinance was invoked and the armed forces were called out to maintain law and order in all districts of the island. On 16<sup>th</sup> March, a state of emergency was declared.

On 5<sup>th</sup> April 1971, like a whiplash in all its fury, the JVP insurgency broke out, and unprecedented numbers of young people began to be detained in regular and makeshift prisons on being arrested in combat or having surrendered.<sup>59</sup> From that stage, I did not find it possible to attend meetings of the Drafting Committee on a regular basis. In May 1971, as we began to consider how to process the charges, if any, against the persons in custody, now numbering almost 14,000, the Attorney General informed me that he might eventually have to file an indictment against the JVP leadership charging them with having ‘conspired to wage war against the Queen,’ an offence punishable under Section 115 of the Penal Code. That section also made it an offence to ‘conspire to deprive the Queen of the sovereignty of

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<sup>59</sup> See A.C. Alles (1976) *Insurgency 1971* (Colombo: Colombo Apothecaries Co.).

Ceylon,' an act that the Constituent Assembly appeared to be then engaged in! An enterprising defence counsel could perhaps argue that Section 115 had consequently fallen into disuse.

The concerns we had at the time were sufficiently serious for me to write to the Prime Minister pointing out that the Constituent Assembly had no legal status whatsoever, and that it would be unwise for a government whose authority was being challenged by insurgent activity within the country to abandon of its own accord the legal foundation upon which it stood and attempt to build a new foundation.<sup>60</sup>

“Indeed, it would be most interesting to consider what the situation would be if the insurgents were to set up their own Constituent Assembly in Mawanella or Anuradhapura. Both Constituent Assemblies would then be outside the pale of the law, competing with each other, and each depending for its efficacy on the number of people who would ultimately accept its jurisdiction. Consider, for example, how chaotic the situation in the country would be if on the day on which the Constituent Assembly proclaims the new Republic, the insurgents were to themselves proclaim the Republic of Sri Lanka. Public servants and the armed forces would be completely free to offer their allegiance to either government since neither would have a legal basis or a legal link with the past.”

My own view at that stage was that a republic could be established immediately by constitutional means. However, the uncertainty in regard to the identity of the shadowy leadership of the JVP, and the fear that certain members of the government and sections of the armed forces might themselves be involved in the movement, soon dissipated, and the country gradually began easing into normalcy. More relevant, however, was the fact that Dr Colvin R. de Silva was absolutely uncompromising; nothing would divert him from his revolutionary journey.

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<sup>60</sup> Letter to the Prime Minister, 26<sup>th</sup> May 1971.

## **Draft Constitutions**

On 10<sup>th</sup> July 1971, the Constituent Assembly adjourned to enable a draft constitution in accordance with the basic resolutions to be prepared and placed before the Assembly. Almost simultaneously, Felix Dias Bandaranaike, Minister of Public Administration, Home Affairs and Local Government, who, as a senior member of the SLFP and a very competent lawyer, might have expected to be appointed Minister of Constitutional Affairs, decided to draft his own constitution. Accordingly, he requested me, in consultation with the Attorney General, (neither of whom were in his Ministry!) to immediately prepare a draft. It was to be based strictly on the 38 basic resolutions. This draft was ready in August 1971, a few days before the Drafting Committee finalised its first draft. What we had produced was less doctrinaire, and more people-friendly. It was forwarded to the Minister of Constitutional Affairs. “Colvin is free to accept or reject it,” said Felix to the press. “Only one draft constitution will be placed before the Subjects and Steering Committee,” responded the Ministry.<sup>61</sup> However, a meeting of the Cabinet Committee on the Constitution was convened on 27<sup>th</sup> August 1971 at Temple Trees to facilitate a dialogue between the two Ministers on their respective drafts.

From time to time, I received fresh drafts of the constitution from the Ministry of Constitutional Affairs. It was evident to me by then that the only contribution I could make was in relation to the practical implementation of some of the provisions of the draft constitution. Moreover, in the Ministry of Justice we had begun preparing draft legislation to reform the civil, criminal and appellate procedures – our legitimate work – and that required a considerable investment in time. However, on 8<sup>th</sup> October 1971, following a discussion with the Attorney General, I wrote to the Prime Minister that several provisions in the most recent draft of the constitution needed amendment or revision in order to prevent serious problems of administration arising upon the constitution being brought into force. I suggested that the final draft be sent to the Attorney General, who was the government’s

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<sup>61</sup> ‘*Felix submits his own Draft Constitution,*’ *The Sun*, 17<sup>th</sup> August 1971: p.1.

principal legal adviser, for a report. In his report, Victor Tennekoon, with his long experience in the profession and on the court, drew attention to several defects, inconsistencies and omissions in the draft. Many of his recommendations, especially those that in any way impinged on matters of policy, were ignored.

A draft constitution was presented by the Minister to the Steering and Subjects Committee on 24<sup>th</sup> December 1971, and to the Constituent Assembly on 29<sup>th</sup> December 1971. It was published in the Ceylon Government Gazette on that day as a government notification. On 3<sup>rd</sup> January 1972, the Assembly met and adopted a resolution confirming that the draft constitution was in accordance with the basic resolutions. The Assembly then divided itself into eleven committees for the purpose of examining the draft constitution in greater detail. The public were assured that any proposals for amendment would be considered by the appropriate committee, provided that they were in conformity with the basic principles adopted in the form of basic resolutions by the Assembly. This meant that only questions of form and detail, and not of principle, would be considered.

### **Committees of the Constituent Assembly**

The eleven Committees of the Constituent Assembly were chaired by Ministers, except the Committee on Control of Finance, which was chaired by the Leader of the Opposition, J.R. Jayewardene. That committee produced the most comprehensive report, including a draft Audit Act and draft Standing Orders relating to the Public Accounts Committee. Many of the other reports either recommended relatively minor drafting changes or focused on finding the correct Sinhala terminology for use in the Sinhala version of the draft constitution. Some focused on relative trivialities, such as changes in designations of certain public officers. The majority of the communications received from the public were rejected *ab initio* as being contrary to the basic resolutions. They included proposals such as that 'Ceylon' should

be retained as the name of the new republic, or that no reference to language should be included in the new constitution.<sup>62</sup>

A revised draft constitution incorporating some of the recommendations made by the committees was circulated on or about 21<sup>st</sup> April 1972. M.D.D. Pieris, Secretary to the Prime Minister, refers in his autobiography to a letter addressed to the Prime Minister on 24<sup>th</sup> April 1972 by Felix Dias Bandaranaike who, following the abolition of the Senate, had been appointed Minister of Justice in addition to his other duties. "The discussion on the constitutional matters by the Cabinet Sub-Committee is proceeding," he wrote, "but in my view not entirely satisfactory."

"Mr Maithripala Senanayake and I have in accordance with your instructions had a conference with the Attorney General and Dharmasiri Pieris, and worked out the further detailed amendments, a copy of which I annex. After the changes are made, I shall submit the Bill to you and if you approve, the Bill can then be submitted to Parliament."<sup>63</sup>

I am not aware of what transpired at that meeting, or what amendments were being proposed, or to which Bill he was referring, since I was away from the country at the time.

The reports of the Committees and a draft revised constitution were placed before the Steering and Subjects Committee on 4<sup>th</sup> May 1972, and before the Assembly on 8<sup>th</sup> May 1972. Mr Suntheralingam went before a Divisional Bench of the Supreme Court and applied for an interim injunction restraining the Prime Minister from continuing with steps to replace the present constitution with one described as the 'Constitution of Sri Lanka.' At the conclusion of his submissions, the three judges, Justices Alles, Deheragoda and Rajaratnam, refused the application. "After due consideration, we feel that the law does not permit us to grant your application," they stated. He did not apply for special leave to appeal to the Court of Appeal which, in March

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<sup>62</sup> *Reports of the Committees of the Constituent Assembly Appointed to Consider the Draft Constitution* (1972) (Colombo: Department of Government Printing): p.270.

<sup>63</sup> M.D.D. Pieris (2002) *In the Pursuit of Governance* (Colombo: Stamford Lake): p.135.

1972, had replaced the Privy Council as Ceylon's highest appellate court.<sup>64</sup>

### **Adoption of the Constitution**

On 22<sup>nd</sup> May 1972, the Constituent Assembly adopted the draft constitution by 119 votes to 16. The UNP voted against. Reiterating “clearly and unequivocally” that the UNP was in full accord with the government that the new constitution should declare a free, sovereign and independent republic, the leader of the UNP, Dudley Senanayake, explained why his party was nevertheless voting against it. He referred to the fact that the government had chosen to ignore “all and every one of the amendments presented” by the UNP. He said his party could not accept a constitution that had, among other defects, the following flaws:

1. Making a particular ideology a constitutional principle, and thereby depriving the people of the right to determine economic policies from time to time at periodic elections.
2. Including a truncated list of fundamental rights and almost nullifying their effect by making them subject to excessive restrictions and numerous principles of so-called state policy.
3. Failing to provide a simple and suitable remedy for the violation of a fundamental right.
4. Preserving laws hitherto in force even if they are inconsistent with fundamental rights.
5. Departing from the practice of all existing republics of directly or indirectly electing the Head of State, and

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<sup>64</sup> The Court of Appeal consisted of four Judges: T.S. Fernando, Q.C. (President), Justice V. Siva Supramaniam, Justice A.L.S. Sirimanne, and Justice G.T. Samarawickrama, Q.C. A fifth Judge, Justice V. Tennekoon, Q.C., was appointed in the following year.

providing instead for nomination by a political migratory figure.

6. Giving the members of the first National State Assembly a term of seven years.
7. Introducing control by the Cabinet of Ministers over the subordinate judiciary.
8. Depriving the judiciary of the power to determine the constitutional propriety of laws.
9. Abandoning the principle of the neutrality of the public service.<sup>65</sup>

Six Tamil MPs, three from the SLFP, two from the Tamil Congress, and one Independent were among those who cast their votes in favour. The 13 members of the Federal Party did not attend the final meeting. In fact, they were in Jaffna where a day of mourning was being observed: black flags, a boycott of schools and the stoning of buses.<sup>66</sup>

After the adoption of the draft constitution, the members of the Constituent Assembly, including those from the UNP who had voted against it, adjourned to the Navarangahala where, at the auspicious time of 12.43 p.m., in the presence of a large gathering that included the judges of the Court of Appeal and of the Supreme Court, the President of the Assembly, Stanley Tillekeratne, certified the adoption and enactment of the new constitution by the Constituent Assembly. Immediately thereafter, Mrs Bandaranaike took her oath of office as Prime Minister. She then nominated William Gopallawa as the President of the Republic, whereupon he took his oath of office. After other ceremonial acts, the focus shifted to President's House (formerly Queen's House), where the judges of the two superior courts, who

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<sup>65</sup> Dudley Senanayake Foundation (2011) *Dudley Senanayake: A Biography* (Colombo: Sarasavi Publishers): p.331.

<sup>66</sup> *Report of the Presidential Commission of Inquiry into the Incidents which took place between August 13 and September 15, 1977*, Sessional Paper VII of 1980 (Commissioner: M.C. Sansoni). This report has recorded the progress of violence from 1972.

were driven there directly from the Navarangahala, took their oaths of office under the new constitution. They were followed by the Cabinet of Ministers, the Secretaries to Ministries and the Service Commanders. Ceylon had ceased to exist, and in its place the Republic of Sri Lanka had arisen.

### **3. THE CONTENT OF THE CONSTITUTION**

In some respects, the 1972 Constitution retained the basic framework established by the 1946 Constitution. For example, a President nominated by the Prime Minister continued to act on advice, as the Governor-General previously did.<sup>67</sup> A Cabinet of Ministers headed by the Prime Minister continued to be charged with the direction and control of the republic and was collectively responsible to the National State Assembly. The Ministers and their deputies (previously 'Parliamentary Secretaries') were to be appointed from among the members of the legislature. However, in other respects, significant changes were made. These are discussed below.

#### **Supreme Instrument of State Power**

The constitution established a unicameral legislature in the form of a National State Assembly of elected representatives of the people which was 'the supreme instrument of state power' – a phrase then in vogue (but not any longer) in the constitutions of the communist states of Eastern Europe. This body would exercise the legislative power of the people; the executive power of the people through the President and the Cabinet of Ministers; and the judicial power of the people through courts and other institutions created by law.<sup>68</sup> It was argued by the Minister that

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<sup>67</sup> A proposal by the UNP that the President be elected by an Electoral College consisting of the members of both Houses of Parliament (i.e. a Senate and a National Assembly) and the members of the duly constituted local bodies in the country, was rejected by the Constituent Assembly.

<sup>68</sup> Constitution of Sri Lanka (1972): Section 3. The UNP proposed that Parliament should consist of two Houses: *Uttara Manthri Mandalaya* (Senate), and *Jatika Mandalaya* (National Assembly). The former would consist of three

the position of the Assembly in regard to sovereignty was no different from that of the British Parliament. “If the British Parliament is a democratic institution, there is no ground for the allegation that the National Assembly proposed by the Minister is undemocratic by reason of its sovereignty,” claimed a note circulated by the Ministry of Constitutional Affairs.<sup>69</sup> That, of course, was misleading. The United Kingdom did not have a written constitution. The supremacy of the Parliament of that country rested on two principles: that no Parliament is bound or limited by Acts of its predecessors or by its own earlier Acts; and that the statutes enacted by Parliament and in force at any time are the highest law in that they alter or nullify any common law rules or earlier statutory provisions that are inconsistent with them. To protect the integrity of the supreme instrument of state power, and in a further departure from the practice both in the United Kingdom and in Ceylon, the constitution excluded the President of the Republic from the law-making process by not requiring his assent; instead, the Speaker would certify that a law had been duly passed.<sup>70</sup>

Felix Dias Bandaranaike appreciated the Minister’s insistence on a single chamber legislature. “We are fed up with legislative bodies composed of persons who will not or cannot stand for election or win,” he wrote to the Minister.<sup>71</sup> However,

“Having regard to the fact that there may sometimes be advantages in a mild degree of reflection and delay, I should like to suggest an alternative for consideration. Suppose we were to have a Second Chamber of persons elected by a wider electorate, such as 22 members for the 22 districts. The persons who could win such electorates would have to be persons with a national standing and not merely parochial appeal. It can be provided that if the Second Chamber disagrees with the primary National Assembly, there should

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members elected by each province, and a sufficient number (to be determined) appointed by the Head of State to represent important interests in the community, such as trade unions, educational, professional, scientific, agricultural, industrial and commercial interests. This was rejected by the Constituent Assembly.

<sup>69</sup> Note on ‘*Sovereignty of the National Assembly*,’ 3<sup>rd</sup> February 1971.

<sup>70</sup> Constitution of Sri Lanka (1972): Section 49.

<sup>71</sup> Letter to Dr Colvin R. de Silva, 4<sup>th</sup> November 1970.

be a joint session debate at which the members of the primary National Assembly would prevail.”

The Minister replied that the only contrary indication to that proposal was that it could prove to be a delaying factor which in a rapidly changing society was disadvantageous. “It is perhaps for this reason that the majority of developing countries prefer a unicameral to a bicameral legislature,” he wrote.<sup>72</sup>

The Prime Minister had already alerted her Minister of Constitutional Affairs that the draft basic resolution on this subject proceeded upon the basis that the people had abdicated the totality of state power to the National Assembly, and that a feature of any democratic constitution was the delegation by the people of state power to different institutions.<sup>73</sup> In an attachment to that letter she noted that:

“For example, legislative power is delegated to a legislature elected by the people. Executive power is delegated to persons who are responsible to the elected legislature. Judicial power is entrusted to judges whose independence is ensured, but who are in the ultimate analysis responsible to the elected representatives. This is a feature that is common to all constitutions in the democratic world which have been prepared with the free participation of the people. On the other hand, in constitutions which have been imposed on the people as a result of political revolutions, one finds this total concentration of power in a single authority, whether it be a National Assembly, a junta or a sole leader.”

She reminded the Minister that it would be wrong to assume that a political revolution had taken place in the country.

“What happened in 1956 was that the late Mr S.W.R.D. Bandaranaike set in motion, within the existing political framework, a social revolution. In 1960 and in 1970 this social revolution has been carried further, also within the existing political framework. Therefore, it would be seen that

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<sup>72</sup> Letter to Felix R. Dias Bandaranaike, 16<sup>th</sup> November 1970.

<sup>73</sup> Letter to the Minister of Constitutional Affairs, 9<sup>th</sup> December 1970.

it has been possible for us within the existing political framework to effect changes which in other countries have been achieved only by a complete overthrow of that political framework. There appears to be, therefore, no real need to make drastic and radical changes in the present political framework.”

She emphasised that the virtue in a system based upon a division of powers was that “there is a built-in system of checks and balances which prevents any one organ of government from acting contrary to the wishes of the people which are expressed in the fundamental law – the Constitution”.

“If the Legislature were to exceed its powers and legislate contrary to the Constitution, the Courts will declare such legislation invalid. If the Judges misconduct themselves, the Legislature has the power to remove them from office. If the Executive acts contrary to the wishes of the Legislature, the Legislature has the power to replace it with another Executive.”

“A separation of powers, therefore, constitutes the surest guarantee that the rights of the people remain with the people,” she concluded. However, perhaps because Mrs Bandaranaike often chose to adopt in Cabinet a consensual form of decision-making, at least on matters on which she did not hold very strong views, her views referred to above were not reflected in the basic resolutions or in the draft constitution.

### **Fundamental Rights<sup>74</sup>**

It was the promise of the entrenchment of fundamental rights that drew the Federal Party and the Tamil Congress into the Constituent Assembly. C. Arulampalam (TC) declared at the meeting that began at the Navarangahala that:

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<sup>74</sup> See also, in this volume, J. Wickramaratne, ‘*Fundamental Rights in the 1972 Constitution.*’

“We have been encouraged to arrive at this decision by the pointed reference to a chapter of fundamental rights in the proclamation convening the Constituent Assembly. We venture to think that the Hon. Prime Minister...and her Government had deliberately mentioned the chapter of fundamental rights in order to win the confidence and to assuage the misgivings of minorities. The Hon. Prime Minister in her message to the nation had emphasized the need for the constitution to become an instrument to achieve unity in diversity, to create a healthy cohesive nation of many races and religious groups. I have no doubt that the Government appreciates that this unity, this cohesion, can only come when everyone in this country, irrespective of race, caste, religion and language, is given equal status in every field of human activity.”<sup>75</sup>

When the basic resolutions were being prepared, the Prime Minister cautioned her Minister of Constitutional Affairs that, “if it is intended to provide for fundamental rights in the new Constitution, such provision must be genuine and meaningful and not be a fraud on the people.”<sup>76</sup> She also observed that, “without the power to enforce, the chapter on fundamental rights will merely serve as an adornment in the Constitution without any meaning whatsoever to the citizen.” She referred him to the 1959 recommendation of the Joint Select Committee in that regard.<sup>77</sup>

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<sup>75</sup> *Proceedings of a Meeting of Members of the House of Representatives, 20<sup>th</sup> July 1970* (Colombo: Department. of Government Printing): Col.258.

<sup>76</sup> Note attached to her letter of 9<sup>th</sup> December 1970.

<sup>77</sup> *First Report of the Joint Select Committee of the Senate and the House of Representatives appointed to consider the Revision of the Constitution* (1958) Parliamentary Series No.15 of the Third Parliament. The UNP moved the following amendment that sought to give effect to the 1959 recommendation:

“5(v) The right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights conferred by the Constitution shall be guaranteed.

(a) The Supreme Court shall have the power to issue directions, orders, writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of the rights conferred by the Constitution.

(b) Without prejudice to the powers conferred on the Supreme Court by the preceding provisions of this section, Parliament may by law empower any other court to exercise within the totality of its jurisdiction all or any of the powers exercisable by the Supreme Court.

From the perspective of the Minister of Constitutional Affairs, including a chapter on fundamental rights in the constitution posed a formidable challenge. To recall his own thoughts, expressed so eloquently at a symposium held under the auspices of the United Nations Association of Ceylon two years earlier:<sup>78</sup>

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

With what appeared to be impeccable logic, Dr Colvin R.de Silva also explained at that meeting why the judicial protection of human rights could not be reconciled with a legislature that was the supreme instrument of state power:

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

His lack of enthusiasm for the inclusion of a chapter on fundamental rights was clearly evident. As he himself told the Constituent Assembly:

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The amendment was rejected by the Constituent Assembly.

<sup>78</sup> United Nations Association of Ceylon, Seminar on ‘*Fundamental Rights in the Ceylon Constitution*,’ Royal College Hall, 26<sup>th</sup> June 1968, (Tape Recording of the Proceedings). The author was its general secretary at the time.

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

When his Cabinet colleague Felix Dias Bandaranaike wondered whether it was necessary to spell out the fundamental rights in detail in the basic resolutions,<sup>79</sup> he confessed:

“Increasing public interest on this subject, apparent from memoranda received from various sections of the community and from newspaper reports of public utterances, makes me think that it would hardly be possible ultimately to resist the demand for fundamental rights.<sup>80</sup>”

Consequently, the fundamental rights that the Minister of Constitutional Affairs considered to be relevant were sandwiched into one paragraph of one section of the constitution.<sup>81</sup> The second paragraph contained a wide exclusion clause which authorised the National State Assembly to restrict the exercise and operation of those rights to protect or achieve a wide variety of interests or objectives,<sup>82</sup> or for the purpose of “giving effect to the Principles of State Policy.”<sup>83</sup> The third paragraph provided

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<sup>79</sup> Letter dated 4<sup>th</sup> November 1970 to Dr Colvin R. de Silva.

<sup>80</sup> Letter dated 16<sup>th</sup> November 1970 to Felix R. Dias Bandaranaike.

<sup>81</sup> Article 18(1). Among civil and political rights that were excluded were the right to freedom from torture, the right to a fair trial, the rights of accused persons, the right to family life, and the right to privacy.

<sup>82</sup> It was significant that Section 18(2) declared the exercise and operation of the fundamental rights and freedoms to be subject to such restrictions ‘as the law prescribes,’ and not ‘as are necessary in a democratic society’ to protect those interests.

<sup>83</sup> The Principles of State Policy were contained in Section 16 of the Constitution. However, Section 17 stated that they “do not confer legal rights and are not enforceable in any court of law; nor may any question of

that all inconsistent existing legislation will nevertheless continue in force. This was contrary to the promise in the Speech from the Throne that not only will the new constitution become ‘the fundamental law of this country,’ but will also supersede both the existing constitution ‘and also other laws that may conflict with the new Constitution.’ There was no special enforcement procedure, although it was suggested from time to time that the former prerogative writs might be invoked.<sup>84</sup> There is no record of this ‘Bill of Rights’ having had any impact on Sri Lankan life in the six years that it remained in force. In the single instance when a fundamental right was invoked, it was by way of a declaratory action in a district court.<sup>85</sup>

### **Judicial Review of Legislation<sup>86</sup>**

The 1970 Constitution deprived the courts of Sri Lanka of the jurisdiction they had hitherto exercised to examine and pronounce upon the validity of a law. Instead, it introduced a mechanism that would enable a Bill to be examined for inconsistency with the constitution by a new body, a Constitutional Court, sitting in the premises of the National State Assembly and consisting, hopefully, of academics and political

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inconsistency with such provisions be raised in the Constitutional Court or any other Court.”

<sup>84</sup> The Indian Constituent Assembly believed that these ancient remedies may not only be inadequate, but may also require special authority in order to be adapted and utilised for this purpose. Accordingly, the Indian Constitution, while guaranteeing the right to move the Supreme Court by appropriate proceedings for the enforcement of rights, provided that the Supreme Court “shall have the power to issue directions or orders or writs... whichever may be appropriate, for the enforcement of the rights”.

<sup>85</sup> In April 1972, while the final draft of the constitution was receiving its finishing touches, the House of Representatives amended the Interpretation Act. This amending law, which was introduced by the Minister of Justice, “to facilitate the acquisition of land for village expansion and other public purposes,” eroded the remedies upon which the new constitution appeared to rely for the enforcement of fundamental rights. The declaratory action was made inapplicable in respect of statutory decisions and orders; the issue of injunctions against the state was prohibited; and the writ jurisdiction (other than *habeas corpus*) was emasculated by being confined to *ex facie* errors of law.

<sup>86</sup> See also, in this volume, J. Wickramaratne, ‘*Fundamental Rights in the 1972 Constitution.*’

scientists rather than career judges. The Minister argued that if there was a body outside the legislature that could decide whether a law had been validly made, then the legislature was not sovereign. He also cited certain cases in support of his argument that judicial review of legislation created confusion and uncertainty.

One of these cases was *Kodeswaran v. The Attorney-General* in which the District Court of Colombo had held in 1964 that the Official Language Act of 1956 was inconsistent with Section 29 of the constitution, in that it transgressed the prohibition against discrimination, and was therefore invalid. On appeal by the Attorney General, the Supreme Court had held, in 1967, that the plaintiff, a Tamil officer in the general clerical service who had been denied an increment for having failed to obtain proficiency in Sinhala, could not sue the Crown to enforce the rules governing the public service. The Supreme Court did not consider it necessary to examine or pronounce upon the validity of the impugned statute. On appeal against that decision, the Privy Council, in December 1969, held that a public servant in Ceylon did have a right of action against the Crown for arrears of salary, but did not consider it proper to express an opinion on the constitutional question “without the assistance of the considered judgment of the Supreme Court.” Accordingly, the case was remitted to the Supreme Court for that purpose. It was pending a hearing when the Constituent Assembly was established.

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

“It will astonish most people in this country to hear that what has been considered the most vital law that was passed in 1956 by the Government of the late Mr. Bandaranaike is still in issue in the courts...Can you imagine a situation like that? Here is a basic law of our country, and by reason of the power given to the courts to sit in judgment on the validity of the law as distinct from the interpretation of the meaning of the law, we do not know where we are and we are rightly acting on the footing that the law is a good one until it is set aside. But, just imagine, how do you run this country in that situation? ...If the courts do declare this law invalid and

unconstitutional, heavens alive! The chief work done from 1956 onward will be undone. You will have to restore the egg from the omelette into which it was beaten and cooked.”<sup>87</sup>

The Minister omitted to point out that when a court declared a particular law to be invalid, it was because Parliament in purporting to enact that law had exceeded its powers. In fact, when the Official Language Bill was presented to Parliament, several members argued that the Bill sought to confer on the Sinhalese community a privilege or advantage which was being denied to persons of other communities,<sup>88</sup> and it was precisely on that ground that the law was later challenged in court. If, on the other hand, the Minister’s complaint was one of delay, and of the consequent uncertainty as to the state of the law, there were other options available which were not presented to the Constituent Assembly. For instance, jurisdiction on constitutional questions could have been vested exclusively in the highest court, as had been done under the constitutions of several Commonwealth countries and as was contemplated by Bandaranaike himself in 1958. Additionally, such court could have been directed to give priority to such matters. It could have been clarified that the decision of a court on the validity of a law should not affect past acts done under that law. If provisions such as these had been included in the 1946 Constitution, the question of the validity of the Official Language Act might have been examined and determined in the same year in which it was challenged, and there would have been no reason to fear that sometime in the dim uncertain future the egg would have to be restored from the omelette into which it had been beaten and cooked.

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<sup>87</sup> *Constituent Assembly Debates*, 3<sup>rd</sup> July 1971: Col.2832. The other two cases he referred to were (a) *Walker Sons & Co Ltd v. Fry* (1965) 68 NLR 73, which was one of a series of cases involving the exercise of judicial power and concerned a labour tribunal. He complained that different views expressed by judges at several levels of appeal demonstrated a lack of uniformity in the thought processes of judges and led to confusion and delay; (b) *David Perera v. Peries* (1969) 70 NLR 217, which was a case arising out of an election petition in which the Supreme Court took a view different from that taken by the court on a previous occasion.

<sup>88</sup> *Parliamentary Debates* (House of Representatives), 5<sup>th</sup> June 1956: Cols.735-746.

Despite the Prime Minister's expressed desire to retain provision for the judicial review of legislation, the constitution stated quite explicitly that "No institution administering justice and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question the validity of any law of the National State Assembly."<sup>89</sup> Apart from the fact that the citizen was now denied the opportunity to canvass the constitutionality of a law that was applied to him, an important channel for the ventilation of grievances was also closed. A person who believed that he had been subjected to an unjust law had to seek other ways of expressing his anger and his frustration. From a government's perspective, a convenient 'scapegoat' on whom unpopular choices could be foisted had been eliminated.

### **The Constitutional Court**<sup>90</sup>

As a necessary corollary to the establishment of a 'sovereign' legislature and the prohibition of the *ex post facto* review of legislation, a procedure was prescribed in the constitution whereby the question whether a Bill or any provision in it was inconsistent with the constitution could be determined before such Bill was taken up for discussion in the National State Assembly. This jurisdiction was vested solely in a new Constitutional Court. The question of inconsistency could be referred to the Court by the Speaker on his own initiative, or if, within a week of the Bill being placed on the agenda of the National State Assembly, he is requested to do so by the Attorney General, the leader of a recognised political party in the Assembly, or such number of members of the Assembly as would constitute a quorum; or on the advice of the Constitutional Court upon being moved by a citizen. The decision of the Court, with reasons, was required to be given within 14 days of the Bill being referred to it. However, it was possible for the Cabinet, by the simple device of an endorsement that the Bill was 'urgent in the national interest,' to avoid any argument in court between contending parties on the

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<sup>89</sup> Constitution of Sri Lanka (1972): Section 48(2).

<sup>90</sup> See also, in this volume, J. Wickramaratne, '*Fundamental Rights in the 1972 Constitution.*'

constitutionality of such Bill. A Bill which bore that endorsement was not required to be published in the gazette, and the Court was required to examine it along with the Attorney General and to communicate its opinion to the Speaker “as expeditiously as possible and in any case within 24 hours of the assembling of the Court.”<sup>91</sup>

Whether it was within 14 days or 24 hours, the concept of anticipatory review was intrinsically flawed. The publication of a Bill in the government gazette did not provide the publicity that was necessary to enable interested parties to advise themselves on whether or not to raise any question of inconsistency. The gazette was not freely available on the day of publication; nor was it widely read. Even a subscription copy was received nearly two or three weeks late. Therefore, a citizen would not have the opportunity of questioning the constitutionality of a Bill unless, being particularly interested in the subject matter of the Bill, he or she followed its progress through the newspapers and then obtained a copy of the Bill in time. Having done so, this public-spirited citizen would have to seek and obtain legal advice, have the petition prepared in proper form and with sufficient copies and then file the same in court, all within a period of barely one week. The Bill or any of its provisions will then be examined or tested for constitutionality, not with reference to its actual implementation, but on a purely hypothetical basis.

In a Note to the Prime Minister,<sup>92</sup> regarding the new responsibility sought to be imposed on him, the Attorney-General reminded her that he ordinarily appeared in courts only for and on behalf of the government.

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<sup>91</sup> This provision was included to enable the speedy enactment of revenue legislation. The Minister explained: “Once in a way, as in the case of the demonetization law, the need arises for a Government in the national interest to pass a law in the shortest possible time before people can make preparations against that law.” *Constituent Assembly Debates*, 4<sup>th</sup> July 1971: Col.2856. Such a provision was considered necessary since pre-emptive action could be taken to nullify the effect of a Bill that sought to impose a new tax or levy new duties, if prior notice was required to be given of such Bill and its passage through the legislature was attended with delay.

<sup>92</sup> Note prepared by V. Tenekoon, Q.C., Attorney-General, October 1971.

“These provisions create a somewhat extraordinary situation where the Attorney-General may very often have to attack and criticize Bills and amendments proposed by the very Government that appointed him. If the Attorney-General happens to be too much of a party man, these provisions will ensure little safety to the country in ensuring that unconstitutional laws are not passed. If, on the other hand, he tends to be frank and honest in the expression of his opinions, he is likely to find himself very unpopular with the Government and possibly very soon out of office. There are also likely to be cases where the Attorney-General might have been consulted before or in the drafting of the Bill. Thus he would have committed himself to a particular view long before he enters upon the constitutional duty of examining Bills.”

In the Constituent Assembly, the Minister of Constitutional Affairs, in explaining the concept of a Constitutional Court, indicated quite clearly his view that persons other than judges should serve as members of this Court. He rejected the proposal made by the Leader of the Opposition that ‘the highest court’ should sit as the constitutional court. He explained why this ‘different court’ should be manned by ‘different people.’

“If you bring the Judges of a regular court...into the Constitutional Court, they become involved in the ordinary everyday matters of political issues in the political arena. That would do no good for Judges...There is also one other thing...It must be realised that expertise in legalism alone is not enough...For instance, supposing we had an equivalent to Sir Ivor Jennings here, would we not consider him a suitable member of the Constitutional Court? ...We have professors of constitutional law, we have men of goodly position and expertise; and what has to be brought in is not only the legal expertise but proper attitudes.”<sup>93</sup>

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<sup>93</sup> *Constituent Assembly Debates*, 4<sup>th</sup> July 1971: Col.2894.

I expressed a different view in a confidential minute addressed to the Prime Minister, a few days before the Constitution became operative.<sup>94</sup>

“This institution has been severely criticised during the past one and a half years on the ground that it could well turn out to be a ‘stooge court’ of the government in power. To allay any such fear or suspicion and criticism of that type, I would suggest that the persons for appointment to the Constitutional Court be chosen, as far as possible, from among those already serving as Judges of the Court of Appeal and the Supreme Court.”

Should the Constitutional Court consist of Judges or of political scientists and legal academics? The Prime Minister sought to effect a compromise between these two conflicting views. She recommended for appointment T.S. Fernando, Q.C. President of the Court of Appeal;<sup>95</sup> V. Siva Subramaniam, Judge of the Court of Appeal; and H. Deheragoda, Judge of the Supreme Court; along with two nominees of the Minister of Constitutional Affairs: K.D. de Silva, who had retired from the Supreme Court as far back as 1960, and J.A.L. Cooray, Lecturer in Constitutional Law at the Ceylon Law College. From this curious mixture of judges, ex-judges and non-judges, and from the fact that the Constitutional Court had no permanent head, nor any clearly defined principles for its constitution or procedure, and was required to sit in the premises of the National State Assembly, there arose a number of operational problems which, in a very short time, led to a serious constitutional crisis. Following an open confrontation with the National State Assembly, the three members of the Court who had been chosen by lot to hear the first reference resigned before reaching a decision on the Bill.<sup>96</sup> And, out of that crisis there emerged a reconstituted Court whose new members, through some of their decisions in politically sensitive

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<sup>94</sup> Minute dated 15<sup>th</sup> May 1972.

<sup>95</sup> When the constitution was being drafted, T.S. Fernando Q.C., (then in retirement from the Supreme Court) together with S. Nadesan, Q.C., made representations to the Cabinet against the concept of a Constitutional Court and argued, *inter alia*, that it would be impractical to expect a court to determine a question relating to the validity of a Bill within a period of 14 days.

<sup>96</sup> The reference was in respect of the Press Council Bill.

references, forfeited public credibility. It was no surprise, therefore, that all of them were 'removed' from their substantive judicial offices when the 1978 Constitution came into force.

### **State Officers**

Public servants and judicial officers, now described as 'state officers,' were brought under the control of the Cabinet of Ministers in respect of their appointment, transfer, disciplinary control and dismissal, and no court could call in question any decision of the Cabinet in that regard.<sup>97</sup> For the purpose of advising the Cabinet on the exercise of its powers, advisory bodies were established.<sup>98</sup> This radical change was not opposed, in principle, by the UNP. It marked the beginning of the process that led to the politicisation of the public services, especially since similar provisions were also contained in the 1978 Constitution. In respect of judicial officers, an effort was made to maintain the practices and procedures followed, and the principles applied, by the Judicial Service Commission under the 1946 Constitution.<sup>99</sup>

Direct ministerial control of administration was secured by providing that the Permanent Secretary – now described as Secretary<sup>100</sup> – to the Ministry, who under the 1946 Constitution had been subject to 'the general direction and control' of the Minister in the performance of his duties, shall henceforth be

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<sup>97</sup> However, Judges of the Court of Appeal, the Supreme Court and of the Constitutional Court, the Attorney General, Secretaries to Ministries, Commissioner of Elections, Secretary to the Cabinet, Auditor General, and the heads of the Army, Navy, Air Force and of the Police were 'state officers' who continued to be appointed by the President on the advice of the Prime Minister.

<sup>98</sup> These were the State Services Advisory Board, the State Services Disciplinary Board, the Judicial Services Advisory Board and the Judicial Services Disciplinary Board.

<sup>99</sup> See N. Jayawickrama, 'Security of Tenure of Judicial Officers: the Sri Lankan Experience' (1980) *Commonwealth Judicial Journal* 3(3): pp.10-16. The 1978 Constitution restored the Judicial Service Commission.

<sup>100</sup> The recommendation of the Committee of the Constituent Assembly chaired by T.B. Ilangaratne that the term 'Secretary' in the draft constitution be changed to 'Secretary-General' was not accepted by the Cabinet. However, the provision for the appointment of 'one or more' Secretaries to a Ministry was deleted on the recommendation of the Committee which was of the view that there should be only one 'Secretary-General.'

subject to ‘the direction and control’ of his Minister. ‘General direction’ related to matters of policy only; ‘direction’ on the other hand could be case specific if the Minister was so inclined. Thereby the Minister, and through him numerous Members of Parliament and constituents whom he wished to humour or accommodate, became directly involved in the routine administration and decision making processes of government departments. This change appeared to have considerable support among the Ministers since many of them believed that Permanent Secretaries who had been appointed by the President on the recommendation of the Prime Minister, sometimes with no prior consultation with the Minister to whom the ministry had been assigned, were a channel through which the Prime Minister exercised oversight and influence, if not control, over those ministries.

### **State of Public Emergency**

The Public Security Ordinance, since its enactment in 1947 at a time when both private and public sectors were virtually crippled by the biggest ever strike organised in the country, had been vehemently opposed by the LSSP and the CP. In the State Council, W. Dahanayake of the LSSP expressed himself in hyperbolic language:

“This Bill will go down to history as the meanest and dirtiest law...I describe it as the most dastardly, the most cruel, the most brutal law that has been inflicted upon the working classes of any country, not excepting Nazi Germany or Italy under Mussolini. Here, under the provisions of this Bill, there is complete and hundred per cent annihilation of civil liberties...I say that this Bill is something which no civilized society should consent to.”<sup>101</sup>

In 1953, S.W.R.D Bandaranaike too objected to the concept of preventive detention in the Ordinance.

“The only purpose of this so-called preventive detention is to cause an injustice owing to the fear and panic on the one

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<sup>101</sup> *State Council Debates*, 11<sup>th</sup> June 1947: Col.2024.

hand, of the authorities, and on the other, owing to their incompetence. In other words, when such an occasion arises, if they feel that A, B, C, and D, and so on, five hundred or a thousand people all over the place, may conceivably give trouble, the easiest thing to do is to collar them all and lock them up, no matter how many, fifty, five hundred or five thousand. That easy way of dealing with matters is neither in keeping with those principles of personal liberty inculcated by democracy, nor indeed necessary.”<sup>102</sup>

In his 1956 MEP manifesto, to which W. Dahanayake also subscribed, he pledged to repeal the Ordinance. However, after he formed a government in that year, he took steps to refine that law and to add a new dimension to it. In 1959, ten months after a state of emergency had been declared in the wake of communal disturbances on an unprecedented scale, the Ordinance was further amended to provide the government with additional powers, by a Parliament from which every single opposition member had either walked out or been carried out. He explained his *volte face*:

It is true that our Government party before the elections felt that the Public Security Ordinance may be safely repealed. But what has happened in recent times has convinced us...that any Government needs legislation of this type as a safeguard for the people.”<sup>103</sup>

That was precisely the view of Mrs Bandaranaike when her Minister of Constitutional Affairs attempted to tamper with the Public Security Ordinance.

The Minister was endeavouring to reconcile the emergency regulation-making power of the future constitutional Head of State with the basic resolution that the National Assembly “shall not abdicate, delegate or in any matter alienate its supreme legislative power nor shall the National Assembly set up a parallel

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<sup>102</sup> *Parliamentary Debates* (House of Representatives), 18<sup>th</sup> August 1953: Col.882.

<sup>103</sup> Broadcast speech of 14<sup>th</sup> February 1959, reported in *The Observer*, 15<sup>th</sup> February 1959.

law-making authority with like power.” This resolution was vital, as the Ministry claimed in a note circulated in February 1971, to “block the easy road, which now exists, to dictatorship.”

“Under the law as it exists today, the Governor-General can, or is in any case given the power by the Public Security Ordinance to make regulations overriding the law. This power can, of course, be exercised only during the period of the emergency. But under the Public Security Ordinance Parliament has no power to revoke the proclamation of an emergency. It is possible, through the exercise of this power, for the Governor-General to become a Dictator or for the Governor-General to be used as a tool by any person who aims at becoming a Dictator. The first step towards the setting up of a dictatorship can therefore, under the present law, be taken within the framework of the law. This danger will be removed by basic resolution 10 since by its terms the delegation of supreme power to the President or to anybody else is forbidden. No one will be allowed to have the power to override the law. Only strictly subordinate legislation is provided for.”

The Ministry of Constitutional Affairs engaged private lawyers to research the application of martial law and the declaration of states of emergency in other countries and circulated several papers on national security to the Drafting Committee. Finally, in September 1970, the Minister prepared a note for the Cabinet Sub-Committee in which he pointed out, *inter alia*, that Section 7 of the Public Security Ordinance which read:

“An emergency regulation or any order or rule made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any law; and any provision of a law which may be inconsistent with any such regulation or any such order or rule shall...to the extent of such inconsistency have no effect so long as such regulation, order or rule shall remain in force.”

was contrary to the basic principle that supreme legislative power must be directly exercised by the National Assembly “which alone can express the sovereign will of the people.” Since the new

constitution will contain the principle of inalienable legislative sovereignty, he submitted that the Public Security Ordinance will become repugnant to the new constitution and will cease to have effect after the constitution came into force.

Accordingly, he proposed the enactment of a new Public Security Act containing a schedule of regulations which will automatically come into force upon the declaration of an emergency. If any special regulations to deal with a new situation became necessary in the course of an emergency, the National Assembly could, by resolution, supplement the schedule of regulations for the purpose of that particular emergency. He also insisted that the National Assembly should have the power to revoke the declaration of a state of emergency, and that such declaration should cease to operate ten days after it is made unless its continuation is approved by the National Assembly.

The debate on this subject was short lived. In March 1971, the Public Security Ordinance was invoked and a state of public emergency was declared to deal with the JVP insurgency. Shortly thereafter, the Prime Minister informed the Minister of Constitutional Affairs that the basic resolutions should be suitably amended to preserve the present power of the Head of State, acting on the advice of the Prime Minister, to make regulations during a state of public emergency. "Any variation of the present position is not in the interests of public security and order," she asserted. Accordingly, the constitution provided that the Public Security Ordinance shall be deemed to be a law of the National State Assembly.

### **The Unitary State**

The Federal Party was unlikely to have expected the Constituent Assembly to take a definitive decision in favour of federalism. In fact, a memorandum on the establishment of a federal republic which it submitted to the Steering and Subjects Committee was described by Dr A.J. Wilson, the son-in-law of S.J.V. Chelvanayakam, as "poorly drafted, betraying an appalling ignorance of constitutional mechanisms;" and was "condemned"

by M. Tiruchelvam Q.C., the leading ideologue of the party.<sup>104</sup> V. Dharmalingam, who was the principal spokesman for the party in the Constituent Assembly, gave expression to its expectations when he suggested that, as an interim measure, the United Front should implement what they had promised in the election manifesto, namely, to abolish the *Kachcheris* and replace them with elected bodies.

“If the 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 decentralising the administration, not in the manner it is being done now, but genuine decentralisation, by removing the *Kachcheris* and in their place establishing elected bodies to administer those regions.”<sup>105</sup>

Despite the earlier assurances held out by the Prime Minister and other Ministers, the government parliamentary group was in no mood to humour the Federal Party.<sup>106</sup> On the one hand, the fact that it had voted to bring down Mrs Bandaranaike’s government in December 1964, and then extended its support to establish a UNP government in March 1965, was probably fresh in their minds. On the other hand, the Marxist parties who had succeeded, through their non-communal policies, in establishing a substantial base in the Northern Province had, after 1960, been made irrelevant by the meteoric emergence of the Federal Party. Consequently, the Tamil-speaking people of that region were denuded of their long-standing southern source of political support. Therefore, ignoring this conciliatory gesture, the government placed before the Constituent Assembly a basic resolution to the effect that ‘The Republic of Sri Lanka shall be a

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<sup>104</sup> A.J. Wilson (1994) *S.J.V. Chelvanayakam and the Crisis of Sri Lankan Tamil Nationalism* (London: Hurst & Co.): p.116.

<sup>105</sup> Cited in J. Wickramaratne, ‘1972 in Retrospect’ in T. Jayatilaka (Ed.) (2010) *Sirimavo* (Colombo: The Bandaranaike Museum Committee): p.62.

<sup>106</sup> According to Wickremaratne, *ibid*, if the government had accepted the proposed compromise for a division of power, it would have proved to be a far-reaching confidence-building measure on which more could perhaps have been built later. Instead, Sarath Muttetuwegama, who followed Dharmalingam, stated that ‘federal’ had become a dirty word because of the political conduct of the Federal Party, and proceeded to condemn its actions.

Unitary State.’ It was probably designed to obtain a vote rejecting federalism. That object having been achieved, there was no reference to a ‘Unitary State’ in the first draft constitution that was circulated internally by the Ministry of Constitutional Affairs on 18<sup>th</sup> August 1971. Obviously, the Minister saw no need to assert the unitary nature of the state in the constitution.

At a meeting of the Ministerial Sub-Committee held at Temple Trees on 27<sup>th</sup> August 1971, Felix Dias Bandaranaike proposed that “a new section be added in the operative part of the constitution stating that Ceylon is a unitary State.” No record exists of any reason provided for that proposal. It could be that he was merely insisting that a basic resolution that had been the subject of debate in the Constituent Assembly be reflected in the constitution. It could also have been an attempt to outmanoeuvre the Marxist Minister who was emerging as a strong advocate of Sinhala nationalism. Dr Colvin R. de Silva, however, “did not think this was necessary and pointed out that the whole structure of the constitution was in fact unitary and, further, unitary constitutions could vary a great deal in form.”<sup>107</sup> Accordingly, the second draft constitution of 11<sup>th</sup> November 1971 did not contain such a section.

Section 2 in the final draft constitution presented to the Steering and Subjects Committee on 29<sup>th</sup> December 1971 stated that, “The Republic of Sri Lanka is a Unitary State.” I do not know the circumstances in which, despite the Minister’s reluctance, these words, devoid of any real significance in contemporary constitutional discourse, found their way into the final draft. Those who were responsible for the insertion of this section may not have anticipated the consequences of their action. The 1978 Constitution not only adopted this section in its entirety, but prohibited its amendment or repeal except by a majority of affirmative votes at a referendum. In course of time, this impetuous, ill-considered, wholly unnecessary embellishment has reached the proportions of a battle cry of individuals and groups who seek to achieve a homogeneous Sinhalese state on this island.

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<sup>107</sup> Notes of the Cabinet Committee on the New Constitution held at Temple Trees on 27<sup>th</sup> August 1971.

## **Buddhism**<sup>108</sup>

Although the Common Programme and the United Front manifesto had both declared that, “Buddhism, the religion of the majority, will be ensured its rightful place,” the early drafts of the basic resolutions prepared in 1970 did not contain any reference to Buddhism. The only reference to religion was the fundamental right to freedom of thought, conscience and religion enjoyed by every citizen. In December 1970, the Prime Minister drew the attention of the Minister of Constitutional Affairs to the summary of representations received by his Ministry from the public which indicated that there “appears to be considerable demand in the country for Buddhism as a state religion and for the protection of its institutions and traditional places of worship,” and suggested that “some provision will have to be made in the new constitution regarding these matters without, at the same time, derogating from the freedom of worship that should be guaranteed to all other religions.” Accordingly, the following basic resolution was submitted to, and adopted by, the Steering and Subjects Committee, and was later included in the draft constitution as a single section Chapter II:

“3. In the Republic of Sri Lanka, the religion of the majority of the people, shall be given its rightful 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 Basic Resolution 5(iv).”<sup>109</sup>

The Committee of the Constituent Assembly that considered the chapter on Buddhism was chaired by the Prime Minister. It heard several delegations and considered hundreds of memoranda.

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<sup>108</sup> See also, in this volume, B. Schonthal, ‘*Buddhism and the Constitution: The Historiography and Postcolonial Politics of Section 6.*’

<sup>109</sup> The UNP proposed a different formulation:

“3. In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people shall be inviolable and be given its rightful place; and accordingly, it shall be the duty of the State to protect and foster Buddhism, its rites, ministers and places of worship, while assuring to adherents of all religions the rights guaranteed by Basic Resolution 5(4).”

While several lay organisations, such as the All Ceylon Buddhist Congress, the Sasana Sevaka Society and the Maha Bodhi Society, urged that Buddhism be declared the state religion, some of the monks who gave evidence appeared to be more concerned with the establishment of ownership of property required for the performance of rites and rituals. In fact, a senior monk emphatically opposed the concept of a state religion. The Committee rejected the proposal that Buddhism be declared the state religion, but recommended that the word ‘rightful’ be replaced by ‘foremost,’ the latter being the English translation of a Sinhala term that a large number of delegations favoured. This recommendation was accepted by the Constituent Assembly. On a later occasion, the Prime Minister wondered whether it would be possible to include a reference to Theravada Buddhism as being the Buddhism contemplated, since she had received representations to that effect from important members of the Buddhist clergy, but she did not pursue the matter.<sup>110</sup>

The Constitution accordingly provided in a one-section chapter that:

“6. 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).”

This was an unusual provision in the constitution of a multi-religious secular state. It was potentially very divisive, and identified those who professed their belief in the great religions such as Hinduism, Christianity and Islam as being ‘the other’ in the Sri Lankan polity. Despite the declaration in Section 18(1)(d) that every citizen shall have the right to freedom of thought, conscience and religion, including the freedom to manifest his religion or belief in worship, observance, practice and teaching, it was inevitable that conflicts would occur as the state, and those claiming authority under the State, proceeded to “protect and foster” Buddhism and accord to it “the foremost place,” whatever

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<sup>110</sup> Notes of the Cabinet Committee on the New Constitution held at Temple Trees on 27<sup>th</sup> August 1971.

these terms might mean in respect of what is essentially a philosophy of life.

### **Official Language**

In 1956, the Official Language Act declaring the Sinhala language to be the 'one official language' of Ceylon was passed by Parliament amidst scenes of unprecedented communal violence in many parts of the country. In 1958, the Tamil Language (Special Provisions) Act was passed only after both militant Sinhalese politicians and Federal Party members of Parliament had been placed in detention. In 1966, a state of emergency was declared to enable regulations made under the latter law to be presented to Parliament. Indeed, since 1956, language had been the most contentious issue between the two principal communities. This is understandable, as S.W.R.D. Bandaranaike had explained in the State Council in 1944, supporting a resolution that Sinhala and Tamil should be the official languages of Ceylon:

“...there is no question that one of the most important ingredients of nationality is language, because it is through the vehicle of language that the aspirations, the yearnings and triumphs of a people through the centuries are enshrined and preserved. Therefore, all that it means to a nation from the psychological, from the sentimental, from the cultural points of view, the value of nationality from all those points of view are expressed through the medium of language. That is why language is such an important ingredient of nationality.”

On that occasion, he refuted the argument that a country could not have more than one official language.

“I would like to point out that other countries are putting up with more than two official languages and are carrying on reasonably satisfactorily...I do not see that there would be any harm at all in recognizing the Tamil language as an official language. It is necessary to bring about that amity, that confidence among the various communities which we are all striving to achieve within reasonable limits...I have no personal objection to both these languages being considered

official languages, nor do I see any particular harm or danger or real difficulty arising from it.”<sup>111</sup>

Dr Colvin R. de Silva had expressed similar sentiments in 1956 when he opposed the Official Language Bill in the House of Representatives and pleaded for parity of status for Sinhala and Tamil:

“If you refuse to help a section of our people of a specific racial stock, having their own separate language, their specific and particular culture, traditions and history, if you deny them their language, right then you are running the risk of hammering them in the future into what they yet are not. Today they are but a section distinctive by reason of their particular racial stock and language, from the Sinhalese within the Ceylonese nation. But if you mistreat them, if you ill-treat them, if you misuse them, if you oppress and harass them, in that process you may cause to emerge in Ceylon, from that particular racial stock with its own particular language and tradition, a new nationality to which we will have to concede more claims than it puts forward now. It is always wiser statesmanship to give generously early instead of being niggardly too late.”<sup>112</sup>

“Parity,” he argued, “is the road to the freedom of our nation and the unity of its components. Otherwise, two torn little bleeding States may yet arise of one little State.”<sup>113</sup>

Notwithstanding its contentious and extremely sensitive nature, the language issue was re-opened, not to respond to the aspirations of the Tamil community, but to provide constitutional status to two pieces of legislation that had contributed most to ethnic conflict in the country. The Prime Minister doubted whether it would be wise to open this matter for debate again and advised the Minister of Constitutional Affairs to let the existing

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<sup>111</sup> *State Council Debates* (1944) Vol.1: Col.816, cited in K.M. de Silva (1986) *Managing Ethnic Tensions in Multi-Ethnic Societies* (Lanham, MD: University Press of America): p.78.

<sup>112</sup> *Parliamentary Debates* (House of Representatives): 14<sup>th</sup> June 1956: Col.1912.

<sup>113</sup> *Ibid*: Col.1917.

laws operate in the form in which they were.<sup>114</sup> That advice was ignored.

Accordingly, the constitution provided that “The official language of Sri Lanka shall be Sinhala as provided by the Official Language Act, No.33 of 1956.”<sup>115</sup> It was not a secret that the principal reason for the constitutional entrenchment of this statute enacted under the 1946 Constitution was to prevent any further proceedings being taken in the *Kodeswaran Case* which the Privy Council had referred to the Supreme Court for argument on the substantive constitutional question whether or not Parliament in enacting that law had acted *ultra vires* that constitution. The constitution also provided that “The use of the Tamil language shall be in accordance with the Tamil Language (Special Provisions) Act No.23 of 1958.”<sup>116</sup> The constitution also provided that “The use of the Tamil language shall be in accordance with the Tamil Language (Special Provisions) Act No.23 of 1958.” Another paragraph was then inserted to emphasise that the regulations made under that Act (in 1966 by the UNP government with the support of the Federal Party and opposed by the SLFP, LSSP and the CP) “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.” The message to the Tamil-speaking community was clear: in the new republic, even the limited right to use your own language is ephemeral, and is unworthy of constitutional status.

The constitution also reformulated and entrenched the language of the courts legislation, another highly contentious law enacted in 1962<sup>117</sup> that had provoked a campaign of civil resistance in the north. Proceedings and records in every court were required to be in Sinhala, but the National State Assembly was empowered to provide otherwise in respect of courts and tribunals in the

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<sup>114</sup> Letter from the Prime Minister to the Minister of Constitutional Affairs, 9<sup>th</sup> December 1970.

<sup>115</sup> Constitution of Sri Lanka (1972): Section 7. The Minister, however, chose to ignore a suggestion made by Felix Dias Bandaranaike that the word ‘one’ be inserted before the words ‘official language.’

<sup>116</sup> Constitution of Sri Lanka (1972): Section 8.

<sup>117</sup> Language of the Courts Act, No.3 of 1961.

Northern and Eastern Provinces. Then, taking reality into account, a proviso was inserted to enable the Minister of Justice “to permit the use of a language other than Sinhala or Tamil” by a judge or lawyer in any part of the country.<sup>118</sup> To complete the process of asserting the superiority of the Sinhala language, the constitution required that all laws be enacted or made in Sinhala, with a Tamil translation,<sup>119</sup> notwithstanding the fact that at the time draft legislation was invariably prepared in English and then translated into Sinhala and Tamil. Moreover, the *Legislative Enactments of Ceylon* had not been translated into Sinhala, and a Bill that sought to amend an existing law had necessarily to be in the language of the original law.

When the basic resolution on language was introduced in the Constituent Assembly, the Federal Party moved an amendment that Sinhala and Tamil shall be:

- (a) the Official Languages of Sri Lanka;
- (b) the languages in which laws shall be enacted;
- (c) the languages of the courts; and
- (d) the languages in which all laws shall be published.

This amendment was rejected by 88 votes to 13. After the division on the amendment, the leader of the Federal Party, S.J.V. Chelvanayakam, made a statement in which he said that his party had come to the “painful conclusion” that “as our language rights are not satisfactorily provided in the proposed constitution, no useful purpose will be served by our continuing in the deliberations of the Assembly.” He added that, “By taking this step we mean no offence to anybody. We only want to safeguard the dignity of our people.” He concluded by stating that, “We do not wish to stage a demonstration by walking out. After the adjournment today, we will not come back.”<sup>120</sup>

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<sup>118</sup> Constitution of Sri Lanka (1972): Section 11. The proviso recognised the fact that it was impossible to change the language of court proceedings overnight from English to Sinhala, and that in the appellate courts it was impractical to attempt to do so.

<sup>119</sup> Constitution of Sri Lanka (1972): Section 9.

<sup>120</sup> *Constituent Assembly Debates*, 28<sup>th</sup> June 1971: Col.2580.

#### 4. THE LEGACY OF THE CONSTITUTION

1972 was not about establishing a republic or adopting a new constitution. Both these objectives were secondary and could have been achieved in the conventional manner, through Parliament, with the two-third majority that the government was able to command in the House of Representatives. Several former British colonial territories, including India, had followed that course. For the architect of the 1972 Constitution, it was the severance of every link between the British Crown and Ceylon that was fundamental. For him, it was the culmination of a political journey that had begun several decades earlier in the depression-ridden 1930s. As Dr Colvin R. de Silva himself stressed on Republic Day, “the process by which we have come to this culminating point has in fact been essentially revolutionary, though this has not been always realised.” From his perspective, it was through an essentially revolutionary process that “the people of Sri Lanka completely severed their connections with the monarchical system of government for the first time in their recorded history.”<sup>121</sup> It is to him, and to him alone, that the credit for that bold, idealistic, even romantic, exercise in autochthony must go. I was privileged to have played some small part in helping to steer the process successfully through a minefield of legal and constitutional obstacles, and occasional nightmares, to enable this country to make that unique unilateral Declaration of Independence.<sup>122</sup>

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<sup>121</sup> C.R. de Silva, ‘*The Making of the Constitution*’ *Ceylon Daily News*, 22<sup>nd</sup> May 1972.

<sup>122</sup> On 2<sup>nd</sup> September 1975, barely three years after the adoption of the constitution, Mrs Bandaranaike reconstituted her Cabinet by excluding the members of the LSSP. Consequently, Dr Colvin R. de Silva ceased to be the Minister of Constitutional Affairs. In fact, the Ministry itself ceased to exist. Her action appeared to have been triggered by certain derogatory statements about the late S.W.R.D. Bandaranaike and criticism of the Prime Minister that were allegedly made by Dr N.M. Perera at a public meeting held to mark the 22<sup>nd</sup> anniversary of the *Hartal* of 1953: see *Ceylon Daily News*, 13<sup>th</sup> August 1953. These had followed the decision of the Prime Minister to assign the subject of the nationalisation of estates of foreign public companies to the SLFP Minister of Agriculture and Lands rather than to the LSSP Minister of Plantation Industries. After the public exchange of several letters between the Prime Minister on the one hand and Dr N.M. Perera and Dr Colvin R. de Silva on the other, the Prime Minister announced her intention to reconstitute the Cabinet. She offered the LSSP Ministers: Dr Perera (Finance), Dr Colvin R. de Silva

## From Federalism to Separatism

The tragedy of the 1972 Constitution was that it heard and responded only to the voices of those who celebrated its creation. When the Federal Party withdrew from the Constituent Assembly on 28<sup>th</sup> June 1971 because they believed that they were unable to influence in any effective manner the course of its proceedings, much was made of the fact that they did not resign from the Assembly, and hardly any concern was expressed on why they had chosen to leave. Indeed, on Republic Day, Dr de Silva wrote:

“All matters of any importance were subjected to full debate and brought to clear-cut decisions. In particular, the proposals of the Federal Party were brought to issue and decision in this way so that a comprehensive picture of their concrete stand was perhaps for the first time placed before the whole nation. No doubt the Federal Party’s proposals were rejected by the Constituent Assembly in its overwhelming majority all along the line.”<sup>123</sup>

It was very naive for those who were involved in this process to have assumed that the votes of the ‘overwhelming majority’ in the Constituent Assembly had finally laid to rest the grievances of the Tamil community that successive governments had since 1956 attempted to address but failed. In fact, the new constitution had actually removed all the measures that had been designed to safeguard the interests of the minorities and which had been an integral part of the constitutional settlement that preceded, and indeed conditioned, the grant of independence in 1948.<sup>124</sup> Once

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(Plantation Industries and Constitutional Affairs) and Leslie Goonewardene (Transport), a choice of three other ministries from seven (Foreign and Internal Trade, Shipping and Tourism, Health, Fisheries, Labour, Posts and Telecommunications, and Plantation Industries), which they declined. She then requested them to tender their resignations, which too they declined. Thereupon, the three LSSP Ministers were removed from office by the President.

<sup>123</sup> C.R. de Silva, ‘*The Making of the Constitution*’ *Ceylon Daily News*, 22<sup>nd</sup> May 1972.

<sup>124</sup> These included the Senate; the concept of ‘nominated members’ of Parliament; the Public and Judicial Service Commissions; and Section 29 of the 1946 Constitution. Previously, the Official Language Act of 1956, the Tamil Language (Special Provisions) Act of 1958, and the Language of the Courts Act of 1961 had negated the 25<sup>th</sup> May 1944 resolution of the State Council, adopted

more, the elected representatives of the Tamil community had engaged in a dialogue with the elected representatives of the majority community who possessed the full range of state power, and had left empty-handed. It was inevitable that human dignity would seek to assert itself.

One week earlier, on 14<sup>th</sup> May 1972, the Federal Party together with the Tamil Congress and the Ceylon Workers Congress (representing a section of the Indian Tamil estate population) had formed the Tamil United Front under the leadership of S.J.V. Chelvanayakam. On 24<sup>th</sup> May, a protest meeting was held in Jaffna presided over by Chelvanayakam. At that meeting, one of the youth speakers, Kasi Anandan, reportedly claimed that “the six Tamils who voted for the new Constitution would not die by illness, by accident, or by natural causes, but would meet their death by some other ways.”<sup>125</sup> Kasi Anandan was taken into custody on a detention order issued under the Public Security Ordinance: the first arrest in connection with an incipient terrorist movement.

It was now becoming evident that parliamentary agitation and passive resistance were being supplemented by acts of violence committed by a militant Tamil youth movement. For example, on 4<sup>th</sup> June 1972, two Tamil persons went by taxi to the residence of Kumarakulasingham, village council chairman of Nallur, who was a supporter of the SLFP. They walked into his house and one of them fired a revolver at him at point blank range, injuring his head. They got away in the same taxi, and subsequently the taxi driver was found shot dead and his taxi burnt. On 7<sup>th</sup> June, two Tamil persons walked into the Colombo residence of S. Thiagarajah, MP for Vaddukoddai, who was a member of the government parliamentary group. One of them shot at but missed him, and they both escaped in a taxi.

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by a majority of 27 votes to 2, that Sinhala and Tamil be declared the official languages of Ceylon within a reasonable number of years.

<sup>125</sup> *Report of the Presidential Commission of Inquiry into the Incidents which took place between 13<sup>th</sup> August and 15<sup>th</sup> September 1977* (Commissioner: M.C. Sansoni): Sessional Paper VII (1980). This report has recorded the progress of violence from 1972, including the events referred to in this paragraph and the next.

Four months later, on 3<sup>rd</sup> October 1972, Chelvanayakam resigned his seat in the National State Assembly and announced his intention to contest the by-election on the issue of the new constitution.

“It is claimed by the Government that a sizeable section of the Tamil people accept the Constitution. We deny this and want to give an opportunity to the Government to prove that claim. The best way in which that can be done is for me as the leader of the Tamil United Front to resign my seat in this Honourable House and re-contest it on my policy and ask the Government to oppose me on its policy. Of course, the decision will be that of the Tamil people. My policy will be that in view of the events that have taken place the Tamil people of Ceylon should have the right to determine their future whether they are to be a subject race in Ceylon or they are to be a free people. I shall ask the people to vote for me on the second of these alternatives...If I lose I give up my policy...Let not the Government deprive the people of their decision on the issues raised by postponing the by-election.<sup>126</sup>

On the announcement of his resignation, copies of the constitution were publicly burnt in Jaffna, the flag of the rising sun was hoisted, and a campaign of passive resistance was launched. Meanwhile, the government did precisely what Chelvanayakam had anticipated. The by-election was postponed from month to month under emergency regulations.

Federalism had now ceased to be an expression in vogue in the political terminology of the Northern Province. Indeed, by postulating a separate Tamil nationalism and by assiduously developing it, the Federal Party had raised Tamil aspirations to a level that was beyond its reach and no longer capable of being fulfilled through regional autonomy within a federal union of Sri Lanka.<sup>127</sup> Conciliatory gestures made by the government from

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<sup>126</sup> English text of Mr Chelvanayakam's speech, *National State Assembly Debates*, 3<sup>rd</sup> October 1972: Col.883.

<sup>127</sup> See N. Jayawickrama, 'Ethnic Protest: The Federal Movement in Sri Lanka 1949-1976' in R. Ghose (Ed.) (1987) *Protest Movements in South and South-East Asia: Traditional and Modern Idioms of Expression* (Hong Kong: Centre of Asian Studies, University of Hong Kong): pp.95-133.

time to time, such as the opening of a university campus in Jaffna and the release of detainees, were negated by measures such as the system of 'standardisation' in which marks obtained by candidates for university entrance were weighted by giving advantage to certain linguistic groups and/or districts. Nothing could have been more frustrating to the educated Tamil youth than his inability to enter the stream of higher education owing to standardisation, and this feeling of despair and non-fulfilment contributed immensely to the emergence of a militant youth movement and the drift to separatism which was now both rapid and intense, and accompanied by increasing violence. On 27<sup>th</sup> July 1975, masked gunmen shot and killed 48-year old Alfred Duraiyappah, the SLFP Mayor of Jaffna.<sup>128</sup>

Meanwhile, twenty-eight months after Chelvanayakam's resignation, the Kankasanturai by-election was eventually held on 6<sup>th</sup> February 1975. In a message to the voters, the Prime Minister recalled the economic developments that had taken place in the Northern Province and the legal measures taken by her government to end social disabilities.<sup>129</sup> She obviously misjudged the mood of the North and failed to recognise the state of dejection that prevailed. The voters of Kankasanturai re-elected Chelvanayakam by a majority that was three times that secured by him in 1970.<sup>130</sup> His statement following his election victory marked a turning point in Sinhalese-Tamil political relations:

“We have for the last twenty-five years made every effort to secure our political rights on the basis of equality with the Sinhalese in a United Ceylon. It is a regrettable fact that successive Sinhalese governments have used the power that flows from Independence to deny us our fundamental rights and reduce us to the position of a subject people. These governments have been able to do so only by using against

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<sup>128</sup> In the two general elections of 1960, Duraiyappah had been elected to the House of Representatives from Jaffna, defeating both the leader of the Tamil Congress (G.G.Ponnambalam, Q.C.) and the FP candidate.

<sup>129</sup> *Ceylon Daily News*, 29<sup>th</sup> January 1975.

<sup>130</sup> Chelvanayakam secured 25,927 votes, while V. Ponnampalam (CP) secured 9457 votes. In 1970, Chelvanayakam (13,520) defeated V. Ponnampalam (CP: 8164), C. Suntheralingam (Ind.: 5788) and T. Thirunavakarasu (TC: 3051). On that occasion, Suntheralingam advocated a separate Tamil State.

the Tamils the Sovereignty common to the Sinhalese and the Tamils. I wish to announce to my people and to the country that I consider the verdict at this election as a mandate that the Eelam Tamil Nation should exercise the Sovereignty already vested in the Tamil people and become free.”<sup>131</sup>

Finally, at Vaddukoddai, on 14<sup>th</sup> May 1976, the Tamil United Front, together with the Muslim United Front, declared that,

“The Tamils of Ceylon, by virtue of their great language, their religion, their separate culture and heritage, their history of independent existence as a separate state over a distinct territory for several centuries till they were conquered by the armed might of the European invaders, and above all, by their will to exist as a separate entity ruling themselves in their own territory, are a nation distinct and apart from the Sinhalese.”

Accordingly, they resolved to “restore and reconstitute the Free, Sovereign, Secular, Socialist State of Tamil Eelam.”<sup>132</sup> This was precisely what Dr Colvin R. de Silva had predicted twenty years earlier:

“Do we, does this House, do our people want two nations? Do we want a single State or do we want two? Do we want one Ceylon or do we want two? And above all, do we want an independent Ceylon which must necessarily be a united and single Ceylon, or two bleeding halves of Ceylon which can be gobbled up by every ravaging imperialist monster that may happen to range the Indian Ocean. These are issues that we have been discussing under the form and appearance of a language issue...If we come to the stage where, instead of parity, we, through needless insularity, get into the position of suppressing the Tamil people from the federal demand which

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<sup>131</sup> *Daily Mirror*, 11<sup>th</sup> February 1975.

<sup>132</sup> Reproduced and discussed in R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) *Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: CPA): Ch.12.

seems to be popular amongst them at present – if we are to judge by electoral results – there may emerge separatism.”<sup>133</sup>

### **A Framework for Authoritarianism**

As subsequent events were to demonstrate, the 1972 Constitution bequeathed to successor governments a constitutional framework, devoid of any checks or balances, which could be utilised to strengthen authoritarianism. In fact, that process began barely two months after the general election of 1977 at which the UNP secured 140 seats in the 168-member National State Assembly.<sup>134</sup> The UNP Prime Minister, J.R. Jayewardene, presented a Bill to amend the constitution to provide for a nationally elected President who would be both Head of State and Head of Government, exercising the powers of both the constitutional Head of State and the Prime Minister.<sup>135</sup> The Bill, which was passed by the National State Assembly on 20<sup>th</sup> October 1977, also provided that the incumbent Prime Minister shall be deemed to be the first President. Accordingly, when the constitutional amendment came into operation on 4<sup>th</sup> February 1978, an omnipotent unaccountable President assumed office in the knowledge that he was assured of a four-fifth majority in an omnipotent legislature. His successors were to preside over a constitutional edifice that would steadily crumble under the increasing weight of inefficiency, corruption, authoritarianism and militarism.

Meanwhile, on the same day that the Second Amendment was passed, the Assembly resolved to establish a Select Committee to

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<sup>133</sup> *Parliamentary Debates* (House of Representatives), 14<sup>th</sup> June 1956: Cols.1912-1913.

<sup>134</sup> The UNP received 3,179,221 votes (50.92% of the votes polled). The TULF was the largest party in opposition, with 18 seats (421,488 votes), while the SLFP won only 8 seats (1,855,331 votes – 29.72% of the total poll). The LSSP and the CP who contested as the United Left Front failed to secure any seats. The leader of the TULF, A. Amirthalingam, was elected Leader of the Opposition, S.J.V. Chelvanayakam Q.C., having passed away in March 1977. In fact, the deaths occurred of two other Tamil political leaders, G.G. Ponnambalam Q.C., and M. Tiruchelvam Q.C., in February 1977.

<sup>135</sup> On 14<sup>th</sup> September 1977, the Bill was certified by the Cabinet as being ‘urgent in the national interest.’

consider the revision of the constitution, and two weeks later the Speaker nominated ten members to serve on it: the Prime Minister and five other Ministers, one Deputy Minister, and three members of the opposition.<sup>136</sup> At the request of Mrs Bandaranaike, I prepared the draft memorandum to be submitted by the SLFP to the Select Committee,<sup>137</sup> and also appeared before the committee to give oral evidence on behalf of the SLFP.<sup>138</sup> Freed from the constraints of office and unencumbered by the doctrinaire politics of its erstwhile allies, the SLFP memorandum departed from previous party policy in several respects. For example, it recommended that (a) Sinhala and Tamil be declared the national languages of Sri Lanka, while the former remained the official language; (b) the Tamil Language Regulations which it had opposed in 1966 be accorded constitutional status; (c) District Ministers be appointed for each administrative district from among the members of the National State Assembly, together with provision for a decentralised budget and a district secretary; (d) a comprehensive statement of fundamental rights based on the two international human rights covenants be included, together with provision for such new remedies as may be considered necessary;<sup>139</sup> and that (e) the Judicial Service Commission and the Public Service Commission be restored. Inexplicably, for a political party now in opposition, the SLFP was unwilling to urge the restoration of the *ex post facto* judicial review of legislation; a

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<sup>136</sup> The members of the Select Committee were Prime Minister J.R. Jayewardene (Chairman), R. Premadasa, Lalith Athulathmudali, Ronnie de Mel, Gamini Dissanayake, K.W. Devanayagam, M.H.M. Naina Marikar, S. Thondaman, Sirimavo R.D. Bandaranaike and Maithripala Senanayake. After J.R. Jayewardene assumed the office of President on 4<sup>th</sup> February 1978, he continued to attend the meetings of the Select Committee, which were now chaired by the new Prime Minister, R. Premadasa.

<sup>137</sup> *Report of the Select Committee of the National State Assembly appointed to consider the Revision of the Constitution*, Parliamentary Series No.14 of the Second National State Assembly: pp.165-168.

<sup>138</sup> The SLFP delegation, which was the first group to be invited to give evidence, consisted of T.B. Ilangaratne, Stanley Tillekeratne, Nihal Jayawickrama and K. Shanmugalingam. The author was the only non-member of the SLFP. For their evidence, see *Report of the Select Committee of the National State Assembly appointed to consider the Revision of the Constitution*, Parliamentary Series No.14 of the Second National State Assembly: pp.207-225.

<sup>139</sup> A draft chapter was submitted to the Select Committee.

submission that was probably received with appreciation by the new government.<sup>140</sup>

Stanley Tillekeratne, former Speaker of the National State Assembly, and I were permitted by the Chairman, at the request of Mrs Bandaranaike, to participate in the deliberations of the Select Committee on behalf of the SLFP. I experienced then what the representatives of the UNP and the FP would have experienced when they participated in the proceedings of the Constituent Assembly. It was only towards the concluding stages of the deliberations in the Select Committee that it became apparent that what the government intended was not the revision of the constitution, but its repeal and replacement by a wholly new constitution which appeared to have been prepared outside the Select Committee. Accordingly, on 31<sup>st</sup> August 1978, with the TULF and the SLFP having walked out, and with 127 voting in favour and none against, the National State Assembly enacted the Constitution of the Democratic Socialist Republic of Sri Lanka. On 8<sup>th</sup> September 1978, the new constitution was brought into operation, thus establishing the Second Republic.<sup>141</sup>

### **Lessons to be Drawn**<sup>142</sup>

While the republic has survived, albeit under a different grandiloquent name, the constitution of 1972 served only the government under whose auspices it was established. It is useful to reflect on the lessons that may be drawn from the constitution-making process and the content of the 1972 Constitution and its subsequent revision.

*First:* No political party should arrogate to itself the power to draft a constitution. A constitution is intended to crystallise a consensus

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<sup>140</sup> Stanley Tillekeratne, who had presided over the National State Assembly – ‘the supreme instrument of state power’ – was averse to advocating any diminution of the authority of that institution.

<sup>141</sup> The expression ‘Second Republic’ was used by A.J. Wilson in his study of the 1978 Constitution: A.J. Wilson (1980) *The Gaullist System in Asia: The Constitution of Sri Lanka (1978)* (London: Macmillan).

<sup>142</sup> See also, in this volume, N. Haysom, ‘*Nation Building and Constitution Making in Divided Societies.*’

among citizens as to the nature and character of their polity and governance. Political ideology has no place in a constitution. Whether the state should aim to establish a socialist democracy by developing collective forms of property, or should move towards a democratic socialist society in which the means of production, distribution and exchange are not centralised in the state, is a political issue to be determined at a general election. Values and priorities change with the needs and pressures of a given time. As the Buddha stated, the same person cannot step into the same river twice. He was articulating the essential impermanence of things animate and inanimate. Everything is in a constant state of flux. Laws need to be reviewed and revised not only to respond to the changing needs of society, but also to give new direction. The constitution, which is the supreme and fundamental law, must therefore be sufficiently flexible to enable different shades of political opinion to be developed and implemented from time to time.

*Second:* A government should not assume the right to draft a constitution. Human nature being what it is, is it likely that the executive, already in control of the legislature, will happily and willingly concede power even to the judiciary, let alone to the people? The arbitrary decision by the UF government to enable the representatives elected in 1970 for a five-year term to continue in that capacity for seven years is an example of what a government would do when it assumes the right to draft a constitution. Mr S. Nadesan Q.C. drew a very apt analogy when, in 1970, he asked what the contents of the *Magna Carta* might have been if, in Runnymede, almost to the day 755 years earlier, the Barons of England had asked King John to draft that historic document without doing it themselves?<sup>143</sup>

*Third:* Even the legislature ought not to attempt to draft a constitution, although it has the power to enact it. Drafting requires technical knowledge, which persons elected to the legislature may not possess in adequate measure. Moreover, the polarisation of political forces means that in the legislature voting is invariably on party lines, and at the end of the day, a

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<sup>143</sup> Nadesan (1970).

constitution that is drafted and adopted by the legislature will almost certainly reflect the views of the governing party.

*Fourth:* A constitution should avoid unnecessary, meaningless, emotion-charged, divisive and destructive provisions or terminology. For example, the Republic of Sri Lanka was not enhanced in stature or repute by the addition in 1978 of the prefix 'Democratic Socialist.' Nor was it necessary for the 1972 Constitution to proclaim that Sri Lanka is a 'Unitary State,' since structures of governance, particularly in a multicultural society, may change from time to time. If Buddhism had been able to survive in the hearts and minds of the people through 450 years of western colonial rule, a constitutional injunction was surely not necessary to keep it alive in the free, sovereign and independent Sri Lanka. Was it really necessary to humiliate the Tamil community by describing Tamil as the language of 'translation,' and the Tamil Language Regulations of 1966 as 'subordinate legislation'?

*Fifth:* A constitution must reflect the contemporary norms of international law. These norms include the universally recognised fundamental rights, an independent and impartial judiciary, the judicial review of legislative and executive action, a free media, access to information, an independent public service, and genuine periodic elections. International human rights law now provides guidance on the minimum acceptable standards for peaceful co-existence in a multicultural society. They include not only the right of minorities to use their own language, but also the right to participate effectively in decision-making, both at regional and national levels. The application of these principles is non-negotiable, and cannot be made subject to the will of the electorate.

*Sixth:* There is no alternative to a national consensus. Such a consensus can only be reached through the widest possible public consultation. Within the Commonwealth, this has been achieved in different ways. One method has been through the appointment of an independent constitutional commission which would hold public hearings throughout the country, and then submit to the legislature a draft constitution prepared on the basis of a critical evaluation of representations received. Another method was

adopted in post-apartheid South Africa when several technical committees were instructed to draft different chapters of a new constitution according to guidelines formulated in accordance with contemporary international law and practice by a group that comprised every shade of political opinion, however small in numbers.

### **A Concluding Thought**

The Republic of Kenya is linked to us by the waves of the Indian Ocean. It is a country that recently emerged through a baptism of fire with a new constitution that was drafted and adopted by a truly national consensus. The new Chief Justice appointed under that constitution expressed himself in words that are especially relevant to contemporary Sri Lanka. He reminded his fellow Kenyans that they must fully discharge their obligations to each other as individuals who are part of a common polity.

“These obligations start from the basic requirements: respect for each other as individuals, as well as respect for communities and other identity groups. It is socially obnoxious, politically reckless, and economically ignorant to cheapen the presence of any community in this country by making derogatory remarks as has been all too evident in our country’s history. It is only the weak-minded people incapable of comprehending the origins of the modern state, its philosophy, its instruments, and its edicts, that resort to such approaches in managing the expression of disagreement. Thus, when I hear leaders warning whole communities that Kenya has its owners, I wonder whether such leaders appreciate the unconstitutionality and illegality of such comments. Just as a fish that grows in a pond may consider itself the king of the sea until it is introduced into the ocean, we too must also awaken to the reality that our ethnic and sectarian interests may only matter if we are disconnected from the rest of the world. Unless we all recognize that Kenya is a confederation of cultures, languages and interests, we shall never be able to cultivate the sensitivity and respect for one another that is necessary to hold us together. We might never live up to true greatness as a member of the

community of nations because we overstayed our welcome in the pond when the ocean beckoned. The things that are seen to divide us – ethnicity, religion, race, class, clan, region, occupation, sexual identity, generation, disability – are also the raw materials needed to create the mosaic of one nation.”<sup>144</sup>

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<sup>144</sup> Dr Willy Mutunga, Chief Justice of the Republic of Kenya, 12<sup>th</sup> Mach 2012. See also, in this volume, Y. Ghai, ‘*Ethnicity, Nationhood and Pluralism.*’