CONSTITUTIONAL AND ADMINISTRATIVE LAW OF SRI LANKA (CEYLON)

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A Commentary on the Constitution and the law of Public Administration of Sri Lanka

by

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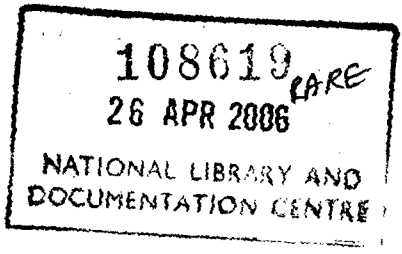

TO THE MEMORY OF
MY FATHER AND MOTHER

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PREFACE

The purpose of this book is to provide a commentary on the republican Constitution and the law of Public Administration of Sri Lanka.

Although the book has been written primarily for the use of students of Constitutional and Administrative Law, I have in the treatment of the subject-matter endeavoured to keep in mind the needs of other classes of readers, such as students of political science and others interested in the government and politics of Sri Lanka. In fact, I am of the view that the study of a subject like public law purely in its legal aspects, ignoring the political and sociological context - in a vacuum, so to speak, - is a profitless and barren task. It is also my belief that for a proper understanding and assessment of the republican Constitution, it is necessary to have some knowledge of the country's political and constitutional background. I have accordingly included in the book a chapter on "Constitutional Development" and another on "The Constituent Assembly and the Making of the Republican Constitution."

Many friends have helped me in various ways. I am particularly indebted to Dr. Colvin R. De Silva, the Minister of Constitutional Affairs and "the architect of the Constitution", for the benefit of several pleasant and profitable discussions with him in his Drafting Committee as well as outside it. I am also obliged to Mr. S. S. Wijesinghe, Clerk to the National State Assembly, for reading the proofs relating to legislative procedure and offering some useful comments. I must record my gratitude to Messrs Walter Jayawardena, Noel Tittawella and M. Sanmuganathan, successive Secretaries to the Ministry of Constitutional Affairs, for providing me with some constitutional documents. My thanks are due, to Mr M. S. Alif, Secretary to the Cabinet of Ministers, and to Mr. R. K. W. Goonesekera, Principal of the Ceylon Law College, for their great interest in the publication of this book and for several acts of assistance. I thank Hansa Publishers Limited and the Colombo Cooperative Printers' Society Limited, Homagama, for technical help and consideration at various stages of the publication of this book. I must also

acknowledge my indebtedness to my former pupils of the Constitutional and Administrative Law class at the Ceylon Law College for the pleasant and thought-provoking dialogue through the years and from which I learnt a great deal. Above all, it is my duty to thank my wife for her encouragement, understanding and assistance.

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INTRODUCTION

CHAPTER I

THE NATURE OF THE CONSTITUTION AND OF CONSTITUTIONAL LAW

The State. One of the dominant characteristics of human society is the existence within it of various social groups. There is, for instance, the family. It is the group to which a person is born. There are other groups to which he may belong, such as a religious organisation, a political party, a trade union or a social club. These various groups have rules which their members must obey. The State may be regarded as that organised group of people comprising, and having supreme power over, all groups and individuals within a definite territory. Its rules form the law of the land. Sri Lanka (Ceylon) is described in the Constitution as "a free, sovereign and independent Republic." (s.I)

The Republic of Sri Lanka is a unitary State; that is, one in which the central government exercises supreme power and authority.In a unitary State, such as ours, the supreme power is concentrated in a single body. This unitary character of the State has made possible the supremacy of the National State Assembly under the Constitution. In Sri Lanka, the local government authorities themselves are subject to a degree of central government control which is greater than in a unitary State like Britain.

A unitary State is contrasted with a federal State, such as the United States of America, the Soviet Union, Australia or Canada. In a strictly federal State, as Dicey, the well-known British constitutional jurist, has pointed out, the supreme power is divided and distributed between the federal or central government on the one hand and the state governments on the other, in such a way that each is supreme within its prescribed sphere. In such federal States as the United States of America, Switzerland and Australia, the subjects allocated to the federal government are specifically enumerated in the Constitution while all the remaining subjects are left to the constituent States. This system has been referred to by Lord Haldane as the true federal

mode, where the States while agreeing on a measure of delegation yet in the main continue to preserve their original constitutions.[1] In Canada, on the other hand, the powers of the constituent States or Provinces are specified and the residual powers are vested in the federal government. Federalism, as Dicey has stated, "is a natural constitution for a body of States which desire union and do not desire unity."[2]

In the Constituent Assembly debate, it was claimed on behalf of the Federal Party that the Republic should be a federal State and that the Party wanted the establishment of a federal State in this country "not to divide Ceylon, but to achieve unity in diversity."[3]

The question whether the Republic should be a unitary or federal State was debated at great length in the Constituent Assembly before the basic resolution that it should be a unitary State was passed. Dicey has explained that "the idea which lies at the bottom of federalism is that each of the separate States should have approximately equal political rights and should thereby be able to maintain the 'limited independence' (if the term may be used) meant to be secured by the terms of federal union."[4] But between the two extremes there are intermediate systems in many States which cannot strictly be described either as unitary or federal. The Indian Constitution, for example, cannot be strictly described as federal. That Constitution establishes what is sometimes called a "quasi-federal system of government" with some unitary characteristics. In the Republic of South Africa the devolution of power on its several Provinces is such that the Republic cannot be described even as a quasi-federal State.

The State exists in order to fulfil certain common purposes and functions. In a modern State these are not confined to the preservation of internal order and the defence against external aggression. The functions of government have in fact a tendency to become increasingly numerous. In Ceylon, particularly since the introduction of universal adult suffrage in 1931, there has been a rapid increase in these functions. In order to perform the various functions of government, the State must necessarily have certain organs or institutions.

1. *Attorney - General* v. *Colonial Sugar Refining Co. Ltd.* (1914) A.C. 237, 253
2. *Law of the Constitution* (8th ed.), lxxv.
3. *Constituent Assembly Debates*, Vol. I, p. 396.
4. Dicey, *op. cit.* See also K. C.Wheare, *Federal Government* (3rd. ed.), p. 15.

The Constitution and Constitutional Law. The fundamental legal rules which relate to the composition and functions of the main institutions of government in the State of Sri Lanka have been selected by the makers of our Constitution and embodied in a formal document which is called the Constitution. Constitutional law, as the term is used in its precise sense, is the law relating to the Constitution. Our Constitution as drafted and adopted by the Constituent Assembly lays down, however, only the basic framework of the system of government. It is, understandably, confined to the main principles and rules relating to basic matters such as the Source of Sovereign power, the Legislature, the Executive, the Administration of Justice, the Process of Constitutional Amendment and the Definition and Guarantee of Fundamental Rights and Freedoms. The makers of the Constitution considered it desirable to have a relatively short and viable Constitution with the result that it contains 134 sections occupying only 72 pages in Sinhala and 56 pages in the English translation. In order to obtain a clear and more complete understanding of the working Constitution it is insufficient to examine merely the fundamental or higher law which is contained in the Constitution. It is also necessary to consider other matters of constitutional importance relating to the system of government.

A "Written" and "Rigid" Constitution. Our Constitution is sometimes said to be "written" in the sense that the rules relating to the main institutions of government are laid down in a formal document. But it is not possible to draw a sharp distinction between "written" and "unwritten" constitutions. Even in Britain, which is often referred to as having an unwritten Constitution, there are many statutes dealing with constitutional matters, such as the Bill of Rights and the Act of Settlement, which are considered to be of greater importance than other statutes. The difference between the two types of Constitutions is therefore not absolute but relative. It lies mainly in the fact that in a written Constitution the main institutions of government are normally embodied in a formal document or documents as the fundamental or higher law of the land. In the case of Sri Lanka this document was adopted deliberately by the Constituent Assembly as the fundamental law of the country. On the other hand, in an unwritten Constitution like that of Britain, many of the main institutions of government have not been formally set down as law at all but have been evolved through constitutional conventions.

Our Constitution may also be described as "rigid" to some extent because it cannot be legally changed with the same ease and in the same manner as ordinary laws, but requires for its amendment or repeal the special procedure prescribed in the Constitution[5]. Constitutional amendments and repeals require the votes of at least two-thirds of all the members of the National State Assembly. Certain provisions of the Constitution are, however, extremely flexible as they continue in force only "until the National Assembly otherwise provides." Even the other provisions of the Constitution cannot be said to be 'entrenched' to the same extent as are those of other more rigid Constitutions. For example, the United States Constitution is more difficult to amend than ours. In that country constitutional amendments must be proposed by two-thirds of both Houses or by a convention summoned on the application of two-thirds of the Legislatures of the several States. The proposed amendments must also be ratified by three-fourths of the Legislatures of the several States or by a convention in three-fourths of the States. In Switzerland constitutional amendment can be effected only by a referendum, that is to say, by the reference of the proposal made by the two Houses to, and by the approval of, a majority of the citizens voting and also of a majority of the cantons. A constitutional amendment may also be initiated if 50,000 voters send up the amendment to the Legislature for submission to the people for their approval. In the Soviet Union constitutional amendments can be made only by decision of the Supreme Soviet adopted by a majority of not less than two-thirds of the votes in each of its Chambers.

Of course, as a leading British Constitutional Law authority has observed, "the rigidity or flexibility of written constitutions cannot be ascertained merely by comparing procedures for constitutional amendment. A Constitution containing a cumbersome procedure for its own amendment may in fact be very flexible if there is no effective opposition to the party in power."[6] On the other hand, in Sri Lanka the Opposition has, generally speaking, been active.

5. A. V. Dicey, *Law of the Constitution* (10th ed.), pp. 127 ff. For a commentary on the distinction between rigid and flexible Constitutions, see Bryce, *Studies in History and Jurisprudence*, Vol. 1, Essay 3.
6. S.A. De Smith, *Constitutional and Administrative Law* (1971) (Penguin Books), p.19.

An Autochthonous Constitution.[7] The republican Constitution, unlike the previous Constitution, is autochthonous or rooted entirely in Sri Lanka's own native soil. There had been considerable criticism of the previous Constitution on the ground that it did not have its legal origin in the country. As a well-known British jurist has stated, "for some members of the Commonwealth it is not enough to be able to say that they enjoy a system of government which is in no way subordinate to the government of the United Kingdom. They wish to be able to say that their Constitution has the force of law and, if necessary, of supreme law within their territory through its own native authority and not because it was enacted or authorised by the Parliament of the United Kingdom; that is, so to speak, 'home-grown', sprung from their native soil, and not imported from the United Kingdom. They assert not the principle of autonomy only: they assert also a principle of something stronger, of self-sufficiency, of constitutional autarky or, to use a less familiar but accurate word, a principle of constitutional *autochthony*, of being constitutionally rooted in their own native soil."[8]

The principle of autochthony was asserted by the Irish in 1922 and was upheld by the Irish Courts which took the view that the 1922 Constitution obtained its legal validity through its approval by the representatives of the people, sitting in the Irish Free State Legislature (Dail Eireann) as a Constituent Assembly.[9] The Irish view was that the Constitution was derived entirely from the sovereignty of the Irish people. This view differed from that taken by the British Courts, namely that, as the Parliament of the United Kingdom had not at that time granted independence to Ireland, the validity of the 1922 Constitution depended on the embodiment of the Irish draft in the Irish Free State Constitution Act passed by the United Kingdom Parliament.[10]

7. See generally K.C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford, Clarendon Press,1960),Chap IV. See also. J.A.L.Cooray, *Constitutional Government and Human Rights in a Developing Society* (1969), pp. 2-9.
8. Wheare, *op. cit.*, p 89.
9. *The State (Ryan)* v. *Lennon* (1935) 1.R.170. See also V. T.H. Delany, "The Constitution of Ireland: Its Origins and Development' (1957-8) 12 *University of Toronto Law Journal* 1, at pp. 2-5.
10. *Moore* v. *The Attorney-General for the Irish Free State* (1935) A.C. 484.

In 1937 the special procedure adopted by Ireland for the enactment of her republican Constitution was devised to make the assertion of autochthony quite evident. That Constitution was not enacted, like other legislation, by the Irish Parliament. The new republican Constitution which had been drafted by the de Valera Government was approved, but not enacted as law, by the Irish Parliament although it had power to do so. The Statute of Westminister gave full powers to the Parliaments of the Dominions to repeal or amend any Act of Parliament of the United Kingdom in so far as it formed part of their law, just as the Ceylon Independence Act has done in the case of Ceylon. Instead of enacting the Constitution, it was approved by Parliament and submitted to the people under the Plebiscite (Draft Constitution) Act. This Act did not, however, state that their approval constituted its enactment, although the Preamble of the Constitution declared: "We, the people of Eire.... Do hereby adopt, enact and give to ourselves. this Constitution."

Dr. K. C. Wheare states: "Two points about these events deserve notice. The first is that, on the Irish as well as on the British view of the legal basis of the Constitution of the Irish Free State, the enactment of the Constitution of 1937 caused a break in Irish constitutional history. There was a gap or break in legal continuity. Whether the Dail owed its authority to the Irish people or to the Parliament of the United Kingdom, it did not enact or purport to enact the Constitution of 1937. It showed to other Commonwealth countries a method of making a break with the past, and of conducting what, in law, was a revolution, not an amendment or revision of the Constitution of 1922. The second point is that Ireland carried out these steps while still within the Commonwealth. It showed the other Commonwealth countries that you could adopt a home-grown constitution without being obliged to leave the Commonwealth."[11]

The principle of constitutional autochthony was also asserted in India when that country adopted her republican Constitution. The Indian Independence Act, 1947, set up two independent Dominions, namely India and Pakistan. The Government of India Act, 1935, was amended to suit the new situation created by the grant of independence.

11. *Op. cit.*, p. 94.

Under the Indian Independence Act, the Indian Legislature received full powers to make laws for the two countries including the power to repeal or amend any Act of the Parliament of the United Kingdom. That Act also provided that the powers of the Legislature of each Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of each Dominion, and that reference in the Act to the Legislature of the Dominion shall be construed accordingly. The constitutional measures as well as the Constitutions themselves which were adopted by these two Assemblies were, however, deliberately not submitted to the Governor-General for his assent. In India the question whether the Governor-General's assent was required, under the then-existing legislation, for constitutional measures passed by the Constituent Assembly was never raised in the Courts. In Pakistan, on the other hand, this question was raised and it was held by the Federal Court that such assent was necessary in order that the constitutional measures of the Constituent Assembly may have the force of law.[12] Thereupon a new Constituent Assembly was summoned in that country by the Governor-General. This Assembly considered and approved the Constitution which was duly presented to the Governor-General for his assent. In that view of the matter there was, so far as India was concerned, a "break in legal continuity" or a legal revolution which the Indian Courts have recognised as a political fact, sitting as they have done under the new Constitution. On the other hand, it may be argued that the Indian Independence Act (which provided that for the purpose of making provision as to the Constitution of each of the new Dominions (India and Pakistan), the powers of each Legislature shall be exercisable in the first instance by the Constituent Assembly of that Dominion) did not require the assent of the Governor-General for the enactment of the Constitution.[13] If that was the position, as Dr. Wheare has pointed out, "we reach the interesting conclusion that the Constituent Assembly did indeed enact the Constitution, and did so under the authority of the powers conferred upon it by an Act of the United Kingdom Parliament, namely, the Indian Independence Act of 1947. The fact that the Constitution

12. *Federation of Pakistan* v *Tamizuddin Khan* P.L.R. (1956); W.P. 306. See Sir Ivor Jennings, *Constitutional Problems in Pakistan* (1957), A. Gledhill, "The Constitutional Crisis in Pakistan (1954-1955)", *Indian Year Book of International Affairs*, 1955, p. 1.
13. See *Wheare, op. cit.*, pp. 96-99.

itself declares at the outset that the people of India enacted it, is in law a mere flourish, for the Constitution was enacted when the final vote was taken by the Constituent Assembly."[14] In other words, if this view is accepted, the Indian Constitution is not strictly autochthonous or "rooted in India's native soil."

In the case of Sri Lanka, on the other hand, the Constituent Assembly quite clearly did not derive its authority to enact the Constitution from the Ceylon Independence Act or any other Act of the United Kingdom Parliament. Nor was its authority derived from any external source, or from the previous Constitution which had been granted by the Queen in Council. The authority of the Constituent Assembly to enact the Constitution was in fact stated by the Government to have been derived from the mandate given by the people who were "politically sovereign". The joint election manifesto of the Parties of the United Front asked for a mandate from the people at the general election of 27 May 1970 "to permit the Members of Parliament you elect to function simultaneously as a Constituent Assembly to draft, adopt and operate a new Constitution." At the election, 115 members of the United Front were returned in a House consisting of 157 members. The Address of the Governor-General at the opening of Parliament on 14 June 1970, (which was quoted by the Prime Minister, Mrs. Sirimavo Bandaranaike in her letter of 11 July 1970 summoning members of the House of Representatives to attend a meeting at the Navarangahala, Royal Junior School, Colombo, to consider and adopt the resolution to constitute, declare and proclaim the Constituent Assembly of the People of Sri Lanka) stated:

> "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... In terms of the mandate, my Government calls upon you to draft and adopt a new Constitution which will become the fundamental law of this country....."

The Prime Minister, Mrs. Bandaranaike, in her Radio Broadcast to the nation on 15 July 1970 repeated the statement that by their vote at the general election the people had given a clear mandate to

14. *Ibid*, p. 99.

the members of the House of Representatives to function as a Constituent Assembly. She reminded her listeners that the Constituent Assembly was "the historic means of a free, sovereign and independent people for giving themselves a Constitution." She went on to state that "the drafting and the adoption of the Constitution by a Constituent Assembly of our own will be an expression of the freedom, sovereignty and independence of our country" and that "we shall thereafter be truly free men and women breathing the air of genuine freedom." On 21 July 1970 the Prime Minister's resolution seeking the appointment of a Constituent Assembly was unanimously passed by the members of the House of Representatives. The Constitution itself was adopted and enacted by the Constituent Assembly on 22 May 1972.

The Preamble[15] of the Constitution states: "We the People of Sri Lanka being resolved in the exercise of our freedom and independence as a nation to give to ourselves a Constitution.... deriving its power and authority solely from the people do..... acting through the Constituent Assembly established by us hereby adopt, enact and give to ourselves this Constitution."

There cannot be the least doubt that the Constitution is autochthonous or constitutionally rooted entirely in Sri Lanka's own native soil. In the enactment of the Constitution the legal and constitutional link with the past was severed. There was, in other words, an undoubted break in legal continuity, or a legal revolution. When the new legal order was accepted by the Courts, the Administration and the general public, there was, to use the language of the Austrian - American jurist Hans Kelsen, a change of *Grundnorm* (the fundamental postulate).[16] The former basic norm or ultimate principle underlying the previous constitutional and legal order was replaced by a new one[17]. So far as the Courts sitting under the provisions of the new Constitution were concerned, they were under its express provisions precluded

15. Although the Preamble does not by itself confer any substantivepower on any institution of Government, yet it indicates (1) the source from which the Constitution derives its claim to obedience, namely the people, and (2) the purpose for which the people established the Constitution: *Jacobson* v *Massachussets* (1905) 197 U.S. 11; Edward S. Corwin, *The Constitution and What It Means Today*, (1954), p. 1
As to the effect of the Preamble in statutory interpretation, see *Attorney-General* v *Prince Ernest Augustus* (1957) A.C. 436, at p. 463.
16. The British jurist, Salmond, formulated this idea as the "ultimate principle" of the legal system from which all others are derived.
17. See Kelsen, *General Theory of Law and State*, p. 118.

from pronouncing upon its legal validity[18]. Sections 132 and 133 of the Constitution in fact made provision for the continuance in service of the Judges, among others, and for their taking an oath of allegiance to the Republic. The oath also stipulated that they would execute the duties of their office in accordance with the Constitution and the law.

Basis of the validity of the Constitution. On 21 July 1970 the members of the House of Representatives, who had been convened to a meeting by the Prime Minister, resolved unanimously "to constitute, declare and proclaim ourselves the Constituent Assembly of the People of Sri Lanka for the purpose of adopting, enacting and establishing a Constitution for Sri Lanka.... deriving its authority from the people of Sri Lanka...." This acceptance of, and acquiescence in, the Constituent Assembly by the representatives of the people belonging to the various political Parties provided a basis for the ultimate validity of the Constituent Assembly and of the new Constitution.

As these representatives of the people included those who had questioned the sufficiency of the mandate claimed to have been given by the electorate to the United Front at the previous general election, the acceptance of the resolution by all the elected representatives considerably weakened the validity of the argument relating to its insufficiency. This claim of a mandate in the Throne Speech of the United Front Government was made presumably on the assumption that there was a convention in this country that a mandate must be sought for such a fundamental constitutional change. As we have already pointed out, the joint election manifesto of the United Front Parties had stated: "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...."

The unanimous acceptance by members of the House of Representatives of the resolution to set up the Constituent Assembly and the numerous memoranda embodying suggestions relating to the new Constitution, which were submitted by the public for consideration by the Assembly and by its Committees under its Standing Orders, were claimed by Government as showing that the legal revolution involved in the setting up of a Consti-

18. See *Luther* v *Borden* (U.S.) 7 Howard 1 (1849); see also Melville Fuller Weston "Political Questions", 38 *Harvard Law Review* 296, (1925).

tuent Assembly for the purpose of drafting and adopting a new Constitution had been accepted and acquiesced in by the general body of the people[19]. So far as the Courts and the Administration were concerned, to borrow the language of a well-known British jurist, they "followed the movement of political events" and recognised the validity of the legal revolution as a "a political fact."[20] As Sir Ivor Jennings has stated: "All revolutions are legal when they have succeeded, and it is the success denoted by acquiescence which makes their Constitutions law."[21]

The Sovereignty of the People. — "We, the People of Sri Lanka" The Constitution declares that sovereignty or the supreme power is in the People and is inalienable. (s.3). The People, in whom the sovereign power resides, are the source from which the Constitution itself derives its authority and claim to obedience. This principle of popular sovereignty enshrined in the Constitution follows the resolution of the members of the House of Representatives constituting themselves the Constituent Assembly of the People of Sri Lanka for the purpose of enacting a Constitution "deriving its authority from the People of Sri Lanka." The Preamble of the Constitution accordingly acknowledges the fact that all powers are derived from the People and that the People are the source of sovereign power. It states: "We, the People of Sri Lanka, being resolved in the exercise of our freedom and independence as a nation to give to ourselves a Constitution....deriving its power and authority solely from the people...." The word "People" is spelt with a capital "P." It emphasizes that the People and their dignity and rights are supreme.

The freedom, sovereignty and independence of the Republic is an essential prerequisite for the existence of the sovereignty of the People. Although the declaration of popular sovereignty in the Constitution is not without value, its realisation in practice is to a very large extent dependent on other matters. These matters include the level of political education among the electorate, the degree of freedom enjoyed by the citizen, the independence of the judiciary, the participation of the people in the functions of government

19. See *post*, Chapter 3.
20. H. W. R. Wade, "The Basis of Legal Sovereignty" (1955) *Cambridge Law Journal*, at p. 191.
21. *Law and the Constitution* (5th ed.), p. 117-18.

and above all on the efficacy of public opinion and the vigilance of the people themselves against any usurpation of their rights and freedoms.

A Constitution cannot obviously provide for all the various agencies through which the popular will is expressed, nor can it guarantee the adequate expression of that will through such agencies. It cannot even ensure that the sovereignty of the people is not weakened by the power of unrepresentative or sectarian pressure groups or the "lobby" to influence the Legislature and the Government. But the Constitution does provide for the normal democratic means through which the popular will can be expressed.

Under the provisions of the Constitution, the National State Assembly consists of the elected representatives of the people. (s.29) The election by the people of their representatives is by the free and secret exercise of the univérsal franchise on a territorial basis at general elections held at the end of every period of six years or earlier, and at which every citizen of over 18 years of age, unless legally disqualified, is entitled to vote and stand for election.[22] The provision for universal franchise and free and periodical elections coming from as far back as 1931 and for free education nearly two decades later, along with the existence of a popular Sinhala, Tamil and English press contributed to the gradual emergence of a politically conscious electorate capable of enforcing its will. This will of the people has been enforced by them in a remarkable fashion on several occasions by the peaceful replacement of previously existing Governments.

Constitutional Law and Administrative Law. Constitutional law, considered as the fundamental law contained in our written Constitution, can be distinguished from that other branch of public law which relates to the organisation, powers and duties of administrative authorities and which is known as Administrative Law.[23] In France proceedings against public authorities (*contentieux administratif*) are instituted in special Administrative Courts which are able to give more effective remedies than the ordinary Courts do in other countries. In Belgium, since 1946 *droit administratif* (Administrative Law) is enforced in Administrative Courts, as in France, whereas previously it was administered

22. See Basic Resolution No. 6 adopted by the Constituent Assembly and embodied particularly in sections 29, 40, 66 and 72 of the Constitution.
23. See Sir Ivor Jennings, *The Law and the Constitution* (5th ed) pp. 63, 217. Hauriou, *Precis Elementaire de Droit Administratif* (4th ed.), p. 14.

in the ordinary Courts. This shows that special Courts are not necessary for the existence of a system of Administrative Law distinct from Constitutional Law, although such Courts make the system more efficient.

Although there is this distinction between these two branches of public law, it is necessary for a proper understanding of Constitutional Law to include in its study at least a part of the ordinary law relating to the Administration. For reasons of convenience, such matters as public corporations, local government and judicial control of public authorities are included in most text books dealing with Constitutional Law but the detailed rules relating to public services such as public health, education and housing are omitted.

Conventions of the Constitution. In addition to the strict law contained in the Constitution and to the judicial decisions interpreting that law, the sources of our Constitutional Law include certain customs or rules of practice which, although they are not directly enforceable in the Courts of law, are nevertheless observed in the working of the Constitution. These customs or practices are referred to as "conventions of the Constitution." Many of these conventions relate to the National State Assembly, to the Executive Government composed of the President and the Cabinet of Ministers and to the relations which exist between them. If these conventions are ignored, the resulting picture of the Constitution would be misleading because some of them go to form the very basis of our system of constitutional government.

One group of conventions relates to proceedings in the National State Assembly. It is a convention that the Speaker protects the rights of minorities in the National State Assembly. The appointment of a number of members of the Opposition Parties to Committees of the National State Assembly is also based on convention. So is the system of "pairing" which is sometimes adopted. According to this system, by arrangement between the Government and Opposition Whips, members of their respective groups who wish to be absent at a division in the House are "paired" so as not to affect the result of the voting. Again, important business of the National State Assembly is arranged between the Government and the Opposition "behind the Speaker's Chair." It is also through constitutional convention that the Opposition is provided with sufficient time to make their contribution to important debates such as that on the Budget. The Government

also provides the earliest opportunity for the Opposition, if it so requests, to move a vote of censure on the Government. In fact, the functions of the Leader of the Opposition as well as of the Opposition itself cannot be effectively carried out in the absence of constitutional conventions.

Another group of conventions relates to the working of the whole system of executive government through various administrative authorities and its co-ordination under the Cabinet of Ministers. Apart from the principle of the collective responsibility of the Cabinet which is enshrined in the Constitution, Ministers are individually responsible and answerable to the National State Assembly for the administration of their Departments[24]. The Minister being constitutionally responsible to the National State Assembly for the acts of state officers in his Departments, it follows that the latter must not be blamed in the House for such acts.

The Constitution of Sri Lanka has incorporated as law some of the important political customs or constitutional conventions which are generally regarded as binding in countries having a Parliamentary system of government. Many of the important conventions relating to Cabinet government have been so embodied in the Constitution. The previous Constitution incorporated by mere reference the British conventions with regard to the powers of the Queen and the Governor-General, subject to the qualification that these conventions were to apply only "as far as may be." (s.4(2)). There was also a proviso that no act or omission on the part of the Governor-General was to be called in question in any Court of law or otherwise on the ground that the above provision had not been complied with. This incorporation of British conventions by mere reference gave rise to certain difficulties and doubts, particularly with regard to the appointment of the Prime Minister in 1952, on the death of Mr. D. S. Senanayake, and also after the general election held on 19 March 1960 [25].

24. *Post*, pp. 215-218
25. *Post*, pp.225*ff*.See also Cooray, *Constitutional Government and Human Rights in a Developing Society* (1969), pp.10-11, 21-25; S.A. de Smith, *The New Commonwealth and Its Constitutions*(1964),pp. 83-84,and "Dissolution of Parliament and the Governor-General's Powers", *Ceylon Daily News*, 1 April 1960; J. A. L. Cooray, "Dissolution of Parliament—The Limits of the Governor-General's Discretion", *Times of Ceylon* 10 April 1960; A. J. Wilson, "The Governor-General and the Two Dissolutions of Parliament,5 December 1959 and 23 April 1960", (1960) 3 *Ceylon Journal of Historical and Social Studies* 187.

The makers of the republican Constitution considered it objectionable to go in search of British conventions which were themselves sometimes indeterminate and uncertain. In any case, the republican Constitution could not for obvious reasons, such as that of national self-sufficiency, refer to and apply British conventions as such. On the other hand, in the case of certain conventions the advantages of flexibility demanded that they should not be incorporated and defined in the Constitution. That would have retarded their growth to meet changing political and social needs.

The method that was adopted in the republican Constitution was to spell out and incorporate such of the previously existing constitutional rules as were thought desirable to formulate explicitly as law. But, unlike most other laws, it was considered by the Constitution-makers to be undesirable that certain conventions set down as law should be called in question in any Court. (s.27 (2)) The undesirability of leaving to the Courts to determine whether there has been compliance with conventions (questions which tend to become highly controversial politically) was illustrated in Nigeria in 1962 in the case of *Adegbenro v Akintola*[26]. In that case, the Privy Council reversed the decision of the Federal Supreme Court and held that the Governor of Western Nigeria had validly exercised his power of removal of the Premier (Chief Akintola) from office under section 33 (10) of the Constitution of Western Nigeria. The Premier had been removed on material other than a prior decision on the floor of the House, on the ground that he had ceased to command the support of a majority of the members. The Privy Council decision led to a constitutional crisis and subsequently there was an amendment of the Constitution to the effect that a Premier could be removed only in consequence of a vote of no-confidence passed by the House.

Under our Constitution many conventions have been codified for greater certainty. Thus it is provided that the President must always, except as otherwise provided by the Constitution, act on the advice of the Prime Minister or of such Minister to whom the Prime Minister may have given authority to advise the President on any particular function assigned to that Minister (s. 27 (1)) The Cabinet

26. (1963) A.C. 614.

of Ministers is charged with the direction and control of the government of the Republic and is collectively responsible and answerable to the National State Assembly (s. 92 (1)). The President is required to appoint as Prime Minister the member of the National State Assembly who, in the President's opinion, is most likely to command the confidence of the National State Assembly (s. 92 (2)). On the death or resignation of the Prime Minister or when the Prime Minister is deemed to have resigned, the Cabinet of Ministers stands dissolved and the other Ministers cease to hold office (s. 98 (1)). The Prime Minister is deemed to have resigned in certain circumstances which are stated in the Constitution. He is so deemed to have resigned, for example, at the conclusion of a general election or if the National State Assembly rejects the Appropriation Bill or passes a vote of no-confidence on the Government (s. 99). If the National State Assembly rejects the Statement of Government Policy at its first session and the Prime Minister within twenty-four hours of such rejection advises the President to dissolve the National State Assembly, the President has power, notwithstanding such advice, to refuse to dissolve the National State Assembly. On the President so deciding, the Prime Minister is deemed by the Constitution to have resigned (s. 100 (1)). The Prime Minister is also deemed to have resigned on the expiry of twenty-four hours of such rejection where he fails to advise a dissolution (s. 100 (2)).

It is not always easy to draw a clear distinction between laws and conventions on the ground that the former are enforceable in the Courts and the latter are not[27]. For example, as already stated, our Constitution has set down as law certain rules which in some other countries are constitutional conventions, but not all of them are justiciable. It is expressly stated in section 27 (2) of the Constitution that no act or omission on the part of the President can be called in question in any institution administering justice nor by any other institution, person or authority on the ground that the President has not acted on the advice of the Prime Minister or of such other Minister who has been authorised by him to advise the President on any particular function assigned to that Minister. The Constitution also

27. See Sir Ivor Jennings, *The Law and the Constitution* (5th ed.), chap. 3. But it is an exaggeration to say that distinction between law and convention does not have any substance: S. A. de Smith, *Constitutonal und Administrative Law* (1971), pp. 48-49; O. Hood Phillips, 'Constitutional Conventions: A Conventional Reply' (1964) 8 *Journal of the Society of Public Teachers of Law* 60.

provides that the Principles of State Policy set out in section 16 "do not confer legal rights and are not enforceable in any Court of law. Nor may any question of inconsistency with such provisions be raised in the Constitutional Court or any other Court." (s 17). On the other hand, Courts have sometimes deemed it necessary to recognise the existence of constitutional conventions and have interpreted the written law on the basis of such conventions.[28]

The main purpose of constitutional conventions in Sri Lanka is to secure that the Constitution works in practice to give effect to what the Constitution has called "the sovereignty of the People". In other words, conventions are directed to ensure that the political and social will of the people prevails at all times. Conventions need to be evolved and developed in order to enable the Constitution to meet changing political and social ideas, circumstances and needs as they arise.

When the authorities who work the Constitution become aware of a constitutional usage or practice and realise the necessity of securing that the Constitution works in accordance with the changing popular will, the practice or usage will be treated as binding and will be obeyed. Conventions are, of course, obeyed in practice for various other reasons. Not all of them are altruistic. Among them is the fear of public opinion and of the political consequences if conventions are disregarded and the machinery of democratic government is trifled with by the authorities concerned.

Sir Ivor Jennings' explanation of conventions in Britain is of relevance also to our own country. "The short explanation of the constitutional conventions," says Sir Ivor, "is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep in touch with the growth of ideas. A constitution does not work itself; it has to be worked by men. It is an instrument of national co-operation, and the spirit of co-operation is as necessary as the instrument. The constitutional conventions are the

28. *Ibralebbe* v *The Queen* (1963) 65 N.L.R. 433. See also *British Coal Corporation* v *The King*(1935)A.C. 500, at p. 511, cited in *Ibralebbe's* Case; *Ryder* v *Foley* (1906) 4 C.L.R. 422; *Commercial Cable Co.* v *Government of Newfoundland* (1916) 2 A.C. 610. *Attorney-General for Ontario* v *Attorney-General for Canada* (1947) A.C. 127.

rules elaborated for effecting that co-operation. Also, the effects of a constitution must change with the changing circumstances of national life. New needs demand a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs. Constitutional conventions are the rules which they elaborate."[29]

29. *The Law and the Constitution* (5th ed.), pp. 81-82. See also Hood Phillips, *Constitutional and Administrative Law* (4th ed.), pp. 80-81.

CHAPTER 2.

CONSTITUTIONAL DEVELOPMENT

The Early Period. Professor Wilhelm Geiger has pointed out that "for hardly any part of the continent of India is there such an uninterrupted historical tradition as for the island of Ceylon."[1] It was called Taprobane by the Greeks and Romans, Serendib by the Arabs, Ceilao by the Portuguese, Zeilan by the Dutch and Ceylon by the British. Nevertheless, the ancient name of "Lanka" or "Sri Lanka" continued to be used in the Island.

The ancestors of the present day Sinhalese, who comprise about seventy per cent of the population of Sri Lanka, are said by Dr. S. Paranavitane to have migrated to this country from Aryavarta (India) — as the abode of Aryanised Indians was known in ancient days — sometime before the third century B.C., when documents in old Sinhalese were first engraved in stone.[2] It is surmised according to the traditions recorded in the ancient chronicles that these Aryan settlers actually came to Sri Lanka in about the fifth century B.C. They appear to have come to this island, from the Indus Valley in north-west India and shortly afterwards also from the Gangetic Valley in the north-east, not directly but most probably after having settled down and remained for some time in an intermediate area.[3]

The settlers naturally brought with them the concept of the Aryan system of village government. The system of village communities among the Aryans came into existence earlier than the conception of a supreme lord or overlord invested with sovereign power[4]. According to the Mahawamsa (Pali chronicle), as early as 425 B.C.,"Pandukabhaya, ruler of Lanka, established the village boundaries over the whole Island

1. Foreword to G.C. Mendis, "*The Early History of Ceylon*" (1935), xi.
2. *History of Ceylon* (Ceylon University Press), pp. 82-83.
3. *Ibid.*, pp. 90-93.
4. See Maine, *Village Communities;* John Budd Phear (1880) *The Aryan Village in India and Ceylon.*

of Lanka." Under this system the people organised themselves in village communities for the purpose of dealing with such matters as water supply and tillage. Sir John D'Oyly has stated that the gamsabhava or village court consisted of the principal and experienced men of the village who met at an ambalama (a village resting place for travellers) or a shady tree or other central place upon the occurrence of any civil or criminal matter, such as disputes regarding limits, debts, petty thefts, quarrels etc; and after inquiring into the case, settled it, if possible amicably, by declaring which party was in default, by adjudging restitution and compensation, or by dismissing with reproof and admonition - their endeavours being directed generally to compromise and not to punishment.[5] Even as late as 1829, Commissioner Colebrooke, who was visiting Ceylon, was so impressed with the working of these village assemblies that he was responsible for the insertion of a provision in the Charter of Justice, 1833, making it lawful for the submission of disputes for the arbitration of gamsabhavas. This ancient type of village institution exists in some form even today in the gamsabhavas or village councils and the Conciliation Boards[6].

So far as the central government was concerned, from the earliest recorded times, namely, the third century B.C., until the year A.D. 1815 when the one hundred and eighty sixth King was dethroned, the system was an absolute monarchy. As D'Oyly has pointed out, the power of the King was supreme and absolute. He had the sole power of life and death, of making peace and war and of legislating for his people.[7] The King exercised his authority through various officers of State. His chief officers employed in the administration of public affairs were the two Adikarams. Next to them were the Disaves or Governors of Provinces, the Lekams or Chiefs of Departments within the mountains, and the Rate Mahatmayas or Governors of small districts. There were, in addition, officers attached to the King's household.

5. *A Sketch of the Constitution of the Kandyan Kingdom*, 1835 (ed. L.J.B. Turner), p. 28; see also Robert Knox, *An Historical Relation of Ceylon* (1681) p. 84.
6. *Post*, Chapters 23 and 26.
7. D'Oyly, *op. cit.*, p 1 ff. The author's account of the Constitution of the Kandyan Kingdom is based mainly on D'Oyly.

Although the King's power was legally unlimited, in practice he generally obtained the advice and assistance of a Council of Ministers (adhikaramvaru) and other high officers of State on important political and administrative matters[8]. D'Oyly has pointed out that the Ministers advised but could not control his will. As he has further stated, the acts of the King's government were, however, presumed to be guided by the institutions and customs of his kingdom (sirit) and it was customary, before important innovations were carried into effect, to consult the principal Chiefs and frequently the principal Priests of the kingdom.

The supreme judical power resided in the King and was exercised in original jurisdiction or in appeal.[9] Where a case was brought under his cognisance, it was either heard in the King's presence or referred for hearing and report to the Maha Naduwa or Great Court. This Court was originally composed of the adikarams, disaves, lekams and muhandirams, and in later years, of all the Chiefs, especially those distinguished for their ability and judgment[10].

The King was under a duty to govern his people in accordance with their laws and customs (sirit). He was expected to maintain a very high standard of conduct and to follow the principles of *dharma* (justice and virtue). Indeed, in theory, the King was even regarded as having been elected by the people. Dr. Paranavitane has stated that the inauguration of ceremonies of a new King during the early period bore witness to these principles:

"It was essential that the King should be consecrated together with the Queen, who must be of Ksatriya lineage like himself. The actual ceremony of anointing was performed at first by a Ksatriya virgin with holy water from the Ganges in a right-spiralled chank, then by the Brahmana chaplain, to be followed by the *setthi* as the leader of the vaisyas. After each of the three anointings, the King was reminded that he has been chosen by the Ksatriyas, Brahmanas and

8. *Mahavamsa*, XVIII, 3; Dr. F. A. Hayley, *The Laws and Customs of the Sinhalese* (1923), pp. 41-42. Dr. S. Paranavitane, *op. cit.*, p. 537.
9. D'Oyly, *op. cit.*, pp. 20 ff.
10. *Ibid.*, at pp. 21-22.

Vaisyas, respectively, to rule over and protect them according to law and custom, and was admonished that, should he fail in his duty, his head would split into seven pieces"[11].

During this period, therefore, it can be said that the Sinhalese did not attach any special sanctity to Kings. Nor did they believe that Kings were of divine origin or had any divine powers[12].

The Mahawansa has recorded the existence of a Tamil kingdom in the north of Lanka in the second century B.C. when Sura Tissa, a younger brother of King Devanampiya Tissa, was ousted by two Tamil invaders from South India. There was a second invasion by Elara, the famous Tamil king reputed for his love of justice, who ruled over the northern region for forty-four years, until he was conquered by Dutugemunu (Dutthagamani), the renowned King of the Sinhalese, who ruled from 161 - 137 B.C. Pliny, the famous Roman author (24 - 79 A.D.) has recorded that there was an exchange of ambassadors between the Sinhalese King and the Roman Emperor (vi. 84-91). There were also embassies sent by the King to China and these became more frequent during the centuries that followed.

Parakramabahu I (the Great) ruled over the whole Island from 1153-1186. His reign is often referred to as the Golden Age of Lanka. The King set up an efficient system of administration with several departments of government. He had a Council of State of high officials to advise him with regard to the performance of the legislative and administrative functions of government. The exact powers of the Council are not known. The *Nikaya Sangrahava* (a well-known Sinhalese work on the History of Buddhism compiled towards the end of the fourteenth century A.D.) gives the following list of officers of State who were members of the Council during the reign of Parakramabahu the Great: (1) Adhikara (Prime Minister); (2) Senevirat (Commander of the Forces); (3) Apa (Heir presumptive of the King); (4) Mapa (Heir-apparent); (5) Mahalena (Chief Secretary); (6) Maharetina (Minister of the Interior); (7) Anuna (Deputy Minister of the Interior) (9) Sabhapatina (Chief Judicial Officer); (9) Situna (Director of Com-

11. *Op. cit.*, p. 230.
12. Dr. G.C. Mendis, *The Early History of Ceylon* (1935), p. 32. See also John Davy, *An Account of the Interior of Ceylon and of the Inhabitants* (1821), p. 159.

merce); (10) Siritlena (Chief Secretary for Legal Affairs); (15) Dulena (Principal Secretary for External Affairs); (12) Viyatna (Chief of the Institutions of Learned Men); (13) Mahawedana (Chief Physician); (14) Mahanekatina (Chief Astronomer and Astrologer); (15) Dahampaskna (Chief Officer for the Administration of Justice and Charities)[13]. Dr. Paranavitane states that, as has been pointed out by Geiger, the administrative organisation of Parakramabahu shows the influence of the *Arthasastra* (of Kautiliya), according to which the army (danda) and the treasury (kosa) are the two instruments by means of which a King could not only maintain control over his own territory, but also keep his opponents in check; and the well-being of the treasury and of the army depends on the revenue brought by the pursuit of agriculture and trade (varta).

Following the Polonnaruwa period (1017-1235), there were several invasions from South India. After the death of Bhuvanaikabahu (c. 1284) or towards the end of his reign, there was the well-known Pandya invasion from South India under Arya Chakravarti. In addition to invasion, there was internal discord and strife within the Sinhalese kingdom. These circumstances resulted in the neglect of the vast irrigation system of the dry zone of the Island and generally in the decline of the political, social and economic organisation on which had rested the ancient civilisation of the Sinhalese. On the other hand, the Northern Tamil kingdom increased in strength after the Pandya invasion until its conquest in the middle of the fifteenth century by Prince Sapumal, the son or adopted son of Parakramabahu VI. Once again the whole Island was brought under the rule of the Sinhalese kingdom under Parakramabahu VI who reigned from Kotte. However, within a decade of the King's death, which occurred in 1467, the Northern kingdom was recovered by the Tamils.

By the beginning of the sixteenth century successive Tamil invasions combined with royal intrigues and insurrections had "diminished the

13. See Memorial of the Chilaw Association dated 5 May 1909 on Constitutional Reform submitted to the Secretary of State for the Colonies; see also Dr.S. Paranavitana, 'Civilisation of the Polonnaru Period: Political, Economic and Social Conditions" in *History of Ceylon* (University of Ceylon, 1960), pp. 540-544. The English translations of the Sinhala terms are only approximate. For a learned account of the political and administrative organisations under the Sinhalese monarchy from the earliest times up to 1505, see Dr. Paranavitana's essays in *History of Ceylon, supra.*

influence of the monarchy and exhausted the strength of the (Sinhalese) kingdom"[14]. In addition to the kingdom of Kotte, there were kingdoms at Jaffna and Kandy, although the King of Kotte, claimed sovereign rights over the whole Island. There were also at this time a number of less important States in the great central region known as the Vanni whose rulers were virtually uncontrolled by the Sinhalese Kings or the King of Jaffna. The foreign trade of the Island and the port settlements, which had in earlier centuries been also in the hands of Jews and Persians (both Christian and Zoroastrian),[15] had come under the virtual control of the Arab-Muslim community which had been commanding the Indian Ocean trade routes for a very long time.

The Portuguese Period. This was the political condition of the country when the Portuguese arrived in 1505 A.D., eight years after Vasco da Gama had rounded the Cape of Good Hope. The Portuguese were seeking to profit from the great achievement of their navigators, by endeavouring to monopolise the trade, particularly in spices, between Europe and the East.[16] They gradually acquired control of the Maritime Provinces of the Island and Dharmapala, King of Kotte, acknowledged the King of Portugal as his overlord. On his death in 1597, the kingdom passed to the King of Portugal by virtue of an earlier bequest made by him. In 1619 Jaffna too became a Portuguese possession. The Portuguese expedition to Kandy, however, failed and on 28 March 1638 the Portuguese army was annihilated at Gannoruwa.

At the Malvana Convention of 1597 Captain-General Don Jeronimo de Azevedo in the name of the Portuguese King solemnly agreed to govern the kingdom according to the laws and customs of the Sinhalese. The Captain-General, was subject to the Viceroy at Goa. The previously existing administrative system was continued by the Portuguese. As the Government had to be administered by foreigners unacquainted with the spirit of the customary laws, it was done

14. Tennent, *Ceylon* (1860) I, p. 385, and II, p. 7.
15. There were Muslim and Christian communities settled in the Island. See Paranavitana, *op. cit.* p. 387. Winstedt, *The Christian Topography of Cosmos Indicopleustes*, p. 322 (7th century). See also Abu Zaid al-Sirafi, *Silsilat al-Tawarikh* (950 A.D.) Paris ed. pp. 122-3: Idrisi (the famous Arab geographer) 1100-c. 1166) has stated that there was a Council of sixteen at the Sinhalese Royal Court, consisting of four Buddhists, four Muslims, four Christians and four Jews.
16. *Report of the (Soulbury) Commission on Constitutional Reform.* Cmd. 6677 (London: His Majesty's Stationary Office, 1945), p. 5.

without proper regard to the duties traditionally imposed on the Sovereign and his Ministers. The result, as Father S. G. Perera has stated, was that the Portuguese administration of the Sinhalese laws told heavily on the people[17].

The territory which was under the control of the Portuguese in the West and South of the Island was divided into four disavanis or provinces, excluding Colombo, which later had some form of municipal organisation with rights and privileges similar to that of a Portuguese *cidade*[18]. The government administration of each disavani was entrusted to an officer called the disave. Each disavani was sub-divided administratively into korales; korales were further sub-divided into pattus and pattus into villages, each village or group of villages being under a vidane.

The Dutch Period. As early as 1602 a Dutch fleet had arrived at Batticaloa. The Union of Spain and Portugal had long provided the Hollanders with an excuse for attacking the settlements of their maritime rivals in the East. In 1656, after a series of campaigns, the Dutch captured Colombo from the Portuguese and hoisted the flag of the Dutch East India Company over the city. Portuguese rule over the Maritime Provinces of the Island ended finally in 1658. The main object of the Dutch in their occupation of the Maritime Provinces was to capture the trade, particularly in cinnamon and other similar products.

The administration of the territories of the Dutch East India Company in Sri Lanka was carried on by a Governor and Director-General of the Island. He was nominated by the Governor-General resident in Batavia and confirmed in his appointment by the Company in Holland. The Governor was assisted by a Political Council of ten members. For purposes of administration the territories occupied by the Dutch were divided into three "commanderies," namely Colombo, Jaffna and Galle. The "disavani" or Province dependent on each of the three commanderies was administered by a Dutch officer called the Disava. The Portuguese system of indigenous local administration, (chief

17. *A History of Ceylon* I (1945), pp. 65-66.
18. Father S G. Perera. *op. cit.*, p. 66 ff; Tikiri Abeysinghe, *Portuguese Rule in Ceylon* 1594-1612 (1966),p. 95. The four disavanis were Matara, Sabaragamuwa, the Four and Seven Korales.

headmen being in charge of korales, superior headmen of pattus and village headmen of smaller areas), was continued by the Dutch[19]. The Company exercised judicial powers under the Statutes of Batavia and a system of Courts, including Land Courts (*Landraad*) was established at Colombo, Jaffna, and Galle. Appeals lay to the Chief Court (*Raad van Justitie*) at Colombo and from it to the Court in Batavia. Sri Lanka owes to the Dutch occupation the system of Roman Dutch law that still prevails in the Island.

Administration by British East India Company. When the French Republic with which Great Britain was at war occupied Holland, the British made haste to occupy the Dutch settlements in Sri Lanka before the French could do so. The British East India Company had long been aware of the importance of Trincomalee as a natural harbour and also of the profitability of the cinnamon trade. On 16 February 1796, the Dutch maritime settlements in the Island passed into the hands of Great Britain with the surrender of Colombo by the Dutch Governor. After the occupation by the British of the maritime settlements, they were made a dependency of the Madras Presidency and administered by the British East India Company. The Governor and Commander-in-Chief in Ceylon had a "discretionary authority as well Civil as Military". The revenue and commercial servants were subject to his orders and were to address him "upon all points on which reference may be requisite"[20]. For practical purposes the civil administration was carried on by members of the Madras Civil Service under the Resident and Superintendent of Revenue. Their duties were administrative, financial and judicial, the most important being the supervision of the collection of revenue[21]. With these officials, who replaced the Mudaliyars, came a host of Madrasi renters and tax farmers. These "collectors" imposed the Madras fiscal system on a people who for many centuries had been governed by their own customary system. The imposition of this alien system caused

19. See P. E. Pieris *Ceylon and the Hollanders*,p. 79. See also *Report of the Special (Donoughmore) Commission on the Constitution*, Cmd. 3131 (London: His Majesty's Stationary Office, 1928), p.8.
20. Colonial Office Papers 55, 1. Jackson to Stuart, 1st March 1796, cited by Dr. Colvin R. de Silva, *Ceylon under the British Occupation*, 1795-1833 (1942), p. 190. Dr. de Silva's book contains an authoritative and detailed account of the political and administrative development of Ceylon during the period, 1795-1833.
21. Lennox A. Mills, *Ceylon under the British Rule* (1933), p. 17.

wide-spread discontent. The levy of a tax on every coconut tree was the last straw which led to an open revolt of the people.

In 1797 Frederick North was appointed Governor of Ceylon by the King of England. By his Commission of 26 March 1798 all civil and military powers were vested solely in him as the King's representative, but he was to act under the direction of the East India Company and of the Governor-General of India. North requested Edmund Carrington, a barrister, to make a draft scheme for a judicial system for the settlements, based on the laws and institutions that existed under the Dutch occupation. On this draft was made the Proclamation of 23 September 1799 [22] which declared that the administration of Justice and Police[23] in the British settlements of Ceylon shall be exercised according to Roman-Dutch law, subject to directions and alterations that may be made by the authorities there mentioned. These authorities did not include the Courts[24]. The Charter of 1801 declared that, in the case of Sinhalese and Muslims, civil justice would be administered according to their own respective laws and usages. In the case of Sinhalese of the Low-country this provision later fell into disuse and the Roman-Dutch law was applied to them.

1802 Constitution. Under the Peace of Amiens, after protracted negotiations with the French, the British settlements in the Island were confirmed as part of the British dominions. On 1 January 1802, those settlements became a Crown Colony independent of the East India Company. All legislative and executive power was vested solely in the Governor subject to confirmation or rejection by the Government in Britain. There was established an Advisory Council consisting of the Chief Justice, the Commander-in-Chief, the Principal Secretary to the Government and other officials nominated by the Governor. The Council was to be consulted by the Governor "on all great and important occasions." But, as the Report of the Colebrooke Commission pointed out, the duty of the Council was merely "to advise and consult with the

22. Chapter 12 of the Legislative Enactments of Ceylon; see also Ordinance, No. 5 of 1833, which extended the provisions to the whole island.
23. Includes both public and private law: *Kodeeswaran* v *Attorney-General* (1969) 72 N.L.R. 337, at p. 340.
24. See *De Costa* v *Bank of Ceylon* (1969) 72 N.L.R. 457, at pp. 462, 510-513.

Governor only when convoked by him". The members, therefore, had no real power or responsibility. A dissenting member, however, was "at liberty to enter a Minute in the proceedings stating the grounds of his opinion and dissent." The Governor had power to suspend or dismiss members as well as civil servants pending the final decision of the Colonial Office. A Supreme Court of Judicature was constituted under the Charter of Justice of 1801. The Court consisted of a Chief Justice and a Puisne Justice. Trial by jury was introduced in criminal cases by the Charter of 1811. A separate Civil Service was established and the Madras officials returned to India.

Governor North, who had earlier carried on several intrigues with Pilima Talauve, the Maha Adigar (Chief Minister) of Sri Wikrama Rajasinghe, the King of Kandy, declared war on the King in 1803. The war eventually ended in a massacre of British troops due mainly to the hilly nature of the country, the difficulties of communications, sickness among the troops and the guerilla method of warfare adopted by the Kandyans. Sir Thomas Maitland, who succeeded North, was not so much concerned with a war against Kandy as with the reorganisation of the system of administration. In 1812 Robert Brownrigg became Governor. Brownrigg wanted what he called "a radical change in the Government of the Kandyan Kingdom." He was also aware of the discontent of Ehelepola, the First Adigar, and other Kandyan chiefs with the King. A pretext for declaring war on Kandy was provided to Brownrigg when ten traders who were British subjects trading in Kandyan territory were accused of being British spies and punished with dismemberment and mutilation. On 10 January 1815, the Governor issued a Proclamation declaring war, which claimed as one of its objects "the deliverance of the Kandyan people from the tyranny and oppression of their ruler." The British troops marched on Kandy and occupied the city on 12 February. Six days later, as John D'Oyly has recorded in his Diary, the King himself was captured by some people of Dumbara in conjunction with some armed men sent by Ehelepola. The King was handed over to the British who sent him off to India. That was the end of the ancient Sinhalese kingdom which had existed for over two thousand years.

Kandyan Convention. On 2 March 1815, the Convention, which had been prepared by D'Oyly, was read to the Chiefs who had been summoned to meet the Governor at the Audience Hall of the King's Palace.

Earlier, the annexation of the Kandyan provinces to the British Empire had been officially declared and proclaimed. The Convention was in the form of a solemn agreement between the Governor on behalf of the British Government on the one part, and the Chiefs "on behalf of the inhabitants" on the other. While vesting the sovereignty of the Kandyan provinces in the British Sovereign, the Kandyan Convention retained the previously existing laws and institutions (except where they were considered to be contrary to British principles of justice), in accordance with the general principles of British Constitutional Law applicable to conquered and ceded colonies[25]. The Convention consisted of 12 Articles. Articles 1 and 2, having recited the cruelties and oppressions of the ruler, Sri Vikrama Rajasinghe, declared that he had, by the habitual violation of the chief and most sacred duties of a Sovereign, forfeited all claims to such title and powers. He was therefore deposed from the office of King. His family and relatives were for ever excluded from the throne, and all claim and title of the "Malabar" race to the dominion of the Kandyan provinces was abolished and extinguished. Article 3 declared that all his male relatives were enemies to the government and were prohibited from entering the Kandyan provinces without the written permission of the British Government. Article 4 vested the dominion of the Kandyan provinces in the British Sovereign to be exercised through the Governor, saving to all chief and subordinate headmen lawfully appointed by the British Government the rights, privileges and powers of their respective offices, and to all classes of the people the safety of their persons and property, with their civil rights and immunities, according to the laws, institutions and customs established and in force amongst them. Article 5 declared that the religion of Boodho (the Buddha) was inviolable and its rites, ministers and places of worship were to be maintained and protected. Article 6 prohibited bodily torture and mutilation. Article 7 prohibited the execution of a sentence of death without the written warrant of the British Governor and provided for the trial of capital offences in the presence of the accredited agents of the Government. Article 8 declared that the administration of civil and criminal justice over the Kandyan inhabitants was to be exercised according to the established forms and by the ordinary authorities, reserving to the Government

25. See *Campbell* v *Hall* (1774) I Cowp. 204. For a text of the Kandyan Convention, see Legislative Enactments of Ceylon, Chapter 390.

the right to redress grievances and reform abuses where necessary. Article 9 provided for civil and criminal justice in the case of persons who were not Kandyans, according to British law. Article 10 repealed the proclamation annexing the Three and Four Korales and Sabaragamuwa. Article 11 expressed the intention of the Governor to collect dues and revenues for His Majesty's use and the support of the establishment. Article 12 declared that the Governor would adopt such dispositions in favour of trade of those Provinces as would facilitate the export of Kandyan products and improve the returns from them.

The Kandyan Provinces came under the jurisdiction of the Governor who exercised it in practice through the Resident at Kandy and a Board of Commissioners of which he was Chairman. They in turn exercised their powers through the existing Sinhalese institutions of government.

The Chiefs soon became disillusioned with the British and felt that their privileges were being curtailed. There was in fact no common interest or bond of sympathy between them and the British, such as language, religion or customs. In 1817 a rebellion broke out in Vellassa and Bintenna and by 1818 spread over most parts of the Kandyan territory. The rebellion eventually collapsed towards the end of October, and Keppetipola, a leader of great courage, was tried and executed.

Proclamation of 1818. A Proclamation was issued by the Governor on 21 November 1818 declaring British sovereignty over the Kandyan provinces. It called "to the mind of every person and of every class" that "the sovereign majesty of the King of Great Britain and Ireland, exercised by his representative the Governor of Ceylon and his Agents in the Kandyan provinces, was alone the source from which all power emanated, and to which obedience was due." It declared that no Chief who was not vested with authority or rank from this sovereign source was entitled to obedience or respect and that no one could exercise any jurisdiction without powers derived from Government. Henceforth every Kandyan would only be subject to the laws which would be administered according to the ancient and established usages of the country by authorities on behalf of the British Sovereign. The Proclamation delegated the general executive and judicial authority in the Kandyan Provinces to the Board of Commis-

sioners and, under their general superintendence, to Resident Agents of Government placed by the Governor. These reforms therefore meant the enormous reduction of the powers of the chiefs and headmen.

Colebrooke Commission: In 1823 a Royal Commission consisting of Major (afterwards Lieutenant-Colonel) William Colebrooke and two others was appointed by the British Government to enquire into the administration of the Government in the Cape of Good Hope, Mauritius and Ceylon. By the time the Commission was due to arrive in Ceylon, the other two Commissioners had fallen ill and returned to England. Ultimately Colebrooke alone arrived in the Island on 11 April 1829. Soon after his arrival, Colebrooke took the rather unexpected step of publishing his Commission in English, Sinhalese and Tamil. He also distributed a detailed questionnaire covering 435 matters to which he received an encouraging response from the people. Colebrooke travelled extensively in the Island interviewing and collecting voluminous evidence from a wide class of people. Charles Cameron, a Scottish barrister, who followed a year later, had been sent to report more particularly on the judicial system.

Among Colebrooke's liberal and far-reaching recommendations were the following: (1) the amalgamation of the Kandyan and Maritime Provinces and their administration as one unit of government by the Governor in Council; (2) the establishment of an Executive and a Legislative Council containing both European and "native" members; (3) the admission of Ceylonese to the Civil Service; (4) the abolition of the rajakariya or compulsory personal service; (5) the abolition of the Government cinnamon monopoly.

In the Judicial Report, Cameron recommended (1) the independence of the Civil Courts from the control of the Governor and the establishment of a uniform judicial system throughout the Island; (2) the abolition of the separate civil jurisdiction of the Supreme Court over Europeans; (3) the grant of power to the Supreme Court to deal with both civil and criminal appeals; (4) the association of Ceylonese assessors with the Judges in the administration of justice. Cameron's main recommendations were embodied in a new Charter of Justice in 1833. The entire administration of justice in the Island was vested in the Supreme Court consisting of a Chief Justice and two Puisne Justices, and in the District Courts with a civil and criminal jurisdiction.

Constitution of 1833. The recommendations of Colebrooke relating to the formation of Executive and Legislative Councils were embodied only to a limited extent in the Constitution of 1833, which was established by an Order in Council. The composition and functions of the Councils were different from those recommended by Colebrooke. The Executive Council which was set up consisted of the Governor who was Chairman and five "official" members. They were the Officer Commanding the troops, the Colonial Secretary, the Queen's Advocate and the Government Agent of the Central Province. The Governor was directed to consult it on all administrative and financial matters except when they were too trivial or too urgent to admit of delay. In the latter case the Governor was to inform the Council of his action and of the reasons for it. The members were authorised to call for information when required. The Governor had the right to reject the advice of the Council provided he sent a full report of the circumstances to the Secretary of State for the Colonies.

The Legislative Council consisted of nine "official" members and six "unofficial" members who were nominated by the Governor. Half of the unofficial members were nominated from the local Europeans and the other half from the Burghers, Sinhalese and Tamils. The President of the Council was the Governor, who had both an original and a casting vote. All Ordinances were to be introduced by the Governor. Any member could, however, enter in the minutes his reasons for wishing to propose any Bill or debate any question. The Governor had the power to veto all legislation. He was forbidden to propose or assent to Bills on a number of subjects, for example, those affecting the Constitution of the Legislative Council, making grants to himself or to any member, increasing or reducing the number of public officers, their allowances or salaries, imposing any new rate or duty which would in any way lessen the Crown's revenue or prerogative and hindering any form of religious worship conducted in a peaceable or orderly manner. The Crown reserved full power to confirm, amend or reject all Ordinances. Thus the Legislative Council, like the Executive Council was purely an advisory body. Nevertheless, the 1833 Constitution was a landmark in the political progress of Ceylon. It contained the seed of representative and responsible government which was to germinate in the years to come.

Strange as it may seem today, the people who agitated for constitutional reform at this time were mainly the European colonists and the

Burghers. The demand for reform and representation came particularly from the mercantile and coffee-planting interests. More power to the Council meant in effect more power to themselves, since proficiency in English was necessary for membership. These reformers demanded, in particular, that the Governor's powers should be curbed and that the number of unofficial members of the Legislative Council be increased.

In 1848 the discontent of the people against the British administration was heightened by the taxes which had been imposed. This situation led to disturbances in various parts of the country, notably in Kandy, Matale, Dambulla and Kurunegala. The 'rebellion', which could not on any showing be said to have constituted a serious threat to British rule in Ceylon, was nevertheless crushed by unnecessarily severe and repressive measures adopted by the Governor, Lord Torrington. Two leaders of the 'rebellion', Gongalagoda Banda and Puran Appu were captured and convicted of treason. A Buddhist monk, Ven. Kudapola Thero, was also tried by court-martial and shot, against the advice of the Crown's law officers, on a charge of failing to give information which might lead to the arrest of a rebel.

These repressive measures together with the serious decline in the coffee industry between 1848 and 1853 provided a new impetus to the demand for constitutional reform. Some petitioners, for example Dr. Christopher Elliott of the Colombo *Observer* and Mr. A.M. Ferguson, even demanded that the system of Crown Colony Government be replaced by responsible government. These demands for popular control of the Legislative Council were strongly opposed by the Governor and the Colonial Office on the ground that they would give too much power to the Europeans and Burghers to the disadvantage of the great majority of Ceylonese. "The Crown", wrote Sir Henry Ward "must hold the balance between European and native interests if it wish to see order maintained and legislation impartially conducted". As a result, however, of these agitations the members of the Legislative Council were given the right in 1860 to introduce legislation, provided it did not deal with financial matters.

In 1864 the matter of constitutional reform came again to the forefront in connection with the question of Ceylon's contribution towards the cost of its military establishment. The British Government called upon Ceylon to pay £135,000 as its contribution towards the

military expenditure of the Island. The unofficial members led by George Wall demanded that the control of the Island's public expenditure was a matter for the Legislative Council. They also expressed dissatisfaction with the management of the public revenue and expenditure. A vote of censure was passed against the Government, and later the unofficial members resigned in a body when the vote was disregarded. An organisation called the "Ceylon League" was formed in 1865 mainly by European colonists and the Burghers with the object of pressing for an unofficial majority in the Legislative Council and the popular control of the Budget. In 1889 the British Government decided to increase the number of unofficial members of the Legislative Council to eight by the addition of two to represent the Kandyan Sinhalese and the Muslims. This was the only reform that was made in the composition of the Legislative Council during seventy-five years.

Towards the end of the nineteenth century and during the early years of the twentieth, the agitation that was carried on by men like Anagarika Dharmapala for a national cultural revival had a remarkable impact on the movement for political reform. Apart from the rural intelligentsia, a class of "English-educated" Ceylonese, imbued with nationalist and reformist ideals, was slowly emerging. There were among this class some brilliant young men who had been educated in British Universities and were fully conversant with the political liberal thought of the time. This English-educated elite formed the spearhead of an indigenous movement for the reform of the Crown Colony system of government which prevailed in Ceylon.

On 12 December 1908 a memorandum on constitutional reform was submitted to the Under-Secretary of State for the Colonies by Mr. (later Sir) James Peiris. It was suggested in the memorandum that the system of racial representation be abolished and that the elective principle be introduced in place of nomination. This was followed in March 1909 by a Memorial sent to the Secretary of State for the Colonies by 760 signatories who claimed to "voice the responsible public opinion of the various communities which were dissatisfied with the Constitution". The memorialists requested the British Government to take the necessary measures to place the Legislative Council of Ceylon on an elective basis and to include Ceylonese members in the Executive Council. Similar requests were contained in Memorials sent by the Ceylon National Association, the Low-Country Products Association, the Jaffna Association and the Chilaw Association.

It could not be seriously denied that these Ceylonese associations and leaders spoke for the people of Ceylon. Nevertheless, in order to offer an excuse for the refusal to recommend constitutional reforms towards responsible government, the Governor, Sir Henry McCallum, in his Despatch of 26 May 1909 vehemently denied that the Memorialists represented the people. This Despatch was made available to the Ceylonese leaders only after the Secretary of State made his decision on the question of Reforms and when it was too late to correct what these leaders maintained were factual misrepresentations made by the Governor. As a result, the Secretary of State was unduly influenced by the views of the local Establishment as expressed in the Governor's Despatch. He decided against the addition of any unofficial members to the Executive Council and also against the introduction of the principle of territorial election in place of nomination and racial representation. The only concession he was prepared to make was a provision for the election of a new member to represent "Ceylonese who have been educated on European lines".

Constitution of 1910. The Legislative Council was accordingly reconstituted by the Royal Instructions of 24 November 1910. The Council was to consist of 21 members, eleven being officials and ten unofficials. Of the latter, four were to be elected to represent respectively the European Urban, the European Rural the "Educated Ceylonese" and the Burgher communities. The remaining six were to be nominated by the Governor as before, one each to represent the Kandyan Sinhalese and Muslims, and two each the Low Country Sinhalese and the Tamils. Two *ex officio* members, namely the Principal Civil Medical Officer and the Government Agent of the Southern Province were added to the previous number of official members. The reconstituted Council met for the first time on 16 January 1912 with a Ceylonese, Mr. (later Sir) P. Ramanathan, who had been elected by the new "educated Ceylonese" electorate. The indigenous elite that had been emerging since the latter part of the previous century constituted a prominant part of that electorate.

In 1915 an impetus for a dynamic political reform movement of the indigenous elite was provided by the Government's unnecessarily severe, almost brutal, suppression of the riots and the communal violence that erupted in Kandy and spread to other places. A number of persons were executed under martial law for alleged complicity in the riots. Several

leaders of the Temperance movement were imprisoned without trial. These happenings led to angry protests by the people culminating in several public meetings and the departure of Mr. E. W. Perera to England to make direct representations to the British Government.

On 17 May 1917 an organisation called "The Ceylon Reform League" was inaugurated. Its main object was that of "securing such reform of the administration and government of Ceylon as will give the people an effective share therein and of encouraging the study of questions bearing on their political, economic and social condition". Seven months later, on 15 December 1917, a Conference on Constitutional Reform was held in Colombo. It was convened by the Ceylon Reform League and the Ceylon National Association, the successor of the Ceylon Agricultural Association which had been established about half a century earlier. There were present 144 delegates from various political associations at the Conference which was presided over by Sir Ponnambalam Arunachalam. There was adopted at the Conference a 'Memorial,' which was later despatched to the Secretary of State for the Colonies, calling on the British Government for certain reforms in the Constitution. In respect of the Legislative Council the reforms demanded were, "the abolition of the official majority, of racial representation and of the nomination of unofficial members by the Governor and, in their stead, a large increase in the number of elected members on a territorial basis". A second Conference under the same auspices was held on 13 and 14 December 1918. This Conference resolved that the Constitution should be reformed with a view to the realisation of responsible government. It was also resolved "that a permanent organisation be formed for the purpose of co-ordinating public opinion and political thought and work in Ceylon by periodically convoking a representative Congress and carrying out its resolutions".

This was the beginning of the Ceylon National Congress. At its first session held on 11 December 1919 the Congress demanded from the British Government, *inter alia*, an enlarged Legislative Council of about fifty members (four-fifths of whom were to be elected territorially on a broad male and a more limited female franchise), an elected Speaker as President, full control of the Budget by the Legislative Council and an Executive Council of which not less than half the

members should be Ceylonese unofficials.[26] Two deputations sent by the Congress were received by the Secretary of State for the Colonies on 15 October 1919 and 23 June 1920 respectively, and on 28 July 1920 a statement relating to Ceylon's future Constitution was made in the House of Commons by the British Government. The British proposals contained in the statement, which was issued in consultation with Governor Manning, were immediately criticised by the Congress. The view expressed by the Congress was that under the guise of extending popular election and control, the proposals seriously curtailed the powers of the Legislative Council, increased the autocratic powers of the Governor, restricted freedom of discussion and control over the Executive and extended the pernicious principle of racial representation.

Constitution of 1920. An Order - in - Council was passed on 13 August 1920 to "confer upon the unofficial members increased powers and responsibility over the proceedings of the Council". Under the Constitution of 1920 (sometimes called the Manning Constitution) the membership of the Legislative Council was increased to 37, composed of 14 official and 23 unofficial members, the latter thus obtaining a majority for the first time. The official members were (1) The Senior Military Officer commanding the troops, if not below the rank of Captain, (2) The Colonial Secretary, (3) The Attorney-General, (4) The Controller of Revenue, (5) The Treasurer, (6) Not more than nine nominated official members. Of the twenty-three unofficial members, eleven were to be elected on a territorial basis (three for the Western Province and one each for the other eight Provinces), five were to be elected by special constituencies (two by the Europeans, one by the Burghers, one by the Chamber of Commerce and one by the Low Country Products Association). Two nominated seats were given to the Kandyans, one each to the Indians and Muslims and three other seats were provided to represent such interests as in the opinion of the Governor were not adequately provided for otherwise. The following were disqualified from being elected members of the Council: (a) persons who were unable to speak,read and write the English language, (b) persons not possessing one of the following qualifications, namely (i) a clear annual income of not less then 1500

26. *Handbook of the Ceylon National Congress*, 1919-1928 (edited by S. W. R. D. Bandaranaike, Joint Hony. Secretary, Ceylon National Congress), pp. 207-208. The Handbook provides a useful record of the activities of the political reform movement during this period.

rupees (ii) the ownership of immovable property either in a person's own right or the right of his wife, the value of which was not less than 6000 rupees (iii) the occupation as owner or tenant, for the period of one year prior to the date of his nomination as a candidate for election, of any house or other building of the annual value of not less than 500 rupees if situated within Municipal, Urban District Council, Local Board or Sanitary Board town limits, and 400 rupees if situated elsewhere. But the powers of the Council were by no means formidable. The initiation of money bills lay with the Governor. He was also given the power to stop the proceedings of the Council when he considered that any legislative measure affected the safety or tranquillity of the Island. He could also declare that the passing of any measure was of paramount importance to the public interest and, in such a case, it could be carried by a majority of the votes of the officials. But every such measure had to be reported immediately by the Governor to the Secretary of State in England. The Governor was given the power to reserve any Bill passed by the Council for the signification of His Majesty's Pleasure. Even in the case of Bills assented to by the Governor, the power of rejection was expressly reserved to His Majesty.

The Congress, as was only to be expected, launched a vigorous attack on the Constitution. At a special session of the Congress held on 16 and 18 October 1920, a resolution was passed rejecting the Reforms Scheme "as utterly inadequate and reactionary and as an affront to the people of Ceylon". In November of the same year the Governor received a Congress deputation and assured them that steps would be taken to amend the Constitution in certain respects after it had been given a fair trial for one year. In view of these assurances the Congress at a special sessions held on 18 December 1920 recommended participation in the elections under the new Constitution.

In 1921 the Congress, which until then could claim to be a fairly comprehensive national organisation, suffered a severe blow when Sir P. Arunachalam and a considerable number of Tamils left that body over a dispute in regard to a question of representation in the Legislative Council. In December of the same year the Legislative Council debated a number of proposals for the further reform of the Constitution which were moved by Mr. James Peiris, the President of the Congress and the member for Colombo Town. These proposals were to the effect that the Legislative Council should consist of 45 members, of whom 6 should be

officials and 28 elected on a territorial basis; that the communal and minority representation should be retained with minor alterations; that the Legislative Council should be presided over by a Speaker elected by itself; that the electorate should be widened by the reduction of the property and income qualifications; that there should be a redistribution of seats in the territorial electorates; that the Executive Council should consist of three official members with whom should be associated three ministers entrusted with portfolios, chosen from the members of the Legislative Council; that section 51 giving power to the Governor to stop proceedings of the Council be repealed; and that certain other minor changes should be made.[27] The speeches of members as well as the Despatch of the Governor submitting a report of the debate were considered by the Secretary of State. He also considered the Report of the Select Committee of the Legislative Council appointed by the Governor to consider the allocation and distribution of seats in the territorial electorates, as well as a joint memorandum of the European, Burgher, Tamil, Muslim and Indian members of the Legislative Council.

Constitution of 1923. On 19 December 1923 the Ceylon (Legislative Council) Order in Council, 1923, was passed by His Majesty in Council. Certain amendments were made to it by an amending Order in Council of 21 March 1924. Under the Constitution of 1923-24, a new Legislative Council was constituted consisting of 12 official and 37 unofficial members. The official members consisted of five *ex officio* members (namely, the Senior Military Officer, Colonial Secretary, Attorney-General, Controller of Revenue and Treasurer) and seven other persons holding public office under the Crown, nominated by the Governor. The unofficial members consisted of three persons nominated by the Governor and thirty-four elected members of whom twenty-three represented territorial constituencies, three represented the European Urban, Rural and Commercial electorates, two represented the Burghers, one represented the Ceylon Tamils in the Western Province, two represented the Indians and three represented the Muslims. The elected members thus constituted a majority in the Council.

The Governor continued to enjoy his special powers under the new Constitution. No law, vote or resolution imposing any tax or disposing

27. See *Report of the Special (Donoughmore) Commission on the Constitution*, Cmd. 3131 (London: His Majesty's Stationery Office, 1928), p. 15.

of or charging any part of the public revenue could be passed unless initiated by the Governor. If the Governor was of opinion that the passing of any Bill, resolution or vote was of paramount importance to the public interest, he could declare it to be so, in which case only the votes of the *ex officio* members and nominated official members were taken into consideration. In such a case a report had to be made to the Secretary of State. The Governor could also reserve his assent to any Bill passed by the Council pending signification of His Majesty's Pleasure. The Council could be dissolved at any time by the Governor. As President of the Council he could attend and preside over its deliberations. In his absence, the Vice-President, who was elected by the Council and held office until the next dissolution, presided. In actual practice, except on special or formal occasions, the Vice-President occupied the Chair. The English literacy as well as the income or property qualifications for elected membership continued to exist under the 1923 Constitution. There were similar qualifications for voters except that the literacy qualification extended to English, Sinhalese or Tamil. This educational and income or property qualification for the franchise limited the electorate to 204,997 or 4 per cent of the total population.

The Executive Council was constituted under Royal Instructions to the Governor. It consisted of three *ex officio* Members, namely the Colonial Secretary, the Attorney-General, the Government Agent for the Western Province and of such other members as the Governor in pursuance of Instructions received from the Secretary of State might from time to time appoint. Four unofficial members were accordingly added. According to the Letters Patent which constituted the Office of Governor and to the Royal Instructions issued to him, the Governor had, except in cases of urgency or little importance, to consult with the Executive Council in making grants of land, in the appointment of Judges and other necessary officers, in the grant of pardon or the reprieve of offenders sentenced to death, in the remission of sentences and fines and in the dismissal or other punishment of public officers of a certain standing. The Executive Council had also certain functions in regard to pensions and gratuities, and in connection with elections. In practice, it was consulted before any Bill was introduced into the Legislative Council and also before making amendments in the Civil Service and Pension Minutes.

On 6 August 1927 the Secretary of State announced the appointment of a Special Commission, with Lord Donoughmore as Chairman,

"to visit Ceylon and report on the working of the existing Constitution and on any difficulties of administration which may have arisen in connection with it; to consider any proposals for the revision of the Constitution that may be put forward and to report what, if any, amendments of the Order in Council now in force should be made". In their Report which was issued on 26 June 1928 the Donoughmore Commission stated[28] that the most striking characteristic of the then-existing Constitution was the divorce of power from responsibility. The unofficial members, who were not responsible for the conduct of public business, enjoyed an overwhelming majority in the Legislative Council; the official members, who were so responsible, were in a permanent minority but they were irremovable except by the Governor in whom all executive authority was vested. The Governor's position, according to the Commission, resembled that of a Prime Minister whose duty it was to carry on the Government with a minority in the House but who was himself denied entrance to the Chamber and was forced to work through a deputy (the Colonial Secretary) to whom he could only give general instructions.

Donoughmore Constitution. The Donoughmore Commission recommended that the new Constitution should transfer to the elected representatives of the people complete control over their internal affairs subject only to such provisions as would ensure that they were helped by the advice of experienced officials and to the exercise by the Governor of certain safeguarding powers. There were two main factors which, as stated in their Report, influenced the Donoughmore Commission against the establishment of a Parliamentary system of government. These were, firstly, not only the absence of any immediate prospect of the appearance of a Party system based on common policies but also a serious danger that in the formation of Parties obligations of race and caste would be too insistent to be ignored. Secondly, the inexpediency, if not the impracticability, of insisting on the exclusion from the purview of the Council of the executive business of the Government. The Commission went on to state: "In taking account of all these factors, it must be our aim not slavishly to follow the forms and practice of the British model which was not designed to meet conditions similar to those obtaining in Ceylon, but to devise a scheme in consonance with local circumstances, a scheme which will be concerned not to reflect an

28. Cmd. 3131 pp. 18-46, 83-100.

alien philosophy but to give free play to the peculiar genius of the Ceylonese themselves and above all a scheme which may bring about a resolute handling of social and economic questions before, as in most Western lands, they have grown too complicated to remedy".

With this end in view they suggested a novel scheme of Government based on Committees under which the Legislative Council was to be replaced by a representative State Council which could deal with administrative as well as legislative matters. The Executive Council was to be abolished and a Board of Ministers was to have ultimate collective responsibility for the annual Budget and Estimates. Communal representation and the previously existing property, income and literacy qualifications for the franchise were to be abolished. Universal adult suffrage was recommended instead. It is noteworthy that the National Congress itself had not asked for such an extension of the franchise. Almost the most prominent advocate for universal franchise before the Commission had been Mr. A. E. Goonesingha. As the leader of the Young Lanka League he had previously represented the radical and labour opinion within the Congress, but had left that organisation in 1927 to form the Ceylon Labour Party. Mr. Goonesinghe made a special point of the fact that very few of the 40,000 members of his Labour Union had a vote.

In their Report the Donoughmore Commissioners stated that they believed that a wider franchise would expedite the passing of social and industrial legislation as was in force in every progressive country. It is relevant to point out in this connection that one of the members of the Commission, Dr. Drummond Shiels, as well as the Secretary of State for the Colonies, Lord Passfield, (formerly Sidney Webb) were Fabian Socialists. The Report also pointed out that when a considerable increase of responsible government was being recommended, the question of the franchise became of first importance. The Report stated further that corruption and manipulation of the electorate were made more difficult the larger that electorate became. The Commissioners also felt that there was considerable justification for the argument that only by exercising the vote could the political intelligence to use it be developed. So far as communal representation was concerned, the Commissioners believed that only by its abolition would it be possible for the various diverse communities to develop together a true national unity. They came "unhesitatingly" to the conclusion that communal representation was "as it were, a canker on the body politic, eating deeper

and deeper into the vital energies of the people, breeding self-interest, suspicion and animosity, poisoning the new growth of political consciousness, and effectively preventing the development of a national or corporate spirit".

When the Report was received in Ceylon a series of debates was initiated on it in the Legislative Council. The Council resolved that government by Executive Committee was "not suited to local conditions" and that the Governor's powers should be curtailed. A common measure of agreement among the various racial communities could not be arrived at because of the controversial nature of the franchise. The minority communities did not support the unqualified acceptance of universal adult suffrage. The Sinhalese members of the Council, although they were prepared to accept universal suffrage, disagreed with the recommendation of the Donoughmore Commission with regard to the enfranchisement of Indians resident in Ceylon. The Commissioners had laid down five years' residence as defined by them would be a sufficient test of "abiding interest" or "permanent settlement" which was necessary for the exercise of the franchise. To meet the demands of the Sinhalese the Governor (Sir Herbert Stanley) in his Despatch to the Secretary of State recommended the qualification of the production of a certificate of permanent settlement granted by some duly appointed officer. This device of a certificate of permanent settlement was intended to afford Indian estate labourers and others an easy and inexpensive method of satisfying the test of domicile as a qualification for enfranchisement.

By his Despatch of 10 October 1929 the Secretary of State for the Colonies (Lord Passfield) announced that the drafting of the necessary Order in Council and other Instruments would be put in hand if the Council on consideration were prepared to accept his proposals. He was not prepared to accept any amendments which destroyed what he called "the balance of the scheme", such as the elimination of the Executive Committee system and the Governor's special powers. On 12 December 1929 the motion "that it is desirable in the interests of Ceylon that the constitutional changes recommended by the Special Commission on the Constitution with the modifications indicated in the Secretary of State's Despatch of 10 October 1929 should be brought into operation" was passed by 19 votes of unofficial members to 17.

Based on these modified recommendations, the Ceylon (State Council) Order in Council, 1931, was passed by the King in Council to establish what came to be known as the Donoughmore Constitution. It had certain characteristic features which may be briefly stated.

The Constitution provided for a State Council consisting of the following: (a) The three persons exercising the functions of Chief Secretary, Legal Secretary and Financial Secretary and called Officers of State; (b) Fifty persons elected on a universal adult franchise in accordance with the Ceylon (State Council Elections) Order in Council 1931 which was passed simultaneously by the King in Council, (c) Not more than eight nominated members appointed by the Governor.

At the first meeting of the Council, it was to elect by secret ballot from among its members seven Executive Committees each of which was to be charged with the administration of one of the following seven groups of subjects and functions: (i) Home Affairs, (ii) Agriculture and Lands, (iii) Local Administration; (iv) Health; (v) Labour, Industry and Commerce; (vi) Education; (vii) Communications and Works. Each Committee was to contain as nearly as possible an equal number of members and every member, except the Speaker and the Officers of State, was to be elected to one of the Committees. Each Committee was to elect its Chairman by secret ballot. The member so elected was to be appointed by the Governor to be the Minister for that group of subjects and functions. The Governor had a discretion to decline to appoint as Minister any member so elected as Chairman. If he so declined the Committee had to elect another member to be Chairman. All questions proposed in an Executive Committee were decided by a majority of the votes of its members present and voting.

Although there was in the new Constitution a considerable transfer to the elected representatives of the people of the responsibility of managing their own internal affairs, yet at the same time the British Government considered it necessary to increase the reserve powers of the Governor in accordance with its usual pattern of colonial constitutional reform. The Governor was given an unqualified right of veto over the executive decisions of the State Council as well as over legislation passed by it. He was also given the power to assume control of any Government Department whenever he considered that a state of emergency had arisen or was imminent and to issue to it such orders as he thought fit.

When a Bill passed by the Council was presented for the Governor's assent, he could (i) assent to it, (ii) refuse his assent, (iii) reserve it for the signification of His Majesty's Pleasure, (iv) postpone its operation, (v) return it for further consideration, (vi) where he was of opinion that the Bill involved an important question of principle, require that it be passed by a two-third majority of all the members of the Council. Matters which the Governor considered were of paramount importance to the public interest or essential to give effect to the provisions of the Constitution and which the Council was empowered to pass in its legislative or executive capacity had effect by a declaration of the Governor as if they had been passed by the Council. The Governor was empowered to dissolve the Council upon its rejection of the Annual Appropriation Bill or upon its decision upon any Bill or motion indicating loss of confidence in the Board of Ministers. The Officers of State had charge of the following subjects: (i) The Chief Secretary was allotted External Affairs, Defence and Public Services; (ii) The Legal Secretary was in charge of the Administration of Justice and other specified legal matters; (iii) The Financial Secretary was in charge of financial matters such as finance, supply, establishments and customs.

The Board of Ministers was composed of the Officers of State and the Ministers, but the former were not entitled to vote on any question submitted to the Board. The Board had the right to determine the order of Government business in the Council and the procedure for the determination of questions affecting more than one Executive Committee. It was also responsible for the preparation of annual estimates of revenue and expenditure and for all financial measures.

The Working of the Donoughmore Constitution. The first elections under the new Constitution were held in June 1931 on the basis of universal adult suffrage. It was inevitable that the enormous change in the composition of the electorate caused by the extension of the franchise would have wide political repercussions. The common man had henceforth to be persuaded on an island-wide basis, rather than patronised or unduly influenced, by the new politicians.

There was a boycott of the elections in the Jaffna peninsula and as a result four seats were left vacant. In July 1932 Mr. E. W. Perera raised in the State Council the question of the reform of the Constitution. Out of the seven resolutions moved by Mr. Perera, six of them which

dealt mainly with the curtailment of the Governor's powers and with the transfer to Ministers of the functions allotted to the Officers of State were passed by the State Council. The seventh resolution which condemned the Executive Committee system was rejected by a large majority of the Council including his former Congress colleagues. The newly-formed Liberal League led by Mr. Perera had earlier launched a formidable attack on the Constitution along the lines indicated in his resolutions. In 1933 there were discussions between the Governor (Sir Graeme Thomson) and the Board of Ministers on Mr. Perera's resolutions. Both the Governor and the Secretary of State made it clear to the Board that they were opposed to any fundamental constitutional changes at that stage.

In the early thirties the discontent which was prevalent particularly among a certain section of the youth against what was called "the slow reformist policy" of the Congress leaders on political and social matters culminated in what was called the "Suriya-Mal Campaign". This campaign for the sale of this local yellow flower was started in order to assist the disabled Ceylonese servicemen of the First World War and as a protest against the collection made annually on 11 November ("Poppy Day") and sent abroad. On 18 December 1935 some of the young Marxist-inspired leaders of the Movement formed a more broad-based political organisation called the Lanka Sama Samaja Party (L.S.S.P.), the chief objectives of which were the attainment of national independence and the establishment of a socialist society. The most prominent of these leaders had received their higher education in Western countries. Mr. Philip Gunawardena had learnt much of his politics in the United States, while Dr. N. M. Perera, Dr. Colvin R. de Silva, Dr. S. A. Wickremasinghe and Mr. Leslie Goonewardene were products of the University of London. At the general election which followed in 1936 the Party nominated four candidates of whom two, Mr. Philip Gunawardena and Dr. N. M. Perera, were elected.

At the first meeting of the new State Council after the general election of 1936, the election of the seven Executive Committees was arranged in such a way that all the seven Committees elected Sinhalese as their Chairmen and hence as Ministers. Sir Baron Jayatilaka, the leader of the State Council, claimed that the so-called "Pan-Sinhalese Ministry" was deliberately created with two motives: firstly, in order to obtain unanimity in the Board of Ministers and thus remove the chief objection of the British Government to the demands of the

previous Board for constitutional reform; and secondly, to demonstrate to the minorities that the then-existing Constitution did not prevent the majority community from excluding them from the Board of Ministers. The Report of the Soulbury Commission has pointed out that the exclusion of members of minorities from the Board of Ministers made clear to them "that they had to seek some other means of safeguarding their position."

Taking advantage of their newly-found unanimity, the Ministers presented a memorandum to the Governor, Sir Edward Stubbs, in March 1937 demanding the curtailment of the Governor's powers and the replacement of the Executive Committee system by Cabinet government.

On 25 November 1937 the Secretary of State addressed an important Despatch to the Governor (Sir Andrew Caldecott) instructing him to examine the constitutional position and submit any recommendations that he might wish to make. So far as the special powers of the Governor were concerned, the Secretary of State was "in entire accord" with his predecessors that the time was not ripe for any relaxation of such powers. On the contrary, he considered that those powers required to be more clearly defined and expressed in terms which did not admit of dispute. Article 22 of the Ceylon (State Council) Order in Council was accordingly amended in November 1937 to give the Governor powers of legislation to be exercised when he considered it necessary "in the interests of public order, public faith or other essentials of good government".

After receiving a number of deputations, the Governor sent his recommendations relating to constitutional reform to the Secretary of State in a Despatch dated 13 June 1938.[29] In his Despatch the Governor rejected the proposal to restrict the franchise. He also opposed all forms of fractional representation on a race basis. He advocated the abolition of Executive Committees and the Board of Ministers. He said that "there was no determining, coordinating, eliminating, controlling or designing force behind the administrative machine". Everything depended upon bargaining and compromise. "As a result", he said, "there could be no fixation and concentration either of policy or of responsibility". The Governor suggested that the functions of Executive Committees and the Board of Ministers could be entrusted to a Cabinet of the normal type.

29. *Ceylon Sessional Paper*, XXVIII of 1938.

The strictures made by the Governor on the Executive Committee system were no doubt too severe. That system could not be blamed for all the ills that were prevalent in Government during this period. Moreover, on the credit side there was, as the Donoughmore Commissioners had anticipated, considerable social improvement and economic progress following on legislation and administration under the Constitution. There was, of course, some justification for the Governor's criticism that under the Executive Committee system there was no co-ordination and concentration of policy or of responsibility. Nevertheless, in the absence of a Party system and of conventions ensuring the rights of minorities in the Legislature, the Executive Committee system, like the Donoughmore Constitution itself, served a useful purpose. The Donoughmore system of government was able to associate in some measure all the members of the State Council with the business of government. It prepared them for the responsible government that was to follow under the succeeding Constitutions. In fact, the Donoughmore Constitution was flexible enough to have worked without a breakdown for a period of fifteen years when it was replaced by the Soulbury Constitution. Although from its inception the Donoughmore Constitution had been the target of strong criticism, it was able to bend without breaking and thus meet the several crises that arose both in time of peace as well as during the Second World War. Even with the establishment by the British Commander-in-Chief, Admiral Sir Geoffrey Layton, of a War Council after the fall of Singapore, the civil administration under the Board of Ministers continued to operate under the Constitution. This was of course a convenient arrangement for the British Government as well as for the Board of Ministers on whose initiative the State Council had in a motion passed on the outbreak of the war assured the British Government "of their whole-hearted support in the prosecution of the war".

Almost from the inception of the Donoughmore Constitution the Board of Ministers acted in many ways as if it were a Cabinet. Important matters relating to government were very often discussed in the Board. In their individual capacities too, Ministers exercised many of the powers normally exercised by Ministers under the Cabinet system of government. They issued orders directly to Heads of Departments who loyally carried them out. As a result, section 45 of the Constitution which expressly required that directions to Heads of Departments should be given only after their approval by the State Council and ratification

by the Governor, rapidly fell into disuse. The principle of ministerial responsibility was often followed in spite of the terms of the Constitution.

But there had been some instances where the Governor had sought to challenge the claim made by Ministers that they had reduced section 45 to "a dead letter". The most notable of these cases were those associated with Bracegirdle and the Mooloya tea estate. In the Bracegirdle case the Governor had, without consulting the acting Minister of Home Affairs, made a deportation order against Mr. Bracegirdle, a young Australian who had some time previously arrived in the Island to be trained as a tea planter. The order was made on the ground of his alleged subversive activities in the plantation areas. Mr. Bracegirdle was subsequently arrested and detained in pursuance of the Governor's order, whereupon an application for a writ of habeas corpus was made on his behalf. When the matter came up for inquiry, the Supreme Court held that the arrest and detention of Mr. Bracegirdle was illegal and made order that he should be released. In the State Council a resolution was passed condemning the act of the Governor in ordering the deportation of Mr. Bracegirdle without the advice of the Minister.

In the case of the Mooloya Incident, the Inspector-General of Police, supported by the Governor, had refused to carry out the instructions of the Minister of Home Affairs given in January 1940 to the effect that the Police should agree to a postponement of the criminal cases which had arisen as a result of a strike on the estate. When the Governor continued to endorse the action of the Inspector-General, the Ministers led by Mr. D. S. Senanayake resigned in protest; but came back later on an assurance by the Governor that the relations between Ministers and Heads of Departments would be investigated by a Select Committee.

One thing had become quite clear as a result of these two incidents. Ministerial power and responsibility had come to stay in spite of the provisions of the Constitution to the contrary. Moreover, the British Government itself had by this time begun to favour the replacement of Executive Committees by a system of responsible Cabinet government.

On 10 November 1938 the Secretary of State in his reply[30] to the Governor's Despatch sent to him earlier stated that he himself had gained

30. *Ceylon Sessional Paper*, XXVIII of 1938, p. 16.

the impression that the system of government by committee did not entirely conduce either to efficiency or to economy of administration or to proper co-ordination of policy. He requested the Governor to take such steps as he thought proper for the debate of his (Governor's) proposals in the State Council. The Secretary of State said that on the result of that debate and the expression of public opinion would depend the measures to be taken for the amendment of the Constitution.

The Reforms Despatch was discussed by the State Council at great length. The basic difficulty was the question of minority representation.

The outbreak of war in September 1939 created a new situation. As already stated, the State Council in a resolution passed at the very outset of the war assured His Majesty the King and the British Government of their wholehearted support in the prosecution of the war. In accordance with the view which had been taken by the Lanka Sama Samaja Party (L.S.S.P.) that it was an "imperialist war", the two members of that Party in the Council did not vote for the resolution.

In 1939 ideological differences arose within the LSSP, and its Executive Committee condemned the Third International. Many of the members of the Committee were inspired by Trotsky and the Fourth International. The immediate causes of the rupture were such events as the Moscow Trials and the Nazi-Soviet Pact. The minority Stalinist group of members who had been expelled from the Party formed the United Socialist Party in November 1940, and three years later dissolved it to establish the Ceylon Communist Party. The LSSP was proscribed in 1942 after their leaders had escaped from Kandy prison where they had been detained from 1940.

In February 1941 the Board of Ministers ascertained from the Governor the position with regard to constitutional reform. Later, the Board expressed the view that further delay in making an official pronouncement regarding the reform of the Constitution was not in the public interest[31]. The Ministers were under constant pressure especially from such younger members of the National Congress as Mr. Dudley Senanayake and Mr. J. R. Jayawardene to demand an immediate declaration from the British

31. *Ceylon Sessional Paper XIII of* 1943. *Correspondence of the Board of Ministers with the Secretary of State and the Governor,* 1941-1943.

Government of full responsible status for Ceylon. On 1 September 1941 the Secretary of State informed the Board through the Governor that the question of constitutional reform could be examined by a Commission or Conference after the war. This statement was found to be unacceptable to the Board of Ministers. The Ministers expressed the view that the appointment of a Commission or the holding of a Conference for further investigation was "unnecessary" and "most undesirable". This was followed by a resolution passed by the State Council in March 1942 demanding "the conferment of Dominion Status on Ceylon after the war" and requesting an assurance from the British Government to that effect. The resolution also requested that Sir Stafford Cripps who was due to visit India to discuss Indian constitutional problems should be instructed to extend his visit to Ceylon in order that he might discuss the question of Dominion Status for Ceylon with the representatives of the people. Sir Stafford, in a telegram to the Governor dated 30 March 1942, much regretted that his visit had to be confined to Indian problems.

In December 1942 the Kelaniya sessions of the National Congress adopted "the freedom resolution", which was proposed by Mr. J. R. Jayewardene, changing the object of the Congress from the attainment of Dominion Status to that of freedom. At the following sessions held in Ambalangoda in December 1943 the Congress decided to admit members of other political Parties who desired to join the organisation. Shortly afterwards Mr. Pieter Keuneman and some other members of the Communist Party joined the Congress. On 21 December 1943 Mr. D. S. Senanayake resigned from membership of the Congress. In the course of his letter of resignation Mr.Senanayake said: "Recent events have shown that the Executive Committee has violated the rules of Congress by admitting as members a number of gentlemen who would not have been entitled to admission under the rules that existed. With the assistance of these new-comers the rules have been amended to enable them to be enrolled. Some of these members have been elected into the Executive Committee even before the required conditions were fulfilled according to the existing rules"[32]. In his reply, the President of Congress maintained that all members had been enrolled according to the rules of Congress and regretted that Mr. Senanayake had decided to sever a connection which dated back to the very inception of the Congress.

32. The whole letter is reproduced in the Congress publication, "25 *Years—But Yet!*" (1945), pp. 33-34.

1943 Declaration. On 26 May 1943 a Solemn Declaration made by His Majesty's Government stated that the post-war re-examination of the reform of the Ceylon Constitution would be directed towards the grant to Ceylon of full responsible government under the Crown in all matters of internal civil administration. His Majesty's Government would retain control of defence and external relations. Apart from measures affecting the above two matters, the classes of reserved Bills would be restricted to those which (a) related to the Royal Prerogative, the rights and property of His Majesty's subjects not residing in the Island, and the trade and shipping of any part of the Commonwealth, (b) had evoked serious opposition by any racial or religious community and which in the Governor's opinion were likely to involve oppression or unfairness to any community, (c) related to currency. The Declaration also invited the Board of Ministers to submit proposals for a new Constitution in accordance with the terms of the Declaration, which proposals would then be examined by a Commission or Conference.

The Ministers completed their draft Constitutional Scheme in February 1944, but withdrew it in August, owing to a difference of opinion with His Majesty's Government with regard to the scope of the terms of the Commission or Conference.[33] His Majesty's Government had in a statement made on 5 July 1944 announced their decision to appoint a Commission to examine the Ministers' proposals and their intention that the appointment "should provide full opportunity for consultation to take place with various interests including minority communities concerned with the subject of constitutional reform in Ceylon and with proposals which the Ministers had formulated".[34] The Ministers, while welcoming the decision to consider their draft constitutional scheme, took the view that the terms of reference enabling the Commission to consult various interests was "a fundamental departure from the Declaration of 1943", in that it stipulated that the acceptance of the scheme was subject only to the conditions laid down by the Declaration.

Soulbury Constitution. Notwithstanding the withdrawal of the Ministers' Scheme[35], His Majesty's Government proceeded to appoint a

33. *Ceylon Sessional Paper* XII of 1944.
34. *Ibid.*
35. *Sessional Paper* XIV of 1944.

Commission with Lord Soulbury as Chairman. The other members of the Commission were Mr. J.F. Rees, Vice-Chancellor of the University of Wales, and Mr. F. J. Burrows, President of the National Union of Railwaymen. According to the terms of reference, the Commission was requested to examine and discuss any proposals for constitutional reform in the Island which had the object of giving effect to the Declaration of His Majesty's Government on that subject; and, after consultation with various interests in the Island, including minority communities, concerned with the subject of constitutional reform, to advise His Majesty's Government on all measures necessary to attain that object.

The Soulbury Commission visited Ceylon from 22 December 1944 to 9 April 1945 and travelled throughout the Island. None of the Ministers gave evidence before the Commission. But, as the Soulbury Commission has pointed out in their Report, Mr. D. S. Senanayake "had an opportunity of expressing his views (to the Commission) in a series of most valuable discussions"[36]. The National Congress, the Sinhala Maha Sabha and the Communist Party did not co-operate with, nor give evidence before, the Commission. The LSSP had been proscribed from 1942. Those political organisations whose representatives gave evidence included the All Ceylon Tamil Congress, Ceylon Muslim League, All Ceylon Muslim Political Conference, Ceylon Moors Association, Ceylon Indian Congress, All Ceylon Malay Congress, Kandyan National Assembly, Burgher Political Association, European Association and the Lanka Mahajana Sabha.

The All Ceylon Tamil Congress, which had been founded by Mr. G. G. Ponnambalam in December 1944, submitted a scheme for "balanced representation", which, according to the proposal, "would avoid the danger of concentration of power in one community but would ensure its equitable distribution among all communities and the people as a whole". This had come to be known as the "Fifty Fifty" demand.

The Report of the Soulbury Commission was published on 9 October 1945. By that time the State Council had already passed the Sri Lanka Bill which framed a Constitution on Dominion lines for Ceylon. The

36. *Ceylon: Report of the (Soulbury) Commission on Constitutional Reform* (1945) Cmd. 6677, p. 4.

main recommendations of the Soulbury Commission were as follows: (1) The Executive Government would consist of a Governor-General with the reserve powers set out in the 1943 Declaration, and a Cabinet of Ministers. (2) The Legislature would consist of the Governor-General and two Houses, called the Senate and the House of Representatives. The Senate would consist of 30 members, of whom 15 would be elected by the House of Representatives and 15 nominated by the Governor-General. The House of Representatives would consist of 95 members elected on universal adult suffrage, with six members nominated by the Governor General. (3) The Cabinet of Ministers would be responsible to the Legislature. The Prime Minister would be appointed by the Governor General and would hold the portfolios of External Affairs and Defence. (4) The powers of appointment, promotion, transfer, dismissal and disciplinary control of public officers would be vested in a Public Service Commission. (5) There would be a Judiciary in which the Chief Justice and Judges of the Supreme Court would be appointed by the Governor-General, with a Judicial Service Commission in which would be vested the powers of appointment, promotion, transfer, dismissal and disciplinary control of all judicial officers. (6) Apart from the proposals for a Second Chamber and for the Public Service Commission, what was claimed as a further safeguard for minority communities was recommended by the Soulbury Commission. The Order in Council embodying the new Constitution would provide that the Ceylon Parliament "shall not make any law to prohibit or restrict the free exercise of any religion; or to alter the constitution of any religious body except at the request of the governing authority of that body". The Constitution would further provide that Parliament "shall not make any law rendering persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable, or confer upon persons of any community or religion any privileges or advantages which are not conferred on persons of other communities or religions".

The principal public reaction to the Soulbury recommendations was that the retention by His Majesty's Government of such extensive reserved powers, especially in regard to defence and external affairs was no longer necessary and hence that Ceylon should be advanced immediately to the status of a Dominion. In a White Paper, embodying the decisions of the British Government, issued on 31 October 1945, that Government stated that they were in sympathy with the desire of the people of Ceylon to advance towards Dominion Status but hoped that the Soulbury Consti-

tution would be accepted and so worked that in a short space of time Dominion Status would be evolved.

The White Paper went on to state that the main features of the Constitution under which Ceylon would be governed during this period would follow the general lines of the recommendation of the Soulbury Commission, with the following principal modifications:

(*a*) Life of the Upper House.—The provisions as regards the life of the Upper House would be changed so that one-third of the membership would retire after two years, and a further third after four years, the arrangements proposed by the Soulbury Commission being followed for their replacement.

(*b*) Reserved Powers of the Governor.—In place of the recommendations of the Soulbury Commission that the Governor should be empowered to enact special Ordinances dealing with Defence and External Affairs, His Majesty's Government would retain the power to legislate for Ceylon by Order in Council.

(*c*) Breakdown of the Constitution.—Any contingency arising in this respect would be covered by the general power of His Majesty's Government to legislate for Ceylon by Order in Council which would include, if necessary, suspension of the Constitution.

(*d*) Shipping.—The Ceylon Government would be empowered to establish and regulate shipping services, both coastal and overseas, provided no action was taken without the concurrence of His Majesty's Government in the United Kingdom, which might be interpreted as subjecting the shipping of other members of the Commonwealth to differential treatment.

(*e*) Public Services.—The period of exercise of the right of retirement of certain classes of officers specified in paragraph 372 (ii) of the Soulbury Report would be reduced from three to two years from the date of the first meeting of Parliament under the new Constitution; and the exercise of the special right of retirement with compensation for loss of career would not extend to officers appointed to the Public Services on agreement for a limited period of years.

In November 1945 the State Council accepted by 51 votes to 3 the following motion moved by Mr. D. S. Senanayake: "This House expresses its disappointment that His Majesty's Government have deferred the admission of Ceylon to full Dominion Status but in view of the assurance contained in the White Paper of October 31, 1945 that His Majesty's Government will co-operate with the People of Ceylon so that such status may be attained by this country in a comparatively short time, this House resolves that the Constitution offered in the said White Paper be accepted during the interim period". An Order in Council was issued on 15 May 1946 embodying the new Constitution based on the Soulbury recommendations as modified by the White Paper.

In order to meet the demand of a Party system under the Cabinet form of government which was established by the Soulbury Constitution, a new Party called the United National Party was formed in September 1946 under the leadership of Mr. D. S. Senanayake. The U.N.P. as the Party came to be known, absorbed most of the members of the Ceylon National Congress which had for a long period spearheaded Ceylon's struggle for political freedom. After some initial hesitation, the Sinhala Maha Sabha, under the leadership of Mr. S. W. R. D. Bandaranaike, also joined the U.N.P. The Sinhala Maha Sabha retained its separate identity within the UNP, which according to Mr. Bandaranaike was "a coalition party" formed "for government purposes".[37] The other organisations that joined the UNP were the All Ceylon Muslim League and the Moors' Association. In origin, therefore, the UNP was not planned and conceived as a rigid political Party wedded to any particular ideology.

After the termination of the war, the legal ban against the LSSP was removed. But soon afterwards differences within the Party caused it to split again. The group which came to be led by Dr. Colvin R. de Silva called itself the Bolshevik-Leninist Party (B.L.P.), while the other led by Dr. N. M. Perera and Mr. Philip Gunawardena continued to be known as the Lanka Sama Samaja Party. The All-Ceylon Tamil Congress, the Ceylon Indian Congress (which represented the 'Indian' estate workers) and the three Marxist parties (the Lanka Sama Samaja Party, the Bolshevik-Leninist Party and the Communist Party) remained opposed to the U.N.P.

37. S. W. R. D. Bandaranaike, *Speeches and Writings*, p. 114.

At the general election to the first Parliament under the Soulbury Constitution, which was held in 1947, the United National Party obtained 42 seats, Independents 21 seats, Lanka Sama Samaja Party 10 seats, Tamil Congress 7 seats, Ceylon Indian Congress 6 seats, Bolshevik-Leninist Party 5 seats, Communist Party 3 seats and Labour Party 1 seat. Twelve of the independent members, the Labour Party member as well as the six Appointed members supported the Government which was formed by Mr. D. S. Senanayake. The Cabinet was composed of 14 Ministers, of whom 11 were from the United National Party, 2 were independents and the other was the Labour Party member. The two independents, Messrs. C. Suntheralingam and C. S. Sittampalam, were taken into the Cabinet with the intention of giving it a national appearance as well as of increasing its supporters in Parliament.

"Fully Responsible Status." On 18 June 1947 a declaration was made in the House of Commons of the United Kingdom by the Secretary of State and in the State Council of Ceylon by the Governor that as soon as the necessary Agreements had been negotiated and concluded on terms satisfactory to the Governments of the United Kingdom and Ceylon, immediate steps would be taken "to confer upon Ceylon fully responsible status within the British Commonwealth of Nations". According to the Memorandum of the Prime Minister (Mr. D. S. Senanayake) which was published on 14 November 1947 it had been agreed that five documents were needed to bring this status into operation[38]:

(1) An Act of Parliament of the United Kingdom, which was later passed as the Ceylon Independence Act, 1947, (a) to confer on the Ceylon Parliament full legislative powers as were conferred on the older Dominions under the Statute of Westminster, (b) to deprive the Government of the United Kingdom of responsibility for the Government of Ceylon and (c) to make consequential amendments to Imperial legislation relating to such matters as armed forces, naturalization, divorce, shipping and copyright, in order to give Ceylon the same status in the British Commonwealth as the other Dominions.

(2) An Order in Council, later called the Ceylon Independence Order in Council, 1947, to remove the limitations on fully responsible status contained in the Ceylon (Constitution) Order in Council, 1946.

38. *Sessional Paper* XXII of 1947.

The chief alterations were to be (a) In place of the Governor there would be a Governor-General who in the exercise of his powers and functions would as far as possible act in accordance with British conventions applicable to His Majesty; (b) The powers reserved to His Majesty to make laws for Ceylon in matters relating to Defence and External Affairs and to amend and revoke the Order in Council were to be abolished; (c) The provisions for reservations of Bills for His Majesty's Pleasure would be revoked.

(3) A Defence Agreement between the two Governments to provide for the taking of any necessary measures for the defence of Ceylon as might be mutually agreed.

(4) An External Affairs Agreement regulating certain matters relating to external affairs and giving Ceylon the international status possessed by the Dominions.

(5) A Public Officers' Agreement transferring to the Government of Ceylon the responsibilities previously vested in the Government of the United Kingdom in respect of public officers who had been appointed with the approval of the Secretary of State for the Colonies or who had entered into agreements with the Crown Agents for the Colonies.

These Agreements were signed on 11 November 1947. The Governor signed on behalf of the Government of the United Kingdom and Mr. D. S. Senanayake signed on behalf of the Government of Ceylon. These steps which had been taken by the Government were approved by the House of Representatives and the Senate. The Ceylon Independence Act received the Royal Assent on 10 December 1947 and the five documents took effect on 4 February 1948.

The constitutional position in Ceylon from 4 February 1948 was therefore that under the Ceylon Independence Act, 1947, all authority of the United Kingdom Parliament to legislate for Ceylon ceased except at the request and with the consent of Ceylon. Under that Act Her Majesty's Government in the United Kingdom ceased from 4 February 1948 to have responsibility for the government of Ceylon. From that date Ceylon was an "autonomous community" in the Commonwealth. The Ceylon Independence Act in effect severed the legal links which had bound Ceylon to the British Parliament and Government. The Colonial

Laws Validity Act, 1865, ceased to apply to any law made by the Parliament of Ceylon and no such law was void or inoperative on the ground of repugnancy to the laws of England or to any existing or future Act of Parliament of the United Kingdom. The Colonial Laws Validity Act (section 5) had provided (*inter alia*) that laws respecting the Constitution of a colony should be passed in such manner and form as may be required by any Act of Parliament, Letters Patent, Order in Council or colonial law in force in the colony.

So far as the legislative powers of Her Majesty in Council were concerned, the Ceylon (Independence) Order in Council, 1947, expressly provided for their cessation. After the enactment of the Independence Act and the Independence Order in Council the Courts accepted and recognised the Constitution which was contained in the Ceylon (Constitution) Order in Council as the supreme law in Ceylon.[39] The Courts also took the view that the Independence Act did not enlarge the area of the powers of the Ceylon Parliament under the Constitution so as to include the power to amend the Constitution notwithstanding the requirements of section 29 (4). The proviso of this subsection stated: "No Bill for the amendment or repeal of any of the provisions of the Constitution Order in Council shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present). In the absence of express provision in the Constitution, the Courts assumed the power of judicial review of the constitutionality of laws passed by Parliament. Constitutional amendments had to be passed in the particular manner required by the subsection. Any purported amendment in violation of that sub-section was held by the Courts to be *ultra vires* and invalid.[40]

Since by the Ceylon Independence Act and the Ceylon Independence Order in Council the power to make laws was renounced by Britain, the Parliament of Ceylon was the body that was vested with the power to

39. See Cooray, *Constitutional Government and Human Rights in a Developing Society* (1969), p. 7.
40. *Thamblayah* v *Kulasingham* (1948) 50 N. L. R. 25; *Kodakan Pillai* v *Mudanayake* (1953) 54 N.L.R. 433; *The Bribery Commissioner* v *Ranasinghe* (1964) 66 N.L.R. 73; *Liyanage and others* v *The Queen* (1965) 68 N.L.R. 265.

make laws having force in Ceylon. This power was, as already stated, subject to the procedural requirements contained in section 29 (4) of the Constitution. If a view which had been expressed *obiter* by the Privy Council was correct, the power was also subject to the substantive limitations contained in section 29 (2).

Section 29 (2) stated that no law passed by Parliament "shall (a) prohibit or restrict the free exercise of any religion; or (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or (d) alter the constitution of any religious body except with the consent of the governing authority of that body: Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body". Section 29 (3) provided that any law made in contravention of section 29 (2) was, to the extent of such contravention, void. According to the view referred to earlier, section 29 (2) of the Constitution Order in Council "represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they had accepted the Constitution and it was therefore unalterable under the Constitution."[41] At the same time, after the enactment of the Ceylon Independance Act, the Ceylon Parliament, as the Privy Council stated in *Ibralebbe* v *The Queen*,[42] was not "in any sense a subordinate legislature" but had "the full legislative powers of a sovereign independent State".

Government under the Soulbury Constitution. Although Mr. D. S. Senanayake's Cabinet was to some extent a coalition and the United National Party itself had only 42 of the 95 elected seats, the Government was nevertheless strong and stable. This was due, in large measure, to Mr. Senanayake's political sagacity and to the enormous prestige which he enjoyed among his colleagues. He was able to enforce strict discipline in his Cabinet. When Mr. Suntheralingam, the Minister of Commerce and Trade, abstained from voting on the Indian and Pakistani Residents (Citizenship) Bill in December 1948, Mr. Senanayake called for his resignation which was immediately tendered.

41. *The Bribery Commissioner* v *Ranasinghe* (1964) 66 N.L.R. 73, at p. 78.
42. (1963) 65 N.L.R. 433, at p. 443.

The Indian and Pakistani Residents (Citizenship) Bill, which provided for the grant of citizenship, and hence the franchise, to Indian and Pakistani residents only on proof of a special residential qualification, was at least partly responsible for a split within the Tamil Congress. Mr. G. G. Ponnambalam accepted a Ministerial portfolio from Mr. Senanayake and with 3 other Tamil Congress members of Parliament crossed over to the Government side. Mr. S. J. V. Chelvanayakam and two other members of the Party remained in the Opposition and in 1949 formed the Federal Party. Its aim was the attainment of a federal system of government under which the "Tamil-speaking areas" would enjoy regional autonomy.

In 1951 Mr. Senanayake's Government and the United National Party suffered a serious loss when Mr. S. W. R. D. Bandaranaike resigned from the Cabinet and with five other members of Parliament crossed the floor of the House into the Opposition. Mr. Bandaranaike had been the Leader of the House and the Minister of Health and Local Government but for some time had been giving expression to the view that the Government was not pursuing a sufficiently radical economic and social policy although he had been pressing for such a policy. Shortly after his resignation from the UNP, Mr. Bandaranaike founded the Sri Lanka Freedom Party. At the first annual conference of the Party held in 1952, Mr. Bandaranaike said that "the appearance of the Party did a great service to the cause of democracy in this country by providing a democratic alternative to the Party in power, and by affording the people who, while being dissatisfied with the policies and programs of the Government, wished to make a change that was neither revolutionary nor extreme, the opportunity of doing so".

After the death of Mr. D. S. Senanayake on 22 March 1952, Mr. Dudley Senanayake succeeded him as Prime Minister. He advised a dissolution of Parliament shortly afterwards and a general election took place in May 1952. The election was fought more on Party lines than the 1947 election. The Bolshevik-Leninist Party had previously merged with the Lanka Sama Samaja Party but the Opposition had continued to suffer a disadvantage in that the "anti-Government" vote was divided among several Parties. The position resulting from the election was that the UNP led by the younger Senanayake won no. less than 54 of the 100 seats, while the SLFP and the LSSP had to be content

with 9 seats each. Together with its allies the Government Party mustered 74 seats as against the 26 seats of the Opposition

The Prime Minister, Mr. Dudley Senanayake, resigned in October 1953. Earlier there had been a declaration of a state of emergency following a *hartal* or stoppage of work which had been called in protest against the reduction of the subsidy on the rice ration. Sir John Kotelawala who was Leader of the House, became the new Prime Minister.

In 1955 the Sri Lanka Freedom Party changed its language policy and declared that Sinhala should be the only official language. Although the United National Party followed suit in February 1956, Sir John's promise made in Jaffna a year and a half earlier that the Constitution would be amended to provide for parity for Sinhala and Tamil was used against him by his opponents in the Sinhalese areas. A writer who was close to the Prime Minister has stated that the change in the language policy of the United National Party was expected to "spike the guns of the SLFP Opposition".[43] In the same month the Sri Lanka Freedom Party under the leadership of Mr. Bandaranaike formed a coalition, namely the *Mahajana Eksath* Peramuna(People's United Front), with two groups which were among the pioneers of the "Sinhala only" movement. These groups were the Viplavakari Lanka Sama Samaja Party (VLSSP) which had split away from the LSSP and was led by Mr. Philip Gunawardena and the Bhasha Peramuna (Language Front). Some independents who had championed "Sinhala only" also joined the coalition of Mr. Bandaranaike.

The groups that formed the Mahajana Eksath Peramuna concentrated their attention on the Sinhalese masses and more particularly on the rural intelligentsia who had hitherto been considered relatively unimportant in the field of government activities. Naturally, this agitation of the Mahajana Eksath Peramuna for a revival of the religious and cultural values of the Sinhalese made a considerable appeal especially to the leaders of the village, such as Buddhist monks, Sinhala teachers, Ayurvedic physicians and petty traders. This revivalist movement sought in some ways to rekindle the earlier movement for the regeneration of these values which had been carried on by men like Anagarika Dharmapala, Piyadasa Sirisena and John de Silva.

43. J. L. Fernando, *Three Prime Ministers of Ceylon* (1963), p. 85.

In order to prevent the splitting of the 'anti-UNP vote' Mr. Bandaranaike entered into "no-contest pacts" with the Lanka Sama Samaja Party and the Communist Party. It has been aptly pointed out that"the opponents of the UNP had heeded the lesson of 1952—the necessity of understanding the strategic value of offering the voter the fewest possible choices in matters involving even the most rudimentary political principles and of appealing to him emotionally".[44]

In February 1956 the UNP decided on a general election and the Prime Minister requested the Governor-General to grant him an immediate dissolution of Parliament. On the major issue of the official language, although both the UNP and the MEP had adopted Sinhala, the question before the Sinhala voter had tended to become, which of the two Parties was the more determined in the implementation of this policy.[45]

The election of April 1956 resulted in a major victory for the Mahajana Eksath Peramuna, which obtained 51 seats over the United National Party, which was able to secure only 8 seats as against 56 which it previously held as the Government in power. The Lanka Sama Samaja Party won 14 seats, while the Federal Party succeeded in winning 10 out of the 14 seats it contested.[46] When the results were finally announced, Sir John Kotelawala resigned although some had earlier expressed fears that he would not do so. There followed a peaceful transfer of power to the new Government. As a result, the people's belief in the Party system and in the free choice of the rulers was considerably strengthened.

In accordance with the election manifesto of the Mahajana Eksath Peramuna, there was enacted in June 1956 the Official Language Act which prescribed the Sinhala language as the one official language of Ceylon. This so-called "Sinhala Only Act" led to communal tensions which culminated in 1958 in a wave of violence and in a declaration of a state of emergency. The official language controversy[47] continued notwithstanding the enactment of the Tamil Language (Special Provisions) Act of 1958. This Act provided for Tamil as a medium of instruction and

44. E. F. C. Ludowyk, *The Modern History of Ceylon* (1966), p. 240.
45. See I. D. S. Weerawardena, *Ceylon General Election, 1956*, p 104.
46. For a detailed examination of the 1956 election, see Weerawardena, *Ceylon General Election, 1956.*
47. For an excellent study of the official language controversy, see Robert N. Kearney, *Communalism and Language in the Politics of Ceylon* (1967).

of examination for admission to the Public Service and also for "prescribed administrative purposes" in the Northern and Eastern Provinces, "without prejudice to the use of the official language of Ceylon"

Towards Revision of the Soulbury Constitution. In July 1956 Mr. Bandaranaike, as Prime Minister, informed the other Governments of the Commonwealth of Ceylon's intention to become a republic while remaining a member of the Commonwealth. As in the case of India in April 1949 and of Pakistan in February 1955, those Governments expressed agreement with this proposal. A republic within the Commonwealth ceases to owe an allegiance to the Crown but accepts the Queen as the symbol of the free association of the independent member nations of the Commonwealth and as such as the Head of the Commonwealth. These nations "remain united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace, liberty and progress". On 26 April 1957, the Prime Minister (Mr. Bandaranaike) introduced in the House of Representatives the motion (which was later passed) that a Joint Select Committee of the House of Representatives and the Senate should be appointed to consider the revision of the Ceylon (Constitution) Order in Council, with reference to the following among such other matters as the Committee might consider necessary: (1) the establishment of a Republic; (2) the guaranteeing of fundamental rights; (3) the position of the Senate and Appointed members of the House of Representatives; and (4) the Public Service Commission and the Judicial Service Commission.

There was general agreement among all political Parties that Ceylon should become a republic. There was also a large measure of agreement on the necessity for the incorporation of fundamental human rights in the new republican Constitution.

So far as the institutions of government themselves were concerned, two had been under particularly heavy attack by critics of the Constitution. They were the Senate and the Public Service Commission. In recommending a Senate, the Soulbury Commission believed that it could make a valuable contribution to the political education of the general public. The Commission stated that there were a number of eminent individuals of high educational and intellectual attainments and possessing notable professional or administrative qualifications and a wide experience of affairs who were averse to entering political life through

the hurly-burly of a Parliamentary election. The Commission considered that it would be an advantage to the country to enjoy the services of men upon whom Party or communal ties rested more lightly and who could express their views freely and frankly without feeling themselves constrained to consider the possible repercussions upon their electoral prospects.

From the inception of the Senate, however, its members continued to be selected not so much on the basis of merit as on service rendered to the Party in power. There was a large body of opinion to the effect that the Senate had not realised the aspirations of the Soulbury Commission and that its record of work had been unsatisfactory. Criticism had been made on the ground that there had been far too little of the careful and efficient scrutiny or the mature discussion of legislative measures that one was inclined to expect of a revising Chamber. The occasions on which its debates had reached a high standard, free from Party politics, had been relatively few and far between. In other words, according to its critics it had to a large extent failed to perform the functions generally associated with a non-Party revising Chamber.[48]

The Public Service Commission was the other institution which had come in for considerable criticism. Under the Soulbury Constitution as already pointed out, the appointment, transfer, dismissal and disciplinary control of public officers were vested in the Commission. The difficulty that had arisen was mainly the result of having hitched an independent Public Service Commission on to a Constitution that had to be worked on the principle of ministerial responsibility. In fact, the tragedy of the Public Service Commission was that under the Constitution it was expected, like Janus, to face both ways at the same time—in the direction of public service independence from ministerial control over appointments, transfers, dismissals and disciplinary control, as well as in the opposite direction, giving effect to the principle of ministerial responsibility to Parliament for the acts of the public service. There had been, as a result, criticism of the PSC, on the one hand, on the ground that it had yielded to ministerial and political pressures that had been applied by successive Governments in power. On the other hand, Ministers had maintained that it was unfair to hold them responsible for the acts

48. See J. A. L. Cooray, *Revision of the Constitution* (1957), pp. 9-12.

of public servants when the control over them was vested in an independent Public Service Commission[49].

The Joint Select Committe on the Revision of the Constitution held several meetings with Mr. Bandaranaike in the Chair. The Minutes of the Committee's proceedings of 16 January 1959 published in its second Report state (*inter alia*) that "the Committee considered and provisionally accepted the principle of establishing a Republic; the question of Ceylon remaining within the Commonwealth was discussed, and the general feeling was that no adequate grounds existed for Ceylon to leave the Commonwealth. In any case the question will only arise after Ceylon has been declared to be a Republic". On 6 February 1959 the Committee arrived at the following general conclusions: (1) The President of the Republic should be a constitutional Head of State; (2) He should be appointed by the members of the Legislature; (3) The Vice-President should be appointed in the same manner as the President; (4) 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; (5) The system of Appointed Members was undesirable and unnecessary. The Committee were also "generally of the view that it would be useful at that 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."

On 5 March 1959 the Committee again considered the question of Fundamental Rights[50]. The following rights "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 (ii) Protection of life and personal liberty, of which no person shall be deprived except according to procedure established by law (iii) Right to freedom of speech and expression (iv) Right to assemble peaceably and without arms (v) Right to form associations or unions. The Rights (ii) to (v) were 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,

49. *Ibid.*, pp. 13-15.
50. See Report (Parliamentary Series), Minutes of 10th Meeting and the Memorandum submitted by Senator E. J. Cooray.

own and dispose of property according to law and the right not to be dispossessed of property save by authority of law; (iii) Right to reside and carry on any lawful occupation, trade or profession in any part of the territory of Ceylon. (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.

After the death of Mr. Bandaranaike on 26 September 1959, Mr. W. Dahanayake was appointed Prime Minister. At the general election which followed in March 1960 the United National Party, which won fifty seats against the Sri Lanka Freedom Party's forty-six, formed a minority Government which was defeated when it faced Parliament. In the ensuing election of July 1960 the Sri Lanka Freedom Party entered into a "no-contest pact" with the Lanka Sama Samaja Party and the Communist Party. The election resulted in a major victory for the Sri Lanka Freedom Party led by Mrs. Sirimavo Bandaranaike, which secured seventy-five seats, while the United National Party won only thirty. Twelve members of the Lanka Sama Samaja Party and four of the Communist Party were also elected to the House. Like the earlier elections and those that followed, the July 1960 election showed the growing tendency towards a polarisation round two main political Parties.

Towards constitutional autochthony. The proposal to establish a republican Constitution by an amendment or revision of the previously existing Constitution Order in Council evoked considerable criticism on

the ground that what was wanted was a complete legal break with the past. The question had earlier been asked, whether in the exercise of the power of Parliament under section 29 (4) of that Constitution to amend or repeal any of its provisions Parliament could legally replace the Queen who was not only the source from which that Constitution derived its legal authority but also a constituent part of Parliament?[51] It was also suggested that a way out of this difficult and doubtful position was the establishment of a Constituent Assembly for the adoption of a republican Constitution.[52] There was also the advantage that the establishment of such an Assembly after a deliberate break in legal continuity or a legal revolution would result in the Constitution it adopted being entirely home-derived or "autochthonous".

A further complication arose in 1964 as a result of a view already referred to, which had been expressed by Lord Pearce in the Privy Council in *Bribery Commissioner* v *Ranasinghe*[53] regarding section 29 (2). This sub-section made void laws prohibiting or restricting the free exercise of any religion or dealing with racial and religious matters specified in the section. Lord Pearce had said that these clauses were "unalterable under the Constitution". This statement, although it was made *obiter*, was the subject of much discussion and concern both in political and legal circles in Ceylon.

At the general election of 22 March 1965, the United National Party secured the largest number of seats with the return of sixty-six of its members. The Sri Lanka Freedom Party came next with forty-one seats. Among the other parties, the Federal Party secured fourteen seats, the Lanka Sama Samaja Party ten seats, Sri Lanka Freedom Socialist Party five seats, Communist Party four seats and the Tamil Congress three seats. 82.1 per cent of the voters exercised their franchise whereas in the March and July 1960 elections the percentage had been 77.6 and 75.6 respectively. The Federal Party, the Sri Lanka Freedom Socialist Party and the Tamil Congress supported the United National Party with the result that it formed a coalition Government with a stable majority.

51. See Cooray, *Revision of the Constitution* (1957), pp. 16-17.
52. *Ibid.*
53. (1964) 66 N.L.R. 73, at p. 78.

Mr. Dudley Senanayake's Government which assumed power on 27 March 1965 took steps to re-establish the Joint Select Committee of Parliament, in order to revise the Constitution and provide for a republic, on terms of reference which were identical with those adopted by previous Governments. The Opposition Parties, however, refused to participate in its proceedings on the ground that it was necessary to have a new Constitution adopted by a Constituent Assembly. These Parties referred also to the statement made by the Privy Council in 1964 in *Ranasinghe's* case that section 29 (2) was entrenched and unalterable under that Constitution[54].

54. See the statement of Mr. Maithripala Senanayake, Leader of the National State Assembly, in *Ceylon Daily News*, 26 September 1972.

CHAPTER 3

THE CONSTITUENT ASSEMBLY AND THE MAKING OF THE REPUBLICAN CONSTITUTION

The framers of the Constitution, while providing for a republic, wanted an "autochthonous" or "home-grown" Constitution.[1] Their object was to effect a legal revolution or a break in legal continuity with the previous order. In other words, the Constitution was intended by its makers to owe its force of law entirely to the people of Sri Lanka and not to be derived from the previous Constitution which was enacted by the King in Council at the Court at Buckingham Palace in London, nor from the Ceylon Independence Act enacted by the British Parliament. The method adopted for the establishment of such an autochthonous Constitution was its enactment by a Constituent Assembly deriving its powers and authority from the people. Although this Assembly was composed of the members of the House of Representatives, it did not function as the House of Representatives of the previous Constitution. Following a resolution adopted at a meeting of members, it functioned solely as the Constituent Assembly of the people of Sri Lanka for the purpose of adopting a Constitution for this country.

Request for a Mandate. Before the general election of 27 May 1970, as already pointed out, the Sri Lanka Freedom Party, the Lanka Sama Samaja Party and the Communist Party entered into an electoral agreement and issued a joint election manifesto, which stated:

"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

1. For a learned discussion of autochthony in relation to Constitutions of the Commonwealth, see K. C. Wheare, "*The Constitutional Structure of the Commonwealth*" (1960), pp. 89-113; Kenneth Robinson, "Constitutional Autochthony in Ghana" 1 *Journal of Commonwealth Political Studies* 41.

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."

At the election the Parties forming the United Front won a sweeping victory, with 91 seats for the Sri Lanka Freedom Party alone against the 17 obtained by the United National Party and the Federal Party's 13 seats. The Tamil Congress obtained 3 seats and the Independents won 2 seats. Along with the Lanka Sama Samaja Party's 19 seats and the Communist Party's 6, the United Front Coalition secured 115 seats, thus obtaining over two-thirds of the 157 seats in the House of Representatives. So far as the number of seats were concerned, and not the actual votes cast for the United Front as against the United National Party at the election, this was an unprecedented election victory. Another remarkable fact was that out of the total electorate, 84.9 per cent of the voters exercised their franchise. With regard to the break-up of the votes, out of the total number of votes polled, namely 4,949,616, the United Front Parties received 2,415,302 while the United National Party and the Mahajana Eksath Peramuna, who were allies in the previous Government at the time of the dissolution of Parliament, secured 1,876,956 and 46,571 votes respectively.

Communication to Members. In a communication dated 11 July 1970, which was addressed to each of the 157 members of the House of Representatives, the Prime Minister convened a meeting of the members for 19 July 1970 at the Navarangahala, Colombo, for the purpose of considering and adopting a resolution constituting themselves the Constituent Assembly of the people of Sri Lanka. The communication was as follows.

"Office of the Prime Minister,
Senate Square,
Colombo 1.
11 July, 1970.

CONSTITUENT ASSEMBLY

WHEREAS in the Address by His Excellency the Governor-General at the opening of the First Session of the Seventh Parliament of Ceylon on the 14th day of June 1970 His Excellency addressing "Honourable Members of the House of Representatives" stated as follows:—

"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. In terms of this mandate, 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".

AND WHEREAS the House of Representatives on the 24th day of June 1970 did present to His Excellency the Governor-General the following Resolution which was passed without division by the House on that date:—

"May it please Your Excellency.
We the members of the House of Representatives thank Your Excellency for the speech with which you have been pleased to open Parliament. We assure Your Excellency that we shall give our attention to all matters placed before us".;

NOW THEREFORE, I, Sirimavo Ratwatte Dias Bandaranaike, Prime Minister, do hereby call upon you.....Member of Parliament, to attend a Meeting of the Members of the House of Representatives at the Navarangahala, Royal Junior School, Colombo on the 19th day of July at 11.00 a.m. to consider and adopt the following Resolution:—

RESOLUTION

We the Members of the House of Representatives in pursuance of the mandate given by the People of Sri Lanka at the General Election held on the 27th day of May 1970 do hereby resolve to constitute declare and proclaim ourselves the Constituent Assembly of the People of Sri Lanka for the purpose of adopting enacting and establishing a Constitution for Sri Lanka which will declare Sri Lanka to be a free sovereign and independent Republic pledged to realise the objectives of a socialist democracy including the fundamental rights and freedoms of all citizens and which will become the fundamental law of Sri Lanka deriving 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 and do accordingly constitute declare and proclaim ourselves the Constituent Assembly of the People of Sri Lanka and being so constituted appoint the 29th day of June at 10.00 a.m. as the date and time when the Constituent Assembly shall next meet in the chamber of the House of Representatives for carrying out the said mandate under the Presidentship of Wanniarachige Don Stanley Tillekeratne M.P. or in his absence of Ibrahim Adham Abdul Cader M.P. and to consider business introduced by or on behalf of the Minister of Constitutional Affairs.

(*Signed*) SIRIMAVO R. D. BANDARANAIKE,
Prime Minister".

At a Press Conference held on the 13 July 1970, the Minister of Constitutional Affairs, Dr. Colvin R. de Silva, stated that the coming into being of the Constituent Assembly on 19 July 1970 would be a historic occasion. "This is not an attempt", said Dr. de Silva, "to create a new superstructure on an old foundation. We are setting out on the task of laying an entirely new foundation for which the people of this country gave us a mandate at the last General Election". Dr. de Silva went on to criticise a statement to the Press made by Mr. S. J. V. Chelvanayakam, the leader of the Federal Party, to the effect that the verdict of the people at the previous general election could not be equated to a decision at a plebiscite on an issue because the people were not called upon to vote exclusively on constitutional reforms and that therefore the claim of the Government that the people had given it a mandate to make the House of Representatives into a Constituent Assembly to draft and adopt a new Constitution was "illegal and unconstitutional". The Minister stated that it was noteworthy that the Governor-General's Speech from the Throne which incorporated the election pledge of the United Front to convene a Constituent Assembly to adopt a new Constitution was passed by the House of Representatives without a division. The Minister took the opportunity to state also that there would be a Drafting Committee to give legal shape to decisions taken by the appropriate authorities with regard to the various constitutional proposals.

The Prime Minister in a broadcast over the Radio on 15 July 1970 referred to the "clear mandate" given at the previous general election,

the "solemn undertaking" given by the Government in the Throne Speech and her communication of 11 July to every member of the House of Representatives, and said:

".....It is your unchallengeable right to set up a Constituent Assembly of our own, chosen by us and set up by us as a free, sovereign and independent people who have finally and for ever shaken off the shackles of colonial subjection.

"In your name I call upon every member of the House of Representatives to attend the meeting and thereby to enter upon the onerous and responsible task entrusted to them by you. I should like to remind you on this occasion that the Constituent Assembly is the historic means of a free, sovereign and independent people for giving themselves a Constitution. A free people require a Constitution drafted while drawing the breath of freedom. Only a sovereign people can create a Constitution which genuinely expresses their own sovereignty. Only an independent people can be sovereign. Thus the drafting and the adoption of the Constitution by a Constituent Assembly of our own will be an expression of the freedom, sovereignty and independence of our country.....

"I would also like to remind you that the Constitution which a nation such as ours gives itself must be adequate for a twofold task. In a multi-racial and multi-religious nation such as ours it has to be the instrument of the development of the nation itself. It must 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. Again, in the case of a nation which is still engaged in the struggle to complete its independence, as ours is, the Constitution must also be an instrument in the hands of the Nation for the fulfilment of its cherished aims. It must be a Constitution which enables us to go forward to the socialist democracy to realise which we have pledged ourselves".

Meeting of Members: In response to the communication of the Prime Minister the members of the House of Representatives met on 19 July 1970 at the Navarangahala. The ceremonial followed was in many respects different from that associated with the formal occasions connected

with the meetings of Parliament. The 1,700 invitees who were present in the Hall included also the chairmen of Village Councils and representatives of workers and peasants. After the Minister of Constitutional Affairs at the invitation of the Prime Minister had read the communication convening the meeting, the Prime Minister proposed that Mr. Stanley Tillekeratne take the Chair. The Leader of the Opposition (Mr. J. R. Jayewardene) seconded the proposal. Mr. Tillekeratne did not wear the wig and gown as he did when he presided as Speaker in the House of Representatives. Nor was any Mace placed on the Table. The reason was that this was not a meeting of the House of Representatives although it was a meeting of its members. After the passing of similar resolutions appointing the Deputy Chairman (Mr. I. A. Cader) and the Secretary Mr. Walter Jayawardene) and the adoption of the rules of procedure, the Prime Minister moved the resolution to set up the Constituent Assembly.

Addressing the Chairman and members of the House of Representatives, the Prime Minister stated[2] that she had called upon them to assemble there in the name of the People of Sri Lanka. She said that they had met in that Hall to emphasize the fact that this was "a meeting of the members of the House of Representatives, but not a meeting of the House of Representatives". She said that they had adopted that course "to underline the fact that both the Constituent Assembly which they had met to establish and the Constitution which the Constituent Assembly will draft, enact and establish will derive their authority from the People of Sri Lanka and not from the power and authority assumed and exercised by the British Crown and Parliament in establishing the present Constitution of Ceylon nor from the Constitution they gave us".

After referring to the election manifesto of the United Front and the Governor-General's Address on the 14 June 1970, the Prime Minister said:

"The House of Representatives on the 24 June 1970 passed without division the Resolution proposed in response to the Governor-General's Address. Subsequently, all Parties present in Parliament made it clear that they would participate in this meeting and by your attendance

2. *Report of proceedings of a meeting of members of the House of Representatives on 19 July 1970* (Department of Government Printing, Sri Lanka (Ceylon), pp. 32-34.

at this meeting you have all contributed to giving it the fullest authority. When you adopt the Resolution before you, you will become the Constituent Assembly of the People of Sri Lanka. It was proposed to use the Parliament constituted under the present Constitution for effecting any necessary constitutional changes. When the Parties of the United Front I lead were in Opposition, we rejected this proposal and did not participate in the work of the Select Committee set up in this connection. It is now clear that in this decision we reflected the thoughts and feelings of the People of Sri Lanka. The People of Sri Lanka have chosen, like other nations which have gained their independence in the post-war years, to give themselves a Constitution of their own making through a Constituent Assembly. It is our duty to carry out the will of the people. Regarding the content of the new Constitution, I shall not try to anticipate your deliberations as a Constituent Assembly. I should only say that our Constitution must be such as helps to strengthen the oneness of our nation. Though there are among us different racial groups such as Sinhalese, Tamils, Moors, Burghers, Malays and others, and many religious communities such as Buddhists, Hindus, Christians and Muslims, we are, and must act as, one Nation. Our Constitution must promote the realisation of the aspiration of the People of Sri Lanka to establish a socialist society in this country. Our Constitution must safeguard our freedom, independence and national sovereignty".

In seconding the resolution, Dr. N. M. Perera, Minister of Finance, also gave reasons for the establishment of a Constituent Assembly for the adoption of a republican Constitution. Dr. Perera said: "Since free democratic constitutions came to be drawn up, a Constituent Assembly drawing its mandate from the people direct had been the instrument for fashioning a Constitution acceptable to the people. We are today following the great tradition that has been set up by all people throughout the world who have wished to live as independent, sovereign people freely associated in terms of liberty, equality and fraternity".

When the discussion on the resolution was resumed in the afternoon in the House of Representatives, Mr. J. R. Jayewardene, the Leader of the Opposition, stated that a mandate from less than fifty per cent of the people was alone no mandate or authority to draft a Constitution and replace or repeal the existing one. He said that the authority given to the members of the House of Representatives was to work within the framework of the existing legislature, for it was an election to that Legislature

with all its entrenched provisions. Mr. Jayewardene went on, however, to make this significant observation:

"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 together if accepted by the people will become the full expression of the hopes, desires and aspirations of the present generation".

On 21 July 1970, the resolution seeking "the constitution, declaration and proclamation" of the Constituent Assembly was passed unanimously.

Standing Orders. The draft Standing Orders of the Constituent Assembly were presented on 29 July 1970 by the Minister of Constitutional Affairs. They were debated and adopted unanimously on 12 August 1970. The Standing Orders provided for a Steering and Subjects Committee of the Constituent Assembly consisting of the Prime Minister (as Chairman), the Minister of Constitutional Affairs and such other members as might be appointed by the President of the Assembly after consulting the Prime Minister and the Minister of Constitutional Affairs. On 12 August 1970 the President of the Constituent Assembly announced the names of 15 members whom he had, in terms of Standing Order No. 1, appointed to serve on the Steering and Subjects Committee. On 19 August two more members were added to the Committee. The Committee was required under the Standing Orders to prepare resolutions embodying the basic principles according to which the Constitution was to be drafted and cause such resolutions to be placed in the Order Book in the name of the Minister. The resolutions were to be published for the information of the public. Any member of the Assembly or any member of the public could, within 10 days of the date of publication, submit to the Steering and Subjects Committee, through the Minister, any draft resolution either embodying basic principles according to which the Constitution should be drafted, or amending any resolution placed by the Committee. In the case of resolutions of members of the Assembly, where the Committee disallowed a resolution in the Assembly, the members could move a motion for the inclusion in its business of the resolution so disallowed. If the motion was passed, the resolution was to be placed on the Order Book in the name of such member. In the case of resolutions by members of the public, the Committee could add to or alter the resolutions placed on the Order Book.

Basic Principles. At a Press Conference on 17 January 1971 the Minister of Constitutional Affairs announced that he had presented to the Steering and Subjects Committee the Basic Resolutions prepared by him with the assistance of his Drafting Committee. With regard to the numerous memoranda embodying suggestions relating to the new Constitution which had been sent to him by various persons and bodies, Dr. de Silva said: "We have read them all so that they were in our minds". Asked whether the draft resolutions had been placed before the Cabinet before they were made available to the Steering and Subjects Committee, the Minister answered in the affirmative. He referred to the fact that a Cabinet Sub-Committee was assisting in constitutional matters. The Minister also said that he was inviting the public to send any amendments to the Basic Resolutions, which they might consider necessary.

Reiterating these views before the Constituent Assembly on 22 January,[3] the Minister explained that although the Basic Resolutions were government proposals and had been approved by the Cabinet, it did not mean that they were unchangeable and could not be amended. The main purpose in having a set of resolutions prepared, Dr. de Silva explained, was to create an atmosphere for healthy discussion. The Minister also referred to the fact that a very large number of memoranda had been received by his Ministry and copies of them would be sent in a few days to each member of the Constituent Assembly. Copies of the draft Basic Resolutions, which had been prepared by him as requested by the Steering and Subjects Committee and presented to it, had also been sent to each member of the Assembly. The Committee had also accepted the suggestion that the draft Basic Resolutions should be printed, published and made available to the public.

In a letter to the Press dated 29 January, the Minister stated that the purpose of publication of the draft Basic Resolutions was to evoke expression of public opinion at that stage in a form which would help to make concrete such issues as would need to be preliminarily determined by the Steering and Subjects Committee.

The debate in the Constituent Assembly on the Basic Resolutions adopted by the Steering and Subjects Committee commenced on 14 March

3. *Constituent Assembly Debates*, Vol. 1, No. 8, 161-166, 170.

1971 with the Prime Minister (Mrs. Bandaranaike) moving the first Resolution. When the Assembly met on 26 April the Minister of Constitutional Affairs moved its adjournment again owing to the situation then prevailing in the country. The situation was that resulting from insurgent activities which had commenced on 5 April and from the state of emergency which had been declared by the Government. On 14 May the Constituent Assembly met again and the debate on the Basic Resolutions continued.

At the outset of the proceedings of 19 May, the Minister of Constitutional Affairs, Dr. Colvin R. de Silva, making a statement on behalf of the Government, said: "In view of the fears that have been expressed in certain quarters that the emergency regulations may interfere with the free expression of views on the present Constitution, the proposals for a new Constitution or the Constituent Assembly and its proceedings, the Government wishes to inform the members of the Assembly, the public and the Press that the emergency regulations will not be used to interfere in any way with such freedom of expression, which may therefore be exercised without fear. The Government wishes to carry on with the proceedings of the Constituent Assembly as expeditiously as possible, because it is anxious to fulfil without delay its election pledge on this vital matter. Moreover, from various representations made to the Government, it is clear that generally in the country there is an impatience growing with the delay that has been experienced in this matter....."

On 28 June 1971 the Constituent Assembly adopted by 88 votes to none (10 declining to vote), the Basic Resolution regarding the language of legislation, namely that "all laws shall be enacted in Sinhala" and that there shall be a Tamil translation of every law so enacted". The amendment proposed by the Federal Party that "Sinhala and Tamil should be (a) the languages in which laws shall be enacted, (b) the Official Languages of Sri Lanka; (c) the languages of the Courts and (d) the languages in which all laws be published" was rejected by 88 votes to 13. After the debate and division on the amendment, Mr. S. J. V. Chelvanayakam, the Federal Party leader, made a statement in the Assembly.[4] He said that as the language rights of the Tamil-speaking people were not satisfactorily provided for in the proposed Constitution, no useful

4. *Constituent Assembly Debates*, Vol. 1, 2580-81.

purpose would be served by their "continuing in the deliberations of this Assembly". He went on to say that after the adjournment that day they would not come back to the Assembly.

Draft Constitution. On 10 July 1971 the Constituent Assembly adjourned in order that a draft Constitution in accordance with the Basic Resolutions might be prepared and placed before the Assembly. With regard to its preparation, the Minister of Constitutional Affairs, Dr. Colvin R. de Silva, stated at a Press Conference on 24 December 1971 that Mr. Felix Dias Bandaranaike's proposals in the drafts which he had submitted to the Minister "had all been carefully considered and had helped the Drafting Committee a great deal". The Draft Constitution which was prepared by the Minister of Constitutional Affairs with the assistance of his Drafting Committee was presented to the Steering and Subjects Committee on 24 December 1971.

The Constituent Assembly was summoned for a formal sitting on 29 December 1971, when the Minister of Constitutional Affairs, on behalf of the Steering and Subjects Committee, presented the Draft Constitution as approved by the Committee to the members of the Constituent Assembly. The Draft Constitution was published in the Ceylon Government Gazette on 29 December 1971 as a Government Notification. The Constituent Assembly adjourned till 3 January 1972 so that, as the Minister said at a Press Conference, "members could study the draft and come prepared to address themselves to a resolution that the draft is in accordance with the basic principles accepted by the Constituent Assembly". On 3 January 1972 the Constituent Assembly accepted the resolution, "That this Assembly is of the view that the Draft Constitution prepared by the Steering and Subjects Committee which was presented on 29.12.1971 is in accordance with the basic principles adopted by the Assembly."

Consideration by Committees. After the House accepted the resolution, the Minister of Constitutional Affairs moved that the Constituent Assembly "do divide itself up into eleven Committees and that the parts of the Draft Constitution to be assigned to each Committee be as set out in the Motion". Eleven Chairmen were then appointed to preside over the respective Committees. A notice was published in the newspapers five days later stating the composition of the Committees and the parts of the Draft Constitution assigned to each. The public were invited to send to the appropriate Committee for its consideration

memoranda on the Draft Constitution. It was also stated that any proposal for the amendment of the Draft Constitution should be in the form of a specific amendment to any particular section or sections of the Draft Constitution and that all amendments should be in conformity with the basic principles adopted in the form of Basic Resolutions by the Constituent Assembly. All memoranda were to be sent to reach the Ministry of Constitutional Affairs not later than 24 January 1972.

By an application to the Supreme Court (S.C. 1 of 1972) Mr. C. Suntheralingam sought an injunction to prevent and prohibit the Minister of Constitutional Affairs "from taking any steps to repeal the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, and to substitute therefor a Constitution entitled 'Constitution of Sri Lanka'."[5] The same petitioner had made a previous application naming as respondents the Honourable Sirimavo R. D. Bandaranaike and the other members of the Cabinet. In that application the petitioner had sought orders restraining the respondents from conducting the proposed proceedings of the Constituent Assembly as convoked and created by a Resolution of the members of the House of Representatives passed on 19 July 1970. The application was refused. In the course of the judgment dated 13 February 1971, H. N. G. Fernando C.J. (Wijayatilaka J. agreeing) stated:

"If and when such a new Constitution is established or is purported to be established, one of two possible situations will in my opinion exist:—

(1) That the new Constitution is a legal and valid instrument which will in law supersede the Constitution and Independence Orders-in-Council which are presently law; in which event a challenge of the validity of the new Constitution will be fruitless.

(2) *Alternatively*, if the true position be, that the new Constitution established by the Constituent Assembly does lack legal force and validity, and if a competent Court will have jurisdiction so to pronounce, the occasion for the making of such a pronouncement can arise only after the Constitution is established or purports to be established, and only in a proceeding in which the validity of some provision of the Constitution properly and actively arises for determination."

5. ***Suntharalingam*** **v** ***The Attorney-General*** **(1972) 75 N.L.R. 126.**

On these same grounds, the Supreme Court (H. N. G. Fernando C.J., Silva S. P. J. and Alles J.) dismissed the petitioner's second application for an Injunction.

When the Constituent Assembly met on 6 January 1972 the President, Mr. Stanley Tillekeratne, announced the names of members whom he had appointed under the Standing Orders to serve on the 11 Committees. Thereafter at several sittings each Committee considered the part of the Draft Constitution assigned to it and heard evidence on certain memoranda which had been received. The Committees then prepared their reports containing drafts of amendments which they considered necessary and statements of reasons for proposing the amendments. These reports were transmitted to the Steering and Subjects Committee through the Minister of Constitutional Affairs. The Steering and Subjects Committee considered the reports together with the draft recommendations of the Minister and approved the revised draft Constitution on 4 May 1972. The draft Constitution so revised together with the reports of the Committees were placed before the Constituent Assembly on 8 May 1972 by the Minister of Constitutional Affairs. The Assembly thereupon went into Committee, considered the Draft Constitution clause by clause and adopted the amendments proposed by the Committee of the whole Assembly.

Adoption of the Constitution. On 22 May 1972 the Prime Minister, Mrs. Bandaranaike, moved "that the Draft Constitution prepared under the provisions of Standing Order No. 23 and presented this day by the Minister of Constitutional Affairs be adopted as the Constitution of the Free Sovereign and Independent People of Sri Lanka". The Assembly went on to adopt the Constitution by 119 votes to 16, with one abstention. Shortly after noon on the same day the members of the Constituent Assembly met at Navarangahala in the presence of a number of invitees to the ceremony. At the auspicious time, namely 12.43 p.m., the President of the Assembly, Mr. Stanley Tillekeratne, certified the adoption and enactment of the new Constitution by the Constituent Assembly.[6]

6. Mr. M. S. Alif, the Secretary to the Cabinet, has recorded that there had been in addition to the 46 sittings of the Constituent Assembly, 21 meetings of its Steering and Subject Committee, 114 meetings of Sub-Committees of the Assembly, 18 meetings of the Cabinet, 22 meetings of the Cabinet Committee on the Constitution and 278 sittings of the Drafting Committee. (*Ceylon Daily News*, 26 September 1972).

On the certification of its adoption by the Constituent Assembly, the republican Constitution came into operation and the persons who were members of the Assembly became members of the National State Assembly in terms of section 42 of the Constitution. The method of enactment and the coming into operation of the new Constitution was clear proof of the break in legal continuity with the previous order. Under the previous Constitution, on the other hand, all legislative measures passed by the House of Representatives were required under that Constitution to be presented to the Governor-General for assent in the Queen's name before they could become law as Acts of Parliament.

In accordance with the provisions of section 43 of the republican Constitution the holder of the office of Prime Minister immediately before the commencement of the Constitution, namely, Mrs. Sirimavo Bandaranaike, became the first Prime Minister under the Constitution immediately it was certified as having been adopted. She assumed office as Prime Minister upon taking the following oath a few minutes later before the members of the National State Assembly:—

"I, Sirimavo Ratwatte Dias Bandaranaike, do solemnly declare and affirm that I will be faithful and bear true allegiance to the Republic of Sri Lanka, that I will uphold the Constitution of Sri Lanka and shall faithfully perform the duties and functions of the office of Prime Minister in accordance with the Constitution and with the law".

The Prime Minister then made a short statement and proceeded to announce the nomination of Mr. William Gopallawa as the first President of the Republic. Mr. Gopallawa then took a similar oath before the members of the National State Assembly who were present and signed the Proclamation summoning the National State Assembly. Later, the Judges and other State officers, entered upon the duties of their respective offices, as required under the Constitution by taking the oath of allegiance to the Republic of Sri Lanka and of due and faithful execution of their offices in accordance with the Constitution and the law.

CHAPTER 4

THE SEPARATION OF POWERS

The powers and functions of government have from very early times been divided into three categories: legislative, executive and judicial. The idea of such a separation of powers is found even in the works of such ancient political philosophers as Aristotle.[1] Many centuries later this principle of separation found expression in Bodin's Republic (1576),[2] and more particularly in John Locke's Civil Government (1690).

Montesquieu's Doctrine It was Montesquieu, the celebrated French jurist, who first elaborated what has come to be known as the modern doctrine of the separation of powers. The basis of his doctrine was that in order to secure political liberty and to prevent the abuse of power the three kinds of powers should serve as checks on each other. In his work, *L'Esprit des Lois* (The Spirit of the Laws) published in 1748, he states the doctrine as follows:

> "When the legislative and executive powers are united in the same person, or in the same body.....there can be no freedom; because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.
>
> Again, there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

1. *Politics*, IV, 14 (Jowett's translation). See Plato's earlier principle of the 'mixed' State which is designed to achieve harmony by a balance of forces....and is the ancestor of the famous separation of powers: Sabine, *A History of Political Theory* (London. 1948), p. 78.
2. Marsilio de Padua who wrote two and a half centuries earlier, like Bodin, appears to have looked at the separation of functions from a utilitarian and not from any political standpoint nor from any principle of the mixed State.

> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of trying the causes of individuals".[3]

Briefly stated, Montesquieu's broad view appears to be, that in order to preserve political liberty, the three kinds of governmental powers should not be concentrated in the same agency. As James Madison has pointed out, the accumulation of all powers, legislative, executive and judicial, in the same hands whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.[4] Montesquieu did not mean to suggest, as some of his more enthusiastic followers have thought he did, "that these departments ought to have no *partial agency* in, or no *control* over, the acts of the other". His view was "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power in another department, the fundamental principles of a free constitution are subverted.[5] The essence of Montesquieu's doctrine seems to be that unless there is a distribution of power in a State, there can be no freedom.

Montesquieu's theory of the separation of powers was based on his own interpretation of the English Constitution of that time. By the time Montesquieu wrote his book, as contrasted with the despotic government of Louis XIV in France, the Revolution of 1688 and the Bill of Rights in England had settled the legislative supremacy of Parliament. The Act of Settlement, 1701, had established the principle of the independence of the Judiciary by removing the Judges from the King's control. The Act had also excluded the servants of the Crown (the Executive) from the Legislature. Thus the fact that the powers of the State were shared between the King, Parliament and the Courts, and the powers of the Legislature were shared between the King, the House of Lords and the House of Commons, was the most obvious feature of the English Constitution and English Constitutional Law, and the most obvious contrast to the despotic and centralised monarchical Governments of the Continent.[6]

3. Book XI, Chapter VI.
4. *The Federalist*, XLVII.
5. *Ibid.*
6. *Report of Committee on Ministers' Powers*, 1932 (U.K.) (Cmd 4060), p. 8.

Position in Sri Lanka. So far as the republican Constitution of Sri Lanka is concerned, it does not embody the doctrine of the separation of powers as, for example, the American Constitution does. The National State Assembly is the supreme instrument of State power. The legislative power is exercised by it directly. The function of the Assembly as the supreme legislative authority of the Republic was considered by the makers of the Constitution to be fundamental. Unlike in the previous Constitution, there is express provision that no institution, person or authority has power to inquire into or pronounce upon or in any manner call in question the validity of any law of the National State Assembly.[7] The executive power is exercised by the Assembly through the President and the Cabinet of Ministers. The Cabinet Ministers are also members of the National State Assembly and the Government remains in power only so long as it enjoys the confidence of the majority of the Assembly. Thus under our system of government there is no separation but co-operation and co-ordination between the National State Assembly and the Cabinet. The judicial power, except in matters relating to its privileges and powers, is exercised through Courts and other institutions created by law. Here, as we shall see later, the Constitution contains provisions which are designed to ensure the independent exercise of the judicial function.

According to a well-known textbook on British Constitutional Law, a strict adherence in a Constitution to the doctrine of the separation of powers demands that the same persons or bodies should not form part of the Legislature and the Executive.[8] On this view there is a breach of the doctrine of the separation of powers in countries like Sri Lanka and Britain which have a Parliamentary Executive or Cabinet system of government. Under our system, as already stated, there is in practice a co-ordination of the legislative and executive powers in a Cabinet of Ministers which is collectively responsible to the National State Assembly of which the Ministers must be members.[9] "Their presence in Parliament makes a reality of their responsibility to Parliament and facilitates co-operation between them and the Legislature, both features of which are vital to parliamentary

7. Section 48 (2).
8. Wade and Phillips, *Constitutional Law* (8th ed.), p. 28.
9. See *post.*, Chap. 12.

government".[10] In the Constitution of the United States, on the other hand, the legislative power which is vested in Congress (the Legislature) is to a very much larger extent independent of the executive power which is vested in the President who is elected directly by the people. Neither the President nor the members of his 'Cabinet' are members of the Congress, nor can the latter become connected with the executive branch, which is the very opposite of what individuals seeking to be Ministers in Britain (and Sri Lanka) must do.[11] But even in the United States the separation, as is often pointed out in that country, is not watertight. This fact is said to have a tendency to cushion restraints that would otherwise impede mutual co-operation between the Legislature and the Executive and act as a hindrance to the speedy and efficient working of government.

It has also been asserted that there is no strict separation of powers in a country where the Legislature controls the Executive or the Executive controls the Legislature.[12] The Cabinet of Ministers is created by the majority in the National State Assembly and can be thrown out of office by it. At the same time it is the Cabinet of Ministers which through its Party majority controls the Legislature. This is particularly so under a two-Party system. Members of the Government Party are reluctant to vote against the Government in the House and thereby risk a dissolution and a general election. Moreover, important legislative measures introduced by the Government have often previously been indicated in its Party manifesto and approved by the electorate at the general election. It is in the Cabinet of Ministers that Acts of legislation generally originate. Therefore under a Parliamentary Executive such as we have in Sri Lanka, although the Legislature and the Executive are not co-extensive, the separation exists only to a limited degree. As a well-known American jurist has stated, the position of the American President in relation to Congress is different:

"The President is never the leader of Congress in the sense in which the British Prime Minister is of the House of Commons. He rarely has at

10. Wade and Phillips, *op. cit.*, p. 28.
11. Bernard Schwartz *American Constitutional Law* (1955), p. 15. See also *Springer* v *Government of the Philippine Islands* (1928) 277 U. S. 189, 201 cited by Schwartz *op. cit.*, p. 12)
12. Wade and Phillips, *op. cit.*, p. 28.

his disposal the almost automatic legislative majority which is available to the Government in Britain. He cannot hold over to Congress the threat of dissolution; its term of office, like his own, is fixed by the Constitution. He does not have the means available to the British Government to ensure disciplined voting along party lines. Nor does he or any other member of the Executive participate immediately in the process of legislation. The President, unlike the Prime Minister, cannot directly ensure that the measures which he desires will be enacted by the Congress. It is these basic differences between the legislative role of the head of the Executive on both sides of the Atlantic that led Professor Laski to assert that under all normal circumstances it is difficult not to feel that the President of the United States must envy the legislative position of a British Prime Minister.

"Yet, though it is clear that the legislative role of the President is not as significant as that of the Prime Minister in a Parliamentary system one should not make the mistake of unduly minimizing its importance. In the first place, the President is expressly given a veto over all legislation by the Federal Constitution.....Important though it may be, it would be erroneous to think that the exercise of the veto power constitutes the sum total of the President's participation in the legislative process".[13]

It is of interest to note that in France although the Constitution of the Fifth Republic provides in Article 34 for the making of laws by Parliament, unlimited powers to rule by decree in a time of emergency have been conferred by Article 16 on the President. Although he is required to consult the Prime Minister and the Presidents of the Assemblies and the Constitutional Council before taking these "exceptional measures", he is under no legal obligation to accept their views.

The separation of powers and the legislative supremacy of the National State Assembly cannot, however, be said to be infringed by the mere conferment of the power of subordinate legislation on administrative or judicial authorities.[14] As it has been pointed out by a learned writer, the legislative power is the sovereign power to make general rules of conduct for the

13. Schwartz, *op.cit.* pp. 98 ff.See also Laski, *The American Presidency* (1940). *p.*111
14. See *post*, Chap. 16.

political community.[15] Further, the analogies from agency law do not apply to the constitutional vesting of the sovereign power of government in the legislature.[16] The doctrine of agency and the maxim *delegata potestas non potest delegari* (a delegated power cannot be delegated) are particularly inapplicable to a Legislature composed of elected representatives of the people exercising plenary powers of legislation.[17]

The exercise of the supreme law-making power by the elected representatives of the people is endangered, on the other hand, if the legislative power is conferred on such authorities without laying down in the enabling Acts the main principles and policies to be applied by them in the making of the delegated legislation. Under our Constitution the National State Assembly cannot delegate its legislative power other than the power to make subordinate laws for prescribed purposes. (s. 45). A Legislature cannot be said to abdicate its general legislative powers as long as the subordinate instrumentality, which it has created for exercising the power, remains responsible directly to it and depends on its will of for the continuance of its official existence.[18]

It is of interest to note that in *Weerasinghe* v *Samarasinghe*[19] it was contended for the petitioner that the Governor-General had no right under the previous (Soulbury) Constitution to make any Emergency Regulations under section 5 of the Public Security Ordinance, as the enabling provision was beyond the power of Parliament as laid down in that Constitution. It was argued that the Emergency Regulations were invalid as that Constitution had entrusted the power to make laws to Parliament and to nobody else, and that therefore no other authority had a law-making power. As against this argument, the Solicitor-General's position was that Parliament

15. Professor Michael Conant's Introduction to Arthur T. Vanderbilt's *The Doctrine of the Separation of Powers and Its Present-Day Significance*, ix. *Prentis* v *Atlantic Coast Line* (1908) 211 US. 210, 226, *per* Holmes J. Allen, *Law in the Making* (6th ed.), p. 409. See also *Report of Committee on Ministers' Powers*, 1932 (U.K.) (Cmd. 4060), p. 20.
16. Conant, *op. cit.*, cf. Locke, *Treatise on Government*, Chap. XI.
17. *R* v *Burah* (1878) 3 App. Cas. 889, at pp. 903-4.
18. *The Reference as to the Validity of the Regulations in relation to Chemicals* (1943) S.C.R. 1 (Canada), *per* Rinfret J., cited in *Weerasinghe* v *Samarasinghe* (1966) 68 N.L.R. 361, at p. 363. See also the other cases cited: *The Zamora* (1916) 2A.C. 79. *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v *Dignan* (1931) 46 C.L.R. 73 (Australia).
19. (1966) 68 N.L.R. 361.

could delegate its power to make laws to the Executive as it had done in that case, even though there was nothing said about it in the Constitution. On this matter, Sansoni, C.J., citing certain sections of the Public Security Ordinance, said:

"All these provisions ensure that Parliament retains its powers and its control over the Executive even during a state of emergency. One thing is essential for the validity of a delegation of its law-making power, and that is that it should not abandon its legal authority or its control over the executive authority to which it has delegated that power. It must not try to transform the executive into a parallel legislature, and abdicate its function. There is nothing in the Public Security Ordinance to indicate that Parliament has abdicated its legislative authority. In my view, the power to make laws for the peace, order and good government of the country include the power to make such a law as the Public Security Ordinance which, and I emphasize this, makes provision for delegation of legislative power only at a time of public emergency".

Independence of the Judiciary. The main application of Montesquieu's doctrine of separation of powers lies in the independence of the Judiciary from executive control and influence. Judicial independence is essential if Judges are to perform their judicial functions without fear or favour. Blackstone, the famous English jurist, has stated that the main preservation of public liberty in England consists "in the distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removeable at pleasure by the Crown".[20]

It is necessary to consider how far judicial independence is maintained under the Constitution. It has already been stated that the judicial power is exercised by the National State Assembly through Courts and other institutions created by law. Except in the matter of its privileges and powers, the National State Assembly does not directly exercise the judicial power. With regard to the separation of the Judiciary, it is true to say that in Sri Lanka the persons who form part of the Judiciary do not form part of the Legislature and the Executive. A holder of any judicial office is disqualified for membership of the National State Assembly and consequently of the Cabinet of Ministers.

20. *Commentaries* i. 269 (12th ed.)

Our Constitution contains provisions which establish the security of tenure of the Judges and of other persons administering justice. Section 122 of the Constitution provides that the Judges of the Court of Appeal, of the Supreme Court or of Courts that may be created by the National State Assembly to exercise and perform similar powers and functions shall hold office during good behaviour and shall not be removed except by the President on an address of the National State Assembly. Section 129 provides that other Judges, State officers constituting Labour Tribunals and Quazis and members of the Board of Quazis exercising jurisdiction under the Muslim Marriage and Divorce Act and all State officers whose principal duty is the performance of judicial functions may be removed for misconduct by the President on an address of the National State Assembly. No motion for the removal of any person belonging to the second category can be placed on the agenda of the National State Assembly until the Speaker has obtained a report from the Judicial Services Disciplinary Board on the particulars of the charges which are alleged in the motion.

The salaries of Judges of the Court of Appeal and Supreme Court are determined by the National State Assembly and are charged on the Consolidated Fund, and cannot be diminished during their term of office. (s.122) The salaries are not debated but are voted annually by the National State Assembly. Since these provisions are contained in our written and rigid Constitution, it can be said that legally the independenc of the judicial function in these respects is more firmly entrenched in Sri Lanka than in a country where similar provisions are contained in a flexible Constitution.

In order to secure the independence of Judges, State Officers and other persons entrusted by law with judicial powers or functions,the Constitution also provides that they shall exercise these powers and functions without being subject to any direction or other interference proceeding from any other person except a superior court or institution entitled under law to direct or supervise such Judge, State officer or person in the exercise of such powers and functions. Every person who, without legal authority, interferes or attempts to interfere with the exercise or performance of the judicial powers or functions of any such Judge or person is guilty of an offence punishable with imprisonment of either description for a term which may extend to one year or with fine or with both (s. 131).

In the Constituent Assembly during the course of the discussion on Mr. J. R. Jayawardene's amendment that there should be a separation of powers, Dr. N. M. Perera said: "But we do want to keep at least the Judiciary completely separate in so far as they should act independently, They should be free to act and feel that they should do justice by the people of the country, by the litigants, in all matters, and as between the Government and the people that they should be impartial. We must ensure that. That independence of the Judiciary we certainly want to ensure, and every member of the Government hopes to ensure that independence of the Judiciary. On that there is no question".[21]

The oft-quoted statement of a former Chief Justice of the United States that "a host of controversies as to private rights (in that country) are no longer decided in Courts"[22] is true to an even greater extent in Sri Lanka. The provisions of the republican Constitution relating to the administration of justice have been drafted to give effect to this factual position. Moreover, as long as there are adequate safeguards against the abuse of the decision-making power of the Administration, the necessary development of administrative justice will not interfere with the independence of the judicial function. The practical effect of judicial independence is, however, diminished where important justiciable issues decided by public authorities are excluded from judicial review.[23] There has in fact been a tendency for the Legislature sometimes to provide by statute that certain orders of Ministers and administrative tribunals "shall be final and conclusive" and "shall not be called in question in any court of law". The Courts have, however, reviewed the legal validity of such orders and decisions where the tribunal has exceeded its jurisdiction and acted *ultra vires*, on the ground that the Legislature could not have intended the administrative authority to exceed its powers without the possibility of the checks and scrutinies of the Courts.[24] This matter has now been statutorily dealt with by the Interpretation (Amendment) Act, No. 18 of 1972. The Act provides that where there is in any enactment, the expression "shall not be called in question in any Court" or any other expression of similar

21. *Constituent Assembly Debates*, Vol. 1, p. 1444.
22. Hughes CJ. in *New York Times*, 13 February 1931.
23. *Post*. pp. 329-334
24. *Ram Banda* v *River Valleys Development Board* (1968) 71N.L.R. 25 at p.38, *per* Weeramantry J. See also *Anisminic Limited*v *Foreign Compensation Commission* (1969) 2 A.C.147.

import in relation to any decision or finding of any person or tribunal, no Court has jurisdiction to pronounce upon its validity or legality except where (a) such decision or finding is *ex facie* not within the power conferred on such person or tribunal; (b) such person or tribunal is bound to conform to the rules of natural justice or the compliance with any mandatory provisions of any law is a condition precedent to the making of the decision or finding and the Supreme Court is satisfied that there has been no such conformity or compliance.

Utility of Doctrine. The separation of powers is of some use only as a general principle of government and not as a strict doctrine under which the powers and functions of government can be precisely defined and demarcated. Even if one were to concede that a system of "checks and balances" and a separation of powers is desirable, it is not always possible to make a precise division or demarcation between the three classes of functions of government. Although there is no clear distinction between them and the difference is one of degree, each class, however, has certain features which are more marked in it than in the other two classes.

Thus in the legislative function the making of rules of general application, usually to operate in future, is more marked than in the administrative (or executive) function. But legislation may apply to special classes of persons or even to particular individuals. For example, the Auditor-General's Fees Act, No. 26 of 1958, enables fees to be charged and recovered in respect of certain audit services rendered by him. Moreover, as the Donoughmore Committee on Ministers' Powers in Britain has pointed out "administrative action often partakes of both legislative and executive characteristics".[25]

In the case of a judicial function the ascertainment of facts in dispute between two or more parties and the application of the law to the facts so found is more marked than in the administrative or quasi-judicial functions. Again, a judicial function usually involves a lesser degree of discretion than the administrative and quasi-judicial functions which are exercised more often on policy and expediency.

The Donoughmore Committee on Ministers' Powers in Britain attempted a distinction between judicial, quasi-judicial and administrative functions as follows:

25. *Report*, Cmd. 4060, p. 19. According to Halsbury, executive functions "are merely the residue of the functions of government after legislative and judical functions have been taken away". (Vol 7, p 192)

"A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

"A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.....His ultimate decision is quasi-judicial and not judicial because it is governed, not by a statutory direction to him to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he has ascertained the facts and to be guided by considerations of public policy. Decisions which are purely administrative stand on a wholly different footing from quasi-judicial as well as from judicial decisions and must be distinguished accordingly.

...In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion".[26]

According to the view of the Committee the distinction between the judicial function, on the one hand, and administrative and quasi-judicial functions, on the other, depends essentially on the element of discretion alleged to be absent in the former and to be present in administrative and quasi-judicial functions. But in the performance of the judicial function the Courts too exercise a certain amount of discretion though its degree is

26. *Report*, pp. 73-4 81. See also Lord Greene, *Law and Progress*, p. 20.

usually less than in the case of the exercise of the other two functions. It has also been said that in the exercise of the judicial function by the Courts, they are bound by a fixed objective standard, dictated by law, while the administrative and quasi-judicial functions ultimately turn on uncontrolled decisions on administrative policy and expediency.[27] It is not possible, however, as even the Donoughmore Committee on Minister's Powers conceded, to maintain such a distinction in practice between law and policy. The Courts, in the exercise of their judicial function, do not decide all cases by a mere application of previous precedent and other sources of the law. Where these formal sources are not available to them, the Courts must (to cite the words of the celebrated French jurist, Francois Geny) "search for light among the social elements of every kind that are the living force behind the facts they deal with".[28] In his famous book on "The Nature of the Judicial Process", Justice Benjamin N. Cardozo has described admirably the part played in the shaping of judicial decisions and in the filling of the gaps in the law by the Judge's notions of justice, morals and social welfare. As Dean Pound has said, "the danger in continuing to deceive ourselves into believing that we are merely applying the old rule or principle to a new case by purely deductive reasoning lies in the fact that as the real thought process is thus obscured we fail to recognise that our choice is really being guided by considerations of social and economic policy or ethics, and so fail to take into account all the relevant facts of life required for a wise decision". Moreover, the Courts in Sri Lanka and in Britain review, when the occasion demands it, decisions made in the exercise of discretion by administrative authorities under statutory provisions empowering such authorities to make "just and equitable orders".[29]

27. See H. W. R. Wade: "Quasi-Judicial and its Background", 10 *Cambridge Law Journal* 216, at p. 227: and D. M. Gordon, "Administrative Tribunals and the Courts" in 49 *Law Quarterly Review* (1933) 94, at pp. 107-8. Contrast W. A. Robson, *Justice and Administrative Law* (3rd ed.) p. 433, who states that this distinction between law and policy is "utterly false", the element of discretion being involved in both judicial and administrative decisions. See also *Report of the (Franks) Committee on Administrative Tribunals and Inquiries (U.K.)* Cmd. 218 (1957), paras, 26-30.
28. *Methode d'interpretation et sources en droit prive positif,* vol. II, p. 180; transl. 9 Modern Legal Philosophy Series, p. 45, cited by Cardozo, *The Nature of the Judicial Process*, p. 16.
29. *Stratheden Tea Co. Ltd.* v *Selvadurai* (1963) 66 N.L.R. 6; *Ceylon Transport Board* v *Thungadasa*; (1970) 73 N.L.R. 211 *Vijaya Textiles Ltd.* v *General Secretary, National Employees Union.* (1970) 73 N.L.R. 405 See also *Roberts* v *Hopwood* (1925) A.C. 578; Griffith and Street, *Principles of Administrative Law* (4th ed.) pp. 143-4.

There is hardly any doubt that a rigid separation of powers is likely to impede quick and efficient governmental action which is demanded by the electorate. There is always a risk of inaction or of conflict. The view of the Constitution-makers was expressed by Dr. N. M. Perera in the Constituent Assembly during a discussion of the separation of powers as follows: "We must have a Constitution that works, and not only works but will provide us with speedy work, to carry out the intentions of the people of this country as speedily as possible".[30] What is of special importance is, however, the need for securing the independence of the Judges in the discharge of their judicial functions.

It has been claimed in favour of a strict separation of powers that it will result in "a government of laws and not of men".[31] But laws and institutions of government cannot by themselves ensure freedom and justice. The real safeguard against the abuse of power lies in the control of the government by the people and through representatives freely chosen by them at regular periodical elections. On the will and vigilance of the governed and on the democratic control exercised by the people over the governors who are responsible to them will depend the existence of good and just government as well as the recognition of the fundamental human rights and freedoms of all persons.

30. *Constituent Assembly Debates*, Vol. 1, 1444.
31. See Constitution of Massachusetts.

PART II

THE NATIONAL STATE ASSEMBLY

CHAPTER 5

THE SUPREMACY OF THE NATIONAL STATE ASSEMBLY

The Nature of the Supremacy of the National State Assembly. The Constitution provides that sovereignty is in the People and is inalienable and that it is exercised through a National State Assembly of elected representatives of the People (ss. 3 and 4). As the supreme instrument of State power of the Republic, the National State Assembly exercises (a) the legislative power of the people; (b) the executive power of the people, including the defence of Sri Lanka, through the President and the Cabinet of Ministers; and (c) the judicial power of the people through Courts and other institutions created by law except in the case of matters relating to its powers and privileges wherein the judicial power of the people may be exercised directly by the National State Assembly according to law (s.5).

The Constitution provides also that so far as the supreme legislative power of the National State Assembly is concerned, it includes the power (a) to repeal or amend the Constitution and (b) to enact a new Constitution to replace it; but such power does not include the power to suspend the operation of the Constitution or any part of it or to repeal the Constitution as a whole without enacting a new Constitution to replace it. (s.44).

In the United Kingdom, the supremacy[1] of Parliament has been stated to mean, in the first place, its right to make or unmake any law whatever. So too in the case of the National State Assembly, it can in strict law legislate for all persons anywhere and on any subject-matter.

1. A. V. Dicey, *Law of the Constitution* (10th ed.), pp. 39-40. Dicey actually used the word 'sovereignty' in relation to the British Parliment, which, as Sir Ivor Jennings has stated, "is a word of quasi-theological origin which may easily lead us into difficulties". (*The Law and the Constitution* (5th ed.), 147 *et seq.*) Moreover not everybody is agreed as to the meaning of 'sovereignty' as used in relation to the Legislature. The term bears different meanings in different contexts and sometimes to different writers in the same context.

It may pass laws having extra-territorial operation, that is to say, laws applying to acts done (even by aliens) outside Sri Lanka. This does not of course mean that the National State Assembly could alter the laws of foreign countries which do not recognise its authority. The extra-territorial legislation would have legal consequences only under our law and not under the law which is applied by the foreign Court exercising jurisdiction in that place.

The provisions of Chapter X of the Constitution which enact a special procedure for laws amending the Constitution and laws inconsistent with the Constitution do not imply any limitations on the legislative supremacy of the National State Assembly. For example, the requirement in section 51 (5), that no Bill for the replacement, repeal or amendment of the Constitution can be certified by the Speaker unless it is passed by two-thirds at least of the whole number of members of the National State Assembly, does not limit its supremacy. Nor is the supremacy of the National State Assembly limited by the provision in section 54 (4) of the Constitution that the decision of the Constitutional Court upon a reference of any question by the Speaker as to whether any provision in a Bill is inconsistent with the Constitution shall be conclusive for all purposes. In that case the Bill may pass into law with the two-thirds majority required for the amendment of the Constitution. As it was said in *The Bribery Commissioner* v *Ranasinghe*[2], with reference to the previous Constitution:

"A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, for example, when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution, there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority".

2. (1964) 66 N.L.R. 73, at p. 83. See also *Harris* v *Minister of the Interior* 1952(2) S.A. 428.

It is also an attribute of the supremacy of the National State Assembly as a continuing body under the Constitution that it cannot bind its successors so as to prevent those bodies from legislating inconsistently with it.[3] If in a subsequent statute the Legislature makes it plain that an earlier statute dealing with the same subject-matter is repealed, effect must be given to that intention just because it is the will of the Legislature.[4] It is of course otherwise if the earlier statute was passed by the prescribed majority as an amendment of the Constitution. Such statute can only be changed by another passed by a similar procedure.

Parliamentary supremacy has also been said by Dicey to mean the absence of any rival or competing law-making authority. The National State Assembly may not abdicate, delegate or in any manner alienate its legislative power, nor may it set up an authority with any legislative power other than the power to make subordinate laws. (s.45(1)). It is expressly provided in the Constitution that the National State Assembly may, however, delegate to the President the power to make, in accordance with the law for the time being relating to public security and for the duration of a state of emergency, emergency regulations in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion or for the maintenance of supplies and services essential to the life of the community. The power to make such emergency regulations include the power to make regulations having the legal effect of overriding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution. (s. 45 (4)).

The National State Assembly may by law confer the power of making subordinate legislation for prescribed purposes on any person or body (s. 45 (3) (a)). The delegation of such legislative authority does not of course affect the legislative supremacy of the National State Assembly. We shall discuss later the various legislative and judicial safeguards which exist to secure that the delegated powers are not exceeded by such persons or bodies.[5]

3. See with reference to the British Parliament, Coke, 4 Inst. 42-43; Blackstone 1 Comm. 90-91; *Vauxhall Estates Ltd.* v *Liverpool Corporation* (1932) 1 K.B.733; *Ellen Street Estates Ltd.* v *Minister of Health* (1934) K.B. 590. Wade and Phillips, *Constitutional Law* (8th ed.), p. 50. Hood Phillips, *Constitutional and Administrative Law* (4th ed.), pp. 60-62.
4. *Ellen Street Estates* case, *supra.*
5. Chap. 16.

The National State Assembly exercises the supreme legislative power of the people by enacting laws in accordance with the procedure set out by or under the Constitution. Such laws may provide for the retrospective operation of any or all of its provisions or for the appointment of a date on which the law or any provisions thereof shall come into operation. No institution administering justice nor any other institution, person or authority has the power or jurisdiction to inquire into, or pronounce upon or in any manner call in question the validity of any law of the National State Assembly. (s. 48). Nor does any such institution administering justice have any jurisdiction, except under the Privileges Act, in respect of the proceedings of the National State Assembly or of anything done, purported to be done or omitted to be done by or in the Assembly (s. 39).

A Bill passed by the National State Assembly becomes a law of the Assembly when the Speaker's certificate is endorsed upon it. The Speaker's certificate that the law "has been duly passed by the National State Assembly" is conclusive for all purposes and cannot be inquired into, pronounced upon or in any matter called in question by any institution administering justice or any other institution, person or authority, (s. 49 (3)). By this provision it is clearly intended "that the Courts of law shall look to the certificate but shall look no further".[6] In other words, no Court or other institution has any jurisdiction to inquire into the question whether the procedural requirements as to the "manner and form" of the legislation or whether any procedural limitations on legislative power contained in the Constitution have been observed as long as the Speaker's certificate is endorsed on the law.

The legislative supremacy of the National State Assembly is both a legal and a political concept. The rule that the Courts will accept as binding and enforce without question all legislation passed by the Assembly does not rest only on the law of the Constitution. Ultimately, like the legal and judicial acceptance of the Constitution itself as basic law, the rule rests also on a political fact.[7] Any change can be brought

6. See *Bribery Commissioner* v *Ranasinghe* (1964) 66 N.L.R. 73 at p. 79, *per* Lord Pearce, approving the statement of H.N. G. Fernando J (as he then was) in the Supreme Court decision of the case reported in 64 N.L.R. 449, at p. 454.
7. See H. W. R. Wade, "The Basis of Legal Sovereignty" (1955) C.L.J. 172; R. F. V. Heuston, *Essays in Constitutional Law* (2nd ed.), Chap. I

about only by a "movement of political events",[8] or a legal revolution, which the people, the Administration and the Courts accept. When such acceptance takes place, there is a change of what Kelsen called the "grundnorm" or fundamental postulate of the legal system.[9] In fact, so far as the establishment of the Constituent Assembly (which, as already stated, did not derive its authority from the previous constitutional and legal order)[10] and the adoption by it of a republican Constitution were concerned, the Courts, the Administration and the public followed "the movement of political events" and acquiesced in the legal "revolution" and the new order. The "revolution" thus became legal.

Practical political limitations on the supremacy of the National State Assembly. There are, in practice, certain political limitations on the supreme power exercised by the National State Assembly:

(*a*) *International Law and Obligations.* Although the rules of International Law and Practice do not legally bind the National State Assembly[11] there is a constitutional convention as well as a legal presumption that the Assembly will enact legislation which is in accord with the principles of International Law[12] and the comity of nations. Thus normally the Courts will presume that a statute does not apply to foreigners with respect to acts outside the country's territory.[13] The Courts recognise the United Nations Charter and the Universal Declaration of Human Rights as being "of the highest moral authority", even though they have no legally binding force.[14] The Government also will be reluctant to bring forward legislative proposals in the National State Assembly which would have the effect of running counter to international obligations undertaken in Conventions to which it has acceded. Similarly the country's obliga-

8. Wade, *op. cit.*, p. 191.
9. See *General Theory of Law and State*, p. 118.
10. See the Resolution of the Members of the House of Representatives passed unanimously on July 21, 1970, declaring themselves the Constituent Assembly of the People of Sri Lanka for the purpose of enacting a Constitution.
11. *Mortensen* v *Peters* (1906) 8 F (Ct. of Sess.) 93.
12. *The Zamora* (1916) A.C. 77; *R* v *Keyn* (1876) 2 Ex. D 160; *Lopez* v *Burslem* (1843) 4 Moo P.C. 300; Wade and Phillips, *op cit.*, p.47; Hood Phillips, *op. cit.*, p. 79.
13. *Keegan* v *Dawson* (1934) Ir. R. 232; *Cail* v *Papayanni* (1863) 1 Moo P.C. (N.S.) 471. *Lopez* case, *supra*; *The Amalia* (1863) 1 Moo P.C. (N.S.) 471.
14. *Leelawathie* v *Minister of Defence and External Affairs* (1965) 68 N.L.R. 487, at p. 490, *per* Sansoni C.J.

tions to the specialized agencies of the United Nations like the International Labour Organisation and to international financial institutions like the International Monetary Fund create practical limitations on the supreme legislative power of the National State Assembly.

(*b*) *The Doctrine of the "Mandate"*. There is a broad convention in Sri Lanka that important matters of policy, both internal and external, must be put by Parties, preferably in their election manifestos, to the electorate for decision at a general election. This principle too may be considered to be a political limitation on the supreme legislative power of the National State Assembly. The growth of Party organisation has resulted in the matter of the implementation of the electoral mandate and programme being left to the Parliamentary Party or group forming the Government rather than directly to the National State Assembly. As long as the Government controls its Party organisation it has, as it should have, a free hand to govern. No Government can, however, with impunity abuse this freedom by making fundamental changes of policy and ignoring the opinion of the electorate. But, for the sake of good and efficient government, the programme contained in the manifesto is often adapted to changed circumstances which could not have been contemplated before the election. In Britain the principle of the "mandate" was stated by Lord Hartington to be that the constituencies are the source of power and, in the absence of an emergency that could not be foreseen, the House "has no right to initiate legislation, especially immediately upon its first meeting, of which the constituencies were not informed, and of which the constituencies might have been informed, and of which if they had been informed, there is, at all events, the very greatest doubt as to what their decision might be".[15]

The election manifesto of each political Party in Sri Lanka contains a general policy based on a variety of proposals which it intends to implement if it is returned to power. If a Party secures a majority at the election, it does not necessarily follow, however, that all the proposals contained in their programme have been accepted by the electorate. This is the main difficulty surrounding the doctrine of the mandate. By casting his vote for a Party candidate, the voter does not always accept all the proposals contained in the Party's manifesto. Different voters

15. *Life of the Duke of Devonshire*, II, pp. 141-2.

may vote for the same Party for different reasons. Nevertheless, it is true to say that in this country, as it has been said in Britain, that "the doctrine (of the mandate) is of importance. Though it must necessarily be vague and its operation a matter of dispute, it is recognised to exist".[16] The principle of the people's mandate may of course be made more certain if contending parties at a general election can agree on the main questions to be placed before the electorate for decision.

The joint election manifesto of the United Front issued to the electorate at the general election of May 1970 sought a mandate from the people to permit the members of Parliament elected by them to function simultaneously as a Constituent Assembly to draft, adopt and operate a new Constitution. The request for the mandate stated explicitly that the Constitution would declare Ceylon to be a free, sovereign and independent Republic pledged to realise the objective of a socialist democracy and that it would also secure fundamental rights and freedoms to all citizens. In his address at the opening of the first session of the seventh Parliament of Ceylon on 14 June 1970 the Governor-General addressing members of the House of Representatives stated: "By their vote democratically cast the people have given you a clear mandate to function as a Constituent Assembly....." Thus it is clear that the Parties forming the United Front and the Government which was formed after the general election considered the seeking of an electoral mandate to be of importance, among other factors, in securing the acceptance of the new Constitution by the people, the Administration and the Courts of law.

Under certain Constitutions the place of the electorate as the so-called "political sovereign" is so important that there is provision for the people to partake in direct legislation. In Switzerland, Australia and many American States a referendum is necessary for effecting constitutional amendments. The referendum is the submission of a measure to the people for their final approval by a direct vote. There is also provision in Switzerland for the initiative. This is a device under which a prescribed number of voters, in this case 50,000, may initiate constitutional amendments. In certain American States the initiative is applicable to ordinary laws.

16. Jennings, *Cabinet Government* (1947), p. 89.

(c) *Public Opinion.* In a democracy such as ours the National State Assembly cannot afford to defy the opinion of the electorate or even of major interest groups. Political power can be maintained by consultation and persuasion, not by coercion. It is often said that either the Government and hence the National State Assembly must persuade the people or must be persuaded by them.

Public opinion however, is often the opinion of the interests affected by the particular proposals, and only seldom of the people as a whole. The organisations representing these interests, such as trade unions and professional associations, should therefore be consulted before legislation affecting them is introduced. The opinions of these interests are also expressed through the Party machine, the Press, and the organisations of various social and functional groups and in many other ways. By their propaganda they are sometimes able to influence public opinion to a disproportionate degree. But although the National State Assembly respects their views and opinions, it does not consider itself in any way bound by them. Nor do all members of the Assembly consider themselves as mere delegates of their electorates.

In this country successive general elections have shown that public opinion is aroused much more by exchanges of views between ordinary individual human beings than by mass communication media. These individual exchanges and experiences have a wholesome tendency to offset in some measure the effect of organised propaganda by a political Party, the Press or the Radio in favour of what it suggests as the only way to accomplish a policy that it considers desirable. This common-sense discussion as a moulder of public opinion is particularly important in a country like Sri Lanka where a very high proportion of the people use their right to vote. In the 1970 general election, for example, according to the Report of the Commissioner of Parliamentary Elections, the percentage of the electorate that voted was 85.2, against India's figure of 57.93 per cent at the 1967 elections.

CHAPTER 6

THE COMPOSITION OF THE NATIONAL STATE ASSEMBLY

Membership. The National State Assembly consists of such number of elected representatives of the people as is determined by the Delimitation Commission in accordance with the provisions of the Constitution. The members of the National State Assembly are designated Members of Parliament. (s.29).

The National State Assembly is deemed to be validly constituted and has power to act notwithstanding vacancies in its membership, and proceedings in the Assembly are valid notwithstanding that it is discovered subsequently that any person, not entitled to do so, sat or voted or otherwise participated in the proceedings. (s.30).

So far as the first National State Assembly is concerned, it is specially provided in the Constitution that the Members shall be (a) persons who were members of the Constituent Assembly immediately prior to the commencement of the Constitution; and (b) such persons as may be elected under the following provisions: Where any electoral district is not represented in the Assembly there is deemed to be a vacancy in the membership and such vacancy must be filled in accordance with the law relating to elections to the National State Assembly in force for the time being. The electoral districts relating to the House of Representatives existing immediately prior to the commencement of the Constitution are the electoral districts in relation to the first National State Assembly. Where a member of the first National State Assembly represented an electoral district in the House of Representatives, he is deemed to be a member for that electoral district in the first National State Assembly. (s.42).

Qualifications of Electors. The Constitution provides that every citizen of the age of eighteen years[1] and over, unless disqualified under the

1. The law does not take cognisance of part of a day, so that a person attains the age of 18 years on the day preceding the anniversary of his eighteenth birthday: *In re Shurey* (1918) 1 Ch. 263

provision of the Constitution, is qualified to be an elector at elections to the National State Assembly. (s. 66). Unless the National State Assembly otherwise provides, such laws relating to citizenship and to rights of citizens as were in force immediately before the commencement of the Constitution continue, *mutatis mutandis*, in force. No law of the National State Assembly can, however, deprive a citizen by descent of the status of citizen of Sri Lanka (s. 67).

Under section 68 of the Constitution a person is disqualified to be an elector at an election of members of the National State Assembly if he is subject to any of the following disqualifications:

(*a*) if he is not a citizen of Sri Lanka;

(*b*) if he is under any law in force in Sri Lanka found or declared to be of unsound mind;

(*c*) if he is serving or has during the period of five years immediately preceding completed the serving of a sentence of imprisonment for a term of six months or longer for an offence punishable with imprisonment for a term of two years or longer, or is under sentence of death, or is serving or has during the period of seven years immediately preceding completed the serving of a sentence of imprisonment for a term of six months or longer awarded in lieu of execution of any such sentence. If any such disqualified person is granted a free pardon such disqualification ceases from the date on which the pardon is granted. In the case of an order of remission, "though its effect is to wipe out that part of the sentence which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of convinction by the court and the sentence passed by it untouched".[2] It has been held by the Supreme Court that even if there is a remission of a part of a sentence which results in a person being actually imprisoned for less than the stipulated period, he has nevertheless completed the serving of a sentence of imprisonment for that stipulated period;[3]

2. *Sarat Chandra Rabha* v *Khagendranath Nath* (1961) 2 S.C.R. 133 (India)at p. 138.
3. *Ellawala* v *Wijesundera* (1971) 74 N.L.R. 265; *Samaraweera* v *Jayewardena* (1966) 69 N.L.R. 241.

(*d*) if a period of seven years has not elapsed since (i) the last of the dates, if any, of his being convicted of any offence under section 52 (1) or 53 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or of such offence under the law for the time being relating to the election of members to the National State Assembly as would correspond to an offence under either of the said two sections; or (ii) the last of the dates, if any, of his being convicted of a corrupt practice under the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or of such offence under the law for the time being relating to the election of members of the National State Assembly as would correspond to the said corrupt practice; or (iii) the last of the dates, if any, being a date after the commencement of the Constitution of a report made by an Election Judge finding him guilty of any corrupt practice under the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or under any law for the time being relating to the election of members to the National State Assembly; or (iv) the last of the dates, if any, of his being convicted or found guilty of bribery under the provisions of the Bribery Act or of any future law as would correspond to the Bribery Act;

(*e*) if a period of five years has not elapsed since—(i) the last of the dates, if any, of his being convicted of any offence under the provisions of sections 77 to 82 (both inclusive) of the Local Authorities Elections Ordinance or for such offence under any future law as would correspond to any offence under the said sections; or (ii) the last of the dates, if any, of his being convicted of an offence under the provisions of sections 2 and 3 of the Public Bodies (Prevention of Corruption) Ordinance or of such offence under any future law as would correspond to the said offence; or (iii) the publication in the Gazette under the provisions of subsection (4) of section 5 of the Public Bodies (Prevention of Corruption) Ordinance or under the provisions of any future law as would correspond to such subsection of a finding against him by a Commission of Inquiry;

(*f*) if a period of three years has not elapsed since—(i) the last of the dates, if any, of his being convicted of an illegal practice under the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or of such offence under the law for the time being relating to the election of members to the National State Assembly as would correspond to the said illegal practice; or (ii) the last of the dates, if any, being a date after the commencement of the Constitution of a report made by an Election Judge finding him guilty of any illegal practice under the Ceylon (Parliamentary

Elections) Order-in-Council, 1946, or under any law for the time being relating to the election of members to the National State Assembly.

The register of electors in operation for the electoral district at the time of an election is conclusive evidence of a person's right to vote at the election of a member to represent that electoral district. A person is not entitled to have his name in more than one register or more than once in the same register even though he may be qualified to have it so entered or retained.[4]

Qualification for Membership of the National State Assembly. A person who is qualified to be an elector is qualified to be elected as a member of the National State Assembly unless he is disqualified under the provisions of section 70.

Under this section no person is qualified to be elected as a member of the National State Assembly or to sit or vote in the National State Assembly:

(*a*) if he becomes subject to any of the disqualifications specified in section 68; or

(*b*) if he (i) stands nominated as a candidate for election for more than one electoral district at a general election; or (ii) stands nominated as a candidate for election for an electoral district and before the conclusion of the election for that electoral district he stands nominated as a candidate for election for any other electoral district; or (iii) being a member of the National State Assembly stands nominated as a candidate for election for any electoral district; or

(*c*) if he is (i) a Judge or other state officer referred to in section 124; or (ii) the Clerk to the National State Assembly or a member of his staff; or (iii) the Commissioner of Elections; or (iv) the Auditor-General; or (v) a state officer holding any office the initial of the salary scale of which is not less than Rs.6,720 per annum; or (vi) an officer in any public corporation holding any office the initial of the salary scale of which is not less than Rs. 7,200 per annum; or (vii) a member of the Regular Force of the Army, Regular Naval Force or the Regular Air Force; or (viii) a police officer or a state officer exercising police functions; or

4. Ceylon (Parliamentary Elections) Order-in-Council, s. 8 (1) and (3).

(*d*) if he has any such interest[5] in any such contract made by or on behalf of the State or a public corporation as may be prescribed by or under a law of the National State Assembly; or

(*e*) if he is an undischarged bankrupt or insolvent, having been declared bankrupt or insolvent; or

(*f*) if during the preceding seven years he has been adjudged by a competent court or by a commission appointed under the Commissions of Inquiry Act or by a Commission appointed with the approval of the National State Assembly or by a Committee of the National State Assembly to have accepted a bribe or gratification offered with a view to influencing his judgment as member of the National State Assembly.

For the purposes of this paragraph, the acceptance by a member of the National State Assembly of any allowance or other payment made to him by any trade union or other organization solely for the purposes of his maintenance is not deemed to be the acceptance of a bribe or gratification.

A "public corporation" for the purposes of the Constitution means any corporation, board or other body which was or is established by or under any written law other than the Companies Ordinance with capital wholly or partly provided by the Government by way of grant, loan or other form.

Penalty for sitting or voting in the National State Assembly when disqualified. Any person who (a) having been elected a member of the National State Assembly but not having been at the time of such election qualified to be so elected, sits or votes in the National State Assembly or (b) sits or votes in the National State Assembly after his seat has become vacant or has become disqualified from sitting or voting, knowing or having reasonable grounds for knowing that he was so disqualified or that his seat has become vacant, as the case may be, is liable to a penalty of five hundred rupees for every day upon which he so sits or votes, to be recovered as a debt to the Republic by an action instituted by the

5. See *Thambiayah* v *Kulasingkam* (1948) 50 N.L.R. 25.

Attorney-General in the District Court of Colombo. If a person who was disqualified ceases to have the disqualification by the time he sits and votes, he is not liable to the penalty.[6]

Delimitation of Electoral Districts. Within one year after the completion of every general census commencing with the first general census completed after the commencement of the Constitution, the President must establish a Delimitation Commission. The Commission consists of three persons appointed by the President who must select persons who he is satisfied are not actively engaged in politics. The President must appoint one of such persons to be the Chairman. If any member of the Commission dies or resigns or if the President is satisfied that any such member has become incapable of discharging his function as such, the President must appoint another person in his place. (s. 77).

It is the duty of the Delimitation Commission to divide each Province of Sri Lanka into a number of electoral districts ascertained as follows: The total number of persons who, according to the last preceding general census, were for the time being resident in the Province must be ascertained to the nearest 75,000. In respect of each 75,000 of this number the Commission must allot one electoral district to the Province and must add a further number of electoral districts (based on the number of square miles in the Province at the rate of one additional electoral district for each 1,000 square miles of area calculated to the nearest 1,000) as follows:

Western Province	.. 1
Central Province	.. 2
Southern Province	.. 2
Northern Province	4
Eastern Province	.. 4
North-Western Province	.. 3
North-Central Province	.. 4
Province of Uva	.. 3
Province of Sabaragamuwa	.. 2

Where it appears to the Delimitation Commission that there is in any area of a Province a substantial concentration of citizens of Sri

6. *De Zoysa* v *Wijesinghe* (1945) 46 N.L.R. 433.

Lanka united by a community of interest, whether racial, religious or otherwise, but differing in one or more of these respects from the majority of the inhabitants of that area, the Commission may make such division of the Province into electoral districts as may be necessary to render possible the representation of that interest. In making such division the Commission must have due regard to the desirability of reducing to the minimum the disproportion in the number of citizens of Sri Lanka resident in the several electoral districts of the Province. Notwithstanding the above provisions, the Delimitation Commission has power to create in any Province one or more electoral districts returning two or more members if the racial composition of the citizens of Sri Lanka in that Province is such as to make it desirable to render possible the representation of any substantial concentration of citizens of Sri Lanka in that Province who are united by a community of racial interest different from that of the majority of the citizens of Sri Lanka in that Province. In any such case the number of electoral districts for that Province, as ascertained, must be reduced so that the total number of members to be returned for that Province does not exceed the total number of electoral districts so ascertained. (s. 78).

In the event of a difference of opinion among the members of the Delimitation Commission, the opinion of the majority is deemed to be the decision of the Commission. Where each member of the Commission is of a different opinion, the opinion of the Chairman is deemed to be the decision of the Commission. (s. 79).

The Chairman must communicate the decision of the Commission to the President who must by Proclamation publish the names and boundaries of the electoral districts and the number of members to be returned by each district. The districts specified in the Proclamation for the time being in force are the electoral districts of Sri Lanka for all purposes of the Constitution and of any law relating to the election of members to the National State Assembly. (s. 80).

Any re-division of the Provinces into electoral districts effected by the Commission and any alteration consequent upon such re-division in the total number of the members of the National State Assembly comes into operation at the next general election held after such re-division and not earlier. However, if a National State Assembly is dissolved before the publication of the Proclamation, the general election consequent on

such dissolution must be held on the basis of the electoral districts existing at the time of such dissolution. (s. 81).

As it was under the previous Constitution, apart from the weightage which is given by area to the Provinces, the allotment of the number of seats to each Province is on the basis of "persons" and not of "citizens", although only the latter are entitled to the vote. The result has been, and will continue for some time to be, disproportionate representation in the National State Assembly. Citizens living in certain Provinces, such as the Central Province, where there are resident persons of Indian origin whose status has not been determined, are over-represented as compared with citizens of other Provinces. However, this disparity in representation will be progressively reduced with the registration of some of these persons as citizens of Sri Lanka and with the recognition of others as citizens of India by the Indian Government, under the Indo-Ceylon Agreement of 1964 relating to persons of Indian origin. There has, nevertheless, been considerable criticism that the electoral system does not give equal value to each person's vote. For example, at the general election of 1970 the electorate of Mihintale comprised 18,188 voters while that of Dehiwala-Mount Lavinia had 70,236 voters.

In the Constituent Assembly there was an amendment moved by Mr. V. Dharmalingam on behalf of Mr. S. J. V. Chelvanayakam that the law regarding delimitation of electoral districts be suitably amended to create electoral districts not on the basis of persons resident in a Province but on the basis of citizens resident in the Province. Mr. Dharmalingam said that "one man, one vote, one value" was a fundamental principle of democracy. He pointed out that the Constitutent Assembly President's electorate of Kotte had a voting strength of 68,383 registered voters, and that his own electorate, Uduvil, had a voting strength of 36,690 whereas the voting strength of Passara was only 16,461. Mr. Dharmalingam added: "One voter in Passara has the electoral power of 4.2 voters in your electorate and 2.3 voters in my electorate".[7] Mr. Dudley Senanayake said that merely changing the calculation from population to citizens would not give equality to the vote. It would lessen the inequality but

7. *Constituent Assembly Debates*, Vol. 1, 1692. The fundamental rights of equal protection of the law guranteed under the Constitution implies the doctrine of "one man, one vote, one value"—see *Baker* v *Carr* 369 U.S. 186 (1962); S.A. de Smith, *Constitutional and Administrative Law* (1971), p. 249.

would not give equality.[8] The Minister of Constitutional Affairs, Dr. Colvin R. de Silva, said that the people were "gravely, unevenly developed while also being under-developed. The combination of these two major factors compels anyone who is trying to work out an adequate electoral or constituency system to give thought to the fact that when in one way he gives equal value to each person's vote, in another way he creates a gross inequality".[9]

Commissioner of Elections. The Constitution provides, that there shall be a Commissioner of Elections appointed by the President. In order to secure his independence of tenure, it is provided that he holds office during good behaviour. It is also provided that his salary is determined by the National State Assembly, charged on the Consolidated Fund and cannot be diminished during his term of office. He can be removed by the President only on account of ill-health or physical or mental infirmity or upon an address of the National State Assembly. The office of the Commissioner of Elections also becomes vacant (a) upon his death; or (b) on his resignation in writing addressed to the President; or (c) on his attaining the age of sixty years. The President may in exceptional circumstances permit a Commissioner of Elections who has reached the age of sixty years to continue in office for a period not exceeding twelve months. (s. 82).

The Commissionor of Elections is required to exercise, perform or discharge all such powers, functions or duties as may be conferred or imposed on or vested in him by the laws for the time being in force relating to elections to the National State Assembly or any other written law. (s. 83) The prevailing election law provides that the Commissioner of Elections shall (a) exercise general direction and supervision over the administrative conduct of elections to the National State Assembly, (b) have power to issue to election officers such directions as he may deem necessary to ensure effective execution of the provisions of the Act, (c) execute and perform all other powers and duties which are conferred upon him by the Act. He is also empowered to make regulations amending, revoking or replacing any of the Postal Voters Regulations in such

8. *Ibid.*, 1704.
9. *Ibid.*, 1715-6.

manner as may be necessary to remove any doubts or difficulties that may arise in their application in the case of an election in any multi-member electoral district.

Election of Members to the National State Assembly. The Constitution provides that the election of members to the National State Assembly shall be free and shall be by secret ballot (s. 72). Subject to the provisions of Chapter XI of the Constitution the National State Assembly has power by law to make provision for—(a) the registration of electors; (b) the preparation and revision of electoral lists; (c) the procedure for the election of members to the National State Assembly; (d) the creation of offences relating to elections and punishment therefor; (e) the grounds for avoiding elections; and (f) such other matters as are necessary or incidental to the elction of members to the National State Assembly. However, a law made under this provision cannot add to the disqualifications enumerated in section 70 (s. 73).

When a state officer is a candidate at any election, he is deemed to be on leave from the date on which he stands nominated as a candidate until the conclusion of the election. Such a state officer cannot during this period exercise, perform or discharge any of the powers, functions or duties of his office. (s. 74). Until the National State Assembly provides for the matters referred to above, such laws relating to or connected with the election of members of Parliament and the determination of disputed elections as were in force immediately before the commencement of the Constitution, subject to the provisions contained in this Chapter, apply, *mutatis mutandis*, to the said matters (s. 75).

With regard to registration of electors, the prevailing law provides that after the completion of the preparation of a register of electors for any electoral district, the registering officer of that district must give notice that the register is open for inspection. Where a person's name which should have been included in a register does not appear on it he may prefer a claim to the registering officer of the district to have it inserted in the register. Any person whose name appears in the register may object to the inclusion or insertion of any name in it. The registering officer must, as soon as practicable, hold a public inquiry into all claims and objections which have been duly made. Any claimant or objector who is dissatisfied with the decision of the registering officer may appeal from it to the revising officer. When the latter has determined the appeal, he

forwards to the registering officer a statement containing the names which he has decided should be included or inserted in the register and those which should be expunged. The registering officer of each electoral district then certifies the register of electors for the district.

On or before the 1st day of June of each subsequent year the Commissioner of Elections must cause the revision of the registers to be commenced. For the purpose of revising the register, the registering officer prepares two separate lists, one (List "A") containing the names of persons in the register who are dead or have become disqualified, and the other (List "B") containing the names of persons who, not being already in the register or otherwise disqualified, appear to the registering officer to be qualified to have their names entered in the register. Upon the completion of the two lists, the register and such lists are open for inspection at the office of the registering officer of the electoral district and at such other places in the district as may be specified. After the claims and objections have been adjudicated upon, the revised register for each district is certified by the registering officer and notice is given of such certification.

With regard to elections themselves, the election law provides that in every Proclamation dissolving the National State Assembly and in every Proclamation or notice ordering the holding of an election, the President must specify the date or dates on which candidates for election are to be nominated and the place or places of nomination. Any person eligible for election as a member of the National State Assembly may be nominated as a candidate for election. Each candidate must be nominated by means of one or more, but not more than three, separate nomination papers each signed by two persons, whose names are in the register of electors for the electoral district as proposer and seconder respectively. The written consent of the candidate must be annexed to or endorsed on each nomination paper. This is an imperative requirement. Omission to comply with it permits the Returning Officer on objection taken before him on this ground on Nomination Day to reject the nomination papers and declare the opposing candidate (if there is one) to be elected uncontested.[10] The signature of the proposer and the seconder must be attested by a Justice of the Peace, a Commissioner of Oaths or a notary

10. *Samaraweera* v *Bandara* (1970) 73 N.L.R. 530.

public. The candidate or some person on his behalf must deposit or cause to be deposited with the returning officer, or with some person authorised by him, between the date of the publication of the Proclamation or notice and one o'clock in the afternoon of nomination day (a) where such candidate is the official candidate of a recognised Party for the purpose of elections, the sum of two hundred and fifty rupees in legal tender; or (b) where such candidate is not the official candidate of any such Party, the sum of one thousand rupees in legal tender. Objection as to the failure of a candidate to deposit the correct sum of money can be raised for the first time by the unsuccessful candidate by way of an election petition.[11]

If a candidate who has made the required deposit is not elected and the number of votes polled by him does not exceed one-eighth of the total number of votes polled or, in the case of an electoral district returning more than one member, one-eighth of the number of votes polled divided by the number of members to be elected, the amount deposited is forfeited to the Republic.

Every nomination paper must be delivered to the returning officer together with a copy of it on the day, and at the place, of nomination between ten o'clock and eleven o'clock in the morning by the candidate or by his proposer or seconder. The returning officer must permit the candidates and their proposers and seconders and one other person, if any, appointed by each candidate in writing to be present there between ten o'clock and eleven thirty o'clock in the morning and there and then to examine the nomination papers of candidates which have been received for that electoral district. During that time objection may be made to a nomination paper on all or any of the following grounds:

(*a*) that the description of the candidate is insufficient to identify him;
(*b*) that the nomination paper does not comply with or was not delivered in accordance with the provisions of the Elections Act;
(*c*) that it is apparent from the contents of the nomination paper that the candidate is not capable of being elected a member of the National State Assembly;

11. *Punchi Banda* v *Lenawa* (1965) 68 N.L.R. 129; contrast *Pamunuwa* v *de Silva* (1965) 67 N.L.R. 569.

(*d*) that the provisions of the section relating to deposits by candidates have not been observed;

(*e*) that by reason of his conviction for a corrupt or illegal practice or by reason of the report of an Election Judge in accordance with the prevailing election law, the candidate is not capable of being elected as a member.

The decision of the returning officer, if disallowing the objection taken on any ground, other than (e), is final; but if he allows the objection it is subject to reversal on an election petition. In the case of an objection under ground (e) the returning officer must refer it for the decision of the Supreme Court.

A candidate may before eleven o'clock in the morning on the day of nomination, but not afterwards, withdraw his candidature by giving a notice to that effect signed by him to the returning officer. If on the day of nomination in any electoral district no more candidates stand nominated for the district than there are vacancies to be filled, the returning officer must, subject to the provisions dealing with a reference to the Supreme Court, declare the nominated candidate or candidates to be elected. He must also forthwith make a return to the Commissioner of Elections who must cause the name or names of the member or members so elected to be published in the Gazette.

If, on the day of nomination in any electoral district, more candidates stand nominated than there are vacancies to be filled, the returning officer must forthwith adjourn the election to enable a poll to be taken. The returning officer must send to each elector whose name appears in the register a poll card specifying (a) the name and number of the electoral district, (b) the name, qualifying address, and registration number of the elector (c) the polling district, (d) the polling station allotted to the elector and (e) the date and hours of the poll.

Unless the Commissioner appoints any other hour, the poll must open at eight o'clock in the forenoon of the date of the poll and close at five o'clock in the afternoon of that day. Not more than two polling agents of each candidate can at any time be admitted to or be allowed to remain in any polling station.

The votes are given by ballot. The ballot of each voter consists of a ballot paper containing a list of the candidates. Each ballot paper has a number printed on the back and a counterfoil with the same number printed on the face. Where only one candidate has to be returned, each voter is given one ballot paper and has one vote. Where more than one candidate has to be returned, each voter is given as many ballot papers and is entitled to as many votes as there are candidates to be returned, and he may give each of his votes to a different candidate or all or any of his votes to the same candidate.

An application to be treated as a postal voter may be made to the registering officer (a) by a member of the Armed Forces or an officer or servant in the Department of Police, Railway, Postal and Telecommunication Services, or the Ceylon Transport Board, on the ground that he is unable or likely to be unable to vote in person by reason of the particular circumstances of his employment as such member, officer or servant, and (b) by any other officer or servant in the public service or of the Central Bank or the Local Government Service on the ground of the particular circumstances of his employment on the date of the poll for a purpose connected with the election or of his being likely to be employed for that purpose, and (c) by a candidate at a general election on the ground that he is unable or likely to be unable to vote in person.

The presiding officer of each polling station, as soon as practicable after the close of the poll in the presence of such of the candidates and their polling agents as attend, makes up into separate packets sealed with his own seal and the seals of the candidates or their agents if they desire to affix their seals (a) the unused and spoilt ballot papers placed together, (b) the marked copies of the register of electors and the counterfoils of the ballot papers, (c) the tendered votes list and (d) the list of voters to whom ballot papers have not been delivered because they have refused to allow the presiding officer to make the appropriate inspection or because they have already been marked, or have refused to allow the officer to mark, with the appropriate mark.

The ballot boxes are secured and similarly sealed and despatched to the returning officer. At the counting of the votes, no persons other than the returning officer, his assistants, clerks, the candidates and their counting agents are allowed to be present, except with the sanction of the returning officer. When the counting of the votes has been completed

the returning officer must forthwith declare the candidate having the greatest number of votes to be elected. Before the returning officer makes the declaration, however, recounts may be made as he deems necessary. Not more than two recounts can be made on the application of any candidate or all candidates and their counting agents.

Corrupt Practices. It is a principle of our law that freedom of election is essential to the validity of an election. One of the best established rules of freedom of election is, that the electors shall come to the poll perfectly freely as they are registered, and that they shall not themselves accept bribes, that they shall not be treated, that they shall not be coerced, and that they shall not be intimidated.[12] The expression "corrupt practice" as used in the Elections Act means any of the following offences: (1) Personation. (2) Treating. (3) Undue influence. (4) Bribery, (5) Making or publishing, before or during any election, for the purpose of affecting the return of any candidate, any false statement of fact in relation to the personal character or conduct of such candidate. This offence too like other election offences must be proved beyond reasonable doubt and there is no difference in the onus of proof between it and other corrupt practices.[13] A police officer's report of a speech made by a candidate's agent at an election meeting is not admissible under section 35 of the Evidence Ordinance in proof of any fact stated in the report.[14] It may, however, be used in terms of section 159 of the Ordinance to refresh the memory of the officer when he gives direct evidence as to the statements made by the agent at the meeting.[15] (6) Making or publishing, before or during any election, for the purpose of promoting or procuring the election of any candidate, any false statement of the withdrawal of any other candidate at such election.

A person is guilty of the offence of personation if, at any election, (a) he votes in person or by post as some other person, whether that other person is living or dead or is a fictitious person; or (b) he votes more than once in or under his own name at such election.

12. See *Drogheda* Case 1 O' & M 252.
13. *Premasinghe* v *Bandara* (1966) 69 N.L.R. 155; *Ilangaratne* v *G. E. de Silva* (1948) 49 N.L.R. 169; *Aluwihare* v *Nanayakkara* (1948) 50 N.L.R. 529 *Chelvanayagam* v *Natesan* (1954) 56 N.L.R. 271. Cf. *Don Philip* v *Ilangaratne* (1949) 51 N.L.R. 561.
14. *Banda* v *Yalegama*(1966)69N.L.R. 361; *Herath* v *Seneviratne* (1967) 70 N.L.R.145.
15. *De Silva* v *Wickremasuriya* (1967) 69. N.L.R. 409, (over-ruling on this point *Ilangaratne* v *de Silva* 49 N.L.R. 169 and disapproving *Don Philip* v *Ilangaratne* 51 N.L.R. 561).

A person who (a) has applied for a ballot paper for the purpose of voting in person; or (b) has made an application to be treated as a postal voter; or (c) has marked, whether or not validly, and returned a ballot paper issued for the purpose of voting by post, is deemed to have voted. In the case of an elector who votes in person, as long as he positively and unequivocally answers the Presiding Officer that he is the person registered in the register and has not already voted, the Presiding Officer cannot refuse him a ballot paper nor inquire into his right to vote.[16]

A person is guilty of the offence of treating if (a) he corruptly gives or provides any meat, drink, refreshment or provision or any money or ticket or any other means or device to enable the procuring of any meat, drink, refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at such election or on account of any person having voted or refrained from voting or being about to vote or refrain from voting; (b) being an elector, he corruptly accepts or takes any such meat, drink, refreshment, provision or any such money or ticket or adopts such other means or device to enable the procuring of such meat, drink, refreshment or provision.

"Corruptly" means with the object and intention of influencing the vote.[17] In a charge of treating it must be shown that the eating and drinking was at the expense or upon the credit of the candidate, either by his authority or by the authority of one or more of his agents in order to influence voters.[18] A single instance of treating, if done with a corrupt intention, is sufficient to invalidate an election, although it may be more difficult to infer a corrupt intention from one isolated act than from several acts of the same kind.[19]

A person is guilty of the offence of undue influence if (a) he makes use of or threatens to make use of any force, violence or restraint; or (b) he inflicts or threatens to inflict any temporal or spiritual injury,

16. *Ahamed* v *Aliyar Lebbe* (1969) 73 N.L.R. 73; Parker, *Election Agent and Returning Officer* (6th ed.), pp. 180-181.
17. *The Carrickfergus Case* 3 O' & H. 90, cited in *Saravanamuttu* v *de Silva* (1941) 43 N.L.R. 294, at p. 318.
18. *Aluwihare* v *Nanayakkara* (1948) 49 N.L.R. 529, at p. 539, citing the *Lichfield case* (1869) 1 O'M & H.22, at p. 26.
19. *Fernando* v *Coorey* (1930) 32 N.L.R. 121.

damage, harm or loss upon any other person in order to induce or compel him to vote or refrain from voting, or on account of having voted or refrained from voting at any election; or (c) by abduction, duress or any fraudulent device or contrivance, he impedes or prevents the free exercise of the franchise of any elector or thereby compels, induces or prevails upon any elector either to give or refrain from giving his vote at any election; or (d) at any time during the period commencing on the day of nomination at any election and ending on the day following the date of the poll (i) he utters at any religious assembly any words for the purpose of influencing the result of the election or inducing any elector to vote or refrain from voting for any candidate at the election,[20] (ii) for such purposes he distributes or displays, at any religious assembly any handbill, placard, poster, notice, sign, flag or banner, or (iii) he holds or causes to be held a public meeting at a place of worship for the purpose of promoting the election of any candidate at an election; or (e) being a member or official of a religious order or organisation (i) he denies or threatens to deny to any member of the family of such member or adherent, any spiritual ministration, service or benefit to which such member or adherent would in the ordinary course have been entitled or (ii) he excludes or threatens to exclude such member or adherent from voting for any candidate at any election, or to support or refrain from supporting any political party at such election, or on account of such member or adherent having voted or refrained from voting for a candidate at such election, or having supported or refrained from supporting any political party at such election; or (f) being the employer of any person (i) he terminates or threatens to terminate such employment, or (ii) he denies or threatens to deny to such other person any benefit or service which the latter already enjoyed, or would have enjoyed, in the ordinary course of such employment, in order to induce or compel him to vote or refrain from voting for any candidate at any election, or to support or refrain from supporting any political party at such election, or on account of having voted or refrained from voting for any candidate at such election, or having supported or refrained from supporting any political party at such election.

The following persons are to be deemed guilty of the offence of bribery: (a) Every person who gives, lends, or agrees to give or lend,

20. A gathering of persons becomes a religious assembly only when they are actually attending any religious proceedings: *Hemadasa* v *Sirisena* (1966) 69 N.L.R. 201.

any money or valuable consideration to or for any elector, or to or for any person on behalf of any elector or to or for any other person, in order to induce any elector to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such elector having voted or refrained from voting at any election; (b) Every person who, gives or procures, or agrees to give or procure, any office, place or employment to or for any elector or to or for any person on behalf of any elector, or to or for any other person, in order to induce such elector to vote or refrain from voting, or corruptly does any such act as aforesaid on account of any elector having voted or refrained from voting at any election; (c) Every person who makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the return of any person as a member of the National State Assembly, or the vote of any elector at any election; (d) Every person who upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement procures or engages, promises or endeavours to procure, the return of any person as a member of the National State Assembly, or the vote of any elector at an election; (e) Every person who advances or pays or causes to be paid any money to or to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election; (f) Every elector who, before or during any election, receives, agrees, or contracts for any money, gift, loan, valuable consideration, office, place or employment, for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any such election; (g) Every person who, after any election, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any such election; (h) Every person who on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or on account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to such candidate, or to his agent or agents, for the gift or loan of any money or valuable consideration, or for the promise of the gift or loan of any money or valuable consideration or for any office, place of employment or for the promise of any office, place or employment; (i) Every person who, in order to induce any other person to agree to be nominated

as a candidate or to refrain from becoming a candidate or to withdraw if he has become a candidate, gives or procures or agrees to give or procure any office, place or employment to or for such other person, or gives or lends or agrees to give or lend, any money or valuable consideration to or for any person or to or for such other person or to or for any person on behalf of such other person.

A person who is guilty of a corrupt practice becomes liable on conviction by a District Court (a) in the case of personation or aiding, abetting, counselling or procuring the commission of personation, to rigorous imprisonment for a term not exceeding 12 months and (b) in the case of other corrupt practices, to a fine not exceeding five hundred rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment. A person who is convicted of a corrupt practice also becomes incapable for a period of seven years from the date of conviction of being registered as an elector or of voting at any election to the National State Assembly or of being elected as a member of the Assembly. If at that date he has been elected a member his election is vacated from the date of conviction.

Where a corrupt practice is committed by any candidate who was not elected as a member at the election or with his knowledge or consent or by any of his agents, such candidate on conviction by a District Court becomes liable to the same punishment and incapacities as a person who is guilty of a corrupt practice. Such candidate cannot, however, be convicted of the offence of treating or undue influence committed by any of his agents if he proves to the District Court (a) that no corrupt or illegal practice was committed at the election by the candidate or his election agent and any such offence was committed contrary to the orders and without the sanction or connivance of such candidate or his election agent; and (b) that such candidate and his election agent took all reasonable means for preventing the commission of corrupt and illegal practices at the election; and (c) that any such offence was of a trival, unimportant and limited character; and (d) that in all other respects the election was free from any corrupt or illegal practice on the part of such candidate and his agents.

A prosecution for a corrupt practice cannot be instituted against such a candidate (a) except within the period during which an election petition could, if he had been elected, have been presented against him,

(b) except by a person who would have had a right to present such petition, (c) except with the sanction of the Attorney-General.

Illegal Practices. In the case of an illegal practice, the question as to whether an offence has been committed is not one of intention of doing that very thing, as it is in the case of a corrupt practice, or whether it has been done honestly or dishonestly; the question here is whether in point of fact the Act creating the offence has been contravened.[21]

The following are guilty of illegal practices as defined in the Elections Act:

(1) A person who at a general election votes in more than one electoral district, or asks for a ballot paper for the purpose of so voting. (s. 8 (2)).

(2) A person who at an election votes more than once in the same electoral district, or asks for a ballot paper for the purpose of so voting. (s. 8 (4)).

(3) A person who is the proprietor, manager, editor, publisher or other similar officer or purports to act in such capacity of any newspaper where there is published any false statement capable of influencing the result of the election and relating to (a) the utterances or activities at any election of any candidate or any political party which is contesting an election; or (b) the conduct or management of such election by such candidate, or any such party. Where, however, such person proves that such publication was made without his consent or connivance and that he exercised all such diligence to prevent such publication as he ought to have exercised having regard to the nature of his functions in such capacity and in all the circumstances, he is not guilty of an illegal practice. (s.58A).

(4) A person who makes any payment, advance or deposit to be made by a candidate at an election or by any agent or by any other person at any time in respect of the conduct or management of an election otherwise than by or through the election agent of the candidate. (s.62).

21. See *Barrow-in-Furness* Case, 4 O'M& H 76.

(5) A person who pays any money provided by any person other than the candidate for any expenses incurred on account of or in respect of the conduct or management of the election, whether as gift, loan, advance or deposit, except to the candidate or his election agent. This provision will not, however, apply to any payment by the returning officer or to any sum disbursed by any person out of his own money for any small expense legally incurred by himself, if such sum is not repaid to him. (s. 62).

(6) An election agent who pays a claim against the candidate or himself in respect of election expenses which is sent to him later than fourteen days after the day on which the candidate returned is declared elected. (s. 63 (2)).

(7) An election agent who makes a payment of election expenses incurred by or on behalf of a candidate later than twenty-eight days after the day on which the candidate returned is declared elected. (s. 63 (4).

(8) Any candidate or election agent who knowingly pays any sum or incurs any expense in excess of five thousand rupees or of an amount equal to twenty cents for each elector on the register, whichever amount is less. (s.66).

(9) Any person who knowingly makes or receives any payment or is a party to any contract (a) on account of the conveyance of electors to or from the poll, whether for the hiring of vehicles or animals of transport or for railway fares or otherwise; or (b) to or with an elector on account of the use of any house, land, building, or premises for or on account of the exhibition of any address, bill or notice. (s. 67 (1) and (2).

(10) A person who knowingly lets, lends, employs, hires, borrows or uses any vehicle, vessel or animal, in any electoral district during the period commencing one hour before the time of the opening of the poll and ending one hour after the time of its closure (a) for the purpose of the conveyance of voters to or from the poll or (b) for any other purpose, other than (i) any legitimate purpose or (ii) any official business, that is to say, the performance of any duty or the discharge of any function accruing from or connected with or incidental to any office, service or employment, held or undertaken or carried on by him. There are certain exceptions to the application of these provisions. (s. 67 (3) and (4)).

(11) A person who engages or employs for payment or promise of payment for the purpose of promoting or procuring the election of a candidate except for the purpose or in the capacities following:—(a) one election agent and no more, (b) a reasonable number of polling agents for each polling district having regard to the need to revoke the appointment of any polling agent for that polling district during the poll; (c) a reasonable number of clerks and messengers having regard to the area of the electoral district and the number of electors on the register. (s. 68).

(12) A candidate or election agent who knowingly makes a false declaration as to election expenses or fails to make the declarations as required by section 70 (2) or to comply with the requirements of section 70 (1) relating to the return respecting election expenses.

A person who commits an illegal practice becomes liable on conviction by a District Court to a fine not exceeding three hundred rupees and by conviction becomes incapable for a period of three years from the date of conviction of being registered as an elector or of voting at any election or of being elected as a member of the National State Assembly. If at that date he has been so elected his election or appointment is vacated from the date of conviction. (s. 72).

Where an illegal practice is committed in connection with any election by a candidate who was not elected as a member or with his knowledge or consent or by any of his agents, such candidate on conviction by a District Court becomes liable to a fine not exceeding three hundred rupees. Such candidate cannot, however, be convicted of an illegal practice committed by any of his agents if he proves to the District Court:

(a) that no corrupt or illegal practice was committed at the election by him or his election agent and the illegal practice which is the subject-matter of the prosecution was committed contrary to the orders and without the sanction or connivance of the candidate or his election agent; and (b) that such candidate and his election agent took all reasonable means for preventing the commission of corrupt and illegal practices at the election; and (c) that the offence or offences constituting such illegal practice was or were of a trivial, unimportant and limited nature; and (d) that in all other respects the election was free from any corrupt or illegal practice on the part of such candidate and his agents. (s. 72A).

Excuse for corrupt or illegal practice. Where upon the trial of an election petition respecting an election of a member of the National State Assembly the Election Judge reports that a candidate at such election has been guilty by his agents of the offence of treating or undue influence or of any illegal practice in reference to such election, and the Election Judge further reports, after giving the Attorney-General an opportunity of being heard, that the candidate has proved to the Court—(a) that no corrupt or illegal practice was committed at such election by the candidate or his election agent and the offences mentioned in the said report were committed contrary to the orders and without the sanction or connivance of such candidate or his election agent; and (b) that such candidate and his election agent took all reasonable means for preventing the commission of corrupt and illegal practices at such election; and (c) that the offences mentioned in the report were of a trivial, unimportant and limited character; and (d) that in all other respects the election was free from any corrupt or illegal practice on the part of such candidate and of his agents, then the election of such candidate does not, by reason of the offences mentioned in such report, become void, nor does the candidate become subject to any incapacity under the Elections Act. (s. 73).

Where, on application made

(1) it is shown to an Election Judge or to a Judge of the Supreme Court by such evidence as seems to the Judge sufficient (a) that any act or omission of a candidate at any election, or of his election agent or of any other agent or person would, by reason of being the payment of a sum or the incurring of expense in excess of any maximum amount allowed by this Act, or of being a payment, engagement, employment, or contract in contravention of any of the provisions of this Act, be but for this section an illegal practice; and (b) that any such act or omission arose from inadvertence or from accidental miscalculations or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith, and

(2) in the circumstances it seems to the Judge, after giving the candidates, the returning officer, and any elector within the electoral district an opportunity of being heard, to be just that the candidate in question and the said election and other agent and person, or any of them, should not be subject to any of the consequences under this Act of the said act or omission, the Judge may make an order allowing such act or omission to be an exception from the provisions of this Act which would other-

wise make the same an illegal practice, payment, employment, or hiring; and thereupon such candidate, agent or person will not be subject to any of the consequences under this Act of the said act or omission. (s. 74).

Where the return and declarations respecting election expenses of a candidate at an election have not been transmitted as required by this Act, or being transmitted contain some error or false statement, then—

(a) if the candidate applies to an Election Judge or a Judge of the Supreme Court and shows that the failure to transmit such return and declarations, or any of them, or any part thereof, or any error or false statement therein, has arisen by reason of his illness, or of the absence, death, illness, or misconduct of his election agent or of any clerk or officer of such agent, or by reason of inadvertence or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant; or

(b) if the election agent of the candidate applies to an Election Judge or a Judge of the Supreme Court and shows that the failure to transmit the return and declarations which he was required to transmit, or any part thereof, or any error or false statement therein, arose by reason of his illness, or of the death, illness or misconduct of any prior election agent of the candidate, or of the absence, death, illness or misconduct of any clerk, or officer of an election agent of the candidate, or by reason of inadvertence or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant, the Judge may, after such notice of the application, and on production of such evidence of the grounds stated in the application, and of the good faith of the application, and otherwise, as to the Judge seems fit, and after giving the other candidates, the returning officer and any elector within the electoral district an opportunity of being heard, make such order for allowing an authorized excuse for the failure to transmit such return and declarations, or for an error or false statement in such return and declarations as to the Judge seems just. (s. 75 (1).

Grounds for avoiding elections. (1) The election of a candidate as a member is avoided by his conviction for any corrupt or illegal practice. (2) The election of a candidate as a member must under s. 77 be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge:

(a) that by reason of general bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred. The election petition must state the material facts on which the petitioner relies.[22] To establish any of these charges it is sufficient to show that, having regard to the majority obtained and the strength of the polling, the result of the election may reasonably be said to have been affected.[23] The offence must be of such a character, so general and extensive in its operation, that it cannot be said that the polling was a fair representation of the opinion of the constituency;[24]

(b) noncompliance with the provisions of the Act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such noncompliance affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connexion with the election by the candidate or with his knowledge or consent or by any agent of the candidate. The substance of the principle of agency has been stated as follows: "If a man is employed at an election to get you votes, or if, without being employed, he is authorised to get you votes, or if, although neither employed nor authorised, he does to your knowledge get you votes, and you accept what he has done and adopt it, then he becomes a person for whose acts you are responsible in the sense that, if his acts have been of an illegal character you cannot retain the benefit which those illegal acts have helped to procure for you".[25] A wider scope has thus been given to the term "agency" in elections than under the common law. Any person who, for example, is invited by a candidate, or by his agent authorised to convene an election meeting, to speak at any such meeting in support of the election has implied general authority to make any speech which in his opinion is likely to promote

22. *Wijewardena* v *Senanayake* (1971) 74 N.L.R. 97.
23. *Pelpola* v *Gunawardena* (1948) 49 N.L.R. 207; *Rutnam* v *Banda* (1944) 45 N.L.R. 145; *North Louth Case* (1911) 6 O'M & H. 124; *South Meath Case* 4 O'M &. 130, at p. 142.
24. *Tarnolis Appuhamy* v *Wilmot Perera* (1948) 49 N.L.R. 361, at p.367, citing Baron Bramwell in the *North Durham Case* (1874) 2 O'M & H. 152.
25. *Jayasena* v *Ilangaratne* (1969) 73 N.L.R. 35, at p. 40, citing Channell J in the *Great Yarmouth Case* 5 O'M & H 178. See also *Chelvanayakam* v *Natesan* (1954) 56 N.L.R. 271 (where the relationship between a candidate and his agent was likened to that existing between master and servant) and *Rutnam* v *Banda* (1944) 45 N.L.R. 145.

the election.[26] The speaker at such meeting is therefore an "agent" within the meaning of the term in Election Law;

(d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been found guilty of a corrupt practice by a District Court or by the report of an Election Judge;

(e) that the candidate was at the time of his election a person disqualified for election as a member.

The return of a member is a serious matter and ought not to be set aside unless the Judge is satisfied beyond doubt that the election is void.[27]

Election Petitions. Every election petition must be tried by the Chief Justice or by a Judge of the Supreme Court nominated by the Chief Justice for the purpose. The Chief Justice or the Judge so nominated is referred to as the "Election Judge". For the purpose of summoning or compelling the attendance of witnesses at the trial of an election petition, the Election Judge has the same power, jurisdiction, and authority as are possessed and exercised by the Judge of a District Court in the trial of a civil action and witnesses must be sworn in the same manner, as near as circumstances will admit, as in the trial of such an action, and are subject to the same penalties for the giving of false evidence. The Election Judge must be attended on the trial of an election petition in the same manner as if he were a Judge of the Supreme Court sitting at Assizes. Unless otherwise ordered by the Chief Justice, all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the Supreme Court. (s. 78). The place of the trial of an election petition must be in, or as near as practicable to, the electoral district to which the petition relates. (s. 78A).

An election petition may be presented to the Supreme Court by any one or more of the following persons, namely: (a) some person who voted or had a right to vote at the election to which the petition relates; (b)

26. *Samaranayake* v *Kariawasan* (1966) 69 N.L.R. 1; *Rutnam* v *Banda* (1944) 45 N.L.R. 145; *Wimalasena Banda* v *Yalegama* (1966) 69 N.L.R.361.
27. *Lateef* v *Saravanamuttu* (1932) 34 N.L.R. 369, at p.377, citing Baron Martin in the *Warrington Case* 1 O'M & H 44.

some person claiming to have had a right to be returned or elected at such election; (c) some person alleging himself to have been a candidate at such election (s. 79). An election petition is a matter in which not only the petitioner but the whole electorate has a vital interest.[28] Therefore when serious charges have been made against the respondent, it is necessary that some investigation should be made with regard to the charges before the petition can be permitted to be withdrawn.[29]

All or any of the following relief to which the petitioner may be entitled may be claimed in an election petition, namely: (a) a declaration that the election is void; (b) a declaration that the return of the person elected was undue; (c) a declaration that any candidate was duly elected and ought to have been returned. Miscount of ballot papers is a valid ground on which relief may be granted under (b) and (c) and an inspection of ballot papers will be allowed for the purpose;[30] (d) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny (s. 80).

On a scrutiny the following votes are struck off: (a) the vote of any person whose name was not on the register of electors assigned to the polling station at which the vote was recorded; (b) the vote of any person whose vote was procured by bribery, treating, or undue influence; (c) the vote of any person who committed or procured the commission of personation at the election; (d) where the election was a general election, the vote of any person proved to have voted at such general election in more than one electoral district; (e) the vote of any person, who, by reason of a conviction of a corrupt or illegal practice or by reason of the report of an Election Judge, or by reason of his conviction of an offence under section 52 or section 53 of the Act, or by reason of the operation of section 4A, was incapable of voting at the election; (f) the vote of any person who, not being entitled to vote in person at the election by reason of subsection (1) of section 42A, voted in person at the election. The vote of a registered elector cannot, except in the case (e), be struck off at a scrutiny by reason only

28. *Rambukwella* v *Silva* (1924) 26 N.L.R. 231, at pp. 253-254; *Saravanamuttu* v *de Mel* (1948) 49 N.L.R. 529.
29. *Don Alexander* v *Leo Fernando* (1948) 49 N.L.R. 202.
30. *Kaleel* v *Themis* (1956) 58 N.L.R. 396; *Kuruppu* v *Hettiaratchy* (1948) 49 N.L.R. 201.

of the voter not having been or not being qualified to have his name entered on the register of electors. On a scrutiny, any tendered vote proved to be a valid vote must, on the application of any party to the petition, be added to the poll (s.85).

Where a scrutiny is claimed the petitioner is entitled to have the votes declared void excluded and the tendered votes added; he is further entitled to inspect and have copies of (a) tendered voters' list (b) the marked register (c) the declaration made by voters who have given tendered ballot papers, but not the tendered ballot papers nor the ballot papers or their counterfoils, before a vote is declared void[31]. The rule of the secrecy of the ballot is strict, and not even the Election Judge is entitled to know until a vote has been declared void for whom it was given[32]. A scrutiny differs from a recount, the latter being only ordered when there has been no proper count according to law. When a scrutiny is asked for, the successful candidate is also entitled to show that votes cast in favour of the petitioner should be struck off for the same reasons contained in the section and therefore he should be made a respondent.[33]

A petitioner must join as respondents to his election petition: (a) where the petition, in addition to claiming that the election of all or any of the returned candidates is void or was undue, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates, other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and (b) any other candidate or person against whom allegations of any corrupt or illegal practice are made in the petition. This requirement is mandatory and failure to comply with it would render a "charge" of undue influence liable to be dismissed.[34] Any candidate not already a respondent to an election petition is, upon application in that behalf made by him to the Election Judge, entitled to be joined as a respondent to such petition; no candidate, however, is entitled to be joined of his own motion as a respondent to such petition under the preceding provisions unless he has given such security for costs as the Election Judge may determine. (s. 80A).

31. *Dias* v *Amarasuriya* (1931) 33 N.L.R. 169.
32. *Ibid.*, at p. 171.
33. *Rajapaksa* v *Kathirgamanathan* (1965) 68 N.L.R. 14.
34. *Wijewardene* v *Senanayake* (1971) 74 N.L.R. 97.

An election petition (a) must state the right of the petitioner to petition within section 79 of this Act; (b) must state the holding and result of the election; (c) must contain a concise statement of the material facts on which the petitioner relies; (d) must set forth full particulars of any corrupt or illegal practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such practice and the date and place of the commission of such practice, and must also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice; (e) must conclude with a prayer as, for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, or as the case may be, and shall be signed by all the petitioners. (s. 80B). All allegations in a petition of the commission of the same corrupt practice or the same illegal practice by a candidate or his agent constitute only one charge for the purpose of giving security for costs in compliance with Election Petition Rules, irrespective of the number of alleged commissions of the same practice specified in the petition.[35] For example, two or more acts of the same corrupt practice of bribery constitute only "one charge".

The Election Judge may, upon such terms as to costs or otherwise as he may deem fit, allow the particulars of any corrupt or illegal practice specified in an election petition to be amended or amplified in such manner as may in his opinion be necessary for ensuring a fair or effective trial of the petition. However, he cannot allow such amendment or amplification if it will result in the introduction of particulars of any corrupt or illegal practice not previously alleged in the petition. Every election petition must be tried as expeditiously as possible and every endeavour must be made to conclude the trial within a period of six months after the date of the presentation of the petition. The Election Judge must make his order deciding such petition without undue delay after the date of the conclusion of the trial .(s. 80C).

At the conclusion of the trial of an election petition the Election Judge must determine whether the member whose return or election is

35. *Wijesekere* v *Perera* (1966) 68 N.L.R. 241; *Tillekewardene* v *Obeysekere* (1931) 33 N.L.R. 65; *Jayawardena* v *Perera* (1947) 49 N.L.R. 1; *Mihular* v *Nalliah* (1944) 45 N.L.R. 251.

complained of, or any other and what person, was duly returned or elected, or whether the election was void, and must certify such determination in writing under his hand. (s.81). At the conclusion of the trial[36] the Election Judge must also make a report setting out (a) whether any corrupt or illegal practice has or has not been proved to have been commited by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any; and (b) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice. Before any person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an Election Judge under this section the Election Judge must give such person an opportunity of being heard and of giving and calling evidence to show why he should not be so reported. (s. 82). The Election Judge is not entitled to report a person except with reference to a corrupt or illegal practice that was in issue at the trial.[37]

An appeal to the Supreme Court lies on any question of law, but not otherwise, against (a) the determination of an Election Judge under section 81, or (b) any other decision of an Election Judge which has the effect of finally disposing of an election petition. (s. 82A (1)). In such cases the Supreme Court sitting on appeal will not interfere (a) unless inferences have been drawn on a consideration of inadmissible evidence or after excluding admissible evidence, or (b) if the inferences are unsupported by legal evidence, and (c) if the inferences are not rationally possible from the evidence or are perverse.[38] Where, at the hearing of an election petition, the Election Judge rejects (even incorrectly) a preliminary objection raised by the successful candidate that the security for costs deposited by the petitioner in order to comply with the requirements of the election law is not sufficient, the candidate, if he is unseated at the conclusion of the trial, has no right of appeal from the Election Judge's decision that the security deposited is sufficient.[39]

36. That is, after the delivery of the judgment. (*In re Karunaratne* (1965) 68 N.L.R 189; *In re Wickremasinghe* (1954)55 N.L.R. 324).
37 *In re Wickremasinghe* (1954) 55 N.I.R. 324.
38. *Jayasena* v *Ilangaratne* (1969) 73 N.L.R. 35 at p. 36. citing *Mahawithana* v *Commissioner of Inland Revenue* (1962) 64 N.L.R. 217 at p. 223. See also *Subasinghe* v *Jayalath* (1966) 69 N.L.R. 121.
39. *Dissanayake* v *Abeysinghe* (1971)75 N.L.R. 12.

Any appeal under s. 82 A (1) may be preferred, either by the petitioner or by the respondent in the election petition, before the expiry of a period of one month next succeeding the date of the determination or decision against which the appeal is preferred. Notice of the filing of a petition of appeal, accompanied by a copy of the petition, must, within ten days of its filing, be served by the appellant on the other party or each of the other parties to the election petition and on the Attorney-General. Appeals must be heard by three Judges of the Supreme Court and must as far as practicable, be given priority over other business of that Court. The Court may give all such directions as it may consider necessary in relation to the hearing and disposal of each appeal. The Attorney-General is entitled to appear or be represented in any appeal. (s. 82A) At the time of the filing of a petition of appeal, or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the appellant must be given on behalf of the appellant. The security must be an amount of not less than five thousand rupees. The security must be given by a deposit of money. If the security is not given by the appellant, no further proceedings can be had on the appeal, and the respondent may apply to the Supreme Court for an order directing the dismissal of the appeal and for the payment of the respondent's costs. (s. 82AA).

The Supreme Court may, upon any appeal preferred under section 82A, affirm, vary or reverse the determination or decision of the Election Judge to which the appeal relates. Where the Supreme Court reverses on appeal the determination of the Election Judge under section 81, the Court must decide whether the member whose return or election was complained of in the election petition, or any other and what person, was duly returned or elected, or whether the election was void, and a certificate of such decision must be issued by the Court. The Supreme Court may order that the election petition to which the appeal relates be tried anew in its entirety or in regard to any matter specified by that Court and give such directions in relation to it as that Court may think fit. The Supreme Court may make any order which it may deem just as to the cost of the appeal and as to the costs of and incidental to the presentation of the election petition and of the proceedings consequent thereon. The decision of the Supreme Court on any appeal is final and conclusive. (s. 82 B (5)[40].

40. See *G. E. de Silva* v *Attorney-General* (1949) 50 N.L.R. 481; *Senanayake* v *Navaratne* (1954) 56 N.L.R. 5; *De Silva* v *Senanayake* (1972) 74 N.L.R. 265.

Termination of Membership. The seat of a member of the National State Assembly becomes vacant: (a) upon his death; or (b) if, by a writing under his hand addressed to the Clerk to the National State Assembly, he resigns his seat; or (c) if he becomes subject to any of the disqualifications mentioned in sections 68 and 70; or (d) if he becomes a member of a state service or, being a member of a state service, does not cease to be a member of such service before he sits in the National State Assembly; or (e) if, without the leave of the National State Assembly first obtained, he absents himself from sittings of the National State Assembly during a continuous period of three months; or (f) if his election as a member of the National State Assembly, or, in the case of a member of the first National State Assembly, his election as a member of Parliament or as a member of the National State Assembly is declared void under the law in force for the time being; or (g) upon the dissolution of the National State Assembly. (s. 36 (1).

Whenever the seat of a member of the National State Assembly falls vacant, except under the provisions of paragraph (f) or paragraph (g), the Clerk to the National State Assembly must inform the President who must within one month by notice in the Gazette order the holding of an election to fill the vacancy. (s. 36 (2)).

CHAPTER 7

THE MEETING AND TERMINATION OF THE NATIONAL STATE ASSEMBLY

1. THE MEETING OF THE NATIONAL STATE ASSEMBLY

The power to summon a National State Assembly is vested in the President. A Proclamation of the President dissolving the National State Assembly must fix a date for the new Assembly to meet after the general election and not later than four months from the date of the Proclamation. A National Assembly must be summoned to meet at least once in every year.

When a new National State Assembly meets for the first time following a general election, it elects three members to be respectively the Speaker, the Deputy Speaker and Chairman of Committees and the Deputy Chairman of Committees. After the election of the Speaker the members take the prescribed oath of allegiance to the Constitution before the Assembly. Except for the purpose of electing the Speaker, no member can sit or vote in the National State Assembly until he has taken the following oath of allegiance to the Constitution before the National State Assembly:—

> "I....., do solemnly declare and affirm/swear that I will be faithful and bear true allegiance to the Republic of Sri Lanka and that I will uphold the Constitution of Sri Lanka". (s. 31).

At the beginning of every session of the National State Assembly the Statement of Government Policy, prepared by the Cabinet of Ministers, is made by the Prime Minister. In the Statement of Government Policy made to the National State Assembly after the inauguration of the Republic, the Prime Minister stated that the Government did not think it was necessary, following previous tradition, to get the President to read the Statement.[1]

1. *National State Assembly Debates*, Vol. 1, p. 190.

The Statement of Government Policy declares the causes for summoning the National State Assembly. It deals in outline with the general political situation, the legislative measures which the Government proposes to introduce and its proposals for the main business of the session. The Statement also calls attention to the supply requirements of the Government. The ensuing debate on the Statement serves the very useful and necessary purpose of affording individual members of the House a welcome opportunity of discussing the policy of the Government, the grievances of the people against the public administration and the economic and political situation in the country.

2. THE TERMINATION OF THE NATIONAL STATE ASSEMBLY

(a) Adjournment. By this the House postpones its uncompleted business. It does not put an end to such business or to a session of the Assembly. An adjournment means an adjournment till the next ordinary sitting day unless the House on a motion made after notice has ordered an adjournment to some other definite date.[2] A motion to adjourn *sine die* will not be entertained. During an adjournment of more than forty-eight hours' duration the Speaker, if so requested by the Prime Minister, must give notice convening the House for an earlier date contained in the request.[3]

(b) Prorogation. This terminates a session and is effected by a Proclamation of the President. The National State Assembly cannot be prorogued for a period longer than four months, and the date for the next session must be stated in the Proclamation. (s. 41 (2)) The President may during a prorogation (i) summon the Assembly by Proclamation for an earlier date (not being less than three days from the date of the Proclamation) or (ii) dissolve the Assembly. (s. 41 (4) and (5)).

Under the present Constitution prorogation does not put an end to pending business. Any Bill which had been introduced in the National State Assembly before the prorogation may be proceeded with during the following session. (s. 41 (3)).

(c) Dissolution. This terminates the life of an existing National State Assembly. Unless it is sooner dissolved, a National State Assembly

2. Standing Order 14.
3. Standing Order 15.

continues for six years from the date appointed for its first meeting. (s. 40 (1)). In the case of the First National State Assembly unless sooner dissolved, it continues for a period of five years commencing on the date of the adoption of the Constitution by the Constitutent Assembly. (s. 42 (5)) The expiry of the specified period operates as a dissolution of the Assembly. So far as the Cabinet of Ministers is concerned, it continues to function during the period intervening between dissolution and the conclusion of the general election. (s. 97).

The Proclamation dissolving the National State Assembly must (a) fix a date or dates for the election of members of the National State Assembly and (b) summon a new National State Assembly to meet on a date not later than four months from the date of the Proclamation. (s. 41 (6)). When the National State Assembly is dissolved by the expiry of the period fixed for its continuance, the dissolution operates as a statutory direction for the election of members to be held before a period of four months commencing on the date of the dissolution. The President is required to fix a date or dates within such period for the holding of the election and for the first meeting of the new National State Assembly. (s. 41 (7).

If at any time after the dissolution of the National State Assembly an emergency is declared under section 134 (2) of the Constitution, the Proclamation declaring the emergency operates as a summoning of the National State Assembly to meet on the tenth day after the Proclamation unless it appoints an earlier date for the meeting, which must be not less than three days from the date of the Proclamation. The National State Assembly so summoned must be kept in session until the termination of the emergency or the conclusion of the general election whichever occurs earlier. (s. 40 (2)).

In practice, Legislatures in Parliamentary democracies such as ours seldom carry on for their full term as they are often dissolved earlier. Towards the end of the life period of a Legislature the Prime Minister often decides the most favourable moment, so far as the Government is concerned, to request a dissolution. A Prime Minister may sometimes miscalculate the mood of the electorate. In the case of Sir John Kotelawala, in spite of the Government's substantial majority in the House, he decided upon dissolution in February 1956 although his government could have continued until May 1957. Far from gaining

a political advantage from this early dissolution, his Party suffered its most severe defeat in the ensuing election in April 1956.

The President must exercise the power of dissolution with the advice of the Prime Minister except where the Constitution empowers him to dissolve the National State Assembly without or against such advice. (ss. 27 (1) and 100). The Constitution provides that if the National State Assembly rejects the Statement of Government Policy at its first session and the Prime Minister within 24 hours of such rejection advises the President to dissolve the Assembly, the President may, notwithstanding such advice, decide not to dissolve it. (s. 100). On the rejection of such advice (1) the Prime Minister is deemed to have resigned, and (2) the President is required to appoint as Prime Minister the member of the National Assembly who, in his opinion, is most likely to command the confidence of the National State Assembly.

The grant or refusal of a dissolution by the President to a Prime Minister in the event of the rejection of the Statement of Government Policy at its first session would depend on several considerations. In particular the President may consider it constitutionally proper to refuse a dissolution where (a) the previous dissolution has been given to the same Prime Minister and (b) there is a likelihood of an alternative Government enjoying the confidence of the National State Assembly being formed without the necessity of going through a general election.[4] As a well-known constitutional jurist has stated with reference to Britain: "The right to a dissolution is not a series of dissolutions".[5] Further, "no Constitution", as Lord Balfour has said, "can stand a diet of dissolutions".

Even where at its first session, the National State Assembly rejects the Statement of Government Policy, the mere fact that some sort of alternative Government with a precarious majority may be possible would not prevent the grant of a dissolution to the Prime Minister.[6] Unless there

4. See J. A. L. Cooray, "Dissolution of Parliament—The Limits of the Governor-General's Dissolution," *Times of Ceylon*, 10 April 1960 (reproduced in the author's *Constitutional Government and Human Rights in a Developing Society* (1959) pp. 24-25). See also S. A. de Smith "Dissolution of Parliament and the Governor-General's Power", *Ceylon Daily News*, 1 April 1960.
5. A Barriedale Keith, *The British Cabinet System*, 1830-1938 (1939), pp. 395-396.
6. See Enid Campbell, "The Prerogative Power of Dissolution" (1961), *Public Law*, p. 165.

is a likelihood of a stable alternative Government being formed, the President would allow a further opportunity to the electorate as the political sovereign of giving a fresh verdict at another election. In order to help him to come to a decision whether a stable alternative Government is likely, the President is entitled to seek advice not only from the Prime Minister but also, as Sir Oliver Goonetilleke, the former Governor-General, did in April 1960, from the Leader of the Opposition and other Party leaders in the House.[7]

As already stated, subject to the exceptional case where a Government is defeated in the debate on the General Statement of Government Policy in the first session of the National State Assembly, the President must in the exercise of the power of dissolution always act on the advice of the Prime Minister. That is to say, in all such cases a dissolution will be automatically granted on the request of the Prime Minister. Automatism in the grant of a dissolution, as Professor Harold Laski has pointed out,[8] "places the responsibility for the government squarely on the shoulders of the electorate, where, in the circumstances, it ought to lie", and tends to preserve the neutrality of the constitutional Head of State. It insulates the President from unnecessary criticism.[9] Automatism also gives complete freedom to the Prime Minister to appeal to the people at any time for their verdict. As Laski has added, "the safeguard against an unwise dissolution is the probability, which is great, that the Government which seeks it will be forced to pay the penalty by the country for so doing".[10]

On 22 April 1960 Mr. Dudley Senanayake's minority Government, which had been formed after the general election of 19 March 1960, was defeated on an Opposition amendment to the Address of Thanks to the Throne Speech by 86 votes to 61. In a statement to the Press which appeared in that morning's newspapers Mr. Senanayake stated that in the event of an adverse vote, he would advice the Governor-General to dissolve Parliament and let the electorate make a final decision. The

7. See also Campbell, *op. cit.*, p. 179.
8. *Parliamentary Government in England* (1945), p. 410.
9. For example, in 1926 there was widespread cirticism of Lord Byng, the Governor-General of Canada, for his refusal of a dissolution to Mackenzie King, the Liberal Prime Minister, and the grant of one not long afterwards to his successor, Mr. Meighen.
10. Laski, *op. cit.*, p. 411; see also Professor J. H. Morgan, *The Times* (London), 10 September 1913, cited in Jennings, *Cabinet Government*, Appendix IV.

Prime Minister stated further that he would be constitutionally quite correct in what he proposed to do and that the Governor-General could be trusted to perform his own functions in a constitutionally correct way. On the following day, 23 April, after the Governor-General (Sir Oliver Goonetilleke) had met the Prime Minister and leaders of Opposition Parties, it was officially announced that Parliament had been dissolved with effect from that day. This grant of a dissolution was, however, criticised in certain quarters.[11]

3. OFFICERS OF THE NATIONAL STATE ASSEMBLY

The Speaker. The chief officer of the National State Assembly is the Speaker. The election of the Speaker (as well as of the Deputy Speaker and the Deputy Chairman of Committees) is provided for in the Constitution and in the Standing Orders. The Speaker is elected by ballot from among the members of the House at its first meeting after a general election. The procedure for his election is contained in the Standing Orders of the House. At an election where there are more than two candidates, the Speaker must be elected by an absolute majority. After his election he takes the oath of allegiance. The mace is the symbol of his authority. It is carried before him when he is entering or leaving the Chamber of the Assembly and on State occasions.

The Speaker presides at sittings of the National State Assembly (s. 33). He is responsible for the orderly conduct of its proceedings. He enforces the observance of rules of order and procedure of the House as contained in its Standing Orders. He is empowered under these Orders to regulate the conduct of business in the House even in matters not provided for in them. The Speaker's decision on any point of order is not open to appeal and cannot be reviewed by the House except upon a substantive motion made after notice. Whenever the Speaker rises during a debate, no member may stand and the House must be silent so that he may be heard without interruption. He names members guilty of disregarding the authority of the Chair or of abusing the rules of the House by persistently and wilfully obstructing its business or other-

11. For a criticism of the decision of the Governor-General, see Dr. A. J. Wilson (1960)3 *Ceylon Journal of Historical and Social Studies*,187. Compare the refusal in 1926 of a request for a dissolution by Mr. Mackenzie King, the Prime Minister of Canada, and in 1939, of a request by General Hertzog, Prime Minister of South Africa (Cooray, *op. cit.*, pp. 23-24.)

wise. If a motion for the suspension of a member from the service of the House is carried, the suspension on the first occasion continues for one week, on the second occasion for two weeks, and on the third or any subsequent occasion for one month.

The Speaker is the representative of the National State Assembly on all occasions. As its presiding officer, he must have tact and an ability to detect quickly breaches of the rules of order. Above everything else, he must be impartial in the House between the different political parties. He sees to it that neither the Government nor the Opposition abuses its position in the House: that the Government is not obstructed in its functions and that the Opposition is not oppressed in the execution of its duties. It is his duty to protect particularly the rights of the minority in the House. He endeavours to secure for it fair play and a time sufficient to have its say in the proceedings. The Legislatures of this country have been fortunate in their choice of Speakers. They have endeavoured to maintain a high tradition of impartiality despite the fact that their seats have often been contested at the general elections and that they have only rarely been selected by agreement between the Government and Opposition.

In a unicameral system such as ours it is doubly important that there should be sufficient discussion and deliberation by the House, including its minority. A denial of this right by a Speaker would result in the delay of legislation caused by frequent motions challenging his decisions on points of order. It would also result in the lack of respect for legislation passed under such conditions.

The Speaker does not take part in debate. In the decisions of the National State Assembly, the Speaker does not vote in the first instance but exercises a casting vote in the event of an equality of votes. (s. 47).

The Deputy Speaker and the Deputy Chairman of Committees. The Deputy Speaker who is also Chairman of Committees is also elected at the first meeting of the National State Assembly after a general election. The Deputy Chairman of Committees is elected at the same meeting. The election of the Deputy Speaker and the Deputy Chairman of Committees is conducted by the Speaker. The procedure for the election is almost the same as that for the election of the Speaker.

In the absence of the Speaker, the Deputy Speaker or, in their absence, the Deputy Chairman of Committees presides at sittings of the

National State Assembly. The Standing Orders provide that the functions of the Speaker may, in his absence, be exercised by the Deputy Speaker or Deputy Chairman of Committees. If none of them is present, a member elected by the National State Assembly for the sitting presides. A Chairman's panel of not less than four members is nominated by the Speaker at the beginning of every session to act as temporary Chairmen of Committees when requested by the Deputy Speaker or, in his absence, by the Deputy Chairman of Committees. From this panel the Speaker appoints the Chairman of each Standing Committee. As in the case of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees, unless they earlier resign their office or cease to be members, vacate their office on the dissolution of the Assembly.

The Clerk to the National State Assembly. This officer is appointed by the President. The members of the staff of the Clerk are appointed by him with the approval of the Speaker. The Clerk is not removable except by the President upon an address of the National State Assembly. Unless the National State Assembly provides otherwise, the age of retirement of the Clerk is sixty years. (s. 35).

It is the duty of the Clerk to keep the minutes of the proceedings of the National State Assembly and of the Committees of the Whole House and to circulate a copy of the minutes, if possible, on the following day. The minutes must record the names of members attending and all decisions of the House whether made formally or informally. The Clerk must prepare from day to day and keep on the Table of the House and in the Library an Order Book showing all business appointed for any future day and any notices of questions or motions which have been set down for any future day. The Clerk is responsible for the safe custody of minutes, records, bills and other documents laid before the House which must be open to inspection by members of the House and other persons under any arrangements sanctioned by the Speaker.

The Serjeant-at-Arms. He attends the Speaker with the mace, when the latter is entering or leaving the House and on State occasions. It is his duty to carry out directions of the Speaker and maintain order in the lobby and passages of the House. He makes arrangements under the direction of the Speaker for the admission of strangers and secures their withdrawal if they misconduct themselves. He causes the removal of persons who are ordered to withdraw by the Speaker.

CHAPTER 8

THE FUNCTIONS OF THE NATIONAL STATE ASSEMBLY

The National State Assembly, has many functions. They include (i) legislation; (ii) control of public finance and (iii) control of the administration, the ventilation of grievances, and the discussion of public affairs and of the policy of the Government.

Public Business is taken up after the presentation of papers and reports, petitions, questions and motions. It consists of Orders of the Day and Notices of Motions. An Order of the Day is a Bill or other matter which the House has ordered to be taken into consideration upon a particular day.

Except in the cases where the special majority is prescribed, namely, for laws amending the Constitution and for laws inconsistent with the Constitution, any question proposed for the decision of the National State Assembly is decided by a majority of votes of members present and voting. The Speaker cannot vote in the first instance but must exercise a casting vote in the event of an equality of votes (s. 47).

The Constitution provides that, subject to its provisions, the National State Assembly may by its resolution or Standing Order provide for (i) the election and retirement of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees; and (ii) the regulation of its business, the preservation of order at its sittings and any other matters for which provision is required or authorized to be so made by the Constitution. Until the National State Assembly otherwise provides, the Standing Orders of the House of Representatives operative immediately prior to the commencement of the Constitution, *mutatis mutandis*, continue in force as the Standing Orders of the National State Assembly. (s. 37).

1. LEGISLATION

The form of legislation existing in Sri Lanka is that by Bill. It is the term applied to the draft legislation during its passage through the National

State Assembly. Chapter IX of the Constitution relates to the procedure for enacting laws and for passing resolutions. It is provided that every Bill must be published in the Gazette in Sinhala, and in Tamil translation, at least seven days before it is placed on the agenda of the National State Assembly. (S.46 (1)) The communique issued by the Cabinet on 30 August 1972 after the publication of, and the consequent agitation against, the Sri Lanka Press Council Bill stated, that the purpose of publication is to give the public an opportunity to express any views or to make any proposals that they wish and thus participate in the process of law-making. The communique went on to state: "The Cabinet which followed with close attention the public discussions on this draft law, discussed the views that had been expressed and decided to defer the introduction of this law in the National State Assembly so as to give itself the opportunity to study carefully various proposals for amendment of the law which have been made". In fact the participation of the people is stated as one of the Principles of State Policy enshrined in the Constitution, as follows: "The State shall strengthen and broaden the democratic structure of Government and democratic rights of the people by affording all possible opportunities to the people to participate at every level in national life and in government, including the civil administration and the administration of justice." (S.16 (6))

The passage of a Bill through the National State Assembly must be in accordance with the Standing Orders of the Assembly and the provisions of Chapter IX. The National State Assembly may, however, in circumstances prescribed in the Standing Orders, suspend their operation. (s. 46 (2) and (3))

Bills may be divided into two classes:

(a) Public Bills. These are measures affecting the community at large or altering the general law.[1]

(a) Private Bills. These measures relate to matters of private or local interest. They are intended to affect or benefit particular persons or bodies. Private Bills are different from Private Members' Bills which may be Public Bills.

1. Chalmers and Asquith, *Outlines of Constitutional Law* (1930), p. 99.

Ordinary Public Bills. When a private member wishes to introduce a Bill in the National State Assembly he must, according to its Standing Orders, move for leave to do so. The member must at the same time state the object and leading features of the Bill and deliver to the Clerk a copy of his motion containing the title of his proposed Bill. If leave is granted, the Bill is deemed to have been read the first time and ordered to be printed. Usually a Public Bill is introduced by a Minister or Deputy Minister. In that case the Bill may be presented after notice without an order of the House for its introduction. When the Bill is so presented at the commencement of public business, its title must be read by the Clerk at the Table. This Bill is then deemed to have been read the first time and to have been ordered to be printed. The "first reading" is usually a formal matter.

The next stage is the second reading and it takes place on a date desired by the introducer. At the second reading the general merits and principle of the Bill are discussed. This is not the stage for a detailed discussion of the several clauses. The usual practice in opposing the second reading of a Bill is to move "that the Bill be read in six months' time". If the motion is carried, the Bill will not be considered during the session.

The Standing Orders provide that when a public Bill has been read a second time, if it is an annual or supplementary Appropriation Bill, it must be referred to a Committee of the whole House. Other Bills must be allocated by the Speaker to a Standing Committee unless the House decides on the motion of a Minister or Deputy Minister that the Bill be referred either to a Committee of the whole House or to a Select Committee to be nominated by the Speaker. The Committee stage is the stage for discussing the several provisions of the Bill and any proposed amendments. The principle of the Bill cannot be discussed in Committee but only its details. The Chairman of the Committee or the Clerk takes the Bill clause by clause and reads the number or the marginal note of each clause in succession. Amendments may be made to a clause, or clauses may be deleted or new clauses added.

After the Committee has completed the consideration of the Bill, it is "reported" to the House, with any amendments that may have been made. In the "report stage" certain further amendments may be made to the Bill. Upon consideration of a Bill reported from a Standing or a

Select Committee, the House considers only those amendments, if any, made by the Committee, but it may further amend those amendments. No new amendments can be made by the House, except those which are consequential upon amendments made by the Committee and accepted by the House. The Bill may, if necessary, be recommitted to the same Committee with reference to particular amendments made by it.

The final stage is the third reading. At this stage only verbal or drafting amendments may be made. The debate must be confined to the matters contained in the Bill. It can be opposed as a whole, as on the second reading, by a motion to postpone the third reading. When a Bill is passed by the National State Assembly it becomes law when the Speaker's certificate is endorsed upon it. (s. 48 (1)) The Speaker or, when he is unable to perform the functions of his office, the Deputy Speaker, is required by the Constitution to endorse on every Bill passed by the National State Assembly, a certificate signed by such officer in the following form: "This law (here include the short title of the law) has been duly passed by the National State Assembly". This certificate is conclusive for all purposes. It cannot be inquired into, or pronounced upon or in any matter called in question by any institution administering justice nor any other institution, person or authority. (s. 49). Nor has any such institution, person or authority the power or jurisdiction to inquire into or pronounce upon or in any manner call in question the validity of any law of the National State Assembly. (s.48(2)).

Quorum. The quorum for a meeting of the National State Assembly is twenty. If at any time during a meeting of the National State Assembly, the attention of the person presiding is drawn to the fact that there are fewer than twenty members present, he must adjourn the sitting without question put. (s. 34). A similar procedure is followed in Committees of the whole House.

Closure. In order to secure the passage of a Bill through the National State Assembly and prevent obstruction, the Standing Orders provide for the termination of debate and discussion. This is the rule of closure. Under this rule any member may move "that the question be now put" and—unless it appears to the Chair that the motion is an abuse of the rules of the House or an infringement of the rights of the minority—the question must be put forthwith and decided without amendment or debate. The motion, in order to be carried, requires on a division at least 20

members in favour of it. The closure rule also applies to a Committee of the whole House. In a Standing Committee the motion, in order to be carried, requires the support of not less than the quorum of the Committee.

It is of some interest to note that in England the power of closure of debate was introduced in 1881 to meet the obstruction of legislation by the Irish Parliamentary Party. It was soon realised that the need for the use of the closure was wider. As it was pointed out a year later, "the principle of closure is an assertion of the principle that the privilege of speech is a privilege which the House permits to be exercised for its own instruction, for its own information, in order to form its own opinion, and that it is not a personal privilege to be used irrespective of the convenience and efficiency of the House".[2]

Private Bills. When a member proposes a Bill which is intended to affect or benefit some particular person, association or corporate body, the Standing Orders of the House[3] provide that notice of it must be given by advertising in the Government Gazette and in at least one newspaper circulating in the Island. The notice must contain a statement of its general nature and objects. The advertisement must appear at least one month before application is made for leave to introduce the Bill. A copy of the advertisement must be delivered by the member to the Clerk together with the copy of the Motion applying for leave to introduce the Bill. If leave is granted the Bill is deemed to have been read the first time.

At the second reading the Bill is not, as in the case of a public Bill, normally opposed, except where some question of principle of policy is involved. After its second reading the Bill is allocated by the Speaker to a Standing Committee. If the Assembly so decides on the motion of a Minister or Deputy Minister the Bill is referred to a Select Committee to be nominated by the Speaker.

The Committee stage is a quasi-judicial proceeding. At this stage proof of the facts and other allegations set forth in the Bill is required as showing that it is expedient that the Bill should be passed. The Com-

2. Lord Hartington, House of Commons, Debates, 1882.
3. See Standing Orders 52 and 53.

mittee may also take such oral or other evidence as it may think requisite. Thereafter, if the Committee finds that the facts and allegations in the Bill are not proved it will report accordingly. On the other hand, if it finds that they have been proved, the Committee must consider the several clauses of the Bill. It may strike out clauses, add new clauses and make any other amendments which it may deem necessary. All such new clauses and other amendments must be reported to the House. No clause can be allowed in such a Bill which is foreign to the import of the notice advertising the Bill. No clause affecting any private right or interest can be allowed in the Bill unless circumstances are set forth in it which render such course justifiable and expedient.

In any case in which individual rights or interests may be peculiarly affected by a Bill, all parties so affected may be heard upon petition before the Committee, either in person or by counsel. When it is intended to examine any witnesses, the petitioner or member of the House requiring them must deliver to the Clerk, two days at least before the date appointed for their examination, a list containing the names, residence and occupation of such witnesses.

2 CONTROL OF PUBLIC FINANCE

The General Principles. The constitutional provisions relating to public finance are designed to confer complete financial control on the National State Assembly. The Constitution provides that the National State Assembly shall have full control over public finance. No tax, rate or any other levy can be imposed by any local government body or any other public authority, except by or under the authority of a law passed by the National State Assembly. (s. 84). The financial business of the Assembly includes not merely the grant of money for the administration of the various public services but also the appropriation of these moneys for these services and the imposition of taxation for the raising of revenue. These functions are intimately connected with the other functions of the Assembly such as the control of the Administration and the discussion of the general policy of the Government. The implementation of policy is necessarily connected with finance. In fact the main characteristic of the financial procedure of the National State Assembly is not so much its legislative aspect as the opportunity it affords for discussion of the general policy of the Government.

The two main constitutional principles relating to public finance are: (1) The raising or spending of public money requires the authority of the National State Assembly. (2) The Assembly will not consider any proposal affecting public finance unless it is made by a Minister under the authority of the Cabinet of Ministers. In other words, the responsibility in respect of matters which affect public revenue is that of the Government. No private member may introduce such a measure. He cannot therefore be held responsible to the National State Assembly for the expenditure and for the policy underlying it, in the same way as the Government can be.

Consolidated Fund: The control that may be exercised by the National State Assembly over the imposition of taxation as well as over the expenditure incurred by Government is greatly facilitated by the creation by the Constitution of the Consolidated Fund. Under the provisions of the Constitution the Fund is composed of all the funds of the Republic which are not allocated by law to specific purposes. (s. 85(1)).The Consolidated Fund does not consist of a separate bank account as in Britain but includes money in the Bank Accounts of the Treasury and of the various Government Departments. It also includes cash at the Treasury and with public officers, and funds with approved agents of the Government of Sri Lanka. This is perhaps the reason why the Auditor-General in this country, unlike his counterpart in Britain, is not required to sanction payments out of the Consolidated Fund. Into the Consolidated Fund must be paid the produce of all taxes, imposts, rates and duties and all other revenues and receipts of the Republic not allocated to specific purposes. Out of the Fund are paid: (1) the expenditure authorised by the Constitution or by permanent legislation for services which are called "Special Law Services". They include such payments as the salary of the President, the Judges, the Auditor-General, the Commissioner of Elections and the interest on the National Debt; (2) the amounts authorised by the National State Assembly each year for services known as "Supply Services".

Subject to two exceptions expressly provided by the Constitution, the rule laid down is that no sum can be withdrawn from the Consolidated Fund except under the authority of a warrant of the Minister in charge of the subject of Finance. No such warrant can be issued unless the sum has by resolution of the National State Assembly or by any law been granted for specified public services for the financial year

during which the withdrawal is to take place or is otherwise lawfully charged on the Consolidated Fund. The two exceptions are: (1) Where the President dissolves the National State Assembly before the Appropriation Bill for the financial year has passed into law he may, unless the Assembly has already made provision, authorise the issue from the Consolidated Fund and the expenditure of such sums as he may consider necessary for the public services until the expiry of a period of three months from the date on which the new National State Assembly is summoned to meet. (2) Where the President dissolves the National State Assembly and fixes a date or dates for a general election, he may, unless the Assembly has already made provision in that behalf, authorise the issue from the Consolidated Fund and the expenditure of such sums as he may, after consultation with the Commissioner of Parliamentary Elections, consider necessary for such election. (s. 86).

The Constitution provides that no Bill or motion, authorising the disposal of, or the imposition of charges upon, the Consolidated Fund or other funds of the Republic, or the imposition of any tax or the repeal, augmentation or reduction of any tax for the time being in force shall be introduced in the National State Assembly except by a Minister, nor unless such Bill or motion has been approved either by the Cabinet of Ministers or in such manner as the Cabinet of Ministers may authorise. (s. 88).

There is one main difference between our Consolidated Fund and that of Britain. In that country, since 1787, there has been a consolidation of all national revenues and all Government accounts into a single fund, namely the Consolidated Fund at the Bank of England. All payments in respect of public expenditure are made from this fund. No payment can be made except on the authority of Parliament. This authority may be given (1) under statutes making a grant for a number of years or without a limitation of time; or (2) under statutes passed each year by the House of Commons.

In Sri Lanka, on the other hand, it has been thought desirable for reasons of practical convenience to have the Consolidated Fund as a residuary Fund into which are paid all revenues which are not channelled to other parallel funds specially provided for by law.[4] In

4. See Sir Ivor Jennings, *The Constitution of Ceylon* (1953), p. 123; C. Balasingham, *Parliamentary Control of Finance* (1968), p. 31.

addition to such specific funds, there are what are known as "Advance Accounts". The original reason for establishing these Accounts was to give an initial advance to finance Government commercial undertakings until moneys were realised from those activities. This practice of obtaining money for expenditure from the Consolidated Fund on an Advance Account has since 1960 been authorised by special provision in the successive Appropriation Acts. These Acts also authorise "the crediting of receipts of advance account activities to the funds of the respective activities, so that in effect an advance account activity has a fund of its own into which these receipts go."[5]

There are also various deposits of money left with the Treasury and these are utilised by it to meet budgeted expenditure chargeable to the Consolidated Fund.[6] This Treasury practice, known as "administrative borrowing" has also been legalised in successive Appropriation Acts. These Acts now provide that expenditure may be met from payments thereby authorised to be met out of the Consolidated Fund or any other fund or moneys of or at the disposal of the Government. This administrative borrowing has undoubtedly the advantage of utilising idle moneys for public expenditure instead of the raising of formal loans by the Government and paying interest on them.

It has pointed out that a difficulty with regard to the control of public expenditure by the National State Assembly arises as a result of "this practice of having a multiplicity of funds, of having one common pool from which all these funds are financed without separate accounts and without formal transfers from one account to the other".[7] What is needed in Sri Lanka, it has also been said, is a Financial Administration Act providing for such matters as the collection, custody, banking and disbursement of public funds as well as the functions of the Treasury.[8]

Estimates of Expenditure. As the Financial Regulations of the Government show, the annual estimates of expenditure for a particular finan-

5. Balasingham, *op. cit.*, p. 32.
6. *Ibid.*, p. 37.
7. Balasingham, *op. cit.*, p. 40.
8. *The Constitution and Public Finance in Ceylon* (1964), (Institute of Chartered Accountants), p. 42. This book includes (*inter alia*) a lecture by the author on the "Constitution," and the ensuing discussion of the members of the panel composed of Dr. N. M. Perera, Sir Lalita Rajapaksa, Mr. L. J. de S. Seneviratne and Mr. D. S. de Silva. The suggestion itself was that of Mr. D. S. de Silva, who at the time was the Auditor-General.

cial year being the financial expression of the Government's policies and programmes of activity during the year, the formulation of the estimates is a matter of crucial importance requiring sound co-ordination and attention to details. The Treasury, in consultation with the Ministry of Planning, and having regard to the Revenue and other receipts estimated to be available, provides allocations to the different Ministries. The Departments concerned must prepare their draft estimates within the limits of the allocations provided. The capital expenditure proposals must fit into the current National Plan which would normally cover a given period of years. The Treasury seeks the approval of the Cabinet for the draft estimates of expenditure of all Departments.

The estimates of expenditure are divided into three parts (1) General estimates of expenditure. These relate to services which are wholly financed from provision included in the estimates. (2) advance accounts. These relate to activities which are permitted to be met out of the receipts of these activities (3) appendices. These contain (a) estimates of expenditure on services which are met direct from loans and (b) any other information considered desirable.

According to the Financial Regulations it is the responsibility of the Head of each Department as its Accounting Officer to see that the draft estimates relating to his Department are prepared in conformity with the Regulations. The Secretary to the Ministry as the Chief Accounting Officer examines the estimates to ensure that they are in order. The Treasury then sends out to the Ministries a Budget programme indicating the dates on which the draft estimates will be considered and discussed at various levels. After the necessary decisions reached at these discussions are incorporated by the Departments as amendments to the estimates, they are returned to the Treasury within the time prescribed in the Budget Programme. The Treasury then prepares the draft estimates of expenditure for the Island. After discussion of the draft estimates by the Ministers concerned, the Treasury revises the consolidated estimates, incorporating any amendments accepted at the discussions.

In the National State Assembly's control of public finance, the draft estimates of expenditure embodied in the Annual Appropriation Bill play a very important part. The Appropriation Bill is submitted by the Minister of Finance to the National State Assembly along with the printed draft estimates. The Bill provides for, in respect of the financial

year to which it relates, (a) payment out of the Consolidated Fund on services under Part I of the estimates (excluding special law expenditure); (b) receipts and payments of Advance Account activities and advances out of the Consolidated Fund in respect of such activities under Part II of the estimates.

Treasury Control. The Prime Minister who, under section 94 (I) of the Constitution, determines the assignment of subjects and functions to Ministers has assigned the subject of public finance to the Minister of Finance. The Minister exercises general control of public expenditure through the Treasury. The control by the Treasury is thus subject to the overriding power of the Minister of Finance and of the Cabinet of Ministers.

Under the Financial Regulation, the chief function of the Treasury is to maintain control and supervision ovar public finance. It is therefore the duty of the Treasury to set up a system of financial administration that is satisfactory in all respects, especially with regard to accounting, security and responsibility. With regard to the preparation of the Budget, as already stated, the Treasury shares responsibility with the Ministry of Planning. We have also referred to the supervision by the Treasury of the estimates presented by the various Government Departments.

Provision under Part I of the estimates of expenditure in respect of each Department is grouped under the Votes of the different Heads of expenditure, which are themselves divided into sub-heads. Authority under the Financial Regulations exists under certain circumstances to transfer surplus funds or savings on one Vote under a particular Head of expenditure to another Vote under the same Head. Such transfer or "virement" which may be made before the end of the financial year, must be authorised by the Secretary to the Treasury. Authority also exists under the Financial Regulations to make a similar transfer or "virement" from one sub-head to another sub-head in certain circumstances. The transfer must be authorised by the Secretary to the Ministry. In Britain such transfer too requires Treasury approval. The Appropriation Act, No. 54 of 1971, which made financial provision for the financial year, 1971-72, enacted that unexpended moneys may be transferred from one Vote to another and from one Vote (Programme) to

another under the same Head of expenditure by order of the Secretary to the Treasury or any other officer authorised by him. (s. 5.)

Towards Programme Budgeting: The Budget in Sri Lanka, like that of Great Britain, has traditionally confined its information to a classification of outlays on the various services. It has not set out the programme of work. The Budget could not, therefore, in any sense, be called a "Programme and Performance Budget". The latter type of Budget would classify the activities of government in such a way as to give information both on the purposes of the classified programme and projects on which the public expenditure is incurred, as well as on the targets of performance of services in relation to a development plan. Such functional budgeting would greatly facilitate the measurement of work performance and hence of efficiency as well as of economy. It would in a development economy, such as ours, not only assist the Auditor General but also facilitate the work of the Public Accounts Committee and hence of the National State Assembly itself in the appraisal of public projects and the control of public expenditure. Recently, some progress has been made towards the establishment in Sri Lanka of a system of Programme Budgeting, as indicated in the format adopted for the presentation of the estimates for 1971/72 of some Departments.[9]

Financial Procedure: Money Bills. The estimates for the financial year, which commences on the first day of January, are laid before the National State Assembly sometime in the latter part of the previous year and the Bill receives its first reading. After the lapse of one week, the second reading is taken up in the House when the Minister of Finance introduces his Budget. In his Budget Speech the Minister reviews the public finance of the previous year as well as the general economic situation. There is also a statement of the Government's general financial policy. He then indicates the financial requirements for the coming year and makes his taxation and other proposals for meeting those requirements.

Under the Standing Orders of the House, only twenty-six days can be allotted to the consideration of the Bill, of which not more than nine

9. See the explanatory note of the Minister of Finance, Dr. N. M. Perera, dated 5 November 1971.

days can be allotted to the second reading. At this stage there is a debate on the Bill or more particularly a discussion of the Budget proposals as incorporating Government policy. In the absence of a "Programme and Performance Budget" the debates cannot be sufficiently concerned with such questions as to whether targets of performance have been achieved and whether the Government activities on which public money had been expended have been carried out efficiently and economically. There was also the problem in the past that members were not given sufficient information through up-to-date administration reports and other ways with regard to the performance of the work for which expenditure was sanctioned. What generally happened was that members were more concerned to ventilate specific grievances, to expose irregularities and, above all, to urge that more projects should be started and more money should be spent in their particular constituencies.

After the second reading, the Bill is referred to a Committee of the Whole House. This is another special feature in the procedure relating to Money Bills. Not more than seventeen days can be allotted to the Committee stage of the Bill unless, on the motion of a Minister, two additional days are allotted to it. According to the Standing Orders of the House, no motion for an increase in the expenditure of a vote, sub-head or item can be made except by a Minister after notice. This notice must, among other things, set out to what sum it is proposed to raise the expenditure on what vote and that the sanction of the Cabinet of Ministers for the increase has been obtained. A private member may move a reduction of such expenditure by a so-called "cut motion". Through such a motion the conduct or policy of a particular Ministry may be discussed and criticised. On the last of the allotted days the Chairman must, unless the Bill has been previously reported, put to the Committee all the estimates which have not been passed.

The Bill is then reported and read a third time. When the Speaker's certificate that it has been duly passed by the Assembly is endorsed upon the Bill, it becomes the Appropriation Law for the ensuing financial year. Similarly the revenue section of the Budget is given effect to under the existing appropriate legislation or by their amendment or by the enactment of a separate Finance Act, as may be found to be necessary.

It has been pointed out that the public discussions on expenditure which take place in the House are often insufficient to provide effec-

tive control of public finance. Dr. N. M. Perera, who has had a long experience in these matters, both as Minister of Finance and as a private member of the House, has stated in 1963 with regard to the discussion of the Appropriation Bill in the former House of Representatives, that only the three or four Ministries which were taken up in their order got the maximum amount of discussion within the days allotted for the Committee stage. "As a result of this", said Dr. Perera, "it has ceased to be a discussion where really a serious attempt is made to control the Executive regarding the expenditure proposed by the Government. Very little concentration is brought to bear on that aspect of the question. Now it has become a very general discussion. Sometimes queer things happen in the Committee stage of the Budget. Most of the people who are participating in the Budget Debates are not the Opposition Members, while in England the discussion is purely reserved for the Opposition. In Ceylon the Government members participate more. They are not concerned with wasteful expenditure but only with getting a little more money for their constituencies. This vitiates the original purpose of our procedure".[10] In fact, Dr. Perera's belief at the time was that not many members of that House went through the estimates, "because it is rather a tiring process".[11]

Authority for Public Expenditure. The passing of the Appropriation Law or a special law or resolution of the National State Assembly does not itself provide complete authority for expenditure of money from the Consolidated Fund. Under the provisions of the Constitution, except where the President dissolves the National State Assembly before the Appropriation Bill for the financial year has passed into law, no sum can be withdrawn from the Consolidated Fund except under the authority of a warrant of the Minister of Finance. No such warrant can be issued unless the sum has by resolution of the National State Assembly or by any law been granted for specified public services for the financial year during which the withdrawal is to take place or is otherwise lawfully charged on the Consolidated Fund. (s. 86).

Under the Financial Regulations of the Government, for the purpose of complying with the above requirement, the following principal Warrants are issued to the Treasury: (a) *General Warrant.* This is a Warrant which

10 *The Constitution and Public Finance in Ceylon, op. cit.*, p. 21. See the suggestion of a Public Expenditure Committee for this purpose, *post*, pp. 162-163.
11. *Ibid.*, p. 20.

grants authority for charging expenditure on the Consolidated Fund in respect of those Supply Services provided for in the Appropriation Law over which the Cabinet of Ministers does not desire to retain a special control. The services for which the General Warrant is issued are prescribed in a schedule attached to it. (b) *Requisition.* If the authority for release of money for expenditure on any of the Supply Services has been withheld, and the Cabinet of Ministers subsequently decides to incur the expenditure, it may direct the Minister of Finance to issue the necessary authority. The Warrant of the Minister granting this authority is known as a "Requisition". (c) *Special Warrant.* This is a Warrant issued by the Minister of Finance to release money required for expenditure on the services provided for in a supplementary estimate authorised by the National State Assembly. (d) *Advance Warrant.* This is a Warrant issued by the Minister of Finance in respect of Advance Account activities provided for in the annual estimates. (e) *Special Law Warrant.* This is a Warrant issued by the Minister of Finance for Special Law Services, such as the salary of the President, the interest on the public debt and sinking fund payments.

Supplementary Estimates. Sometimes it becomes necessary to incur expenditure for which provision has not been made in the Annual Appropriation Law or by any other law. Often these supplementary estimates add up to such a high proportion of the expenditure as given in the Budget as to distort completely the picture of the original budgetary position. The Financial Regulations of the Government provide that whenever such a situation has arisen in the opinion of a Minister, after prior consultation with the Minister of Finance, he should forward to the Minister of Finance for transmission to the Cabinet of Ministers a supplementary estimate showing the whole extent and estimated cost of the service required and the reasons for it. If the Cabinet of Ministers approves any such expenditure it will include it in a Supplementary Estimate and submit it for the approval of the National State Assembly.

Contingencies Fund. In order to provide for urgent and unforeseen expenditure, the Constitution provides that the National State Assembly may by law create a *Contingencies Fund. (s. 87 (1)).* The Constitution provides further that the Minister of Finance, if satisfied (a) that there is need for any such expenditure and (b) that no provision for such expenditure exists, may, with the consent of the Prime Minister, authorise provision to be made for it by an advance from this Fund.(s.87(2))

As soon as possible after every such advance, a Supplementary Estimate must be presented to the National State Assembly for the purpose of replacing the amount so advanced. (s 87 (3)).

A Contingencies Fund was created by the Contingencies Fund Law, No. 11 of 1972. This Law provides that a sum of twenty million rupees should be paid out of the Consolidated Fund and form part of the Contingencies Fund. It is also provided that all moneys advanced out of the Contingencies Fund created by Act No. 14 of 1948,[12] and not replaced at the date of the commencement of the new law should be deemed to be advances paid out of the Contingencies Fund created by this Law and accordingly the provision of section 87 (3) of the Constitution should apply to such advances. The Secretary to the Ministry in charge of the subject of Finance is required to have the custody of the Contingencies Fund and to keep the accounts relating to it.

The Auditor-General. The control of public expenditure by the National State Assembly extends to the examination of public accounts. The purpose of such examination is to ensure that moneys granted to the Administration have been properly expended by it. Section 89 of the Constitution provides that there shall be an Auditor-General appointed by the President for the purpose of auditing public accounts. He does so on behalf of the National State Assembly.

The duties and functions of the Auditor-General are stated in section 90. The section requires the Auditor-General to audit the accounts of all Departments of Government and the accounts of local authorities and of public corporations and of any business or other undertaking vested under any written law in the Government. The Auditor-General is also required to perform such duties and functions as may be prescribed by law by the National State Assembly. The Auditor-General or any person authorized by him is, in the performance of his duties and functions, entitled (a) to have access to all books, records, returns and other documents; (b) to have access to stores and other property; and (c) to be furnished with such information and explanations as may be necessary for the purposes of the

12. Formerly, Chapter 415 of the Legislative Enactments.

audit. The Auditor-General is required to report to the National State Assembly, annually and as and when he deems necessary, on the performance of his duties and functions under the Constitution.

Our Auditor-General's counterpart in Britain, the Comptroller and Auditor-General has, as the name suggests, another function. As Comptroller it is his duty to ensure that no payment is made out of the Consolidated Fund without the authority of Parliament. His sanction is needed before any advance is made even to the Treasury by the Bank of England out of the Consolidated Fund. He will refuse sanction if the advance has not been authorised by Parliament. The purpose of this system is thus to secure that only such payments are made out of the Fund as have been properly authorised by Parliament. In Sri Lanka the Auditor-General is not invested with such a power of "pre-expenditure" control of payments out of the Consolidated Fund. Under the Constitution, as we have seen, moneys can be withdrawn under the authority of a warrant of the Minister of Finance.

In order to secure the independence of the Auditor-General from executive control and influence, the Constitution provides that he shall hold office during good behaviour. He can be removed by the President but only (a) on account of ill-health or physical or mental infirmity or (b) upon an address of the National State Assembly recommending his removal. The salary of the Auditor-General must be determined by the National State Assembly, charged on the Consolidated Fund and cannot be diminished during his term of office. (s. 89)

The Public Accounts Committee. The Public Accounts Committee which is established under the Standing Orders of the National State Assembly examines the accounts showing the appropriation of the sums granted by the Assembly to meet the public expenditure and of other accounts laid before it as the Committee considers to be necessary, together with the Auditor-General's reports on them. The Committee which consists of not more than seven members, nominated by the Committee of Selection, has power to send for persons, papers and records and to report to the National State Assembly from time to time.

Under the Standing Orders of the National State Assembly the Committee examines any excess on any sub-head of a vote and states in its report whether the excess is on the vote or only on one or more sub-heads.

If the latter is the case the Committee must inquire whether the Excess was incurred with proper authority and with due regard to economy. If the Committee is so satisfied, it reports accordingly and no further sanction for the excess is required. If it is not so satisfied, the Committee must report that it has disallowed the excess or so much of it as it thinks fit.

Whenever the Public Accounts Committee has reported either that an excess has been incurred on a vote or that it has disallowed certain items of expenditure, a motion to resolve the House into Committee to consider a grant to make good such an excess or such items as have been disallowed may be put on the Order Paper by the Minister of Finance for consideration on a day within one year after the close of the financial year.

The comments and recommendations of the Public Accounts Committee are examined by the Treasury. Those approved by the Minister of Finance are published as Treasury Minutes. These Minutes are issued to Government Departments for their compliance. They form a body of "case law" in the field of public financial administration.

The strongest argument in favour of the Public Accounts Committee, as in the case of an Ombudsman, is that its mere existence creates in those charged with public expenditure a fear of being censured, on an examination of their accounts, for any irregularities committed by them. As a result there is a greater degree of care in the application of public money by Government Departments and other public authorities. The usefulness of what at present is really a "post-mortem" examination of public expenditure will be considerably enhanced if the Committee is also entrusted with the additional function of examining the estimates presented to the National State Assembly. Unlike most other Parliamentary democracies, Sri Lanka has no Estimates Committee. If the Public Accounts Committee was given such an additional function, it could, in examining the estimates of expenditure, report on the economies that could be effected having regard to the policy implied in those estimates. It may also suggest alternative proposals to secure greater efficiency in the public administration. The Committee which could well be renamed the Public Expenditure Committee, would in their report examine, with the assistance of sub-committees, the extent to which the Government Departments and the public corporations have

carried out their responsibilities relating to public expenditure.[13] The establishment of a Public Expenditure Committee combining the functions of an Estimates and a Public Accounts Committee would make more meaningful the role of the National State Assembly in the control of public expenditure. It would enable the National State Assembly, firstly, to discuss "the Government's expenditure strategy and policies, as set out in projections of public expenditure several years ahead", secondly, to examine "the means....being adopted to implement strategy and to execute policies, as reflected in the annual estimates of expenditure", and thirdly, "to scrutinise retrospectively the results achieved and the value for money obtained on the basis of annual accounts and related information from departments on the progress of their activities".[14] In the exercise of these functions it would have the expert assistance of the Auditor General. The information made available through its investigations and reports would result in the raising of the standard of debate in the National State Assembly on financial measures and in more efficient control by the House over public expenditure.

Audit and Accountability.[15] The scope of public audit and the functions of the Public Accounts Committee have not been wide enough to provide the Legislature and the public with sufficient information to decide whether the public money that had been expended on the various services had been used economically and efficiently. To a considerable extent the audit function has been hamstrung by the existing legal provisions. Consequently auditing in the past has not included a sufficient checking of the work done in respect of monies provided by the Legislature from the point of view of performance and efficiency. Such checking is particularly necessary in a development economy such as ours.

13. In Britain the *Report of the Select Committee on Procedure* (H.C 189 of 1946) has recommended the amalgamation of the Public Accounts and Estimates Committees into a Public Expenditure Committee entrusted with the whole task of examining with the assistance of sub-committees the field of public expenditure (Wade and Phillips, *op. cit.*, p. 143). In 1965 a Select Committee on Procedure suggested that a new Select Committee should be set up "to examine how the Departments of State carry out their responsibilities and to consider their Estimates of Expenditure and Reports". (Hood Phillips, *op. cit.*, p. 205).
14. *Plowden Report on the Control of Public Expenditure* (United Kingdom), (1961) Cmd. 1432, para. 12.
15. See Cooray, *Constitutional Government and Human Rights in a Developing Society* (1969), pp. 66-68.

The policy of assuming a large measure of control over the economy in the implementation of the national economic plan together with the vesting of various industrial and commercial undertakings in statutory corporations and boards necessitate certain legal and constitutional changes in the functions of the Public Accounts Committee and of the Auditor-General. As we have seen, the Constitution requires the Auditor-General to audit the accounts of all Government Departments, local authorities, public corporations and Government undertakings and to report annually to the House. In order to have more effective control of public finance by the National State Assembly through the Public Accounts Committee, there must be, first of all, a comprehensive definition of the functions of the Auditor-General in an Audit Act. The Auditor-General should be specifically entrusted under the law with powers of audit of performance and efficiency in addition to the functions of "regularity" audit. The latter is generally limited to conformity with financial and budgetary requirements and with statutory provisions. In Israel, and also in many Socialist countries, auditing is not confined to pure "regularity" auditing but is concerned with analysing, checking and implementation of the Budget and of the National Plan. Under our system of representative democracy, however, not only should the scope of audit be widened to cover efficiency and performance but the independence of the auditor as the agent of the National State Assembly, and not of the Government, should also be maintained by law.

The present legal functions of the Auditor-General are based on political assumptions which are no longer true. It is now considered to be a function of the State to interfere in industrial and commercial matters in the interests of the whole community. Since public corporations have been established in order to run certain industrial and commercial undertakings efficiently, economically and in the interest of the people, the functions of audit should include a regular evaluation of plans and progress of work according to commercial principles. As Mr. Bernard Soysa, the Chairman of the Public Accounts Committee, has stated: "A developing country operating on the basis of a plan, requires that audit shall play a more dynamic role. Planning and implementation require constant checking and rechecking in order that targets may be, if necessary, revised and decided targets attained.....If, in fact, audit functions in a dynamic way, promoting growth and development, with technical advice where necessary, pointing out early mistakes which might occur—with that entire process geared to the implemen-

tation of a plan, surely far from having a paralysing effect the Auditor-General's intervention would be welcomed as a shot in the arm".[16]

The Auditor-General cannot be expected to undertake these enlarged functions with his present staff. He must be given an adequate skilled staff for thie purpose. Unless there is a separate branch of specialised audit trained for its new role, it is futile to undertake these additional functions of audit.

If a serious attempt is to be made to solve the problem of bringing the growing public expenditure on public sector activities under better Parliamentary control, the Auditor-General's report must contain additional information. As stated earlier, it must relate to questions such as whether approved plans and targets have been conformed to and whether lack of planning and co-ordination has resulted in inefficiency and increased costs. It is only on the basis of such information that the National State Assembly can have effective control of public enterprise on behalf of the people it represents. Recent audit reports on some of the public corporations have in fact begun disclosing information about financial structure, profitability, unit costs, capacity utilisation, funds utilisation and other matters of financial and operating significance.[17] It is, however, necessary that a general Audit Act should give legal validity to such methods of enforcing public accountability.

In a memorandum to the Steering and Subjects Committee of the Constituent Assembly,[18] the Auditor-General emphasized that the auditing system was very rigid and that the scope of the audit should be widened to enable positive and immediate steps to be taken to cut down waste and prevent losses which sometimes involved millions of rupees. The memorandum also pointed out that with Ceylon becoming a republic, the Auditor-General too should be given wide powers to bring those responsible for frauds and malpractices to book without delay. The Auditor-General said that the audit system in Israel was flexible and enabled the Auditor-General to bring irregularities to the notice of the Public Accounts Committee directly and also to submit interim reports. The

16. *Proceedings of a Seminar on the Role of Audit in a Developing Country*, (Government Press, Ceylon), pp. 18, 23.
17. See Report of the Auditor-General, Parliamentary Series No. 3 of 1970.
18. *Ceylon Daily News*, 22 January 1972.

Auditor-General emphasised that auditing was a part of financial control and that the reports submitted were intended to facilitate the exercise of stricter financial control over the activities under review.

3. CONTROL OF THE ADMINISTRATION.[19]

The Government is answerable to and is controlled by the National State Assembly. The Assembly has the power to throw the Government out of office. The National State Assembly does not, however direct or control the Administration in its actual execution of the policy approved by the House,nor is such control desirable from the point of view of efficient government. In the actual task of government and administration, control by the Assembly can be said to exist only in a special sense, namely, in its right to criticism. Under the Standing Orders questions relating to public affairs may be put to the Prime Minister or to any Minister or Deputy Minister relating to subjects with which the person questioned is concerned. A motion for the adjournment of the House can be made for the purpose of discussing a definite matter of urgent public importance. Like the British Parliament, which has been described as the "grand inquest of the nation", the National State Assembly exercises the vital powers of ventilating the grievances of the people and of eliciting information relating to public administration.

In practice the Prime Minister and the Cabinet of Ministers control the National State Assembly to a large extent. The Government exercises considerable power over its majority in the Assembly through its Party organisation. The Government has the right to allocate time in the House and decide the order in which business should be introduced. As long as the Government Party or Parties continue their support, the Government will normally be able to control the Assembly and carry through its legislative and other measures. It is unusual for members of the Government party to disobey their "whip" and vote against the Government. As a last resort the Prime Minister can threaten to use the weapon of dissolution of the National State Assembly.

Although the Government exercises a measure of control over the National State Assembly, it has to be remembered that the Prime Minister and the Cabinet of Ministers can remain in power only so long as they

19. This topic is further discussed in Chapter 12, *post*.

are able to command the support of a majority in the House. There is a limit beyond which the Government cannot force its views on its back-benchers. They may refuse to follow the Government if these views are not acceptable to their supporters in their constituencies. In such cases no Government can be insensitive to the feeling of the majority in the Assembly as the embodiment of the opinion of the electorate. If it wishes to remain in power the Government must bow to "the sense of the House". As Sir Ivor Jennings has observed, "a Government must perpetually look over its shoulder to see whether it is being followed. If it is not, it must alter direction. For in this sense, and this sense only, is it true that a democracy is government of the people by the people"[20]. In 1962 Mrs. Bandaranaike's Government which had proposed to reduce the subsidised rice ration was later forced to withdraw it when the Government realised that the majority of their members in the House were not prepared to support the proposal for fear of repercussions in their constituencies.[21] The old British argument that "our fellows won't stand it" became equally effective with the Cabinet in Sri Lanka. As a result of the Cabinet's withdrawal of the proposal the Minister of Finance resigned. If the Government does not bow to the opinion of the National State Assembly, the House has the means of breaking the Government. According to the provisions of the Constitution if the Assembly passes a motion of "no-confidence" in the Government or declines to pass the Budget the Prime Minister must either resign or advise a dissolution of the Assembly within 48 hours of that event.

The Ministers are collectively responsible to the National State Assembly for all acts of government. If a Minister is not able to defend these acts in the Assembly, he must resign. While Ministers are collectively accountable to the Assembly for all acts of government, each Minister is also individually answerable in a similar manner for all acts done in the Departments under his charge.

Debate and Criticism. Since the Ministers are responsible and answerable to the National State Assembly, the latter exercises the func-

20. *Cabinet Government* (1947), p. 364.
21. A somewhat similar situation arose in 1972. See also the withdrawal by the British Government in December 1935 of the Hoare-Laval proposals for the partition of Ethiopia after the proposals were severely criticised in the country and on both sides of the House of Commons, and the subsequent resignation of the Foreign Secretary.

tion of debating the policy of the Government as well as of criticising the Administration. The Assembly's function of criticism is performed mainly by the Opposition, which is therefore a very important part of the machinery of representative democratic government.[22] The function of the Opposition is not to obstruct the Government. It is rather to criticise the policy of the Government and its administration. Through such criticism, the Opposition seeks to control and influence the Government and to suggest to the electorate the choice of a "better policy." In extreme cases the Opposition may even consider it necessary to move a vote of no-confidence in the Government and in that way attempt to compel it to resign or dissolve the Assembly. When the Opposition desires to move a vote of censure on the Government, it is a convention that the Government must provide the time for it at the earliest opportunity.

There are various other opportunities for the National State Assembly to exercise its important function of debate, discussion and criticism. The debate on the Statement of Government Policy at the beginning of each session, on the Budget proposals and on supplementary estimates provide such opportunities for discussion of the general policy of the Government as well as for criticism of the Administration. It is an old customary rule in the Parliamentary democracies that ventilation of grievances must precede the grant of supplies. There is also provision under Standing Order 18 for a motion by a member for the adjournment of the House for the purpose of discussing a definite matter of urgent public importance. Such a motion will not be allowed unless the member obtains the leave of the House or, where leave has not been given, it is supported by at least twenty members.

Questions. One of the most important methods of securing redress of individual grievances against the Administration is the use of questions addressed to Ministers. The Standing Orders of the National State Assembly provide for the asking of questions after the presentation of papers and reports and before the commencement of public business. Questions relating to public affairs may be put to the Prime Minister or to any Minister or Deputy Minister in order to obtain information on a matter of fact with regard to subjects with which the member questioned is concerned. The latter must cause the answers to be printed in the official

22. See *post*, pp. 222 - 224.

report of the Debates of the Assembly unless the member asking the question has required an oral answer. A member may put a supplementary question for the purpose of further elucidating any matter of fact regarding which oral answer has been given. But such a question must not introduce matter not included in the original question. A question must not be made the pretext of a debate.

Advisory Committees in the National State Assembly

There is hardly any doubt that the functions of the members of the National State Assembly could be more effectively performed and some of the rigours of Party government could be mitigated by the establishment of a system of Advisory Committees in the Assembly as part of its organisation.[23] Such a system could profitably replace the present informal Committees which for the most part are confined to the members of Parties supporting the Government. If the functions of the Advisory Committees are well-defined and are solely advisory, the Ministers would continue to remain responsible to the National State Assembly and would be prevented from shifting their responsibility to the Committees. Therefore, far from interfering with ministerial responsibility to the National State Assembly, such Committees could make it more effective.

The need for such a system of Committees has been emphasised in many countries having a system of Parliamentary democracy in order to make the role of members more useful. There is a widespread feeling that the National State Assembly as a whole is not sufficiently effective and that the backbencher is denied a useful role in the House.

In the Constituent Assembly, during the discussion of the Basic Resolutions, Mr. M. M. Mustapha gave expression to this view when he said: "I ask the Hon. Minister whether in practice the backbenchers and the Opposition have any say in the legislation that is brought before the House. No doubt we know that sometimes important proposals are incorporated in a White Paper before they are embodied in a Bill and are discussed at the meetings of the Government Parliamentary Group, but we also know the type of discussion that takes place. No doubt when the matter comes up before Parliament in the form of a Bill, the Opposition has an opportunity of expressing its view, but more often

23. See Cooray, *op. cit.*, pp. 58 - 60.

than not we find that criticism from the Opposition or the expression of views from the backbenchers does not have any effect at all on the Minister concerned or on the Government.

"The point I am trying to make is that, to that extent, except for the Cabinet, the other members of Parliament who are representatives of the people are not brought in as participants in the process of government.... We sometimes find that a person who has been rejected by the people as their representative has greater influence with the Government and that he is brought into participate in the Government while the man who is elected by the people is left out. We see that every day. I ask, is this Parliamentary democracy?"[24]

The Minister of Constitutional Affairs, Dr. Colvin R. de Silva, himself expressed admiration for that aspect of the Executive Committee system of the Donoughmore Constitution which brought every member of the elected Assembly into association with legislation and administration. "It is my hope and intention", he said, "to bring something approximate to it at least into the future Standing Orders so that every member of the National State Assembly will feel himself not a mere voting machine but a living part of a functioning Assembly in this country"[25].

A well-known British constitutional jurist, Professor Barriedale Keith, has also made a proposal for appointing Parliamentary Committees to co-operate with the Ministers. He has stated: "The Committees would be duly constituted with reference to the strength of parties in the House. Purely party committees are not suggested.....Co-operation between parties would thus be effected in moulding legislation, and the procedure could be applied in the case of the exercise of the delegated legislative powers of departments to good effect"[26].

It is of interest to note that in India there are informal Consultative Committees for the various Ministries. They provide for informal discussion between members of Parliament and the Ministries of the

24. *Constituent Assembly Debates*, Vol. 1, 1525-26.
25. *Ibid.*, 2686, 2730. See also the views regarding Committees expressed by Mr. M. Tennekoon and Mr. Roy Rajapaksa at 2712-3, 2739-46.
26. *The British Cabinet System*, 1830-1938 (1939), pp. 346-7. See also Herbert Morrison, *Government and Parliament* (1954), pp. 208-212, and W. I. Jennings, *Parliamentary Reform* (1934).

Government on the working of administrative Departments. In England Mr. L. S. Amery in the course of his Chichele lectures at Oxford has suggested the institution of Parliamentary committees, presided over by the Ministers concerned, as a method of supplying the House with better information on many subjects that can be supplied by occasional debates and by questions, and of keeping Ministers more closely in touch with members on their special subjects. "My own experience in the offices which I have held", says Mr. Amery,[27] "is that I should have gained by such regular opportunities of giving information and explaining my policies and of gathering the views of those interested, and that the effect upon the quality of debates would have been equally beneficial". He has also pointed out that Lord Haldane's Machinery of Government Committee advocated such committees for their value not only to Ministers but to their departments:

"The particular argument in favour of some such system to which we feel justified in drawing attention is that if Parliament were furnished, through such Committees of its members, with fuller knowledge of the work of departments, and of the objects which Ministers have in view, the officers of the departments would be encouraged to lay more stress upon constructive work in administering the services entrusted to them for the benefit of the community than upon anticipating criticism which may be, and in present conditions often is, based upon imperfect knowledge of the facts or the principles at issue".

The committees would of course have no executive powers. They would not interfere with ministerial decisions. As Professor Harold Laski has pointed out, these committees attached to each Ministry would watch the process of administration, make suggestions on policy for examination and discuss confidentially the principles of bills before the prestige of the Minister became associated with each clause and schedule of their content.[28] According to Laski such committees could also act in an advisory capacity in relation to the issue of subordinate legislation

27. *Thoughts on the Constitution*, p. 54.
28. *Parliamentary Government in England* (1945), pp. 211-214. It is of interest to note that in Britain a recent report of the House of Commons Select Committe on Procedure has endorsed "the proposal of its predecessor that regular use should be made of pre-legislation committees, set up at the discretion of the Government, to consider subjects which might subsequently form the basis for legislation, and of post-legislation committees to inquire into difficulties in the application and interpretation of statutes and consequent delegated legislation within a short period of their enactment", Gavin Drewry in 35 *Modern Law Review*, p. 290.

and act as a watchdog of the House. In short, these committees would tend to make the functions of all members of the National State Assembly more meaningful in the modern context of a developing society.

The adoption of a system of advisory committees in the National State Assembly may to some extent comply with the suggestions made by Mr. S.W.R.D. Bandaranaike, in an address before the Indian Council of World Affairs in New Delhi, on 4 December 1957, when he was Prime Minister of Ceylon. He commended for the consideration of Asian democracies an "executive type" of government in which all members of Parliament, whatever the Party to which they might belong, could have some share in government, though the majority Party would naturally have the major share. Mr. Bandaranaike recalled the experiment on these lines carried out in Ceylon from 1931 until 1946, and said that such a form of government would not destroy the Party system but would lay greater emphasis on the work of the country than on Party.[29] In 1959 in a memorandum submitted to the Joint Select Committee on the Revision of the Constitution, Mr. Bandaranaike, along with Dr. N. M. Perera, suggested that constitutional provision should be made to attach Advisory Committees from amongst members of Parliament to each Ministry. They laid special emphasis on the need for a Foreign Affairs Committee to be appointed by the Speaker in consultation with the various political Parties.

The executive committee system which was originally referred to by Mr. Bandaranaike and which prevailed under the Donoughmore Constitution of Ceylon did undoubtedly possess certain advantages, notably the utilisation of the services of members of all Parties in the constructive work of government. But that system was far from advisory and contained some serious defects which resulted in its abolition and replacement by the Cabinet system of government in 1946. As Sir Andrew Caldecott, then-Governor of Ceylon, stated in his Despatch to the Secretary of State in 1938, although much useful work had been done in executive committees, that system had made administration cumbrous and dilatory, and prevented the fixation and concentration of policy and responsibility. The administration, according to Sir Andrew, had become centrifugal and each committee went its own way without any common direction or control. It was with the intention of obviating these evils that Cabinet Government was adopted instead.

29 *Speeches and Writings*, pp 412-413

CHAPTER 9

THE PRIVILEGES OF THE NATIONAL STATE ASSEMBLY

The National State Assembly should be able to perform its functions effectively and with dignity, authority and independence. In order to accomplish this purpose, it is essential that the Assembly collectively, and its members individually, should enjoy certain special rights or privileges. The privileges of the members exist, therefore, for the benefit of the House and not for their personal benefit.[1] As Erskine May, the well-known British authority on Parliamentary privileges has stated: "The distinctive mark of a privilege is its ancillary character.....they are enjoyed by individual members, because the House cannot perform its functions without unimpeded use of the services of its members; and by the House for the protection of its members and the vindication of its own authority and dignity".[2]

The Constitution states that until the National State Assembly otherwise provides, the privileges, immunities and powers of the National State Assembly and of its members shall be the same as those of the House of Representatives and of its members immediately prior to the commencement of the Constitution, and accordingly the Parliament (Powers and Privileges) Act shall as far as applicable and *mutatis mutandis*, continue in force. (s. 38 (1)). The privileges of the National State Assembly are thus derived from the Constitution and the National State Assembly (Powers and Privileges) Act.[3] The long title of the Act states that it is "an Act to declare and define the privileges, immunities and powers of the National State Assembly and of the members thereof; to secure freedom of speech and debate or proceedings in the Assembly; to provide for the punishment of breaches of the privileges of the Asembly; and to give protection to persons employed in the publication of the

1. O. Hood Phillips, *Constitutional and Administrative Law* (3rd ed.), p. 170.
2. *The Law, Privileges, Proceedings and Usage of Parliament* (17th ed. 1964), p.42.
3. Chapter 383 of the Legislative Enactments. See section 38 of the Constitution.

reports, papers, minutes, votes or proceedings of the Assembly". The Act provides that all privileges, immunities and powers of the National State Assembly form part of the general and public law of Sri Lanka and must be judicially noticed in all Courts in Sri Lanka. (s. 9).

Freedom of speech and debate. Freedom of speech is essential to the proper functioning of the National State Assembly. The National State Assembly (Powers and Privileges) Act provides that there shall be freedom of speech, debate or proceedings in the House and that such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any Court or place out of the House. (s. 3).[4] No member is liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of anything which he may have said in the House or by reason of any matter or thing which he may have brought before the House by petition, bill, resolution, motion or otherwise. (s. 4).

Connected with the privilege of freedom of speech is the right to exclude "strangers". No stranger is entitled as, of right, to enter or to remain within the House or its precincts. (s. 20 (1)). The Speaker is authorised under the Act to issue such orders as he may in his discretion deem necessary for the regulation of the admittance of strangers to the House or its precincts, and for the maintenance of order and decorum in it. (s. 20 (2)). If at any sitting of the House or of a Committee any member takes notice that strangers are present, the Speaker or Chairman must forthwith put the question, "That Strangers be ordered to withdraw" without permitting any debate or amendment.[5] No notice is necessary to be given of a motion for the withdrawal of strangers.[6] The Speaker or Chairman has also the power to order the withdrawal of strangers from any part of the Chamber. Copies of orders made by the Speaker must be duly authenticated by the Clerk and exhibited in conspicuous positions within the precincts of the House. Such copies, when so authenticated and exhibited, are deemed to be sufficient notice to all persons affected by them. (s. 20 (3)). The Speaker may at any time order any stranger to withdraw from the House or its precincts. (s 20 (4)). Any person creating or joining

4. See also the English Bill of Rights(1688), Art 9. Statements published in a petition to, and for the use of, members only are not actionable, (*Lake* v *King* (1667) Saunders 131).
5. Standing Order of the National State Assembly, No. 19(2).
6. Standing Order, No. 25 (5).

in any disturbance in the House or in the precincts during its actual sitting may be arrested without warrant on the verbal or written order of the Speaker, and may be kept in the custody of an officer of the House pending the determination by it whether or not such person should be punished for an offence under Part II of the Act; but no such person can be kept in custody after the termination of the sitting. (s. 21(1)). All police officers, constables and other persons are required under the Act to assist in the apprehension and detention of any person in pursuance of any such order. (s. 21(2)).

Another consequence of the privilege of freedom of speech is the protection offered to persons responsible for publications authorised by the House. Any proceedings, civil or criminal, against persons for the publication of any reports, papers, minutes, votes or proceedings by order or under the authority of the House are to be immediately stayed upon delivery of a certificate of the Speaker or of the Clerk stating that such publication is by order or under the authority of the House or any Committee. (s. 19).

Freedom from arrest. Except for a contravention of the Act, no member is liable to arrest, detention or molestation in respect of any debt or matter which may be the subject of civil proceedings while proceeding to, or in attendance at, or returning from, any meeting or sitting of the House. This immunity or privilege does not, however, prevent a member who is deemed to have committed any act of insolvency from being dealt with under the Insolvency Ordinance. (s. 5). Nor does the privilege, according to the section, prevent a member from being arrested on a criminal charge or from being detained under any emergency regulation made under the Public Security Ordinance. The practice of the House since the attainment of this country's independence requires that in such cases the House should immediately be informed through the Speaker of the imprisonment or detention of any member together with the reasons for his imprisonment or detention.[7] In giving his ruling on 6 May 1971, on the matter of privilege raised by the member for Galle (Dr. W. Dahanayake) in the House of Representatives over the detention of the member

7. See Hansard, Vol. 31, column 281. See also Erskine May, *Parliamentary Practice*, 17th ed., p. 80, and the Rules of the Indian Lok Sabha. It has been held in India that a Member who is detained has a right to correspond with the Legislature: *In re Anandan*, A.I.R. 1952 Mad. 118.

for Kiriella (Mr. Vasudeva Nanayakkara), the Speaker (Mr. Stanley Tillekeratne) stated that on two previous occasions the Prime Ministers of the time (the late Mr. S. W. R. D. Bandaranaike and Mrs. Sirimavo Bandaranaike) had followed this practice. In regard to the matter before him the Speaker said that the Prime Minister, Mrs. Bandaranaike, had in her letter of 5 May very graciously regretted that the necessary information had not been conveyed to him, as Mr. Speaker, in writing and had also assured the House that no disrespect was intended.

Right to exclusive cognisance of proceedings in the House. Except in the case of a criminal offence committed within the precincts of the House, it has full control of its proceedings and all other matters arising within the House.[8]

The right to exclusive cognisance of proceedings in the House involves three principal matters:[9]

(1) The right of the House to be the judge of the lawfulness of its own proceedings. The House is clearly not responsible to any external authority for following the rules (of procedure) it lays down for itself, but may depart from them at its own discretion. This right of the House exists even where the procedure is laid down by statute. The Constitution lays down that subject to the provisions of the Privileges Act, no Court or other institution administering justice has power or jurisdiction in respect of the proceedings of the National State Assembly or of anything done or omitted to be done by or in the National State Assembly (s. 39)

(2) The right to punish its own members for their conduct in the House. The National State Assembly has under the Act the power of admonition, removal and suspension.

(3) The precise meaning of the term "proceedings in the House". Although it is difficult to give a clear definition of "a proceeding in the National State Assembly" it has been said in England that so far as the

8 See National State Assembly (Powers and Privileges) Act, ss. 3 and 4. *Burdett* v *Abbot* (1811) 14 East 1, at p. 128. *Bradlaugh* v *Gossett*(1884)12 Q.B.D. 271, 283.

9. H. N. G. Fernando J in the *Attorney-General* v *Samarakkody and Dahanayake* (1955) 57 N.L.R. 412, at p. 422, citing May's *Parliamentary Practice* (14th ed.) pp. 59 *et.seq. Bradlaugh* v *Gossett* 12 Q.B.D. 271.

House of Commons is concerned the term "covers both the asking of a question and the giving of written notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of Parliamentary business".[10] This term includes not only "the transaction of Parliamentary business" with the Speaker in the Chair or in a properly constituted Committee of the House. It includes also, for example, "communications between one member and another or between a member and a Minister, so closely related to some matter pending in or expected to be brought before the House that, although they do not take place in the Chamber or a committee room, they form part of the business of the House; as, for example, where a member sends to a Minister the draft of a question he is thinking of putting down, or shows it to another member with a view to obtaining advice as to the propriety of putting it down or as as to the manner in which it should be framed".[11]

In *Attorney-General* v *Samarakkody and Dahanayake*[12] the Attorney-General alleged, *inter alia*, that the 1st respondent who was a member of the House of Representatives was guilty of disrespectful conduct in the precincts of the House and the 2nd respondent, who was also a member, of abetment of such conduct, both acts being offences specified in the Privileges Act. The facts were briefly that at a sitting of the House another member, X, on being suspended from the service of the House, had refused to leave when he was ordered by the Speaker, to do so. The Speaker had thereupon ordered the Sergeant-at-Arms to remove the member from the House, and had stated, "I suspend the sitting of the House" and had vacated the Chair. The mace had remained on the Speaker's Table. Thereafter, and before the Sergeant-at-Arms removed X, the 2nd respondent had proposed that the 1st respondent take the Chair and another member had seconded that motion. No objection having been taken to the motion the 1st respondent had taken the Chair. There-

10. *Report of the Select Committee on the Official Secrets Acts*, H.C. 101 (1938 39), quoted in May, *Parliamentary Practice* (17th ed.), p. 62
11. H. N. G. Fernando J., *op. cit.*, at p.423 (citing May). See also the English case of *Duncan Sandys* (1938) H.C. Pap. 173 (attempt to require a member of Parliament to divulge the source of his information on which a question had been asked in the House); the *Strauss Case* (1958) 5th Report of Privileges Committee 591 H.C. Deb, 5 s., cols. 811-813 (threat of libel action for making grave allegations by a Member in a letter to the Minister).
12. (1955) 57 N.L.R. 412.

after X had made a speech in the Chamber and had continued to speak until the Sergeant-at-Arms entered with the Police and removed X from the Chamber. On the entry of the Sergeant-at-Arms, the 1st respondent had vacated the Chair. It was held by the Supreme Court that the conduct of the two respondents, even if it was disrespectful, was not justiciable by the Court. It was conduct included within the scope of sections 3 and 4 of the Privileges Act and could not therefore be impeached or questioned in proceedings taken in the Supreme Court. The Court held that the jurisdiction to take congnisance of such conduct was exclusively vested in the House.

In *The Attorney-General* v *Michael de Livera*,[13] it was held by the Privy Council that the answer given to the question, what is a "proceedings in the House" depends on the consideration, "in what circumstances and in what situations is a member of the House exercising his "real" or "essential" function as a member? For, given the proper anxiety of the House to confine its own or its members' privileges to the minimum infringement of the liberties of others, it is important to see that these privileges do not cover activities that are not squarely within a member's true function... The most perhaps that can be said is that, despite reluctance to treat a member's privilege as going beyond anything that is essential, it is generally recognised that it is impossible to regard his only proper functions as a member as being confined to what he does on the floor of the House itself. In particular, in connection with his approaches to or relations with Ministers, whether or not on behalf of one of his own constituents, it is recognised that his functions can include actions other than the mere putting down and asking of a Parliamentary question".

The House has the right to regulate its own proceedings. When a member disregards the authority of the Chair or abuses the rules of the House by persistently and wilfully obstructing the business of the House or otherwise the Speaker must forthwith put the question on a motion being made "that such member be suspended from the service of the House".[14] No amendment, adjournment or debate is allowed on the motion. If the motion is carried and the member is suspended, the suspension on the first occasion continues for one week, on the second

13. (1962) 64 N.L.R. 409, at pp. 413-414.
14. Standing Order No. 82 (1).

occasion for two weeks, and on the third or any subsequent occasion for one month.[15] If the member who has been suspended refuses at any time during the period of suspension to obey the direction of the Speaker to withdraw from the precincts of the House the Speaker may direct such steps to be taken as are required to enforce his decision.[16]

Power to order attendance of witnesses. The Privileges Act provides that the House and any Committee duly authorised on that behalf may order any person to attend before the House or before such Committee and to produce any paper, book, record or document in his possession or under his control. (s. 10). Such order to attend or produce documents must be notified to that person by a summons of the Clerk issued by direction of the Speaker or the Chairman of the Committee. (s. 11). Witnesses may be examined on oath or affirmation with regard to any facts, matters and things relating to the subject of inquiry. (s. 13). Any person who intentionally gives a false answer to any material question or gives false evidence in the course of any statement made by him in a case referred to the Attorney-General under section 26 of the Act is guilty of the offence of perjury under section 190 of the Penal Code. (s. 14). Except with regard to evidence in respect of which proceedings for perjury under the Penal Code or for an offence under the Act, witnesses are immune from civil or criminal proceedings by reason of anything they may have said in evidence. (s. 16). No member or officer of the House or shorthand writer employed for the purpose is allowed to give evidence elsewhere of evidence or proceedings in the House without the prior leave of the House. (s. 17).

Breaches of privilege and the power of punishment. The Act contains a Schedule specifying acts and omissions which are declared to be breaches of privilege. Part A of the Schedule enumerates the offences which are punishable only by the Supreme Court. They are:

1. Assaulting, insulting or wilfully obstructing any member coming to or going from the House or on account of his conduct in the House or any committee, or endeavouring to compel any member by force, insult or menace to declare

15. Standing Order No. 82 (2).
16. Standing Order No. 82 (4).

himself in favour of or against any proposition or matter depending or expecting to be brought before the House or any committee.

2. Sending to a member any threatening letter or challenging a member to fight on account of his conduct in the House or committee.

3. Tampering with, deterring, threatening, beguiling or in any way unduly influencing any witness in regard to evidence to be given by him before the House or any committee.

4. Presenting to the House or to any committee any false, untrue, fabricated or falsified document with intent to deceive the House or any committee.

5. Wilfully publishing any false or perverted report of any debate or proceedings of the House or a committee or wilfully misrepresenting any speech made by a member in the House or in committee.

6. Wilfully publishing any report of any debate or proceedings of the House or a committee the publication of which has been prohibited by the House or committee.

7. The publication of any defamatory statement reflecting on the proceedings and the character of the House.

8. The publication of any defamatory statement concerning any member in respect of his conduct as a member.

9. The offering to or acceptance by any member or officer of the House of a bribe to influence him in his conduct as such member or officer, or the offering to or acceptance by any member or officer of the House of any fee, compensation, gift or reward for or in respect of the promotion of or opposition to any Bill, resolution, matter, rule or thing submitted to of intended to be submitted to the House or any committee.

10. The printing of a copy of any Act or Ordinance or of any report, paper, minutes or notes or proceedings of the House or any committee, which purports to have been printed by the Government Printer or by or under the authority of the House or any committee but which in fact has not been so printed or the tendering in evidence of any such copy as aforesaid.

11. The abetment of any act or omission specified in any of the preceding paragraphs.

Breaches of the privileges of the National State Assembly which are specified in Part B of the Schedule are punishable by the Supreme Court, and, if committed in respect of or in relation to the House, also by the House. (s. 22). The offences enumerated in Part B are:

1. The wilful failure or refusal to obey any order or resolution of the House under this Act, or any order of the Speaker or any member which is duly made under this Act.

2. Wilful disobedience to any order for attendance or for production of papers, books, records or documents made by the House or any committee duly authorised in that behalf unless such attendance or production be excused as provided in section 13 and section 15 of the Act.

3. Refusing to be examined before or to answer any lawful and relevant question put by the House or any such committee, unless such refusal be excused as provided in section 13 and section 15.

4. Assaulting, insulting or wilfully obstructing any member in the House or in committee or in the precincts of the House.

5. Assaulting or resisting or wilfully interfering with an officer of the House in the Chamber or in committee or in the precincts of the House.

6. Creating or joining in any disturbance in the Chamber or in committee or in the vicinity of the House while the House or any committee is sitting, knowing or having reasonable grounds

to believe that proceedings of the House or committee are or are likely to be interrupted.

7. Disrespectful conduct in the precincts of the House.

8. Prevarication or other misconduct as a witness before the House or in committee.

9. The publication of any proceedings in a committee of the House before they are reported to the House.

10. The abetment of any act or omission specified in any of the preceding paragraphs.

The Supreme Court may on application made by the Attorney General and supported by evidence on affidavit

(a) if satisfied that any member or other person appears to have committed any offence specified in the Schedule cause notice to be served on him calling upon him to show cause why he should not be punished; and

(b) if no cause or no sufficient cause is shown, after such inquiry as the court may consider necessary convict him of the offence and sentence him to imprisonment, simple or rigorous, for a term not exceeding two years or to a fine not exceeding five hundred rupees or both such fine and imprisonment. (s. 23 (1)).

In the case of any alleged offence committed in respect of or in relation to the House such an application by the Attorney-General may be made only if:

(a) the Attorney-General has furnished a report to the Speaker stating that in his opinion there is sufficient evidence to warrant the taking of further steps under the Act in that case;

(b) the House, after consideration of such report, has by resolution required the Attorney-General to make the application. (s. 25 (1)).

For the purpose of enabling the Attorney-General to furnish a report in relation to an alleged offence the Speaker may refer the case to him

(a) on complaint being made to him in chambers by any member or (b) if required to do so by resolution of the House. (s. 26 (1)).

The House has jurisdiction to punish summarily any breach of privilege specified in Part B which is committed in respect of or in relation to the House by any member or other person provided that (a) in any case which has been referred to the Attorney-General, a report has been furnished by him to the effect that in his opinion there is sufficient evidence to warrant the taking of further steps under the Act in respect of the alleged offence; (b) no application has been made to the Supreme Court. (s. 27).

The punishment which may be imposed by the House for an offence is (a) admonition at the Bar of the House; (b) removal from the precincts of the House; (c) where the offence is committed by a member of the House, in addition to or in lieu of any of the above punishments, suspension from the service of the House for any period not exceeding one month; (d) where the offence is committed by a person who is not a member, prohibition from entering the House or its precincts for a period not exceeding six months. (s. 28).

CHAPTER 10

AMENDMENT OF THE CONSTITUTION; THE CONSTITUTIONAL COURT

The principle of the supremacy of the fundamental law as laid down in the Constitution depends for its effectiveness in practice upon the provisions governing constitutional amendment. A Constitution that can be changed in the same manner as ordinary law by a simple majority can hardly be said to embody the basic framework of the State as the fundamental law of the land. It is mainly for this reason that our Constitution as well as Constitutions such as those of the United States, Canada, India and most other countries are rigid in various degrees. Particularly where there are centrifugal forces within a State, such as racial differences, a certain degree of rigidity in the Constitution is desirable. Under a rigid Constitution the power to alter the Constitution is not given to an ordinary majority in the Legislature as in the case of ordinary legislative amendment. The restriction of fundamental human rights and the reform of fundamental political institutions and rules set down in the Constitution are considered too important to be left within the reach of ordinary majorities in the Legislature.

As Harold J. Laski has stated: "There are notions so fundamental that it is necessary in every State to give them special protection..... It (the legislature) ought not, in a word, to be able to alter the basic framework of the State except under special conditions direct access to which is difficult".[1] On the other hand, change in the political institutions of the State should not be too difficult because, as Burke has pointed out, "a State without the means of some change is without the means of its conservation".

Procedure for Constitutional Amendment and for Inconsistent Laws. Chapter X of the Constitution provides for the special procedure for laws amending the Constitution and laws inconsistent with the Constitu-

1. *Grammar of Politics* (1925), pp. 304-6. See also *Marbury* v *Madison*, 1 Cranch at p. 176.

tion. No Bill for the repeal or amendment of any provision of the Constitution can be placed on the agenda of the National State Assembly unless the provision to be repealed or amended and consequential amendments, if any, are expressly stated in the body of the Bill and the long title of the Bill expressly states that the Bill is for the amendment of the Constitution. (s. 51 (1)). No Bill for the repeal of the Constitution can be placed on the agenda of the National State Assembly unless the Bill contains provisions replacing the Constitution to be repealed and the long title of the Bill expressly states that the Bill is for the repeal and replacement of the Constitution. (s. 51 (2)). Explaining these provisions in the Constituent Assembly, the Minister of Constitutional Affairs, Dr. Colvin R. de Silva said:

"You cannot unknowingly and incidentally and by necessary implication or by any of these suggested ways alter the Constitution. It is too important a document. So, if you want to change the Constitution you must bring a Bill which states that it is brought to change the Constitution or that it is brought to repeal or alter or amend this or that provision in the following way; and that Bill, therefore, which is placed before the House for the purpose of amending the Constitution will have to be passed by a special majority".[2]

If in the opinion of the Speaker, or when he is unable to perform the functions of his office in the opinion of the Deputy Speaker, a Bill does not satisfy the conditions in s.51 (1) or (2), he must direct that such Bill be not proceeded with unless it is amended so as to satisfy the required conditions. (s. 51 (3)). No provision in any law has the legal effect of repealing or amending any provision of the Constitution by implication. (s. 51 (4)). No Bill for the replacement, repeal or amendment of the Constitution can be certified by the Speaker unless it is passed by the votes of at least two-thirds of the whole number of members of the National State Assembly (including those not present). (s. 51 (5)).

The National State Assembly has also power to enact a law which in some particular or respect, is inconsistent with any provision in the Constitution without amending or repealing such provision provided that such law is passed by the majority required for the amendment of the

2. *Constituent Assembly Debates*, Vol. 1, 2849.

Constitution. (s. 52 (1)). Such laws cannot be interpreted as amending the constitutional provisions with which those laws are inconsistent. (s. 52 (2)).

In the Constituent Assembly the Minister of Constitutional Affairs Dr. Colvin R. de Silva stated "that there is a distinction between amending the Constitution and passing a law which is repugnant to some provision in the Constitution."[3] He said: "There can be cases—they are extremely rare cases but they can, in fact, happen in practice and one good case is our Bribery Act—where a Bill or a provision thereof may be repugnant to the Constitution, which the House wishes nevertheles to accept and pass into law without thereby changing the Constitution. We may wish to preserve the Constitution in its generality completely but we may wish to pass in one particular way a special law that may offend the Constitution. That is how the question of repugnance comes.... A law passed by this House is not challengeable in the Courts. So, one must provide for the possibility of repugnance being there and therefore you have the safeguard against it. Now, if, in the opinion of the Speaker, any provision in any Bill is repugnant to any provision of the Constitution, then the Bill itself must be passed by the prescribed majority, and not merely that provision....Of course, there is nothing to prevent the Government withdrawing that provision and asking that the Bill be passed without it, or for amending that provision so that the repugnancy is gone. Then, of course, we come back with an ordinary Bill which requires an ordinary majority. But if the Government wishes to have that provision in the Bill in respect of the repugnancy in the Constitution, then the Speaker will not certify that Bill unless it is passed by a two-thirds majority".[4]

Examination of Bills. It is the duty of the Attorney-General to examine every Bill for any contravention of the procedural requirements of section 51 of the Constitution and for any provision which cannot be validly passed except by the special majority prescribed by the Constitution. The Attorney-General or any officer assisting him in the performance of his duties must be afforded all facilities necessary for the performance of his duties. If the Attorney-General is of opinion that a Bill

3. *Constituent Assembly Debates*, Vol. 1, 2877-8.
4. *Constituent Assembly Debates*, Vol. 1, 2849-50.

contravenes any of the requirements of section 51 or that any provision in a Bill cannot be validly passed except by the special majority prescribed by the Constitution, he must communicate such opinion to the Speaker. If the Attorney-General is of the opinion that the Speaker should refer either of the above-mentioned questions to the Constitutional Court, he must communicate such opinion to the Speaker. The duty of the Attorney-General includes the duty of examining all amendments proposed to a Bill and of communicating his opinion at the stage when the Bill is ready to be put to the National State Assembly for its acceptance. (s. 53).

Under the previous Soulbury Constitution the question of the constitutionality of enacted laws could have been raised in the Courts, but only incidentally in the course of legal proceedings. The Courts dealt with the matter of constitutionality only in so far as it was necesssary for the decision of the particular case before it.

THE CONSTITUTIONAL COURT

Composition and Jurisdiction. The Constitution provides that there shall be a Constitutional Court for the performance of the functions assigned to it by the Constitution. The President must appoint, for a term of four years, five persons to be members of the Constitutional Court. (s. 54 (1)). Prior to the appointment of the members of the Constitutional Court, the National State Assembly must fix the remuneration to be paid to its members. The remuneration so fixed remains unaltered throughout the period of its term and is charged on the Consolidated Fund. (s. 57).

Any question as to whether any provision in a Bill is inconsistent with the Constitution shall be referred by the Speaker or, when he is unable to perform the functions of his office, the Deputy Speaker, to the Constitutional Court for decision if (a) the Attorney-General communicates his opinion to the Speaker under section 53; or (b) the Speaker receives within a week of the Bill being placed on the Agenda of the National State Assembly a written notice raising such a question signed by the leader in the National State Assembly of a recognized political Party; or (c) the question is raised within a week of the Bill being placed on the agenda of the National State Assembly by written notice addressed to the Speaker and signed by at least such number of members of the National State Assembly as would constitute a quorum of the National

State Assembly; or (d) the Speaker or, where he is unable to perform the functions of his office, the Deputy Speaker, takes the view that there is such a question; or (e) the Constitutional Court on being moved by any citizen within a week of the Bill being placed on the Agenda of the National State Assembly, advises the Speaker that there is such a question. (s. 54 (2)).

The original Basic Resolution before the Constitutional Assembly did not provide for the right of a citizen to move the Constitutional Court in order to challenge any Bill which was before the National State Assembly on the ground of its inconsistency with the Constitution. This was provided by an amendment moved by the Minister of Constitutional Affairs and adopted unanimously by the Constituent Assembly. By the incorporation of this right in the Constitution, the ordinary citizen too is sought to be made "a guardian of the Constitution".

In the case of a Bill which is, in the view of the Cabinet of Ministers, urgent in the national interest and bears an endorsement to that effect, the provisions of section 46 (1), which requires publication of Bills in the Gazette at least seven days before they are placed on the agenda of the National State Assembly, and of section 54 (2), which requires the Speaker to refer the question of inconsitency to the Constitutional Court in the stated cases, have no application. (s. 55 (1)).

As the Minister of Constitutional Affairs, Dr. Colvin R. de Silva stated in the Constituent Assembly, there comes once in a way as in the case of the demonetization law, the need for a Government in the national interest urgently to pass a law in the shortest possible time before people can make preparations against that law.[5] Such a Bill must be referred by the Speaker to the Constitutional Court, which is required to advise the Speaker whether (a) in its opinion the provisions of the Bill are consistent with the Constitution; or (b) in its opinion the Bill or any of its provisions is inconsistent with the Constitution; or (c) it entertains a doubt that the Bill or any of its provisions is consistent with the Constitution. The Constitutional Court must communicate its advice to the Speaker as expeditiously as possible and in any case within 24 hours of the assembling of the Court. (s. 55 (2)). Until the Speaker has received

5 *Constituent Assembly Debates*, Vol 1, 2856

the advice of the Constitutional Court on the Bill, it cannot be placed on the agenda of the National State Assembly. (s. 55 (3)). If the Constitutional Court advises the Speaker that the Bill or any of its provisions is inconsistent with the Constitution or that the Court entertains a doubt whether the Bill or any provision in it is consistent with the Constitution, such Bill cannot pass into law except with the special majority required for the amendment of the Constitution. (s. 55 (4)).

Whenever occasion arises for the determination of any matter arising under section 54 (2) or section 55, three members of the Constitutional Court chosen in accordance with the rules of the Court must determine the matter. (s. 54 (1)). No proceedings can be had in the National State Assembly in relation to a Bill referred to the Constitutional Court under Section 54 (2) or section 55 until the decision of the Constitutional Court or its opinion under section 55 has been given (s. 54 (3)). The decision of the Constitutional Court shall be given within two weeks of the reference, with the reasons. A dissentient member of the Court may also state his reasons for his dissent and these shall be forwarded together with the majority decision and reasons. (s. 65). The decision of the Constitutional Court upon a reference under section 54 (2) binds the Speaker and is conclusive for all purposes. No institution administering justice and likewise no other institution, person or authority has the power or jurisdiction to inquire into, pronounce upon or in any manner call in question a decision of the Constitutional Court. (s. 54 (4)).

A vacancy in the membership of the Constitutional Court arises (a) upon the death of a member; or (b) on the resignation of a member by a writing addressed to the President; or (c) on the removal of a member by the President on account of ill-health or physical or mental infirmity; or (d) on the determination of the term for which the members of the Constitutional Court are appointed. Any vacancy referred to above may be filled in accordance with the provisions of section 54 (1). Whenever a member of the Constitutional Court is absent from Sri Lanka, the President may appoint a person to be a member of the Court during such absence. Subject to the above provisions, the membership of the Constitutional Court remains unaltered during the period for which it was appointed. (s. 56).

The Case for a Special Court. In the Constituent Assembly there was some discussion regarding the questions whether a special Constitu-

tional Court was necessary and whether persons other than members of the Judiciary should be members of the Constitutional Court. The Minister of Constitutional Affairs, Dr. Colvin R. de Silva, in dealing with these questions referred to the Constitutional Council provided for in the French Constitution.[6] He reminded the House that three of its members are appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. In addition to the nine members provided for above, former Presidents of the Republic are, he said *ex-officio* life-members of the Constitutional Council. Dr. de Silva also referred to the fact that the members of the Federal Constitutional Court of the Federal Republic of Germany are elected, one-half by the Bundestag and one-half by the Bundesrat. "In other words", said the Minister, "for people to be chosen (for a Constitutional Court) from outside the judiciary and the Courts is quite a common practice, and it is common not by accident". He said that Mr. Gamini Dissanayake expressed this point very well and he would only like to add this: "If you bring the judges of a regular Court with their regular position—career judges, that is to say—into a place like a Constitutional Court, they become involved in the ordinary everyday matters of political issues in the political arena. That would do no good for the judges".[7]

Earlier in the debate Mr. Gamini Dissanayake had said: "From my way of thinking, I consider that the Hon. Minister has been somewhat correct in reposing the function of determining the constitutional vaiidity of laws (Bills) in a separate Court which he is creating, namely, the Constitutional Court. In my view, the question of interpreting Constitutional laws is a specialised function, and the question of determining the validity of laws (Bills) in the present context and in the way envisaged by the Hon. Minister comes very rarely within the purview of the present Courts .....It is, I think, very desirable and necessary that when laws are being challenged, not *ex post facto* but in the process of legislation that a very expeditious, cheap and quick method is devised where the validity or not of a particular Bill is to be determined. Now, if one

6. Among its other functions, the French Constitutional Council pronounces whether organic laws submitted to it before their promulgation are in conformity with the Constitution. (Article 61 of the French Constitution)—a limited power of judicial review which is somewhat similar to that of the Constitutional Court of Sri Lanka. One of its tasks is to protect the fundamental rights guaranteed by the Constitution.
7. *Constituent Assembly Debates*, Vol. 1, 2892-4. For a contrary view, see S. Nadesan, *Comments on the Constituent Assembly* (1971), pp 35 ff

were to go and repose that function in the regular Courts of law, in my view, it is going to be a very tedious, cumbersome and very expensive procedure, and it will make matters difficult both for the subject who goes to the Court and for the judges who are called upon to determine the validity of those laws (Bills)".[8]

Procedure. The Clerk to the National State Assembly is the Registrar of the Constitutional Court and convenes the Court. (s. 58). The Constitutional Court may from time to time, subject to the provisions of the Constitution, make rules of Court for regulating generally its practice and procedure.[8a] Every rule of Court must be published in the *Gazette* and it comes into operation on the date of such publication or on such later date as may be specified in such rule. All rules of Court must, as soon as convenient after their publication in the *Gazette*, be brought before the National State Assembly for approval. Any such rule which is not so approved is deemed to be rescinded as from the date of disapproval but without prejudice to anything previously done under it. (s. 59).

The Chairman of the Constitutional Court for any occasion is chosen in accordance with the rules of Court. (s. 60). The decision of the Court is by majority vote. No member of the Constitutional Court present at a session may refrain from voting. (s. 61). The decision shall be given within two weeks of the reference together with the reasons. A dissentient member of the Court may also state his reasons for his dissent and these must be forwarded together with the majority decision and reasons (s. 65). All hearings before the Court must be open to the public. (s. 62).

The Attorney-General has the right to be heard on all matters before the Constitutional Court. The Court may in its discretion grant to any person such hearing as may appear to the Court to be necessary before dealing with any question referred to it under section 54 (2). The Court may also if it thinks it necessary or expedient summon and hear witnesses and order the production before it of any document or other thing. No member of the National State Assembly can appear as an Advocate or a Proctor before the Constitutional Court. (s. 63).

8. *Constituent Assembly Debates*, Vol. 1, 2882-3.
8a. Rules were made by the Court and published in a Gazette Extraordinary dated 27 January 1973.

The Constitutional Court has full power and authority to take cognizance of and to try in a summary manner any offence of contempt committed against or in disrespect of its authority and on conviction to commit the offender to jail until he shall have purged his contempt or for such period as to the Court shall seem meet; and such imprisonment shall be simple or rigorous as the Court shall direct and the offender may in addition thereto or in lieu thereof in the discretion of the Court be sentenced to pay a fine not exceeding five thousand rupees. The State officers enforcing or carrying out the orders of the Supreme Court made under its contempt jurisdiction shall in like manner enforce and carry out the orders of the Constitutional Court made under the preceding provisions. (s. 64)'

Judicial Review under the Soulbury Constitution. As already stated, under the previous (Soulbury) Constitution the supremacy of the Constitution was secured by the power of judicial review of the constitutionality of enacted legislation. The ordinary Courts became the ultimate arbiters of constitutionality of laws. The Courts had the power to strike down legislation which they considered to be repugnant to the Constitution. Although this power of judicial review of enacted legislation was not expressly conferred by the Soulbury Constitution, it was assumed by the Courts, as in the United States of America,[9] as being incidental or implied, from the written and rigid nature of that Constitution.[10]

Under such a system of judicial review of legislation, "the Constitution", as Chief Justice Hughes of the United States once remarked, "is what the judges say it is".[11] The principles of interpretation which are applied to strike down legislation are laid down by the Judges themselves. Its logic is created by them. It has been said that their decisions sometimes depend upon what Justice Holmes once called the "inarticulate major premise" from which they proceed, as in the case of other human beings. The convictions of their beliefs are necessarily reflected in their judgments. Critics of this system of judicial review under which Judges can strike down legislation even after a long period since their enactment

9. Its famous enunciation was by Chief Justice Marshall in *Marbury* v *Madison* (1 Cranch 137).
10. *Kodakan Pillai* v *Mudanayake* (1953) 54 N.L.R. 433; *Liyanage and others* v *The Queen* (1965) 68 N.L.R. 265.
11. Hendel, *Charles Evans Hughes and the Supreme Court* (1951), p. 11.

call it "government by unelected judges". It is also said that through such a system of review, the Courts sometimes tend to become another Chamber of the Legislature[12] or even a "super-legislature."[13] Pandit Jawaharlal Nehru has stated: "it is obvious that no Court, no system of Judiciary can function in the nature of a Third House, as a kind of Third House of correction."[14] The views of Franklin D. Roosevelt with regard to judicial review of enacted law, when the United States Supreme Court repeatedly invalidated "New Deal" legislation, were similar.[15]

One of the criticisms that was made against the judicial review of legislation as it existed under the previous Constitution was that it was possible for any Court to strike down legislation after it had been implemented for several years. Uncertainty was thus introduced into the law. In *Kodeeswaran* v *The Attorney-General*[16] an action was brought by a public officer against the Attorney-General as representing the Government for the increment of salary which he alleged was due to him and which had been refused because he did not pass a test in the Sinhala language. One of the plaintiff's contentions was that the Official Language Act, 1956, was unconstitutional and void and therefore the Government had no right to impose the language test upon public servants. The District Judge decided that issue in Kodeeswaran's favour. The Supreme Court did not consider it necessary to rule on this matter since it held that the plaintiff, as a public servant, could not sue for the increment in salary. The Privy Council, having overruled the Supreme Court on that point, sent the case back for decision on the constitutional and other issues. When the question of judicial review became the subject of debate during the framing of the republican Constitution, the *Kodeeswaran Case* was used by Government spokesmen to support their case against retaining the power of the Courts to strike down legislation.

12. See Lambert *Le Government des juges;* Laski, *The American Democracy* (1948) p. 111. Jawaharlal Nehru, *Constituent Assembly Debates,* Vol. 9, pp. 1195-6.
13. Brandeis J, dissenting, in *Burns Baking Co.* v *Bryan* 264 U.S. 504, 534. (1924).
14. *Constituent Assembly Debates,* Vol. 9, pp. 1195-6. Compare the political effects of *Colak Nath's Case* A.I.R.1967 S.C.1643 (later over-ruled), where the majority judgment of the Supreme Court of India decided that Part III of the Indian Constitution could not be amended by the Indian Parliament on the ground that "in giving to themselves the Constitution, the people reserved the fundamental freedoms to themselves." See also *Bribery Commissioner* v *Ranasinghe* (1964) 66 N.L.R. 73, at p. 78.
15. See Broadcast address delivered on 9 March 1937.
16. (1969) 72 N.L.R. 337 (P.C. Judgment); 70 N.L.R. 121 (S.C. Judgment); D.C Colombo 1026/Z (D.C. Judgment).

In the Constituent Assembly, the Minister of Constitutional Affairs, Dr. Colvin R. de Silva said:

"".....15 years after the event the position is that the Official Language Act is under challenge in the Courts, the only judgment by any competent Court in the matter being the judgment of the District Court that the Official Language Act is invalid, and in the meantime, quite rightly, the Government of Ceylon continue to apply the Official Language Act, for the matter is in appeal and therefore the decision is not binding on the Crown.....If we have this power (of judicial review of the constitutionality of legislation), if the Courts do declare this law invalid.....the chief work from 1956 onwards will be undone. You will have to restore the egg from the omelette into which it was beaten and cooked".[17]

The classic example that is often cited from the United States to illustrate the validity of this criticism of judicial review of enacted law is the *laissez faire* approach adopted by the American Supreme Court during the period from 1890 to 1937. The striking down of legislation had the effect of hindering certain measures of economic and social reform which the legislature desired to implement in the interests of the people. In the *Lochner Case*,[18] for instance, the Court held that a New York statute fixing maximum hours for bakers was invalid on the ground that it was "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labour which may seem to him appropriate or necessary for the support of himself and his family". The Court stated: "The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labour in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment....Under that provision no statute can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labour is part of the liberty protected by this amendment". This view was criticised by

17. *Constituent Assembly Debates*, Vol. 1, 2833-4.
18. *Lochner* v *New York* 198 U.S. 45 (1905); see Bernard Schwartz, *American Constitutional Law* (1955), pp.208-212 for a learned discussion of this and other cases decided by the American Supreme Court illustrating the Court's acceptance, during the period, of the *laissez-faire* theory of governmental functions. See also Corwin, *Constitutional Revolution Ltd.* (1941).

Mr. Justice Holmes in his dissenting judgment in the course of which he went on to state that the Fourteenth Amendment did not enact Mr. Herbert Spencer's *Social Statics* and that the Court should not base its judgments "upon an economic theory which a large part of the country does not entertain".[19] Again, during the period from January 1935 to May 1936 many laws incorporating Franklin Roosevelt's New Deal program which was intended to meet the economic depression were declared unconstitutional. It is not surprising that even in this classic home of judicial review certain reforms have been sugggested to ensure the supremacy of Congress; such as, the grant of power to Congress to override a judicial decision declaring a statute to be unconstitutional by enacting it a second time at least by a two-thirds majority.[20]

It is of interest to note that in Ireland the conferment of the power of declaring void the legislation of the National Parliament on the High Court (and later the Supreme Court) was effected with a certain amount of misgiving. As Mr. de Valera said: "I know that in other countries Courts are set up known, roughly, as Constitutional Courts, to deal with such matters which take a broader view — I do not wish to be hurtful — which take a broader view, or not so narrow a view as the ordinary Courts which, strictly interpreting the ordinary law from day to day, have to take. If I could get from anybody any suggestion for some court to deal with such matters other than the Supreme Court, I would be willing to consider it. I confess now that I have not been able to get anything better than the Supreme Court to fulfil that function."[21] In other words, the interpretation of a Constitution being admittedly in some ways different from that of ordinary law, De Valera's contention was that this function should be left to be performed by a special Constitutional Court set up for the express reference and review of constitutionality.

Fundamental Law and the Review of Bills by the Constitutional Court. The framers of the republican Constitution were considerably impressed

19. *Lochner Case*, at p. 75.
20. See Charles Warren, *Congress, the Constitution and Supreme Court* (1925)Chap. V. The conservative majority on the Court or the "Old Court" as it was later called,disappeared after 1937 with the increasing application of the presumption of constitutionality of laws.
21. 67 Dail Debates 53-54, cited by J. M. Kelly, *Fundamental Rghts in the Irish Law and Constitution* (1961), pp. 15-16.

by the argument against allowing the Judges to strike down legislation which had earlier been enacted by the representatives of the people. On the other hand it had been asked in this country too, as it had been asked earlier elsewhere: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restrained?"[22] It was in the face of this dilemma that the device of the Constitutional Court was adopted in the republican Constitution. Through this device it was sought to combine the view that the laws passed by the National State Assembly as the supreme instrument of State power should not be allowed to be struck down by any outside body, with the other view that a judicial body should bring to the notice of the National State Assembly any Bill or provision in a Bill which was inconsistent with the Constitution and therefore required the special majority necessary for a constitutional amendment. This concept of the Constitutional Court was designed (1) to prevent the National State Assembly itself from becoming the ultimate arbiter of the constitutionality of its own intended legislation, and (2) to enable the Assembly to vindicate its supremacy by validly passing any legislation it desires by means of its special majority which is required under the Constitution.

Interpretation of the Constitution. The Constitutional Court naturally follows the well-accepted rules of interpretation of statutes for the purpose of deciding whether a provision in a Bill is inconsistent with the Constitution. The Court will also develop its own rules of interpretation having regard to the nature of our own Constitution. In fact, the decisions of foreign Courts require to be used with caution as the principles underlying similar constitutional provisions in different countries are seldom identical. Thus the test which is applied by the Constitutional Court in order to decide whether a restriction of a fundamental right in a Bill is justifiable under section 18 (2) of the Constitution is not the "clear and present danger" test which had been adopted in many cases in the United States but the objective test applied by the average prudent man.

The Court will naturally pay heed to the plain meaning of the words contained in the Constitution.[23] In construing each provision, the Con-

22. *Marbury* v *Madison*,1 Cranch 137,at p. 176 (U.S. 1803) *per* Chief Justice Marshall.
23. See *Attorney-General for Ontario* v *Attorney-General for Canada* (1912) A.C. 571, 583; *Chiranjit Lal* v *Union of India* (1950) S.C.R. 869.

stitution must be read as a whole. When the grammatical and literal construction would lead to some absurdity, repugnance or inconsistency with the rest of the instrument, the grammatical and ordinary sense of the words may be modified to avoid that difficulty, but no further.[24] Where, however, the text of the Constitution is not explicit and its words are of doubtful meaning, external aids, such as debates and reports of the Constitutent Assembly and other similar historical facts relating to the Constitution may be used in interpretation.[25] In such cases the Court will also be inclined to adopt a "flexible" or "liberal" interpretation to suit the changing and surrounding circumstances and which will illustrate the full import of the meaning of the words.[26] Such interpretation also implies an understanding of the new developments and contemporary facts—political social and economic.[27] Among competing objectives and values, those mentioned in the Preamble of the Constitution and the Principles of State Policy, for example, would naturally be preferred in the process of interpretation of the Constitution.[28]

When we interpret the words of the Constitution, as the great Chief Justice of the United States, John Marshall, once said in a celebrated case, "we must never forget that it is a Constitution we are expounding"[29] This basic document must be interpreted as far as possible in a liberal and progressive manner consistent with its language. Its provisions

24. See *Grey* v *Pearson* (1857) 6 H.L.C. 61, 107; Basu, *Commentary on the Constitution of India* (3rd ed.), p. 24
25. Cooley, *Constitutional Limitations* (7th ed.), p. 101; see *Gopalan* v *State of Madras* (1950) S.C.R. 88, *Mc Culloch* v *Maryland* (1819) Wheat 316. (U.S.)
26. *James v Commonwealth of Australia* (1936) A.C. 578, 614. Thus in case of an ambiguity in the words of the Constitution, proceedings in the Constituent Assembly, such as Reports of its Committees, may be relied on in the course of interpretation; see *Gopalan's case* (1950) S.C.R. 88, 110-111; see also *United States* v *Wong Kim Ark* (1898) 169 U.S. 649. It is submitted that the attitude of the Courts in some Commonwealth cases towards the question of the acceptance of such external aids to interpretation has been too rigid and conservative.
27. Compare the so-called "Brandeis Brief" of the U S which involved the introduction of social and economic facts into the written argument presented to the Court by the parties as first employed by Brandeis, as Counsel in *Muller* v *Oregon* (1908) 208 U.S. 412 (Edward Mc Whinney, *Judicial Review in the English Speaking World* (1956), pp. 176-177).
28. See *Bombay* v *Balsara* (1951) S.C.R. 682.
29. *Mc Culloch* v *Maryland*, (1819) 4 Wheaton 316, 407. See also *Attorney-General for New South Wales* v *Brewery Employees Union* (1908) 6 C.L.R. 469, 611-612; (Australia); *James* v *Commonwealth of Australia* (1936) A.C.578, 614; *Peiris* v *Perera* (1968) 71 N.L.R. 481, at p.489, where Alles J stated that a Constitution "was intended to serve future generations of the subjects of the country under changing conditions." It should not be regarded as "an absolute having no relation to the lives of men:" *Martin* v *Struthers* (1943) 319 U.S. 141.

must be adopted to the new conditions and developments. The flexibility and clasticity of the Constitution will, in fact, be the measure of its strength and longevity. In explaining the principle of "flexible" interpretation, it has been said on high authority: "It is not that the meaning of the words (in the Constitution) changes, but the changing circumstances illustrate and illuminate the full import of that meaning".[30]

Where it is alleged that a Bill or any provision in a Bill is inconsistent with the Constitution, the Bill or provision will be examined by the Constitutional Court to ascertain its pith and substance or its true nature and character for the purpose of determining the question of inconsistency.[31] The Court will also act on the principle that a Legislature may not do indirectly (by an ordinary majority) what it cannot do directly.[32] Where a Bill though framed so as not to offend directly against a section of the Constitution, indirectly achieves the same result, it would be declared to be inconsistent with the Constitution.

The Court will not declare a Bill or any provision in a Bill to be repugnant to the Constitution because it is said to offend against the spirit of the Constitution unless the spirit is expressed in the provisions of the Constitution.[33] The Court may doubt the wisdom of the proposed legislation or even "share the intense and almost universal aversion" to the Bill or provision, but nevertheless hold that it is not for the Court to judge the necessity for it.[34] In other words, the spirit of the Constitution will be gathered only from its language.[35] It has been said: "It is difficult upon any general principle to limit the omnipotence of the sovereign legislative power by judicial interpretation, except so far as the express words of a written Constitution give that authority."[36]

30. *James' case* (*ante*), at p. 614. See also *Attorney - General of Ontario* v *Attorney - General of Canada* (1947) AC 127, 153
31. See *Kodakan Pillai* v *Mudanayake* (1953) 54 N.L.R.433, at p.439; *Mudanayake* v *Sivagnasunderam* (1951) 53 N.L.R. 25, at pp. 39-40.
32. *Kodakan Pillai's case* (*supra*), at p. 438.
33. See *Kariapper* v *Wijesinghe* (1966) 68 N. L. R. 529, at p. 537; *State of Bihar* v *Kameshwar* A.I.R. (1952) S.C. 252, 309. *Keshavan Menon* v *State of Bombay* (1951) S.C.R. 228, 232.
34. *The Queen* v *Liyanage and others* (1963) 65 N.L.R.73, at p.84; see also *The Queen* v *Buddharakkita Thera* (1962) 63 N.L.R. 433; *Balsara* v *State of Bombay* 52 Bom L.R. 799, 820; *Keshavan Madhava Menon* v *State of Bombay*(1951) S.C.R. 228, 232; *American Federation of Labour* v *American Sash Co.* (1949)335 U.S. 538.
35. *Gopalan* v *State of Madras* (1950) S.C. 27, 42, 80.
36. *Gopalan's case* (*supra*), p. 50.

In the course of interpretation the question sometimes arises whether a provision in a Constitution is imperative or directive. One of the tests that have been applied is "...Does the Constitution provide for the contingency as to what is to happen in the event of non-compliance with the requirements of (the provision)"[37] With regard to statutory prescriptions relating to the performance of public duties, it has been said that where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed or in other words as directory only.[38] Where compliance with a provision of the Constitution is impossible, strict compliance must obviously be dispensed with on the basis of the maxim that *lex non cogit ad impossibilia.*[39] The general rule is of course that constitutional provisions should be regarded as mandatory where such construction is possible.[40]

37. *State of U. P.* v *Manbhodan Lal Srivastava* (1958) S. C. R. 533 cited in H. M. Seervai, *Constitutional Law of India* (1968), p 53.
38. See also *Montreal Street Rail Co.*, v *Normandin* (1917) A. C. 170 at p 174, where Maxwel is cited.
39. See Maxwell on the *Interpretation of Statutes* (10th ed,), pp 385-6.
40. Cooley, *Constitutional Limitations*, p. 154; Wynes, *Legislative and Executive Powers*, p. 36; Seervai, *op. cit.*, pp. 52-53

PART III

THE CENTRAL ADMINISTRATION

CHAPTER 11

THE PRESIDENT

Appointment and Tenure. At the apex of the executive pyramid stands the President. The Constitution provides that there shall be a President of the Republic of Sri Lanka who is the Head of the State. (s. 19).

Any citizen who is qualified to vote at an election of a member of the National State Assembly may be nominated by the Prime Minister for the office of the President. In the Constituent Asembly, the Minister of Constitutional Affairs, Dr. Colvin R. de Silva, claimed that nomination was preferable to election by the House because an election would involve the future President in a power struggle and in his becoming a target of attack as, he said, happened in India in the case of Mr. V. V. Giri. On the other hand, added Dr. de Silva, under a system of nomination by the Prime Minister, the latter would anxiously ponder over the question: "How can I choose as Head of State a person who will be so acceptable that I can be sure that he commands the confidence of the people in an even wider sense than I as Prime Minister command?"[1] The argument was that nomination would not necessarily weaken the position of the President as the embodiment of national unity to the same extent as election would.

The person so nominated by the Prime Minister assumes office as the President of Sri Lanka upon his taking the following oath before the Chief Judge of the highest Appellate Court or other Judge of that Court:

"I.....do $\frac{\text{solemnly declare and affirm}}{\text{swear}}$ that I will be

faithful and bear true allegiance to the Republic of Sri Lanka, that I will uphold the Constitution of Sri Lanka and shall faithfully perform the

1. *Constituent Assembly Debates*, Vol. 1, 2690.

duties and functions of the Office of President in accordance with the Constitution and with the law". (s. 25).

The President holds office for a period of four years. It is provided by the Constitution that notwithstanding the expiration of that period the President remains in office until the assumption of office by the next President. (s. 26(1)). The salary and allowances of the President and, on retirement, his pension or gratuity are determined by resolution by the National State Assembly and are charged on the Consolidated Fund. They cannot be altered to his disadvantage. (s. 24).

The office of President becomes vacant (a) upon his death; or (b) on his resignation in writing addressed to the Prime Minister; or (c) on the determination by the Prime Minister that the President is incapable of performing the functions of his office by reason of mental or physical infirmity; or (d) on the National State Assembly passing a resolution expressing no confidence against the President, proposed by the Prime Minister; or (e) on the National State Assembly passing by the votes of at least two-thirds of the members a resolution expressing no confidence against the President; the resolution can be introduced by any member by a written notice addressed to the Speaker and signed by such member and by at least half the total number of members of the National State Assembly. (s. 26 (2.)

Whenever the President is prevented by illness or any other cause from performing the duties of his office, or is absent from Sri Lanka or during any period in which his office is otherwise vacant, there is provision under the Constitution for the appointment of a person to act in the office of President. The acting President is the person who is nominated by the Prime Minister or, in the absence of such nomination, he is the person for the time being lawfully performing the functions of the Chief Judge of the highest Appellate Court. The acting President too, before assuming office, must take the oath in the form and manner prescribed for the President under the Constitution. (s. 28).

Position and Powers of the President. The Constitution provides that the President is the Head of the Executive and the Commander-in-Chief of the armed forces. (s. 20). He is not a part of the Legislature as the Queen is in Britain or the President is in India. The President is nevertheless given many powers and functions under the Constitution.

However, he is always, except as otherwise provided by the Constitution, required to act on the advice of the Prime Minister or of such Minister who has been given authority by the Prime Minister to advise the President on any particular function assigned to that Minister. But no act or omission on the part of the President can be inquired into, pronounced upon or in any manner called in question in any institution administering justice or in any other institution or otherwise on the ground that the above provision has not been complied with. (s. 27). The President thus occupies a position somewhat similar to that of the Chief Executive under the previous Constitution and of the Sovereign in Britain.

Section 21 of the Constitution lists numerous powers and functions of the President. He (a) declares war and peace; (b) summons, prorogues and dissolves the National State Assembly; (c) appoints the Prime Minister, the other Ministers and Deputy Ministers; (d) appoints the Judges of the Court of Appeal, of the Supreme Court and of Courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding or substantially similar to the powers and functions exercised by the aforesaid Courts, Commissioners (including Commissioners of Assize) and other State officers who may under the Constitution or other law be appointed by him. He appoints, for example, the members of the Constitutional Court and of the Delimitation Commission. He also appoints the Commissioner of Elections, the Attorney General, the heads of the Army, Navy and Air Force and of the Police Force, the Auditor-General, the members of the State Services Advisory-Board, of the State Services Disciplinary Board, of the Judicial Services Advisory Board and of the Judicial Services Disciplinary Board, and the Clerk to the National State Assembly; (e) receives and recognises, appoints and accredits Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents; (f) presides at ceremonial sittings of the National State Assembly; (g) performs other functions pertaining to his office as are prescribed by the Constitution or other law and such functions as are by international usage performed by a Head of State; and (h) keeps the Public Seal of the Republic and makes and executes under it grants and dispositions of such land and immovable property vested in the Republic as may be lawfully granted by the President, and uses the Public Seal for sealing all things whatsoever that shall pass the said Seal.

Upon the Prime Minister advising the President of the existence or the imminence of a state of public emergency, the President declares a

state of emergency. The President is required to act on the advice of the Prime Minister in all matters legally required or authorised to be done by the President in relation to a state of emergency. (s. 134 (2)). The President is responsible to the National State Assembly for the due execution and performance of the powers and functions of his office under the Constitution and under other law, including the law for the time being relating to public security. (s. 91). As we have already seen, under the provisions of the Constitution the National State Assembly may remove the President either by passing a resolution of no-confidence against him, proposed by the Prime Minister or by passing by the votes of at least two-thirds of the whole number of members of the Assembly a resolution of no-confidence against him.

The President is the constitutional or formal head of the executive. Under the Parliamentary type of executive such as exists in Sri Lanka the effective executive power resides in the Cabinet of Ministers which is responsible to the National State Assembly. It is an exaggeration, however, to describe the President as merely a symbol or figurehead exercising purely formal functions. In the case of certain powers and functions, as we have already seen, he exercises a limited measure of discretion. This is particularly so, for example, in his appointment of a Prime Minister when a Party has no recognised Leader or when no Party or "Group" commands an absolute majority of seats in the National State Assembly after a general election. The appointment of a Prime Minister is in fact the most important function performed by the President.[2] It is the President's duty, where necessary with the assistance of the Party leaders in the Assembly, to find a Government so that, to adapt the famous phrase of the Duke of Wellington, the service of the sovereign people may be carried on.

The President exercises a discretion also when a request for a dissolution of the National State Assembly is made to him by the Prime-Minister on a rejection of the Statement of Government Policy at its first session. Even if the Prime Minister within forty-eight hours of such rejection advises the President to dissolve the National State Assembly, the President may notwithstanding such advice decide not to dissolve the National State Assembly. Upon the President so deciding the Prime Minister is deemed to have resigned. (s. 100 (1)).

2. See *post*, pp. 224-229.

The fact that the President is the constitutional or formal Head of State does not mean that he may not, to use the familiar words of Walter Bagehot, "advise, encourage and warn" the Ministers.[3] Although he must always, except as otherwise provided in the Constitution, act on the advice of the Prime Minister, the President is entitled to give the latter both information and his opinion.

The formality of the functions of the President does not mean that he should not be kept informed by the Prime Minister of important matters concerning the Government's programme and of the decisions made by the Cabinet of Ministers.[4] But he should have no dealings with regard to governmental matters with individual Ministers or with other members of the National State Assembly without the approval of the Prime Minister. In the case of a President with ability, experience in public affairs and with notable personal qualities, he would naturally be listened to with great respect by the Prime Minister. If the President refrains from or is neutral in Party politics, such a President might even be able to introduce where needed a little common sense into Party acrimony. He may encourage in public life the idea of the national well-being and of national unity. The extent of the President's influence, as opposed to power, over the Prime Minister and the Cabinet of Ministers will, above all, therefore depend on his personality, abilities and experience. Thus, although the French President in the Third Republic was only the formal executive, Presidents like Poincare exercised considerable influence in the French Council of Ministers where the real executive power lay under the Constitution. However, the Cabinet of Ministers may, if it thinks fit, decide to reject the exercise of such influence.

As the Head of the State, it is the President's function to perform social and ceremonial duties of a public nature. Walter Bagehot, the well-known constitutional jurist, has referred to similar functions of the British monarch as the "dignified" functions. These functions are of special importance from the point of view of the unity of the nation and

3. For the part played in this connection by constitutional Heads of State in Britain, see Harold Nicolson, *George V;* John Wheeler-Bennet, *Gerge VI;*
4. Since the attainment of Independence, it has been the general practice for Prime Ministers in this country to give such information regularly to the Head of State. In times of emergency meetings and consultations have been more frequent. For Britain see Winston Churchill, *Their Finest Hour* (1949), p. 379; J. A. Spender, *Life of Campbell-Bannerman* (1924), i, p. 301 ff.

loyalty to the Republic. The President, as the chief symbol of national unity, is the proper authority to perform the "dignified" functions. There has, however, been a tendency in Sri Lanka to obtain the performance of many of these formal and social duties by the Prime Minister. One result has been that most Prime Ministers have, in the performance of such duties, expended much time which they might otherwise have utilised to perform the multifarious constitutional and legal functions attached to that increasingly onerous office.

In the Constituent Assembly, Mr. J. R. Jayewardene moved an amendment, seconded by Mr. R. Premadasa, to the Basic Resolution, moved by the Minister of Constitutional Affairs, relating to the President. The amendment involved three principles: one, that the President should be vested with the executive power of the Republic; two, that he should be elected by the people by universal suffrage; and three, that he should preside over the Cabinet of Ministers. Mr. Jayewardene said that under the Presidential system of government, the Government, once elected for a period of years could not be displaced by the vagaries of political forces in the elected Assembly, as happened in this country in December 1964 and as almost happened when Mr. Bandaranaike was Prime Minister. Mr. Jayewardene said that there were pressure groups outside Parliament, various religious bodies, trade unions and other groups to take advantage of a Government which is not very strong in the Legislature to see that their own pet views or even personal matters are attended to rather than the wider interests of the people at large. Mr. Jayewardene said that there were pressure groups within Parliament itself and the Government Parliamentary Group itself which hindered the implementation of a policy of economic development for the people of the country.[5]

Mr. A. C. S. Hameed said that the United National Party was not unanimous with regard to this question of a Presidential form of government. He added that the prevailing system of representation and responsible government had not failed although 'plan implementation' had been ineffective. Moreover, a general election in reality meant the election of a Prime Minister. Mr. Hameed stated that the most important thing in this type of Government responsible to the Legislature was that the Government had to ensure, as long as it was in office, that it was

5. *Constituent Assembly Debates*, Vol.1, 2625 ff.

in tune with public opinion. Mr. C. X. Martyn pointed out that under the American Presidential system there was the power of veto over legislation and that this would take away the legislative supremacy of Parliament to which they were pledged.

The Power of Pardon. When any offence has been committed for which the offender may be tried within the Republic, the President may grant a pardon to any accomplice in the offence who gives information which leads to the conviction of the principal offender or one of the principal offenders. (s. 22 (1)). The President may also grant to any offender convicted of any offence in any Court:

(*a*) a pardon, either free or subject to lawful conditions;
(*b*) a respite, either indefinite or for such period as the President may think fit, of the execution of any sentence;
(*c*) a substitution of a less severe form of punishment for any punishment imposed on the offender;
(*d*) a remission of the whole or part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence[6].

A free pardon extinguishes the sentence as well as the conviction whereas a conditional pardon merely rescinds the sentence. A remission reduces the amount of a sentence without changing its character while a substitution or commutation substitutes for the sentence passed by the Court a sentence of a different character.

This power may be exercised before, during or after trial and conviction. In practice the power is only exercised after conviction and sentence and is used when there is some special reason why a sentence should not be carried out or why a conviction should not be expunged.[7]

Where an offender has been condemned to death by the sentence of any Court, the President must cause a report to be made to him by the Judge who tried the case. This report must thereafter be forwarded by the President to the Attorney-General with instructions that after the

6. Section 22 (2). of the Constitution; Criminal Procedure Code (Chapter 20 of the Legislative Enactments), s. 328.
7. Wade and Phillips, *Constitutional Law* (8th ed.), p. 321.

Attorney-General has advised on it, the report be sent together with the Attorney-General's advice to the Minister whose function it is to advice the President on the exercise of this power. This function has been assigned by the Prime Minister to the Minister of Justice.

Before giving his advice to the President, the Minister peruses the record of all Court proceedings in the case, the trial Judge's notes and where he considers it necessary, a report on the prisoner's health and condition which is called for by him. The Minister is also often interviewed by lawyers and others on the prisoner's behalf.

In England, Speakers of the House of Commons have frequently disallowed questions to the Minister relating to the advice tendered to the Queen with regard to the exercise of the prerogative of pardon, until execution of sentence.[8] It has even been claimed that "the Home Secretary is responsible to the Crown and not to the House of Commons, not merely in the case of capital punishment, but in any prerogative matter".[9] It is interesting to note however, that even in England it has been said by Mr. Justice Humphreys:

"Where it is the King's Prerogative of Mercy one can understand that nobody must ask the King why he did it; but now that everybody knows that it is not really the King's Mercy I am in some difficulty myself in seeing why the Home Secretary should not say 'It has been found in this case that the man has since gone mad and therefore I recommend a reprieve', or 'It has been found in this case that there were three relatives who died of insanity which was quite unknown to the jury or to the judge and had not been found out at the time of the trial'. Why should he not so say? There would be no quarrel about it at all. It would be a very good reason. If his real reason is something totally different which he does not want them to know, then I dislike secrecy".[10]

In Sri Lanka there can be no question of any royal prerogative. Under the Constitution the Minister is responsible and answerable to

8. 434 H.C. Deb. c. 959.
9. Royal Commission on Capital Punishment, Minutes of Evidence, p. 363. (Sir John Anderson), cited by G. Marshall, *Parliament and the Prerogative of Mercy* (1961) Public Law 17.
10. *Royal Commission on Capital Punishment*, Minutes of Evidence, p. 260, cited by G. Marshall, (*supra*).

the National State Assembly and can be questioned about the exercise of this constitutional function. The grant of pardon is a power conferred upon the President by the Constitution, in the exercise of which he must act on the advice of the Minister of Justice.

Immunity of the President. No civil or ciminal proceedings can be instituted or continued against the President during his term of office for anything done or omitted to be done by him in his official or private capacity. (s. 23 (1)). Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which such person holds the office of President cannot be taken into account in calculating any period of time prescribed by that law. (s. 23 (2)). No institution administering justice nor any other institution, person or authority has the power or jurisdiction to inquire into, pronounce upon or call in question any act or omission on the part of the President on the ground that, in violation of the provisions of section 27 (1), he has failed to act on the advice of the Prime Minister or other Minister to whom the Prime Minister has given authority to advise on any particular function assigned to him. (s. 27(2).

Although the President is not answerable in Court, nevertheless section 91 of the Constitution states that he is responsible to the National State Assembly for the due execution and performance of the powers and functions of his office under the Constitution and other law, including the law relating to public security.

CHAPTER 12

THE CABINET OF MINISTERS AND THE PRIME MINISTER

1. THE CABINET OF MINISTERS

The Nature of the Cabinet of Ministers. The Constitution (ss. 5 (b) and 92 (1)) provides for a Cabinet of Ministers through which, in addition to the President, the executive power is exercised and which is charged with the direction and control of the government of the Republic. The Cabinet is made collectively responsible to the National State Assembly and answerable to it on all matters for which the Ministers are responsible.

In fact, one of the dominant characteristics of the Constitution is the supreme control and responsibility of the Cabinet of Ministers in respect of the determination, subject to the approval of the National State Assembly, of the general policy as well as in respect of the direction of that policy and the decision-making powers of the Administration. The Cabinet of Ministers is thus the central directing authority of the Republic responsible for the formulation and execution of the national policy. It is really the authority which governs; but it can do so only with the support of the majority of the National State Assembly.

The Cabinet of Ministers consists of the leaders of the Party or Parties which can command the support of a majority in the National State Assembly. The Cabinet of Ministers, like the Cabinet described by Walter Bagehot in his classical work on the English Constitution, is essentially a committee, "a connecting link" between the legislative and executive authorities. According to Bagehot, the efficient secret of the English Constitution was this "close union, the nearly complete fusion, of the executive and legislative powers".

The formation of the Cabinet. It is on the Prime Minister's advice that the President appoints (as well as dismisses) the Ministers. The Constitution requires that the Ministers should be appointed from among the

members of the National State Assembly. (s. 94 (2)). The Prime Minister does not however, have an entirely free hand in the choice of Ministers. He has to accommodate the political leaders of his Party or group of Parties forming the Government. In the formation of the Cabinet, he will naturally consult with them. He has to placate various groups and interests among his Party supporters. After all, it is because the Prime Minister is leader of his Party that he is assured of a majority in the National State Assembly. Certain senior and important Party men therefore become an automatic choice. There are other considerations which must also be taken into account in the choice of Ministers. Administrative and forensic ability, for instance. But professional skill and expertise have not always found as significant a place in the choice of Ministers here as in countries like the United States, the Soviet Union and France. In order to qualify for choice the Ministers must not only have what the Prime Minister considers to be sufficient intellectual and political capacity. In order that the Government may retain its power it is necessary to have Ministers who command great personal popularity in the Government Parliamentary Party and in the National State Assembly. These and other similar difficulties in Cabinet-making in Britain made Mr. Ramsay MacDonald, the former Labour Prime Minister, say in sheer desperation on a certain occassion that "it is easier to create a revolution than to make a Cabinet".[1]

The actual size of the Cabinet of Ministers is also determined by the Prime Minister. The Constitution provides that the Prime Minister shall determine the number of Ministers and Ministries and the assignment of subjects and functions to Ministers. On the Prime Minister's advice, the President appoints from among the members of the National State Assembly Ministers to be in charge of the Ministries so determined. The Prime Minister may at any time change the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet of Ministers. Such changes do not affect the continuity of the Cabinet of Ministers, including the continuity of its responsibility to the National State Assembly. (s. 94).

In Sri Lanka there has been in recent times a steady increase in the size of the Cabinet of Ministers. When a Cabinet is too

1. H. H. Tiltman, *J. Ramsay Mac Donald, Labor's Man of Destiny*, (1929), p. 207.

large and unwieldy constructive discussion with a view to the taking of decisions and the proper co-ordination of policy are obviously difficult. On the other hand, with the increasing nationalisation of industries and businesses and the control of the economic life of the people, the number of Ministers must be adequate to the onerous task of modern government.

Mr. D. S. Senanayake's Cabinet formed in 1947 had 14 Ministers while Mr. Dudley Senanayake who succeeded him as Prime Minister in 1952 had 13. This number was maintained by Sir John Kotelawala in 1953 and by Mr. S. W. R. D. Bandaranaike in 1956. Mrs. Sirimavo Bandaranaike's first Government, which was formed on 23 July 1960, contained 11 Ministers. They were the Prime Minister and the Ministers of Agriculture, Lands, Irrigation and Power; Finance; Commerce, Trade, Food and Shipping; Justice; Health; Transport and Works; Education and Broadcasting; Local Government and Housing; Industries, Home and Cultural Affairs; and Labour and Nationalised Services. In June 1964 the number of Ministers was increased to 15 when the Lanka Sama Samaja Party joined the Government.

Under Mr.Dudley Senanayake's third Government which was formed on 27 March 1965, there were 17 Ministers. They were the Prime Minister and Ministers of State; Finance; Land, Irrigation and Power; Home Affairs; Health; Nationalised Services and Sport; Industries and Fisheries; Commerce and Trade; Justice; Local Government; Agriculture and Food; Education and Cultural Affairs; Labour, Employment and Housing; Public Works; Posts and Telecommunications; Communications; and Social Services.

Mrs. Bandaranaike's second Government which was formed on 31 May 1970, contained 21 Ministers. They were the Prime Minister who also assumed charge of the Ministries of Defence and External Affairs as well as of Planning and Employment; Minister of Irrigation, Power and Highways; Minister of Foreign and Internal Trade; Minister of Education; Minister of Shipping and Tourism; Minister of Labour; Minister of Public Administration Local Government and Home Affairs (who later assumed charge also of the Ministry of Justice); Minister of Industries and Scientific Affairs; Minister of Finance; Minister of Communications; Minister of Plantation Industry and Constitutional Affairs; Minister of Justice; Minister of Agriculture and Lands; Minister of Fisheries; Minister of Housing and Construction; Minister of Posts and Telecom-

munications; Minister of Health; Minister of Information and Broadcasting; Minister of Social Services; Minister of Cultural Affairs; and the Minister of Parliamentary Affairs and Sports.

A Minister or a Deputy Minister continues to hold office throughout the period during which the Cabinet of Ministers continues to function under the provisions of the Constitution unless he (a) is removed by a writing under the hand of the President; or (b) resigns his office by a writing under his hand addressed to the President; or (c) ceases to be a member of the National State Assembly. (s. 96). The Cabinet of Ministers continues to function, however, during the period intervening between dissolution and the conclusion of the general election. (s. 97).

Functions of the Cabinet of Ministers. The main functions of the Cabinet of Ministers are in many respects similar to those of the British Cabinet. In Britain, these functions have been described as "(a) the final determination of the policy to be submitted to Parliament;(b)the supreme control of the national executive in accordance with the policy prescribed by Parliament; and (c) the continuous co-ordination and delimitation of the authorities of the several Departments of State".[2]

On matters involving issues of major policy, before a Minister takes a decision, it would be his duty to consult the Cabinet of Ministers and act accordingly. Before submission of a matter to the Cabinet of Ministers, a Minister would normally take it to the Prime Minister and obtain his advice. Where matters do not involve important questions of policy, the Minister would normally decide them himself or in consultation with the Prime Minister.

Meetings of the Cabinet of Ministers are summoned normally by the Prime Minister. A Minister who wishes to have an early decision on any matter concerning his Department may request the Prime Minister to summon a meeting of the Cabinet of Ministers. When a Minister desires to submit a matter for the consideration of the Cabinet of Ministers he submits in the first instance a written memorandum containing his proposals. Before a memorandum is submitted to the Cabinet, the proposals should have been examined by all Departments which are concerned in the matter.

2. *Report of the Machinery of Government Committee* (1918) Cmd. 9230, p. 5.

The Cabinet Secretariat circulates these memoranda and other necessary documents among the other members of the Cabinet. The decision on the matters that should be placed on the agenda rests with the Prime Minister. Matters that are not on the agenda can be discussed at a meeting of the Cabinet of Ministers only with the special permission of the Prime Minister. Such permission would be given only in exceptional circumstances.

Some matters are not normally discussed in the Cabinet of Ministers. For example, the advice to be given by the Prime Minister for a dissolution of the National State Assembly, and the making of certain appointments such as those of Ambassadors and other diplomatic agents.

Some Prime Ministers in Ceylon and in Britain are said to have had a so-called 'inner Cabinet'.[3] That is really a small informal group of Ministers who discuss questions which may or may not come before the meeting of Ministers. An 'inner Cabinet' has no formal status, nor is it in any sense a Committee of the Cabinet. Harold Laski, in his book on "Parliamentary Government," has stated as broadly true "that in any Cabinet there will be five or six ministers upon whom the Prime Minister will place special reliance." Such a group, according to Laski, "in most cases enables opinions to be weighted rather than counted; and it permits the taking of vital decisions suddenly with the reasonable assurance that full Cabinet approval can be obtained later." There is of course a danger that other Ministers may resent this other seat of power.

The proceedings of the Cabinet of Ministers are secret and confidential. A complete record of the proceedings is not kept. But minutes of proceedings and a record of decisions which are arrived at are kept by the Secretary to the Cabinet of Ministers. The decisions are communicated by him to the Ministries concerned for their implementation. Although the proceedings of the Cabinet of Ministers remain secret, its decisions are often disclosed to the public. In fact, as a former British Cabinet Minister has pointed out, although Cabinet **discussions**, must, from their nature, be kept secret, Cabinet **decisions**, with few exceptions, have to be made public in order to be made

3. See J. L. Fernando, *Three Prime Ministers of Ceylon* (1963), p. 21; Jennings, *Cabinet Government* (1947), pp. 196 ff; Laski, *Parliamentary Government*, pp. 250 ff.

effective.[4] Actually, the secrecy of Cabinet discussions is necessary for arriving at a compromise and agreement among the Ministers and thus giving effect to the principle of collective responsibility.

The Sri Lanka Press Council Law, No 5 of 1973, provides that no person shall publish, or cause to be published in any newspaper (i) any matter which purports to be the proceedings, or any part thereof, of a meeting of the Cabinet of Ministers; (ii) any matter which purports to be the contents, or any part of the contents, of any document sent by or to all or any of the Ministers, to or by the Secretary to the Cabinet of Ministers; or (iii) any matter which purports to be a decision, or any part of a decision, of the Cabinet of Ministers, unless it has been approved for publication in the newspapers by the Secretary to the Cabinet of Ministers (s. 1 (1) and (2)).

The Cabinet of Ministers exercises general control of the Administration. In actual practice, the executive functions of the Administration are for the most part performed by State officers and by administrative agencies or public corporations which have been established by law for the performance of certain specified functions. In the case of such agencies, the control over their powers which is exercised by the Ministers is limited to that permited in their respective constituent Acts and in other legislation. Shortly after the United Front Government assumed office in 1970, the Cabinet decided to review periodically the progress of work done by the various public authorities. According to a Government communique issued on 18 June 1971, the Secretary to the Cabinet had called for progress reports from all the Ministries in respect of the Government's activities during the first year of its term. The Ministries in consultation with the Departments and Corporations under them were to make their reports outlining the policies adopted by them and giving

4. Patrick Gordon Walker, *The Cabinet* (1970), p. p. 167-70. Mr. Gordon Walker suggests, that "the main effective change towards less secrecy would be for the Cabinet to share with Parliament and public more of the factual information on which the Government make some of their decisions. Moves in this direction have begun to be taken....The device of the Green Paper enables Parliament and public to make their views known between the initial Cabinet discussions and the final decision.... A Green Paper sets out tentative ideas and invites public discussion on them." A device such as the above would be very desirable in Sri Lanka, in view of the Principle of State Policy provided for in section 16 (b) of the Constitution, namely, that it is the duty of the State to afford all possible opportunities to the people to participate at every level in national life and in government.

a resume of work completed and the programmes that were being undertaken with special reference to the relevant items enumerated in the Throne Speech (as it was then called), wherever applicable. The Permanent Secretaries of the different Ministries were also requested to include in the report a list of measures adopted by them which directly benefited the day-to-day life of the citizen.

Committees of the Cabinet of Ministers. The Cabinet of Ministers sometimes sets up ad hoc Committees to consider and report on specific matters. The present-day work of the Cabinet of Ministers is so large that efficiency could be maintained only by the use of such Committees. One of the most important Committees appointed in recent times was that on "Terms and Conditions of Employment in Statutory Boards and Corporations", which was presided over by Mr. George Rajapaksa, Minister of Fisheries.

The Office of the Cabinet of Ministers. The Constitution provides that there shall be a Secretary to the Cabinet of Ministers who shall be appointed by the President. It is also provided that the Secretary shall, subject to the directions of the Prime Minister, have charge of the office of the Cabinet of Ministers and perform such other duties and functions as may be assigned to him by the Prime Minister or the Cabinet of Ministers. (s. 102).

The functions of the Secretariat are in many respects similar to those of the Cabinet Office in Britain. In accordance with the instructions given to him by the Prime Minister, the Secretary is responsible for summoning meetings of the Cabinet of Ministers, for the preparation of the agenda for such meetings, for the keeping of the minutes, for the circulation of Cabinet papers among Ministers and for the communication of decisions of the Cabinet to the appropriate person or authority. The Secretariat of the Cabinet of Ministers cannot interfere with the responsibility of Departments of Government to the appropriate Minister.

Ministerial Responsibility. The Constitution provides that the Cabinet of Ministers shall be collectively responsible to the National State Assembly and be answerable to the Assembly on all matters for which they are responsible. (s. 92 (1)). The expression "collective responsibility" means essentially that every Minister must accept and, if necessary, defend decisions of the Cabinet of Ministers. The Cabinet

must in its turn be ready to defend its policy and resign if it is defeated on a vote which is one of confidence. (s. 99 (2))

Collective responsibility which is one of the characteristics of the Cabinet system in Britain is customarily explained in that country by a reference to Lord Salisbury's famous statement of 1878: "For all that passes in Cabinet, each member of it who does not resign is absolutely and irretrievably responsible, and has no right afterwards to say that he agreed in one case to a compromise while in another he was persuaded by his colleagues".[5]

The Ministers must speak with one voice. They must all tell what Lord Melbourne has called "the same story". There can be no divergence, as there was under the Donoughmore Constitution, between one Minister's policy and another's. The policy is never that of a Minister but always that of the Cabinet of Ministers or the Government. "The defeat of a Minister on any issue is a defeat of the Government".[6] If a Minister disagrees with the policy of the Cabinet of Ministers, he must resign. If he does not resign, he is responsible for the decisions of the Cabinet and cannot disown them on any ground. He must not only vote with the Government but must even be prepared to support the decisions of the Cabinet of Ministers in the National State Assembly, even though he may have opposed them in the Cabinet.

In 1948-49 the question arose in this country whether it was constitutionally proper, having regard to the principle of collective responsibility, for a Minister to abstain from voting or purposely to absent himself at voting time. In that case, Mr. C. Suntharalingam, the Minister of Commerce and Trade, abstained from voting with the Government of Mr. D. S. Senanayake on the Indian and Pakistani Residents (Citizenship) Bill in December 1948. Mr. Suntharalingam maintained that he had conformed to Lord Melbourne's dictum (with regard to collective responsibility) in that he had said nothing during the debate in the House contrary to the "same story" of the Government.[7] Mr. Senanayake took the view that as a member of the Government, Mr. Suntharalingam's duty was

5. *Life of Lord Salisbury* II, pp. 219-20.
6. Jennings, *Cabinet Government* (1947), p. 383
7. See *Ceylon Daily News*, 16 December 1948 and House of Representatives *Debates*, Vol. VIII (1950), col. 3272.

to vote with the Government. In his letter to Mr. Suntharalingam dated 11 December 1948, Mr. Senanayake stated: ".....The proper procedure for a member of the Cabinet so long as he remains in the Cabinet is to vote with the Government on any Government measure that comes before the House. If any Minister does not wish to associate himself with any particular measure that is brought forward by the Cabinet he must not appear as a member of the Cabinet at the time the measure is taken up and his clear duty then is to send in his resignation. On the other hand, a Minister who does not resign is required to vote with the Government, though, of course, he may tender his resignation immediately afterwards."[8] The Prime Minister took the view that the position taken up by Mr. Suntharalingam was incompatible with his position as a Cabinet Minister and called for his resignation which was immediately tendered.

On 15 March 1958, Mr. S.W.R.D. Bandaranaike found it necessary as Prime Minister of the Mahajana Eksath Peramuna (People's United Front) Government to issue a directive against public criticism of the Government by Ministers (as well as by other members of the Government Parliamentary Party). The directive which laid down a code of conduct to be observed by all members stated (*inter alia*): "No member of the Government Party, whether a Minister or otherwise, should attack any other member of the Party in a public speech or in Parliament or in any statement to the Press. Any points of difference must be only discussed either in the Cabinet or at the Government Parliamentary Party meetings".

The responsibility of Ministers is not only collective. It is also individual. Apart from his personal liability in law for all illegal acts, a Minister is answerable individually to the National State Assembly for all acts done by him as well as for the conduct of the Departments under his charge. It is not open to a Minister to avoid responsibility for an act done in his own Department by putting the blame on his official or on another Minister. As an experienced Minister of the Labour Government in Britain has stated: "If a mistake is made in a Government Department the Minister is responsible even if he knew nothing about it until, for example, a letter of complaint is received from an M.P., or there is criti-

8. Mr. Senanayake's letter is reproduced in House of Representatives, *Debates*, Vol. V, col. 602.

cism in the Press, or a Question is put down for answer in the House; even if he has no real personal responsibility whatever, the Minister is still held responsible. He will no doubt criticise whoever is responsible in the Department in mild terms if it is a small mistake and in strong terms if it is a bad one, but publicly he must accept responsibility as if the act were his own. It is, however, legitimate for him to explain that something went wrong in the Department, that he accepts responsibility and apologises for it and that he has taken steps to see that such a thing will not happen again".[9]

The Cabinet of Ministers does not automatically accept responsibility for all acts done by or under the authority of a Minister in his Department or treat the question as one of confidence in the Government. His action may be disowned by the Government and the resignation of the Minister may follow. If the Minister does not resign the National State Assembly may call for his resignation by moving a vote of "no-confidence" in him.

It has been said in England that the punitive effect of the principle of individual responsibility may be negatived by (1) the re-appointment of a Minister who has resigned to another post; (2) a timely reshuffle of Ministerial posts before the issue of resignation becomes a pressing one; and (3) the solidarity of his Ministerial colleagues which protects a Minister who is unpopular with the Opposition.[10]

2. THE CABINET OF MINISTERS AND THE NATIONAL STATE ASSEMBLY

The Cabinet of Ministers consists of the representatives of the Party or coalition of Parties which is supported by a majority of the National State Assembly. The Constitution states that the National State Assembly which is the supreme instrument of State power of the Republic exercises the executive power of the people through the President and the Cabinet of Ministers. (s. 5 (b)). The President is only the

9. Herbert Morrison, *Government and Parliament: A Survey from the Inside* (1954), pp. 320-1.
10. S. E. Finer, "The Individual Responsibility of Ministers," *Public Administration* (1956), p. 377. See also Marshall and Moodie, *Some Problems of the Constitution* (1959), pp. 78-87.

constitutional Head of State and, except where the Constitution otherwise provides, acts on the advice of the Prime Minister. The Cabinet of Ministers is the body that joins the Administration with, and makes it responsible to, the National State Assembly.

The Cabinet of Ministers represents the political leadership of the majority Party, or group of Parties in the National State Assembly. There is not, therefore, between the Cabinet or its Head, the Prime Minister, on the one hand, and the National State Assembly, on the other, the same conflict that sometimes arises between the President and Congress in the United States. In that country there is a more rigid separation between the Executive and the Legislature. The result is that the President is unable to influence Congress to any appreciable extent or to control its legislation or to exercise any power of dissolution.

It is true that the Cabinet of Ministers or the Government is able, through its Party organisation and the operation of various constitutional rules, in a sense, to control the National State Assembly. The Party Whip is normally obeyed by each member of the Party. To defy the Whip is to defy the Party and, as a rule, also his constituents who elected him on the Party "ticket". Since the establishment of responsible government in this country, there has been as a result a continuous shift of what is sometimes called "the constitutional centre of gravity" from the Legislature to the Executive.

It is also true that the majority of the National State Assembly controls the Government and seeks to secure that it conforms to the will of the people. If the Government fails to retain the confidence of that majority as representative of the people, the Government will cease to exist. If, for example, the National State Assembly rejects the Appropriation Bill or passes a vote of no-confidence, the Prime Minister is deemed to have resigned and the Cabinet of Ministers stands dissolved. (s. 99 (2)).

The Party System. Edmund Burke defined a Party as "a body of men, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed". Parties form an essential constituent of the machinery of representative and responsible government which is embodied in our Constitution. The Party system and the system of Parliamentary democracy are inseparable. Indeed, as Walter Bagehot, the English constitutional jurist, has observed, "Party

government is the vital principle of representative government". Through the Party system the Government achieves a measure of stability in the National State Assembly. Enjoying the support of its Party or group of Parties in the National State Assembly, the Government is able to direct it with firmness and courage in the knowledge that its majority will carry its decisions and legislative proposals through the Assembly. The members of each Party agree on a policy based on certain political and economic principles and the Party organisation keeps the members attached to the Government. The Government controls its Party members in the business of the National State Assembly and, where necessary, its Whips are put on to secure their presence in the House. During her first Government, Mrs. Bandaranaike had occasion to refer to what she called "the imperative need" for members of the Parliamentary Party to be present in the House in order to support the Government. She said that any inexcusable absence on their part was "a serious reflection on Party organisation and the loyalty and obligation which a member owed his Party and the people he represents". For the political success of a Party the enforcement of discipline among its members is essential. We have already referred to the Directive issued to all members of the Government Parliamentary Party by Mr. S. W. R. D. Bandaranaike on 15 March 1958, when he was Prime Minister. It stated (*inter alia*) that "members of the Government Party in speaking at public meetings should avoid creating any impression that they are opposed personally to one or another aspect of government policy". Practically all Parties have at some time or another had occasion even to expel a member for his statements or actions directed against the Party concerned.

For obvious reasons members are reluctant to defy the Party. A member who leaves or is forced to leave the Party faces the obvious danger of having to walk into the political wilderness, unless of course he has the power and influence in the country to form another powerful Party. Mr. S. W. R. D. Bandaranaike was that rare type of person who was able to leave a powerful Party like the United National Party, which he did by crossing the floor of the House in 1951, and be returned to power only five years later with an overwhelming majority for his Party.

The Party system has recently come in for a considerable amount of criticism in this country.[11] The main argument has been that, since

11. For a detailed examination of this criticism, see Cooray, *Constitutional Government and Human Rights in a Developing Society*, 56-59.

a Government is dependent for its existence on the Party majority in the House, promises are made and later implemented solely to ensure the temporary popularity of the Government and not in the long-term interests of the people as a whole. It has often been said that a Party's political advantage and the personal ambitions of its leaders often take precedence over national unity and development. In other words, the gravamen of the charge is that the self-promoting functions of Parties have eclipsed their social and national functions and more particularly, that decisions have been taken by one Party or opposed by another purely to secure immediate political gain. It cannot be seriously disputed that political Parties on either side of the House have not infrequently been reluctant to act unitedly for implementing even measures of national development which are generally accepted in the country as necessary and urgent. The contention is that the Party system has divided the nation and has become a liability which a developing country like Sri Lanka can ill afford to retain.

Having regard to these undoubted defects and the need for harnessing the united effort of the whole nation towards development, opponents of the Party system have advocated its abolition or its replacement by one Party which could secure the services of all in the urgent tasks of government. It is, at first sight, an attractive suggestion. But experience has shown that a one-Party system, although it may mean strong executive government, has had a tendency to lead towards the eclipse of representative and responsible government. Nor have the one-Party or Partyless States in Asia and Africa generally fared better than others in the attainment of their economic, social and political objectives. There are countries, both in the East and in the West, where the political leadership necessary for economic development and efficiency has been adequately supplied by democratic Parties embracing the entire nation and organised on the basis of social and economic policies.

An adequate expression of public opinion through Parties is necessary for the successful working of our system of representative democracy. The Party system gives a choice to the voters. It is through the Party system that free expression is given to the differing views held by the electorate. This system demands that groups sharing similar economic and political views should be allowed to place them before the people so that they may elect, from the competing Parties, the government of their choice. The emergence of a bipolarised Party system in the

country has enabled the people to be presented with alternative economic and social programmes and policies for their choice. It is the development of this competitive system, more than anything else, that has been responsible for the survival of representative democracy in the Island.

It is also necessary to realise that some of the features of our Party system are due to the peculiar evolution of that system in this country as in some other countries of South Asia. In the period preceding independence there were in these countries national freedom movements which, although comprising diverse racial, religious, linguistic and economic interests, worked together for the common cause of ending foreign rule. With the advent of independence the Party which had been identified with the freedom movement naturally obtained political power. The enthronement of such a Party delayed considerably the emergence of a strong and responsible Opposition. In countries like India, Sri Lanka, Philippines and Malaysia, leaders of the national freedom movement, who were wedded to a form of liberal democracy, continued to be at the helm of affairs for a comparatively long period after independence. During that period the prevailing system of representative democracy had a tendency to stabilise itself. In India, Pandit Nehru, as the political heir of Gandhi, held the post of Prime Minister until his death in 1964. Although D. S. Senanayake and S. W. R. D. Bandaranaike in Sri Lanka did not quite possess the national image that Gandhi and Nehru had in India, Sri Lanka's democratic system of government had the advantage of a more literate electorate which had exercised universal adult suffrage since 1931, earlier than any other Asian country. The result has been a considerable degree of stability of government through the polarisation of the system around two main parties or groups.

The Opposition. The representative democratic system of government demands that the people should have the right to change, through the exercise of their vote, a Government that has forfeited their confidence. The most vital part of the critical function of the National State Assembly is performed by the Opposition. It is the Opposition which provides the people with the choice of such an alternative Government. Political Parties, as already stated, are necessary for the creation of such an Opposition. While the Government is in office, the Opposition, led by the "Leader of the Opposition," criticises it on behalf of the nation. The main function of the Opposition both inside and outside the National State Assembly is, therefore, to criticise the Government where necessary, so that the

electorate may be persuaded to return the critics as the next Government. The eyes of the Opposition are particularly directed on the floating vote. Without necessary criticism, a Government is liable to become lethargic, inefficient and corrupt.

The business of the Opposition, however, is not to obstruct the work of the Government for purely Party advantage but only to criticise it constructively where such work can be bettered. In a developing country such as ours which inherited a colonial economic structure, the most important and urgent problems are the attainment of rapid economic and social development and the establishment of social justice. In such a country, even more than in others, it is the duty of the Opposition to co-operate with the Government where such co-operation is necessary in the national interest. It is not the function of the Opposition, as Opposition Parties have sometimes done in the past two decades, to exploit for Party gain those temporarily unpopular measures which a Government may be forced to take in the long-term interest of the nation and which are admittedly considered to be necessary in the furtherance of that interest.

It should be stated that there have in fact been instances, particularly in time of emergency, where the Government and the Opposition have offered each other their mutual co-operation. For example, during the disturbances that took place in April 1970 the Prime Minister, Mrs. Bandaranaike, was reported to have disclosed to the Leader of the Opposition, Mr.J.R. Jayawardene, certain information which was available to the Government. There have also been in the past several instances where there have been understandings between the Government and the Opposition relating to certain matters of foreign affairs so that the nation could put forward a united national front. In October 1954 when the Prime Minister, Sir John Kotelawala, went to New Delhi for discussions with the Indian Government on the Indo-Ceylon problem relating to persons of Indian origin resident in Ceylon, he took with him as a member of the delegation Mr. S. W. R. D. Bandaranaike, the Leader of the Opposition, so that the decisions arrived at might be acceptable to both the Government and the Opposition. Even on certain matters of national importance, Mr. Dudley Senanayake when he was Prime Minister, had obtained the views of Mr. S. W. R. D. Bandaranaike, as Leader of the Opposition.[12] These instances provide recognition of the principle that the

12. Bandaranaike *Speeches and Writings* (1963), p 154

Opposition too has a responsibility to the nation not only to criticise where criticism is necessary, but also to co-operate with the Government where such co-operation is in the national interest.

The useful part that can be played by the Opposition in our system of representative government is recognised in the custom and practice of the House which confer on the Opposition certain rights and privileges in legislative procedure. The Government, for example, allots time to the Opposition so that it may have an opportunity of criticising it or even of passing a vote of "no-confidence" on the Government. This is an essential part of our democratic process. In the past even "government days" have been allotted to the Opposition for the consideration of "no-confidence" motions. There is also a practice in this country for important business in the House to be arranged by the Government after consultation with the Opposition. Such business is usually arranged "behind the Speaker's chair" for their mutual convenience.

3. THE PRIME MINISTER

The Appointment of a Prime Minister. The President must appoint as the Prime Minister the member of the National State Assembly who, in the President's opinion, is most likely to command the confidence of the Assembly. (s. 92 (2)). It was expressly provided in the Constitution that the holder of the office of Prime Minister immediately before the commencement of the Constitution would be the first Prime Minister under the Constitution and would assume office upon taking the prescribed oath before the members of the National State Assembly present at that time. (s. 43).

It has often been said in Sri Lanka, and in other Parliamentary democracies earlier by men like Lord Bryce and Sir Ivor Jennings, that the purpose of a general election is primarily to enable the people to choose a Prime Minister. In other words, the election is plebiscital in character. The choice is the embodiment of the will of the people. In voting for a Party candidate the voter in effect votes for the leader of that Party or of the coalition of Parties to which the candidate belongs. Parties in this country are fully aware of this fact. There is considerable publicity and careful grooming of the Prime Ministerial candidate in order to make him appear as the symbol of the nation.

Since the President must after a general election appoint the leader of the Party or coalition of Parties which can command a majority in the National State Assembly, the President's choice of the Prime Minister is, in normal circumstances, purely formal. He has to comply with the wishes of the Party or coalition. For example, where a Party or a coalition of Parties with a recognised leader has an overall majority in the House, as it happened after the general elections of 1952, 1956, July 1960 and 1970, then that leader will be appointed Prime Minister. Even when a Party or coalition of Parties has no clear majority in the House, the discretion of the President is confined within very narrow limits. It is, moreover, an accepted rule in Parliamentary democracies of the Commonwealth that when a Government is defeated, either in Parliament or at the polls, or the Government resigns, the Head of State should first send for the Leader of the Opposition.[13] Even where the latter is unable to form a Government, the President should not take the initiative by sending for another Party leader, but should wait for the leaders of the various Parties to agree on a leader who should be sent for by the President. It is only in this way that the President's impartiality and non-involvement in Party politics can be secured. If the person whom the President ultimately chooses as Prime Minister cannot command a majority in the House, that person will cease to be Prime Minister.

After the general election of 19 March 1960 the Governor-General invited Mr. Dudley Senanayake as the leader of the largest Party to form a Government, which he did, although his Party did not have an overall majority in the House. The Party position in the House was as follows: United National Party, 50 seats; Sri Lanka Freedom Party, 46 seats; Federal Party, 15 seats; Lanka Sama Samaja Party, 10 seats; Mahajana Eksath Peramuna, 10 seats; Lanka Prajathanthrawada Party, 4 seats; Ceylon Communist Party, 3 seats; Jatika Vimukthi Peramuna, 2 seats; and 4 other Parties had 1 seat each. When the Government met Parliament, it was defeated by 86 votes to 61 in the debate on the Throne Speech. Mr. Dudley Senanayake ceased to be Prime Minister after the general election which followed on 20 July 1960 when Mrs. Bandaranaike's Sri Lanka Freedom Party obtained 75 seats and she was called upon by the Governor-General to form the Government.

13. Jennings, *Cabinet Government* (1947), p. 28

As in the case of the other Ministers, the Prime Minister may resign his office by a writing addressed to the President. In view of the difficulties and doubts that had arisen under the previous Constitution as a result of the incorporation of British conventions by mere reference, the republican Constitution has spelled out in sections 99 and 100 the occasions when the Prime Minister is deemed to have resigned.

The Prime Minister is so deemed to have resigned:

(1) at the conclusion of a general election; or

(2) if the National State Assembly rejects the Appropriation Bill or passes a vote of no-confidence in the Government or rejects the Statement of Government Policy at any session other than the first session and the Prime Minister does not, within twenty-four hours of such rejection of the Appropriation Bill or of such passage of a vote of no-confidence in the Government or of such rejection of the Statement of Government Policy, advise the President to dissolve the National State Asembly, upon such twenty-four hours having elapsed;

(3) if the National State Assembly rejects the Statement of Government Policy at its first session and (a) the Prime Minister within twenty-four hours of such rejection advises the President to dissolve the National State Assembly and (b) the President notwithstanding such advice decides not to dissolve the Assembly.

(4) if the National State Assembly rejects the Statement of Government Policy at its first session and the Prime Minister does not within twenty-four hours of such rejection advise the President to dissolve the Assembly.

In the case of the death or personal resignation of a Prime Minister on grounds such as ill-health, the Party cannot be said thereby to have forfeited the confidence of its majority in the National State Assembly. The Constitution provides that, upon the death or the resignation of the Prime Minister, the President must appoint another and he assumes office as Prime Minister upon taking the following oath:

"I....., do solemnly declare and affirm/swear that I will be faithful and bear true allegiance to the Republic of Sri Lanka, that I will uphold the Constitution of Sri Lanka and shall faithfully perform the duties and functions of the Office of Prime Minister in accordance with the Constitution and with the law".

These provisions do not operate if the death or resignation of the Prime Minister occurs in the period intervening between dissolution and the conclusion of the ensuing general election. In that event, the Cabinet of Ministers continues to function with the other Ministers as its members. The President is required by the Constitution to appoint one from among such Ministers to be the Prime Minister. If in this period there is no other Minister, the President must exercise and perform the powers and functions of the Cabinet of Ministers until the conclusion of the general election. (s. 98).

On the death or resignation of a Prime Minister the person whom the Party desires as his successor may not always be apparent. In such a case the President will consult the members of the previous Cabinet of Ministers as well as other members of the Government Parliamentary Party in order to ascertain their choice. On the death of Mr. D. S. Senanayake in March 1952 the Governor-General, Lord Soulbury, sent for Mr. Dudley Senanayake, the Minister of Agriculture and Lands in the previous Government, in preference to Sir John Kotelawala, who was the Leader of the House of Representatives as well as the more senior Minister. It was generally believed at the time that the Governor-General ultimately chose Mr. Dudley Senanayake not so much on a statement which was said to have been made by the previous Prime Minister, Mr. D. S. Senanayake, to the Governor-General, as on what the Governor-General himself ascertained was the majority opinion of the time in the United National Party.

Sir John's view of the matter was different from that of the Governor -General and has been expressed by him as follows: "Logically, and in the normal course, the Governor-General would send for the Deputy Leader of the Party in power, who was also the most experienced member of the Cabinet, the Leader of the House of Representatives, and one who had been in constant touch with D. S. Senanayake right through his public career and could claim to know that leader's mind better than any other Minister. In other words, I could be forgiven for regarding myself as the obvious choice".[14]

14. *An Asian Prime Minister's Story* (1956), p. 77. See also Sir John's letter to the Governor-General which is reproduced: *op. cit.*, pp. 79-80.

Thus, even where there is no officially recognised leader of the Party, the discretion of the Head of the State is minimal. With regard to his own appointment as Prime Minister by the Governor-General, Lord Soulbury, on the resignation of Mr. Dudley Senanayake on 12 October 1953, Sir John Kotelawala has written:

"While he (Lord Soulbury) waited for Dudley Senanayake's decision I was certain that he was still determined not to send for me if he could help it. A prominent business-man called on me with a message from the Governor-General to the effect that I must apologize to him for all I was supposed to have said or written disparagingly about him if I was to be Prime Minister. My answer was that I was not one of those who would do anything for the sake of becoming Prime Minister. And I would in no circumstances apologize to Lord Soulbury.

It must have been clear to Lord Soulbury that everybody interested in preserving the stability of the Government wanted me to be the next Prime Minister. But his prejudice against me was too strong to be easily overcome. He attempted to arrange for a friendly meeting between the two of us through a third party. But I would have none of it. He would have to approach me direct.

Lord Soulbury was ultimately compelled to act in accordance with a constitutional convention. He entrusted the formation of a Government to me, as a senior member of the Cabinet, who was Leader of the House of Representatives and had the full support of the party with the largest following in the House".[15]

On the death of Mr. S. W. R. D. Bandaranaike on 26 September 1959, the Governor-General, Sir Oliver Goonetilleke, summoned the Ministers and requested them to select their own leader. After about half an hour the Ministers announced that they had agreed that Dr. W. Dahanayake should be the New Prime Minister.[16] Dr. Dahanayake was the senior Minister in Mr. Bandaranaike's Cabinet in the absence of Mr. C. P. de Silva, the Leader of the House, who was ill at the time and out of the Island.

15 *An Asian Prime Minister's Story* (1956), pp. 91-92.
16. B. P. Peiris, in *Ceylon Daily News*, 6 May 1969.

It is of considerable interest in this connection to note the statement of Mr. Patrick Gordon Walker that in England in 1957 the Parliamentary Committee of the Parliamentary Labour Party ("the Shadow Cabinet") had laid down the procedure that the Labour Party would follow if a Prime Minister lost office by death, resignation or otherwise. "In a published statement it was declared that a meeting of the Parliamentary party should be held forthwith to elect a leader who alone could be entitled to accept the Monarch's invitation to become Prime Minister"[17] In 1965 the Conservatives introduced a formal procedure for the election of the Party leader by ballot among their members of Parliament.[18]

The Status of the Prime Minister. The Prime Minister is, as provided in section 92 (2) of the Constitution, the Head of the Cabinet of Ministers. In Britain, John Morley who has described the Prime Minister as "the keystone of the Cabinet arch", has stated: "Although in Cabinet all its members stand on an equal footing, speak with equal voice, and, on the rare occasions when a division is taken, are counted on the fraternal principle of one man, one vote, yet the head of the Cabinet is *primus inter pares* (the first among equals), and occupies a position which, so long as it lasts, is one of exceptional and peculiar authority".[19]

In Sri Lanka, as it is in Britain today, the Prime Minister is, however, much more than the first among equals. As the leader of the Party and as the symbol of the nation within the country, in International Conferences abroad and in meetings with world leaders, the Prime Minister naturally commands the respect and devotion of his colleagues. He broadcasts to the nation as its leader. The Prime Minister also exercises considerable powers of patronage. The republician Constitution does not provide for a Second Chamber but there are many offices for which appointments have to be made by the Prime Minister.

The Prime Minister has power under the provisions of the Constitution to give directions and assign duties and functions to the Secretary to the Cabinet of Ministers, who is in charge of the Office. (s. 102). His control over the Secretariat of the Cabinet of Ministers also enables the Prime Minister to exercise control over the entire central government organisation.

17. *The Cabinet* (1970), pp. 74-75.
18. *Ibid.*
19. *Walpole*, p. 157.

In Sri Lanka the Prime Minister is even more powerful and influential than his British counterpart, because once in office he becomes far more indispensable to the Party and can therefore exercise far greater powers. The exact extent of the powers exercised by him depends to a large degree on the personality, character and ability of the particular Prime Minister. It also depends on the ability and personality of his Ministerial colleagues. A strong Prime Minister can be very powerful in Sri Lanka, particularly if he realises the value of the proper use of the weapon of dissolution. Neither Ministers nor ordinary members of the National State Assembly like to run the risk involved in an early general election. The effectiveness of this weapon depends on whether the Prime Minister's colleagues and Party members believe that the threat is seriously held out. It is well - known that Prime Ministers, commercing with Mr. D S Senanayake, have used this weapon with considerable success.

What the Prime Minister's position should be in relation to the Cabinet was explained in the Constituent Assembly by Mr. Dudley Senanayake, who had himself been a Prime Minister for four periods, earlier, as follows:

"....The Prime Minister's word must prevail in the Cabinet. After all, the Ministers hold their portfolios from the Prime Minister. And there is the well-known case of a British Prime Minister who at a Cabinet Meeting found that he was the only one for the proposition and all the other Ministers were opposed to it, and he said 'Ayes have it', and proceeded to the next item. That is my concept of a Prime Minister".[20]

The Minister of Constitutional Affairs, Dr. Colvin R. de Silva endorsed and amplified this statement. He said:

"Cabinets do not work by vote; that is to say, they do not work by majorities. Cabinets work by consensus, and consensus is collected by the Prime Minister, which really means what the Prime Minister thinks ultimately; he is the 'consensus' of the Cabinet. Whoever disagrees will have to resign, not the Prime Minister".[21]

20. *Constituent Assembly Debates*, Vol. 1, 1428.
21. *Ibid.*, 2797.

It is well-known that what generally happens in Cabinet is that the Prime Minister, as Chairman, is able through the weight of his authority to settle any differences of opinion that have arisen. The sense of the Cabinet is revealed during its discussions and as a rule the compromise suggested by the Prime Minister is accepted by his colleagues. They realise that any other course would not be in the interests of the government and might even place it in jeopardy.

The powerful position of the Prime Minister is not of course equivalent to that of a dictator. Nor as we have already pointed out, is his position similar to that of an American President. It is not even correct, having regard to the functions of the Cabinet of Ministers and the position of the Prime Minister under our Constitution, to suggest that there is in him such a concentration of power as to amount to what is called 'Prime Ministerial government'. Such a suggestion would be an over-simplification of the real position. Quite apart from the limitations under the Constitution, the Prime Minister cannot afford to disregard habitually the views of his Ministerial colleagues or the Party opinion both inside and outside the National State Assembly. The Prime Minister must have the collaboration and the confidence of his Ministerial colleagues and of the Government Parliamentary Party. A revolt in the Cabinet or Party may be fatal to his continuance as Prime Minister. His powers will be real and effective to the extent that he is able to persuade his colleagues to accept his views.

The Functions of the Prime Minister. After accepting the task of forming a Government, the Prime Minister determines the number of Ministers. As already stated, it is on the advice of the Prime Minister that the other members of the Cabinet of Ministers are appointed by the President. The Prime Minister also assigns subjects and functions to Ministers. He may create a new Department or transfer an existing Department from one Minister to another. A list of Deputy Ministers is also submitted by the Prime Minister to the President for appointment by him. The Prime Minister may for any reason call for the resignation of any Minister or Deputy Minister. He may advise the President to remove any of them in case of a refusal to resign when called upon by him.

In the National State Assembly, the Prime Minister is the chief spokesman for the Government. Statements of Government policy are normally made by the Prime Minister. As we have seen earlier, it is

also the Prime Minister's function to advise the President on a dissolution of the National State Assembly.

As the Head of the Cabinet of Ministers, the Prime Minister presides over it. He summons meetings of the Cabinet of Ministers and approves the agenda of the meetings. He superintends and co-ordinates the policy and work of the various Ministries. It is of course impossible for a Prime Minister, having regard to the increase and expansion of the functions of government, to become familiar with or supervise closely the business of the various Ministries. Nor is it necessary to do so. The Prime Minister is consulted by, and gives advice to, other Ministers on questions of policy and other important matters coming before them. He resolves any differences and disputes that may arise between the various Ministries. The Prime Minister may give instructions that particular matters must be referred by Ministers personally to him. It is by this practice of consultation that the Prime Minister maintains general supervision of Government policy and administration for which he has a special responsibility.

All major appointments are made on the recommendation of the Prime Minister. These include the appointments of the President and other Judges of the Court of Appeal, the Chief Justice and other Judges of the Supreme Court, members of the Constitutional Court, the Attorney-General, Commissioners of Assize, Ambassadors and other diplomatic agents, the Secretary to the Cabinet of Ministers, the Clerk to the National State Assembly, the Commissioner of Elections and the Heads of the Army, Navy and Air Force and of the Police Force. The administration of such patronage also considerably enhances the prestige and status of the Prime Minister.

CHAPTER 13

THE CENTRAL GOVERNMENT DEPARTMENTS AND THE STATE SERVICE

1. THE CENTRAL GOVERNMENT DEPARTMENTS

Organisation of Departments. The central administration of the country is carried out by Government Departments. The organisation of each Department is hierarchical in character. At the head of each group of Departments is a Minister who is responsible to the National State Assembly for the work of the Ministry.

Each Minister is charged with the administration of the subjects and functions which under section 94 of the Constitution are assigned to him by the Prime Minister. The assignment of subjects and functions can at any time be changed by the Prime Minister who may also recommend to the President changes in the composition of the Cabinet of Ministers. Such changes do not affect the continuity of the Cabinet of Ministers nor of its responsibility to the National State Assembly.

A Notification is published from time to time after the assumption of duties by a Prime Minister, stating the number of Ministers and the functions assigned to each. The Government Departments are grouped under these various Ministries. On 2 June 1970 the Prime Minister, Mrs. Bandaranaike, by a Government Notification published in the Gazette, assigned Departments, Subjects and Functions to Ministers, as indicated in its schedule.

Under the Minister are one or more Deputy Ministers. Section 95 of the Constitution provides that the President may appoint, from among the members of the National State Assembly, Deputy Ministers to assist the Ministers in the performance of their duties pertaining to the Assembly and to their Departments and to exercise and perform such powers and duties of the Ministers under written law as may be delegated to the Deputy Ministers. A Minister may, by notification published in the

Gazette, delegate to his Deputy Minister any of the powers or duties conferred on the Minister by any written law.

There is also for each Ministry a Secretary appointed by the President. Any Secretary may be transferred by the President to any other post in the State Service. The Secretary to the Ministry exercises, subject to the general direction and control of his Minister, supervision over the Departments of Government or other institutions in charge of his Minister. For the purpose of this section the Office of the Clerk to the National State Assembly, the Department of the Commissioner of Elections, the Department of the Auditor-General and the Office of the Secretary to the Cabinet of Ministers, are deemed not to be Departments of Government. The President can transfer any Secretary to a Ministry to any other post in the State Service. (s. 103).

The Secretary is the head of the staff of the Ministry. As the Chief Accounting Officer of the Ministry, he is responsible for seeing that the Annual and Supplementary Estimates are prepared by the Departments within his charge. It is his duty to co-ordinate such estimates, obtain the report of the Treasury on them and submit them to his Minister with the Treasury report. Conclusions of the Cabinet of Ministers and decisions of Ministers affecting Government Departments are conveyed to them by the Secretaries to the Ministries, who are charged with the duty of ensuring that such decisions are given effect to. A Minister communicates with the Secretary in regard to matters of policy affecting his Ministry. The Secretary conveys such instructions to the Head of Department concerned. Each Head of Department is responsible to the Secretary for the administration of his Department.

The Law Officers of the Government. The Attorney-General and his deputy, the Solicitor-General, as the Law Officers of the Government, represent it in all civil and criminal proceedings. They are the legal advisers of the Government. Their advice is sought not only on ordinary legal problems of Government Departments but also on matters of constitutional and international law. The Cabinet of Ministers itself may seek the advice of the Attorney-General before it arrives at a decision.

Under the Constitution it is the duty of the Attorney-General to examine every Bill for any contravention of the requirements of sections 51 (1) and (2) that constitutional amendments and repeals must be expres-

sly stated and also for any provision which cannot be validly passed except by the special majority prescribed by the Constitution. If the Attorney-General is of opinion that there is such a contravention or such a provision in a Bill, he must communicate such opinion to the Speaker. If the Attorney-General is of opinion that the Speaker should refer such question to the Constitutional Court, he must communicate such opinion too to the Speaker. The Attorney-General's duty includes that of examining all amendments proposed to a Bill and of communicating his opinion at the stage when the Bill is ready to be put to the National State Assembly for its acceptance (s. 53).

Any question as to whether any provision in a Bill is inconsistent with the Constitution must be referred by the Speaker to the Constitutional Court for decision if the Attorney-General communicates his opinion to the Speaker under section 53 of the Constitution (s. 54 (2) (a)). The Attorney-General has the right to be heard on all matters before the Constitutional Court. (s. 63 (1)).

In the early part of the British occupation the Chief Law Officer of the Crown was known as the Advocate Fiscal. This term was reminiscent of the previous Dutch rule in Ceylon. After Queen Victoria's accession to the British Throne, the Advocate Fiscal became known as the Queen's Advocate. By an Ordinance of 1883 the titles of Queen's Advocate and Deputy Queen's Advocate were changed to Attorney-General and Solicitor-General respectively.

Under the provisions of the Civil Procedure Code, all civil actions by or against the Government must be instituted by or against the Attorney-General. In any action to which the Government is a party, all processes of court issuing against the Government must be served upon the Attorney-General. In criminal proceedings before the Supreme Court and District Courts the prosecution is conducted by the Attorney-General or by one of his Deputies.

The decision to institute a criminal prosecution is taken by the Attorney-General alone, acting in a quasi-judicial manner. But before instituting prosecutions in 'political' cases, for example, sedition, where public policy is involved, the Attorney-General may properly consult the Prime Minister with regard to the views of the Government as matters which he would take into consideration in arriving at a decision. This

was the accepted principle enunciated in England (quite apart from the question of the correctness of its application)[1] in the matter of the withdrawal of the prosecution of Mr. Campbell, the Communist editor of the *Worker's Weekly* for an offence under the Incitement to Mutiny Act. In the House of Commons the Attorney-General, Sir Patrick Hastings, stated that the decision to withdraw the prosecution was his alone although, since the public interest was involved, it was his right as well as his duty to consult the Cabinet. In agreeing with the Attorney-General the Prime Minister, Mr. Ramsay MacDonald, stated:

> "Every Law Officer who is undertaking a prosecution in the interests of the State must possess himself not only of guidance on technical law, but must possess himself of guidance on the question whether if a prosecution is instituted the effect of the prosecution will be harmful or beneficial to the State in whose interests it has been undertaken".[2]

Having consulted the Prime Minister and the Cabinet of Ministers he alone must decide whether or not to prosecute. As Lord Simon stated with regard to the position in England: "The Attorney-General should absolutely decline to receive orders from the Prime Minister or Cabinet or anybody else, that he shall prosecute".[3]

With regard to the advice given to the Government by the Law Officers, the general rule is that in order to enable frank advice to be given uninfluenced by Party political considerations, such advice and opinion must not be laid before the House. Ministers may, however, be questioned whether they have taken advice from the Law Officers. According to the practice in Britain, they cannot be asked to say what advice was given, nor can the Ministers "in the last degree shift their responsibility by accepting the opinion of the Law Officers on any matter whatsoever".[4] A

1. The first Labour Government of 1924 was brought down mainly due to the allegation that the Attorney-General had withdrawn the prosecution owing to pressure of the Cabinet. This was denied by the Attorney-General.
2. 177 H.C. Deb., 5s. 629. See also Marshall and Moodie, *Some Problems of the Constitution*, pp. 172-180.
3. Cited by the Rt.Hon. Sir Elwyn Jones, "The Office of Attorney-General," *Cambridge Law Journal* (1969), at p. 50.
4. 46 H.C. Deb. 5s. (Mr. Swift McNeil), cited by Marshall and Moodie, *op. cit.*, pp. 175-176: see also Lord MacDermott, *Protection from Power under English Law*, pp. 25-40.

Minister must accept responsibility even where he has followed, against his own view, the Attorney-General's advice on the matter.

The Attorney-General has the power to stop proceedings in any criminal prosecution by entering a *nolle prosequi.* He has also power to grant or withhold sanction for the prosecution of certain offences such as perjury, sedition, criminal defamation and for various offences committed in connection with elections to the National State Assembly. Certain offences, in order that they be compounded, require his sanction. An appeal to the Supreme Court against an acquittal by a lower Court also requires his sanction. He is a necessary party representing the public in the assertion and protection of public rights.

As far back as 1928 the Report of the Donoughmore Commission referred to the criticism of the organisation of the Attorney-General's Department as a second "bottle-neck," not less effective than that of the Colonial Secretariat (in the Pre-Donoughmore Constitution) in obstructing the free flow of public business. The Commission suggested that as a method of avoiding congestion it would be worthwhile to examine the possibility of supplying the new Ministers with their own legal advisers on whom they could rely for routine legal advice. The day-to-day legal business of Government Departments has expanded so rapidly since 1931 that there is immediate need for the "bottle-neck" to be superseded by a reorganisation of the Attorney-General's Department by the appointment of permanent legal advisers who would specialise in the legal business of the different Government Departments and Public Corporations. At present there are legal officers attached to certain Ministries but for the most part they deal with only routine legal problems.

II. THE STATE SERVICES

Who is a State Officer? A "State Officer" means any person who holds a paid office as a servant of the Republic, but does not include (a) the President; (b) a Minister or a Deputy Minister; and (c) a member of the National State Assembly by reason only of the fact that he receives any remuneration or allowance as a member. (s. 105).

Tenure of Office. The Cabinet of Ministers is responsible for the appointment, transfer, dismissal and disciplinary control of State officers and is answerable for such matters to the National State Assembly.

Subject to the provisions of the Constitution, the Cabinet has the power of appointment, transfer, dismissal and disciplinary control of all State officers. Notwithstanding any delegation the Cabinet may exercise such powers. The Cabinet is required to provide for and determine all matters relating to State officers including the constitution of State services, the formulation of schemes of recruitment and codes of conduct for State officers, the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of State officers. No institution administering justice has the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory Board, the State Services Disciplinary Board, or a State officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of State officers. (s. 106).

Except as otherwise expressly provided by the Constitution, every State officer holds office during the pleasure of the President[5]. The National State Assembly may however in respect of a State officer holding office during the pleasure of the President provide otherwise by a law passed by a majority of those present and voting. Subject to the provisions of the Constitution, and unless the National State Assembly otherwise provides, the Services of the Government of Ceylon existing immediately prior to the commencement of the Constitution, *mutatis mutandis* continue and are deemed to be State Services. The rules, regulations and procedures relating to the Services of the Government of Ceylon that were in force immediately prior to the commencement of the Constitution are, *mutatis mutandis*, deemed to continue in force as rules, regulations and procedures relating to State services as if they had been made or provided under the Constitution. Until provision is made under section 106 in regard to the delegation of authority for appointment, transfer, dismissal and disciplinary control of State officers, the authorities to whom such powers had been delegated by the Public Service Commission immediately prior to the commencement of the Constitution, continue to exercise such powers. (s. 107).

All pensions, gratuities or other like allowances payable to persons who have ceased to be in the service of the Government of Ceylon or

5. For the contractual relation between the Government and State officers, see *post*, pp. 371-372

cease to be in the service of the Republic of Sri Lanka, or to widows, children or other dependants of such persons, are governed by the written law under which they were granted, or by any subsequent written law which is not less favourable. All such pensions, gratuities and other like allowances become a charge on the Consolidated Fund. (s. 109).

The following State officers are appointed by the President: (a) State officers required by the Constitution or by or under the authority of a written law to be appointed by the President; (b) the Attorney-General; and (c) heads of the Army, Navy and Air Force and of the Police Force. (s. 108).

The following provisions of the Constitution apply to all State officers, other than (a) the State officers referred to in section 108, who are appointed by the President, and members of the staff of the Clerk to the National State Assembly, who are appointed by the latter with the approval of the Speaker under section 35; (b) every State officer, the principal duty or duties of whose office is the performance of functions of a judicial nature; subject to the provisions of any law of the National State Assembly, any question as to whether or not an office falls within (b) must be decided by the Cabinet of Ministers. Such decision is final and conclusive. No institution administering justice and likewise no other institution, person or authority has the power or jurisdiction to inquire into, pronounce upon or in any matter call in question any such decision; (c) the members of the Army, Navy and Air Force; and (d) the members of the President's Office or of his personal staff:

(1) State Services Advisory Board. The Constitution establishes a State Services Advisory Board to exercise, perform or discharge such powers, functions or duties as are required of the Board under the Constitution. The Board consists of three members appointed by the President, one of whom is designated Chairman. No person can be appointed or remain a member of the State Services Advisory Board (a) if he is a member of the National State Assembly; or (b) if he is a member of the State Services Disciplinary Board; or (c) if he is a State officer. Every member of the State Services Advisory Board holds office for a period of four years from the date of his appointment. The office of a member of the State Services Advisory Board becomes vacant (a) upon the death of such member; or (b) on such member resigning his office by a writing addressed to the President; or (c) on such member being removed from

office by the President. A member of the State Services Advisory Board may be paid such salary as may be determined by the National State Assembly. The salary payable to any such member must be charged on the Consolidated Fund and cannot be diminished during his term of office. (s. 111).

(2) **State Services Disciplinary Board.** The Constitution also establishes a State Services Disciplinary Board to exercise, perform or discharge such powers, functions or duties as are required of the Board under the Constitution. This Board also consists of three members appointed by the President, one of whom must be designated Chairman. No person can be appointed or remain a member of the Board (a) if he is a member of the National State Assembly; or (b) if he is a member of the State Services Advisory Board; or (c) if he is a State officer.

Every member of the State Services Disciplinary Board holds office for a period of four years from the date of his appointment. The office of a member of the State Services Disciplinary Board becomes vacant (a) upon the death of such member; or (b) on such member resigning his office by a writing addressed to the President; or (c) on such member being removed from office by the President. A member of the State Services Disciplinary Board may be paid such salary as may be determined by the National State Assembly. The salary payable to any such member must be charged on the Consolidated Fund and cannot be diminished during his term of office. (s. 112).

(3) **Appointment of State Officers.** Except where the Constitution otherwise provides, appointments to posts of Heads of Departments and to such other posts as may be prescribed by the Cabinet of Ministers must be made by the Cabinet after receiving the recommendation of the Minister in charge of the Ministry or the Department to which the posts are attached. No such recommendation can be made by a Minister except after consultation with the State Services Advisory Board. In case the recommendation for such appointments is from amongst the State officers in service in another Ministry or Department, the recommendation of the Minister must be made only after consultation with the Minister in charge of that other Ministry or Department. (s. 113).

Appointments to other posts which may be prescribed by the Cabinet of Ministers may be made by the Cabinet only after having received,

through the Minister in charge of the Ministry or Department to which the posts are attached, the recommendation of the State Services Advisory Board. (s. 114).

The Cabinet of Ministers may in accordance with the assignment of subjects and functions by the Prime Minister and subject to such conditions as may be prescribed by the Cabinet, delegate to any Minister all or any of its powers of appointment under section 106 except the power to make the appointments referred to in sections 113 and 114. A Minister exercising the powers of appointment so delegated to him can do so only after receiving the recommendations of the State Services Advisory Board, and if the person to be appointed is a State officer in another Ministry or Department, only after consultation with the Minister in charge of that other Ministry or Department. (s. 115). A Minister may with the concurrence of the Cabinet of Ministers delegate to any state officer subject to such conditions as may be prescribed any of the powers of appointment delegated to such a Minister. Notwithstanding any such delegation, the Minister is, with the concurrence of the Cabinet of Ministers, entitled to act in regard to any matter so delegated to a state officer. (s. 116).

(4) Dismissal and Disciplinary Control of State Officers. The Cabinet of Ministers is required to exercise its powers of dismissal and disciplinary control of state officers only after receiving through the Minister in charge of the Ministry or Department to which a state officer is attached, a recommendation from the State Services Disciplinary Board. (s. 117).

The Cabinet of Ministers may, in accordance with the assignment of subjects and functions by the Prime Minister and subject to such conditions as may be prescribed by the Cabinet delegate to a Minister its powers of dismissal and disciplinary control of state officers. A Minister must exercise the powers so delegated to him only after receiving a recommendation from the State Services Disciplinary Board. An order made by a Minister in the exercise of such powers is, except where the order is one of dismissal, final. A state officer aggrieved by such an order of dismissal has, subject to procedures determined by the Cabinet of Ministers, the right to make a single appeal against such order of dismissal to the Cabinet of Ministers who have the power either to confirm or vary in any manner such order of dismissal. (s. 118).

A Minister may with the concurrence of the Cabinet of Ministers delegate to any state officer, subject to such conditions as may be prescribed, any of the powers of dismissal and disciplinary control delegated to such a Minister. Notwithstanding any such delegation the Minister is, with the concurrence of the Cabinet of Ministers, entitled to act in regard to any matter so delegated to a state officer. A state officer aggrieved by an order relating to a disciplinary matter including an order of dismissal made under the powers so delegated has, subject to the procedures determined by the Cabinet of Ministers, the right to make a single appeal against such an order to the State Services Disciplinary Board. The order of the State Services Disciplinary Board on such an appeal is, except when it is one of dismissal, final. A state officer aggrieved by an order of dismissal of the State Services Disciplinary Board has, subject to the procedures determined by the Cabinet of Ministers, the right to make a single appeal to the Minister who has the power to vary such order of dismissal.(S.119)

During the debate in the Constituent Assembly on the Basic Resolution relating to State Officers, Mr. Felix R. D. Bandaranaike suggested that in every case where the Cabinet of Ministers exercised its powers (of appointment, transfer involving promotion or an increase of salary, dismissal or disciplinary control of a State Officer), otherwise than in accordance with the advice or recommendation of the advisory body, the Cabinet of Ministers should cause to be tabled in the National State Assembly the advice and recommendations received and a statement of the reasons of the Cabinet of Ministers for not acting in accordance with such advice and recommendations.[6] Mr. Bandaranaike said that this was a method of ensuring legislative control of the actions of the executive and ensuring that fairness and justice would prevail.

(5) Transfer of State Officers. The Cabinet of Ministers is required to exercise its powers of transfer of state officers in accordance with the procedures to be prescribed by it. The Cabinet may, subject to such conditions as may prescribed, delegate to a Minister all or any of the above powers. A Minister may with the concurrence of the

6. *Constituent Assembly Debates,* Vol. 1, 2974. See Cooray, *Constitutional Government and Human Rights in a Developing Society* (1969), pp. 15-16. for a similar suggestion with regard to a Public Service Commission vested with the function of making recommendations to the Government regarding appointments, promotions, transfers, dismissals and disciplinary control of public servants.

Cabinet delegate to any state officer, subject to such conditions as may be prescribed, any of the above powers delegated to such Minister. Notwithstanding any such delegation the Minister is, with the concurrence of the Cabinet of Ministers, entitled to act in regard to any matter so delegated to a state officer. "Transfer" for the purpose of this section means the moving of a state officer from one post to another post in the same service or in the same grade of the same Ministry or Department with no change in salary. (s. 120).

Some Problems of State Service. With the modern extension of the functions of government, especially those of a social and economic nature, the State Service has assumed an increased importance. These regulatory functions of the State have been particularly noticeable after the grant of universal suffrage in 1931.

The State Service was naturally influenced during the latter part of the British occupation by the character of the British Civil Service. At that time the foundation of the Civil Service in Britain was based on the principles enunciated by Macaulay for India and Northcote and Trevelyan for their mother country. On the inspiration of these ideas, Mr. Gladstone's action in 1870, whereby he abolished patronage and substituted recruitment by merit through open competitive examination, was followed in Ceylon with regard to the highest administrative class which came to be exclusively known as the Civil Service. The open competitive examination was held simultaneously in England and in Ceylon, based on identical question papers. From 1863 to 1870 the examination held locally was non-competitive and was intended to test the candidate's "general attainments". After 1937 there was no further recruitment of Europeans to the Civil Service. The examinations were held only in Ceylon.

In 1963 the Civil Service was replaced by the Ceylon Administrative Service and officers of the former service were absorbed into it. There are three classes of the Administrative Service. Class I is composed of Heads of Departments, Class II of Deputies and Class III of Assistants. There was continued, even after the emergence of political Parties in Ceylon, the English tradition of political neutrality or imparitiality. This tradition has, however, been progressively weakened with the increase in political patronage. On the other hand, it is claimed that the execution of Government policies is greatly facilitated by the appointment to the

top grade of the administration of officials who are in tune with those policies. Recently there has been a tendency in Ceylon, with this end in view, to change Secretaries to Ministries and other top-level administrators with the emergence of a new Government.

The Treasury control of the Public Service as it existed until recently tended to create an unhealthy feeling of inferiority and dependence on the part of other Government Departments. According to the assignments of Departments, and of subjects and functions made by the Prime Minister on 31 May 1970, Public Administration has been entrusted to a separate Minister. Subject to the provisions of the Constitution, the recruitment, appointments, transfers and promotions in the State service as well as conditions of service, allowances and other connected matters are within the purview of the Minister of Public Administration. The cadre of Government Departments, including the creation of posts, remains with the Minister of Finance. It is of some interest to note that the Fulton Committee of Britain in its report of 1968 has recommended the establishment of a new Civil Service Department to take over the recruitment functions of the Civil Service Commission and the central management functions of the Treasury. This proposal along with the other main recommendations, such as the establishment of a Civil Service College and the abolition of classes within the Civil Service, have been accepted by the Government.

Rapid economic development and social welfare is dependent on sound public administration. The efficient administration of the functions of government in that regard depends in turn very largely on the efficiency and goodwill of the public service. The goodwill of public servants can be secured by the recognition of their economic and social rights by the State. These rights have been defined in the Universal Declaration of Human Rights, and other documents of the United Nations. Primarily they involve fair wages, social security and a decent living for themselves and their families. So far as efficiency and experience in administration are concerned, South Asian countries like Sri Lanka were fortunate, as compared with certain African countries, in that at the time of the attainment of independence the public services were manned to a considerable extent by experienced local personnel. The number of public servants, however, steadily increased with the expansion of the public sector and the growth of governmental activity.

Regardless of the fact that the functions of government were rapidly changing, the colonial pattern of recruitment for the public service continued to be followed in Ceylon after independence by successive Governments in power. That pattern which was based on the limited functions of the *laissez-faire* State favoured a broad general education to specialised training in the selection of the higher administrative personnel. As a result, development and other economic functions of government suffered to a considerable extent from the defects which are generally associated with an unskilled bureaucracy. It has been stated that "the faults most commonly enumerated are over-devotion to precedent, remoteness from the rest of the community, inaccessibility and faulty handling of the general public; lack of initiation and imagination; ineffective organisation and waste of manpower; procrastination and unwillingness to take responsibility or to give decisions".[7]

It is unfair, however, to lay the entire blame on public servants for the manner in which their duties are executed or for their addiction to "red tape". The fact is that public servants are accountable to their superiors by a mass of rules and regulations which often inhibit effective independent action on their part and which offend the principle of fair treatment of individuals in relation to the public administration.

There has also been criticism with regard to the constitution of the higher administrative grades. The criticism arose from the fact that although the activities of the State expanded enormously after the attainment of independence and the functions of government became increasingly technical, most of the high administrative posts continued to be manned by civil servants. Such posts were sometimes denied even to highly qualified technical personnel with administrative ability. The result was that these specialists had no direct access to the Ministers and could not effectively take part in the shaping of policy and in general administration. In addition, there has been in recent years a steady flight of engineers, doctors, social scientists and other professional and technological personnel to the developed countries and to various International Agencies. This is the so-called "brain-drain" problem of Sri Lanka. Actually this problem has not assumed such serious proportions as some

7. *Report of the Committee on the Training of Civil Servants* (U.K.) Cmd. 6525 (1944), para. 13.

people believe because this country continues to have a considerable number of professional and technical men to fill the responsible posts in the public administration. Nevertheless, it is true to say that there has been a flight of talent due to such causes as the lack of opportunity to use their knowledge, alleged discrimination in matters of appointments and tenure, and the better emoluments offered in the developed countries.

So far as the scientists, technicians and professional men outside the State Service were concerned, there has sometimes been a tendency on the part of a section of the permanent service to resist attempts by various Governments to obtain the assistance of such men in the making of decisions. In recent times it has been realised by successive Governments that the co-operation and assistance of specialists is essential in the shaping of policy. Various steps have also been taken to reconstitute the public administration so that it may become an efficient and dynamic instrument for the execution of the expanding functions of government.

Duties of State Officers. In each Government Department the detailed work of administration is performed by the administrative class as well as by other permanent, skilled officials who together constitute the State Service. The determination of policy and the taking of important decisions are matters for the Ministers. It is the duty of public servants loyally to carry out such policy and decisions, once they have been formulated. But in the process of the formulation of policy within each Ministry it is the function of the public servants to advise the Minister and thus place at his disposal all their skill and experience.

In Britain, Sir Warren Fisher has stated succinctly the duties of public servants:

"Determination of policy is the function of Ministers, and once a policy is determined it is the unquestioned and unquestionable business of the civil servant to strive to carry out that policy with precisely the same energy and precisely the same goodwill whether he agrees with it or not. That is axiomatic and will never be in dispute. At the same time it is the traditional duty of civil servants, while decisions are being formulated, to make available to their political chiefs all the information and experience at their disposal, and to do this without fear or favour, irrespective of whether the advice thus tendered may accord or not with the Minister's initial view. The presentation to the Minister of relevant facts, the ascer-

tainment and marshalling of which may often call into play the whole organisation of a Department, demands of the civil servant the greatest care. The presentation of inferences from the facts equally demands from him all the wisdom and all the detachment he can command"[8].

As previously stated, the Secretary to each Ministry exercises, subject to the general direction and control of his Minister, supervision over the Departments of Government or other institutions in charge of his Minister. In terms of the Manual of Procedure of the Government of Sri Lanka the Minister communicates with the Secretary in regard to matters of policy affecting his Ministry and the latter conveys such instructions to the Head of the Department concerned. The Secretary has general charge of establishment matters relating to Departments under his supervision. As Chief Accounting Officer of the Ministry he is responsible for seeing that the Annual and Supplementary Estimates are prepared by the Departments under his charge.

Political Activities of Public Servants. In order to enable administrative officers to carry out loyally and impartially the policies of any Government that may be in power, active participation in political activities is forbidden to certain grades of State officers. Uncontrolled political activity will inevitably result in the deterioration of administrative discipline in Government Departments. Our system, under which a Government may be peacefully changed following the results of a general election, demands that State officers should act impartially and loyally with respect to whatever Government is in power, irrespective of its Party complexion. On the other hand, it is desirable in a democratic society "for all citizens to have a voice in the affairs of the State and for as many as possible to play an active part in public life".[9]

These principles are sought to be given effect to by the provision in the Constitution that only State officers holding any office the initial salary of which is not less than Rs. 6,720 per annum are disqualified from being elected members of the National State Assembly or from

8. *Royal Commission on the Civil Service in the United Kingdom* (1929) (Tomlin Commission), *Minutes of Evidence*, p. 1268.
9. *Report of the Committee on the Political Activities of Civil Servants* ("Masterman Committee") (1949) Cmd. 7718, cited in Hood Philips, *Constitutional and Administrative Law*(4th ed.), p. 331.

sitting or voting in the House. (s. 70 (c) (5)). When a State officer is a candidate at any election, he is deemed to be on leave from the date on which he stands nominated as a candidate until the conclusion of the election. Such a state officer cannot during this period exercise, perform or discharge any of the powers, functions or duties of his office (s.74).

III. ADVISORY COMMITTEES, PEOPLE'S COMMITTEES, EMPLOYEES' COUNCILS AND VILLAGE ORGANISATIONS

The proper working of democratic government involves consultation with, and the participation in public administration of, the various groups forming the community. With this end in view, Advisory Committees in Government Departments, People's Committees on a territorial basis, Elected Employees' Councils and various village organisations have been established in Sri Lanka. The purposes of the establishment of the first three bodies have been stated to be as follows:

"The present administrative set-up, including the Kachcheri[10] system, is inherited from colonial days. It is not only bureaucratic and inefficient but also thoroughly unsuited to ensuring the speedy fulfilment of today's needs. We shall transform the administration thoroughly, make it more democratic, and link it closely with the people through (i) Elected Employees' Councils (ii) Advisory Committees in Government offices and (iii) People's Committees on a territorial basis. The administration will thus be made more responsive to the needs of the country and the wishes of the people. The new bodies that we shall create will also help to associate the people with the work of formulating and implementing national economic plans. We shall create special machinery whereby complaints of delay, obstruction and malpractice by public officers at all levels can be speedily investigated and disposed of. The structure and outlook of the Public Services will also be reformed in order to make them real instruments of service to the people".[11]

It was claimed by the Prime Minister, Mrs. Sirimavo Bandaranaike that Sri Lanka was "the first democratic country trying out an experiment

10. The office of the collector (later of the Government Agent) under the revenue system introduced by the British from Madras.
11. Election Manifesto of the United Front (1970), p. 4.

of this nature, where people at grass-root level are brought into participation with the administrative machinery in an attempt to bring about better understanding between the people and the administration".[12]

In fact, the concept of popular participation and redress was well known in Sri Lanka in ancient times. Although the system of government which prevailed in the Island from the earliest recorded era has been often described as an absolute monarchy and the King was at the apex of the entire administrative organisation, he was nevertheless expected to follow what the Mahavamsa has referred to as "the path of good and ancient custom". Two of the features of that custom were the participation of the people of the village (gam vasiyo) in certain matters relating to the administration of the village (gama) and, as the story of King Elara's bell hung up with a long rope at the top of his bed is meant to illustrate, the redress of grievances of the people against the public administration.

1. Advisory Committees. In a circular[13] dated 15 August 1970 issued by the Ministry of Public Administration, Local Government and Home Affairs and Justice to all Secretaries and Heads of Departments it was stated that the Government had decided to set up Advisory Committees. Such Committees were to be established in all Government Departments (other than the Railway Department) and in all Statutory Boards and public corporations (including the Central Bank, Nationalised Banks, Universities, etc.) but excluding industrial corporations and service corporations which provide public utility services (such as the Ceylon Transport Board, Port Cargo Corporation, etc.). The circular also stated that separate instructions would be issued by the Ministers concerned regarding the establishment of "Employees' Councils" in industrial corporations and service corporations running public utility services. Where there was any doubt as to whether an Advisory Committee or an Employees' Council should be set up in a particular Board or corporation, the matter was to be referred to the Minister concerned for a decision.

The number of members of each Advisory Committee depends on the total number of employees in the institution concerned, the minimum

12. Special Message issued on 1 December1971 on the occasion of the inauguration of People's Committees.
13. Public Administration Circular No. 8.

number of members being 5 and the maximum 20. The term of office of each Advisory Committee is two years. The Minister has power, however, to dissolve an Advisory Committee at any time where he is satisfied that it is in the public interest to do so. In such a case, a new Advisory Committee must be elected within six months from the date of dissolution.

The Advisory Committee may exercise the following powers and functions: (i) it may draw attention to acts of neglect of duty, undue delay in attendance to public business, wastage of public funds, frauds or other malpractices in the institution concerned; (ii) it may advise on measures designed to improve the efficiency and effectiveness of the institution's organisation in order to speed up the institution's business, to effect economies in the running of the office and eliminate unnecessary loss and wastage; (iii) it may ask for and obtain information from the management on all matters relating to the running of the institution concerned except information of a classified nature. It is the duty of the Head of the Department to investigate any complaints brought to his notice under (i) above and to inform the Advisory Committee of the results of such investigation. The Advisory Committee or any delegation of its members appointed by the Committee has the right to interview the Minister concerned direct on any matter falling within its purview.

The Advisory Committee is not entitled to 'inspect' or 'supervise' the work or functioning of the institution. It was not intended to create a parallel authority to supervise the administration of an institution. This is entirely a function and responsibility of the Head of that institution.[14]

2. People's Committees (Janata Committees). The People's Committees Act, No. 16 of 1971, made provision for the establishment of People's Committees throughout Sri Lanka and defined their powers, functions and duties. Mr. Felix Dias Bandaranaike, the Minister of Public Administration, Local Government, Home Affairs and Justice in the United Front Government has said that "the idea of People's Committees is entirely a new concept for this country and it had to be tailored to fit into our way of life..... They are intended to be instruments for associa-

14. Circular Letter of the Department of Public Administration dated 12 April 1971, to all Permanent Secretaries and Heads of Departments.

ting the people more closely with the administration and inducing a greater sense of public responsibility, efficiency and integrity in the public service..... They would ensure that waste, fraud, neglect of duty or abuse of authority by public functionaries would be promptly reported to the appropriate authorities for necessary and effective action".[15]

People's Committees are thus intended to provide, so far as the day to day economic and social activities of the government are concerned, a novel means for popular participation, for the exercise of vigilance and for redress of grievances.

Each ward of a local authority constitutes an area of authority of a People's Committee. Each Committee consists of eleven persons appointed by the Minister who is in charge of the subject of rural development. In making the appointments the Minister must take into consideration such recommendations as may be made by any local authority, rural development society, praja mandalaya, co-operative society, trade union or any member of the National State Assembly within the area of authority. Of these persons three must be between the ages of eighteen and twenty-five years and one must be the elected member representing the ward which constitutes the area of authority of the Committee.

The general aims and objects of People's Committees are: (1) to keep vigilance (a) over the activities of Government Departments, local authorities or other institutions financed by the Government with a view to the prevention of abuse of authority, wastefulness, neglect of duty, misuse of public funds and corruption, and (b) over the activities of authorised dealers of essential commodities with a view to the prevention of irregularities in the distribution, sale or purchase of such commodities and to bring such irregularities to the notice of the competent authority; (2) by maintaining vigilance and making complaints to the proper authorities to prevent anti-social, illegal and immoral activities such as smuggling, illicit immigration, profiteering and the running of brothels; (3) to encourage the establishment of, to stimulate interest in, and to promote the objects of, popular institutions such as co-operative societies, cultivation committees, rural development societies, praja mandalayas and mahila samithies;(4)to promote liaison between Government Departments,

15. Message issued on 1 December 1971 on the occasion of the coming into operation of People's Committees.

Government corporations, local authorities and the people of the area of authority; (5) to assist the people of the area of authority to make representations, individually or collectively, to the proper authorities for redress or relief on any matter; (6) to assist the people of the area of authority in obtaining certified copies of birth, marriage and death registrations, if called upon to do so; (7) to suggest schemes to the Government or local authorities for urban or village development and improvement, and for the betterment of the conditions of the people within the area of authority; (8) to ensure that proper facilities are provided for the physical, mental and spiritual development of the people of the area of authority; (9) to advise the Minister on any matter referred to the Committee for such advice; (10) to issue statements to the Press relating to the activities of the Committee or contradicting wrong reports relating to activities within the area of authority; (11) to help in maintaining peace and harmony between various racial, religious and other groups living in the area of authority; and (12) to be vigilant about any abuse or misappropriation of any trust funds of a public nature. (s. 12).

A Committee has generally all such powers and rights as are reasonably necessary to carry out the aims and objects already referred to and in particular the power to (a) make inquiries and receive written replies from any Government Department, Government corporation, local authority, co-operative society, cultivation committee, rural development society or any private non-religious organisation which receives or has received funds from the Government, and from any wholesale or retail trading establishment dealing in commodities essential to the life of the community, regarding any matters which, in the opinion of the Committee, are matters relating to the aims and objects of the Commitee; (b) examine any documents in the custody of any of the above-mentioned bodies (except documents the contents of which are prohibited by any written law from being divulged to the public), take copies of them and have them certified by the officer or person in whose custody they are, without payment of any fee; (c) call upon any of such bodies to furnish to the Committee certified copies of extracts (including bills of quantities) on which work or payment has not been completed; (d) enter any wholesale or trading business establishment dealing in commodities essential to the life of the community during any reasonable hours of the day and examine or inspect any document, equipment or any other article whatsoever, with the permission of the person who for the time being is in charge of such establishment for any purposes relating to the aims and objects

of the Committee; (e) report any public officer or employee of any Government corporation or local authority to his immediate superior where the Committee suspects any misconduct or neglect of duty on the part of such officer and to be present at the preliminary inquiry instituted against such officer upon such report; (f) report any matter of public importance to an appropriate senior officer of the area and to be present at the preliminary inquiry made by such officer into such matter upon such report, and if not satisfied with the manner or result of such inquiry, to report such matter direct to the appropriate Minister; (g) make inquiries or investigations on its own motion or upon representations or complaints made to it by any person in the area of authority, regarding any matter relating to the aims and objects of the Committee; (h) make representations to the appropriate Minister on any matter of national importance; (i) where the Committee considers it necessary to do so, to institute, in the name of the Chairman or the Secretary of the Committee, criminal proceedings under section 148 (1) (b) of the Criminal Procedure Code; and (j) where so requested by any person who makes a statement at the police station, to be present when such statement is recorded at such police station. (s. 13).

It is the responsibility of the Committees to keep under constant scrutiny the level of consumer satisfaction given by the various Government and public sector services where people have complaints such as inefficiency, rude service, delays and corruption. Mr. Felix Dias Bandaranaike has emphasised, that the most important function of these Committees "is to fight bribery and corruption at all levels both in Government and non-government institutions.....These Committees have only one purpose, to serve the people."[16]

The proposal to establish People's Committees gave rise to some misgivings in certain quarters. There was a fear that the Committees would abuse their powers. As the Prime Minister, Mrs. Bandaranaike, stated these fears were not unjustified but it was not the Government's intention to create a Frankenstein monster as some people feared.[17] She exhorted the Committees to dispel these fears and justify the confidence reposed in them by the Government. There can be no doubt that if the People's Committees can by their vigilance assist in the eradication

16. Message (*ante*).
17. Special Message, (*ante*).

of corruption and wastage and at the same time refrain from accentuating political, racial, religious, caste or class differences, they can render a necessary and useful service in public administration.

A Committee may authorise in writing its Chairman or Secretary to institute, in the name of the Committee, criminal proceedings in respect of offences under the Control of Prices Act, Weights and Measures Ordinance, Animals Act, Forest Ordinance and section 15 or 18 of the Excise Ordinance.

The Chairmen of these Committees are, during the period they hold office, ex-officio Justices of Peace for the administrative district within which the area of authority is wholly or mainly situated. Further, the Chairmen as well as Secretaries of such Committees are "peace officers" within the meaning and for the purposes of section 148 (1) (b) of the Criminal Procedure Code.

It is the duty of all Government Departments, Government corporations, co-operative societies, cultivation committees, rural development societies, praja mandalayas and other non-religious private organisations which receive or have received funds from the Government, and of any private wholesale or retail trading establishment dealing in essential commodities (a) to assist and co-operate with the Committee in the discharge of its powers and functions; (b) to maintain a special register and record in it all the complaints received from the Committee and the action taken on each such complaint; (c) to take action without delay on representations and complaints made by the Committee and communicate its decisions to the Committee; (d) to state reasons in such communication if such decision does not give effect to the demand or request of the Committee or does not accept the truth of any statement made by the Committee; (e) to permit the Committee to take copies of any documents (other than those the contents of which are by any written law prohibited from being divulged to the public) and to have them certified by an appropriate officer of the Department or institution concerned, without payment of a fee; (f) to provide all facilities to the Committee for the inspection of any buildings, machinery, equipment and stores, including any books, documents or records owned or possessed by them; and (g) to furnish all information required and answer all oral questions asked by the Committee in the exercise of its powers. (s. 17).

Any person who: (1) obstructs any member of the Committee in the lawful exercise of his powers under the People's Committees Act; (2) wilfully fails or refuses to furnish any document or other information which the Committee in the exercise of its powers under the Act demands from him, shall be guilty of an offence under the Act. Any person who is guilty of an offence under this Act, upon conviction after summary trial by a Magistrate, becomes liable to be punished with a term of imprisonment of either description not exceeding six months or with a fine not exceeding one thousand rupees or with both such fine and imprisonment. No prosecution can be instituted under this section except by or with the sanction of the Attorney-General. (s. 22).

3. Employees' Councils. In accordance with the Public Administration Circular, No. 8 of 15 August 1970, Employees' Councils have been established in several public corporations on the instructions of the appropriate Ministers. It has been stated that the Ceylon Transport Board has been in the vanguard of the Employees' Councils movement set up by the Government. The constitution of the Ceylon Transport Board Employees' Councils has served as a model to other public corporations.

Under clause 2 of its constitution the Employees' Council may exercise all or any of the following powers or duties: (i) to ensure efficient working of the unit for which the Employees' Council was elected: (ii) to inquire into and notify to the management of the unit any malpractices in the various fields of work and to suggest ways and means of preventing such malpractices; (iii) to inquire into and notify to the management of the unit unremunerative routes, excessive consumption of spare parts, fuel and the high cost of maintenance of buses in any particular place; (iv) to inquire into and suggest to the management of the unit any deviations from existing methods that would raise the level of productivity and the intake of revenue; (v) to inquire into and make to the management of the unit any suggestions that will effectively benefit the management and be an advantage to the commuter; (vi) to notify the management of any invention, particular skill, innovation or modification made by an employee resulting in benefit to the Board; (vii) to advise the management of the unit generally in the running and maintenance of an efficient regular omnibus service and in the preparation of the Annual Budget of the Ceylon Transport Board in so far as it relates to that particular unit.

Clause 3 of the constitution relates to the annual elections to Employees' Councils and the procedure to be adopted. Clause 10 requires the management of the unit to consult regularly the Employees' Council: (i) on all matters affecting the conditions of work, level of production, intake of revenue and efficiency of operations; (ii) in the drafting of operational schedules, apportionment of work, and in the assignment of overtime; (iii) any other management functions including the acquisition of land, opening of new routes and Depots, budgetary allocations and constructions of buildings. Clause 13 provides that where on any matter coming within the functions, duties and obligations of the Employees' Council there is disagreement between the management of the unit and the Employees' Council the decision of the management on such matter must prevail. There is a right of appeal by the Employees' Council to the Chairman of the Board and from him to the Minister whose decision is final and conclusive.

4. **Rural Development Societies and Divisional Development Councils.** Popular participation at the village level is encouraged through such organisations as Rural Development Societies and Divisional Development Councils, the members of which, apart from the officials, are sought to be drawn from the leaders of the village. The Divisional Development Councils have been designed particularly to encourage the participation of the people at the village level towards the growth and co-ordination of the rural economy and the gearing of it to the national development plan. The emphasis in the Councils is on small viable agricultural and industrial projects which would provide employment opportunities in the village areas. It is still too early to estimate the extent to which these various organisations can be made to be effective agencies for the participation of the people in the public administration. It is a Principle of State Policy enshrined in the Constitution as a guide to the governance of Sri Lanka that the State shall strengthen and broaden the democratic structure of Government and democratic rights of the people by affording all possible opportunities to the people to participate at every level in national life and in government, including the civil administration and the administration of justice."[18]

18. Section 16 (2) (6) of the Constitution.

CHAPTER 14

THE ARMED FORCES

The Armed Forces consist of the Army, the Navy and Air Force. The Army, Navy and Air Force Acts[1] provide for the raising and maintenance of the Army, Navy and Air Force respectively. Each Force consists of a Regular Force, a Regular Reserve, a Volunteer Force and a Volunteer Reserve. The President is the Commander-in-Chief of the Armed Forces. The Prime Minister as the Minister in charge of Defence, is responsible for the Armed Forces, and is assisted by the Deputy Minister and the Secretary to the Ministry. The President appoints a Commander of the Army, a Captain of the Navy and a Commander of the Air Force to command the Army, the Navy and the Air Force respectively.

Discipline. Officers and men of the Army and Navy are subject respectively to military law and naval law as contained in the Army and Navy Acts and other legislation. Officers and men of the Air Force are similarly subject to the Air Force Act. In addition, they remain subject to the ordinary law of the land. A member of the Army, Navy or Air Force who commits respectively a military, naval or air-force offence, or a civil offence may be taken into military, naval or air-force custody as the case may be, by an officer of the category described in the particular Act.

The offences created by the Army and Air Force Acts include: offences in respect of military service; mutiny and insubordination; desertion, fraudulent enlistment and absence without leave; disgraceful conduct; drunkenness; offences in relation to persons in custody, to property, to false documents and statements, to courts-martial, and to enlistment; and miscellaneous military offences. Offences under the Navy Act include misconduct in the presence of, and communication with, the

1. Chapters 357-359 of the Legislative Enactments.

enemy; neglect of duty; mutiny; insubordination; desertion; offences in relation to courts-martial and naval officers exercising judicial powers, to person in custody, to property, to documents and statements, and to enlistment; and other miscellaneous offences.

Courts-Martial. There are three kinds of courts-martial that may be set up under the Army and Air Force Acts to try persons subject to military and air force law respectively, namely, general courts-martial, field general court-martial and district court-martial. The scale of punishments which may be imposed by courts-martial under the Army and Air Force Acts are, in order of severity: death; imprisonment; cashiering; dismissal from the Army or Air Force; forfeiture of seniority of rank; severe reprimand or reprimand; and such penal deductions as may be authorised by the respective Acts. Under the Navy Act, on the other hand, there is only one kind of court-martial to try persons subject to naval law. The scale of punishments, in order of severity, which may be imposed by courts martial and naval officers exercising judicial power under the Navy Act are: death; rigorous imprisonment; dismissal with disgrace from the Navy; simple imprisonment; detention; dismissal without disgrace from the Navy; forfeiture of seniority as an officer; dismissal from the ship to which the offender belongs; severe reprimand; reprimand; disrating subordinate or petty officer; forfeiture of pay, allowance and other emoluments due, and of medals and decorations granted to the offender; and such minor punishment as may be prescribed. A general court-martial may be set up by the President or an officer of a rank specified under the particular Act and who is authorised by the President to do so. The court-martial must consist of not less than three nor more than nine members. Where it is convened to try a person for the offence of treason, murder or rape, the court-martial must consist of not less than five members, and where it is convened to try a person for any civil offence, it must consist of not less than three members. An accused person may object, for any reasonable cause, to any member of a court-martial. A general court-martial may try any person subject to military or air force law, as the case may be, for any offence under the particular law or for any civil offence, except that a general court-martial cannot try a person for the offence of treason, murder or rape committed in Sri Lanka or in any place in the Commonwealth outside Sri Lanka unless he was on active service at the time he committed it.

Where only a part of the Army or Air Force is on active service or is in any country outside Sri Lanka, and it is impracticable in the opinion

of the commanding officer to convene a general court-martial, he may convene a field general court-martial. A field general court-martial may try (a) any person subject to military or air-force law as the case may be who while on active service under the command of the officer commanding it, is charged with any military or air-force offence as the case may be or with any civil offence; and (b) any person subject to military or air-force law as the case may be who, while in any foreign country under the command of such officer, is charged with any offence against the property or person of any inhabitant or resident of that country.

A district court-martial may be convened by any person empowered to convene a general court-martial or by an authorised officer of a rank specified under the Act. Subject to the same restrictions as are imposed on a general court-martial, a district court-martial may try a person subject to military or air-force law as the case may be who is not an officer and who is charged with any military or air-force offence or with any civil offence other than murder.

A general court-martial may impose any punishment authorised by the relevant Act and may in addition to or without any other punishment (1) in the case of a warrant officer sentence him to the following punishment: (a) a severe reprimand or a reprimand (b) forfeiture of seniority of rank (c) such deduction from his pay as is authorised by the Act and (d) either in addition to or without any of the above punishments, dismissal from the Army or, if he was originally enlisted as a private, reduction to the rank of private; (2) in the case of a non-commissioned officer, order forfeiture of seniority of rank or reduction to rank of private. A general court-martial cannot pass sentence of death on any person without the concurrence of at least two-thirds of its members. A field general court-martial may impose any punishment which a general court-martial is empowered to inflict. Where a field general court-martial consists of less than three officers, it cannot impose any punishment more severe than imprisonment or field punishment allowed by the Act. A field general court-martial cannot pass sentence of death on any person without the concurrence of all its members. A district court-martial may impose any punishment other than the punishment of death which a general court-martial is empowered to impose. At all proceedings before a court-martial the prosecution as well as the defence are entitled to be represented by Counsel.

For the trial and punishment of a person subject to naval law who has committed any naval or civil offence, the President or an officer of a rank not below that of Lieutenant Commander authorised by him may order a court-martial to be held. A court-martial consists of not less than three nor more than nine members. Where it is convened to try a person subject to naval law for the offence of treason, murder or rape, the court-martial must consist of not less than five members. Where it is convened to try such a person for any other offence, it must consist of not less than three members. As in the case of courts-martial set up under the Army and Air Force Acts, an accused may object, for any reasonable cause, to any member of the court-martial.

A person subject to naval law who is convicted by a court-martial of the offence of treason or murder must be punished with death. If he is convicted of the offence of culpable homicide not amounting to murder or of rape he must be punished with simple or rigorous imprisonment for a term not exceeding twenty years. A sentence of death cannot be passed on any person by a court-martial unless, where the number of members of the court-martial does not exceed five, at least four of the members present, and, where the number of members of the court-martial exceeds five, not less than two-thirds of the members present, concur in the sentence.

Judge-Advocate. The authority ordering a general court-martial under the Army and Air Force Acts or a court-martial under the Navy Act must appoint a person who has sufficient knowledge of the practice and procedure of courts-martial and of the general principles of law and of the rules of evidence, to act as Judge-Advocate of the court-martial. It is the duty of the Judge-Advocate, whether before or during the proceedings, to give advice on questions of law or procedure relating to the charge or trial, to the prosecutor and to the accused. The Act declares them entitled to obtain such advice at any time after the appointment of the Judge-Advocate. During the proceedings he can give such advice only with the prior permission of the court-martial. It is also his duty to invite the attention of the court-martial to any irregularity in the proceedings. Whether or not he is consulted, he must inform the court-martial and the authority convening it of any defect in the charge or in the constitution of the court-martial, and must give his advice on any matter before it.

The Judge-Advocate must take all such action as may be necessary to ensure that the accused does not suffer any disadvantage in consequence of any incapacity to examine or cross-examine witnesses or to give evidence clearly. He may, for that purpose, with the permission of the court-martial, question any witness on any relevant matter. At the conclusion of the case he must, unless both he and the court-martial consider it unnecessary, sum up the evidence and advise the court-martial upon the law relating to the case before the court-martial proceeds to deliberate upon its finding. The failure of the Judge-Advocate to sum up on the evidence before the court deliberates on its finding is a fatal irregularity.[2]

Confirmation of Conviction and Sentence. The conviction and sentence of an accused by a court-martial under the Army and Air Force Acts is not valid until confirmed by the authority having power to do so. If the court-martial is a general court-martial, the confirming authority is the President or an officer authorised by him. If the court-martial is a field general court-martial he is the officer duly authorised by the President. If it is a district court-martial he is an officer authorised by the President to convene general courts-martial or an officer empowered by such authorised officer to confirm the conviction and sentence. A sentence of death passed on any person by a court-martial in respect of an offence committed by him while not on active service cannot be carried into effect unless it has been confirmed both by the confirming authority and by the President.

The confirming authority may refer the conviction or sentence or both to the court-martial for revision once. It may also withhold confirmation wholly or partly and refer the conviction and sentence or the unconfirmed part of it to a superior authority competent to confirm them. In regard to sentence, the confirming authority may mitigate, remit or commute the punishment or suspend the execution of the sentence. Where the sentence is one of imprisonment or detention passed on a soldier, it may confirm the sentence and direct that the soldier be not committed to prison or detention barracks until the order of a superior military authority has been obtained. "Superior military authority" means the President, the Commander of the Army or any officer authorised by the President, or the officer in chief command of any such part of the Army as may be on active service outside Sri Lanka.

2. *Jayanetti* v *Martinus* (1968) 71 N.L.R. 49.

The President or the Minister or any prescribed officer may revise any sentence which has been confirmed by a confirming authority by mitigating, remitting or commuting the punishment.

Civil Courts and the Armed Forces. The Army, Navy and Air Force Acts do not affect the jurisdiction of a civil Court to try or punish for any civil offence any person subject to military law. It is the duty of every commanding officer on an order of a civil Court to surrender to that Court any officer or soldier under his command who is charged with, or convicted of, any civil offence before that Court. It is also his duty to assist any police officer or any other officer concerned or connected with the administration of justice to arrest any officer or soldier so charged or convicted.

The provisions of section 42 of the Courts Ordinance which relate to the grant and issue of writs of mandamus, certiorari and prohibition are deemed to apply in respect of any court-martial or of any military authority exercising judicial functions. The provisions of section 45 of the Courts Ordinance relating to the issue of writs of habeas corpus are deemed to apply in respect of any person illegally detained in custody by order of a court-martial or other military authority.

A member of the Armed Forces, like any other citizen, is bound by the ordinary law. Therefore he will be liable in the civil Courts for all illegal acts even if they are committed in obedience to the orders of a superior officer unless he can otherwise justify them. There is some authority for the proposition that such orders of his superior would constitute justification where orders were not "necessarily or manifestly illegal".[3] Such orders might be held to be "an absolute justification in time of actual war—at all events, as regards enemies and foreigners".[4]

Military Law and Martial Law. The term "martial law" is sometimes incorrectly used to describe military law which, as we have seen, is a body of special statute law governing the armed forces. Martial law, on the other hand, is no law at all but is merely a right and duty under the common law of members of the armed forces, like all citizens, to repel force by all necessary force in time of emergency, such as riot, rebellion

3. *Keighly* v *Bell* (1866) 4 F & F 763, 790.
4. *Ibid.*

or invasion, and to maintain public order.[5] It has been held in England that under the common law when there is such an emergency amounting to a state of war, any military tribunals or so-called courts-martial which may be set up to administer summary justice cannot be considered to be Courts in the ordinary sense but are merely bodies advisory to the Military Commander.[6] Under the English common law the Courts will not interfere with the acts of the military authorities so long as a state of war is recognised by them to exist.[7] As Lord Halsbury has stated:[8]

"It is by this time a very familiar observation that what is called 'martial law' is no law at all... The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force, but it is found convenient and decorous from time to time, to authorise what are called 'Courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to... casual action... But to attempt to make these proceedings of so-called 'courts martial,' administering summary justice under the supervision of a military Commander, analogous to the regular proceedings of Courts of Justice is quite illusory."

5. See *Ex parte Marais* (1902) A.C. 109*: Tilonko* v *Attorney-General of Natal* (1907) A.C. 93, at p. 94.
6. *Re Clifford and O'Sullivan* (1921) 2 A.C. 570*: Tilonko's Case*, (*supra*)
7. *Marais' Case* (*supra*)
8. *Tilonko's Case*, at p. 94.

PART IV

ADMINISTRATIVE LAW

CHAPTER 15

THE NATURE AND GROWTH OF ADMINISTRATIVE LAW

The administrative organisation of Sri Lanka comprises (a) the central government authorities, which include the President, the Cabinet of Ministers and the Government Departments; (b) the local government authorities; and (c) the legally independent statutory authorities such as the public corporations. Until the establishment of universal suffrage in 1931, the powers and functions of the administrative authorities were mostly confined to the maintenance of defence and public order, on the one hand, and to the collection of revenue, on the other. The State and the institutions of Government were not conceived as instruments of economic and social policy to the same extent as they are conceived today. This was also, broadly speaking, the position in England until 1867 when the Representation of the People Act gave the Parliamentary franchise to many sections of the working class. In accordance with the nineteenth-century *laissezfaire* and individualist conceptions of the functions of Government, the State hardly made any provision for the regulation of the economic and social life of the community in the interests of the welfare of its individual members.

In Sri Lanka as late as 1928, as the Donoughmore Commission stated in their Report, there was evidence of gaps which had been left in the social structure by the absence of any poor law system, of workmen's compensation, of up-to-date factory legislation, of proper or even decent housing for certain sections of the people and of control over sweated trades or adequate facilities for primary education.[1] According to the Donoughmore Commissioners the absence of such social legislation was due largely to the important place which feudal ties, family help and private charity had always occupied in Ceylonese society; but modern development by which Ceylon had been affected, had tended to make

1. *Report of the Special (Donoughmore) Commission on the Constitution* (1928) Cmd. 3131, p. 43.

domestic and private charity unequal to the solution of the economic problems of the day.[2] The Commission recommended the grant of universal franchise in the belief that it would expedite the passing of such social and industrial legislation that was in force in progressive countries.[3] As visualised by the Donoughmore Commission, after the grant of universal adult suffrage the mass of the people were able to influence the Government with regard to their social and economic needs. As a result there was a considerable extension of the functions of government.[4] More social services began to be provided by the State. Legislation was passed providing for minimum wages, maternity benefits, poor relief in cities, workmen's compensation and rent restriction. There were new laws affecting public health, education, housing and town improvement, agriculture and food and also establishing nationalised industries and services. During the Second World War, due to the inability of private enterprise to maintain an adequate supply of essential goods and commodities needed by the community, the Government was compelled to undertake their importation and distribution and, in certain cases, even their production in this country. After the War, these trading, commercial and industrial activities of the Government were continued and expanded. The experience in the carrying on of these activities revealed that Treasury and civil service methods were not suitable for the efficient functioning of public enterprise. In order to achieve the flexibility and initiative associated with private enterprise more and more public corporations came to be statutorily established in the post-independence period. The policy of nationalisation of essential services has resulted in a further increase in the number of these corporations and Boards.

The wide extension of the functions of Government naturally resulted in the increase and expansion of the administrative authorities whose duty it was to exercise these functions and administer these services. It also resulted in the necessity for exercising political and legal control over these authorities to secure the proper exercise of their powers. The Law relating to the various administrative authorities, including the control of their powers is known as Administrative Law. This is also the French and German conception of Administrative Law. It is, in other words,

2. *Report, Ibid.*
3. *Report*, p. 83.
4. See *Report of the (Soulbury) Commission on Constitutional Reform*(1945) Cmd. 6677, Chap. VI.

the whole body of law which determines the organisation, powers, duties and liabilities of administrative authorities.[5] With regard to the powers of administrative authorities, it should be stated that the emphasis, so far as the administrative lawyer is concerned, is naturally on the legislative, administrative and judicial powers in their relation to the rights and duties of citizens and on the remedies available where the limits of such powers are exceeded. Administrative Law thus includes in its scope the law relating to

(*a*) the organisation of the Administration, that is, the central and local authorities as well as other statutory bodies,
(*b*) the powers—legislative, administrative and judicial—of these public authorities, and
(*c*) the political and judicial control of such public authorities.

The growth of Administrative Law has in fact been so rapid in the common-law world that this system of law is regarded as "the outstanding legal development of the twentieth century, reflecting in the law the hegemony of the executive arm of the government".[6] Nevertheless, for a considerable period of time Administrative Law was not given its proper recognition in many common-law countries. Unlike in France and Germany where there were important writings on the subject for over a century, the first book with *Administrative Law* as its title was published in England only in 1929. The writer was Dr. F. J. Port. A year earlier Professor Robson had published his book entitled *Justice and Administrative Law*. In the United States also there is now greater recognition of a system of Administrative Law. This neglect of Administrative Law in the common-law countries was, as already pointed out, due largely to the influence of Dicey who denied its existence in England and in countries that derived their legal systems from English sources.[7] But as Professor S. A. de Smith has pointed out, although Anglo-Saxon attitudes towards the problems of Administrative Law are too deeply ingrained to be suddenly transformed, noticeable changes have taken place in recent years.[8]

5. E. C. S. Wade in Appendix I to the 9th ed. (1939) of Dicey's *Law of the Constitution*, pp. 475-484; See also Hauriou, *Precis Elementaire de Droit Administratif* (4th ed.) p. 14; Waline, *Traite Elementaire de Droit Administratif* (1958); Sir Ivor Jennings, *The Law and the Constitution* (5th ed.) p. 217.
6. Vanderbilt in Introduction to Schwartz, *French Administrative Law and the Common-Law World*, xiii (1954).
7. Dicey, *Law of the Constitution* (1885), p. 180.
8. *Judicial Review of Administrative Action* (2nd ed.), p. 6.

In Sri Lanka too there has recently been a tendency on the part of the Courts to develop a system of Administrative Law based on well-known general principles of justice. Incidentally, there is reason to believe that this process would be hastened if appeals involving Administrative Law are assigned to a specially established Administrative Division of the Supreme Court.

There is no essential difference between Administrative Law in common-law countries like England or Sri Lanka and that in France or Germany where it is known as *droit administratif* and *Verwaltungsrecht* respectively. But as already pointed out, the study of Administrative Law in common law countries like England and the United States has, until recently, been influenced by what has been called the "misconceptions and myopia"[9] of Professor Dicey. In his classical work published in 1885 Dicey made the surprising statement that in the above-mentioned countries, "the system of administrative law and the very principles upon which it rests are in truth unknown".[10] According to Dicey *droit administratif* or Administrative Law was incompatible with the "rule of law" which was a fundamental principle of the British Constitution. Dicey described *droit administratif* as that portion of French law which determined (i) the position and liabilities of all State officials; (ii) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and (iii) the procedure by which these rights and liabilities are enforced[11]. It is true that in France disputes between public authorities and citizens are determined not in ordinary Courts but in special Administrative Courts; whereas in Sri Lanka and other common-law countries they are generally determined in the ordinary Courts of law. But some of the remedies available in the Administrative Courts have their parallel in the writs of the Supreme Court and other remedies against public authorities in the common-law countries. Dicey however was emphatically of the view that

> "the fact that the ordinary courts can deal with any actual or probable breach of the law committed by any servant of the Crown still preserves that rule of law which is fatal to the existence of true droit administratif".[12]

9. Justice Frankfurter, Forward, 47 *Yale Law Journal* 515, 517 (1938). See Bernard Schwartz, *Introduction to American Administrative Law* (2nd ed.) p. 1; J. A. G. Griffith & H. Street, *Principles of Administrative Law* (4th ed.), p. 3.
10. Dicey, *Law of the Constitution* (1885) p. 180.
11. *Ibid.*
12. 31 *Law Quarterly Review* 152.

But, as Professor J.H. Morgan has pointed out, "what Administrative Law does in France, and still more in Germany, is not to exempt public officials from responsibility where in this country they would be liable, but to extend that liability to cases where in this country they would be immune".[13] In fact Dicey himself admitted that under *droit administratif*, the *Conseil d'Etat*, as the highest Administrative Court, had worked out new remedies for various abuses on the part of officials which had hardly been touched by the ordinary law in England. "The interesting aspect of the French System", states a well-known British jurist, "is that the administration has succeeded in developing, from within itself, its own machinery of self-discipline, administrative in its origins but yet fully imbued with legal technique. In England, on the other hand, the civil service works in an atmosphere far removed from legal influence, and legal control lies with entirely different organs, which by nature are unaccustomed to administrative work".[14] In 1946 Belgium realised the advantages of the French system of separate Administrative Courts and established such a system and a *Conseil d'Etat* in that country. Until that time Belgian Administrative Law was enforced by the ordinary Courts, though more successfully than in the common-law countries.[15] This experience of Belgium illustrates the fact that Administrative Courts are by no means necessary for the existence of a system of Administrative Law. These Courts only enable a more coherent and systematised body of Administrative Law to be developed.

In any event the redress of an injury which is caused by a wrongful or negligent act of a public official in the course of his service (called *faute de service* in France) and which must be pursued in the Administrative Court, constitutes only a small portion of Administrative Law. That law includes, in addition, the organisation, powers and functions of the various administrative authorities.[16] Thus it is only a part of that law, namely that which deals with proceedings against public authorities (*contentieux administratif*), which is administered in special Administrative

13. Introduction to Gleeson E. Robinson's *Public Authorities and Legal Liability*, p. lxi.
14. H. W. R. Wade, *Administrative Law* (1961), p.8.
15. See Vauthier, *Precis de Droit Administratif de la Belgique* (1928); Sir Ivor Jennings, *The Law and the Constitution*, (5th ed.), p. 236.
16. See Marcel Waline, *Traite Elementaire de Droit Administratif* (1958) (5th ed.), p. 9; Hauriou, *Precis de Droit Administratif* (4th ed.), p. 14; Jennings, *The Law and the Constitution* (5th ed.), p. 217.

Courts in France but in ordinary Courts in England and other common-law countries. But this is a strange reason for suggesting, as a former Chief Justice of England did, that in these countries there is no such system of Administrative Law as is found in France, but a "rule of law" instead.[17]

Making a final assessment of the French and English systems from the point of the efficiency of public administration and their subjection to the Rule of Law, two learned English authors see in the French system "undoubted advantages, especially the administrative expertise of those called upon to sit in judgment upon the administration, the simplicity of the remedies, the process of written instruction permitting an intimate dialogue between court and administrator, and, most salutary of all, the depth to which the court may probe into administrative action yet without treaspassing on policy or usurping the administrator's role as the ultimate arbiter on 'opportunite'. "In all these respects" add the authors, "the *droit administratif* is strong, the English law weak".[18]

17. Lord Hewart in his Introduction to Sir Maurice Amos, *The English Constitution* (1930), p. vi. See Jennings, *The Law and the Constitution* (5th ed.), p. 313.
18. Brown and Garner, *French Administrative Law* (1967), p. 140.

CHAPTER 16

SUBORDINATE LEGISLATION

General Nature. The nature and growing volume of legislation, especially in modern times, has obliged the Legislature to confer in increasing measure considerable legislative powers on various persons or bodies to be exercised under the terms of enabling Acts. The legislation which is made by the inferior authorities in pursuance of the power granted by the National State Assembly is known as "subordinate legislation" or, as it is sometimes called, "delegated legislation". In countries where the Constitution adheres strictly to the separation of powers and vests the legislative power in the National Legislature objections have sometimes been raised to the delegation of the legislative power by the Legislature. In a passage which is often cited, Locke has said: "The legislature cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others".[1] The effective answer to this objection is that given by Professor Frankfurter (as he then was) who said that "the practical demands of government preclude the doctrinaire application (of the maxim against delegation), for, as he said, "we are dealing with what Madison called a 'political maxim' and not a technical rule of law".[2]

The maxim borrowed from the law of agency and trust, *delegata potestas non potest delegare* ("a delegated power cannot be delegated") does not apply to the National State Assembly, which is the supreme instrument of State power. Under the Constitution, although the National State Assembly may not abdicate, delegate or in any manner alienate its legislative power nor set up an authority with any legislative power, it may confer by law upon such authority or any person the power of making subordinate legislation for prescribed purposes. The delegation by the National State Assembly to the President of the power to make

1. *Of Civil Government*, section 141.
2. Frankfurter, *The Pubic and its Government* (1930), p. 77, cited by Bernard Schwartz *An Introduction to American Administrative Law* (1962), p. 33.

emergency regulations in accordance with the law for the time being relating to public security is also specially provided for in the Constitution. (s. 45)

Conditional and subordinate legislative powers may thus be delegated to administrative authorities by the National State Assembly by means of enabling legislation.[3] Conditional legislation is a form of subordinate legislation in which the law is complete when enacted except that the delegating authority (the National State Assembly) is given the power to decide whether or not the conditions for bringing the law into operation have been fulfilled. As long as the National State Assembly does not abandon or divest itself of its legislative power and control by a transfer of such power to a person or body and as long as the limits of such delegated power are prescribed in the enabling statute, the conferment of the power to make subordinate legislation is constitutional.[4]

Under the Indian Constitution, the Supreme Court of that country has stated that the Indian Parliament must in the enabling Act declare the policy of the law, the controlling legal principles and a limiting standard to be applied by the delegated authority.[5]

It is true to say of Sri Lanka, as it has been said of Britain, that if the Legislature does not confer law-making powers on subordinate authorities it would be unable to pass the kind and quality of legislation which modern public opinion required.[6] Moreover, in this country the acceptance

3. See *R* v *Burah* (1878) 3 App. Cas. 889, 903-904. *Hodge* v *The Queen* (1883) 9 App. Cas. 117, 132; *Powell* v *Apollo Candle Co.*(1885) 10 App. Cas. 282. Even under a Constitution such as that of Australia which embodies the doctrine of separation of powers, a delegated power of legislation is valid as long as it is subordinate to the Legislture.This power includes the power to modify or repeal other statutes: *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v *Dingnan* (1931) 46 C.L.R. 73, 100; *Roche* v *Kronheimer* (1921) 29 C.L.R. 329.
4. S. 45; See *Weerasinghe* v *Samarasinghe* (1966) 68 N.L.R. 361; *Hodge* v *The Queen* (*supra*); *R* v *Banerji* (1945) 72 I.A.241, 265. See also the Indian cases cited and the learned discussion of these cases in H.M. Seervai, *Constitutional Law of India* (1968) Chapter XXI.
5. See *Harishanka Bagla* v *State of M. P.* A. I. R. 1954 S. C. 465, at p.468; *Bhatnagars* v *Union of India* A.I.R. 1957 S.C. 478. *The Delhi Laws Act* case, A.I.R. 1951 S.C 332 did not establish any clear principle regarding the limits of delegation of legislative powers in India. Compare the policy and standard prescribed in the United States in such cases as *Panama Refining Co.* v *Ryan* (1934) 293 U.S. 388 and *Yakus* v *United States* (1944) 321 U.S.414. Compare *Schechter Poultry Corp.* v. *United States* (1935) 295 U.S. 495.
6. *Report of the Committee on Ministers' Powers* (in England). Cmd.4060 (1932), p. 23. See also *Report of the Attorney-Grneral's Committee* (1941) 97 (U.S)

of the need for economic control and planning by the State is, so far as political Parties are concerned, universal. Under the Constitution the Republic is pledged to carry forward the progressive advancement towards the establishment in Sri Lanka of a socialist democracy (s.16(2)). Subordinate legislation is therefore a prime necessity in Sri Lanka. It is freely used in this country and its only limitation under the Constitution is that it can be made only for the purposes prescribed in the enabling Act. It is subject to the control retained under the enabling statute by the National State Assembly. The limits that are set out in the statute make it clear that the Assembly is not abdicating its legislative function and that the administrative authority is exercising merely a subordinate power of legislation.

Forms of Subordinate Legislation. There are various forms of subordinate legislation. In Sri Lanka there has sometimes been a lack of uniformity in the use of names by which these forms are known. The Report of the Committee on Ministers' Powers in England recommended that

"the expressions 'regulation', 'rule' and 'order' should not be used indiscriminately in statutes to describe the instruments by which the law-making power conferred on Ministers by Parliament is exercised. The expression 'regulation' should be used to describe the instrument by which the power to make substantive law is exercised, and the expression 'rule' to describe the instrument by which the power to make law about procedure is exercised. The expression 'order' should be used to describe the instrument of the exercise of (a) executive power, (b) the power to take judicial and quasi-judicial decisions".[7]

The main forms of delegated legislation are:

(1) Regulations made by the President. For example, the President has power, under the Constitution and the Public Security Ordinance,[8] to make emergency regulations in accordance with the provisions of the Ordinance;

(2) Regulations, rules and orders made by Ministers and by Government Departments under various statutes. This is the most

7. Cmd. 4060 (1932), p. 64.
8. Legislative Enactments of Ceylon, Chapter 40. s.5.

frequent form of delegated legislation in Sri Lanka. For example, under the Co-operative Societies Ordinance[9] the Minister may make all rules as may be necessary for the purposes of carrying out or giving effect to the principles and provisions of the Ordinance. These rules have effect when they have been approved by the National State Assembly and published in the Government Gazette. Even under some statutes establishing public corporations, such as the Insurance Corporation Act, No. 2 of 1961, it is the Minister who is empowered to make regulations for the purpose of carrying out or giving effect to the principles and provisions of the Act and in respect of any matter for which regulations are authorised to be made by the Act.

(3) By-laws made by local government authorities. The Municipal Councils, Urban Councils, Town Councils and Village Communities Ordinances empower the respective local authorities to make by-laws having effect as binding law for the persons of the areas for which such authorities have been constituted.

(4) Rules, regulations and by-laws made by public corporations under powers conferred by their constituent Acts. For example, under the Ceylon Tourist Board Act, No. 10 of 1966, the Board may make rules in respect of matters for which rules are authorised or required to be made by the Act.

(5) Rules and orders of Court relating to the practice and procedure of Court made by the Constitutional Court under section 59 of the Constitution and by Judges of the Supreme Court under the Courts Ordinance.[10]

"Sub-Delegation". It is sometimes considered necessary in the interests of public administration that the authority on whom the power of delegated legislation is conferred by the National State Assembly should in its turn be empowered to sub-delegate its power to another authority. It may even be considered necessary in certain cases that the process should go even further.

9. Legislative Enactments of Ceylon, Chapter 124, s.54.
10. Legislative Enactments of Ceylon, Chap. 6, s. 49.

Section 6 of the Public Security Ordinance provides that emergency regulations, made by the President under section 5, may provide for empowering such authorities and persons as may be specified in the regulations to make orders and rules for any of the purposes for which such regulations are authorised by the Ordinance.

Unless the National State Assembly has in the enabling or parent Act expressly or impliedly authorised the sub-delegation, the maxim *delegatus non potest delegare* applies to make the sub-delegation unlawful. Sub-delegated legislation creates difficult problems in practice relating to the application of the doctrine of *ultra vires*. It is certainly not easy to state in all such cases whether and to what extent the maxim *delegatus non potest delegare* applies. The truth is that no precise dividing line can be drawn between legislative acts on the one hand and administrative acts on the other. This is particularly so when these acts are in such forms as directions, instructions and circulars issued by a delegated legislative authority.[11]

So far as English cases on sub-delegation are concerned it has been said that "they do not present any clear guidance on the two chief difficulties: namely, whether the power delegated was to make laws or mere administrative rulings, and when an authority, say a Minister, who has been given power to legislate has also, by implication, received power to sub-delegate that power."[12] At any rate, the sub-delegation to another of the power to determine when and where the provisions of a certain regulation should operate does not amount to a delegation that is considered objectionable or as going to power.[13]

Reasons for Subordinate Legislation. The necessity for subordinate legislation arises mainly from the following reasons:[14]

(1) *Pressure on Parliamentary time:* Practical necessity, such as the lack of time or the need for quick action, makes the National State

11. *Blackpool Corporation* v *Locker* (1948)1 K.B. 349; *Jackson, Stansfield & Sons* v *Butterworth* (1948) 2 All E.R. 558; S.A. de Smith "Sub-Delegation and Circulars" (1949) 12 Modern Law Review 37; *Report of Committee of Ministers' Powers* (in England) Cmd. 4068, p. 19
12. Lawson and Bentley, *Constitutional and Administrative Law* (1961), p. 58.
13. *Croft* v *Rose* (1957) A.L.R. 148. (Australia).
14. See *Report of Committee on Ministers' Powers* (in England) Cmd. 4060 (1932).

Assembly lay down only the general principles of the legislation in the Act itself. It often delegates to Ministers and Government Departments the power to make orders, rules or regulations relating to the necessary administrative machinery and other subordinate matters.

(2) *Flexibility:* Subordinate legislation permits experiment and the progressive utilisation of experience. It also allows provision to be made when the necessity arises to meet unforeseen contingencies or to suit local conditions. The alternative is a new amending Act which will have to be enacted each time in the National State Assembly through its various stages.

(3) *Technicality of subject-matter:* Technical matters which frequently arise in modern legislation cannot ordinarily be dealt with satisfactorily and effectively in the National State Assembly. With regard to such technical matters the delegation to Ministers and other public authorities of the power to make regulations facilitates prior consultation with experts and with the interests affected by the operation of the Act. It is also often considered desirable to deal with technical matters which do not concern policy in subordinate legislation rather than in the statutes themselves.

(4) *Emergency Powers:* Where a state of public emergency exists or is imminent there is a need for quick action. In Sri Lanka the Public Security Ordinance confers powers on the President to make emergency regulations, subject to the National State Assembly's safeguards, in order to meet a situation of emergency. The Government and its officers and agents are protected from unlawful acts done in good faith in pursuance of such regulations or orders and directions given under them. During the disturbances of 1958 and 1971 very wide powers were conferred on the Executive by such regulations.

Exceptional Types of Delegation. In England the Report of the Committee on Ministers' Powers has classified certain types of subordinate legislation which should be considered as the exceptional practice of Parliament:[15]

15. Cmd. 4060, p. 31.

(1) Powers to legislate on matters of principle or general policy and to impose taxation.

(2) Powers to amend Acts of Parliament, that is, either the Act by which the powers are delegated, or other Acts.

(3) Powers conferring so wide a discretion on a Minister that it is almost impossible to know what limit Parliament did intend to impose.

(4) Instances where delegated legislation has been excluded from the jurisdiction of the Courts by specific provisions to that effect in the enabling Act.[16]

Safeguards for Subordinate Legislation. Although subordinate legislation is necessary and inevitable in any modern State, there must be adequate and effective safeguards in order to secure (1) that there is consultation and participation of the people interested in such legislation; (2) that the National State Assembly, which is the supreme law-making body of elected representatives of the people, does not become a mere ratifying authority. The power of subordinate legislation entrusted to public authorities must be controlled and confined. There must also be adequate publicity for the regulations. Control and safeguards are provided not necessarily on any assumption that the delegated bodies are lacking in good faith. "In fact, some of the most honest people are the most unreasonable; and some excesses may be sincerely believed in, quite beyond the limits of reasonableness".[17]

In Sri Lanka the Constitution declares that the National State Assembly exercises the legislative power of the people. It is, therefore, essential that there should be such legislative control of subordinate legislation as would ensure that the National State Assembly does not in effect alienate its power and that the centre of gravity is not in practice shifted from the Assembly to administrative authorities.[18] It is with this end in view that control over subordinate legislation is exercised by the National State Assembly and by the Courts.[19]

16. Such provisions are interpreted strictly by the Courts.See *Chester* v *Bateson*(1920) 1 K.B. 829.
17. Scrutton L.J., in *R* v *Roberts* (1924) 2 K.B. 695, at p.719
18. See Cooray in *The Constitution and Public Finance in Ceylon* (1964), p. 2.
19. Chapter 19. *post*.

A. CONTROL BY THE NATIONAL STATE ASSEMBLY

There are certain safeguards which are provided by the National State Assembly and which are designed to ensure the proper use of the power of subordinate legislation. The control and supervision of such legislation is primarily a matter for the National State Assembly. Its members are under a duty to remain in touch with the needs of the people as their elected representatives. It is they who are in a position to consider whether the delegated legislative power has been reasonably exercised, having regard to its intentions and hence to the wishes of the people. Safeguards such as the "laying" procedure enable members to object in the National State Assembly to regulations and orders, or ask questions relating to them. In this way they are enabled to keep in touch with the Administration. We shall now consider the techniques of Parliamentary control.

1. "Laying" Procedure in the National State Assembly

In Sri Lanka there is no general statute as there is, for instance, in England[20] which requires all subordinate legislation to be laid before the National State Assembly. There are in practice, two forms of procedure. The first requires an affirmative resolution for the continuance of the subordinate legislation ("affirmative procedure"); and the second, that under which such legislation is laid before the National State Assembly with immediate effect but subject to annulment ("negative procedure"). The affirmative procedure has certain advantages over the negative procedure. Perhaps its chief advantage is the greater opportunity for debate and criticism which, however, is not always availed of. In order to make such legislative control more effective by giving the House sufficient information about the content of subordinate legislation, it is desirable that enabling statutes should, generally speaking, provide that rules made under them should be laid before the House for a specified period before publication in the Gazette. There should also be explanatory notes on the rules or a statement of objects and reasons for the benefit of the members of the National State Assembly.

What is the legal effect of a requirement in a statute that subordinate legislation made under it should be laid before the National State

20. Statutory Instruments Act, 1946.

Assembly? According to Professor S. A. de Smith a similar requirement, which is contained in the English Statutory Instruments Act 1946, is uncertain, although he goes on to say that "it is true that laying requirements have generally been regarded as directory both by the Courts and by learned commentators".[21] De Smith adds:[22]

> "But the wording of the 1946 Act is very strong ("a copy of the instrument.....shall be so laid before the instrument comes into operation") and there is a recent dictum to the effect that those words are to be read in their literal sense (*R* v *Sheer Metalcraft* Ltd. (1954) 1 Q.B. 586 at p. 590); moreover, the duty to lay an instrument before Parliament, especially when it is accompanied by a provision for the annulment or affirmation of the instrument by resolution, is a constitutional safeguard of some value, and an omission to carry out this duty ought not to be lightly regarded".

The legal position, where the statute is silent on the effect of non-compliance, has been stated by these commentators to be that if the non-compliance defeats the intention of the statute, then the provision will be regarded as imperative.

As already stated, there is no provision of law in Sri Lanka corresponding to the Statutory Instruments Act of England in regard to a general procedure for laying subordinate legislation before the National State Assembly. In order to ascertain whether a particular piece of subordinate legislation has the force of law at the time of its publication in the Gazette or after it has been approved by the National State Assembly, one must examine the terms of the statute under which the legislation is made and the language used.[23] Where the enabling statute provided that subordinate legislation by Order of the Minister, varying rates of tax on motor vehicles using heavy oil, "shall come into force on the date of its publication in the Gazette....., and shall be brought before the House of Representatives within a period of one month from the date of the publication of such Order in the Gazette....by a motion that such

21. *Judicial Review of Administrative Action* (2nd ed), p. 131 Craies, *Statute Law*, p. 317. Allen, *Law and Orders* (1965), pp.145-6. *Bailey* v *Williamson* (1873) L.R. 8 Q.B. 118; *Prithi Singh* v *Union of India*, A.I.R. 1959 Manipur 43, 45.
22. *Ibid.*
23. *Podi Appuhamy* v *Government Agent, Kegalle* (1967) 70 N.L.R. 544, at p. 546, *per* Alles J; C. K. Allen, *Law and Orders* (3rd ed.), 145-146.

Order shall be approved", it was held that the provisions were not mandatory and the Order was valid even though the subordinate legislation was not laid before the House as required.[24]

Most enabling Acts, especially in recent times, require that (i) the subordinate legislation made under such Acts shall, as soon as convenient after its publication in the Government Gazette, be brought before the National State Assembly for approval; and (ii) any regulation which is not so approved is deemed to be rescinded as from the date of disapproval, but without prejudice to anything previously done under it from the date it came into operation on publication.[25] The mere confirmation of such subordinate legislation by the National State Assembly does not of course prevent the Courts from considering whether such legislation is *ultra vires* of the enabling Act.[26]

2. Other Legislative Safeguards

As Ministers are responsible to the National State Assembly for the activities of the Departments under their charge any member of the National State Assembly may ask from the Minister concerned questions relating to such departmental legislation. He may also put down a motion, call for a debate, and in extreme cases move a censure of the Government.

The question arises whether these safeguards are sufficient to meet the dangers incidental to subordinate legislation and to maintain effective control by the National State Assembly over the law-making powers of these subordinate authorities. There have been complaints that the control of the House over subordinate legislation is to some extent ineffective and that the time available is not sufficient for adequate scrutiny.

In England too, the Report of the Donoughmore Committee on Ministers' Powers had stated three decades earlier that Parliamentary con-

24. *Podi Appuhamy's case* (*ante*). Contrast *Illeperuma Sons Ltd.* v *Government Agent Galle* (1968) 70 N.L.R. 549. where H. N. G. Fernando C.J held that this laying requirement was imperative. See the discussion of these two cases by L. J. M. Cooray in *The Journal of Ceylon Law*, Vol. 1, pp 16.-20.
25. See, for example, Ceylon Broadcasting Corporation Act, No. 37 of 1966 s. 46 (2); Ceylon Electricity Board Act, No. 17 of 1969, s. 56 (4).
26. *Ram Banda* v *River Valleys Development Board* (1968) 71 N.L.R. 25, at p. 38, *per* Weeramantry J.

trol over subordinate legislation in that country was defective. They recommended that in each House a Standing Committee should be established and charged with the duty of scrutinising (i) every Bill containing any proposal for conferring legislative powers on Ministers, as and when it is introduced; (ii) every regulation made in the exercise of such powers and required to be laid before Parliament as and when it is laid.[27] The Report made it clear that in no case was it contemplated that the Committee should go into the merits or policy of either the Bill or the regulation but would report only upon its form and whether it was wholly normal or in any respect exceptional. The function of the Committee would be to inform the House, in the one case, of the nature of the legislative powers which it was proposed to delegate and, on the other, of the general characteristics of the regulation.

Since 1944 there has been in England such a "Scrutiny" Committee on Delegated Legislation in the House of Commons. The duty of the Committee is to consider whether the special attention of the House of Commons should be drawn to any statutory instrument on any of the following grounds specified in the terms of reference: (1) that it imposes a tax or charge on public revenues; (2) that it excludes challenge in the Courts; (3) that it purports (without any specific authority in the parent Act) to have retrospective effect; (4) that there has been unjustifiable delay in publication or laying before Parliament or in sending a notification to the Speaker when the instrument comes into operation before it has been laid; (5) that its form or purport calls for elucidation; or (6)that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it was made.[28] The reports presented by the Committee have shown that delegated legislation has been carefully scrutinised and that the scrutiny has sometimes resulted in the withdrawal or modification of such legislation.[29] In India too, a similar Committee on subordinate Legislation has existed in the House of the People since 1 December 1953.

There can be no doubt that such a scrutiny Committee on Subordinate Legislation in the National State Assembly can serve a useful

27. Cmd. 4060, pp. 63, 67-69.
28. Report of Select Committee on Delegated Legislation (1953), xiii.
29. See Kersell, *Parliamentary Supervision on Delegated Legislation* (1960) for an account of the work of the Committee.

purpose, particularly in view of the growing volume of subordinate legislation in recent times. The Committee could review also the operation of delegated legislation and consider public grievances in that connection.

B. JUDICIAL CONTROL

Where the power of subordinate legislation conferred by the enabling or parent Act is exceeded, such legislation is liable to be questioned in the Courts on the ground that it is *ultra vires*, because of defects of procedure or of substance. This matter of judicial control of subordinate legislation is considered later in Chapter 19.

C. OTHER SAFEGUARDS

1. Publication

It is an elementary principle that all laws should be accessible to the people. This has been said to be the very justification for the maxim that ignorance of the law is no excuse.[30] The Interpretation Ordinance provides that all rules, regulations and by-laws made by any authority under a power conferred by any enactment shall be published in the Government Gazette and shall have the force of law as fully as if they had been enacted in the enabling statute.

It is generally provided in enabling Acts in Sri Lanka that the subordinate legislation made under the Acts shall come into operation on the date of such publication or on such later date as may be specified in the regulation. There has been published under the authority of the Government a collection of Subsidiary Legislation of general application in seven volumes, up to 30 June 1956, under the Legislative Enactments of Sri Lanka. This superseded the earlier publication of 1938.

In countries such as the United States there is statutory provision for *antecedent* publicity by requiring public notice to be given, subject to certain specified exceptions, of statutory rules which the administrative authority proposes to make. Unless there are special reasons for not doing so, interested persons must be afforded the opportunity of making any written representations before the rules are finally made.[31] Such

30. *Blackpool Corporation* v *Locker* (1948), 1 K.B. 349.
31. See the Amercian Administrative Procedure Act, 1946, and the Attorney General's Manual on the Act (1947), at p. 26, cited by Schwartz, *op. cit.*, p.61.

antecedent publicity undoubtedly encourages popular participation in the rule-making power.

2. Prior Consultation

In addition to the control of subordinate legislation by the National State Assembly and the Courts, there is another safeguard which accords well with government by consent; that is, the process of prior consultation. This process needs to be extended to interests and individuals particularly affected, in addition to advisory bodies assisting Ministries. There is a growing awareness in Sri Lanka of the value of consultations and conferences with interests likely to be affected by the particular subordinate legislation. In England there are many statutes which expressly require such prior consultation. Where an enabling statute requires the prior consultation of a particular body, a failure by the subordinate law-making authority to do so may invalidate a regulation subsequently made by it.[32] Consultation means that sufficient information and opportunity must be given to the authority to enable it to tender advice.[33]

Even if there is no statutory requirement for prior consultation with specified bodies, a departmental practice of consultation with individuals, advisory committees and interests likely to be affected will have the advantage of making the subordinate legislation more acceptable, democratic and beneficial. It is only then that the people will have confidence in the subordinate law-making powers of the Administration.

Administrative Quasi-Legislation[34]

Administrative authorities sometimes issue pronouncements, notifications and instructions setting out rulings and interpretations of certain statutes and the mode in which provisions in such statutes will be put into effect. These statements of the administration are sometimes described as "administrative quasi-legislation". Although such statements have considerable effect in practice for purposes of guidance, they have no legal force. It would, of course, be different if in addition to matters of

32. See *May* v *Beattie* (1927) 2 K.B. 353; *Rollo* v *Minister of Town and Country Planning* (1948) 1 All E.R. 13, 17.
33. *Rollo's case (supra)* at p. 17, *per* Bucknill L.J.
34. See R. E. Megarry, "*Administrative Quasi-Legislation*" (1964) 60 *Law Quarterly Review* (1944) 125; Sir Carlton Allen, *Law and Orders* (2nd ed). pp. 211-212.

purely internal administration, they contain material which is legislative in character and made under the authority of an enabling Act of Parliament.[35] "It is the substance and not the form, or the name that matters".[36] Such sub-delegated legislation is construed strictly by the Courts and has in fact been criticised on the ground that "neither the public....nor the legal adviser of an affected member of the public, however directly he may be affected, has any source of information about his rights to which he can turn as of right and automatically".[37]

35. See *Blackpool Corporation* v *Locker* (1948) 1 K.B. 349, pp. 367-369; *Jackson, Stansfield & Sons* v *Butterworth* (1948) 2 All E.R. 558.
36. *Locker's case (supra)*, at p. 368, *per* Scott L.J.
37. *Ibid.*

CHAPTER 17

ADMINISTRATIVE JUSTICE

An important development in the field of public law in Sri Lanka has been the grant by the Legislature of powers of adjudication to various bodies outside the ordinary Courts of Law. These Administrative Tribunals determine legal rights and disputes arising for the most part in the course of administering economic and social legislation. The progressive extension of the functions and activities of government in recent times has resulted in a proliferation of these Administrative Tribunals.

The question is sometimes asked, what is the nature of the authority to which administrative adjudication should with advantage be entrusted? It may be generally stated that where the deciding authority should be directly accountable to the National State Assembly, the determination should preferably be left in the hands of the Minister or Department. On the other hand, where it is necessary to provide against the danger of undue political pressure being brought to bear on the deciding authority, the determination should be in the hands of another body outside the Department. This latter body or Tribunal should be regarded "as machinery provided by Parliament for adjudication rather than as part of the machinery of administration".[1]

Administrative Tribunals versus Courts

There can be no doubt, as the Committee on Ministers' Powers in England has stated,[2] that "well-considered reasons of practical convenience" may justify the establishment of Administrative Tribunals. Disputes arising in the course of social welfare legislation, for example, are generally speaking unsuitable for decision by Courts of law.[3] Administrative

1. *Report of Committee on Administrative Tribunals and Enquiries (Franks Report)* 1957, Cmd. 218, para 40.
2. Report (1932) Cmd. 4060, p. 115.
3. See W. Ivor Jennings, 'Courts and Administrative Law—The experience of English Housing Legislation', 49 *Harvard Law Review* 426.

Tribunals, on the other hand, are better able to give effect to policy and to adopt a more functional method of interpretation suitable to modern social needs. "Social legislation can rarely be comprehended by seeing its effects as solely an issue between two individuals, but the isolated issue is the centre of traditional common law technique".[4] There is also the fact that in cases where justice can be done only if it is done at a minimum cost, these Tribunals can be made to be cheaper to the parties concerned.[5] In addition, many questions arising under social legislation require for their solution specialised knowledge of the subjects. Tribunals are also not rigidly bound by technical rules of evidence and procedure as the Courts are. They can act more speedily. Often the work of the Courts is such that relief cannot be obtained quickly.

It is therefore wrong to consider the modern exercise of judicial functions by Administrative Tribunals as unwarrantable or as a kind of "New Despotism"[6] or conspiracy on the part of officials to overthrow the Rule of Law administered in the Courts. The Rule of Law is not overthrown when a Tribunal is given a judicial discretion by the National State Assembly. It is overthrown only where the Courts are prevented from determining whether the purported exercise of such powers by Administrative Tribunals are authorised by law. But these advantages possessed by Administrative Tribunals are not in themselves sufficient to justify jurisdiction being given to them in preference to the Courts of law, except where special circumstances clearly so demand. In the absence of special considerations which make a Tribunal more suitable, decisions should be entrusted to Courts of law with their traditions of independence and impartiality.[7]

CLASSIFICATION OF ADMINISTRATIVE TRIBUNALS

There are numerous Tribunals entrusted with judicial functions in Sri Lanka. It is difficult to give an exhaustive classification of such Tribunals except by way of examples.

4. R. M. Jackson, *The Machinery of Justice*, (5th ed.), p. 301, cited in Wade and Phillips, *Constitutional Law*, (8th ed.), p. 695.
5. *Franks Report, op. cit.*, p. 97; W. H. Pillsbury, 'Administrative Tribunals', 36 *Harvard Law Review* 407.
6. Lord Hewart, "*The New Despotism*, (1929), p. 52.
7. *Franks Report*, para. 38. Lord Greene M. R., in "Law and Progress" *Law Journal*. vol 94.

(1) Compulsory Acquisition of Land and Property

There are many statutes which confer powers of compulsory acquisition on public authorities. It is usual for such legislation to provide for the assessment of the compensation payable in such cases.[8] It is also customary to create Tribunals with jurisdiction in relation to these matters. Under the Land Acquisition Act,[9] where the Minister decides that land in any area is needed for any public purpose and a notice to persons interested in the land is published, an acquiring officer is required to hold an inquiry into its market value, claims for compensation, the respective interests of the claimants and other matters which need investigation for the purpose of making an award. The Act also establishes a Board of Review to which persons who are awarded compensation may appeal against the award on the ground that the amount of compensation is insufficient.

(2) Paddy Lands

The Paddy Lands Act, No. 1 of 1958, which was passed to provide for (*inter alia*) security of tenure to tenant cultivators of paddy lands, set up Boards of Review to which appeals lie from certain determinations or decisions made by persons or bodies specified under the Act.

(3) Rent Restriction

The Rent Restriction Act[10] set up a Rent Control Board for each area governed by the Act and a Board of Review to hear appeals from orders made by Rent Control Boards.

(4) Regulation of Industrial Disputes

Under the Industrial Disputes Act,[11] Industrial Courts and Labour Tribunals have been established for the investigation and settlement of industrial disputes. The Court or Tribunal has the duty to make all such inquiries and hear all such evidence as it may consider necessary, and thereafter make such award or order as may appear to it to be just and equitable.

8. By the Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961, however, school properties to which the Act applied were vested in the State without compensation.
9. Chapter 460 of the Legislative Enactments.
10. Chapter 274, ss. 19 & 21.
11. Chapter 131, ss. 4 (2), 31A and 31B.

(5) Workmen's Compensation

The Workmen's Compensation Ordinance[12] provides that if any question arises in any proceeding under the Ordinance as to the liability of any person to any compensation or as to its amount or duration or as to the age of any workman or dependent, the question shall, in default of agreement, be settled and determined by a Commissioner for Workmen's Compensation.

(6) Assessment of Taxes

The Inland Revenue Act[13] provides for an appeal by a person aggrieved against the amount of an assessment to the Commissioner of Inland Revenue and from his determination to the Board of Review.

(7) Licensing of Traders

The Licensing of Traders Act, No. 62 of 1961, makes provision (*inter alia*) for the licensing of traders, for ensuring the maintenance of business standards and morality and for enabling the maintenance of fair and stable prices in essential consumer commodities. The Act empowers the licensing authority to make a "punitive order" suspending or cancelling the licence issued to a trader and requiring him to pay into the Consolidated Fund a sum not exceeding five thousand rupees. A trader against whom a punitive order is made can appeal against it to a Tribunal of Appeal constituted under the Act.

(8) Muslim Marriage and Divorce

Under the Muslim Marriage and Divorce Act[14] Quazis have been invested with powers to inquire into and adjudicate upon certain specified matters. Boards of Quazis hear appeals from their decisions.

(9) Patents and Trade Marks

The Patents and Trade Marks Ordinances[15] provide that the Registrar shall, after hearing the applicant for the grant of a patent or for the registration of a trade mark, as the case may be, and any opposing party who desires to be heard, decide the question of the grant or registration.

12. Chapter 139, s. 30.
13. No. 4 of 1963, ss. 97-99.
14. Chapter 115, s. 47.
15. Chapters 152, s. 11. and 150, s. 12.

(10) Disciplinary Committees of Professional bodies

Under the Medical Ordinance[16] the Medical Council is vested with power to inquire into professional misconduct of medical practitioners whose names are on the register. The Council may erase names from and restore names to the register. The Courts Ordinance[17] and the Law Society Ordinance[18] provide for the holding of preliminary inquiries into cases of misconduct of proctors by Disciplinary Committees of the Law Society. Certain University authorities are also vested with powers to hold inquiries in certain cases of breaches of discipline. In the exercise of these powers the authorities must observe the principles of natural justice.[19]

GENERAL PRINCIPLES OF PROCEDURE

In order to serve the interests of the people, both collectively and individually, and to promote good government, certain recognised principles of procedure should be observed by Administrative Tribunals. These principles have been stated in the Report of the Franks Committee on Administrative Tribunals in Britain to be "openness, fairness and impartiality".[20]

(1) Constitution of Tribunals

The question arises whether members of a particular Tribunal should be appointed by the Minister in charge of theDepartment directly or from a panel chosen by interested bodies. In England the Franks Committee recommended in their Report that the chairman should be appointed by the Lord Chancellor who is in that country responsible for the appointment of Judges to the High Court and for other judicial appointments. The Committee recommended that the other members should be appointed by the Council on Tribunals. The Tribunals and Inquiries Act 1958 provides[21] that the chairmen of Tribunals which are listed in the Act should be selected by the Minister responsible from a panel of persons appointed by the Lord Chancellor. The Act also provides that the Council may make general recommendations to the appropriate Minister on appointments to membership of the scheduled Tribunals. The power of dismissal of members can be exercised by Ministers only with the concurrence of

16. Chapter 105, s. 33.
17. Chapter 6, s. 17A
18. Chapter 277, s. 9.
19. *University of Ceylon* v *Fernando* (1960) 61 N.L.R 505.
20. Cmd. 218 (1957), para. 23.
21. S.3.

the Lord Chancellor. In Ceylon under the previous Constitution the appointment and dismissal of all "judicial officers" (that is, those who were Judges of Courts, other than the Supreme Court, as well as other holders of judicial office) were required to be made by the Judicial Services Commission which consisted of the Chief Justice, another Judge of the Supreme Court and one other person who is or has been a Judge of that Court.[22] Even in regard to members of the Board of Review established under the Land Acquisition Act[23] the Minister was required, before making any recommendation to the Governor-General in regard to such matters as appointment and removal of members, to obtain the advice of the Judicial Service Commission.

Under the present Constitution, the appointment of State officers constituting Labour Tribunals and those the principal duty of whose office is the performance of functions of a judicial nature is made by the Cabinet of Ministers after receiving the recommendation of the Judicial Services Advisory Board. There is a Judicial Services Disciplinary Board to exercise the powers of dismissal and disciplinary control over such State officers administering justice.

(2) Procedure

It is extremely important in the interests of justice that the fundamentals of fair administrative procedure should be laid down with regard to the exercise of discretionary powers of public authorities.[24] As the Franks Report pointed out in England, there is the need for openness, fairness and impartiality. The procedure must, for example, in the case of statutory inquiries by Tribunals, enable the parties to present their case fully, to know the case they have to meet and for this purpose to receive in good time a document setting out the main points of the opposing case.[25] Hearings before Tribunals should as a general rule be held in public.

22. See, *The Bribery Commissioner* v *Ranesinghe* (1964) 66 N.L.R. 73.
23. Chapter 460. of the Legislative Enactments.
24. Cooray, *Constitutional Government and Human Rights in a Developing Society* (1969) p. 70; See also Franks Report, para 63, and the U.S. Federal Administrative Procedure Act of 1946 which lays down certain minimum standards of fair administrative procedure.
25. Franks Report, paras. 42, 67-72. See also *Peradeniya Service Bus Co.* v *Sri Lanka Omnibus Co.* (1949) 51 N.L.R.233, at p. 237. As to the right to require an inquiry to be reopened because new factual evidence has been received, see J.A.G. Griffith, *The Council and the Chalkpit* (1961) 39 *Public Administration* 369. See also *Burton* v *Minister of Housing and Local Government* (1961) I.Q.B. 278.

There may of course be certain exceptions: for example, where public security would be involved, where intimate personal or financial circumstances would have to be disclosed and where matters of professional capacity and reputation would be involved.[26]

The right of the citizen appearing before a Tribunal to have the services of legal representation should be curtailed only in the most exceptional circumstances.[27] Such circumstances may exist in arbitral and conciliatory proceedings. The American Federal Administration Procedure Act, s. 6(a), provides that "every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding". The legal aid scheme should be extended at least to the more important Tribunals and particularly to the appellate Tribunals.[28] While the chairman must retain control of the proceedings, this does not justify a limitation upon the right of a party to examine his own witnesses directly or to cross-examine directly the witnesses of his opponent.[29]

The Supreme Court has stated that, even where there is no legal duty to do so, Administrative Tribunals should give reasons for their decisions and make them available to the parties.[30] As the Franks Report points out, "a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out. Further, a reasoned decision is essential in order that, where there is a right of appeal, the appellant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal". Where reasons are given, the decision can be more easily challenged if it discloses an error of law. Proper review by

26. Report, paras. 77-81. Inland Revenue Act, No. 4 of 1963, s 101 (5)
27. Report, para. 87. See s. 6(a) of the American Administrative Procedure Act, 1946. See also Report on 'The Rule of Law in a Free Society", International Congress of Jurists, New Delhi, India (1959), p. 7; and the Report on "Executive Action and the Rule of Law", Rio de Janeiro, Brazil (1962), p. 25; *Pett* v *Greyhound Racing Association Ltd.* (1968) 2 All E. R 545, at p. 549, per Lord Denning, M.R.. cited in the *Report of the Commission on Industrial Disputes (Ceylon)* 1966-69; (S.P. No. 4 of 1970)
28. Report, para. 89.
29. Report, para. 93.
30. *Kandy Town Bus Co. Ltd.* v *Commissioner of Motor Transport* (1949) 51 N.L.R. 153, at pp. 154-156; *Fernando* v. *Paul E.Pieris* (1948) 37 C.L.W. 32. See the British Tribunals and Inquiries Act, 1958, s. 12, and Franks Report, para. 98. See also the American Administrative Procedure, Act,s.8(b); *Padfield* v *Minister of Agriculture* (1968) A.C. 997.

the Courts of decisions is possible only if they are contained in "speaking orders", that is to say, orders which give reasons. The reasons must be proper, adequate and intelligible and deal with the substantial points that have been raised.[31] Where there is a statutory duty to state reasons, if the Tribunal does not deal with the points that arise, the Court can order him to make good the omission.[32] Although a few statutes[33] provide for reasons to be given for decisions, there is a lack of uniformity in this respect in the several Acts creating Administrative Tribunals. Final appellate Tribunals should also publish selected decisions and circulate them to lower Tribunals, not only to satisfy the public that decisions are reasonably consistent but also to guide appellants and their advisers for their future conduct.[34] What is needed in Sri Lanka is an Administrative Procedure Act imposing (*inter alia*) a general duty on Tribunals to give reasons for their decisions. This would, to a large extent, act as a check on the abuse of administrative power.

On the desirability of giving reasons as a check on official "autocracy" some interesting remarks were made by two distinguished members of the Donoughmore Committee on Ministers' Powers in Britain in reply to a witness who insisted unconvincingly that the communication of reasons should be entirely discretionary:

Professor Laski: Would you not agree that to give a decision always without reasons is the very definition of autocracy, and that the giving of decisions without giving the reasons upon which they are based is as near autocracy as you can get?

Miss Wilkinson: Would not the Shah of Persia in his mediaeval days strongly have approved of the views you are putting forward now?[35]

(3) Appeals

It is not feasible to have review by way of appeal on merits from a Tribunal of first instance to a Court of law. Under such a procedure the values of, and responsibility for, administrative adjudication of fact by

31. *Re Poyser and Mills' Arbitration* (1963) 1 All E.R. 612, at p. 616.
32. *Iveagh* v *Minister of Housing and Local Government* (1963) 3 All E.R.817, at p. 820.
33. See the Motor Traffic Act (Chapter 203), ss. 67 (2) and 97 (2); and the Land Acquisition Act (Chapter 460), s. 25 (5).
34. Report, para. 102. *Report of the Attorney - General's Committee* (U.S.), p. 30.
35. *Minutes of Evidence* 266, Q. 3646, quoted by Allen, *Law and Orders*, 167.

administrative experts would be destroyed, and Tribunals "would be turned into little more than media for the transmission of evidence to the Courts".[36] It has also been stated on high judicial authority that the supremacy of law does not demand "that the correctness of every finding of fact to which the Rule of Law is to be applied shall be subject to review by a Court. If it did, the power of the Courts to set aside findings of fact by an Administrative Tribunal would be broader than their power to set aside a jury's verdict"[37]. A flood of appeals may in certain cases clog the administrative machinery. But decisions of Administrative Tribunals should be subject to review by the Courts for excess or abuse of jurisdiction. Judicial review of administrative decisions through writs or by appeal on points of law to the Courts should not, except for grave reasons, be restricted by the enabling statute.[38]

In England there have been suggestions that there should be a general appellate Tribunal outside the ordinary Courts of law with a jurisdiction somewhat similar to that of the *Conseil d'Etat* of France.[39] It would have the power to review the decisions of inferior Administrative Tribunals and similar bodies on all grounds, whether of fact, law or policy.[40] It would also have jurisdiction to hear appeals from decisions of Ministers, and also appeals against harsh or unfair administrative decisions in that field of administration where no special Tribunal or enquiry procedure has been provided.

The establishment of such an appellate body has been opposed mainly on the ground that a dual system of Courts is not desirable. It has been said that "two systems of law would arise, with all the evils attendant on this dichotomy".[41] As Professor W. Friedmann has

36. *Report of the Attorney-General's Committee* (U.S.) p. 91.
37. *St. Joseph's Stock Yards* v *U.S.*, 298 U.S. 38 (1936).
38. See *Franks Report*, para 107. As examples of curtailment of judicial review, see the Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961, s. 9; ("A Vesting Order made by the Minister shall be final and conclusive and shall not be called in question in any court whether by way of writ, order, mandate or otherwise".); See also a similar provision in the Criminal Law (Special Provisions) Act, No. 1 of 1962, s. 8, and the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, s. 25.
39. See, for example, W. A. Robson, *Justice and Administrative Law* (3rd ed.) p. 459. In France the *Conseil d'Etat* hears appeals from the decisions of the Administrative Courts of first instance ("*tribunaux administratif*"). In Germany too, there is a similar structure of Administrative Courts.
40. Robson, *ibid.* Franks Report, para. 120.
41. Franks Report, paras. 121-123; C. J. Hamson, *Executive Discretion and Judicial Control* (1954), p. 123.

pointed out, the basic fallacy in this reasoning is that "there are, in fact, two systems of law in existence, and the dichotomy, 'evil' or otherwise, has been with us for some time. The only difference between the civil law and the common law jurisdiction is that the former openly recognises Administrative Law as a discipline of its own, with its characteristic problems and solutions, whereas the latter continues to live with the fiction that there is only one system of law, the common law, with administrative sideshoots sprouting from the stem here and there. The result is that there is a widespread lack of proper appreciation of characteristic public law problems and institutions, such as the nature of government contracts, the status of the public corporation, the statutory immunity of public authorities, and many more".[42]

Another proposal has been put forward in England by Sir Ivor Jennings. He has advocated an Administrative Court forming part of the High Court and which would hear complaints against excess of powers by administrative authorities and appeals on points of law.[43] According to Jennings such an Administrative Court would adopt new rules of interpretation in relation to the problems of Administrative Law with something of the spirit of the *Conseil d'Etat*.[44]A further proposal was made in a pamphlet entitled *Rule of Law* prepared in 1955 by the Inns of Court Conservative and Unionist Society. It was for the establishment of an Administrative Division of the High Court with general appellate jurisdiction over administrative decisions generally and not only over decisions of Tribunals. It has been said that "even though this proposal avoids conflicting systems of law, it is none the less open to serious objection on the ground that appeals would lie from expert tribunals to an inexpert general appellate body".[45] Professor Friedmann has in reply to this objection stated that it is difficult to grasp "why, in the light of the experience of the Continental highest Administrative Appeal Courts, such a Court in England—or the United States—should be a 'relatively inexpert' body.....What is needed is experience in, and understanding of, the nature of the administrative process and of the basic problems of the relations between governors and governed".[46]

42. *Law in a Changing Society* (1959), p. 413.
43. W. Ivor Jennings, 'The Report on Ministers' Powers' in 10 *Public Administration*, pp. 333-350.
44. Jennings, *op. cit.*, p. 350.
45. Franks Report, paras. 124-125.
46. *Law in a Changing Society* (1959), p. 413.

So far as Sri Lanka is concerned, there is need for a body such as a Council of Tribunals for the purpose of systematising and co-ordinating the various tribunal procedures that exist at the present time. What is also needed is the establishment of a suitable administrative jurisdiction somewhat similar to that of the *Conseil d'Etat* of France. In any event there should be established, at least as an initial step, a small body for the purpose of co-ordinating the constitution and working of Administrative Tribunals and procedures.

CHAPTER 18

THE REDRESS OF GRIEVANCES—THE OMBUDSMAN

With the rapid expansion of the activities of government there has been a simultaneous increase in the powers of administrative authorities. As a result of this development there is an urgent need in this country for the establishment of some independent authority for the securing of redress to aggrieved persons in cases of maladministration where the existing legal and constitutional machinery is insufficient or ineffective. Complaints are often made that proper standards of conduct are not observed by public officers. The complaints include those of negligence, inefficiency, bias, unfair discrimination, oppressive behaviour, delay and even failure to reply to communications addressed to administrative authorities. As the Report of *Justice*, the British section of the International Commission of Jurists, has pointed out with reference to Britain, such complaints "give rise to feelings of frustration and resentment because of the inadequacy of the existing means of seeking redress".[1] In the mixed societies of the Asian region these complaints assume a more serious character than in countries where the population is homogeneous in nature.

Inadequacy of existing Remedies. There is no doubt that in the expanding sphere of State activity and administrative power the present constitutional, legal and administrative remedies are inadequate and inappropriate to deal with some types of maladministration. For example, in order to institute a regular action in a Court of law, the grievance must amount to a cause of action recognised by law. Even in cases where express rights of appeal to the Courts against administrative decisions are conferred by statutes on specified grounds, the scope of the appeal from such decisions is strictly confined to those grounds of appeal. Similarly where a complainant invokes the supervisory jurisdiction of the Supreme Court, it will grant relief only where the administrative agency had exceeded its powers and acted in breach of certain principles recognised by law. The Court limits its control to

1. *The Citizen and the Administration: the Redress of Grievances* (1961), p. 37.

strictly "illegal" acts with the result that the citizen is left without any legal remedy in cases of maladministration which stop short of illegality. As long as a subjective discretion is exercised by an administrative authority on issues of fact, the erroneous decision of that authority on the weight of evidence cannot, unlike in the French *Conseil d' Etat,* be the subject of judicial review. It is well established in Sri Lanka that the reviewing Court does not substitute its own discretion in place of that given to the administrative authority by law. The Court will only interfere with administrative discretion if it is abused or is based on extraneous, irrelevant or improper considerations. Moreover, the Interpretation (Amendment) Act, No. 18 of 1972, has considerably curtailed judical control of administrative authorities though injunctions and declaratory judgments.

It is true that in certain countries, such as the United States, the reviewing Court goes somewhat further than in other common-law countries and examines findings of fact in order to satisfy itself whether or not those findings are based on "substantial evidence". It is also true that Courts in some countries have used their creative power to grant relief in deserving cases. The Courts in the United States and Sri Lanka, for example, have, where statutes have not provided otherwise, controlled the arbitrary exercise of official discretion in withholding passports from citizens of those countries. But the creative power of the Courts by itself is inadequate to correct all types of administrative abuse. There is the further difficulty that even in cases where judicial review is available for redress of grievances, the parties, especially in developing countries, are often too poor or the subject-matter of dispute is too small for such remedies to be pursued in the Courts, having regard to the delays and the high costs of litigation. Another drawback in the judicial remedy is that departmental files and other government documents are sometimes withheld from Courts by the Executive on the legal plea that they relate to affairs of State or are communications made in official confidence by the disclosure of which the public interests would suffer.

Administrative tribunals which have been set up under various statutes do not have a sufficiently wide jurisdiction to deal with the whole area of the exercise of administrative discretion and to provide adequate remedies in cases of maladministration. Moreover, adjudication by tribunals is not appropriate in cases which involve the exercise of discretion based on considerations of policy and which should be govern-

ed by ministerial responsibility. It is not feasible to provide over the whole field of public administration for a statutory procedure for objecting or deciding on objections.[2]

The extension of the statutory right of appeal to Tribunals or to the Courts, although it may be desirable in appropriate cases, particularly in the modern context of developing countries, cannot therefore adequately solve the problem of the abuse of administrative power. Moreover Administrative Tribunals cannot act as quickly, informally or effectively as an Ombudsman or Independent Parliamentary Commissioner. Even in a country like Britain with a proliferation of Administrative Tribunals and with an Administration credited with traditionally high standards of efficiency and fair dealing, there existed, as the famous *Crichel Down* affair so patently revealed, a considerable gap in the remedies against the abuse of administrative power. It will be recalled that this inquiry was ordered by the Minister of Agriculture into the complaint of a person whose land, which had been requisitioned for use as a bombing range during World War II, had not been returned to him when it was no longer needed for the purpose for which it had been requisitioned.[3]

There are numerous "Crichel Downs" in Sri Lanka and in other developing countries but there are only a very few individuals, sufficiently wealthy or influential like Commander Martin who can successfully obtain a similar inquiry under the prevailing system. As Lord Shawcross has said: "With the existence of a great bureaucracy there are inevitably occasions, not insignificant in number, when through an error or indifference, injustice is done—or appears to be done. The man of substance can deal with these situations. He is near to the establishment; he enjoys the status or possesses the influence which will ensure him the ear of those in authority. He can afford to pursue such legal remedies as may be available. He knows his way around. But too often the little man, the ordinary humble citizen, is incapable of asserting himself. The little farmer with four acres and a cow could never have attempted to force the battlements of Crichel Down".[4] In Sri Lanka and other developing countries of South Asia the aggrieved citizen is even more often "the little man".

2. See *Franks Report*, Cmd. 218 (1957) para. 10.
3. *See* Report of the Inquiry (Cmd. 9176).
4. *The Citizen and the Administration.*

Another method which we have already considered and which is adopted for the purpose of obtaining redress of grievances relating to maladministration is through their ventilation in the National State Assembly. This remedy too is not sufficiently adequate for that purpose. It is true that since Ministers are responsible to the National State Assembly for the acts of the Administration, it is open to an aggrieved citizen to try to obtain redress through a member of Parliament. The member can always raise the matter in the Assembly at question time, or by moving that a petition be read and referred to the Public Petitions Committee. The matter may also be raised on adjournment of the House or in the course of debate. However, the effectiveness of the Parliamentary remedy depends to some extent on the political alignment of the member raising it and on the Minister's officials who prepare the answer than on the intrinsic merits of the original complaint. For obvious reasons the Minister will be inclined to be on the defensive and to support the officers who are under his charge. Moreover, in the case of local authorities and public corporations the Minister may disclaim responsibility on the ground that the complaint relates to day-to-day administration. As a learned commentator has stated: "Because of Parliament's inability to cope with the situation, our naive faith (in most Commonwealth countries) in the doctrine of ministerial responsibility has often resulted in something dangerously close to administrative irresponsibility".[5] The institution of the Parliamentary Commissioner or Ombudsman is therefore not an alternative but is a necessary supplement making the procedure of the National State Assembly relating to the redress of grievances more effective.

Other remedies. How then should we bridge this gap in the remedies against administrative action? If we look at precedents in other parts of the world we find that this problem of redress of grievances against administrative authorities has been dealt with in one of two main ways. Firstly, in France and in other countries which have followed the French precedent, there is a special system of Administrative Courts under the supervision of the *Conseil d'Etat* (*Section du Contentieux*) presided over by independent professional Judges to investigate complaints against the administration. These Courts have in France developed a body of *jurisprudence* or case law providing for cheap, flexible and effective remedies

5. Donald C.Rowat, *The Ombudsman—Citizen's Defender* (1965), pp. 290-291.

which are often the admiration of other countries. There is under the French system an effective method of legal and judicial control extending to the fact and grounds of administrative discretionary action. The need therefore arises, in the first place, for an Administrative Court or similar institution based on the French model to supply the gap in the remedies which are available in the Courts of law.

Even in countries with well-developed systems of Administrative Courts, the institution of the Ombudsman, as in Sweden and Finland, performs a necessary and useful function. The two systems are not alternatives. Their functions are not identical. Administrative Courts cannot cope with all possible types of complaints over the whole of the growing fields of public administration. In some areas there is no formal procedure for objecting. Moreover, certain types of complaints of a non-legal nature demand more informal remedies such as explanations and corrections from Government Departments. They demand also cheaper and more expeditious proceedings than are normally found in the Administrative Courts, even though the procedures of these Courts are less formal and less costly than those of the ordinary Courts of law.

The establishment of an Ombudsman has consequently become the increasingly popular method of dealing with the problem of maladministration speedily, informally and without cost. It is not a rival authority to the National State Assembly, the Courts or Administrative Tribunals. On the contrary it fills a gap in an area which is best served by an authority exercising persuasive and recommendatory functions.

Scandinavian Ombudsmen. In Sweden there has been a Parliamentary Commissioner of Justice ("Justitieombudsman") appointed by Parliament since 1809 and a special Parliamentary Commissioner for Military Administration ("Militieombudsman") since 1915. Finland in 1919 established the institution of a Parliamentary Commissioner based on the Swedish model. Alfred Bexelius, the Swedish Ombudsman, has said:

"The ombudsman has great freedom in deciding the direction of his supervisory activity. Every citizen has the right to complain to him. No one need employ a lawyer to approach him. He receives an average of 1,200 complaints a year and he investigates every one that he thinks is well founded. Neither the Government nor Parliament can stop the investigation of a complaint".

The office of Parliamentary Commissioner in Denmark, where there is ministerial responsibility to Parliament, is deserving of special study in Sri Lanka and other countries in this Region which are based on a somewhat similar Parliamentary system of government. The Danish Constitution of 5 June 1953 (Section 55) provided: "By statute there shall be provision for the appointment by the Folketing (Parliament) of one or two persons, who shall not be members of the Folketing, to supervise the civil and military administration of the State". In 1954, Act No. 203 was passed giving effect to this provision and Mr. Stephen Hurwitz became the first holder of the office. The Act provided that the Parliamentary Commissioner should not be a member of the Folketing, should be legally qualified and, subject to such general rules as might be laid down for his activities, be independent of the Folketing in the performance of his duties. According to the Act and the Directives for the Parliamentary Commissioner's activities which were passed by Parliament in 1956 in pursuance of the Act, his jurisdiction comprises Ministers, civil servants and all other persons acting in the service of local authorities in matters for which recourse may be had to a central government authority. It may be mentioned here that, so far as the countries of the South Asian Region are concerned, broadly speaking, it is desirable that the local administration should also be subject to the Ombudsman's jurisdiction. This matter is, however, best decided in practice by each country having regard to the constitutional relation existing between the Central Government and the local authorities.

The 1954 Act in Denmark further provided that complaints might be lodged with the Parliamentary Commissioner by any person and that he might take up a matter for investigation on his own initiative. It is also provided that any person deprived of his personal liberty is entitled to address written communications in sealed envelopes to the Commissioner. In this connection Mr. Hurwitz has mentioned that inspections of prisons and penal institutions are made by him (usually after announcement in advance), and the prisoners are informed that they will have an opportunity of talking to the Commissioner without the presence of any officials from the prison.[6]

Commonwealth Experience. "Justice", the British Section of the International Commission of Jurists, decided in 1959 to institute an

6. *Public Law* (1958), p. 240.

independent inquiry into the adequacy in Britain of the then-existing means for investigating complaints of wrong decisions or of maladministration on the part of Government Departments and other public bodies. The inquiry was directed to cases where there was no Tribunal or other body under legal procedure available for dealing with such complaints, and to a consideration of possible improvements to such means, with particular reference to the Scandinavian institution of the Ombudsman. The Report of "Justice", (which was compiled by Sir John Whytt, formerly Chief Justice of Singapore, and his colleagues who included Lord Shawcross, Sir Sydney Caine, Professor H. W. R. Wade and Mr. Norman Marsh) was published in November 1961. It recommended the establishment in Britain of a Parliamentary Commissioner along the lines of the Scandinavian Ombudsman, with an independent status like that of the Auditor-General. Plans for such a Parliamentary Commissioner for Administration on the general model of the Scandinavian Ombudsman were subsequently outlined in a White Paper issued by the British Government. Explaining the need for such an official, the Government stated that the existing safeguards including the right of appeal to Tribunals or to review by the Courts could not cover all cases where a private person felt he was suffering from an injustice through faulty government administration. The new office was intended "to develop those remedies still further". Although, according to the White Paper proposals, Britain's Parliamentary Commissioner was to deal only with complaints referred to him by members of Parliament, it is interesting to note that it was subsequently suggested by some learned organisations in that country that the initiation of inquiries by the Commissioner should not be restricted to those arising from such complaints.

A Parliamentary Commissioner for Administration was subsequently appointed in Britain under the Parliamentary Commissioner Act, 1967. The Commissioner is independent of the Executive, like the Judges. He deals with complaints of injustice in consequence of maladministration against public authorities specified in the Act and which are referred to him by members of Parliament. As the Parliamentary Commissioner (Sir Edmund Compton) has pointed out, "it was the desire of Parliament that the office should not be set up to replace the intimate connections that M.Ps have with their constituencies—but rather to reinforce them". There are, however, serious disadvantages in obliging an aggrieved constituent to deal with his M.P. alone. In fact, as already stated, there

has been considerable criticism of this provision in England. It is significant that in this connection the Ceylon Colloquium on the Rule of Law held in February 1966 has stated in its conclusions that the Ombudsman should, as in New Zealand, deal with complaints lodged by any aggrieved person and also take up any matter on his own initiative. On 22 July 1969 the British Prime Minister informed the House of Commons that the Government had also accepted in principle the establishment of an Ombudsman system for investigating complaints of maladministration by local government. He said it would be analogous to that of the Parliamentary Commissioner (in central government affairs) but separate from it.[7]

In 1959 a paper of Professor Hurwitz on the institution of the Ombudsman in Denmark was presented at a United Nations Seminar in Ceylon. This paper created a good deal of interest in the English-speaking world and particularly in New Zealand.[8] In 1962 New Zealand had the distinction of being the first Commonwealth country to adopt the institution of the Ombudsman. The New Zealand Parliamentary Commisioner (Ombudsman) Act, No. 10 of 1962, provides for the investigation, either on receiving a complaint or of his own initiative, of "any decision or recommendation or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity" in or by any of the scheduled Departments of State and other organizations. Unlike his British counterpart the New Zealand Commissioner has authority to investigate all "unfair and unjust" decisions, and not merely those involving maladministration. The Commissioner is not authorised to investigate any decision, recommendation, act or omission in respect of which a right of appeal or objection or a right to apply for a review on the merits of the case lies to a Court or Tribunal, whether or not the right of appeal or application has been exercised.

The Commissioner in New Zealand is appointed by the Governor-General on the recommendation of the House of Representatives. He is removable only on an address from the House. His power is limited to making a recommendation to the competent executive body. Unlike his Swedish counterpart, he has no power to institute proceedings for

7. *Public Law* (1969), p. 319.
8. D. J. Hewitt, "The Origin of the Ombudsman in New Zealand and His Work", *The New Zealand Law Journal* (1966), pp. 345-347; Robson, *Journal of Public Administration*, vol. 22, p. 79.

maladministration nor even to order proceedings to be instituted, as in Denmark. The Commissioner's power is nevertheless sufficient to discourage maladministration because such acts would be the subject-matter of Ministerial and Parliamentary questions. The fear of publicity minimises to a large extent acts of injustice. The Commissioner is precluded from investigating such matters as legal advice given to the Crown, discipline and terms of service in the armed forces and other matters in which there are already statutory provisions for appeal or review. It is also provided that the Commissioner must, on the request of any Minister, consult that Minister before reaching a final opinion and that any Minister who is concerned may be consulted at any time during or after the investigations. There is further provision that disclosure cannot be required where the Attorney-General certifies that the giving of information or the answering of any question or the production of any document or paper or thing might prejudice security, defence, international relations, the investigation and detection of offences, or which would involve the disclosure of proceedings of the Cabinet or any Cabinet committee relating to matters of a secret or confidential nature.

Sir Guy Powles was appointed on 1 October 1962 as the first holder of this office in New Zealand. As Ombudsman, Sir Guy formulated general principles of procedural fairness and administrative courtesy and laid down standards of conduct which the Administration should obey. He also laid down that matters of policy were not matters of administration which were within his jurisdiction.

The Report of the New Zealand Ombudsman for 1964 showed the extent to which administrative injustice could exist even in a modern welfare State, and how satisfactorily many acts of maladministration could be remedied by the institution of the Ombudsman. In numerous cases both sides had been brought together by the Ombudsman and a mutually satisfactory solution arrived at. The Report contained a summary of one particularly noteworthy case dealt with by the Ombudsman. It is recorded that after a complaint had been investigated by the Ombudsman the Chairman of the Social Security Committee apologised to a mother of four children who had been told by one of his officers to return the next day to collect her new order book although she had already travelled a considerable distance to come to the office. Similar cases of maladministration are of considerable frequency in other welfare States but go without any redress in the absence of suitable remedial machinery.

The Norwegian Government's statement introducing the Ombudsman Bill in the Storting (which provided for the establishment of an Ombudsman for Civil Affairs in 1962) is of interest to developing countries of the Commonwealth. It summarised the chief merits of this institution:

"The system of an Ombudsman may be of great help to anyone who feels that he has been subject to abuse of power by administrative authorities. To bring a suit at a court of justice may appear to be difficult and expensive. Not everybody will have the opportunity of having a case debated in the Storting by interpellation and question. Many people will also shrink from the idea of going to the newspapers with a case. By bringing the matter before the Ombudsman, the person concerned may have it examined in a simple and inexpensive manner.

The system will probably be advantageous to the public service also, as the Ombudsman will clear up and eliminate complaints which have no firm basis. In this way he may turn out to be a protector of government employees as against querulous and other quarrelsome persons. Further, the Ombudsman may lessen the burden of work for the members of the Storting, who now constantly get complaints from private persons concerning the activities of some administrative authority".[9]

So far as the developing countries of the Commonwealth are concerned it is of particular interest to note that the Constitution of Guyana provides for the appointment of an Ombudsman. The Guyana Ombudsman investigates complaints of injustice in consequence of a "fault in administration". Such fault includes discrimination on grounds of race, place of origin, political opinion, colour or creed.[10] The experience of the Ombudsman in Guyana would be valuable especially to those developing countries with societies that are heterogenous.[11]

Mention should also be made of the fact that in Soviet Russia, in East European countries, in the Philippines and in Japan there are institutions which in some respects resemble that of the Ombudsman. Even in the United States a strong case has been made out for American

9. Government Bill, No. 30 (1959-60), 6.
10. Constitution of Guyana, Art. 56.
11. See, Hing Yong Cheng, "The Emergence and Spread of the Ombudsman Institution", *The Annals of the American Academy of Political and Social Science* (May 1968), p. 27.

Ombudsman by such eminent jurists as Walter Gellhorn and Kenneth Culp Davis.[12] In Gellhorn's view, although the U.S. is rich in responsive administrators and procedural safeguards against official abuse, the country's channels of complaint are so clogged that citizens either get no hearing or win isolated victories that rarely cure the root causes of their grievances.[13] Davis too has found the basic idea of the Ombudsman "throughly sound" and "exceedingly attractive". He has stated:

"Neither codes of uniform administrative procedure nor laws prescribing minimum procedural safeguards can accomplish the single objective of devising better protection against unfairness and at the same time increasing the effectiveness of the administrative process. What we need are sustained, continuing inquiries, embracing all kinds of governmental processes in all the myriad agencies".[14]

Sri Lanka. The question of the desirability of having an Ombudsman in Sri Lanka, particularly in view of the increasing growth of administrative powers, was raised by the author in April 1963 in the course of a public lecture given at the Institute of Chartered Accountants.[15] It was also suggested that this method of dealing with maladministration through an Ombudsman was peculiarly suitable for developing countries of South Asia such as ours, because most of the complainants were persons of limited means. The informal nature of the investigation by an Ombudsman or a Parliamentary Commissioner for Administration will not normally involve any expenditure by way of legal costs or other expenses. If, however, the Ombudsman does determine in an exceptional case that any person should be represented by lawyers or otherwise, it could be provided in the Act constituting the office that he may consider payment towards that person's legal costs in the case.

In recent years the agitation for an Ombudsman has been considerably stepped up in this country. There have been numerous allegations of abuse of powers by State officers, including the Police. Those allegations are at present given publicity in various forums. Those State

12. Walter Gellhorn, "Administrative Procedure Reform: Hardy Prerennial, 48 *American Bar Association Journal* (March 1962)243. Kenneth Culp Davis, "Ombudsman in America"; *University of Pennsylvania Law Review* 109 (June 1961.)
13. See *Ombudsmen and Others* (1966) and *When Americans Complain* (1966); See also *Time* Magazine, 2 December 1966.
14. "Ombudsmen in America", (1962) *Public Law*, pp 41-42.
15. See *Constitution and Public Finance in Ceylon*, pp. 8-9, 15.

officers, who now complain that allegations made against them are baseless, will themselves welcome a stoppage of the present practice and its substitution by an investigation by a high independent official like the Ombudsman. They would thus be protected from baseless allegations. Moreover, the establishment of the Ombudsman will enable Ministers and State officers, to devote more time for their administrative duties, due to the shrinkage in the correspondence between them and citizens with regard to the redress of wrongs alleged to have been done by the Administration.

The South-East Asian and Pacific Conference of Jurists held in Bangkok in February 1965 made a Declaration that, in the light of the experience gained in Scandinavia and New Zealand, consideration should be given to the Ombudsman concept as a means of individual redress and the improvement of administration. The Conference arrived at the conclusion that, while adaptation to local circumstances would be necessary, it was understood that the basic principles underlying such a concept were: the complete independence of the office from the Executive; its full and untrammelled power, including access to files and the hearing of witnesses, to investigate complaints against administrative actions of the Executive; and the limitation of its power to recommendations addressed to competent legislative and executive organs.[16]

The Declaration of Colombo which was made by the South-East Asian Conference of Jurists (Ceylon Colloquium), who assembled in Colombo from 10-13 January 1966, also noted:

"That a Parliamentary Commissioner for Administration or Ombudsman provides an informal and prompt means of drawing attention to the grievances of citizens in their dealings with the administration, of securing redress of such grievances by the weapons of publicity, persuasion and recommendation and generally of ensuring the highest standards of efficient and fair administration".[17]

When this question of the appointment of an Ombudsman has been mooted in some countries, certain arguments have been adduced against

16. *Report on the Proceedings of the South-East Asian and Pacific Conference of Jurists*, 1965 (International Commission of Jurists, Geneva), p. 184.
17. *The Rule of Law and Human Rights* (International Commission of Jurists, Geneva) 1966, p. 71.

it. For instance, in countries with systems of Cabinet government it has sometimes been said that the powers of the Ombudsman relating to discretionary decisions of administrative authorities may interfere with the execution of policy for which the Ministers are responsible and answerable to the people and their representatives in the Legislature. But it has not been suggested by those who recommend the establishment of an Ombudsman that his jurisdiction should extend to any consideration of policy. There cannot therefore be any interference with ministerial responsibility to Parliament. His main function is to receive and investigate complaints. As Professor Stephen Hurwitz has stressed with reference to the functions of the Parliamentary Commissioner in Denmark, "he has no authority to change an administrative decision. The duty of the Commissioner is to act as a supervisor of government administration and not as a special court of appeal. The administration is not obliged to follow the recommendations of the Commissioner....."[18] Nor should the existence of the Ombudsman interfere in any way with the existing practice of referring complaints to members of Parliament so that they may raise those matters in the National State Assembly. On the other hand, it is very likely that members will welcome the opportunity and find it convenient to refer such complaints where necessary to the Ombudsman and secure justice for their constituents. At present these complaints are referred to the appropriate Department which in effect acts as a judge in its own cause.

It has been stated, mainly by those in charge of the Administration, that the smooth working of governmental machinery and indeed the public interest itself would be adversely affected if every official act or document becomes open to scrutiny as of right at the instance of citizens. But the public interest does not seem to have suffered in a country like Sweden where for nearly two centuries citizens have had access to official documents subject to a few exceptions, such as those which relate to the security of the country, its relations with foreign Powers and the prevention and prosecution of crime. The conclusions of the Ceylon Colloquium on the Rule of Law also state that, so far as the countries of the South Asian Region are concerned, the Ombudsman should have the power to require full disclosure of documents except in respect of such matters as security, defence, international relations and Cabinet papers.

18. *The Ombudsman* (1961) Copenhagen, p. 11.

Another objection which was originally put forward by some civil servants in Denmark was that the institution of the Ombudsman would result in less flexibility, in that public servants would be afraid to take responsibility without being protected by written rules. This fear too has apparently been proved by experience to be unfounded.[19] In fact, in Scandinavian countries the Public Service has continued to be at least as efficient as it was before the establishment of the office of Ombudsman. It has further been objected that it would be difficult to obtain the services of a suitable person who would enjoy the confidence of the Legislature and of the country as a whole. But there are persons, such as present or former members of the Judiciary, who will command the necessary public confidence.

A more serious objection against the establishment of an Ombudsman is that in countries inhabited by large populations he could not possibly deal with the numerous complaints that would be made. It is also said that a proliferation of regional Ombudsmen on the lines of a Government Department would run the serious risk of de-personalising the institution and minimising the value of a man of integrity respected by the community[20]. Whatever be the merits of these contentions, so far as small countries like Sri Lanka are concerned, there will not be the same organisational difficulties, and an Ombudsman with a relatively small department will be sufficient. In countries like Denmark, Sweden and New Zealand the complaints received are dealt with by small staffs.

There is also the objection that is sometimes taken, that the establishment of such an institution would result in a multiplication of unfounded complaints against administrative officials, a result which it is said would lead to a discontended Administration. As a matter of fact, many public servants, police officials in particular, have considered the present position in Sri Lanka and other countries of the Region to be demoralising. They complain that, in the absence of machinery for the proper investigation of alleged administrative abuses by an independent official, allegations which they consider unfounded and unjustified are made by interested persons in public forums without the officials concerned being

19. I. M. Pederson, "The Danish Parliamentary Commissioner in Action", *Public Law*, 1960, p. 115
20. See L. J. Blom-Cooper, 'An Ombudsman in Britain", *Public Law*, 1960, p. 149.

given an opportunity of meeting the charges and exculpating themselves. Such officials would welcome an investigation by an independent official like the Ombudsman. It is noteworthy that the annual reports of the Swedish Ombudsman, for example, show that more than 90 per cent of the complaints are found to be groundless.[21] The Ministers too, who will be relieved to a great extent of the necessity of inquiring into such complaints against State officers, will be able to devote more of their time to the important functions of government.

Against these objections, perhaps the most formidable argument in favour of an Ombudsman is that the mere existence of such an official would go a long way to discourage administrative officials from abusing their powers through fear that such abuses and injustices would be brought by the victim to the "Grievance Man", and through him, where necessary, to the Minister and to the National State Assembly itself. This has been the experience not only of the Scandinavian countries but also of New Zealand. Moreover, as Alfred Bexelius, the Swedish Ombudsman, has stated:

"Even if the Ombudsman's office has not done and cannot do anything remarkable, it is an expression of real democracy that society maintains an institution with the object of protecting citizens against society's own organs, and that everybody in society has the right to have his complaints against authority investigated, even if he is poor and without social position in the country".

21. *The Ombudsman— Citizen's Defender*" (Edited by Donald C. Rowat) 1965, p. 230

CHAPTER 19

JUDICIAL CONTROL OF POWERS—THE SCOPE OF REVIEW

1. EXCESS OR ABUSE OF POWERS—DOCTRINE OF ULTRA VIRES

According to the popular conception of the Rule of Law, there should be adequate judicial safeguards to ensure that public authorities exercise the powers vested in them within the limits imposed by law. The application of the doctrine of *ultra vires* is designed to ensure that public authorities do not exceed or abuse their legal powers. If they do so, the Courts will declare such acts *ultra vires* and invalid. The *ultra vires* doctrine implies that "discretinary powers must be exercised for the purposes for which they were granted; relevant considerations must be taken into account and irrelevant considerations disregarded; they must be exercised in good faith and not arbitrarily or capriciously. If the repository of the power fails to comply with these requirements it acts *ultra vires*".[1]

In France, unlike in Sri Lanka and other common law countries, there is a separate system of Administrative Courts, at the apex of which is the *Conseil d'Etat*, for the purpose of reviewing the exercise of administrative powers in relation to the rights of citizens. The principle of *legalite* recognised by the French Administrative Courts is wider and more flexible than the doctrine of *ultra vires* and the rules of natural justice adopted in common law countries.[2] But there seems to be no essential difference between the grounds stated earlier for quashing an act of a public authority as being *ultra vires* in common-law countries and the French doctrines of *exces de pouvoir* (act done by a public authority outside its legal powers) and of *detournment de pouvoir* (power possessed by a public authority used by it for a purpose outside its intended scope while adhering to formal legality).

1. S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed.), p. 89.
2. See Brown and Garner, *French Administrative Law* (1967), p. 109; see also Schwartz, *French Administrative Law and the Common Law World* (1954); C. J. Hamson, *Executive Discretion and Judicial Control* (1954).

Want or Excess of Jurisdiction. If a person or body exercising a power is illegally or improperly constituted, an act done by such person or body may be declared *ultra vires* and void.[3] Where the qualifications for membership or the required quorum of a Tribunal are prescribed by statute, the provisions must be strictly complied with.[4] If under a statute the jurisdiction which is conferred on a body depends on the existence of certain facts, the absence of an essential fact will deprive that body of its jurisdiction and any decisions made by it will be *ultra vires*. These facts, which constitute a condition precedent to the exercise of the administrative power or jurisdiction, are often referred to as "jurisdictional facts". Unless the legislation has entrusted the body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, that body, although it can inquire into the facts in order to decide whether or not it has jurisdiction, cannot give itself jurisdiction by wrongly deciding those facts to exist.[5] Thus, in *Leo* v *The Land Commissioner*,[6] where the Land Commissioner was empowered under the Land Redemption Ordinance to acquire "agricultural land" as defined in the Ordinance and no other property, a purported exercise of the power was quashed and held invalid on the ground that, in the opinion of the Court, the property in question was not "agricultural land" within the meaning given in that statute. Gratiaen J said:[7] "....the mere fact that he (the Land Commissioner) was 'satisfied' (which is conceded) did not vest him with jurisdiction if in fact the land was not 'agricultural' in character". Again, in a well-known English case, where power had been given to a local authority to acquire compulsorily land except when it did not form part of a park, the Court held that the land was in fact part of a park and quashed the order of the local authority which had been confirmed by the Minister.[8] Where the Court decides that the facts as found by the Tribunal are jurisdictional it may itself inquire into and determine those

3. *R* v *Nat Bell Liquors* (1922) 2 A.C. 128; *Woollett* v *Minister of Agriculture and Fisheries* (1955) 1 Q.B. 103.
4. *Potato Marketing Board* v *Merricks* (1958) 2 Q.B. 316.
5. *Leo* v *The Land Commissioner* (1955) 57 N.L.R. 178; *White and Collins* v *Ministry of Health* (1939) 2 K.B. 838; *R* v *Commissioners for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313, at p. 319, *per* Lord Esher M.R.; *R* v *Fulham Rent Tribunal, ex parte Zerek* (1951) 2 K.B. 1, at p.6; *Mudanayake* v *Sivagnanasunderam* (1951) 53 N.L.R. 25. *Eshugbayi Eleko* v *Government of Nigeria* (1931) A.C. 662, at p. 670. See also the American cases of *Crowell* v *Benson* (1932) 285 U.S. 22 and *Social Security Board* v *Nierotko* (1946) 327 U.S. 358, 369.
6. (1955) 57 N.L.R. 178.
7. At p. 182.
8. *White and Collins* v *Minister of Health* (1939) 2 K.B. 838

facts but will, however, be reluctant to disturb the Tribunal's finding where there is a conflict of evidence[9]. It is necessary to state that the difficulty about this concept of "jurisdictional fact" is that it is not always easy to decide what facts are jurisdictional and what facts are not. The decision in such cases is often quite arbitrary.

Defects in Procedure. Where a statute specifies a particular procedure for the exercise of a certain power, the failure to follow that procedure may make the exercise of the power *ultra vires* and void.[10] Procedural defects which deprive a body of jurisdiction cannot be cured by acquiescence or waiver.[11]

In order to determine whether the procedural requirements are mandatory or merely directory not affecting the validity of the act done, the whole scope and purpose of the enabling statute as well as the practical effects of the exercise of the power on individual rights will be considered.[12] If there is a substantial compliance with the procedure, a trivial departure from the prescribed manner or form will not invalidate the act.

Writs of the Supreme Court being discretionary they will not be issued for disregard of procedural requirements if the consequences of granting the writ would be disastrous to the public interest. Where the validity of an Act of Parliament was challenged on the ground that one of the members of the former House of Representatives had been elected to represent two electoral districts, the Supreme Court refused to grant a writ, taking into consideration that its grant would nullify all legislation passed by Parliament since it came into existence as well as all actions taken under them.[13] If a statute empowers a Minister to exercise a power

9. *R* v *City of London Rent Tribunal,ex parte Honig* (1951) 1 K.B. 641. *R* v *Fulham Hammersmith & Kensington Rent Tribunal, ex parte Zerek* (1951) 2K.B. 1, at pp. 11-14.
10. *R* v *Minister of Health, ex parte Davis* (1929) 1 K.B. 619; *Minister of Health* v *The King* (on the prosecution of Yaffe) (1930) 2 K.B. 98; (1931) A.C. 494; *Franklin* v *Minister of Town and Country Planning* (1948) A.C. 87, 103; *R* v *Paddington and St. Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd.* (1949) 1. K.B. 666. *Ridge* v *Baldwin* (1964) A.C. 40 at p. 117.
11. *Ridge* v *Baldwin* (1964) A.C. 40.
12. See de Smith, *op. cit.*, p. 126-128; *Francis Jackson Development Ltd.* v *Hale* (1951) 2. K.B. 488, at p.493; *Hill* v *Ladyshore Coal Co.* (1930) *Ltd.* (1936) All E.R. 299.
13. *P.S. Bus Co. Ltd.* v *Ceylon Transport Board* (1958)61 N.L.R. 491; *Simpson* v *Att. Gen.* (1955) N.Z.L.R. 271.

after consulting a specified body, the failure to consult that body before exercising the power may make such action *ultra vires*.[14] Consultation means that the Minister must give sufficient information and opportunity to the particular body to tender advice.[15] Where the Minister is required to consider the report of his officer, an order of the Minister cannot be challenged on the ground that he has not acted on the recommendations contained in the report so long as he has in making the order taken the report into consideration.[16]

Improper Purpose. The powers of public authorities must be exercised for the purpose for which they were granted.[17] They must be exercised in good faith and not for an improper purpose.[18] So long as the power is exercised for a purpose which is within the terms of the statute, the motive may be irrelevant.[19] A distinction cannot, however, always be drawn between motives and purposes. Although it is said that the law is not, as a rule, concerned with motive as a primarily subjective phenomenon, both motive and purpose in the sense of a desired end may, if they affect the quality of the act, render that act invalid.[20] A "malicious" misuse of authority, as Viscount Radcliffe has suggested in the Ceylon case of *David* v *Abdul Cader*,[21] may cover a set of circumstances which

14. *Virginia Cheese & Food Co.* v *Minister of Agricultural Economics and Marketing* 1961 (1) S.A. 229; see also *May* v *Beattie* (1927) 2 K.B. 353. Griffith & Street, *op. cit.* (4th ed.), pp. 103-104.
15. *Rollo* v *Minister of Town and Country Planning* (1948) 1 All E.R. 12; *see also Re Union of Benefices of Whippingham and East Cowes* (1954) A.C. 245; *Port Louis Corpn. v Attorney - General of Mauritius* (1965) A.C. *IIII* (P.C.): *there must be genuine consultation.*
16. *Roberts* v *Hopwood* (1925) A.C. 578, at pp. 606-607, *per* Lord Sumner; de Smith, *op. cit.*, at p. 265.
17. *Leeds Corporation* v *Ryder* (1907) A.C. 420, at p. 423.
18. *Westminster Corporation* v *London and North Eastern Railway.* (1905) A.C. 426; *Sydney Municipal Council* v *Campbell* (1925) A.C. 338. (Having a power to acquire land compulsorily for the purpose of effecting improvements to the city, acquisition with the object of obtaining an anticipated enhanced value held to be void); *Roberts* v *Hopwood* (1925) A.C. 578 at p. 610 (an expenditure on a lawful object might be so excessive as to be unlawful); *Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation* (1948) 1 K.B. 223; (1947) 2 All E.R. 680. *Prescott* v *Birmingham Corporation* (1954) 3 All E.R. 698; (1955) Ch. 210 (grant of concessionary fares on municipal corporation buses was *ultra vires*, not being a proper exercise of discretion); *Roncarelli* v *Duplessis* (1952) 1 D.L.R. 680; (1959) S.C.R. 121.
19. *Robins (E) & Sons Ltd.* v *Minister of Health* (1939) 1 K.B. 520, at p. 537.
20. S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed.) p. 312. See also the Australian case of *Arthur Yates & Co. Pty. Ltd* v *Vegetable Seeds Committee* (1945) 72 C. L.R. 37.
21. (1963) 65 N.L.R. 253; (1963) 3 All E.R. 579. Se also *Roncarelli* v *Duplessis* (1959) S.C.R. 121.

go beyond the mere presence of ill-will and amount to an actionable breach of duty. In that case it was held by the Privy Council that the chairman of the urban council as the licensing authority owed a duty to the applicant for the licence with regard to the execution of the statutory power and that if the chairman had in fact acted maliciously in refusing the licence, an action for damages might lie. Evidence of motive or ulterior purpose of a representative legislative body, however, as opposed to one exercising merely administrative functions, may not be admissible.[22]

Sometimes a public authority may have exercised a power for authorised as well as unauthorised purposes. In such a case in order to determine the validity of the act, the Courts have tried to ascertain the "true purpose" for which the power was exercised.[23] In England Denning L. J. in a dissenting judgment has suggested for the determination of validity the test of "dominant purpose".[24]

Extraneous Considerations. An administrative body must not take into account extraneous or irrelevant considerations or ignore relevant or material matters as may be inferred from the enabling Act. If it does so, the Courts will quash such acts as *ultra vires* and void.[25] However, the Courts do not act as a Court of Appeal or encroach on a discretionary power given by statute by forcing it to exercise the power in a particular manner. The Courts go no further than to ensure that the body exercises its discretion to hear and determine the matter according to law.[26] A refusal to admit relevant evidence may amount to an abuse of discretion constituting a refusal of jurisdiction.[27] Similarly an erroneous admission of evidence may amount to an excess of jurisdiction. But "it is often difficult to draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds which it was intended to take into consideration and those cases where it had heard and determined upon grounds outside and beyond its jurisdiction".[28]

22. *Arthur Yates & Co. Pty. Ltd.* v *Vegetable Seed Committee* (1945) 72 C.L.R. 37.
23. *Westminister Corporation* v *London and North Western Railway* (*supra*); *The King* v *Brighton Corporation, ex parte Shoesmith* (1907) 96 L.T. 762.
24. *Earl Fitzwilliam's Wentworth Estates Co.* v *Minister of Town and Country Planning* (1951) 2 K.B. 284, at p. 307.
25. *Associatied Provincial Picture Houses Ltd.* v *Wednesbury Corporation* (1948) 1 K.B. 223, at pp. 233-4; *Roberts* v *Hopwood* (1925) A.C. 578, at p. 600.
26. *Smith* v *Chorley R.D.C.* (1897) 1 Q.B. 678, at 680-681; *Fraser* (*D.R.*) *& Co. Ltd.* v *Minister of National Revenue* (1949) A.C. 24, at p. 36.
27. *R* v *Marsham* (1892) 1 Q.B. 371, at p. 378, *per* Lord Esher.
28. *R* v *Port of London Authority, ex parte Kynoch Ltd.* (1919) 1 K.B. 176, at p. 183, *per* Bankes L.J.

Unreasonableness. Unless there is a statutory duty to act reasonably, the unreasonable exercise of a discretionary power in itself is not, as a general rule, a ground for judicial review. But where an administrative decision "is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".[29]

So long as a discretion has been lawfully exercised by an administrative authority, the Courts will desist from substituting their own decision for that of the deciding authority even where the latter decision has been against the weight of evidence. The Courts often accept administrative decisions, not because they have no right to determine what is lawful but "simply because they are themselves ill-equipped to weigh the merits of one solution of a practical question as against another. If the review of administrative determinations were to be very broad, with the reviewing Court deciding the case *de novo* on its independent judgment, Administrative Tribunals would be turned into little more than media for transmission of the evidence to the Courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications".[30]

A clear line cannot be drawn between review, on the one hand, for taking extraneous considerations into account or ignoring relevant considerations and, on the other, for unreasonableness of the administrative decision.[31] It is interesting to note in this connection that in France the Conseil d'Etat will quash as a *detournement de pouvoir* the use of power or discretion not clearly directed to the attainment of that purpose so read into the statute by it.[32]

In the United States the Courts review administrative decisions which are not based on substantial evidence, that is, by "such relevant

29. *Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation* (1948) 1 K.B. 223, at p. 230 *per* Lord Greene M.R.; see also *Willams* v *Giddy* (1911) A.C. 381; *Robinson* v *Minister of Town and Country Planning* (1947) K.B. 702, at p. 724; *Smith* v *East Elloc Rural District Council* (1956) A.C. 736, *per* Lord Reid; *Union Government* v *Union Steel Corporation* (1928) A.D. 220.
30. Bernard Schwartz, *American Administrative Law* (2nd ed), p. 190, quoting *Report of the Attorney-General Committee*,p. 91.
31. See *Roberts* v *Hopwood* (1925) A.C. 578 (although a local authority was empowered to pay its employees such wages as it "may think fit", wage resolutions which were guided by "executive principles of socialistic philanthropy" were *ultra vires*. See also *Prescott* v *Burmingham Corporation* (1955) Ch. 210; de Smith *op. cit.*, p. 330.
32. C. J. Hamson, *Executive Discretion and Judicial Control*, at p. 167.

evidence as a reaonable mind might accept as adequate to support a conclusion".[33] This American theory of review, as Professor Bernard Schwartz has pointed out, "is not as different from that which prevails in Britain as one might at first believe....since the American courts themselves do not inquire into the weight of the evidence.....The substantial evidence test is thus a test of the *reasonableness*, not of the *rightness*, of administrative findings of fact".[34] Professor E. C. S. Wade too has stated that the difference between the American and the English scope of review is "of less significance since an English court can fall back on the 'no evidence' rule, i.e. that as a matter of law an inference from the facts does not logically accord with and follow them, as the late Lord du Parcq once put it".[35] In *Ceylon Transport Board* v *Gunasinghe*[36] it was held that a Tribunal's finding of fact for which there is no evidence—a finding which is both inconsistent with the evidence and contradictory of it—may be interfered with on the basis of error on a question of law. Though the basic theory of review is similar in the United States the scope of review in this respect is actually narrower in Britain. In Sri Lanka too, as in Britain, the reviewing Court often looks only to satisfy itself that there is some evidentiary basis for the administrative finding, and does not, as in the United States, undertake a quantitative examination of the supporting evidence.[37] The American method of review has the advantage of being non-jurisdictional and therefore avoids the difficulty of deciding whether any given fact is jurisdictional or not.

In the case of by-laws made by subordinate authorities, they may be declared void not only, as in the case of other delegated legislation, as being *ultra vires* on the ground of repugnancy to the enabling Act or other law,[38] but also because they are unreasonable.[39] "If, for instance, they

33. *Consolidated Edison Co.* v *National Labour Relations Board* (1938) 305 U.S. 197, at p. 229, *per* Chief Justice Hughes. Griffith and Street, *op. cit.* 230. See Walter Gellhorn, *Administrative Law*, p. 928 for other authorities. See also L. Jaffe, "Judicial Review: Question of Fact", 69 Harvard Law Review 1020 (1956).
34. *American Administrative Law* (2nd ed.), pp. 196. 197, 200, *Minister of National Revenue* v *Wrights' Canadian Ropes Ltd.* (1947) A.C. 109, 123, *per* Lord Green M.R. See also the Ceylon case of *Heath & Co. (Ceylon) Ltd.* v *Kariyawasam* (1958) 71 N.L.R. 382.
35. Foreword to Schwartz, *American Administrative Law* (1950) vi. citing *Bean* v *Doncaster Amalgamated Collieries Ltd.* (1944) 2 All E.R. 279, at p. 284. See the criticism of this statement in Griffith and Street, *Principles of Administrative Law* (4th 3d.), pp. 230-231.
36. (1968) 72 N.L.R. 76. See also *Inland Revenue* v *Fraser* (1942) 24 Tax Cases 498.
37. Schwartz, *op. cit.*, p. 198.
38. *Powell* v *May* (1946) K.B. 330.
39. *Kruse* v *Johnson* (1898) 2 Q.B. 91; *Repton School Governors* v *Repton Rural District Council* (1918) 2 K.B. 133; *Baird* v *Glasgow Corporation* (1936) A.C. 32.

(the bye-laws) were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*'. But ..... a bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there".[40] By-laws made by representative public authorities are interpreted benevolently by the Courts and are presumed to be reasonable. So far as regulations made by Ministers and other Central Government authorities are concerned, particularly where such regulations have to be tabled in the National State Assembly and can be annulled in the usual way, they will not be declared invalid unless they are wholly unreasonable as to go beyond the power given by the statute."[41]

In favour of the benevolent interpretation of by-laws of public representative bodies, it has been urged that "if it is the duty of the courts to recognise and trust the discretion of local authorities, much more must it be so in the case of a Minister directly responsible to Parliament and entrusted by the Constitution with the function of administering the department.....Over and above these reasons for trusting to the Minister's constitutional discretion is the further consideration that these regulations have to be laid on the table of both Houses....and can be annulled in the usual way".[42] But the mere fact that subordinate legislation made by a Minister has been laid before the National State Assembly will not preclude the Court from pronouncing on its validity in a proper case. In *Ram Banda* v *River Valleys Development Board*,[43] it was held

40. *Kruse* v *Johnson* (1898) 2 Q.B. 91, at p. 99, *per* Lord Russell C.J.
41. *Sparks* v *Edward Ash Ltd.* (1943) K.B. 223, at p. 229-230; *R* v *Essex Appeal Tribunal* (1918) 82 J.P. 1, 2; *Taylor* v *Brighton Borough Council* (1947) K.B. 736, at p. 739; *Robinson* v *Minister of Town and Country Planning* (1947) K.B. 702; *Institute of Patent Agents* v *Lockwood* (1894) A.C. 347, at p. 357; Compare *R* v *Broad* (1915) A.C. 1110, at pp. 1122-1123; see de Smith, *Judicial Review of Administrative Action*, pp. 220, 221. *Victorian Chamber of Manufacturers* v *The Commonwealth* (1943) 67 C.L.R. 413; *R* v. *Abdurahman* 1950 (3) S.A. 136 (A.D.), at. 150.
42. *Sparks* v *Edward Ash Ltd.* (1943) K.B. 223, at pp. 229-230.
43. (1968) 71 N.L.R. 25.This decision was overruled by a majority of the Divisional Bench of the Supreme Court but was, on appeal, upheld by the Court of appeal; cf *Institute of Patent Agents* v *Lockwood* (1894) AC. 347, at p. 359, *per* Lord Herschell; see also *Minister of Health v The King (on the prosecution of Yaffe)* (1931) A. C. 494.

by Weeramantry J that section 39 (2) of the Industrial Disputes Act which provides that every regulation made by the Minister should be placed before Parliament for approval and that, on such approval and publication in the Gazette, it shall be "as valid and effectual as though it were herein enacted" does not confer validity on a regulation which is outside the scope of the enabling powers, and that the mere passage of such regulation through Parliament does not give it the *imprimatur* of the legislature in such a way as to remove it, through the operation of section 39 (2), from the purview of the Courts.

At the other extreme are the by-laws of non-representative bodies such as public corporations exercising trading and commercial functions. To this type of subordinate legislation the test of "unreasonableness" is applied strictly by the Courts.

Sub-delegation of Powers.[44] The general rule is expressed by the maxim *delegatus non potest delegare*. An authority to which the exercise of a legislative, executive or judicial power is delegated cannot sub-delegate it to another unless expressly or impliedly authorised to do so by the relevant statute.[45] In deciding whether there is an implied power to delegate, the Court will consider the nature of the duty as well as the character of the person on whom the duty is entrusted.[46]

"Judicial authority normally cannot of course be delegated....There are, on the other hand, many administrative duties which cannot be delegated. Appointments to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under the Crown or not, he would normally have no authority to delegate. He could take advice, of course, but he could not by a minute authorise someone else to make the appointment without

44. See S.A. de Smith "Sub-Delegation and Circulars" (1949) 12 M.L.R. 37.Willis, "*Delegatus non potest delegare*" (1943) 21 Can. Bar Rev. 257.
45. *Allingham* v *Minister of Agriculture* (1948) 1 All E.R. 780 (Sub-delegation to its officer by an agricultural executive committee of the discretionary powers which were vested in the committee without retaining supervisory control held to be invalid); see also *Jackson, Stansfield & Sons* v *Butterworth* (1948) 2 All E.R. 558 (Sub-delegation of the power granted to local authorities to issue licences on behalf of the Minister of Works held to be void.)
46. *Vine* v *National Dock Labour Board*, (1957) A.C. 488 (disciplinary powers of a local dock labour board could not be delegated to a disciplinary committee); *Barnard* v *National Dock Labour Board* (1953) 2 Q.B. 18 (disciplinary powers of Board could not be delegated to its port manager)

further reference to him.....I am clear that disciplinary powers, whether 'judicial' or not, cannot be delegated".[47]

A judicial or quasi-judicial tribunal which is constituted under a statute so as to inspire trust and confidence and to weigh fairly the rights and interests of individual parties has no implied right to delegate its power.[48] The validity of the sub-delegation by a public body or investigating authority may depend on whether the power of control and decision are retained by the delegating authority in its own hand.[49]

In the case of Ministers the Courts have recognized that the powers and duties conferred on them are normally exercised under their authority and control by responsible officials in their Departments and that "public business could not be carried on if that were not the case".[50] In the exercise of their powers and duties the decision of his official is constitutionally the decision of the Minister.[51] There are some matters, however, which are so important that the Minister must act personally and not through his officers. For example, the power to issue a detention order under Emergency Regulations,[52] a warrant under the Fugitive Offenders Act, 1881,[53] or a deportation order under the Immgirants and Emigrants Act[54] must be exercised by the Minister personally. If a statute requires the Minister to "consider" an officer's report, an order of the Minister could be challenged if he did not genuinely consider it.[55]

There is a presumption that a delegate of legislative power cannot sub-delegate it to another person or body.[56] Under the Public Security

47. *Vine's Case(supra)*, at p.951, *per* Lord Somervill.See also *Barnard's Case(supra)*, at p. 40, *per* Denning L.J.
48. *Vine's Case (supra); General Medical Council* v *United Kingdom Dental Board* (1936) Ch. 41.
49. *Osgood* v *Nelson* (1872) L.R. 5 H.L. 636;de Smith, *op.cit.* (2nd ed.) pp. 287-288.
50. *Carltona Ltd.* v *Commissioners of Works* (1943) 2 All E.R.560, at p.563, *per* Lord Greene M.R. *Local Government Board* v *Arlidge* (1915)A.C.120. *Lewisham Borough Council* v *Roberts* (1949) 2 K.B. 608. See also *Woolett* v *Minister of Agriculture and Fisheries* (1955) 1 Q.B. 103.
51. *per* Lord Greene M.R. (*supra*); *Lewisham Metropolitan Borough* v *Roberts* (1949) 1 All E.R. 815, at p. 828, *per* Jenkins J.
52. *Liversidge* v *Anderson* (1942)A.C.206; *Point of Ayr Collieries Ltd.* v *Lloyd George* (1943) 2 All E.R. 547, at p. 548.
53. *R* v *Brixton Prison (Governor), ex parte Enahoro* (1963) 2 Q.B. 455, at p. 466.
54. See *R* v *Chiswick Police Station Superintendent, ex parte Sacksteder* (1918) 1K.B 578.
55. *Franklin* v *Minister of Town and Country Planning* (1948) A.C. 87, at p.103, *per* Lord Thankerton.
56. *King-Emperor* v *Benoari Lal Sarma* (1945) A.C. 14, at p. 24.

Ordinance[57] sub-delegation of the delegated legislative power is expressly provided for. Section 6 of the Ordinance states that emergency regulations (which the President is empowered to make under Section 5) may provide for empowering such authorities or persons as may be specified in the regulations to make orders and rules for any of the purposes for which such regulations are authorised by that Ordinance to be made.

Surrender of Discretion. A person or body entrusted by statute with discretionary powers cannot surrender or divest themselves of these powers by contracting in advance to exercise it in a particular way or taking any action incompatible with the due exercise of their powers.[58] A Tribunal may in the honest exercise of its discretion adopt a general policy by which it will be guided in deciding particular cases but it cannot "pass a rule or come to a determination, not to hear any application of a particular character by whomsoever made".[59] The personal discretion vested in an authority cannot also be taken away by the orders of another, even if the latter is a superior, such as a Minister.[60]

2 THE PRINCIPLES OF NATURAL JUSTICE

The rules of natural justice, like the "due process of law" clause that exists in the United States, ensure that the fundamentals of fair administrative procedure are adhered to by Administrative Tribunals. In the United States the rules of fair procedure, as contained in the concept of "due process of law," are embedded in the Constitution itself and cannot be done away with by the Legislature in the course of ordinary legislation.[61] This concept of "due process" does not form part of our Constitution, but the rules of natural justice are recognised by our law.

In *The University of Ceylon* v *Fernando*[62] Lord Jenkins said that subject to the reservation that the requirements of natural justice

57. Legislative Enactments of Ceylon (Chapter 40).
58. *Birkdale District Electricity Supply Co.* v *Southport Corporation* (1926) AC. 355, at p. 364; See also *Sharp* v *Wakefield*(1891)A.C. 173; *R* v *Stepney Corporation* (1902) 1. K.B. 317.
59. *R* v *Port of London Authority, ex parte Kynoch Ltd.* (1919) 1 K.B.176, at p. 184, *per* Bankes L J.
60. *Simms Motor Units* v *Minister of Labour* (1946) 2 All E.R. 201.
61. See Bernard Schwartz. *An Introduction to American Administrative Law*, pp 105-106; see also Gellhorn and Byce, *Administrative Law,: Cases and Comments* (4th ed.), p. 709.
62. (1960) 61 N.L.R. 505, at p. 512.

must depend to a great extent on the facts and circumstances of each case, Lord Loreburn's much quoted statement in *Board of Education* v *Rice*[63] still affords as good a general definition as any of the nature of and limits upon the requirements of natural justice in that kind of case.

"....they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything.....They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view".

In *Local Government Board* v *Arlidge*[64] Lord Haldane in developing Lord Loreburn's statement said: "....they must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made". It is however important to note that the content of these two principles of what may be called "fair" procedure" varies according to such circumstances as the constitution of the tribunal, the nature of the inquiry, the subject-matter that is being dealt with and the exact words of the statute.[65]

It has been pointed out by Lord Pearce in *Maradana Mosque (Board of Trustees)* v *Minister of Education*[66] that "when an applicant is applying to quash an Order on the ground that there was an infringement of the rules of natural justice, he is not confined to the face of the record. He may establish his case from other reliable evidence". In that case their Lordships of the Privy Council held that it was sufficiently established by the official paper published by the Government, which contained a broadcast statement of the Minister, that he in making the order complained of was largely influenced by an alleged contravention of a statutory provision of which the applicants had no notice.

The scope of the rules of natural justice are now considered to be wider than it was stated to be in the older cases. As Lord Denning M.R.

63. (1911) A.C. 179, at p. 182.
64. (1915) A.C. 120, at p. 132.
65. *The University of Ceylon* v *Fernando* (1960) 61N.L.R. 505; *Russell* v *Duke of Norfolk* (1949) 1All E.R.109, at p.118, *per* Tucker L.J.; *R* v *Registrar of Building Societies* (1960) 2 All E.R.549, at p.554, *per* Lord Parker C.J; see also *Arlidge* case at p.130, *per* Lord Haldane and at p.140, *per* Lord Parmoor, *Wiseman* v *Borneman* (1969) 3 W.L.R. 706, 710.
66. (1966) 68 N.L.R. 217, at p. 224; (1966) 1 All E.R. 545, at p. 550.

has said recently in England in *R* v *Gaming Board for Great Britain*[67] "At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge* v *Baldwin* (1964) A.C. 40. At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. *R* v *Metropolitan Police Commission, ex parte Parker* (1953) 1 W.L.R. 1150 and *Nakkuda Ali* v *Jayaratne* (1951) A.C. 66 are no longer authority for any such proposition".

(a) The Rule against Bias: No man may be a judge in his own cause

A tribunal should be impartial and free from bias. It has been said on high judicial authority that Judges, like Caesar's wife, should be above suspicion[68]. The tribunal should have no pecuniary or other personal interest in the subject-matter, or other similar form of bias.[69] There must not even be the appearance of bias. The *dictum* of Lord Hewart C.J. that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[70] has been adopted in a number of cases in England and in Sri Lanka.

A mere general interest in the object to be pursued does not disqualify.[71] The Courts have in fact issued a warning against "the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done".[72] The test is whether there is a real likelihood of bias.[73] The matter will be considered by the Court "as a reasonable man would judge of any matter in the conduct of his own business".[74] There may be real likelihood of bias where there is, for example, personal friendship or hostility, family or other close relationship with a party.[75]

67. (1970) 2 W.L.R. 1009.
68. *Leeson* v *General Council of Medical Education* (1889) 43 Ch. D. 366, at p. 385, *per* Bown L.J.
69. *Dimes* v *Grand Junction Canal* (1852) 3 H.L.C. 759 (decree of Lord Chancellor Cottenham set aside by the House of Lords on the ground that he was a shareholder in the company, although it was not suggested that he was influenced by this interest): *R* v *Sunderland Justices* (1901) 2 K.B. 357.
70. *R* v *Sussex Justices, ex parte McCarthy* (1924) 1 K.B. 256, at p. 259; See also *Cooper* v *Wilson* (1939) 2 K.B. 309; *Franklin* v *Minister of Town and Country Planning* (1948) A.C. 87.
71. *R* v *Deal Justices, ex parte Curling* (1881) 45 L.J. 439, at p. 441 (a magistrate who subscribed to the Society for the Preventon of Cruelty to Animals was not thereby disqualfied from trying a charge brought by that body for cruelty to a horse.)
72. *R* v *Camborne Justices, ex parte Pearce* (1955) 1 Q.B. 41, at p. 52.
73. *Frome United Breweries* v *Bath Justices* (1926) A.C. 585. *R* v *Camborne Justices, ex parte Pearce* (*supra*).
74. *R* v *Sunderland Justices* (*supra*), at 373, *per* Vaughan Willams, L.J.
75. See de Smith, *Judicial Review of Administrative Action* (2nd ed), pp. 246-252.

In the case of judicial functions vested in Ministers, they may sometimes have to be exercised in favour of government policy ("departmental bias"). For example, "if a minister is considering whether to make a scheme for say an important new road, his primary concern will not be with the damage which its construction will do to the rights of individual owners of land. He will have to consider all manner of questions of public interest and, it may be, a number of alternative schemes. He cannot be prevented from attaching more importance to the fulfilment of his policy than to the fate of individual objectors...."[76] In this sphere of judicial functions the rule against bias is more restricted than in other spheres although even here the order could be set aside if there is evidence of some gross bias.[77]

Bias renders the proceedings voidable only, not void.[78] Objection on the ground of bias may therefore be waived by an aggrieved party by his acquiescence in the proceedings.[79]

It has been suggested that in a case of necessity, where no other Judge has jurisdiction, a Judge may act although he has an interest which would otherwise disqualify him.[80] The modern tendency is to apply the rule of necessity only in rare instances. In the United States it has been held that just as in the case of a Judge in a Court of law, so also an administrative agency is not disqualified by mere prejudgment of the issues by the agency in the first hearing.[81] Statutes may, of course, authorise persons or bodies to adjudicate in cases where they have an interest.[82]

(b) The Right to be Heard: "Audi alteram partem"

Each party must be given adequate notice of the case against him and thereby afforded a fair opportunity of stating his own case and of

76. *Ridge* v *Baldwin* (1964) A.C. 40; (1963) 2 All E.R. 66, at p. 76, *per* Lord Reid.
77. *Franklin* v *Minister of Town and Country Planning* (1948) A.C. 87 (an order could be challenged if the Minister did not consider the report of the official and the objections or "if his mind was so foreclosed that he gave no genuine consideration" to the question before him—*per* Lord Thankerton, at p. 106).
78. *Dimes* v *Grand Junction Canal* (1852) 3 H.L.C. 759.
79. *R* v *Cheltenham Commissioners* (1841) 1 Q.B. 467. *R* v *Richmond JJ* (1860) 24 J.P. 422.
80. H. H. Marshall, *Natural Justice* (1959), 38; De Smith, *Judicial Review of Administrative Action*, (2nd ed), 262; Griffith and Street, *Principles of Administrative Law*, (4th ed), 158; *Serjeant* v *Dale* (1877) 2 Q.B.D. 558, 566. *The Judges* v *Att-Gen. for Saskatchewan* (1937) 53 T.L.R. 46 (P.C.)
81. *National Labour Relations Board* v *Donnelly Garment Co.* 330 U.S. 219 (1947), at pp. 236-7, *per* Justice Frankfurter (cited in Schwartz, *Introduction to American Administrative Law* (2nd ed.), 143.
82. Marshall *op. cit.*, p. 41.

correcting or contradicting any relevant statement prejudicial to him.[83] This rule governs even domestic tribunals, such as committees of clubs which under their rules have power to expel members for misconduct.[84]

Although there may be no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.[85] In *Durayappah* v *Fernando*[86] the Privy Council held that the rule, *audi alteram partem*, was applicable to a decision of the Minister to make an order under section 277 (1) of the Municipal Councils Ordinance dissolving and superseding the council, if it appeared to him that the council was incompetent in the performance of any duty or duties imposed upon it or persistently refused or neglected to comply with any provision of law. In that case, the Privy Council stated that, outside well-known classes of cases such as dismissal from office. deprivation of property and expulsion from clubs, there was a vast area where the principle could only be applied upon most general considerations. Although outside these cases no general rule could be laid down as to the application of the general principle in addition to the language of the provision, there were according to their Lordships' view three matters which must always be borne in mind when considering whether the principle should be applied or not. "These three matters are: First, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasion is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanction in fact is the latter entitled to impose on the other".[87]

83. *The University of Ceylon* v *Fernando* (1960) 61 N.L.R. 505 (P.C.); *Board of Education* v *Rice* (1911) A.C. 179, at p 182, *per* Lord Loreburn L.C., *Local Government Board* v *Arlidge* (1915) A.C. 120, at p. 132, *per* Lord Haldane. See S.A. de Smth, "The Right to a Hearing in English Administative Law (1955) 68 *Harvard Law Review* 509. See also Universal Declaration of Human Rights, 1948, Art 10.
84. *Fernando* v *The University of Ceylon* (1956) 58 N.L.R. 265, at pp. 279-280. *Wood* v *Wood* (1874) L.R 9 Ex. 190, 196. *Fisher* v *Keane* (1878) 11 Ch. D. 353. *Lapointe L'Association et Bienfaisance et de Retraite de la Police de Montreal* (1906) A.C. 535; *General Medical Council* v *Spackman* (1943) A.C. 627. See also Sir John Morris, "The Courts and Domestic Tribunals" (1953) 69 L.Q.R. 318.
85. *Durayappah* v *Fernando*(1966) 69 N.L.R. 265,at p.269. citing with approval Byles J. in *Cooper* v *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180, at p. 194. See also *Subramaniam* v *Minister of Local Government and Cultural Affairs* (1959) 59 N.L.R. 254. *Errington* v *Minister of Health* (1935) 1 K.B. 249, at p. 280, *per* Roche L.J.
86. *Supra* (overruling *Sugathadasa* v *Jayasinghe* (1958) 59 N.L.R. 457).
87. At pp. 269, 270, cited in *Jayawardene* v *Silva* (1970) 73 N.L.R. 289, at p. 294.

Similarly a Minister who was empowered to take over an unaided school for State management, if satisfied that the school was being administered in contravention of any provision of the Assisted Schools Act, No. 5 of 1960, was bound by the rules of natural justice to give the proprietors notice of what was charged against them and to allow them to make answer.[88]

In the application of the rules of natural justice to dismissal of employees three classes of cases have been distinguished by Lord Reid[89]: (1) dismissal of a servant by his master, when the question does not arise whether the master has heard the servant in his own defence although such dismissal may constitute a breach of contract (ii) dismissal from an office held during pleasure, where too the officer has no right to be heard before he is dismissed[90] (iii) dismissal from an office where there must be something against a man to warrant his dissmissal. In this third class of case the employee has a right to a hearing before he can lawfully be dismissed. In *Ridge* v *Baldwin*[91] the Brighton watch committee dismissed the Chief Constable from his office acting under a statutory provision which empowered them to dismiss "any constable whom they think negligent in the exercise of his duty or otherwise unfit for the same". The House of Lords, reversing the decision of the Court of Appeal, held that the rules of natural justice applied and he should have been given an opportunity to be heard before the power of dismissal was exercised.

In *Vidyodaya University* v *Silva*[92] it was held by the Judicial Committee of the Privy Council that, although the University was regulated by statute and contracts of employment of teachers were subject to the statutory power of the Council to suspend or dismiss any officer or

88. *Maradana Mosque (Board of Trustees)* v *Minister of Education*(1966) 68 N.L.R 217; (1966) 1 All E.R. 545. See also *Shareef* v *Commissioner for Registration of Indian and Pakistani Residents* (1965) 67 N.L.R. 433; (1966) A.C. 47.
89. *Ridge* v *Baldwin* (1964) A.C. 40, at pp. 65-68.
90. It is of interest to note that the Constitution of India, Art. 311 (2), expressly provides that, subject to certain specified exceptions, no public servant shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.
91. *Supra.*
92. (1964) 66 N.L.R. 505; (1964) 3 All E.R. 865. Prof. S. A. de Smith includes this case among his "less commendable" decisions and has stated that it contains "unsatisfactory reasoning" the most plausible explanation of which was thought to be the reluctance to give a decision leading to reinstatment. (*Judicial Review of Administra tive Action*, 161, 217).

teacher on the grounds of incapacity or misconduct, the relationship between the University and the teachers was that between master and servant, and there was no need to have given the respondent an opportunity of being heard before his dismissal.

It is submitted however, with due respect to the Privy Council, that the above was not just an ordinary master and servant case where the common law remedy might be adequate. Under the statute the power of dismissal could be exercised "on the grounds of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University". In other words, the statute has expressly restricted the University's ordinary common law powers of dismissal. On the authority of *Ridge* v *Baldwin* itself, it could be submitted that when the Council of the University was, in the exercise of its statutory power, examining the question of the teacher's fitness on the ground of incapacity or misconduct, it was bound to observe the principles of natural justice. It may also be added that the "fair-procedure" approach employed in *Ridge's* case also accords with modern notions of academic freedom of University teachers as well as with the liberal principles of French and American administrative law with regard to similar "employer-employee" relationships.

In *University of Ceylon* v *Fernando*[93] a General Act of the University provided that, where the Vice-Chancellor was satisfied that any candidate for examination had acquired knowledge of any question, he might suspend the candidate from the examination. The Privy Council decided the appeal on the assumption that the Vice-Chanceller was required in accordance with the principles of natural justice to give the student a fair opportunity to correct or contradict any relevant statement made to his prejudice. It was held, however, on the facts of the case that the finding had been reached with due regard to the principles of natural justice.

Notice which is given of one charge is not sufficient for proceeding under another charge even though both charges arise out of the same circumstances.[94] In *Board of Trustees of Maradana Mosque* v *Minister*

93. (1960) 61 N.L.R. 505; (1960) 1 All E.R. 631.
94. *Maradana Mosque* (*Board of Trustees*) v *Minister of Education* (1966) 68 N.L.R. 217; *Annamunthodo* v *Oilfield Workers' Trade Union* (1961) A.C. 945 (explusion of the applicant under a rule of the union which was invoked without giving him notice of it was void, notwithstanding the fact that he had attended a hearing earlier in respect of a charge of breaking four other rules.)

of Education,[95] although the applicants had an opportunity of answering the complaint under s. 6 (i) of the Act, which required them to pay teachers their monthly salary not later than the tenth of the following month, they had had no notification of any complaint under s.6 (k) under which they were bound to satisfy the Director of Education that necessary funds to conduct the schools were available. Since the alleged contravention of s. 6 (k) played an important part in the Minister's decision to make the order under s. 11 declaring that the school should cease to be an unaided school, the Privy Council held that the order should be quashed. Although a Tribunal is not bound to treat the matter for decision as if it were a trial and may obtain information in any way it thinks best, it ought not to base its decision on evidence for one party without allowing the other an adequate opportunity of meeting it.[96] This rule applies also to real evidence.[97] All relevant reports must be disclosed to the parties.[98]

Even when a party makes objections in accordance with statutory requirements, in considering the objections evidence cannot be received from the other party without the former being given an opportunity of meeting it.[99] Whenever a punishment, forfeiture or disability may be imposed by a Tribunal and a duty to hold an inquiry exists, the party concerned has a right to call evidence if he so desires.[100] The further question, whether it could be a valid answer to say that the party had in truth no defence even if he had been given an opportunity of presenting it, has been left undecided by the Privy Council and by the House of Lords in England.[101]

Where evidence is given by or on behalf of one party, the other party should not normally be refused the opportunity of testing the

95. *Supra.*
96. *Shareef* v *Commissioner for Registration of Indian and Pakistani Residents* (1965) 67 N.L.R. 433; *The University of Ceylon* v *Fernando* (*ante*), at p. 515; *Board of Education* v *Rice* (*ante*); *Ridge* v *Badwin* (1964) A.C. 40.
97. *R* v *Paddington & St. Marylebone Rent Tribunal, ex parte Bell London & Provincial Properties Ltd.* (1949)1 K.B. 666.
98. *Shareef* v *Commissioner for Registration of Indian and Pakistani Residents* (1965) 67 N.L.R. 433; (1966) A.C. 47.
99. *Munasinghe* v *The Auditor-General* (1961) 64 N.L.R. 474, at p. 478; *Stafford* v *Minister of Health* (1946) K.B. 621, at p. 625. *Errington* v *Minister of Health* (1935) 1 K.B. 249.
100. *Vadmaradchy Hindu Educational Society Ltd.* v *Minister of Education* (1961) 63 N.L.R. 322; *General Medical Council* v *Spackman* (1943) A.C. 627.
101. *Board of Trustees of Maradana Mosque* v *Minister of Education* (1966) 68 N.L.R 2.17, at p. 224; *Ridge* v *Baldwin* (1964) A.C. 40.

evidence by cross-examination.[102] In *University of Ceylon* v *Fernando*[103] the Privy Council held that the omission of the tribunal to tender an essential witness unasked for cross-examination by a student who was charged with cheating at an examination did not constitute a breach of the right to a fair hearing. The Privy Council went on to state:

"In their Lordships' view, this might have been a more formidable objection if the plaintiff had asked to be allowed to question Miss Balasingham and his request had been refused.....There is no ground for supposing that, if the plaintiff had made such a request, it would not have been granted".

In a case where a party is entitled to appear in person, he has, unless there is statutory provision to the contrary, also a right to appear by counsel or other agent[104] except before a domestic tribunal. It has been stated by eminent jurists that the right to legal representation before statutory tribunals should be curtailed only in the most exceptional circumstances and for sufficient reasons.[105]

Where a decision is not a nullity and is only voidable, it will be declared void only at the instance of the person against whom the decision is made.[106] In *Durayappah* v *Fernando*[107] the Privy Council held that the Minister's order, made under section 277 (1) of the Municipal Councils Ordinance, superseding the Municipal Council for incompetence without giving an opportunity to the Council to be heard in defence, was not a nullity; it was voidable, not as the instance of the Mayor in his personal capacity but only of the Council when the order could have been held void *ab initio*.[108] Their Lordships deprecated the use of the word "void" in distinction to the word "voidable" in the field of law with which their

102. *The University of Ceylon* v *Fernando* (*ante*), at 518-519; *Osgood* v *Nelson* (1872) LR. 5 H.L. 636, at pp. 646, 660. *Marriot* v *Minister of Health* (1936) 154 L.T. 47, at p. 50.
103. (*Supra*).
104. *R* v *St. Mary Abbotts Assessment Committee* (1891) 1 Q.B. 378; *R* v *Board of Appeal, ex parte Kay* (1916) 22 C.L.R. 183. See *Report of Franks Committee on Administrative Tribunals* (1957) Cmd. 218, para. 87.
105. *Franks Committee's Report*, para. 87; *Report of the Internatioal Congress of Jurists*, New Delhi (1959), p.8.
106. *Durayappah* v *Fernando* (*infra*), at 274. See also *Ridge* v *Baldwin* (1964) A.C. 40, at 86, *per* Lord Evershed, and at 141-142, *per* Lord Devlin. See de Smith, *op. cit.*, 224 (note 9) and 227 (note 26).
107. (1966) 69 N.L.R. 265.
108. See de Smith, *op. cit.*, 224 (note 9) and 227 (note 26) for some illuminating comments on this part of the decision.

Lordships were concerned on the ground that the words "void" and "voidable" were imprecise and apt to mislead.[109]

3. STATUTORY RESTRICTION OF JUDICIAL REVIEW

Statutes in Sri Lanka sometimes purport to exclude judicial review of administrative decisions and of subordinate legislation.[110] The statement made in this connection by Professor S. A. de Smith with reference to Britain is also true of Sri Lanka. He states: "The Executive has shown an understandable reluctance to offer the citizen a sporting chance of disturbing the course of administration, and has secured the passage of legislation designed to protect the exercise of its administrative and subordinate legislative powers against effective challenge in the courts. In addition, attempts have been made to limit or take away the inherent supervisory jurisdiction of the High Court over the determination of some classes of claims and controversies by Ministers and special tribunals."[111]

There is in Sri Lanka a strong presumption against the statutory exclusion of the jurisdiction of the ordinary Courts of law.[112] It is indeed a principle of our law that every person has a right of access to the Courts for the determination of his legal rights and such access cannot be denied except by clear words of legislation.[113]

It is relevant in this connection to point out that in Ceylon the judicial power was wielded by the Judicature under the Charter of Justice of 1883 and later under the Courts Ordinance of 1889. Under the Charter

109. *Ibid*, at p. 273.
110. See, for example, Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961, s 9: ("A Vesting Order (made by the Minister) shall be final and conclusive and shall not be called in question in any court whether by way of writ, order, mandate or otherwise"); see also similar provisions in the Criminal Law (Special Provisions) Act, No. 1 of 1962, s.8, and the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, s. 25.
111. *Judicial Review of Administration Action* (2nd ed.), p. 340.
112. See J.A.L. Cooray, "Judicial Review through Certiorari in Ceylon", 1 *Ceylon Journal of Law* (1970), 75.
113. *Modera Patuwata Co-operative Fishing Society Ltd.* v *Gunawardena* (1959) 62 N.L.R. 188, at p. 192; *Aziz* v *Thondaman* (1959) 61 N.L.R. 217, at 222-223; *Andrews* v *Mitchel* (1905) A.C. 78; *Chester* v *Bateson* (1920) 1 K.B. 829; *In re Bowman* (1932) 2 K.B. 621, at p. 633; *Pyx Granite Co. Ltd.* v *Ministry of Housing and Local Government* (1960) A.C. 260, at p. 286; *Stark* v *Wickard* (1944) 321 U.S. 288, 309; See also *Report of the Committee on Ministers' Powers* (England) (Cmd. 4060) 45.

as well as under the Courts Ordinance the Supreme Court was empowered to grant remedies or writs of certiorari, prohibition, mandamus, procedendo and habeas corpus.[114]

The Interpretation Ordinance (section 22, which was inserted by the Interpretation (Amendment) Act, No. 18 of 1972) now provides:

"Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court", or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceeding and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal.

Provided, however, that the preceding provisions of this section shall not apply to the Supreme Court in the exercise of its powers under section 42 of the Courts Ordinance in respect of the following matters, and the following matters only, that is to say—

(*a*) where such order, decision, determination, direction or finding is *ex facie* not within the power conferred upon such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and

(*b*) where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Supreme Court is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:

114. Charter of Justice, ss. 36 and 49; Courts Ordinance, ss 42 and 45.

Provided further that the preceding provisions of this section shall not apply to the Supreme Court in the exercise of its powers under section 45 of the Courts Oridinance to issue mandates in the nature of writs of habeas corpus.

In England, it is of some interest to note, section 11 of the Tribunals and Inquiries Act, 1958, enacts that any provision in an Act passed before the above-mentioned Act stating that any order or determination shall not be called in question in any court shall not, subject to certain exceptions, prevent the grant of the remedies of certiorari and mandamus.[115] In Italy the Constitution itself provides in Article 113 that judicial review cannot be "excluded from nor confined to particular methods of challenge or particular categories of acts".[116]

Under the English common law, a general finality clause in a statute that a determination or decision of a public authority "shall be final and conclusive" does not restrict or prevent the Courts from exercising their powers of review to correct patent errors of law[117] or jurisdictional defects.[118] Nor does such a clause affect the power of the Court under that law to grant a declaratory judgment that the determination or order is invalid.[119]

Where a finality clause provided that the determination of a public authority "shall not be called in question in any court of law", it has been held in England, that the Court might still consider whether the decision was within "the area of the inferior jurisdiction".[120] Such a finality clause would not prevent the Courts even under the common law from exercising their powers of review if the so-called determination was outside the area of the jurisdiction of the public authority and is a nullity.

115. See also the Report of the Franks Committee on Administrative Tribunals and Enquiries in England, Cmd. 218 (1957), para 117; and the Report of the Donoughmore Committee in Ministers' Powers in England, Cmd. 4060 (1932) para. 65.
116. See S. Galeotti, *The Judicial Control of Public Authorities in England and in Italy* (1954), 89.
117. *R* v *Minister of Transport, ex parte H.C. Motor Works*(1927) 2 K.B. 401.
118. *R* v *Medical Appeal Tribunal, ex parte Gilmore* (1957) 1 Q.B. 574; *R* v *Nat Bell Liquors Ltd.*(1922) A.C. 128, at pp. 159-160; See also *United States ex rel. Trinler* v *Caruse*, 166 F. 2d 457, 460-461; *Estep* v *United States* 327 U.S. 114, 120 (1946).
119. *Pyx Granite Co.* v *Minister of Housing and Local Government* (1960) A.C. 260; *Ridge* v *Baldwin* (1964) A.C. 40.
120. *Anisminic Limited* v *Foreign Compensation Commission* (1969) 1 All E.R. 208, 224. See also *Ridge* v *Baldwin* (1964)A.C. 40, at pp. 120-1; See also *Ram Banda* v *River Valleys Development Board* (1968) 71 N.L.R. 251

As it was pointed out in the *Anisminic* case[121] decided by the House of Lords in England, "there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account". In other words, the determination, in order that it may be final must be "a real determination", not one "which purports to be a determination but which in fact is no determination at all",[122] and is a nullity.

It should be mentioned that in an earlier English case, where a statute provided that a compulsory purchase order of a public authority could not be questioned "in any legal proceedings whatsoever" after the expiry of the prescribed period of time, it was held by the House of Lords, by a majority of three to two, that the validity of such an order cannot be challenged in the Courts after the prescribed period, even on the ground that it had been made in bad faith.[123] It has since been stated by the House of Lords that this case needs reconsideration, if a case arose where bad faith was alleged.[124] So far as the interpretation of these and similar finality clauses found in the legislation of Sri Lanka is concerned, our Courts as already stated, are now governed by section 22 of the Interpretation Ordinance.

Another example of an exclusive clause is contained in the provision that an order or regulation made by a public authority "shall on publication in the Gazette, have the force of law" or "shall have effect as if

121. *Ante*, at pp. 213-214, *per* Lord Reid.
122. *Ibid.*
123. *Smith* v *East Elloe Rural District Council* (1956) A.C. 736.
124. *Anisminic* case, at pp. 221, 238, 246; See also *Arthur Yates & Co. Pty. Ltd.* v *The Vegetable Seeds Committee* (1946) 72 C.L.R. 37.

enacted in this Act". The above examples also remind one of the so-called "Henry VIII clause" of England which was adopted some years ago to empower a Minister to modify the enabling or parent Act or any other Act for the purpose of bringing the former Act into operation. These provisions will not have the effect of excluding judicial review if the order or regulation is in conflict or is inconsistent with the provisions of the Act.[125] It has been said in England[126] that *Lockwood's* case is "no authority for the proposition that where a statute lays down that certain conditions must be complied with before a rule or order is made, the courts are precluded from saying that the order or rules are inoperative because the power to make them never arose". The Donoughmore Committee on Ministers' Powers in England has pointed out in its Report[127] that the House of Lords in *Minister of Health* v *The King* (on the prosecution of Yaffe)[128] "laid it down that while the provision makes the order speak as if it were contained in the Act, the Act in which it is contained is the Act which empowers the making of the order, and that therefore, if the order as made conflicts with the Act, it will have to give way to the Act. In other words, if in the opinion of the Court the order is inconsistent with the provisions of the Act which authorises it, the order will be bad".

In *Ram Banda* v *River Valleys Development Board*,[129] Weeramantry J held that a statutory provision that every regulation made by the Minister should be placed before Parliament for approval and that, on such approval and publication in the Gazette, it shall be "as valid and effectual as though it were herein enacted" does not confer validity on a regulation which is outside the scope of the enabling powers. The mere passage of such a regulation through Parliament does not give it the *imprimatur* of the Legislature in such a way as to remove it from the purview of the

125. *Subramanim* v *Minister of Local Government and Cultural Affairs* (1957) 59 N.L.R. 254, at p. 261; *The Pinkahana Kahaduwa Co-operative Society Ltd.* v *Herath* (1957) 59 N.L.R. 145; *Minister of Health* v *The King, ex parte Yaffe* (1931) A.C. 494; Cf. *Institute of Patent Agents* v *Lockwood* (1894) A.C. 347. and see Graham Harrison, *Notes on Delegated Legislation*, pp. 63-68; Willis, *Parliamentary Powers of English Government Departments*, pp. 62-101, and C.K. Allen, *Law and Orders* (3rd ed.), pp. 258-263.
126. *Yaffe's* case (1930) 2 K.B. 98, at pp. 158-159, *per* Greer L.J.
127. Cmd. 4060, p. 40.
128. (1931) A.C. 494, 501.
129. (1968) 71 N.L.R. 25. This case was over-ruled by a majority of the Divisional Bench of the Supreme Court, but was later upheld by the Court of Appeal.

Courts on the ground of *ultra vires*.[130] Nor does section 17 (1) (e) of the Interpretation Ordinance that "all rules shall be published in the Gazette and shall have the force of law as if they had been enacted in the Ordinance or Act of Parliament" by itself clothe such rules with validity.[131]

130. *Ram Banda's* case (*supra*); see also *The Pinikahana Kahaduwa Co-operative Society Ltd.* v *Herath* (1957) 59 N.L.R. 145, at pp. 152-156; *Lockwood's* case (*supra*), at p.366; *Bowles* v *Bank of England* (1913) 1 Ch. 57; *Stockdale* v *Hansard* (1839) 9 A & E.1. Cf. *Sparkes* v *Edward Ash Ltd.* (1943) K.B. 223, at pp.230; *Lockwood's* case (*supra*), at p. 357 and *Yaffes* case (*supra*), at pp. 502-3, *per* Viscount Dunedin; *Bessemer & Co. Ltd.* v *Gould* (1912) 107 L.T. 298.

131. *Ram Banda's* case (*supra*), at p. 33; cf. *Abdul Cader* v *Sittinisa* (1951) 52 N.L.R. 356.

CHAPTER 20

JUDICIAL CONTROL OF POWERS—METHODS OF REVIEW

There are various methods by which the Courts can review administrative action.[1] In addition to the ordinary common law remedies for civil injury available in the Courts of law, the Supreme Court has power under the Courts Ordinance "to inspect and examine the records of any Court and to grant and issue, according to law, mandates in the nature of writs of mandamus, quo warranto, certiorari, procedendo and prohibition against any District Judge, Commissioner, Magistrate or other person or tribunal".[2] The Constitution provides that "the powers of the highest Court with original jurisdiction established by law for the administration of justice shall, except in matters expressly excluded by existing laws or laws enacted by the National State Assembly, include the power to issue such mandates in the nature of writs as the Supreme Court is empowered to issue under the existing law. The National State Assembly shall have the power to enact such laws by a majority of the Members present and voting". (s. 121(3)).

Although these writs (with the exception of quo warranto, which was provided for by Ordinance No. 4 of 1920) were introduced into Ceylon by the Charters of Justice[3] of the early British period, the jurisdiction of the Supreme Court is now derived exclusively from the Constitution and from s. 42 of the Courts Ordinance. The range of the jurisdiction of the

1. For a suggestion to consolidate the existing judicial remedies and procedures of administrative law, see Cooray, *Constitutional Government and Human Rights in a Developing Society*, pp. 41-2, 70.
2. Legislative Enactments of Ceylon (chapter 6), s. 42. The writ of habeas corpus, now provided for in section 45 of the Courts Ordinance, is dealt with in Chapter 28, *post*. For the historical origins of these prerogative writs in England, see S.A. de Smith, *Judicial Review of Administrative Action*, chapter 8. The prerogative writs certiorari, prohibition and mandamus have been replaced in Britain by judicial orders of the same names by the Administration of Justice (Miscellaneous Provisions) Act, 1938. The procedures relating to these orders are less technical than those which related to the prerogative writs.
3. See Charters of 1801, 1833 and 1868.

Court to grant these writs must be found within the words of the statutory grant.[4]

Where section 42 of the Courts Ordinance gives power to the Supreme Court to issue these mandates in the nature of writs "according to law" it has been held to mean that the relevant rules of English common law must be resorted to in order to ascertain in what circumstances and under what conditions the Courts should be moved for the issue of a writ.[5] These rules must themselves guide the practice of the Supreme Court.[6] In *Abdul Thassim* v *Edmund Rodrigo*[7] a Bench of Five Judges of the Supreme Court held that the Controller of Textiles, when he cancelled the licence of a dealer acting under the Defence (Control of Textiles) Regulations, 1945, was according to English common law a "person or tribunal" within the meaning of section 42 of the Courts Ordinance and that it was not necessary that such person or tribunal should be of the same genus as District Judges, Commissioners or Magistrates.

1. PROHIBITION AND CERTIORARI

Prohibition and certiorari can be considered together because the principles governing their issue are in many respects similar. The main point of difference between them is that prohibition is sought at an earlier stage than certiorari. The writ of prohibition lies to restrain an inferior Court or tribunal from proceeding in excess of jurisdiction, so long as there is "something to which prohibition can apply, some act which the respondents, if not prohibited, may do in excess of their jurisdiction".[8] Prohibition does not therefore lie where a final decision has been given. Certiorari, on the other hand, lies to quash an order or decision that has already been given without jurisdiction. In appropriate cases both writs may be sought together in the same proceedings to quash an order already made by the inferior tribunal and also to prevent it from continuing to exceed its jurisdiction.

4. *Nakkuda Ali* v *Jayaratne* (1950) 51 N.L.R. 457, at p. 460. In re *Election of a Member for the Local Board of Jaffna* (1907) 1 A.C.R. 128.
5. *Nakkuda Ali* v *Jayaratne* (1950) 51 N.L.R. 457, at p. 461; See also (1873) 2 Grenier's Reports, 122, at p. 125; *Gooneratnanayake* v *Clayton* (1929) 31 N.L.R. 132, 133. *Abdul Thassim* v *Edmund Rodrigo* (1947) 48 N.L.R. 121; *Wijesekera* v *Assistant Government Agent, Matara* (1943) 44 N.L.R. 533; *Goonesinghe* v *de Kretser* (1944) 46 N.L.R. 107.
6. See note 1 (*supra*).
7. (1947) 48 N.L.R. 121.
8. *Estate and Trust Agencies* (1927) *Ltd.* v *Singapore Improvement Trust* (1937) A.C. 898, at pp. 917-8, *per* Lord Maugham; *R* v *Electricity Commissioners* (1924) 1 K.B. 171, at p. 204.

In many leading cases the Courts of Sri Lanka have adopted the well-known dictum of Atkin L.J. in *R* v *Electricity Commissioners.*,[9] namely, that the Court has jurisdiction to issue the writs of certiorari and prohibition "wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority".

In order that these writs may issue the body must in the first place exercise a jurisdiction that is legal though not necessarily statutory.[10] The writs will not issue to a body which derives its jurisdiction from agreement or contract. "The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of certiorari".[11] The circumstance that a University or other authority is established and regulated by statute does not necessarily show that contracts of employment made with teachers are other than ordinary contracts of master and servant.[12] Thus, where a statutory body is merely given a power to dismiss a member of its staff without any specification of the grounds of dismissal or of the procedure to be followed before dismissal, that body may not be bound to act judicially in reaching its decisions; in such a case certiorari will not lie.[13] It would be otherwise where there is "an entirely different situation from the ordinary master and servant case", for example, where there is a statutory scheme which gives a number of rights and imposes a number of obligations going far beyond any ordinary contract or service.[14]

The writs will not lie where a person or body exercises a jurisdiction without legal authority to determine questions affecting the rights of subjects. Thus the writs do not generally issue to a voluntary domestic tribunal or a

9. (1924) 1 K.B. 171, at p. 204.
10. *R* v *Criminal Injuries Compensation Board, ex p Lain* (1967) 2 All E.R. 770; (1967) 2 Q.B. 864.
11. *Vidyodaya University Council* v *Silva* (1964) 66 N.L.R. 505, at p. 507; *Ridge* v *Baldwin* (1964) A.C. 40; *R* v *National Joint Council for Craft of Dental Technicians, ex p. Neate* (1953) 1 All E.R. 327; (1953) 1 Q.B. 704.
12. *Vidyodaya Case (supra)*; It is submitted, however, that the denial in this case to a teacher of a statutorily-regulated University of the right to be heard before dismissal, on the ground that the case was one of ordinary contract between master and servant, amounted to the adoption of too narrow a view of the scope of certiorari. 633. Contrast *Mc Clelland* v *Northern Ireland General Health Services Board* (1957) 2 All E.R. 129; and *Ridge* v *Baldwin* (*supra*).
13. *Kulatunga* v *Co-operative Wholesale Establishment* (1963) 66 N.L.R. 169; *Thenabadu* v *Samarasekera* (1967) 70 N.L.R. 472.
14. *Vine* v *National Dock Labour Board* (1957) A.C. 488, at p. 500.

private arbitral body which derives its jurisdiction from the consent of its members.[15] The position is otherwise in the case of arbitrators invested with jurisdiction by statute. The reason for the difference is that when the National State Assembly has conferred statutory powers on such bodies which, when exercised, may lead to the detriment of subjects who have to submit to their jurisdiction, it is essential that the Courts should be able to control the exercise of such jurisdiction strictly within the limits which the Assembly has imposed upon them.[16]

The writs will be refused where the body exercises a merely advisory, deliberative or non-binding recommendatory power distinct from a legal authority or jurisdiction.[17] Certiorari will not lie as a means of interfering with the proceedings of a legislative or deliberative assembly.[18] Nor will the writ issue to quash a non-binding report.[19] In *Dias* v *Abeywardena*[20] it was held that a writ of prohibition did not lie even against a Commissioner appointed by the Governor-General under the Commissions of Inquiry Act to inquire into alleged unlawful interception of telephone messages and to make a report, *inter alia*, as to the persons responsible for such unlawful interception or by or to whom the contents of messages so intercepted were divulged. On the other hand, if an adverse finding against a person by a Commissioner would under legislation have the effect of depriving that person of his civic rights, the writs would lie.[21] The writs may also be available where a public body is required by law

15. *Colombo Commercial Co Ltd.* v *Shanmugalingam* (1964) 66 N.L.R. 26, at p. 32; *R* v *National Joint Council for the Craft of Dental Technicians, ex parte Neate* (1953) 1 Q.B. 704, at p. 708; *Lee* v *Showman's Guild of Great Britain* (1952) 2 Q.B. 329, at p. 346.
16. *Colombo Commercial Co. Ltd.'s* Case (*supra*); *Neate's* Case (*supra*) *R* v *Powell ex parte Camden* (1925) I.K.B. 641.
17. *Dias* v *Abeywardena* (1966) 68 N.L.R. 409; *R* v *Macfarlane, ex parte O'Flanagan and O'Kelly* (1923) 32 C.L.R. 518; *R* v *Clipsham* (1965) 49 D.L.R. (2d) 747; *R* v *Legislative Committee of the Church Assembly* (1928) 1 K.B. 411. *Re Clifford and O'Sullivan* (1921) 2 A.C. 570.
18. *R* v *Legislative Committee of the Church Assembly*, (*supra*); *R* v *Wright ex parte Waterside Workers' Federation* (1955) 93 C.L.R. 528, at pp. 541-542.
19. *Seneviratne* v *The Attorney-General* (1968) 71 N.L.R. 439 (where it was held by Tennekoon J that the writ does not issue even to proceedings of an Inquirer or Magistrate holding an inquest of death); *R* v *St. Lawrence's Hospital, Caterham ex parte Pritchard* (1953) 1 W.L.R. 1158. Contrast *R* v *Boycott* (1939) 2 K.B 651 and *R* v *Botting* (1966) 56 D.L.R. (2d.) 25. See also de Smith, *Judicial Review of Administrative Action*, pp. 217-221, on exposure to legal hazards as a ground for importing a duty to act judicially although the proceeding does not itself involve any final determination.
20. *Supra.*
21. *De Mel* v *De Silva* (1949) 51 N.L.R. 105.

to determine at any stage of the process matters affecting the rights of subjects even though the final decision is left to confirmation or approval by some other public authority.[22]

The "rights" affected are not restricted by any particular category. These are not to be confined to rights in the jurisprudential sense to which correlative legal duties are annexed.[23] These legally recognised interests have included immunity from being found guilty of incompetence in the performance of duties,[24] a workman's right to the receipt of compensation on account of illness[25] or a benefit from instruction in a special school on the basis of a certificate.[26]

The writs, it is often said, are issued in respect of judicial acts as distinguished from ministerial and administrative acts. But this distinction is not always easy to draw in practice. Even in the United States where there exists a more rigid separation of powers than in Sri Lanka or England what is judicial and what is, on the other hand, merely "administrative" has never been effectively defined.[27] The term "judicial act" as used in this connection is sometimes described as one which involves, after investigation of facts and circumstances, the exercise of some right or duty to make a decision or perform an act that imposes obligations upon or affects the rights of individuals.[28] It has also been said that the term "extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties."[29]

In *Nakkuda Ali* v *Jayaratne*[30] the Controller of Textiles had cancelled a textile dealer's licence acting under a Regulation conferring such

22. *Estate and Trust Agencies* (1927) *Ltd.* v *Singapore Improvement Trust* (1937) A.C. 898, at p. 917 (P.C.); *De Mel* v *De Silva* (*supra*)
23. De Smith, *Judicial Review of Administrative Action* (2nd ed.), at p. 70, 163, 395-396.
24. *Durayappah* v *Fernando* (1966) 69 N.L.R. 265; (1967) 2 A.C. 337.
25. *R* v *Postmaster-General, ex parte Carmichael* (1928) 1 K.B. 291.
26. *R* v *Boycott, ex parte Keasley* (1939) 2 K.B. 651.
27. Walter Gellhorn and Clark Byse, *Administrative Law, Cases and Comments*, (1960), at p. 403.
28. See *R* v *Dublin Corporation* (1878) 2 L.R. Ir. 371, at p. 376-377; *R* v *Woodhouse* (1906) 2 K.B. 501, at p. 535; *R* v *Electricity Commissioners* (1924) 1 K.B. 171, at p. 205; *Subramaniam* v *Minister of Local Government and Cultural Affairs* (1957) 59 N.L.R. 254, at pp. 259-60; *Vadamaradchy Hindu Educational Society Ltd.* v *Minister of Education* (1961) 63 N.L.R.322, at p. 327.
29. *Local Government Board* v *Arlidge* (1915) A.C. 120, at p. 140.
30. (1950) 51 N.L.R. 457 (P.C.); (1951) A.C. 66; See also *Kadawata Meda Korale Multi Purpose Cooperative Societies Union* v *Ratnavale* (1964)66 N.L.R. 220; and *Hassan* v *The Controller of Imports and Exports* (1967) 70 N.L.R. 149.

power to do so where he had "reasonable grounds to believe" that any dealer was unfit to be allowed to continue as a dealer. The Privy Council held that, although there should in fact have existed reasonable grounds known to the Controller before he could have validly exercised the power of cancellation, he was not under a duty to act judicially. Their Lordships of the Privy Council adopted the following statement of Lord Hewart C.J. in *R* v *Legislative Committee of the Church Assembly*[31]: "In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially." In *Nakkuda Ali*'s case the Privy Council went on to point out: "It is that characteristic that the Controller lacks in acting under the Regulation".

In *Ridge* v *Baldwin*[32] Lord Reid disapproved this part of the judgment in *Nakkuda Ali*'s case which gave a narrow interpretation to the duty to act judicially, as having been given "under a serious misapprehension of the effect of the older authorities and therefore cannot be regarded as authoritative". According to Lord Reid, both Bankes L.J. and Atkin L.J. in *R* v *Electricity Commissioners*[33] inferred the judicial character of the duty from the nature of the power (to affect the rights of subjects).[34] It is submitted that this wide interpretation given by Lord Reid, if it is acceppted, is equally applicable to certiorari as to a declaratory action to invalidate a decision for breach of the rules of natural justice.[35]

In the course of the Privy Council judgment in *Nakkuda Ali*'s case their Lordships also said:[36]

"It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct ana-

31. (1928) 1 K.B. 411, at p. 415.
32. (1964) A.C. 40; (1963) 2 All E.R. 66.
33. (1924) 1 K.B. 171, at pp. 198 ff.
34. In *Durayappah* v *Fernando* (1966) 69 N.L.R. 265, at pp. 269-270; (1967) 2 A.C. 337, at 349, the Judicial Committee of the Privy Council stated that "it should not be assumed that their Lordships necessarily agree with Lord Reid's analysis of that case or with his criticism of the *Nakkuda Ali* case.
35. See, however, the contrary view expressed by T. S. Fernando J in *Kadawata Meda Korale Multi-Purpose Cooperative Societies Union Ltd.* v *Ratnavale* (1964) 66 N.L.R. 220, at p. 229.
36. At pp. 462-463.

logous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this regulation.....No procedure is laid down by the Regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private, before the Controller acts".

There are, however, cases where in the absence of any express statutory duty to provide a hearing to the parties or to follow a procedure analogous to the judicial, an implied duty to act judicially has been held to arise from the nature of the statutory power to affect the rights of individuals.[37] In other words, certiorari may issue as long as a judicial element may be inferred from the nature of the power to affect the rights of citizens. "The duty to act judicially may arise in widely different circumstances which it would be impossible and, indeed, inadvisable to attempt to define exhaustively"; but it will not arise if the administrative body in arriving at its decisions has "throughout to consider the question from the point of view of policy and expediency".[38] The answer in each case will depend "on the wording of the statute, the subject-matter dealt with, and the circumstances under which the power to act is conferred."[39] The same administrative agency may even be required to act judicially at one stage in the exercise of a power though not at another stage.[40] In *Subramaniam* v *Minister of Local Government and Cultural Affairs*[41] the relevant section of the statute provided that "if at any time the Minister is satisfied that there is sufficient proof" of any of the facts enumerated therein, the Minister may by Order remove any member of a Town Council from office. It was held that when making such Order, the Minister not

37. *University of Ceylon* v *Fernando* (1960) 61 N.L.R. 505 (P.C.); (1960) 1 All E.R. 631; *Maradana Mosque (Board of Trustees)* v *Minister of Education* (1966) 68 N.L.R. 217 (P.C.); (1966) 1 All E.R. 545; *Durayappah* v *Fernando* (1966) 69 N.L.R. 265; (1967) 2 A.C. 337; *Ridge* v *Baldwin* (1963) 2 All E.R.. 66; (1964) A.C. 40; *R* v *Manchester Legal Aid Committee, ex parte Brand & Co. Ltd.* (1952) 2 Q.B. 413; *New Zealand Licensed Victuallers' Association of Employees* v *Price Tribunal* (1957) N.Z.L.R. 165, at pp. 203, 209-210.
38. R v *Manchester Legal Aid Committee, ex parte Brand & Co. (ante).*
39. *Kandiah* v *Minister of Local Government* (1966) 69 N.L.R. 25, at p. 28. See also *Munasinghe* v *Jayasinghe* (1958) 61 N.L.R. 425, at p. 428.
40. *Munasinghe* v *Jayasinghe* (1958) 61 N.L.R. 425, at p. 428. *Leo* v *The Land Commissioner* (1955) 57 N.L.R. 178; *R* v *Manchester Legal Aid Committee, ex parte Branch & Co. (supra), Robinson* v *Minister of Town and Country Planning* (1947) K.B. 702.
41. (1960) 59 N.L.R. 254.

only exercised a power which involved legal authority to determine questions affecting the rights of subjects but was also under a duty to act judicially. Gunasekera J. said:[42]

"It was stated in the judgment of the Divisional Bench (in *de Mel* v *de Silva*)[43] that the Commissioner had to inquire into various allegations of bribery and for that purpose he had to examine witnesses on oath or affirmation "and reach a decision on such evidence with regard to the allegations made against the petitioner". While it so happened that in that case the person who "had legal authority to determine questions affecting the rights of subjects" also had the power to examine witnesses on oath or affirmation it is not necessary that such a person should have that power in order that he may be under a duty to act judicially.....The Commissioner in de Mel's case was under a duty to act judicially because his decision, upon questions affecting the rights of subjects, was one that had to depend upon the proof of certain allegations of fact, and not because he had the power to examine witnesses on oath or affirmation or had some of the other attributes of a court".

In *Nakkuda Ali*'s case their Lordships of the Privy Council also stated that when the Controller cancelled a licence he was not determining a question affecting the rights of subjects but was merely "taking executive action to withdraw a privilege".[44] This distinction which was drawn by the Privy Council between the "privilege" of the grant or withdrawal of a licence and the taking away of some "right" or proprietary interest has also been subject to much criticism. The withdrawal of a licence in public law may well mean the deprivation of a person's means of earning a livelihood. A conceptualist approach equating public and private law licences and the procedures to be followed by various licensing authorities may often prove unrealistic.[45] Licensing procedures often differ

42. At p. 259 (citing in support *R* v *Manchester Legal Aid Committee, ex parte Brand & Co.* (*ante*).
43. (1949) 51 N.L.R. 105.
44. 51 N.L.R. 457, at p. 463; See also *R* v *Metropolitan Police Commissioner, ex parte Parker* (1953) 2 All F.R. 717; cf. *Merricks* v *Nott-Bower* (1965) 1 Q.B. 57, at p. 61; see also D. M. Gordon, "The Cab Driver's Licence Case" (1954) 70 L.Q.R. 203.
45. *Ridge* v *Baldwin* (1964) A.C. 40, *per* Lord Evershed. (His Lordship, however, stated that on the language of the enactment in *Nakkuda Ali*'s case there was in truth conferred on the Controller an unfettered discretion); Friedmann and Benjafield, *Principles of Australian Administrative Law* (2nd ed.) p. 147. De Smith *Judicial Review of Administrative Action*, pp. 153, 208-211. See also *Noordeen* v *Chairman, Village Committee, Godapitiya* (1943) 44 N.L.R) 294, at p. 295.

from each other. There are many reported cases reviewing certain licensing functions of administrative authorities by certiorari and prohibition, particularly where licences have been revoked,[46] although certain other licensing functions have been held by the Courts to be unreviewable by these writs as they were not regarded as judicial.[47] No distinction between so-called rights and privileges appears to have been the basis of these decisions.

Grounds on which Certiorari and Prohibition may be awarded

Some of the grounds upon which certiorari and prohibition may be awarded have already been discussed in Chapter 19 in connection with the scope of review.[48] These grounds are: (i) Want or excess of jurisdiction; (ii) Denial of the rules of natural justice; (iii) Error of law on the face of the record; (iv) Fraud or collusion.

(i) *Want of jurisdiction.* This may arise by reason of the illegal or improper constitution of the Tribunal.[49] It may also arise because the necessary statutory requirements which constitute a condition precedent to the exercise of jurisdiction have not been satisfied, or because the Tribunal, although it had jurisdiction in the first place, has proceeded to consider matters beyond its competence.[50] The Tribunal may also exceed its jurisdiction by acting in bad faith and for an improper purpose[51] or by taking into account extraneous or irrelevant considerations or ignoring relevant matters.[52]

As long as a Tribunal has jurisdiction to enter upon the enquiry, it does not exceed its jurisdiction by making an incorrect decision on

46. E.g. *R* v *Woodhouse* (1906) 2 K.B. 501; *R* v *London County Council ex parte Entertainments Protection Association Ltd.* (1931) 2 K.B. 215. *Klymchuk* v *Cowan* (1964) 45 D.L.R. (2d) 587; see the cases in Commonwealth jurisdictions referred to in de Smith, *Judicial Review of Administrative Action*, p. 211 note 43. For withdrawal of licences of "domestic tribunals," see *Russel* v *Duke of Norfolk* (1949) 1 All E.R. 109, 119. (Before a racehorse trainer's licence is withdrawn by the stewards of the Jockey Club on the ground of misconduct he must be given an opportunity of defending himself). See also De Smith, 68 *Harvard Law Review* (1955), pp. 569, 594.
47. *Nakkuda Ali's* Case (*ante*); *Parker's* case (*ante*)
48. See *ante*, pp. 311-318.
49. See *ante*, pp. 311-312.
50. De Smith, *op. cit.* pp. 407-408; Griffith and Street, *op. cit.* p. 217.
51. See *ante*, pp. 313-314.
52. See *ante*, p. 314.

the merits.[53] In cases where jurisdiction depends on the existence of a certain state of facts ("jurisdictional facts") which are preliminary or collateral to the merits of the case or to the question for decision the Tribunal cannot give itself jurisdiction by a wrong decision on such facts.[54]

(ii) *Denial of Natural Justice.*[55]

(iii) *Error of Law on the Face of the Record.* The Courts will quash the decision of an inferior Tribunal if the error of law is apparent on the face of the record. This rule extends to a Tribunal although it is not a Court of record and whether or not the error goes to jurisdiction.[56] Unlike in the case of an appeal for error of law, certiorari for error of law can only quash, but not alter, the decision and only for errors which appear on the face of the record.

The question arises, what is meant by the "record"? It was held in *Virakesari Ltd.* v *Fernando*[57] that the record includes not only the formal order, but also all those documents on which the decision appears to be based. It was also held in that case that the omission of an inferior Tribunal to take into consideration a relevant document forming part of the record or a misconstruction of such a document is an error of law appearing on the face of the record. In a well-known English case[58] Lord Denning stated that the record "must contain at least the

53. *Colonial Bank of Australia* v *Willian* (1874) L.R. 5 P.C. 417, at p. 444.
54. See *ante*, pp. 311-312.
55. The principles of natural justice are discussed, *ante*, pp. 320-329.
56. *Mudanayake* v *Sivagnanasunderam* (1951) 53 N.L.R. 25; *Dissanayake* v *Kulatilleke* (1956) 59 N.L.R. 310; *Hayleys Ltd.* v *Crossette-Thambiah* (1961) 63 N.L.R. 248; *New Dimbulla Co. Ltd.* v *Brohier* (1962) 64 N.L.R. 380; *Stratheden Tea Co. Ltd* v *Selvadurai* (1963) 66 N.L.R. 6; *Colombo Commercial Co. Ltd.* v *Shanmugalingam* (1964) 66 N.L.R. 26; *Walsall Overseas* v *London & North Western Railway* (1878) 4 App. Cas. 30, at pp. 40, 43-4; *R* v *Nat Bell Liquors Ltd.* (1922) 2 A.C. 128; *R* v *Northumberland Compensation Appeal Tribunal, ex parte Show* (1952) 1 K.B. 338.
57. (1963) 66 N.L.R. 145 (citing Lord Denning's statement in the English House of Lords case of *Baldwin & Francis Ltd.* v *Patent Appeal Tribunal* (1959) A.C. 633, at p. 690). See also *Hayleys Ltd.* v *de Silva* (1962) 64 N.L.R. 130, at p. 140, and *New Dimbulla Co. Ltd.* v *Brohier* (1962) 64 N.L.R. 380. Cf. *R* v *Chertsey Justices, ex parte Franks* (1961) 2 Q.B. 152 (certiorari for error in oral statement). See also comments by R. E. Megarry in (1962) 77 L.Q.R. p. 157 and by D. M. Gordon, at p. 322 (*ibid*).
58. *R* v *Northumberland Compensation Appeal Tribunal, ex parte Shaw* (1952) 1 K.B, 338, at p. 352; see also *R* v *Patents Appeal Tribunal, ex parte Baldwin & Francis Ltd.* (1959) 1 Q.B. 105; *Baldwin & Francis Ltd.* v *Patents Appeal Tribunal* (1959) A.C. 663, at pp.688-691. *R* v *Patents Appeal Tribunal, ex parte Swift & Co* (1962) 2. Q.B. 647.

document which initiates the proceedings, the pleadings, if any, and the adjudication; but not the evidence, nor the reasons, unless the Tribunal chooses to incorporate them". Where the decision refers to and incorporates extracts of other documents, the whole of those documents will be regarded as incorporated in the record, if they are sufficiently related to the subject-matter of the decision.[59]

In *Maradana Mosque (Board of Trustees)* v *Minister of Education*,[60] the Privy Council found it "unnecessary to embark upon a discussion" of the question whether the record in relation to the Minister's Order taking over Zahira College, Colombo, for Director-management should be taken to include the letters of the Director of Education relating to the "take-over" and the Minister's broadcast statement of his reasons for the Order.

In Sri Lanka a Tribunal generally is under no obligation to make a "speaking order", that is, one setting out the reasons on which it is based. Cases have come before the Courts where no written reasons had been given by Tribunals for their decisions. In view of the importance of sufficient reasons being given for the purpose of effective judicial review of administrative decisions, the Supreme Court has stated from time to time that it is desirable that this should be done by Tribunals.[61] Where, however, a particular statute requires a body to give reasons, it is an error of law not to give reasons or to give reasons which are substantially inadequate.[62]

In England it has been held that a decision which according to statutory provision "shall be final" may be quashed for error of law on the face of the record.[63] Even if there has been delay in making the application, where notice on the respondent has already issued and at the sub-

59. *R* v *Medical Appeal Tribunal, ex parte Gilmore* (1957) 1 Q.B. 574; *Swift & Co.* case (*ante*); *Baldwin & Francis Ltd's* case (*ante*).
60. (1966) 68 N.L.R. 217, at p. 225.
61. *Kandy Town Bus Co Ltd.* v *Commissioner of Motor Transport* (1949) 51 N.L.R. 153; *Fernando* v *Paul E. Pieris and others* (1948) 37 C.L.W. 32. In England the Tribunals and Inquiries Act, 1958, requires Tribunals subject to the Act to state the reasons for their decisions. See also *Report of Committee on Ministers' Power in Britain*, Cmd. 4060, p. 116, and *Report of Committee on Administraitve Tribunals and Enquiries* (1957) Cmd. 318, para. 98.
62. See Motor Traffic Act (Chap. 203), SS. 22. 63 (2), 97 (2). See *Re Poyser and Mills' Arbitration* (1964) 2 Q.B. 467.
63. *Reg.* v *Medical Appeal Tribunal, ex parte Gilmore* (1957) 1 Q.B. 57.

sequent hearing the petitioner, as a party aggrieved, is able to establish an error of law on the face of the record, and there is no other remedy, certiorari is granted *ex debito justitiae*.[64]

(iv) *Fraud.* Decisions made by inferior tribunals may be quashed through certiorari if they have been obtained by clear and manifest fraud or collusion.[65] Even express statutory exclusion of certiorari has been held to be ineffective under the common law to exclude the power to quash an order of a tribunal when a case of manifest fraud is shown.[66]

Locus Standi. Any person who is aggrieved by the decision of a tribunal is entitled to make an application for prohibition or certiorari. The term "a person aggrieved" is generally given a broad construction by the Courts.[67] Where injustice has been done to an applicant for relief it is natural for the Courts to adopt a lenient attitude in deciding the sufficiency of his interest in the subject-matter. Surprisingly, however, the Privy Council, in the following case from Ceylon adopted, it is submitted, too strict a test in determining that the applicant was not an aggrieved person. In *Durayappah* v *Fernando*[68] where a Minister had in the exercise of his statutory power dissolved a Municipal Council for incompetence, it was held by the Privy Council that the Order of the Minister being only voidable the Mayor had no right independently of the Council to apply for writs of certiorari and injunction because he held no office that was independent of the Council. This decision has also been criticised as it is based on the distinction between "void" and "voidable" administrative action. It has been said by an eminent English jurist that the distinction "which makes sense, when applied to certain kinds of contract, does not make sense when applied to unlawful acts of public authorities. Such acts are either lawful and valid or unlawful and void. That is why "voidable" has never played a part in Administrative Law, and should play no part now".[69]

64. *Virakesari Ltd.* v *Fernando* (1963) 66 N.L.R. 145.
65. *R* v *Gillyard* (1848) 12 Q.B. 527; *R* v *Leicester Recorder* (1947) K.B. 726; *Colonial Bank of Australasia* v *Willan* (1874) L.R. 5 P.C. 417; *R* v *Ashford, Kent Justices, ex parte Richley* (No. 2) (1956) 1.Q.B. 167.
66. *Colonial Bank of Australasia* v *Willan (ante).*
67. *Kandy Omnibus Co. Ltd* v *Roberts* (1954) 56 N.L.R. 283; *R* v *Manchester Legal Aid Committee, ex parte Brand & Co.* (1952) 2 Q.B. 413. See D.C.M. Yardley, "Certiorari and the Problem of Locus Standi". (1955) 71 L.Q.R. 388.
68. (1966) 69 N.L.R. 265 (P.C.)
69. Professor H.W. R. Wade in 83 L.Q.R. 525-526.

This same jurist (Professor Wade) has further stated: "The House of Lords (in the *Anisminic* case)[70] has made it perfectly clear that nullity is the consequence of all kinds of jurisdictional error e.g. breach of natural justice, bad faith, failure to deal with the right question, and taking wrong matters into account. Although this merely confirms long-established law, it should help to resolve the tangle caused by paradoxical suggestions that action in excess of jurisdiction may be voidable as opposed to void. As Lord Reid observed, there are no degrees of nullity.[71]

Refusal of Relief. The circumstances in which the writs will be refused are in many respects similar to those relating to mandamus.[72] For example, the writs will be refused on the ground of unreasonable delay[73] or acquiescence or waiver or because their issue would be vexatious or futile or because of the probable consequences of their issue.[74] In *P.S. Bus Co. Ltd.* v *Ceylon Transport Board*[75] the Court refused the writ on the ground that the consequences of granting the writ would be disastrous, and stated: "It would result in all the legislation passed by Parliament since it came into existence and all its actions liable to be regarded as illegal and of no effect. It would affect the rights and liabilities of several thousands of people who conducted their business activities and their lives on the basis that legislation enacted by Parliament is valid; it would disturb the peace and quiet of the country; and above all, it will bring the government of the country to a standstill".

Although as a general rule the Supreme Court will not grant these writs where there is an alternative and equally convenient remedy, the rule is not a rigid one. If the applicant satisfies the Court that the decision has been made without jurisdiction or in complete disregard of the rules of natural justice, the writs will lie even though an alternative remedy is also available.[76] In *Sirisena* v *Kotawera-Udugama Co-operative Stores*

70. (1969) 1 All E.R. 208, (H.L.)
71. Wade in 85 L.Q.R. 212.
72. See *ante*, pp. 353-4. De Smith, *op. cit.*, pp. 578-586.
73. See e.g. *R* v *Stafford Justices, ex parte Stafford Corporation* (1940) 2 K.B. 33.
74. *P.S. Bus Co. Ltd.* v *Ceylon Transport Board* (1958) 61 N.L.R. 491. See also *R* v *Paddington Valuation Officer, ex parte Peachy Property Corporation Ltd.* (1965) 2 All E.R. 836.
75. 61 N.L.R. 491, at pp. 496-497
76. *Sirisena* v *Kotawera-Udugama Co-operative Stores Ltd.* (1949) 51 N.L.R. 262. *R* v *Wandsworth Justices, ex parte Reid* (1942) 1 All E.R. 56; *R* v *Postmaster-General, ex parte Carmichael* (1928) 1 K.B. 291; *R* v *Paddington Valuation Officer, ex parte Peachy Property Corporation Ltd.* (1966) 1 Q.B. 380; see also de Smith *op. cit.*, pp. 436-438.

Ltd.,[77] certiorari was granted to quash the award of an arbitrator made in flagrant excess of his statutory jurisdiction under the Co-operative Societies Ordinance even though an alternative remedy was available under the Ordinance. Where an aggrieved party applies for certiorari in respect of an order made by a quasi-judicial body which had acted in the particular matter where it totally lacked jurisdiction, that party is entitled to the writ as of right; but where there was only a contingent want of jurisdiction, acquiescence or waiver or similar conduct would place even an aggrieved party in the same position as a stranger and the grant of relief is discretionary.[78]

Practice and Procedure. No Rules have been made by the Supreme Court with regard to the procedure to be adopted in applications for writs. It is desirable that the procedure should be governed by such Rules. The present practice is by way of application to the Supreme Court by way of petition together with an affidavit verifying the statement of facts relied upon in the petition. Fresh evidence to supplement that in the record is not receivable except where there is an objection to the jurisdiction on the ground of disqualification of the members of the Tribunal on the ground of their bias or interest in the subject-matter.[79] Cross-examination of deponents on their affidavits is permitted in exceptional circumstances.[80] Persons other than those who are parties to the application are not entitled to take part in the proceedings as intervenients.[81]

Future of Certiorari and other Writs. It has been seen already that there are many deficiencies associated with certiorari and other writs. There is, for example, the difficulty of distinguishing "judicial" from "administrative" acts[82] and of defining such phrases as "excess of jurisdiction", "error of law on the face of the record" and "real exercise of discretion". Moreover, in a writ proceeding no discovery of documents can be obtained nor can such a proceeding be combined

77. *Ante.*
78. *Kandy Omnibus Co. Ltd.* v *Roberts* (1954) 56 N.L.R. 293.
79. *Mudanayake* v *Sivagnanasunderam* (1951) 53 N.L.R. 25; *R* v *Nat Bell Liquors Ltd.* (1922) 2 A.C. 128. at p. 160.
80. *Mansoor* v *Minister of Defence and External Affairs* (1965) 64 N.L.R. 498. *R* v *Stokesley (Yorks) Justices, ex parte Bartram* (1956) 1 All E.R. 563, De Smith, *Judicial Review of Administrative Action* (2nd ed.), p. 441.
81. *Chandrasena* v *de Silva* (1961) 63 N.L.R. 143.
82. See Wade, "Courts and the Administrative Process," 63 L.Q.R. 164; De Smith, "Wrongs and Remedies in Administrative Law", 15 *Modern Law Review* 189;*Pyx Granite Co.* v *Ministry of Health* (1958) 1 Q.B. 554, at p. 574, *per* Lord Denning.

with ordinary civil remedies such as injunction and damages. There is also the question of the existence of a plurality of remedies and the difficulty of deciding whether an alternative remedy is more appropriate.

Certiorari and the other writs "have accumulated so vast a cargo of technicalities that the citizen desirous of challenging an administrative power or privilege finds himself frequently engulfed in a procedural bog which bars him from his goal."[83] The technicalities, procedural defects and other deficiencies of these writs, as compared with the superior flexibility of the declaratory judgment, have persuaded a distinguished American jurist to suggest that "either Parliament or the Law Lords should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinkers to prevent them from rising again.[84] His remedy is simple: "Establish a single, simple form of proceeding for all review of administrative action. Call it 'petition of review'. Get rid of extraordinaries as means of review. Focus attention then on the problems having significance—whether, when and how much to review".[85] Lord Denning too has suggested that the procedure of certiorari (and mandamus) are not suitable for the winning of freedom in the new age. He has stated[86]: "They must be replaced by new and up-to-date machinery, by declarations, injunctions and actions for negligence; and, in judicial matters, by compulsory powers to order a case stated. This is not a task for Parliament.....The Courts must do this. Of all the great tasks that lie ahead, this is the greatest".

These views are indeed controversial but there cannot be much doubt that the usefulness of these writs would be greatly enhanced in our developing and changing society by the adoption of more flexible rules with regard to the scope of the writs and by the amendment of their procedure.

83. Borchard, *Declaratory Judgments* (2nd ed.), xv.
84. Kenneth Culp Davis, "The Future of Judge-Made Public Law in England: Problem of Practical Jurisprudence", 61 *Columbia Law Review*, pp. 201, 204 (1961). See also the same author's article on "English Administrative Law an American View" in (1962) *Public Law* 139 and Louis L. Jaffe, 'English Administrative Law—A Reply to Professor Davis (1962) *Public Law* 407.
85. Davis, *Administrative Law Treatise* (1958), Vol. 3, p. 389.
86. Freedom under the Law (1949), p. 126. See also *Pyx Granite Co. Ltd.* v *Ministry of Housing and Local Government* (1958) 1 Q.B. 554, at p. 570 and Lord Mac Dermott, *Protection from Power under British Law* (1957), p. 88. It has been suggested that, even including the declaration and injunction, the complexity and uncertainty of English Administrative Law remedies compare ill with the simple forms of action of the French Administrative Courts; see Brown and Garner, *French Administrative Law* (1967), p. 133.

The element of flexibility is becoming increasingly marked in India and Pakistan. It is discernible also in Sri Lanka. Professor H. W. R. Wade of England has said: "We need to build up something like the concept of 'due process of law'[87] and the "courts should return to their fine tradition of enforcing the rules of natural justice as general principles; certiorari could then continue to play its historic part, subject to the necessary procedural reform".[88] Writing in 1962 Professor Wade complained further that English Administrative Law was suffering from weakness and uncertainty and that it needed "the unifying, strengthening and improving spirit that Holt and Mansfield breathed into our commercial law".[89]

But, as Professor S. A. de Smith has stated,[90] "in a series of cases decided in the 1960's, the English Courts and the Privy Council gradually began to evacuate the untenable positions that were being adopted in the early 1950's and to address themselves to essentials". The most notable of these cases is of course *Ridge* v *Baldwin*[91]. In his celebrated speech Lord Reid outlined a broad conception of the "judicial "function requiring the application of the rules of natural justice and arising by implication from the nature of the function itself and the circumstances in which it is exercised.[92] So far as Sri Lanka is concerned, this modern trend towards the avoidance of technicalities and the formulation of a judicial policy of fair administrative procedure relating to administrative action is also visible in certain recent cases.[93] As long as this trend towards a broader re-definition of the scope of certiorari and other writs continues, there would not be the same urgent need to replace the writs by entirely new machinery, as had been suggested by some critics during what may be called the "dark age" of natural justice.

2. MANDAMUS

The writ of mandamus lies to command persons or bodies to perform public duties imposed upon them by law. Unlike prohibition and certiorari mandamus is not limited to judicial and quasi-judicial acts.

87. "Law, Opinion and Administration" (1962) 78 L.Q.R. 188, at p. 228.
88. "The Future of Certiorari", (1958) *Cambridge Law Journal*, p. 228.
89. "Law, Opinion and Administration" (1962) L.Q.R. 200.
90. *Judicial Review of Administrative Action* (2nd ed.),pp 158-159.
91. (1964) A.C. 40.
92. At pp. 73-79.
93. *Subramaniam* v *Minister of Local Government and Cultural Affairs* (1957) 59 N.L.R. 254; *Samuel* v *de Silva* (1959) 60 N.L.R. 547; *University of Ceylon* v *Fernando* (1960) 61 N.L.R. 505; *Munasinghe* v *Auditor-General* (1963) 64 N.L.R. 474. *Maradana Mosque (Board of Trustees)* v *Ministry of Education* (1966) 69 N.L.R. 265. *Durayappah* v *Fernando* (1966) 69 N.L.R. 265.

Scope. The duty to be performed must be of a public nature and not one that is of a private character.[94] To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute; it may be sufficient for the public duty to have been imposed by common law, or even by custom or contract.[95] The applicant for mandamus must have a legal right amounting to a sufficient personal interest in the performance of the duty.[96] It is submitted that it is sufficient that his interest is only as a member of the public or of any affected class to which the duty is owed. The writ will issue only if there is an existing duty and not one that may arise in the future.[97] Mandamus will not also be issued to undo an act which has already been done.[98] Nor will the writ be granted by way of prohibitory injunction requiring a person to refrain from doing something unlawful.[99]

It is often said that while mandamus lies to compel the performance of a duty, it cannot be used to review the correctness of the exercise of a discretionary power, however erroneous on the merits of the case, so long as there has been a fair and honest exercise of discretion.[100] In the United States, the courts will review administrative findings which are not supported by substantial evidence, that is, by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".[101]

There is a duty on the part of a tribunal or other public authority to exercise a statutory discretion one way or the other. Where there is a wrongful refusal to exercise it, mandamus will lie. Where an authority

94. *Perera* v *Municipal Council of Colombo* (1947) 48N.L.R.66; *Rodrigo* v *Municipal Council, Galle* (1947) 49 N.L.R. 89; *Perera* v *Ceylon Government Railway Uniform Staff Benevolent Fund* (1963) 67 N.L.R. 191.
95. S. A. de Smith, *Judicial Review of Administrative Action* (2nd. ed.), at pp. 561-562; *R* v *Secretary of State for War* (1891) 2 Q.B. 326, at p. 335.
96. *The Bank of Chettinad* v *Tea Export Controller* (1935) 37 N.L.R. 190; *Sumangala Maha Nayaka Thero* v *The Registrar General* (1941) 42 N.L.R. 251, at p 255, R v *Lewisham Union Guardians* (1897) 1 Q.B. 498; *Ex parte Napier* (1852) L. J. Q.B. 332, at p. 335. *R* v *Commissioners for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313, at p. 317.
97. *Mohamedu* v *Silva* (1949) 52 N.L.R. 562.
98. *Mohamedu* v *Silva* (*supra*). *Ex parte Nash* (1850) 15 Q.B. 92, at p. 95.
99. *The Colombo Buddhist Theosophical Society* v *de Silva* (1961) 63 N.L.R. 237.
100. *Value* v *Commissioner of Income Tax* (1943) 45 N.L.R. 6; *In re Salgado* (1892) 1 S.C.R. 189; *Fernando* v *Boake* (1883) 5.S.C.C. 170; *R* v *Kingston Justices, ex parte Davey* (1902) 86 L.T. 589; *R* v *Port of London Authority, ex parte Kynoch Ltd.* (1919) 1 K.B. 176 at 183-185. *R* v *London County Council, ex parte Corrie* (1918) 1 K.B. 78. De Smith, *op. cit.*, 108-109.
101. Griffith and Street, *op. cit.*, 230, citing *Consolidated Edison Co.* v *National Labour Relations Board* (1938)305 U.S. 197, at p 229. *Gellhorn, Administrative Law* 928.

has exercised even its unfettered discretionary power unlawfully, namely, by misdirecting itself in law or by taking into account irrelevant considerations or without regard to relevant considerations the Court will hold that it has failed to exercise its discretion or jurisdiction according to law and therefore mandamus will lie.[102]

Where a power is conferred for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of persons who have that right, when required on their behalf.[103] For example, the Court will require it to be exercised where such persons are specifically pointed out and there is a definition by the Legislature of the conditions upon which they are entitled to call for its exercise.[104]

Mandamus does not lie against the State itself, nor against the President nor a servant or agent of the State acting exclusively in the capacity of such servant or agent.[105] However, with the expansion of the sphere of government activity this rule is being increasingly attacked.[106] Where there is expressly imposed by statute on a Government Department or a State officer a public duty which is owed to the subject and not merely to the State, mandamus will lie to enforce its performance.[107]

The applicant for mandamus must show that he has requested performance of the duty and has been refused. There may be a refusal by

102. *Padfield* v *Minister of Agriculture, Fisheries and Food* (1968) 1 All E.R. 694; *Wijesuriya* v *Moonesinghe* (1959) 64 N.L.R. 180; *de Zoysa* v *Dyson* (1945) 46 N.L.R. 351; *Noordeen* v *Chairman Village Committee, Godapitiya* (1943) 44. N.L.R. 294; *The Bank of Chettinad* v *Tea Export Controller* (1935) 37 N.L.R; 190 at pp. 195-196; *Samynathan* v *Whitehorn* (1934) 35 N.L.R. 225 at pp. 227-229 *In re S.E. Fernando* (1924) 26 N.L.R. 211; *R* v *Askew* (1768) 4 Burr 2186 at pp. 2188-2189; *Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation* (1948) 1 K.B. 223. See de Smith, *op. cit.*, 565-566.

103. *Julius* v *Bishop of Oxford* (1880) 5 App. Cas. 214 at p. 241, *per* Lord Blackburn.

104. *Julius'* case (*supra*), at p. 225, *per* Lord Cairnes.

105. *Munasinghe* v *Deverajan* (1955) 57 N.L.R. 286; *City Motor Transit Co. Ltd.* v *Wijesinghe* (1961) 63 N.L.R. 156; *Kariapper* v *Wijesinghe* (1966) 68 N.L.R. 529 (Supreme Court); 70 N.L.R. 49 (Privy Council); *R* v *Secretary of State for War* (1891) 2 Q.B. 326 at p. 334. *R* v *Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387; *Denby* v *Berry* (1922) 279 F317, reversed on other grounds: (1923) 263 U.S. 29. Williams, *Crown Proceedings*, pp. 148-150.

106. See E.C.S. Wade, "The Courts and the Administrative Process' (1947) 63 L.Q.R. 164, at p. 170; W. W. Lucas, "The Immunity of the Crown for Mandamus" (1909) 25 L.Q.R. 290.

107. *City Motor Transit Co. Ltd.* v *Wijesinghe* (*ante*); De Smith, *Judicial Review of Administrative Action*, pp. 575-576; *R* v *Commissioner for Special Purposes of Income Tax* (1888) 21 Q.B.D. 313. *Minister of Finance of British Columbia* v *R* (1935) 3 D.L.R.316.

conduct which shows that the respondent is clearly determined not to comply with the applicant's request to perform his duty; for example, where the respondent, by his failure to reply to letters of the applicant and by his continued silence, withholds a direct answer to the petitioner's request he may legitimately be regarded as having refused to do his duty.[108] The rule that there must be a prior demand and a refusal does not apply to those duties which affect the public at large.[109]

Discretion. The grant of mandamus is a matter for the discretion of the Court, even where there is a *prima facie* case.[110] The writ may be refused not only upon the merits but also by reason of expediency and the consequences of granting it, such as public inconvenience and disorder.[111] The Court will not, however, be astute to discover reasons for not granting this great constitutional remedy.[112] It will exercise its discretion according to certain well-settled principles. Mandamus may be refused on the ground that its issue would be futile and could not be obeyed by the respondent or would be of no use or benefit to the applicant.[113] The writ may also be refused where there has been delay or acquiescence on the part of the applicant or where the Court is not convinced that his motive is to secure the performance of a public duty.[114]

The Court will not ordinarly exercise its discretionary power to grant a writ when there is an alternative remedy "equally convenient, beneficial and effectual".[115] For example, where there exists an equally convenient

108. *Wijeyesekera & Co. Ltd.* v *The Principal Collector of Customs* (1951) 53 N.L.R. 329; *City Motor Transit Co. Ltd.* v *Wijesinghe* (1961) 63 N.L.R. 156; *R* v *Brennock and Abergavenny Canal Navigation* (1835) 3 A & E. 217; 111 E.R. 295; *R* v *Commissioners of the Navigation of the Thames and Isis* 8 A & E . 901; 112 E.R. 1080.
109. *Amugodage Jamis* v *Balasingham* (1950) 52 N.L.R. 321.
110. De Smith, *op. cit.*, p. 579. Gellhorn & Byse, *Administrative Law*, pp. 912 ff.
111. *Inasitamby* v *Government Agent, Northern Province* (1932) 34 N.L.R. 33,at p. 35; See also *R* v *Paddington Valuation Officer, ex parte Peachy Property Corporation Ltd.* (1964) 2 All E.R. 836.
112. *Madanayake* v *Schrader* (1928) 29 N.L.R. 389,at p. 393; *Rochester Corporation* v *R* (1858) E.B. & E. 1024, at p. 1030.
113. *In re Wimalasuriya* (1927) 28 N.L.R. 417; *Simon Silva* v *Assistant Government Agent, Kalutara* (1931) 33 N.L.R. 257; *Goonesinghe* v *Mayor of Colombo* (1944) 46 N.L.R. 85; *Sethu Ramasamy* v *Moregoda* (1961) 63N.L.R.115; *Shamsudeen* v *Minister of Defence and External Affairs* (1961) 63 N.L.R. 430. de Smith *op. cit.*, pp. 581-582.
114. *Madanayake* v *Schrader* (1928) 29 N.L.R. 389; *Sumangala Maha Nayake Thero* v *Registrar General* (1941) 42 N.L.R. 25; *R* v *Church Wardens of All Saints, Wigan* (1876) 1 A.C. 611, at p. 620.
115. *Fernando* v *Government Agent, Western Province* (1914) 17 N.L.R. 314, at p 318; *Perera* v *Municipal Council of Colombo* (1947) 48 N.L.R. 66; *Fernando* v *Dharmasiri* (1969) 72 N.L.R. 320; *Re Barlow* (1861) 30 L.J.Q.B. 271; *Pasmore* v *Oswaldtwistle Urban District Council* (1898) A.C. 387, 394.

remedy provided by law by way of appeal, mandamus may not be granted.[116] The alternative remedy may even be to a domestic forum.[117] But the mere existence of an alternative remedy will not preclude the Court from issuing the writ in appropriate cases, particularly where the remedy is not equally effectual as well as convenient and there is a necessity for speedy justice.[118]

Where the issue of the writ would affect adversely a party who is not before the Court, that party must be made a respondent to the proceedings.[119] The petitioner for mandamus may move that necessary parties be added as respondents, so long as the substantive application before the Court is not ready for inquiry.[120] Persons who are not parties are not entitled to take part in the proceedings as intervenients.[121] The Court has discretionary power to order the petitioner to deposit in Court a sum of money as security for the costs of the respondents.[122]

3. QUO WARRANTO

Origin. Unlike the other writs of the Supreme Court, quo warranto was provided for by the Legislature at a comparatively late stage after the establishment of the Court and "only after the Judges had repeatedly deplored the fact that it was not competent to them to grant the writ and so question disputed Municipal elections."[123]

116. *Dankoluwa Tea Estates Ltd.* v *The Tea Controller* (1940) 42 N.L.R. 36; *Samynathan* v *Whitehorn* (1934) 35 N.L.R. 225; *The Bank of Chettinad* v *Tea Export Controller* (1935) 37 N.L.R. 190; *Don Carolis* v *Chairman U.C., Gampaha* (1949) 51 N.L.R. 227.
117. *Cooray* v *Grero* (1953) 56 N.L.R. 87; *R* v *Dunsheath, ex parte Meredith* (1951) 1 K.B. 127.
118. *Local Government Commisson* v *Urban Council, Panadura* (1952) 55 N.L.R. 429; *Seenivasagam* v *Kirupamoorthy* (1953) 56 N.L.R. 450; *Samaraweera* v *Balasuriya* (1955) 58 N.L.R. 118; *Wijesuriya* v *Moonesinghe* (1959) 64 N.L.R. 180; *Pathirana* v *Goonesekera* (1962) 66. N.L.R. 464; *R* v *Newcastle-on-Tyne Corporation* (1899) 60 L.T. 963; *Rakhaldas Mukherjee* v *S.P. Ghose* (1952) A.I.R. Cal. 171.
119. *James Perera* v *Godwin Perera* (1946) 48 N.L.R. 190; *Goonetilleke* v *Government Agent, Galle* (1946) 47 N.L.R. 549; *Carron* v *Government Agent, Western Province* (1945) 46 N.L.R. 237; *In re Keik* (1880) 3 S.C.C. 12.
120. *Vinnasithamby* v *Joseph* (1961) 65 N.L.R. 359.
121. *Chandrasena* v *de Silva* (1961) 63 N.L.R. 143.
122. *Jayasinghe* v *Dayaratne* (1952) 54 N.L.R. 90.
123. *Piyadasa* v *Goonesinghe* (1941) 42 N.L.R. 339, at pp. 342-343; *Application of a Mandamus on the Chairman of the Municipal Council, Colombo* (1913) 18 N.L.R. 97, 104. See also *In re Jaffna Local Board Election* (1907) 1 A.C.R. 128; *Abeywardene* v *Chairman Municipal Council, Galle* (1906) 9 N.L.R. 304, at p 309. In England the Local Government Act, 1933 (s. 84) provided for the validity of a local government election to be challenged in Court by election petition.

The writ of quo warranto was eventually introduced into the law of Ceylon by Ordinance No. 4 of 1920, which amended the Courts Ordinance for this purpose. It is of interest to note in this connection that in England the old prerogative writ of quo warranto was later superseded by "information in the nature of quo warranto" which itself was replaced in 1938 by injunction under the Administartion of Justice (Miscellaneous Provisions) Act. The High Court may now grant an injunction in similar circumstances to restrain a person from acting in an office to which he is not elected.

Scope. Under the law the writ of quo warranto may be granted by the Supreme Court to determine whether the holder of a public office is legally entitled to it. It is necessary that the office which is usurped should be "of a public nature and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others".[124] The test to be applied is whether there has been usurpation of an office of a particular nature and independent in title,[125] that is to say "an office or employment which was a subsisting, permanent, substantive position which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders".[126]

The person against whom quo warranto is applied must be in actual possession of the office.[127] So long as a person is actually in office, the circumstance that he neither functioned in fact as such officer nor received any remuneration is immaterial.[128] In Sri Lanka in the absence of any procedure under the Local Authorities Elections Ordinance the writ of quo warranto lies to question the election of a member of a local government authority, who has acted in that office.[129] If, however, the election

124. *Deen* v *Rajakulendran* (1938) 40 N.L.R. 25, at p. 28, citing with approval an opinion delivered in the House of Lords in *Darley* v *The Queen* (1846) 12 Cl F. 520. *Chandrasena* v *de Silva* (1961) 63 N.L.R. 308. *Ex parte Richards* (1878) 3 Q.B.D. 368.
125. *Rex* v *Speyer* (1915) 1 K.B. 595.
126. *Perera* v *Amerasinghe* (1953) 54 N.L.R. 477, at p. 479, citing Rowlatt J in *Great Western Railway Company* v *Bater* (1922) 2 A.C.1.
127. *Ukku Banda* v *Government Agent, Southern Province* (1927) 29 N.L.R. 168, at p. 170, citing *R* v *Whitewell* 5 T.R. 85.
128. *Fonseka* v *Sellathurai* (1951) 54 N.L.R. 486. Compare *De Zoysa* v *Kulatileke* (1945) 46 N.L.R. 143; *Wijegoonewardene* v *Kularatne* (1950) 51 N.L.R. 453; *Pundelick Vishwanath* v *Mahadev Binjray* AIR (1959) Bom. 2; *R* v *Whitewell* 5 T.R. 85: in the case of a municipal councillor, for instance, he assumes office by taking his seat or otherwise acting in such office.
129. *Piyadasa* v *Goonesinghe* (1941) 42 N.L.R. 339; *Gunasekera* v *Wijesinghe* (1963) 65 N.L.R. 303.

was merely 'colourable' and therefore void, so that in point of law the office is vacant, then the remedy is to seek a writ of mandamus to proceed to an election *de novo*, the pretended election being a nullity.[130] Even if the validity of an election cannot be questioned by quo warranto, the writ is nevertheless available for the purpose of calling upon a person who is *prima facie* disqualified from holding a particular office to show upon what authority he claims to hold such office.[131] The writ of quo warranto cannot be used to canvass the decision of a person such as the presiding officer who is appointed by law to exercise functions of a judicial character with respect to the election.[132]

Quo Warranto will not be granted to question the title of a person to an office after he has actually ceased to hold it. This rule is subject to two exceptions; namely (a) where the resignation has taken place only after the issue of the rule *nisi* and (b) where the applicant's purpose is to substitute another candidate in the office.[133]

Discretionary Remedy. Quo Warranto, like the other writs, is a discretionary remedy and the circumstances in which the Court will exercise its discretion are similar. For example, the Court may refuse to grant the writ where there has been undue delay,[134] or acquiescence on the part of the aggrieved party in the proceedings.[135] Thus a member of a local authority who has participated and concurred in the alleged election irregularities on which he bases his application for the writ is disqualified from impeaching a title conferred by the election.[136] The writ will be refused because of the motives or conduct of the applicant or where he is actuated by malice[137] or where there is a remedy equally appropriate and

130. *Samarakoon* v *Tikiri Banda* (1949) 51 N.L.R. 259, at p. 261; *Application for a Mandamus on the Chairman of the Municipal Council* (1913) 18 N.L.R. 97; *Re Barnes Corporation, ex parte Hutter* (1933) 1 K.B. 668.
131. *Cumarasinghe* v *Abeyratne* (1937) 39 N.L.R. 150, at p. 152; *R* v *Beer* (1903) 2 K.B. 693; *R* v *Diplock* L.R. 4 Q.B. 549.
132. *Cumarasinghe* v *Abeyratne* (1937) 39 N.L.R. 150; Shortt on *Mandamus* (1st ed.), p. 132.
133. *Fernando* v *Peiris* (1943) 44 N.L.R. 390; *R* v *Blizard* 2 Q.B. 55.
134. *Wijegoonewardene* v *Kularatne* (1950) 51 N.L.R. 453; *Jayasooria* v *de Silva* (1940) 41 N.L.R. 510; *Perera* v *Rajapakse* (1925) 26 N.L.R. 422.
135. *Givendrasinghe* v *de Mel* (1948) 49 N.L.R. 422; *Jayasooria* v *de Silva* (1940) 41 N.L.R. 510. *Navaratnam* v *Sabapathy* (1968) 71 N.L.R. 566.
136. *Thassim* v *Wijekulasuriya* (1952) 55 N.L.R. 59; *Inasitamby* v *Government Agent, Nothern Province* (1932) 34 N.L.R. 33, at p. 36. *Karunaratne Bandara* v *Aladin* (1944) 45 N.L.R. 340.
137. *Mendias Appu* v *Hendrick Singho* (1945) 46 N.L.R. 126; *Marikar* v *Punchihewa* (1938) 39 N.L.R. 412, at p.415; *Wijeyratne* v *Obeysekere* (1928) 30 N.L.R. 153.

effective.[138] Quo Warranto will not therefore lie in the case of a Parliamentary election because of the existence of the alternative remedy of an election petition.[139] The writ probably lies in the case of a member of the National State Assembly if the disqualification continues or arises after his election.[140] The writ may be refused where its issue would be vexatious or futile,[141] where disastrous consequences would follow its grant[142] or where the irregularity complained of has not really affected the result of the election to an office.[143]

4. INJUNCTION

An injunction is an order of a Court whereby a party to a proceeding is required to do or to refrain from doing a particular unlawful act. The person seeking an injunction must show that he will suffer special damage if the person or authority against whom relief is asked for is not restrained from doing or continuing to do the wrongful act.

The Interpretation Ordinance (section 24, which was inserted by the Interpretation (Amendment) Act, No. 18 of 1972) provides that no enactment shall be construed to confer on any Court, in any action or other civil proceedings, the power to grant an injunction or make an order for specific performance against the Republic of Sri Lanka, a Minister or a Deputy Minister in respect of any act done or intended or about to be done by any such person or authority vested by law in any such person or authority. The above provisions are not to be deemed to affect the power of such Court to make, in lieu thereof, an order declaratory of rights of parties. The section also provides that no Court shall in any civil proceeding grant any injunction or make an order against a State officer if the granting of the injunction or the making of the order would be to give relief against the Republic which could not have been obtained in proceedings against the Republic.[144]

138. *Deen* v *Rajakulendran* (1938) 40 N.L.R. 25; *Samarakoon* v *Tikiri Banda* (1949) 51 N.L.R. 259; *Fernando* v *de Silva* (1951) 53 N.L.R. 154.
139. See *R* v *Morten* (1892) 1 Q.B. 39; *Biman Chandra* v *Mukerjee* AIR (1952) Cal.79
140. See *R* v *Beer* (1903) 2 K.B. 693.
141. *Peiris* v *Gunasekera* (1963) 66 N.L.R. 498; *Punchi Singho* v *Perera* (1950) 53 N.L.R. 143.
142. *P.S. Bus Co. Ltd.* v *Members and Secretary of Ceylon Transport Board* (1958) 61 N.L.R. 491.
143. *Jayasooria* v *de Silva* (1940) 41 N.L.R. 510; *Navaratnam* v *Sabapathy* (1968) 71 N.L.R. 566.
144. Compare Crown Proceedings Act, 1947, of England, s. 21.

An injunction may be prohibitory or mandatory. A prohibitory injunction is granted to compel a party to refrain from doing a specified act. A mandatory injunction affirmatively directs a party to do some act or restore something.[145] In Administrative Law, applications for mandatory injunctions are less common than those for prohibitory injunctions because the performance by public authorities of their legal duties is often enforced by the remedy of mandamus.

Injunctions may also be divided into temporary or interlocutory and perpetual. An interim or interlocutory injunction is one that is granted at any stage of an action to prevent a change in the *status quo* and which is effective only until the determination of the action or until the further orders of the Court. A perpetual injunction, on the other hand, is one that is granted at the conclusion of the proceedings in the action.

Under the Courts Ordinance[146] it is lawful[147] for a District Court or a Court of Requests to grant an injunction on any action:

(*a*) where it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act or nuisance the commission or continuance of which would produce injury to the plaintiff; or

(*b*) where it appears that the defendant during the pendency of the action is doing or committing, or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or committed, an act or nuisance in violation of the plaintiff's rights respecting the subject-matter of the action and tending to render the judgment ineffectual; or

(*c*) where it appears that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff.

145. *Pillai* v *Tambi* (1893) 2 S.C.R. 59; *Fernando* v *Ammal* (1909) 12 N.L.R. 200, 205.
146. Chapter 6 of the Legislative Enactments, s. 86.
147. These words are permissive and it is in the discretion of the Court to determine whether an injunction should be granted: *R* v *Bishop of Oxford* (1880) 5 App. Cas. 214, 222. This discretion should, however, be exercised in accordance with reason and on sound judicial principles: AIR (1933) All 86, 90.

In any such case it is lawful for the Court, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, to grant an injunction restraining any defendant from:

(i) committing or continuing any such act or nuisance;
(ii) doing or committing or procuring or suffering to be done or committed any such act or nuisance;
(iii) removing or disposing of such property.

But a Court has no power to remove a defendant who is in possession of the subject-matter of the action and to place the plaintiff in possession pending the result of the action.[148]

An injunction may be obtained to prevent a public authority, which is not statutorily excluded from its operation, from exceeding its powers.[149] An injunction, like the writ of quo warranto, may also be obtained to restrain a person, from acting in an office to which he is not entitled and, if necessary, to declare the office to be vacant.[150] In the case of legislative proceedings in the National State Assembly, the Courts cannot interfere by injunction. The Constitution provides that, except as otherwise expressly provided in the Constitution, no Court or other institution administering justice has power or jurisdiction in respect of proceedings of the National State Assembly or of anything done, purported to be done or omitted to be done by or in the National State Assembly. (s. 39 (1)).

The application for the injunction, except in cases where an injunction is prayed for in a plaint in any action, must be by petition, and must be accompanied by an affidavit of the applicant or some other person having knowledge of the facts, containing a statement of the facts on which the application is based.[151] An injunction may not be granted where there is an alternative remedy which is adequate. In particular, an injunction will not be granted where the plaintiff's injury can be sufficiently compensated by way of damages.[152] Where public rights are affected an injunction can

148. *Pounds* v *Ganegama* (1938) 40 N.L.R. 73.
149. *Attorney-General* v *Fulham Corporation* 1921 I Ch. 440; *Attorney-General* v *Manchester Corporation* 1906 I Ch. 643.
150. See de Smith, *Judicial Review of Administrative Action* (2nd ed.), pp. 479-481.
151. Civil Procedure Code (Chapter 101 of the Legislative Enactments), s.662. In both these cases an affidavit is essential: *Rampukpota* v *Jayakody* (1928) 29 N.L.R. 383.
152. *Madar* v *Makeen* (1922) 27 N.L.R. 227; *Jinadasa* v *Weerasinghe* (1929) 31 N.L.R. 33.

be brought only by the Attorney-General either at his own instance or at the request of some individual member of the public (relator). A private individual can sue for an injunction where either the interference with a public right involves also an interference with a private right of his own or, where in respect of the interference with a public right he suffers some special damage peculiar to himself.[153] In all other cases the Attorney-General must be joined as a party.[154] "Special damage" in this connection has been described as damage different in kind, as well as in degree, from the damage suffered by the rest of the public.[155]

An injunction may also be granted to prevent persistent contravention of a statute conferring rights on the public.[156] An injunction may be granted to accompany the summons, or at any time after the commencement of the action and before final judgment, and with or without notice, in the discretion of the Court, unless the defendant has answered, in which case it must be granted only upon notice or an order to show cause; and where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the Court may grant an injunction restraining the defendant until the hearing and decision of the application.[157] The Court may require security before granting an injunction.[158] The Civil Courts Commission has recommended that the Civil Procedure Code should be amended to give effect to the present practice requiring the Court in every case in which it grants an injunction without notice to the opposite party to secure the payment of all compensation, damage and costs that may be sustained by the opposite party by reason of the issue of an injunction.[159]

An injunction directed to a corporation, board or other public body is binding not only on the body itself, but also on all members or officers of that body whose personal action it seeks to restrain.[160]

153. *Boyce* v *Paddington Borough Council* (1903) 1 Ch. 109; *Lyon* v *Fishmongers Co.* (1876) 1 App. Cas. 662.
154. *Attorney-General* v *Ashborne Recreation Ground Co.* (1903) 1 Ch. 101; *London County Council* v *Attorney-General* (1902) A.C. 165.
155. G. H. L. Friedman, "The Definition of Particular Damage in Nuisance", (1953) 2 *University of Western Australia Annual Law Review*, 490-503; I. Zamir, *The Declaratory Judgment*, pp. 270-272.
156. *Attorney-General* v *Bastow* (1957) 1 Q.B. 541: *Attorney-General* v *Harris* (1961) 1 Q.B. 74; *Attorney-General* v *Smith* (1958) 2 Q.B. 173.
157. Courts Ordinance, s. 87.
158. *Don Mathes* v *Dissanayake* 6, C.W.R. 358.
159. Sessional Paper XXIII (1955), Part 2, para. 179.
160. Civil Procedure Code, s. 665.

An order for an injunction may be discharged or varied or set aside by the Court on application made thereto on petition by way of summary procedure by any party dissatisfied with the order.[161] If it appears to the Court that the injunction was applied for on insufficent grounds, or if, after the issue of an injunction which it has granted, the action is dismissed or judgment is given against the applicant by default or otherwise, and it appears to the Court that there was no probable ground for applying for the injunction, the Court may, on the application of the party against whom the injunction issued, award against the other party such sum as it deems a reasonable compensation for the expense or injury caused to that party by the issue of the injunction.[162]

The Supreme Court has power under section 20 of the Courts Ordinance[163] to grant and issue injunctions to prevent any irremediable mischief which might ensue before the party making application for such injunction could prevent the same by bringing an action in any original Court. This power was given originally by section 49 of the Charter of Justice of 1833. In *Gnanamuttu* v *Chairman U.C. and Urban Council, Bandarawela*[164] the petitioner applied to the Supreme Court for an interim injunction against the Council restraining it from interfering with or disconnecting the petitioner's water supply, pending the action for a perpetual injunction restraining it in the District Court notice of which he had previously given to the Urban Council. It was held that the Supreme Court had power, under section 20 of the Courts Ordinance to issue a mandatory injunction and to order the respondents to restore the water supply to the condition in which it was at the time notice of action was given. But an injunction will not be granted by the Supreme Court if the petitioner was in a position to apply to the District Court for an injunction at about the time that he filed his application in the Supreme Court or even if, between the date of his filing his petition in the Supreme Court and the date of hearing of arguments, the petitioner could have instituted action in the District Court.[165] Apart from its power derived under this section the Supreme Court has no inherent authority to issue injuctions.[166]

161. Civil Procedure Code, s. 666.
162. Civil Procedure Code, s. 667
163. Chapter 6, Legislative Enactments. In a fit case an injunction can be granted after only *ex parte* hearing and without prior notice to the opposite party: *Arnolis Silva* v *Tambiah* (1961)63 N.L.R. 228.
164. (1942) 43 N.L.R. 366.
165. *Buddhadasa* v *Nadaraja* (1955) 56 N.L.R. 537.
166. *Mohamedo* v *Ibrahim* (1895) 2 N.L.R. 36.

Indeed this power is a strictly limited one to be exercised only on special grounds and in special circumstances, (1) where irremediable mischief would ensue from the act sought to be restrained, (2) an action would lie for an injunction in some Court of original jurisdiction and (3)the plaintiff is prevented by some substantial cause from applying to that Court.[167]

An order for an injunction must be implicitly observed until it is discharged and every diligence must be exercised to obey it to the letter.[168] Disobedience to an injunction is punishable by fine or imprisonment as a contempt of court,[169] notwithstanding that it was irregularly issued.[170] Where an injunction granted by a District Court has been disobeyed the Supreme Court too has power to punish the offender for contempt of court.[171]

5. DECLARATORY JUDGMENT

Under the Civil Procedure Code (section 217 (G)), a Court may by decree or order, without affording any substantive relief or remedy, declare a right or status. In a declaratory judgment the Court merely declares the legal rights of the party to the action. The declaration does not contain any coercion or means for securing its enforcement. Although a declaratory judgment has no coercive force and cannot be directly enforced like an executory judgment, it is nevertheless effective in practice. The reason is that, apart from it being *res judicata*, the other party will, at least for fear of public cirticism, respect the decision once the law is declared by the Court.

The Interpretation Ordinance (s. 23, which was inserted by the Amending Act, No. 18 of 1972) enacts that, subject to the provisions of section 24, where a Court of original civil jurisdiction is empowered by any enactment to declare a right or status, such enactment shall not be construed to empower such Court to entertain or to enter decree or make any order in any action for a declaration of a right or status upon any ground

167. *Mohamado* v *Ibrahim* (1895) 2 N.L.R.36; *Ratwatte* v *Minister of Lands* (1969) 72 N.L.R. 60.
168. *Gnanamuttu* v *Chairman U.C. and Urban Council, Bandarawela*(1942) 43 N.L.R. 366, at p. 370. *Harding* v *Tingey* 10 L.T.N.S. 325; *Spokes* v *Bamburg Board of Health* L.R. 1 Eq. 48; *Russel* v *East Anglian Railway Co.* 20 L.J. Ch. 261.
169. Courts Ordinance, s. 57; Civil Procedure Code, ss. 663, 800; *Gnanamuttu's* case (*supra*)
170. *Silva* v *Appuhamy* (1899) 4 N.L.R. 178.
171. Courts Oridnance, s. 47: *In re Cader* (1963) 68 N.L.R.293.

whatsoever, arising out of or in respect of or in derogation of any order or finding which any person, authority or tribunal is empowered to make or issue under any written law. The effect of section 24 is that, although no enactment can be construed to confer on any Court in any civil proceedings the power to grant an injunction or an order for specific performance against the Republic, a Minister or Deputy Minister in respect of any act in the exercise of any power or authority vested by law, this provision does not affect the power of such Court to make, in lieu thereof, an order declaratory of rights of parties.

Subject to the class of orders or decisions which are expressly excluded by sections 23 and 24 of the Interpretation Ordinance, declarations may be awarded by a Court for such purposes as the determination of a status such as the validity of a marriage, the settlement of disputes relating to rights of property or arising out of contract or the declaration of the rights of private employees.[172]

In a class of case not expressly excluded under sections 23 and 24 of the Interpretation Ordinance a declaratory order may be granted, in lieu of an injunction or specific performance to review not only "judicial" acts but also those which are legislative or administrative. The order may be made respecting the validity of any decision of a Minister or Deputy Minister which was in excess of jurisdiction.[173] The Court may declare the decision of the Minister or Deputy Minister to be invalid due to failure to observe the rules of natural justice even where the exercise of the power has not been made subject to any express procedural requirement.[174]

Where the Court exercises its discretionary power of awarding a declaration in lieu of an injunction, it does so on certain general principles. The remedy will be granted only where the question at issue between the

172. For a full account of the scope of these classes of cases, see S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed.), Chap II, and I. Zamir, *The Declaratory Judgment* (1962), Chap. 5.
173. *Barnard* v *National Dock Labour Board* (1953) 2 Q.B. 18; *Vine* v *National Dock Labour Board* (1957) A.C. 488.
174. *Cooper* v *Wilson* (1937) 2 K.B 309; *Ridge* v *Baldwin* (1964) A.C. 40. Contrast *Vidyodaya University* v *Silva* (1964) 66 N.L.R. 505 and see the criticism of this case by de Smith, *op. cit.*, at p. 215.

parties is real and justiciable and not fictitious or academic.[175] The Court will only grant a declaration where the applicant's legal rights are affected. This is a serious limit to its usefulness as a remedy in Administrative Law because it may be refused purely on the ground that the applicant has no legal standing. The remedy will also be refused where the question is raised in relation to hypothetical facts. A declaration may not be available where the jurisdiction of the Minister or Deputy Minister is exclusive or where another remedy is the appropriate one.[176] Even in a case where certiorari may be an appropriate remedy the Court is not debarred from granting a declaration in a permitted case.[177] The declaratory order may, however, not be made if there is another exclusive and effective remedy which has been provided.[178]

175. *Russian Commercial Industrial Bank* v *British Bank for Foregin Trade Ltd.* (1921) 2 A.C. 438, at p. 452, *per* Lord Sumner. *Re Bernato, Joel* v *Sanges* (1949) Ch. 258; *Attorney-General for Australia* v *R and the Boilermarkers' Society of Australia* (1957) A.C. 288, at p. 316. The Privy Council expressed the view that to give advisory opinions on hypothetical cases would embarrass the judges in dealing with subsequent actual disputes). See generally De Smith, *op. cit.*, 522 ff; I. Zamir, *The Declaratory Judgment* (1962), pp. 43 ff.

176. *The Land Commissioner* v *Ladamuttu Pillai* (1960) 62 N.L.R. 169; *Leo* v *The Land Commissioner* (1955) 57 N.L.R. 178. See also *Pyx Granite Co.* case (1958) 1 Q.B. 554 at pp. 571, 579. *Healey* v *Minister of Health* (1955) 1 Q.B. 221. *Punton* v *Ministry of Pensions and National Insurance* (1963)1 All E.R. 275; (1964) 1 All E.R. 448.

177. *Pyx Granite Co.* case (1960) A.C. 260, at p. 290, *per* Lord Goddard; *Cooper* v *Wilson* (1937) 2 K.B. 309; *Barnard* v *National Dock Labour Board* (1953) 2 Q.B. 18; *Vine* v *National Dock Labour Board* (1957) A.C. 488. Cf. *Singho Mahatmaya* v *The Land Commissioner* (1964) 66 N.L.R. 94. See also I. Zamir, *The Declaratory Judgment* (1962), pp. 96 ff.

178. *Watt* v *Kesteven* C.C. (1955) 1 Q.B. 408. See Zamir, op. cit., pp. 69 ff; De Smith, *op. cit.*, pp. 518-522.

CHAPTER 21

PROCEEDINGS BY AND AGAINST THE STATE AND STATUTORY AUTHORITIES

THE STATE AND ITS RIGHTS, LIABILITIES AND OBLIGATIONS

The State may be regarded in law as a legal person or corporate entity. Under the Romans the Fisc as representing the State, which was originally outside the scope of the private law (jus civile), became a juristic person during the era of the Emperors.[1] This Roman law conception of the State later passed into the Roman-Dutch law.

When the British occupied the maritime settlements of the Dutch in Ceylon in 1796, the Crown did not impose English law.[2] The Royal Proclamation that was issued by British Governor Francis North on 23 September 1799 declared that the administration of justice and police in these settlements should be henceforth and during His Majesty's pleasure be exercised by all Courts of judicature, civil and criminal, 'according to the laws and institutions that subsisted under the ancient government of the United Provinces', subject to such deviations and alterations as have been or might hereafter be by lawful authority ordained and published.

In Ceylon, as Arunachalam has pointed out,[3] the legal status of the Fisc, as representating the State, became complicated by the statutory introduction in 1866 of the English law of corporations. According to English law the State is not recognised as a juristic entity. But the term "the Crown" is generally used to refer to the Queen in her official capacity as a corporation sole and the nearest equivalent of the Fisc.

1. Arunachalam, *Digest of the Civil Law of Ceylon*, vol. 1, p. 208. J.W. Jones, "The Early History of the Fiscus", 43 L.Q.R. (1927), p. 499. In Germany, since Gierke, the view that State and *fiscus* are separate institutions had been largely abandoned: Street, *Governmental Liability* (1953), p. 20.
2. *Karonchihamy* v *Angohamy* (1904) 8N.L.R.1, at pp.10-11, *Kodeeswaran* v *Attorney General* (1969) 72 N.L.R. 337, at p. 339.
3. Arunachalam (*supra*); see also C. G. Weeramantry, *The Law of Contracts* (1967), p. 493.

Although the State may conveniently be regarded for certain purposes a legal or corporate entity, it is obviously a very different kind of person from the rest of the community and in many respects its relationship to other persons is unique.[4]

The Constitution states that, unless the National State Assembly otherwise provides, the Republic of Sri Lanka shall possess and exercise all powers, privileges, immunities and rights whatsoever possessed, exercised or exercisable by Elizabeth the Second Queen of Ceylon and shall have all her obligations and duties, howsoever arising, as were in existence immediately prior to the Constitution coming into operation. (s. 13).

The Constitution also provides that all rights and all duties or obligations, howsoever arising, of the Government of Ceylon and subsisting immediately prior to the commencement of the Constitution shall be rights, duties and obligations of the Government of the Republic of Sri Lanka under the Constitution. (s. 14). The assumption of these duties and obligations by the Government of the Republic does not of course impose any fetter or limitation on the legislative powers of the National State Assembly under the Constitution.

Procedure. All civil actions by or against the Republic must be instituted by or against the Attorney-General.[5] The Attorney-General was earlier styled "Queen's Advocate" and still earlier, until almost the end of the nineteenth century, he was called the Advocate Fiscal.[6] Formerly actions against the Government[7] were brought as of right against the Advocate Fiscal, and later against the Attorney-General. With regard to an action against a Minister, Deputy Minister or State officer, if the Attorney-General undertakes the defence, he must apply to the Court, and on such application the Court must substitute the name of the Attorney General as a party defendant in the action.[8] The Government's decision

4. *Die Spoorbond* v *S.A.R.* (1946) AD. 999, at pp. 1011-12. Compare the principle of similar liability (Rechtsstaat) in Germany and other European countries.
5. Civil Procedure Code (Chap. 4 C.L.E.), s. 456.
6. *Sanford* v *Waring* (1896) 2 N.L.R. 361, at p. 365.
7. In any case in which the Crown could be sued in Ceylon, there was no material distinction between the "Crown" and the "Government of Ceylon": *Colombo Electric Tramways Co.* v *Attorney-General* (1913) 16 N.L.R. 161, at p. 194. *Le Mesurier* v *Layard* (1898) 3 N.L.R. 227. See also *Siman Appu* v *Queen's Advocate* (1884) 9 A.C. 571.
8. Civil Procedure Code, s. 463.

to undertake the defence involves also the acceptance of responsibility by the State for the satisfaction of the decree which might otherwise have been awarded in favour of the plaintiff against the State officer individually.[9]

The Republic enjoys certain privileges in procedure which are denied to the citizen. Thus it has the right of discovery of documents against the subject though the subject has no such right against the Republic. Such discovery enables a party to obtain an order of court to inspect all documents which are in the possession of his opponent and which relate to any matter in issue in the action. The Republic enjoys also the privilege of refusing to disclose communications made to it in official confidence on the ground that the public interest would suffer by the disclosure.[10] But the Court has jurisdiction to inspect the document and order the disclosure of documents for which privilege is claimed.[11] It is the right and duty of the Court to hold the balance between the interests of the public in ensuring the proper administration of justice and the public interest in the withholding of documents whose disclosure would be contrary to the national interest.[12] The expression "communication made in official confidence" includes not merely inter-official correspondence but also correspondence by members of the public with public officials.[13]

No writ against person or property can be issued against the Attorney-General in any action brought against the State or in any action in which he is substituted as a party defendant.[14] In England, although there is no execution against the Crown, the Crown Proceedings Act provides a process of certification of orders made against the Crown.[15] Although procedurally the issue of a writ of execution against the Attorney-General is thus prohibited, the judgment debt is paid from public funds as the decree is in truth a decree against the State.[16]

9. *The Attorney-General* v *Russel* (1955) 57 N.L.R. 364, at p. 366.
10. Evidence Ordinance (Chap. 14 of C.L.E.) s. 124.
11. *Keerthiratne* v *Gunawardene* (1956) 58 N.L.R. 62; *Robinson* v *State of South Australia* (1931) A.C. 704. *R* v *Snider* (1954) S.C.R. 479. (Can.).
12. *Conway* v *Rimmer* (1968) A.C. 910, applying *Robinson* v *South Australia* (1931) A.C. 704 and *Glasgow Corporation* v *Central Land Board* (1956 S.C. (H.L.) 1), and not following *Duncan* v *Cammel Laird & Co. Ltd.* (1942) A.C. 624, with regard to the wide rule laid down by it.
13. *Keerthiratne's* case (*supra*).
14. Civil Procedure Code, s. 462.
15. S. 25.
16. *Russel's case* (*supra*).

No action can be instituted against the Attorney-General as representing the Republic or against a Minister, Deputy Minister, or State officer in respect of an act purporting to have been done by him in his official capacity, until the expiration of one month after notice in writing of the intended action has been delivered to the Attorney-General, Minister, Deputy Minister or State officer, as the case may be, or left at his office.[17] The plaint in the action must contain a statement that such notice has been delivered or left. The above requirements must be strictly observed and the notice should be in the form prescribed in the Schedule to the Code.[18] This does not mean, for example, that a slight variation in the quantum of relief claimed in the action renders the notice invalid.[19] The object of the Legislature in requiring the notice seems to be to afford to the Attorney-General an opportunity to reconsider his position with regard to the claim made, and to make amends or settle the claim, if so advised, without recourse to the trouble and cost of litigation.[20]

The Crown Debtors Ordinance, No. 14 of 1843,[21] was passed, as stated in the title, to provide for the better security and recovery of debts due to the Crown, (now the Republic). The Ordinance authorises the Government Agent, upon his knowledge of the default of payment by any debtor of the Republic or notice to him of any debt due to the Republic, to seize any property of the debtor to an amount sufficient to, cover the debt. Within seven days after such seizure a libel or information setting out the nature and amount of the debt must be filed in Court, and such Court is required to deliver to the Fiscal a warrant to sequester the property. The "libel" is merely the formal complaint to Court and is not meant to be a plaint.[22] A warrant of sequestration may issue before as well as after judgment and sections 658 and 659 of the Civil Procedure Code apply to the investigation of claims to property which has been sequestered.[23] Crown debts upon mortgages, judgments, bonds or other specialities are preferred to all sub-

17. Civil Procedure Code, s. 461.
18. *De Silva* v *Ilangakoon* (1956) 57 N.L.R. 457. *Tampoe* v *Murugesu* (1909) 1 Cur L.R. 107.
19. *Pelis Singho* v *Attorney-General* (1954) 57 N.L.R. 143; *Le Mesurier* v *Murrah* (1898) 3 N.L.R. 113.
20. *Saibo* v *Attorney-General* (1947) 48 N.L.R. 574, at p. 575; *Secretary of State* v *Kundan Singh* AIR (1932) Lahore 374.
21. Chapter 96 of the Legislative Enactments.
22. *Attorney-General* v *de Croos* (1925) 26 N.L.R. 451.
23. *Sellammah* v *Attorney-General* (1958) 60 N.L.R. 291. See also *The Government Agent, Southern Province* v *Kalupahana* (1923) 25 N.L.R. 13.

sequent debts becoming due to any person from such Crown debtors.[24] Previous transfers of movable property made bona fide and upon good consideration are not affected.

Liability in Contract. So far as breach of contract and the recovery of property against the Republic are concerned, such actions (previously against the Crown) have been brought against the Attorney-General as well as his predecessor in title, the Queen's Advocate, for a long series of years and the practice has been recognised by the Supreme Court.[25]

With regard to governmental contracts the State is bound in law only where its servant or agent has been acting in the discharge of a duty within the limits of his authority, or, if he has exceeded that authority, when the Government has ratified the excess.[26] The right of the servant or agent to act for the Government of the Republic must be established by reference to statute or otherwise.[27] No public officer, unless he possesses some special power, can hold out on behalf of the Republic that he has the right to enter into a contract in respect of the property of the Republic when in fact no such right exists.[28]

If the agent is held out as having only a limited authority to do, on behalf of his principal, acts of a particular class, then the principal is not bound by an act done outside that authority even though it be an act of that particular class; this is for the reason that the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorised.[29]

24. Section 5. The tacit hypothec of the State over the property of those with whom it has contracted is limited to contracts connected with the collection of revenue: *Attorney-General* v *Pana Adappa Chetty* (1928) 29 N.L.R. 431. Under Sinhalese law the Government had no preferential rights in respect of debts: Arunachalam, *Digest of Civil Law*, Vol. 1, p. 349; Sir John D'Oyly, *A Sketch of the Constitution of the Kandyan Kingdom*, p. 240.
25. *Jayewardena* v *Fernando and the Queen's Advocate* (1881) 4 S.C.C. 77; *Simon Appu* v *The Queen's Advocate* L.R. 9 A.C. 571; *Colombo Electric Tramways Co.*v *The Attorney-General* (1913) 16 N.L.R. 161, at pp.177-8; *De Soysa* v *Attorney-General* (1917) 19 N.L.R. 493.
26. *Attorney-General* v *Wijesuriya* (1946) 47 N.L.R. 385, at p. 392, citing *Collector of Masulapatam* v *Cavaly Vencata Narainappah*(1860) 8 Moore's Indian Appeals 554 Compare the *contrat administratif* (public law contract) in French law.
27. *The Attorney-General* v *Silva* (1953) 54 N.L.R. 529, at p. 536. See also *Rowlands v Attorney-General* (1971) 74 N.L.R. 385.
28. *Silva's* case (*supra*); *Wijesuriya* v *Attorney-General* (1950) 51 N.L.R. 361, at pp 366-7.
29. *The Attorney-General* v *A. D. Silva* (1953) 54 N.L.R. 529, at p. 537, citing with approval Lord Atkinson in *Russo-Chinese Bank* v *Li Yau Sam* (1910) A.C. 174, at p. 184.

If funds are not appropriated by the National State Assembly, which under the Constitution has full control over public finance, in order to meet the obligations of the Government of the Republic, then although the contract is not void, it is nevertheless unenforceable against the Government. In *Rowlands* v *Attorney-General*,[30] Weeramantry J expressed the view that "one of the clearest statements relating to the enforceability of contracts against the Crown is that by Evatt J of the High Court of Australia in *New South Wales* v *Bardolph*.[31] This statement which summarised the law on this matter in terms accepted thereafter even in England as one of the most authoritative expositions of the subject, states: 'In the absence of some controlling provision, contracts are enforceable against the Crown if (a) the contract is entered into in the ordinary or necessary course of Government administration, (b) it is authorised by the responsible Ministers to the Crown, and (c) the payments which the contractor is seeking to recover are covered by or referable to a parliamentary grant for the class of service to which the contract relates.....The failure of the plaintiff to prove (c) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into a contract....The enforcement of such contracts is to be distinguished from their inherent validity'."

As the National State Assembly exercises full control over public finance, it is natural that contracts made by agents of the State without appropriation by the Assembly should be unenforceable. As Viscount Haldane said in *Kidman*'s case (above): "He (the agent) was presumed only to bind the funds which might or might not be appropriated by Parliament to answer the contract, and if they were not, that did not make the contract null and ultra vires; it made it not enforceable because there was no *res* against which to enforce it".

There is a general principle of law that the State or any public authority[32] cannot be restrained by an existing contract from exercising its legal and constitutional functions which are essential to its existence

30. (1971) 74 N.L.R. 385, at p. 403
31. (1934) 52 C.L.R. 455, at pp. 474–5; *Commonwealth of Australia* v *Kidman* (1926) A.L.R.I., at pp. 2–3, *per* Viscount Haldane.
32. *William Cory & Son Ltd.* v *London Corporation* (1951) 2 K.B. 476.

and which concern the welfare of the State.[33] According to Professor Mitchell the principle to be found in the cases appears to be

> "that a body entrusted with special powers for public purposes should not be allowed to disable itself from exercising those powers, since to do so is to deny the object for which that body was created and for the achievement of which it was given special privileges".[34]

In Sri Lanka all State officers, except where the Constitution or the law otherwise provides, are ordinarily employed at the pleasure of the Government of the Republic. Their appointments are terminable at will. The ordinary power of dismissal at pleasure, as stated above, may be expressly excluded by legislation.[35] According to some English and Commonwealth decisions the appointment is so terminable even if a public servant is appointed for a fixed period.[36] It has been said in England that this power conceded to the Crown by the Courts is in fact a departure from the rule of law and for which there seems to be no adequate justification.[37] In fact there are dicta by English judges to the effect that if the terms of the appointment expressly provide for a power to determine 'for cause', it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded.[38]

33. H. Street, *Government Liability*(1953), pp. 98-99; Wade and Phillips, *Constitutional Law* (7th ed.),p. 686; O. Hood Phillips, *Constitutional and Administrative Law* (4thed.), pp.671-672 J.D.B.Mitchell, *The Contracts of Public Authorities*(1954), pp. 27-32, 52-65. *Rederiaktiebolaget Amphitrite* v *The King* (1921) 3 K.B. 500. *Commissioners of Crown Lands* v *Page* (1960)2 All E.R. 726, at pp. 735-6. *Stone* v *Mississippi* (1879) 101 U.S. 814. Compare, however, *Robertson* v *Minister of Pensions* (1948) 2 All E.R. 767, at p. 770, where Denning J. (as he then was) said that the defence of executive necessity was of limited scope and "only avails the Crown where there is an implied term to that effect, or that is the true meaning of the contract".
34. *The Contracts of Public Authorities*, at p. 60.
35. *Kodeeswaran* v *Attorney-General* (1969) 72 N.L.R. 337, at p.341; *Silva* v *Attorney-General* (1958) 60 N.L.R. 145; *Pillai* v *Fonseka* (1968) 71 N.L.R. 202. *Gould* v *Stuart* (1896) A.C. 575. *Dunn* v *R.* (1896) 1 Q.B. 116, *Shenton* v *Smith* (1895) A.C. 229.
36. *Dunn* v *R.* (1896) Q.B.116; *Denning* v *Secretary of State for India*(1920)37 T.L.R. 138; *Rodwell* v *Thomas* (1944) K.B. 596, at p. 602; *Riordan* v *War Office* (1959) 3 All E.R. 552. No member of the armed forces can bring an action for breach of contract of service: *De Dohse* v *R.* (1886) 3 T.L.R. 114; *Grant* v *Secretary of State for India* (1877) 2 C.P.D. 445; *Commonwealth* v *Quince* (1944) 68 C.L.R. 227
37. Glanville L. Williams, *Crown Proceedings* (1948), p. 66.
38. *Reilly* v *R.* (1934) A.C. 176, at p.179, *per* Lord Atkin; *Robertson* v *Minister of Pensions* (1949) 1 K.B. 227, at p. 231,; *per* Denning J. These dicta were approved by the Supreme Court in *Silva* v *Attorney-General* (1958) 60 N.L.R. 145 and in the Canadian case of *Mc Lean* v *Vancouver Harbour Commissioners* (1936) 3 W.W.R. 657.

Under our law the implied term in the contract of service that the State may dismiss at will may not only be excluded by statute, but even be subject by express contract to removal for cause.[39] This procedure for removal may be enforced against the Government by appropriate proceedings. Where a public servant is aggrieved by the unlawful termination of his services it is open to him to institute an action seeking relief that the termination of his services was void and inoperative. Even where the power to determine a contract exists, such power is not inconsistent with the existence of a contract until so determined.[40]

Thus under the common law of Sri Lanka an action may be brought by a State officer for remuneration agreed to be paid to him by the terms of his appointment and remaining unpaid.[41] But a member of the Army, Naval or Air Force cannot sue even for salary or allowances that he has already earned.[42] With regard to the right to a pension or allowance by a State officer, it is not one that can be enforced in a Court of law.[43]

Liability in Delict. Under the law as it stood before the Crown (Liability in Delict) Act, No. 22 of 1969, the Government could not be sued in respect of wrongs committed by its servants or agents in the course of their employment. The question whether the Roman-Dutch law (being the common law of Ceylon) differed from the English law in holding that the Crown could be made liable in delict or tort had often been mooted in the Supreme Court.[44] But it was "solemnly settled" by judicial

39. *Kodeeswaran* v *Attorney-General* (1969) 72 N.L.R. 337, at p.341; *Silva* v *Attorney-General* (1958) 60 N.L.R. 145; *Shenton* v *Smith* (1895) A.C. 229, at pp. 234-5. *Pillai* v *Fonseka* (1968) 71 N.L.R. 202.
40. *Kodeeswaran* case (*supra*), at p. 341, citing Lord Atkin in *Reilly* v *R.* (*supra*).
41. *Kodeeswaran* v *Attorney-General* (1969) 72 N.L.R. 337; *Jansz* v *Tranchell* (1865) Ram. 160; *Fraser* v *Queen's Advocate* (1863-68) Ram.316; *Terrel* v *Secretary of State for the Colonies* (1953) 2 All E.R. 490, at p.497; *Sutton* v *Attorney-General* (1923) 39 T.L.R. 294; *Carey* v *Commonwealth* (1921) 30 C.L.R. 132. See also Logan "A Civil Servant and His Pay" (1945) 61 L.Q.R. 240.
42. *Attorney-General* v *Chanmugam* (1967) 71 N.L.R. 79. See Army Act (Chapter 357) s. 24; Navy Act (Chapter 358) s. 161; Air Force Act (Chapter 359) s. 24. See also *Leaman* v *R.* (1920) 3 K.B. 663.
43. *Gunawardena* v *Attorney-General* (1948) 49 N.L.R. 359. See also Minutes on Pensions, 1965.
44. *Don Hendrick* v *The Queen's Advocate* (1881)4 S.C.C.76; *Newman* v *The Queen's Advocate* (1883) 6 S.C.C. 29; *Appuhamy* v *The Queen's Advocate* (1884) 6 S.C.C. 72. Compare *Sanford* v *Waring* 2 N.L.R. 361 and *Le Mesurier* v *Layard* 3 N.L.R. 227, at p. 230; where Bonser C.J. stated that he was not aware of any authority for the proposition that the Government of the United Provinces ever claimed the attribute of impeccability.

decision in 1913 that no such action lay against the Sovereign because of the feudal rules that "the Queen can do no wrong" and that She could not be sued in Her own Court.[45]

It was realised for a long time in Ceylon that the position of the Sovereign as a litigant was far from satisfactory, having regard particularly to the rapid expansion of the activities of the Government in the sphere of public administration. The State was increasingly carrying on business and other activities very much like any of its citizens. The Report of the Civil Courts Commission,[46] which was issued in 1955, stated that strong representations had been made to the Commission that the immunity of the Crown against the tortious acts of its servants as well as the privileges enjoyed by the Crown in regard to civil procedure should be ended. The Commission was of the view that such immunity was an "anachronism" which should be abolished. The Report also recommended that the Crown should be required to make discovery of documents, produce documents, give inspection of documents and to answer interrogatories, but without prejudice to the right of the Crown to withhold any document or refuse to answer any question on the ground that the disclosure of the document or the answer to the question would in the opinion of a Minister be injurious to the public interest. The Commission in their Report also recommended that the Crown should be exempted from the operation of the rule which makes it lawful for the Court, where on an order for inspection privilege is claimed, to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

The Republic (Liability in Delict) Act 1969. Section 2 (1) of the Act provides that "subject to the provisions of this Act, the Republic shall be subject to all those liabilities in delict to which, if it were a private person of full age and capacity, it would be subject in respect of delicts committed by its officers or agents".

The proviso to this sub-section states that "no proceedings shall lie against the Republic by virtue of the preceding provisions of this subsection in respect of any act or omission of an officer or agent of the

45. *The Colombo Electric Tramways Co.* v *The Attorney-General* (1913)16,N.L.R.161; approved by the Privy Council in *British Petroleum Company Limited* v *The Attorney-General* (1925) 27 N.L.R. 385, at p. 389; *Nadarajah* v *The Attorney-General* (1956) 59 N.L.R. 136.
46. Sessional Paper XXIII—1955, pp. 28-29.

Republic unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in delict against that officer or agent or his estate".

The liability that may have to be considered in the proceedings is that of the official of the State and not of the State itself. If there is no cause of action against the State officer the Republic cannot be made liable under the section. The Republic can take up any of the defences that would have been available in law to the State officer if he had been sued in respect of the act. Thus the Republic may take up the defence of "Act of State" if the act complained of was done under the authority of the Republic by a State officer against an alien or his property outside Sri Lanka, or if the act arose in the course of relationship with another State, such as treaty rights.[47]

'Officer' is defined in the interpretation section (s. 13) to mean any person who holds a paid office as a servant of the Republic in respect of the Government of the Island, and to include a Minister of the Republic. 'Agent' is defined in the section not to include an independent contractor employed by the Republic.

The section thus makes the Republic vicariously liable for the wrongful acts of its officers in the course of their employment or of its agents within the scope of their powers. In deciding whether a State officer acted subject to the control of the State (where the State would be liable) or in discharge of an independent duty (where the State would not be liable), reference is made *inter alia* to the statute by which the duty is imposed, and sometimes one need look no further, for the statute may clearly indicate whether or not the duty is to be independently discharged.[48] The fact, however, that the duty imposed upon an official is a statutory one, does not necessarily deprive the State of such control over him in the discharge of that duty as to take him out of the category of servant.[49] The proviso exempts the Republic in cases where an employer is under a vicarious liability even though the servant cannot be sued for any actionable tort due to, for example, a statutory provision.[50]

47. See the English cases *of Buron* v *Denman* (1848)2 Ex. 167, and *Rustomjee* v *The Queen* (1876) 2 Q.B.D. 69. See also *Secretary of State for India* v *Kamachee Boye Sahaba* (1859) 13 Moo P.C. 22.
48. L. A. Rose Innes, *Judicial Review of Administrative Tribunals in South Africa* (1963) p. 232; *B.S.A. Co.* v *Crickmore*, 1921 A.D. 107.
49. *Rose Innes (supra).*
50. *Smith* v *Moss* (1940) 1 K.B. 424; *Twine* v *Bean's Express* (1946) 1 All E.R. 202.

Section 2 (2) provides that, where the Republic is bound by a statutory duty which is binding on persons other than the Republic and its officers, the Republic shall be liable in delict (if any) for breach of such duty as if it were a private person. This makes the Republic liable even where under the general law the State officer responsible for the damage owed no duty of care to the plaintiff.[51] This sub-section, however, applies only 'where the Republic is bound by a statutory duty'. Under the Interpretation Ordinance[52] the Republic is not bound by any enactment in the absence of express words or by necessary implication. It is noteworthy that the Republic (Liability in Delict) Act provides that nothing in it shall affect any rules of evidence or any presumption relating to the extent to which the Republic is bound by any written law.

By section 2 (3) of the Act, functions conferred by law upon a State officer who commits a delict while performing those functions are deemed to have been conferred by virtue of instructions lawfully given by the Republic. By sub-section (4) the Republic has the benefit of any statute which negatives or limits the amount of the liability of any State officer. Sub-section (5) excludes proceedings against the Republic in respect of anything done by any person while discharging or purporting to discharge any responsibilities of a judicial or quasi-judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.[53]

With regard to the infringement of a patent, registered trade mark or copyright by an officer or agent of the Republic, section 3 (1) of the Act makes the Republic liable if the infringement is committed with the authority of the Republic. Section 3 (2) preserves the existing rights of the Minister under section 30 of the Patents Ordinance to use the invention for the services of the Republic on agreed terms or, in default of such agreement, on such terms as may be settled by the Court.

51. The position would have been otherwise if the action was instituted before the Act came into operation. (See *Adams* v *Naylor* (1946) A.C. 543; *Royster* v *Cavey* (1947) K.B. 204).
52. Legislative Enactments, Chap. 2, s. 3. See *Cooper* v *Hawkins* (1904) 2 K.B. 164.
53. *Anderson* v *Gorrie* (1895) 1. Q.R. 668; *Scott* v *Stansfield* (1868) L.R. 3 Ex. 220. See also *Mendis* v *Lima* (1858) 3 Lor. 44. "Considering the potentiality for vagueness implied in the term 'quasi-judicial', the inclusion of quasi-judicial responsibilities might lead to uncertainty as to the exact scope of the exemption given to the Crown in this regard": V. Ratnasabapathy, "Crown (Liability in Delict) Act" (1970) 1 *Journal of Ceylon Law* 127. See also *Royal Aquarium and Summer and Winter G arden Society Ltd* v *Parkinson* (1892) I Q.B. 431.

Where the Republic is liable under Part 1 of the Act, section 4 makes the law relating to indemnity and contribution applicable to the Republic in respect of liability as if it were a private person. The law Reform (Contributory Negligence and Joint Wrongdoers) Act is particularly made binding on the Republic.

Section 5 provides that, subject to the provision of the Post Office Ordinance, the National Savings Bank Act and the Telecommunications Ordinance, no proceedings in delict will lie against the Republic for anything done or omitted to be done in relation to a postal article by any person while employed as an officer or agent of the Republic, or in relation to the National Savings Bank or to a telephonic message of the Republic while so employed; nor will any officer of the Republic be subject, except at the suit of the Republic, to any civil liability for any of the matters above stated.[54]

Section 6 gives immunity in delict for death or personal injury caused by a member of the armed forces (while on duty) to another person (a) where the person suffering the injury is a member of the armed forces who is either on duty at the time or though not on duty as such, is on any land, premises, ship, aircraft or vehicle which is being used for the armed forces and (b) the Minister of Defence and Foreign Affairs certifies that the injury suffered is attributable to service for purposes of entitlement to an award from the Republic. Both the Republic and the person doing the act are exempt from liability. Nor do proceedings in delict lie against the Republic for death or personal injury suffered by a member of the armed forces where the Minister certifies that the injury was suffered in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces. Where the death or injury is attributable to service for the purposes of entitlement to an award, the Republic is exempt from liability under the section even if no award is made.[55]

The Minister of Defence and Foreign Affairs may issue a certificate, which shall be conclusive,

54. See *Deen* v *Attorney-General* (1923) 25 N.L.R. 333. In England the Crown Proceedings Act, 1947, made the Crown liable for the loss of or damage to a registered inland postal packet, but even in that country there is no liability in contract: *Triefus & Co. Ltd* v *Post Office* (1957) 2 Q.R. 352.
55. *Adams* v *War Office* (1955) 3 All E.R. 245.

(*a*) that a person was or was not on any particular occasion on duty as a member of the armed forces; or

(*b*) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the forces.

Section 7 states that nothing in this Part of the Act shall extinguish or abridge any legal powers and in particular the powers exercisable by the Republic whether in time of peace or war, for the purposes of the defence of Sri Lanka, or of the exercise of emergency powers or of training or maintaining the efficiency of any of the armed forces.

LIABILITY OF STATE OFFICERS

As a general rule where a State officer enters into a contract as the agent of the State he does not become personally liable on the contract. In the discharge of his other official duties he is personally liable for all delicts committed by him, and it is no defence that the act complained of was done by him in his public capacity.[56] The orders of the State cannot be pleaded as a defence.

A State officer is not, however, personally liable for the wrongful acts of his subordinates, unless he has expressly authorised them, for the reason that their relationship is not one of master and servant, both being equally servants of the State.[57] Under the Public Servant (Liabilities) Ordinance[58] no action can be maintained against a public servant (a) upon any promise to repay money paid or advanced to him or to another person at his request (b) upon any promise to be answerable for the debt or default of another person or (c) upon any bond, bill of exchange, promissory note or other security made, drawn, accepted, endorsed or given by him. This immunity does not apply to a public servant who at the date when the liability sought to be enforced was contracted was in receipt of a salary in regard to his fixed appointment of more than five hundred and twenty rupees a month.[59]

56. Salmond on *The Law of Torts* (10th ed.), p. 49. *Paramsoty* v *Veenayagamoorthy* (1943) 44 N.L.R. 361.
57. *Sangarapillai* v *Prasad* (1944) 45 N.L.R. 443; *Colombo Electric Tramway Co.* v *Attorney-General* (1913) 16 N.L.R. 161; *Bainbridge* v *Postmaster General* (1906) 1 K.B. 178; *Raleigh* v *Goschen* (1898) 1 Ch. 73.
58. Chapter 103 of the Legislative Enactments, s. 2.
59. Even if he is seconded to a public corporation on a greater salary, he is immune from action: *Ratnasingham* v *People's Bank* (1969) 72 N.L.R. 73.

ACTIONS FOR DAMAGES AGAINST PUBLIC AUTHORITIES

Whether a public authority is liable in damages to a person injured by a breach of statutory duty will depend on the intention of the National State Assembly as ascertained by a consideration of the whole Act and the circumstances, including the pre-existing law, in which the Act was enacted.[60] The ascertainment of the intention of the Assembly is therefore essentially a matter of the judicial construction of the statute. In order to succeed in the action the plaintiff must show that the statute imposes a duty on the authority concerned towards himself, that the damages suffered by him was a direct result of the breach of duty and that the damage was such as was contemplated by the statute.[61] So far as a failure to perform a statutory duty by a statutory authority is concerned, the general rule to be applied has been stated as follows:

"It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty".[62]

Where a duty is owed to the public and not to individual members of it, the person who suffers injury has no right of action.[63] For example, according to the statute no duty may be owed to individual consumers by public corporations supplying commodities or facilities to the general public.[64] The existence of a specific remedy which is open to the plaintiff, such as an appeal to the Minister, for the enforcement of the statutory duty, may show an intention to exclude an action for damages.[65]

60. *Cutler* v *Wandsworth Stadium Ltd.* (1949) A.C. 398, at p. 407, *per* Lord Simonds.
61. *Groves* v *Wimborne* (1898) 2 Q.R. 402 at, p. 415, *per* Vaughan Williams L.J.; *Phillips* v *Britannia Hygienic Laundry Co.*(1923) 2K.B. 832, at p. 842, *per* Atkin L.J.
62. Vaughan Williams L.J. (*supra*).
63. *Saunders* v *Holborn District Board of Works* (1895) 1 Q.B. 64; *Atkinson* v *New castle Waterworks Co.* (1877) 2 Ex.D. 441; *Stratton's Derby Brewery Co.* v *Derby Corporation* (1894) 1 Ch.431. *Municipal Council of Sydney* v *Bourke* (1895)A.C. 433 (P.C.).
64. *Clegg, Parkinson* v *Earby Gas Co.* (1896) 1 Q.B. 592; *Eric Gnapp Ltd.* v *Petroleum Board* (1949) 1 All E.R. 980. On the other hand, in *Read* v *Croydon Corporation*(1938) 4 All E.R.631, the defendants were held liable for breach of their statutory duty to the father of a child who had contracted typhoid through drinking water supplied by the defendant.
65. *Pasmore* v *Oswaldtwistle U.D.C.* (1898) A.C. 387.

It is not a defence to an action for delict to plead that an act has been permitted by statute, if it has been done negligently[66] or done in such a way as to cause a nuisance, or other civil wrong.[67] It is otherwise if the statute directs or authorises the doing of the particular act which causes damage.[68] The public authority will also be exempt from liability if the infringement of the rights of others is a "demonstrably necessary consequence of doing what is authorised to be done".[69]

An action for damages for delict may also lie for malicious misuse of statutory power by refusal by a public authority to grant a licence.[70] In such a case it cannot be contended that the only remedy of the applicant for the licence is to apply for a mandamus.[71]

Quite apart from its liability for a breach of a statutory duty, a public authority may be liable for the wrongful acts of their servants or agents committed in the course of their employment, in accordance with the ordinary common law rules of master and servant. The liability of the public authority for the delicts, therefore, is vicarious. A statutory corporation is liable for such a wrongful act of its servant or agent even where malice is a necessary ingredient of the delict.[72] Although a corporation such as an urban council may be held to be liable for defamation committed by its servants or agents, it cannot be held liable for the statements of members made during a meeting of the council, for such statements cannot be said to be authorised by the council.[73]

A statutory corporation may be held liable for the delicts committed by its servant within the scope of his employment even in an undertaking

66. *Geddes* v *Bann Reservoir Proprietors* (1878) 3 App. Cas. 430 at p. 455, *per* Lord Blackburn. *Mersey Docks and Harbour Board* v *Gibbs* (1866) L.R.1 H.L. 93. *Cassidy* v *Ministry of Health* (1951) 2 K.B. 343.
67. *Metropolitan Asylum District Board* v *Hill* (1881) 6 App. Cas. 193; *Manchester Corporation* v *Farnworth* (1930) A.C. 171.
68. *Mersey Docks and Harbour Board* v *Gibbs* (*supra*), *per* Blackburn J. *East Freemantle Corporation* v *Annois* (1902) A.C. 213 (P.C.)
69. *Marriage* v *East Norfolk Rivers Catchment Board* (1950) 1 K.B. 284, at p. 307.
70. *David* v *Abdul Cader* (1963) 65 N.L.R. 253; (1963) 3 All E.R. 579.
71. *Ibid.*
72. *Samarasekera* v *Urban District Council, Negombo*(1935) 37 N.L.R. 169; *Citizens' Life Assurance Co.* v *Brown*(1904) A.C. 423. *De Bure* v *Mc Carthy and Stepney B. C.* (1942) 1 All E.R. 19; *Percy* v *Glasgow Corporation* (1922) 2 A. C. 299.
73. *Samarasekera* v *Urban District Council, Negombo* (*supra*).

which is *ultra vires* the corporation.[74] But if an employee has independent duties vested in him by the law, the corporation appointing him is not liable in respect of delicts committed in the course of those duties.[75]

So far as damages for breach of contract are concerned, statutory corporations are liable for *intra vires* contracts. They have power to contract only for the purposes authorised by statute[76] or such purposes as are fairly incidental to those expressly conferred.[77] A public authority cannot also bind itself by contract not to exercise statutory powers conferred on it.[78] It has been suggested that the scope of this principle should be limited so that only those contracts will be affected which seriously impede the essential governmental functions carried on by the contracting authority.[79]

74. *Campbell* v *Paddington Corporation* (1911) 1 K.B. 869 (Corporation held liable for damages for injuries caused by a hoarding which it had no power to erect); *Citizens Life Assurance Co.* v *Brown* (1904)A.C. 423 (Corporation may be liable even in cases where the tort committed requires as one of its elements the presence of malice).
75. *Stanbury* v *Exeter Corporation* (1905) 2 K.B. 838. *Fisher* v *Oldham Corporation* (1930) 2 K.B. 364; *Enever* v *R* (1906) 3 C.L.R. 969.
76. *Ashbury Railway Carriages Co.* v *Riche* (1875) L.R. 7 H.L. 653.
77. *Att-Gen.* v *Great Eastern Railway Co.* (1880) 5 App. Cas. 473.
78. *Ayr Harbour Trustees* v *Oswald* (1883) 8 App. Cas. 623.
79. J. D. B. Mitchell, *The Contracts of Public Authorities* (1954), pp 7, 61.

CHAPTER 22

PUBLIC CORPORATIONS

In the economy of Sri Lanka, public enterprise has become of increasing importance. The steadily expanding functions of government, as evidenced by the establishment of several nationalised industries, public utilities and social services, have led to the creation of a large number of public or State corporations. Under the Finance Act, No. 37 of 1971, a public corporation has been defined to mean "any corporation, board or other body which was or is established by or under any written law, other than the Companies Ordinance, with capital wholly or partly provided by the Government by way of grant, loan or other form". These corporations belong to a category which is distinct from that of the Central Government Departments or of the local authorities. During the British occupation of the Island even such public enterprise and utilities as existed were administered mostly by Government Departments. Such enterprises included the railways and the generation of electric power.

Public corporations are found in countries with different economic and political systems and the reasons for their establishment sometimes vary with each country.[1] In Sri Lanka the main reason for the establishment of State Corporations is the general agreement among the main political parties that there should be public control particularly of basic industries and public utilities, together with commercial freedom and business-like efficiency in their administration. Rigid Treasury control and public service methods which are sometimes referred to as "red tape", and undue political interference in the day-to-day administration of these industries and services are certainly not conducive to their efficient operation. There is also the added

1. Public Corporations exist even in a country with a private enterprise economy like the United States. In that country the implied power under the Constitution to establish incorporated administrative agencies was upheld as far back as 1819 in the famous case of *Mc Culloch* v *Mayland* (4 Wheat 316), although the U. S Constitution did not expressly give such power and although the executive Power of the U. S. is vested in the President.

reason that in Sri Lanka, as in any other developing countries, there are many fields of development necessary in the public interest where private enterprise is unable or unwilling to enter. This is due to such reasons as lack of sufficient capital resources or of their foreign exchange components, slowness and insufficiency of commercial profits and other similar reasons. The reasons for the increasing establishment of public corporations in Sri Lanka are not therefore necessarily ideological.

TYPES OF CORPORATIONS

The numerous public corporations that have been set up in Sri Lanka cannot be classified on any orderly or logical basis. Broadly speaking, they may be said to fall into three main groups:

(a) Managerial bodies administering industrial and commercial undertakings. Corporations have been established by many statutes in order to manage nationalised industries and commercial undertakings. This group includes the Ceylon Transport Board,[2] the Ceylon Electricity Board,[3] the Ceylon Petroleum Corporation,[4] Air Ceylon,[5] Bank of Ceylon,[6] People's Bank,[7] State Mortgage Bank,[8] National Savings Bank,[9] the Insurance Corporation,[10] the Port (Cargo) Corporation,[11] the Atomic Energy Authority,[12] the Ceylon Hotels Corporation,[13] the Ceylon Plantations Corporation,[14] the Milk Board,[15] the Ceylon Shipping Corporation[16] and State Gem Corporation.[17]

(b) Managerial bodies administering public and social services. This group includes the Mahaweli Development Board,[18] the Industrial

2. Motor Transport Act, No. 48 of 1957.
3. Ceylon Electricity Board Act, No. 17 of 1969.
4. Ceylon Petroleum Corporation Act, No. 28 of 1961.
5. Air Ceylon Act (Chapter 280 of Legislative Enactments).
6. Bank of Ceylon Ordinance (Chapter 397)
7. People's Bank Act, No. 29 of 1961.
8. Ceylon State Mortgage Bank Ordinance (Chapter 398)
9. National Savings Bank Act, No. 30 of 1971.
10. Insurance Corporation Act, No. 2 of 1961.
11. Port (Cargo) Corporation Act, No. 13 of 1958.
12. Atomic Energy Authority Act, No. 19 of 1969.
13. Ceylon Hotels Corporation Act, No. 14 of 1966.
14. Ceylon State Plantations Corporation Act, No. 33 of 1966.
15. Milk Board Act (Chapter 281).
16. Ceylon Shipping Corporation Act, No. 11 of 1971.
17. State Gem Corporation Act, No. 13 of 1971.
18. Mahaweli Development Board Act, No. 14 of 1970.

Development Board of Ceylon,[19] and the Sri Lnka Broadcasting Corporation.[20]

(c) **Regulation of Supervisory Bodies.** Important examples of such bodies are the Ceylon Tourist Board,[21] the Ceylon Tea Board[22] and the Paddy Marketing Board.[23]

GENERAL CHARACTERISTICS OF PUBLIC CORPORATIONS

(a) **Constitution.** Public corporations are created by special statutes and show a general pattern regarding their constitutions and powers. The constituent statute establishes the governing Board by the name assigned to it as a body corporate or a separate legal person with perpetual succession, a common seal and a right to sue and be sued in its name. There are also general Acts such as the State Industrial Corporation Act, No. 49 of 1957, and the Sri Lanka State Trading Corporations Act, No. 33 of 1970, which provide for the establishment of public corporations by Incorporation Order published in the Gazette, where the Government considers them necessary or desirable for the purpose stated in the Act. The Board of a public corporation is usually vested with the power to acquire, hold and dispose of property, to enter into contracts and do other things which are necessary for the attainment of its purposes. The Board is also given the power to appoint its staff and provide for their remuneration.

(b) **Administration.** The Board is responsible for the administration of the public corporation. It has a chairman and members who are, as a general rule, appointed by the appropriate Minister. Sometimes, as in the case of the Mahaweli Development Board, a certain number of members are designated by the public office which they hold. They are called *ex officio* members. In certain statutes there is provision for a member to be appointed by or in consultation with one or more Ministers. Sometimes the Minister who is given the power of appointment of members of the Board is required to exercise his discretion with regard to such appointment within a certain class of qualified persons. For example,

19. Industrial Development Act, No.36 of 1969.
20. Ceylon Broadcasting Corporation Act,No. 37 of 1966.
21. The Ceylon Tourist Board Act,No. 10 of 1966.
22. Ceylon Tea Board Act, No.15 of 1970.
23. Paddy Marketing Board Act, No.14 of 1971.

four members of the Mahaweli Development Board must be appointed by him from persons who have had experience and shown capacity in engineering, agriculture, science, commerce, administration or accounting. Members of the National State Assembly are disqualified for membership. It is also usually provided that the chairman and the other members may be removed from office by the Minister without assigning any reason. Their remuneration is generally determined by the Minister with the concurrence of the Minister of Finance.

(c) **Finance and Financial control of Corporations.** Each Board is given authority to have its own fund. Into it must be credited all moneys received by the Board, including such sums as may be voted by the National State Assembly for the use of the Board. All payments made by the Board must be made from the fund.

The Finance Act, No. 38 of 1971, provides for financial control of all public corporations except those that may from time to time be exempt from any or all of its provisions by Order of the Minister of Finance published in the Gazette. Under the provisions of the Act, it is the duty of the governing body of a public corporation to conduct the business of the corporation so that the ultimate surpluses on revenue account are at least sufficient to cover the ultimate deficits on such account over a period of five years or such other period as may be determined by the Minister of Finance. (s. 7 (1)).

The Act also provides that every public corporation must prepare in respect of every financial year a budget which must be approved by the governing body of the corporation not later than three months prior to the commencement of the financial year to which the budget relates (s. 8 (1)). However, no commitments of capital expenditure provided in such budget in excess of five hundred thousand rupees can be incurred by the corporation except (a) in any case where the appropriate Minister is the Minister of Planning, with the prior approval of the Minister given with the concurrence of the Minister of Finance or (b) in any case where the appropriate Minister is not the Minister of Planning with the prior approval of the appropriate Minister given with the concurrence of both the Minister of Planning and the Minister of Finance. (s. 8 (2)).

A public corporation must cause proper accounts of the income and expenditure, assets and liabilities and of all other transactions of the

corporations to be kept, and prepare an annual statement of accounts and statistics relating to the activities of the corporation.(s. 12).

Th Auditor-General is the auditor for every corporation. (s. 13 (1))For the purpose of assisting him in the audit, the Auditor-General may, if he thinks it necessary to do so, employ the services of any qualified auditor or auditors who are required to act under his direction and control. The Auditor-General must inspect the accounts, the finance, the management of the finances and the property of a public corporation. The Auditor-General must, as far as possible and necessary, examine (*inter alia*) whether there has been economy and efficiency in the commitment of funds and utilization of such funds. (s. 13 (3)). The accounts of a public corporation for each financial year must be submitted to the Auditor-General for audit within four months after the close of that year along with any report on the accounts which the Auditor-General may require to be submitted in the manner specified by him. Any such corporation which contravenes or fails to comply with the preceding provisions of this sub-section is guilty of an offence under the Act and, on conviction before a Magistrate, becomes liable to a fine not exceeding one thousand rupees. (s. 13 (6)). The Auditor-General must, within ten months after the close of the financial year, submit a report to the National State Assembly on the result of the audit carried out in respect of each public corporation drawing attention to matters which in his opinion would be of interest to the Assembly. (s. 13 (7) (c)).

A public corporation must, immediately after the end of each financial year of the corporation, prepare a draft annual report on the exercise, discharge and performance by the corporation of its powers, functions and duties during that year and of its policy and programme. Such report must set out any directions given by the appropriate Minister to the corporation during the year. Copies of such report must, within four months after the end of that year, be submitted to the appropriate Minister and to the Minister of Finance (if he is not the appropriate Minister), the Minister of Planning and the Auditor-General. A public corporation must, on receipt of the audited accounts in respect of any year, cause a copy of each of the following documents relating to that year to be transmitted to the appropriate Minister: (a) the audited balance sheet; (b) the audited operating and profit and loss accounts; (c) any comments or observations made by the Auditor-General which he considers should be published with the annual report of the corporation;

(d) the statement of accounts and statistics; and (e) the annual report of the corporation. The appropriate Minister must lay copies of the above documents transmitted to him before the National State Assembly before the end of ten months following the year to which such report and accounts relate. Each corporation must cause copies of such documents to be printed and to be made available for purchase by the public (s. 14).

(d) Legal Status and Liability. As already stated, the statute establishing a public corporation makes it a legal entity with perpetual succession and a common seal and with capacity to sue and be sued in its corporate name. The exact legal position of a public corporation can be ascertained only by a consideration of the provisions of the particular constituent statute. Its position as a litigant in the Courts is, subject to such statutory provision, the same as any other party to a legal proceeding. In countries such as France and Germany, proceedings against public corporations, as in the case of other public activities, are normally brought in the Administrative Courts and the principles of Administrative Law, as distinct from those of private law, apply in such cases.

The question whether a particular public corporation is a servant or agent of the State, that is to say, a mere organ of the Central Government, has been said by the Courts in Sri Lanka and Britain to depend among other things, on the terms of the constituent statute, including the degree of control which may be exercised by the Government. If it is not such a servant or agent, but an independent authority, it will not be entitled to the privileges and immunities of the State in litigation.[24] Nor are its employees State officers. In Sri Lanka, as in Britain, in the absence of provision in the statute to the contrary, the Courts have generally regarded industrial and commercial corporations constituted on the general pattern, and particularly those managing nationalised industries, as not having the status of servants or agents of the State.

24. *Tamlin* v *Hannaford* (1950) 1 K.B. 18, *per* Denning L.J, at p. 24; *Glasgow Corporation* v *Central Land Board* (1956) S.L.T. 41. See Griffith, "Public Corporations as Crown Servants", 9 *University of Toronto L.J.* 169 (1952). Although this is the prevalent view based on a majority of decided cases, it is submitted that the better view is that of Glanville Williams (see *Crown Proceedings*, Ch. 2) and of W. Friedman (see *Law and Social Change*, pp. 209 ff; and *The Public Corporation* (1954) pp. 174-175), namely that for the purposes of legal liability no distinction should be made between the different types of corporations for the reason, among others, that the immunities of the Crown, originally based on feudalism, should not apply to corporations which are separate legal entities created by law.

In the English case of *Tamlin* v *Hannaford*,[25] in holding that the British Transport Commission was not a servant or agent of the Crown, Denning L.J. said:

> "The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport....He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors— — the members of the Commission—and fixes their remuneration. They must give him any information he wants, and lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature, in matters which appear to him to affect the national interest, and as to which he is the sole judge, and they are then bound to obey. These are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the share holders, or even of a sole shareholder. In the eye of the law, the Commission is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department, nor do its power fall within the province of government".

In *Ceylon BankEmployees Union* v *Yatawara*,[26] it was held, following *Tamlin's* case, that the Bank of Ceylon was not an agency or Department of the Government, in spite of Government control in the shape of the Minister's power to appoint and remove Directors and to issue directions with regard to certain kinds of business. In *Ceylon Tea Propaganda*

25. (1950) 1 K.B. 18, at p. 24, See also *Metropolitan Meat Industry* v *Sheedy* (1927) A.C. 899, at pp. 905-906; *International Railway Co.* v *Niagara Parks Commission* (1941) A.C. 328; *Grain Elevators Board (Vict.)* v *Dunmunkle Corporation* (1946) 73 C.L.R. 70; *Keifer & Keifer* v *Reconstruction Finance Corporation* (1939) 306 U.S. 381.
26. (1962) 64 N.L.R. 49.

Board v *The Commissioner of Inland Revenue*,[27] it was held that the fact that the Board received financial assistance from the Government did not render it a Government Undertaking. In *Air Ceylon Ltd.* v *Rasanayegām*,[28] the Court decided that provisions in the Air Ceylon Act, in terms of which the Government had made contributions to the capital of the corporation, the members of the corporation were appointed by the Minister and sums remaining out of nett receipts had to be paid by the Corporation into the Consolidated Fund, did not have the effect of making the Government the employer of persons employed on the staff of Air Ceylon. In *Coconut Research Board* v. *Subramaniam*[29] it was held that the Coconut Research Board, a corporate body, was not entitled to claim privileges available to the Crown. In dealing with the argument of the petitioner that the Board performed functions and duties which had traditionally been performed by the Crown or the Government, Weeramantry J. said: "The functions performed by the Coconut Research Board cannot be said to be of a kind which by the Constitution of the country fall within the province of Government and are committed to the Crown[30].

CONTROL OVER STATE CORPORATIONS

(a) Judicial Control. As statutory authorities, public corporations are subject to the doctrine of *ultra vires*. They can exercise only such powers as are derived from the constituent statute. If they act outside their powers, such acts are unjustified by law and are subject to judicial control. As a result, they have power to enter into contract only for the purposes authorised by the statute.[31] Being statutory bodies, they are also subject to the power of judicial review for excess or abuse of their powers.[32] The tests of legality of the operations of public corporations,

27. (1963) 67 N.L.R. 1.
28. (1968) 71 N.L.R. 271.
29. (1969) 72 N.L.R. 422.
30. *Ibid.* 424. (*Mersey Docks and Harbour Board* v *Cameron* (1865) 11 H.L.C. 443 distinguished.) It is submitted that the distinction on which the above statement was based is not tenable because the activities of the State have long ceased to be confined to those which are traditional but include industrial and commercial functions and social services. See *Tamlin* v *Hannaford* (1950) 1 K.B. 18; *Grain Elevators Board* v *Dunmunkle* (1946) 73 C.L.R. 70; W. Friedmann, *Law and Social Change* (1951), pp. 210 ff. Under the present Republican Constituition of Sri Lanka, one of the objectives of a socialist democracy, which the Republic is pledged to realise, is the development of collective forms of property.
31. *Ashbury Railway Carriage Co.* v *Riche* (1875) L.R. 7 H.L. 653.
32. See Chapter 20. For a detailed account of the objects and powers of public corporations in Sri Lanka, see A. R. B. Amerasinghe, *Public Corporations in Ceylon* (1971), Chap. IV.

which are adopted by the Courts are similar to those of *exces de pouvoir* (excess of power) and *detournement de pouvoir* (abuse of power) developed by the *Conseil d'Etat* of France.[33]

The application of the doctrine of *ultra vires* becomes more restricted where the provisions in the statute relating to the powers of the corporation are so widely drawn as to give a large discretion to the Board of a public corporation. Thus, by section 9 (i) of the Mahaweli Development Board Act. No. 14 of 1970, the Board is empowerd "to do all other things which are necesary for the proper discharge of its functions". The Courts will probably question the exercise of such power only on such grounds as bad faith, or corruption or where the decision is so unreasonable that no reasonable body of men could have arrived at it.[34]

(b) Ministerial Control. Public corporations are responsible through the appropriate Minister to the National State Assembly. The constituent Acts require that each public corporation shall, as soon as possible after the end of its financial year, send to the Minister a report on the exercise of its powers and duties during the year and on its policy and programme. The report must set out any direction given by the Minister to the Board during that year. Together with the report the Board is also required to send to the Minister a statement of accounts and statistics prepared under the provisions of the constituent statute. The Minister must lay copies of the report before the National State Assembly.

The borrowing powers of public corporations are also controlled by the Minister. The governing body of a public corporation can exercise its borrowing powers:(a) in any case where the appropriate Minister is the Minister of Finance, only with the concurrence of the appropriate Minister or in accordance with the terms of any general authority given with his concurrence; or (b) in any case where the appropriate Minister is not the Minister of Finance, with the concurrence of both such Ministers or in terms of a general authority given with like concurrence.[35] The

33. *The Public Corporation: A Comparative Symposium* (1954 ed. W. Friedman), at p. 180.
34. See *Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation* (1948) 1 K.B. 223.
35. Finance Act, No. 38 of 1971, s. 16 (2).

aggregate of the amounts outstanding in respect of any borrowings by the governing body of a public corporation cannot at any time exceed, (a) in any case where the appropriate Minister is the Minister of Finance such sum as may be determined by him, or (b) in any case where the appropriate Minister is not the Minister of Finance, such sum as may be determined by the appropriate Minister with the concurrence of the Minister of Finance.[36] Where any liability in respect of foreign exchange will be incurred by any borrowing, then the governing body cannot exercise the borrowing powers without prior concurrence of the Minister of Planning.[37] The financial control over corporations which is exercised by the Government is directed towards the reconciliation of the requirement of efficient and economical performance with that of service in the public interest.

The Finance Act, No. 38 of 1971, provides that where the appropriate Minister considers that the activities of a public corporation should be terminated, the Minister may, under the authority of a resolution passed by the National State Assembly (a) dissolve the corporation; and (b) appoint one or more liquidators of the corporation for the purpose of its liquidation. (s. 19). Constituent Acts of public corporations also empower the Minister to make regulations to give effect to the principles and provisions of those statutes. In the case of such statutes as the Mahaweli Development Board Act, No. 14 of 1970, although the Board is empowered to make rules relating to the appointment, remuneration, promotion, dismissal and disciplinary control of its officers and servants, the rules must be approved by the Minister in order that they may have effect.

The constituent Acts of public corporations generally provide that the appropriate Minister may issue to the Board general or special directions as to the performance of its duties and the exercise of its powers. Mutual consultation and discussion would to some extent provide a protection against the abuse of this Ministerial power and an incentive towards the better working of public corporations. There could also profitably be consultation and discussion between officials of the Ministry and the public corporation.

It is normally provided that the Minister may, from time to time, direct the Board in writing to furnish to him in such form as he may

36. Ibid., S. 16 (3).
37. Ibid., S. 16 (4).

require, returns, accounts and other information with respect to the property and business of the Board and that the Board shall carry out every such direction. There is sometimes a further provision that the Minister may order all or any of the activities of the Board to be investigated and reported upon by such person as he may specify, and on such order being made the Board is required to afford all facilities to carry out this order.

A very effective means of control is exercised by the Minister through his power of appointment of members of the Board and of their removal without stating any reason. So far as the power of appointment is concerned, since the Board of a public corporation is responsible in the first place for the efficient commercial operation of the particular industry or business, its members should be appointed not on the basis of political affiliation or as a party reward, but primarily on their competence and ability to man the industry or service in the interests of the public. The most competent Board of members must be appointed.[38] There have been criticisms that under successive political regimes this principle of appointment has often been disregarded. As it has been said in an authoritative Report:

"Generally, persons are appointed to boards of directors not on grounds of knowledgeability or competence required for the particular business or service. It appears that very often political loyalties for the party in power has been the main consideration in the selection of a particular person as a director. We do not suggest that persons with political loyalties should be excluded from appointments to boards, but it is necessary to ensure that such persons also have competence, ability and time to handle responsibilities as directors".[39] It may be desirable therefore to define the field of competent persons from which the Minister may make his choice.

It is also generally known that under successive Governments there have been undue political and other pressures exerted on Boards with

38. For an exhaustive discussion of the factors to be considered in appointing Directors of Boards, see A. R. B. Amerasinghe, *Public Corporations in Ceylon* (1971), pp. 117-146.
39. *Report of the George Rajapakse Committee on Terms and Conditions of Employment in Statutory Boards and Corporations*, at p. 228, cited in A. R. B. Amerasinghe, *Public Corporations in Ceylon* (1971), p. 145. Dr. Amerasinghe himself has said that "all political parties have regarded some nominations to Boards as a means of paying off political debts". (*op. cit.*, p. 142).

regard to appointments, promotions and transfers of officers and other employees of corporations. The result has been the decline of efficiency and morale, the employment of unsuitable executives and of excessive labour and the unjustified increase of emoluments. With regard to the power of removal, a characteristic feature has been its frequent exercise by Ministers, particularly on a new Government being established after a general election. This threat of removal is partly the explanation for the existence of a far greater degree of ministerial control than is warranted under the terms of the constituent statutes.

In England the Report of the Select Committee on Nationalised Industries on the air corporations stated that these corporations allowed the Minister to exercise more power and control than was given under the statute.[40] The Committee however, recommended that "when a Minister wishes, on grounds of national interest, to override the commercial judgment of a chairman, he should do so by a directive which should be published".

A well known English treatise on *Constitutional Law* has commented on an instance of the use of the ministerial power of direction in England, which attracted considerable criticism. Similar uses of ministerial power have occurred in Sri Lanka and therefore the comments are relevant:

> "Whether the matter was dealt with technically by way of a general direction or not is perhaps not clear, but in April 1952 the Minister of Transport intervened to stay an application by the Transport Commission to the Transport Tribunal for an increase of fares. This intervention was justified by the wish of the Government to check the rising cost of living, but it had the effect of preventing the Transport Commission fulfilling its statutory obligation of 'making ends meet'. If it was the intention of Parliament that a power to give general directions in the national interest should be exercised only for purposes which are not the direct concern of the relevant board, it is difficult to see how the independence for day-to-day administration could long be maintained in face of general directions of this character which could only result in undermining the stability of the

40. (1959) H.C. 213. See Wade and Philipps, *op. cit.*, p. 292.

> concern. Although the ministerial intervention in 1952 has not been the only cause, it contributed at the time to emphasising the insolvency of the railways".[41]

The argument is sometimes advanced in Sri Lanka that public transport should be subsidised. The reply can be made that public money should not be utilised for this purpose in a commercial undertaking where a considerable proportion of the users of the service can well afford to pay a fare which is at least sufficient to cover the cost of transport. As it was once laid down as a government policy in Britain, "although the industries have obligations of a national and non-commercial kind, they are not....social services absolved from economic and commercial justification".[42]

On this question of ministerial control, the recommendations of the Select Committee on National Industries in Britain are of particular interest:

> "When proposing alterations in coal prices, the Board should consult the Minister of Power as to the public interest, but, having done so, should take full responsibility for their price determinations. The Minister should have a statutory power in the national interest to give the Board specific directions in relation to prices. Such a direction should be laid before Parliament and published, so that Parliament and the public would be fully informed about the respective responsibilities of the Minister and the Board in a particular case".[43]

(c) **Parliamentary control.** The supervision of public corporations by the National State Assembly as representative of the national interest is exercised, for the most part, in three ways.

(i) *Debates.* There are various occasions on which debates may arise on the affairs of public corporations. There may be a debate on a motion concerning the corporation, on adjournment in the debate of

41. Wade and Philipps, *op. cit.*, p. 289.
42. Cited in Lawson and Bentley, *Constitutional and Administrative Law* (1961), p.166.
43. H.C. 187—I of 1957-8, para. 89, cited by Griffith and Street, *Principles of Administrative Law* (4th ed.), p. 306.

the General Statement of Government Policy at any session, on the Budget proposals, on a vote of censure or on the reception of the annual report and accounts.

(ii) *Questions.* These questions are normally directed[44] to matters of departmental administration which are within the responsibility of the Minister as laid down in the constituent statute.[45] For example, the question may properly relate to capital expenditure, the form of accounts and audits, the annual report and programme of development or a direction given by the Minister to the corporation. But the Minister may refuse to answer questions on matters of "day-to-day" administration unless he considers them to be of sufficient public importance. The customary reply of Ministers in Britain is that it would be inappropriate for them to interfere with the discretion of the Board in such matters.[46] However, it is not always easy to draw a line of demarcation between questions of day-to-day management and those of broad policy. The progressive extension of ministerial control in recent years has increased the opportunities for questions and debate on matters which do not relate to strict policy. In Britain, there is a persistent feeling in Parliament that questions should be answered with the object at least 'of informing Parliament about the aims, activities and problems of the corporations and not of controlling their work'.[47]

(iii) *Committees.* The Public Accounts Committee examines the accounts of each public corporation together with the Auditor-General's Report. This Committee is appointed by the National State Assembly "for the examination of the accounts showing the appropriation of the sums granted by the Assembly to meet the public expenditure and of such other accounts laid before the Assembly as the Committee may think fit, together with the Auditor-General's reports thereon".[48] The Committee has power to send for persons, papers and records and to report to the Assembly from time to time. The appropriate Minister may direct the

44. 478 House of Commons Debates 5s.col. 2801, cited in Griffith and Street, *Principles of Administrative Law* (4th ed.), at p. 302.
45. See Erskine May, *Parliamentary Practice* (16th ed.), p. 356. See also British Hansard, Vol. 233, col. 246.
46. See British Hansard, Vol. 240, col. 1279, 1286. See also A. H. Hanson, *Parliament and Public Ownership*, Chapter IV and "Parliamentary Questions on the Nationalised Industries" in *Public Administration* (1951) Vol. 29, p. 53.
47. *Report of Select Committee on Nationalised Industries*, 23 July 1953, p. xii, cited in H. W. R. Wade, *Administrative Law* (1961), p. 36.
48. Standing Order 125.

governing body of a public corporation to give effect to such recommendations made by the Public Accounts Committee in its reports to the National State Assembly relating to the corporation as may be determined by the Minister. (s. 15).

From the experiences of Public Accounts Committees in the past there had been several suggestions that in order to ensure that the reports and accounts were examined without undue delay, there should be a time-limit laid down by law for the furnishing of the annual accounts by corporations and other public bodies which are required to submit such accounts to be laid before the Legislature.[49] It was suggested that delay in the furnishing of annual accounts and in the answering of audit queries had in the past often resulted in Parliamentary control over public expenditure becoming inadequate. The Finance Act,No.38 of 1971, now provides that the accounts must be submitted to the Auditor-General for audit within four months after the close of the financial year along with any report on the accounts which he may require to be submitted. (s. 13 (6)).

But delay in the furnishing of reports and accounts is not the only reason for the inadequate control of public corporations by the Legislature. The members of the House sitting together cannot, due to lack of time and of expert knowledge, be expected to enter into a sufficiently detailed discussion of matters relating to corporations. As the Public Accounts Committee, in its report on the Auditor-General's comments on the Government Accounts for 1956-57 has stated, it is apparent that the degree to which the Legislature is able to keep itself informed in regard to the working of public corporations is wholly inadequate. The Committee recommended that some procedure had to be devised to enable the Legislature to inform itself more satisfactorily than at present in regard to the working of the different corporations so as to be able to evaluate their performance and to ensure that the intentions of the Legislature are being fulfilled. It also recommended that a periodic review of the affairs of every public corporation, which would eventuate in a report that would be available to the Legislature, should be rendered obligatory by law. It is apparent that a Select Committee of the National State Assembly on public corporations would be an appropriate body to examine and report to the National State Assembly on the reports and

49. See, for example, Cooray in *The Constitution and Public Finance* (1964), p. 5.

accounts of public corporations and thus enable the Assembly to have the necessary information concerning their working. In the alternative, the composition and functions of the Public Accounts Committee should be enlarged to meet the situation which has arisen as a result of the increase in the industrial, commercial and other economic acitvities of the State and in the number of public corporations entrusted with such activities.

In Britain in 1956, the House of Commons established such a Select Committee on Nationalised Industries "to examine the Reports and Accounts of the Nationalised Industries established by statute whose controlling Boards are appointed by Ministers of the Crown and whose annual receipts are not wholly or mainly derived from moneys provided by Parliament or advanced from the Exchequer". This Committee provides the necessary liaison between the British Parliament and the public corporations. It is recognised by the Committee that its object should be "that of informing Parliament about the aims, activities and problems of the corporations and not of controlling their work.[50] It is required to have "a regard, not merely to present and past financial policy and stability, but to future plans, and programmes". The Committee has examined several industries and carried out detailed investigations of the general policies and workings of several nationalised industries.

In Sri Lanka the Public Accounts Committee's findings based on the Auditor-General's reports have revealed recurrent losses and defaults in some public corporations. Governments have had occasion even to call for reports of acts of maladministration. A drawback in the achievement of more successful results by the Public Acounts Committee has, as already stated, been the delay in the finalisation of the financial accounts of corporations. Another defect has been the absence of a body such as an Efficiency Audit Commission to assist the Committee.[51]

There is not the slightest doubt that the effectiveness of legislative control of public enterprises would be hampered by confining the functions of any Committee of the National State Assembly to the finance of public corporations without extending such function to their efficiency. The function of audit with regard to public corporations should not be limited to

50. A. H. Hanson, *Parliament and Public Ownership* (1960), p. 136.
51. See W. A. Robson, and *Nationalised Industry and Public Ownership* (1960), pp 201-202.

the discovery of irregularities according to colonial rules of financial and administrative procedure. As already stated, one of the purposes for the establishment of public corporations is the elimination of rigid public service administration and Treasury control which hamstring public enterprise. Audit approach should be more positive in order to facilitate efficiency, adaptability and rapid development. The strict functions of audit should be combined with a review of the financial management of public enterprise according to commercial principles. The audit reports should, for example, contain an examination of such matters as management efficiency, profitability, attainment of approved plans and targets and a general evaluation of the work of the corporation.[52] In order to facilitate management and efficiency auditing, corporations and other public sector bodies should adopt proper systems of management accounting.

Mr. Bernard Soysa, who was Chairman of the Public Accounts Committee of the former House of Representatives has stated:

> "The concept was introduced in the United States of America of what is called a comprehensive audit (namely): 'The utilisation of materials, and personnel within the limits of its programmes and activities and their execution in an effective, efficient and economical fashion.....' "[53]

It is indeed desirable that there should be legal provision for a system of management and efficiency audit in Sri Lanka, involving a regular evaluation of plans, progress of work and assessment of profitability. The system demands modern costing, accounting and programming procedures which are in vogue in modern private enterprises and which contribute to their efficiency. The enlarged functions of public audit, including efficiency and policy control that is envisaged is best performed, as in such countries as Yugoslavia and Israel, by a separate branch of specialised audit having the requisite expert knowledge of the principles of financial management of public enterprises. Such an external efficiency auditing body would be of real assistance to the National State Assembly

52. Cooray, *Constitutional Government and Human Rights in a Developing Society* (1969), p.68.
53. *Proceedings of a Seminar on the Role of Audit in a Developing Country* (Government Press, Ceylon) pp, 18, 23.

in the exercise of its control over public corporations.[54] It could also advise the Minister, when such advice is requested by him, for example, in the exercise of his direction-issuing power.

Pricing Policy. In 1967 the Rajendra Committee which reviewed the pricing policies of public corporations in Ceylon was reported to have found that public enterprises had not contributed to economic growth in proportion to the capital invested in them by the State.[55] The Committee had examined the working of 36 State industrial and commercial enterprises and public utilities. Among the findings of the Committee were (i) The State had not formulated an overall general policy in regard to the financial obligations of public enterprises to the State; (ii) No general policy directives had been issued to the State industrial corporations in regard to the pricing of their goods and services but specific directives have been issued from time to time to certain industrial corporations;(iii)Where specific directives had been issued as in the case of the Ceylon Oils and Fats Corporation and the Eastern Paper Mills Corporation, the interests of the consumers had been given precedence over the need to ensure the economic viability of the enterprise; (iv) The Boards of public corporations, Government Departments operating public utility services and the Ministry in charge of them had generally been more concerned with providing services at the cheapest possible cost to the consumer and had ignored the necessity to run economically viable enterprises. This disinclination to raise charges to cover costs of operation particularly in Government Departments like the Railway, Posts and Telecommunications had gravely affected the quality of the services that these departments performed. (v) The sale of goods and services of public corporations and enterprises at artificially low prices tended to increase the demand for such goods and services. To cope with this increasing demand additional investment became necessary but the earnings of these ventures were insufficient to provide additional capital for expansion owing to the low prices of their goods and services. They had therefore to depend more and more on the government for capital, which could be provided only by diverting resources from other pressing needs for investment. This generally resulted in an un-

54. See, for example, the *Commission de Verification des Comptes* of France which is an independent auditing body concerned with the financial review of public enterprises and with the exercise of a "judicial" control over them. Professor W. A. Robson has suggested an efficiency audit commission for Britain. ("Problems of Nationalized Industry").

55. *Ceylon Daily News*, ,9 January 1967.

economic allocation of scarce capital resources; (vi) In the case of the Ceylon Transport Board and the Port (Cargo) Corporation the statutory requirement that these enterprises should levy charges to cover cost of operations, amortise original capital and build up adequate reserves within the enterprise for its expansion, had been ignored. Even where legal provision existed for determination of fares-charges by a statutory Board, as in the case of the Fares Board prescribed in the Motor Transport Act no action had been taken on the recommendations made by the statutory body;[56] (vii) In the case of those enterprises where the Minister concerned was required to fix charges-fares, there had been a general disinclination to review such charges-fares, although the costs of operation of these enterprises had increased substantially. How far the existing charges-fares lagged behind rising costs of operation could not be indicated precisely in the absence of an efficient system of costing; (viii) There had been no consistent policy in regard to the tax obligations of public enterprises; (ix) The capital structure of public enterprises lacked consistency. While some enterprises were provided with loan capital others had received outright grants which were treated as equity capital. (x) The role and function of the Treasury representatives on the Boards of public corporations had nowhere been clearly defined. In a majority of corporations these representatives had been mainly concerned with the control of cadres and establishments only.

The Committee made the following recommendations after an examination of the law and practice pertaining to pricing policy in public corporations and enterprises.

1. Government should give clear policy directives on pricing: (a) The authorities responsible for fixing the prices of goods and services of public corporations and enterprises should be required to fix their prices in a manner to ensure— (i) a minimum return (after tax) to the Government of at least one per cent above the current borrowing rate of Government on the capital and capital reserves; and (ii) an allocation to capital reserves as would be adequate, taking the nature of the enterprise into consideration. (b) Where, for any reasons of public interest, Government did not wish that a corporation should follow a pricing policy as indicated in (a) above, the Minister in charge should propose an alternative to the

56. The bus fares charged by the Ceylon Transport Board have since been increased.

public corporation concerned in writing. The corporation concerned should then state the precise financial implications of following the alternative proposal and where it would result in a loss of income, the Minister in charge should seek Parliamentary sanction for following the alternative policy and seek a supplementary vote for finding the consequent loss of income to the corporation. The corporation should show this transaction in its accounts clearly.

2. Government should organise the institutional arrangements necessary to ensure that these policy directives are carried out.

3. Public enterprises should be required to pay all taxes, duties and other fiscal levies payable by enterprises in the private sector; they should, as a corollary, be entitled to tax and tariff concessions similar to those enjoyed by the private sector.

4. (a) The capital reserves of public enterprises should be deposited in the Treasury. This would enable the Government to utilise the surplus funds of corporations and enterprises and would, at the same time, give these enterprises a return on their surplus funds and enable them to build up reserves.(b) No money should be invested in any expansion project by a corporation or a Government enterprise without the prior-approval of the Ministry of Planning and Economic Affairs.

General Conclusions. In Sri Lanka the acceptance by the major political Parties of the need for State economic planning and for a large public sector in industry and commerce naturally implies a considerable measure of control by the Government and the National State Assembly over the affairs of public corporations. In fact, there has in recent times been a re-appraisal of the objectives of public corporations relating to investment, production and performance. Such re-appraisal made periodically is necessary because public enterprise forms an essential and vital part of the national plan. Since the Minister is answerable for policy, he must have the power of control over these objectives. Otherwise the principle of answerability to the people through their elected representatives would be endangered. The final control over the policy of public corporations must necessarily lie with the National State Assembly.

In the past there have in fact been complaints by Boards of public corporations that their commercial judgment and decisions on matters

relating to day-to-day affairs have been interfered with on grounds of Party politics and political expediency. These Boards have maintained that such interference has deprived them of that initiative and flexibility of movement which are generally associated with private enterprise.

It is desirable that the selection of executive and other personnel should, subject to the procedural rules laid down by the Government, be left in the hands of the Boards. If public corporation are to be run efficiently, they should not be regarded as avenues for providing employment in order to secure political support or as consideration for such past support. Directors and managers should be chosen for their business ability and specialised knowledge of the particular industry or business and their competence to run it efficiently in the public interest. Political views of candidates for membership of public corporations should be irrelevant unless such views are likely to interfere with the successful working of the public enterprise.

In order that there should be a clear definition of responsibilities of the Minister and the Board, it is desirable that the Minister's authority should be exercised by directives which should be put down in writing. As the British Select Parliamentary Committee on Nationalised Industries has suggested, "when a Minister wishes, on grounds of national interest, to override the commercial judgment of the Board, he should do so by a directive which should be laid before Parliament and published so that Parliament and the public would be fully informed about the respective responsibilities of the Minister and the Board in a particular case."[57]

Apart from the exercise of the Ministerial power of issuing directives to Boards of public corporations, it is clearly desirable that there should be free and frank discussion between the Minister and the Board on matters relating to the affairs of the particular corporation. These informal discussions could go a long way to blend the autonomy of the Board in respect of day-to-day management with the responsibility of the Minister to the National State Assembly for the affairs of the corporation.

It is also necessary that there should be a certain amount of decentralisation of large and unwieldly public enterprises. Such decentralisation

57. H.C. 187-I of 1957-58, para. 89.

would lessen the evils of bureaucratic management on the one hand and increase competitive efficiency on the other. A distinguished jurist has pointed out that "in the Soviet economy there has been in recent years a measure of legal and administrative decentralisation of State enterprises, so as to promote competitive efficiency by a kind of price and market mechanism, commercial accountability and greater managerial autonomy".[58]

Effective organs of worker and consumer representation could also be made to perform useful functions of an advisory nature. Employees' Councils have already been established in some public corporations. Such organisations should give expression to the rights as well as responsibilities of employees. Efficiency and output on the part of employees would be increased by the payment of bonuses and other additional remuneration to them according to output and profits. In this connection it is of interest to note that the introduction of a new system of bonuses has been stated to be under consideration by the Ceylon Transport Board. Instead of the usual 'flat' bonus, it is intended that a bonus related to the profit and performance of each unit of the corporation will be paid to the employees of that unit.[59]

In addition to Employees' Councils, there should be set up an efficient system of consumer representation. Consumer Councils will enable the views and grievances of the people using the service to be known to the particular corporation. The decentralisation of consultative machinery, whether it pertains to consumers or workers, will result in a greater sense of participation and ownership at all levels on the part of employees, consumers and the community generally.

58. W. Friedmann, *The State and the Rule of Law in a Mixed Economy* (1971), p. 5.
59. Message from the Minister of Communications, Mr. Leslie Goonewardena, to Employees' Councils of the Ceylon Transport Board, dated 19 April 1972.

CHAPTER 23

LOCAL GOVERNMENT AUTHORITIES

1 INTRODUCTION

Local government consists of the system of functions which are carried on over specific areas of the country by local authorities. The expression "local authorities" as commonly used in statutes means (1) Municipal Councils (2) Urban Councils (3) Town Councils and (4) Village Councils.[1] Local government law is the law relating to the organisation, powers and functions of these authorities. As distinct from local agents of the Central Government, they exhibit certain characteristics, namely:[2] (1) Local authorities are constituted under their respective statutes as legally independent entities having a separate legal existence as corporate bodies. They are not the agents of the Central Government. Their officers and servants are in law the servants of these bodies and are not servants of the State, or State officers as they are known in Sri Lanka. Being statutory corporations they are subject to the doctrine of *ultra vires* and can exercise only the powers which are expressly conferred upon them by the statute or may fairly be regarded as incidental to, or consequent upon, those powers.[3] The application of the *ultra vires* doctrine has been discussed earlier.[4] (2) In modern times local authorities are elected by the inhabitants of the area to administer the functions assigned to the authorities, each acting in the particular area. (3) Local authorities have powers to raise the money necessary for their activities by imposing local rates and taxes. In order to provide for the whole of their expenses the Central Government also provides financial assistance to local authorities. (4) To some extent local authorities are autonomous bodies who,

1. See, for example the interpretation clause (s. 89) of the Local Authorities Elections Ordinance (Chapter 262 of the Legislative Enactments).
2. These characteristics are enumerated and examined in Hart's *Introduction to the Law of Local Government and Administration* (1968), pp. 6-7. See also Lawson and Bentley *Constitutional and Administrative Law* (1961), pp. 203-204.
3. *Ashbury Railway Carriage and Iron Co.* v *Riche* (1875) L.R. 7 H.L. 653; *Attorney-General* v *Great Eastern Railway Company* (1880) 5 App. Cas. 473.
4. Chap. 19, *ante*.

within the limits of the powers conferred upon them by statute, are free to decide questions of policy for the administration of their localities. There is necessarily a certain amount of control which is exercised by the Central Government over their activities.

In a country like Sri Lanka a well organised system of local government authorities can be made to play a significant role in the important task of economic and social development. Such authorities are peculiarly suited for the purpose of securing the necessary participation of the people, commencing from the local and village level.

2 DEVELOPMENT OF LOCAL GOVERNMENT

The idea of local or more particularly village self-government in Sri Lanka can be traced back to ancient times. As far back as the fourth century B.C., King Pandukabhaya "established the village boundaries over the whole Island of Lanka".[5] Each village area was thus demarcated and matters of common interest in the area were administered by a gamsabhava or village council. A gamsabhava was composed of the principal men of the village who met at an ambalama (resting place) or under a tree.[6] As D'Oyly has stated, although these Councils had both criminal and civil jurisdiction in questions of boundaries, petty debts and petty offences, their endeavours were directed to compromise rather than punishment.[7] These village councils also facilitated the payment of dues to the King. The rata sabhawas or district councils existed in certain areas and were composed of the chief citizens from each village comprising the district, and officials. This system of village government continued to flourish in the Kandyan Kingdom until the Rebellion of 1817-1818. It ceased to have legal recognition after the Proclamation of 1818, and subsequently began to decline.[8] But the Colebrooke Commission was so impressed by this institution even in 1829 that as a result of its recommendations the Charter of 1833 provided that disputes may be submitted to the arbitration of gamsabhavas. With the establishment of Police Courts and Courts of Requests in 1843, however, they fell again into desuetude.[9]

5. Mahavamsa x, 103.
6. Robert Knox, *Historical Relation of Ceylon*, (1681), p. 84.
7. D'Oyly's *Sketch of the Constitution of the Kandyan Kingdom*, p. 82.
8. Father S.G. Perera, *A History of Ceylon for Schools* (1945), p. 116.
9. *Ibid.*

In 1871 when Sir Hercules Robinson was Governor of Ceylon, the gam-sabhava or village council system was revived and reconstituted by Ordinance No. 26 of 1871. In his Despatch to the Secretary of State, when transmitting the Ordinance, the Governor said:[10]

> "In former times the Sinhalese village communities managed altogether for themselves the affairs of their social and communal life. The cultivation of the fields, the common pasturing of cattle, the conduct of fisheries, the use of village paths, and other like matters of common concern were regulated by ancient custom; and all breaches of these customs and disputes between the villagers were settled by a Tribunal consisting of an Assembly of Elders in each Village.....
>
> The effect of the establishment of the Courts having jurisdiction over the villagers was inevitably to deprive the Village Tribunals of their authority.....this substitution of law for usage could not fail to produce important results. In fact, it deprived the people of the power of self-government which had nominally been left to them, for it took from them the means of enforcing penalties for breaches of their law.....
>
> One thing is certain that, if the measure itself succeeds, it will prove of uncommon benefit to the country. It will furnish the Government with an administrative machinery, which is greatly needed and without which it is hardly possible to effect any improvement in the social and moral conditions of the people....."

Governor Robinson is reported to have said that he wished for no better epitaph over his grave than that: "He restored village councils in Ceylon".

Village committee administration was strengthened by the Village Communities Ordinances, No. 9 of 1924 and No. 60 of 1938.

In order to deal mainly with such matters as public health and sanitation in small towns a new local authority was created in 1892. These

10. Cited in the Report of the Commission on Local Government (1955) (Sessional Paper XXXIII), p. 8.

authorities, known as Sanitary Boards, were constituted under the Small Towns Sanitary Ordinance. In 1898 another authority with similar powers was created for the larger towns. These were the Local Boards. By the Local Government Ordinance, No. 11 of 1920, a more complete scheme of local government was attempted by providing for the establishment of District Councils for all parts of the Island, other than municipal areas, and which were charged with the administration of matters relating to (a) public thoroughfares, (b) public health, (c) public services, (d) general local wants and interests. Another important step taken in the development of local government in towns was the enactment of the Urban Councils Ordinance, No. 61 of 1939.

So far as the origin of municipal administration in Sri Lanka is concerned the Report of the Donoughmore Commission has stated:

> "While the Village Committees have a foundation in ancient custom and the Sanitary Boards, Local Boards and Urban District Councils have resulted from an attempt gradually to make administration advance with development under modern conditions, the creation of municipalities as long ago as 1865 was the outcome of a desire, somewhat characteristic of the time, to implant British democratic institutions in those countries for the welfare of which Great Britain had assumed responsibility".[11]

In 1910 a Municipal Councils Ordinance was passed and a series of amendments were made to that Ordinance from 1917 to 1935. In 1947 a new Municipal Councils Ordinance consolidated the previously existing Colombo Municipal Council (Constitution) Ordinance, No. 60 of 1935, and the Municipal Councils Ordinance of 1910.

As the Report of the Commission on Local Government states, "the changes after 1931 show certain definite lines of consistent policy, namely (1) the encouragement of the development of local government institutions, (2) the grant of wider powers and duties to these bodies, (3) the extension of the franchise to permit basically all local inhabitants to participate in local government, (4) the withdrawal of the official element from the composition of these councils, (5) the abolition of purely bureaucratic boards like Sanitary Boards, Road Committees and Local Boards".[12]

11. (1928) Cmd. 3131, p. 109.
12. (1955) Seessional Paper XXXIII, p. 17.

3. LOCAL AUTHORITIES

(a) Municipal Councils. The Municipal Councils Ordinance, No. 20 of 1947,was passed to amend and consolidate the law relating to Municipal Councils. Section 2 of the Ordinance empowers the Minister by Order published in the Gazette to (a) declare any area to be a Municipality, (b) define the limits of the Municipality so declared and (c) assign a name and designation to the Municipal Council to be constituted for the Municipality so declared.

Every Municipal Council is a corporation with perpetual succession and a common seal and has power, subject to the Ordinance, to acquire, hold and sell property, and may sue and be sued by such name and designation as may be assigned to it under the Ordinance.[13] The common seal of the Council must remain in the custody of the Municipal Commissioner and must not be affixed to any contract or other instrument on behalf of the Council, except in the presence of the Mayor or Deputy Mayor and the Commissioner.[14]

The first business of the first general meeting of the Councillors elected at a general election of a Municipal Council is the election of a Mayor and Deputy Mayor. The Municipal Commissioner is required to be the Chairman of this Meeting. Where there are more than two candidates for election of Mayor or Deputy Mayor and no candidate receives at the first voting more votes than the aggregate of the votes received by the remaining candidates, the procedure is as follows: the candidate receiving the lowest number of votes is excluded from the election and the voting proceeds, one candidate being excluded from the election after each subsequent voting until a candidate receives more votes than the aggregate received by the remaining candidates or, as the case may be, until voting in respect of two candidates only is held and completed. The Mayor and Deputy Mayor so elected are each, during the tenure of office, *ex officio* a Justice of the Peace and Unofficial Magistrate for the administrative district in which the Municipality is situated. If, at a special meeting of the Council convened for the purpose, a resolution for the removal of the Mayor or Deputy Mayor from office is passed by not less than one-half of the total number of Councillors and is confirmed by a

13. s. 34 (1).
14. s. 34 (2).

resolution similarly passed at another special meeting of the Council, he is deemed to vacate office on the date on which the resolution is confirmed. A special meeting of the Council to consider the resolution must be convened by the Municipal Commissioner if a requisition for such meeting is made to him in writing signed by not less than two-fifths of the total number of Councillors. The Commissioner is required to preside at these special meetings of the Council.

Except at meetings for his election or removal, the Mayor, or, in his absence, the Deputy Mayor, presides. The Mayor is *ex officio* the chairman of the Standing Committee on Finance. He may be present and may speak, but not vote, at a meeting of any of the other Standing Committees. He presides and may speak and vote at every joint meeting of the Standing Committee on Finance and any other Standing Committee or Committees.

The Council can delegate by resolution any of its powers, duties or functions. The Mayor or other officer authorised by him is empowered to hold all inquiries which he may deem necessary for any of the purposes of the Ordinance, and for that purpose to administer oaths and summon witnesses.[15] The Mayor is also empowered to suspend, dismiss, fine or reduce in status any officer or servant receiving a salary not exceeding one hundred rupees a month or withhold for any specified period any increment to his salary.[16] The annual Budget as well as supplementary Budgets must be submitted to the Council by the Mayor.[17] He must also, as soon as possible after the close of each financial year, prepare a detailed report of his administration during the previous year, with a statement showing the nature and amount of receipts and disbursements on account of the Municipal Fund during that year.[18]

For each Municipal Council there is a Municipal Commissioner who is next to the Mayor the chief executive officer of the Council[19] The Commissioner is responsible for the custody of all books, deeds, contracts, accounts, vouchers and other documents and papers of the Council. He must permit any Councillor to inspect or peruse the same in the Municipal office.

15. s. 40 (1) (j).
16. s. 181.
17. ss. 211 and 214.
18. s. 218.
19. s. 170 (1).

The functions of Municipal Councils relate to the regulation, control and administration of all matters relating to public health, public utility services and public thoroughfares, and generally with the protection and promotion of the comfort, convenience and welfare of the people and the amenities of the Municipality. The Municipal Councils Ordinance as well as other statutes confer various powers and duties upon Municipal Councils. They have power, *inter alia*, to establish and maintain the following public services: (i) water supply, (ii) the lighting of streets, public places and public buildings, (iii) the supply of electric light or power, (iv) markets, (v) public baths, bathing places, laundries, and places for washing animals, (vi) any other form of public service, subject to such prohibition or restriction of the establishment and maintenance of that service as may be imposed by any other law.

A Municipal Council has, within the Municipality, the following duties: (a) to maintain and cleanse all public streets and open spaces vested in the Council or committed to its management; (b) to enforce the proper maintenance, cleanliness and repair of all private streets; (c) to supervise and provide for the growth and development of the Municipality by the planning and widening of streets, the reservation of open spaces, and the execution of public improvements; (d) to abate all nuisances; (e) to establish and maintain (subject to the extent of its resources) any public utility service which it is authorised to maintain under the Ordinance and which is required for the welfare, comfort and convenience of the public; (f) generally to promote the public health, welfare and convenience, and the development, sanitation and amenities of the Municipality.

Every Municipal Council must establish a Municipal Fund for its general financial purposes. Into this Fund must be paid

(*a*) all rates, taxes, duties, fees and other charges levied by the Council by any law;
(*b*) all fines levied and penalties recovered and payable to it under the authority of any law;
(*c*) the amount of all stamp duties and fees specified in the Second Schedule of the Ordinance;
(*d*) all sums realised by sales, leases or other transactions of the Council;
(*e*) all revenue derived by the Council from any property vested in the Council, or by the administration of any public service;

(*f*) all sums and all sources of revenue from time to time appropriated or made over to the Council by the National State Assembly;
(*g*) subject to any special appropriation made by the Minister, all grants allocated to the Council by the Minister;
(*h*) all sums otherwise accruing to the Council in the course of the exercise of its powers and duties.

A Municipal Council may, with the sanction of the Minister, borrow such sums as may be required for any of the following purposes:

(*a*) the carrying out of any work of a permanent character undertaken under the provisions of the Ordinance or any enactment repealed by Ordinance No. 29 of 1947;
(*b*) the establishment, completion, improvement or development, of any public service undertaken as aforesaid;
(*c*) the acquisition of any land or building required for the purposes of or in connection with any such work or public service;
(*d*) any machinery, plant or equipment required for the purposes of any such public service.

The sanction of the Minister is not, however, necessary for borrowing any such sum if the amount outstanding in respect of all loans already raised by the Council does not exceed the total income received by the Council during the three years immediately preceding the year in which that sum is to be borrowed.

The amount at any time outstanding in respect of all loans raised by a Municipal Council shall not exceed in the aggregate ten times the fair average annual income received by the Council from all rates, taxes, properties and other sources of income for the preceding five years, or, in the case of any Municipal Council which has not been in existence for five years, ten times its income for one year as appraised by the Council, subject to the approval of the Minister. But in any case in which the liabilities of a Municipal Council in respect of its loans are wholly or mainly due to the Government of the Republic of Sri Lanka, the Minister may, by Order published in the Gazette, authorise the limit prescribed to be exceeded to such extent as may be stated in the Order.

Every sum borrowed by a Municipal Council must be repaid within such period as the Council, with the sanction of the Minister, may deter-

mine. Where any sum is borrowed by a Municipal Council for the purpose of meeting expenditure on the construction of new works or the extension or alteration of existing works forming part of an undertaking of a revenue-producing character, any annual provision required to be made by the Council for the repayment of the loan may be suspended for a stated period. The Mayor must transmit, within one month after being requested by the Minister to do so, a return showing the provision made by the Council for the repayment of moneys borrowed by it.

A Municipal Council is empowered to assess from time to time with the sanction of the Minister any rates on the annual value of all houses and buildings of every description, and of all lands and tenements whatsoever within the Municipality. All houses, buildings, lands or tenements which are situated within an area not benefited by the conservancy service provided by the Council are exempt from any portion of such rates that is declared by a resolution of the Council to be levied for the purpose of providing such service. All school buildings, buildings wholly or mainly used for religious purposes, public libraries, burial and cremation grounds and buildings in charge of military sentries are exempt from the payment of such rates.

Every Municipal Council is empowered to make such by-laws as may appear necessary for the purpose of carrying out the principles and provisions of the Ordinance. Contravention of a by-law is an offence under the Ordinance. No by-law has effect until it has been approved by the Minister, confirmed by the National State Assembly, and notification of such confirmation is published in the Gazette. Without prejudice to the generality of the powers conferred, by-laws may be made with respect to any of the following matters: (1) officers and servants, (2) buildings, building operations and works, (3) drainage, (4) waterworks, (5) sanitation, (6) streets, (7) land and property, (8) markets, fairs, bakeries and provisions, (9) management and control of slaughter houses, (10) stray cattle, (11) regulations for quarantine stations for cattle, (12) revenue, (13) the prescribing of fees and charges for matters required to be done under the Ordinance, (14) the licensing and regulation of hair dressers, barbers' shops, lodging houses, restaurants, eating houses and tea and coffee boutiques, (15) the regulation and control of offensive or dangerous trades or businesses, (16) the licensing of money-changers, accountants and auditors, (17) the licensing and control of places of public entertainment, (18) the regulation and control of the sale, storage, or manu-

facture for the purposes of sale, of articles of food and drink, (19) itinerant vendors, (20) laundries and washing, (21) dairies, (22) establishment and regulation of tolls.

(b) Urban Councils. Under the Urban Councils Ordinance the Minister of Local Government is empowered by Order published in the Gazette to declare any area which is not a Municipality, and which by reason of its development or its amenities is urban in character, to be a town for which an Urban Council may be constituted. Every Urban Council is a corporation with perpetual succession and a common seal, and may sue and be used by the name assigned to it. The first meeting of the Council after a general election of members is convened by the Assistant Commissioner of Local Government. He presides at the meeting until the election of the Chairman who thereafter presides over the proceedings held for the election of the Vice-Chairman. Where there are more than two candidates for election as Chairman or Vice-Chairman and no candidate receives at the first voting more votes than the aggregate of the votes received by the remaining candidates, the procedure which must be followed is similar to that of the election of the Mayor or Deputy Mayor of a Municipal Council.

The Chairman is the chief executive officer of the Council, and all executive acts and responsibilities which are directed or empowered to be done or discharged by the Council may be done or discharged by the Chairman. Except as regards matters expressly committed to him, he must act in conformity with such resolutions as may from time to time be passed by the Council. The Chairman may be removed from office on a resolution duly passed by not less than two-thirds of the total number of members of the Council at a special meeting convened for the purpose by the Assistant Commissioner or a written request by not less than one-half of the total number of members of the Council. The functions of the Council are the regulation, control and administration of all matters relating to the public health, public utility services and public thoroughfares, and generally the protection and promotion of the comfort, convenience and welfare of the people and the amenities of the town.

Within their administrative limits, Urban Councils are entrusted with powers and duties which are similar to those of Municipal Councils. They are the general authorities for thoroughfares, communications and public health. They have power to establish and maintain the following

public utility services: (i) water supply, (ii) the lighting of streets, public places, and public buildings, (iii) the supply of electric light or power, (iv) markets, (v) public baths and bathing-places, (vi) manufacture and supply at cost price of squatting plates for latrines, (vii) provision of housing accommodation for the poorer classes, (viii) any other form of public service, subject to such provision or restriction of its establishment and maintenance as may be imposed by any other law.

Every Urban Council is empowered to make such by-laws, not inconsistent with the provisions of the Ordinance, as may be authorised or required by the Ordinance, or may appear to the Council to be necessary for the purposes of the exercise of its powers and the discharge of its duties. No by-law has effect until it has been approved by the Minister and notification of such approval is published in the Gazette. Without prejudice to the generality of the powers conferred, by-laws may be made with respect to any of the following purposes: (i) procedure, (ii) officers, (iii) taxation, (iv) loans, (v) the imposition, levy and recovery of rates and charges, (vi) land and property, (vii) thoroughfares, (viii) buildings, (ix) public health and ameneties (x) animals (xi) markets and fairs, public and private, (xii) waterworks, (xiii) public services, (xiv) the measure or dimension of bread, and the regulation of its manufacture and quality.

Every Urban Council must establish a Local Fund for its general financial purposes. Into this fund is payable (a) the fines and penalties accorded to Urban Councils under the Ordinance, (b) the amount of all stamp duties and fees accorded to Urban Councils, (c) subject to any special appropriation made by the Minister, all grants allocated to the Council by the Minister, (d) all rates, taxes, duties, fees and other charges levied under the authority of the Ordinance, (e) all sums realised by sales, leases or other transactions of the Council, (f) all revenue derived by the Council from any property vested in the Council or by the administration of any public service, (g) all sums derived from any source of revenue made over to any local authority to which the Council is the successor in pursuance of any repealed enactment, (h) all sums and all sources of revenue from time to time appropriated or made over to the Council by the National State Assembly, (i) all sums otherwise accruing to the Council in the course of the exercise of its powers and duties.

An Urban Council may, subject to the approval of the Minister, impose and levy a rate on the annual value of any immovable property

or any species of immovable property situated within the town. The Council may impose different rates for different areas or parts of the town according to the services provided by the Council for each such area or part. The following are exempt from rates: (a) all lands or buildings wholly or mainly used for religious, educational or charitable purposes, (b) all buildings in charge of military sentries, (c) all burial and cremation grounds, (d) any immovable property which the Council may specially exempt from such rate on the ground of the poverty of the owner, (e) in the case of any defined portion of a rate, declared by resolution of the Council to be levied for the purposes of any special public service, any immovable property situated within any area which is not benefited by such service, or within which other provision is made for the said or a like service to the satisfaction of the Council.

An Urban Council may, subject to the approval of the Minister, borrow from the Government of the Republic of Sri Lanka or any person or body such sum of money as may be necessary for any of the purposes of the Council. The approval of the Minister is not necessary if the amount outstanding in respect of all loans already raised by the Council does not exceed the total income received by the Council during the three years immediately preceding the year in which that sum is to be borrowed. Every loan raised by the Council is subject to such rate of interest and to such conditions for the repayment thereof as may, where the loan is raised with the approval of the Minister, be approved by the Minister, and, in any other case, be determined by the Council.

The amount at any time outstanding in respect of all loans due from any Urban Council shall not exceed in the aggregate ten times the fair average annual income received by the Council from all rates, taxes, properties and other sources of income for the preceding five years, or, in the case of an Urban Council which has not been in existence for five years, ten times its income for one year as appraised by the Council, subject to the approval of the Minister. But in any case in which the liabilities of a Council in respect of its loans are wholly or mainly due to the Government of the Republic of Sri Lanka, the Minister with the concurrence of the Minister of Finance may authorise the limit prescribed to be exceeded to such extent as may be stated in the Order.

The mode and order of repayment of any sums borrowed and the arrangements for the liquidation of any loan must, subject to the provisions

of the Local Loans and Development Ordinance, be such as may be prescribed by by-laws or regulations made under the Ordinance, and, in the absence of any such by-laws or regulations must be in accordance with the provisions of the Municipal Councils Ordinance with the necessary modifications.

(c) **Town Councils.** Any area which by reason of its development or its amenities is urban in character may, under the Town Councils Ordinance, be declared a town by Order of the Minister published in the Gazette. The Minister may also define its administrative limits and assign a name and designation to the Town Council to be constituted for the town so declared.

Like other local authorities a Town Council is a corporation with perpetual succession and a common seal and may sue and be sued under the name assigned to it.

The Assistant Commissioner of Local Government is required to convene the first meeting of the Council after a general election of the members and preside over it until the election of the new Chairman. The mode of election of the Chairman and Vice-Chairman is similar to that in the case of Municipal and Urban Councils.

The Chairman is the executive officer of the Council, and all executive acts and responsibilities which are by any enactment directed or empowered to be done or discharged by the Council may be done or discharged by the Chairman. There is provision similar to that under the Urban Councils Ordinance for the removal of the Chairman from office by resolution of the Council.

The powers and duties of a Town Council are similar to those of a Municipal or Urban Council. They relate to: (i) the maintenance and cleansing of all public thoroughfares and open spaces vested in the Council or committed to its management; (ii) the enforcement of the proper maintenance, cleanliness, and repair or all private streets; (iii) public health including the abatement of nuisances; (iv) the establishment and maintenance of public utility services such as water supply, lighting, markets.

The power of a Town Council to make by-laws for the exercise of its powers, the provisions relating to the Local Fund, the power to levy rates and other taxes, the borrowing powers, the provisions relating to accounts and audit are also similar to those of an Urban Council.

(d) *Village Councils.* The Minister is empowered under the Village Councils Ordinance to declare that any divisional revenue officer's division or any part of it shall be brought within the the operation of the Ordinance. Such division or part of it is then subdivided into village areas consisting of one or more villages or groups of villages. A Village Council is constituted for each village area. The mode of election of the Chairman and of his removal from office is similar to that relating to Chairmen of Urban and Town Councils.

The powers of Village Councils include the following: (a) the establishment or maintenance of any public service which is required for the welfare, comfort or convenience of the public, subject to the extent of the resources of the Committee and to such prohibition or restriction of the establishment or maintenance of that service as may be imposed by any other law; and with the sanction of the Minister to levy a special rate upon the area benefited by such service; (b) the power to undertake the construction of such new village works as may be necessary and the alteration, improvement or maintenance of existing village works; (c) the power to establish ferries and collect tolls; (d) the power to apply any part of the Communal Fund to the conduct of experiments in agriculture and the breeding of domestic animals and to the maintenance of experimental farms and studs for this purpose; (e) the power to apply any part of the Communal Fund for relieving public distress due to famine, epidemic diseases or any other cause; (f) the power to levy rates and taxes in accordance with the provisions of the Ordinance; (g) the power to authorise surveys of private premises for any public purpose in the village area; (h) the power to establish and maintain public utility services.

Every village area must have a Communal Fund. This Fund is similar to the Funds of other local authorities. A Village Council has power to make by-laws for the exercise of its powers and duties, and to borrow money as in the case of other local authorities.

4. CENTRAL GOVERNMENT CONTROL

A considerable measure of control over local authorities is exercised by the Central Government by the following means:

(a) **Control over finance.** The accounts of local authorities are audited by the Auditor-General or by officers authorised by him. In the case of Municipal Councils a continuous audit of such accounts is maintained. The Minister is empowered to direct the auditor to call the attention of the Council to any material defect, impropriety or irregularity in the expenditure of moneys by, or in the recovery of moneys due to, the Council or in the Municipal accounts. The Council must report to the Minister on the action taken or to be taken by it in respect of such defect, impropriety or irregularity. Any orders made by the Minister are final and must be complied with by the Council and all other persons. So far as the accounts of Urban Councils and Town Councils are concerned, the audit is done during each half of the financial year, while the accounts of Village Councils must be inspected, examined and audited annually. The auditor must disallow every item of the accounts which is contrary to law and surcharge it on the person making or authorising it. We have already mentioned that the Minister has a power of control over loans and that his approval is generally necessary for the exercise of the borrowing powers of local authorities. In the case of Urban Councils and Town Councils the annual budget must be submitted to the Commissioner of Local Government. Where the Minister is of opinion that the financial position of such a Council is such as to make his control over its budget desirable, he may direct that it shall be subject to his sanction and in such a case the Council is required to take any directions of the Minister with respect to it. Central control is also exercised through the payment of grants by the Government.

(b) **Powers in respect of local legislation.** Under the Municipal Councils Ordinance the Minister is empowered to make regulations generally for the purpose of giving effect to the principles and provisions of the Ordinance. Under the Urban Councils and Town Councils Ordinances the Minister may make rules of procedure for the guidance of the Councils and of their officers. Under the Village Communities Ordinance the Minister is empowered to make rules on any matter connected with the execution or enforcement of the provisions of the Ordinance. By-laws made by local authorities require the approval of the Minister.

(c) **Powers of dissolving local authorities.** Under the Municipal Council Ordinance, if it appears to the Minister that a Municipal Council is not competent to perform, or persistently makes default in the performance of any duty imposed on it or persistently refuses or neglects to

comply with any provision of law, the Minister may by Order published in the Gazette, direct that the Council shall be dissolved and superseded. By a subsequent Order the President may appoint a Special Commissioner to perform the powers and functions of the Council so dissolved. Similarly under the Urban Councils and Town Councils Ordinances, if the Minister is satisfied that there is sufficient proof of (a) persistent refusal to hold or attend meetings or to vote or to transact business at any meetings that may be held; or (b) wilful neglect, or misconduct in the performance, of the duties imposed by the Ordinance; or (c) persistent disobedience to or disregard of the directions, instructions or recommendations of the Minister or of the Commissioner of Local Government; or (d) incompetence and mismanagement or (e) abuse of the powers conferred by the Ordinance on the part of the Chairman, Council or any of its members, the Minister may by Order published in the Gazette (i) remove the Chairman from office; or (ii) remove all or any of the members of the Council from office; or (iii) dissolve the Council. Where the Minister dissolves a Council he may appoint a Special Commissioner to administer the affairs of the town. Under the Village Councils Ordinance the Minister may, for similar acts of incompetence, mismanagement or misconduct on the part of the Chairman or Village Committee (i) remove the Chairman from office or (ii) dissolve the Village Committee and either direct that a general election be held for the purpose of electing a fresh Committee or direct any public officer to administer the affairs of that village area for a specified period.

(d) **Inspection and Inquiry.** Under the Municipal Councils Ordinance the Minister is empowered to require a Council to furnish him with any extract from any proceedings of the Council or of any of its committees. He may also call for any statistics connected with the working, income and expenditure of the Council. If it appears to the Minister that any Municipal Council is omitting to fulfil a duty or to carry out any work imposed upon it by any written law he may give notice to the Council that unless, within fifteen days, the Council shows cause to the contrary, he will appoint a special officer to inquire into and report to him the facts of the case and to recommend the steps necessary for the purpose of fulfilling the duty or carrying out the work. The Minister may then make an order requiring the Council within a specified time to fulfil the duty or carry out the work as determined by him. The Urban Councils and Town Councils Ordinances similarly empower the Minister to cause

to be made all necessary inquiries in relation to matters concerning public health or any matters with respect to which his approval is required under the Ordinances. There is also a power given to the Minister under the Urban Councils, Town Councils and Village Councils Ordinances, similar to that under the Municipal Councils Ordinance, to make inquiry as to default in duty by Urban, Town and Village Councils and to give and enforce an order requiring a Council to do necessary work. The Minister or the Commissioner of Local Government has power to (a) inspect any public building, immovable property or institution of a Council or any work in progress under its direction, (b) inspect any book or document of a Council, (c) require a Council to furnish statements, accounts, reports or copies of documents relating to the proceedings or duties of the Council or any of its committees.

(e) **Determination of Disputes.** If any question arises between any local authorities with reference to their rights or obligations, such a dispute may, with the consent of the parties or on the application of any party, be referred by the Minister to the Commissioner. The order of the Commissioner with reference to the dispute is deemed to be a final settlement of all matters in issue. An appeal lies to the Minister by a person who is aggrieved by the disallowance or surcharge by an audit of any item of the accounts of any local authority.

(f) **Policy.** Under the Urban Councils and Town Councils Ordinances the Minister or the Commissioner of Local Government may (i) bring to the notice of any Urban or Town Council any measure which in the opinion of the Minister or the Commissioner ought to be taken within the town in the interests of public health or safety; or (ii) bring to the notice of any Council any general question of administrative policy as to which it is desirable that the Council should co-ordinate its policy with the policy generally in force in Sri Lanka.

(g) **Control over Powers.** In the case of Village Committees, their powers are subject to the limitation that any resolution or decision arrived at in their exercise cannot be given effect to until such resolution or decision is approved by the Minister with the concurrence of the Minister of Finance in certain specified cases and by the Assistant Commissioner of Local Government subject to an appeal to the Minister in other specified cases.

5. LOCAL GOVERNMENT ELECTIONS

All elections to local authorities are governed by the Local Authorities Elections Ordinance. No person is qualified to vote at any local government election unless his name is entered in any National State Assembly register of electors for the time being in operation.[20] In the case of any election to a Village Council, no person is qualified to vote if he at the time (i) is a labourer or kangany in charge of labourers employed on any plantation and in occupation of any building on the plantation provided by the employer for the accommodation of any such labourer or kangany, or is the spouse or a child or a dependant or any such labourer or kangany and is living with him in any such building on any such plantation or (ii) is an inhabitant of an urban area within the administrative limits of an Urban Council or Town Council. Subject to these disqualifications a person whose name is entered in any National State Assembly register and who was on the first day of June in the year of the commencement of its preparation or revision "ordinarily resident"[21] in any ward is entitled to have his name entered in the electoral register of that ward.

Disqualifications. A person is disqualified to be elected or to sit or vote as a member for any ward of an electoral area of any local authority if he

(a) on the date of the commencement of the preparation or revision of the National State Assembly register for the time being in operation for the electoral district in which that electoral area is situated was not qualified to have his name entered in that register; or

(b) on the aforesaid date was not resident in that ward or any other ward of the same electoral area; or

(c) is not a citizen of Sri Lanka; or

(d) is less than eighteen years of age; or

20. The crucial date for determining qualification for membership can be fixed only with reference to the register which is in operation as defined by law and not with reference to the date of the commencement of its revision, if such revision has not been completed: *Herath Banda* v *Dissanayake* (1961) 64 N.L.R. 303.

21. This expression connotes residence in a place with some degree of continuity and apart from accidental or temporary absence: *Sundara Banda* v *Pathirana* (1970) 73 N.L.R. 100.

(e) is (i) a judge or State officer administering justice within the meaning of section 124 of the Constitution. The terms do not include (1) a Justice of the Peace (2) a Justice of the Peace and Unofficial Magistrate (3) a Commissioner for Oaths and (4) an inquirer appointed under section 120 of the Criminal Procedure Code; or (ii) a member of the "Armed Forces", which term has been defined to mean the Sri Lanka Army, the Sri Lanka Navy and the Sri Lanka Air Force; or (iii) a police officer, which expression has been defined to mean a member of the police force established under the Police Ordinance; or (iv) a peace officer exercising police functions under the Criminal Procedure Code; or (v) a public officer in any Government Department holding any office the initial of the salary scale of which is not less than Rs. 6,720 per annum; or (vi) an officer in any Government Corporation holding any office the intial of the salary scale of which is not less than Rs. 7,200 per annum. 'Government Corporation' here means a Corporation the capital of which is wholly or partly subscribed by the Government; or

(f) is a member of any other local authority;[22] or

(g) is an officer or servant of such authority in actual employment by, and in receipt of a salary from, such authority, or is a person whose employment by such authority was terminated within a period of one year before the date of the election of members to such authority; or

(h) directly or indirectly, himself or by any other person whatsoever in trust for him or for his use or benefit or on his account, holds or enjoys, in the whole or in part, any contract or agreement or commission made or entered into with or accepted from any person for or on account of such authority. These provisions do not extend to any pension or gratuity granted by such authority in respect of past service, nor to any contract, agreement or commission entered into or accepted in its corporate capacity by any incorporated trading company in which such person may be a member or a shareholder or

(i) is, under any law in force in Sri Lanka, found or declared to be of unsound mind; or

22. The election of such a person as a member of a local authority is liable to be declared null and void by a writ of quo warranto: *Anthonipillai* v *Rajasooriar* (1970) 74 N.L.R. 172.

(j) is an uncertified or undischarged bankrupt or insolvent; or

(k) is serving a sentence of imprisonment for an offence punishable with imprisonment for a term exceeding twelve months or is under sentence of death or is serving a sentence of imprisonment awarded in lieu of execution of a sentence of death; or

(l) is a member of the Local Government Service constituted by the Local Government Service Act, No. 18 of 1969: this provision does not, however, extend to a person who holds a post the initial of the salary scale of which is less than Rs. 6,720 per annum, if he seeks election to a local authority under which he is not employed at the time of the election in question, or under which he was not employed during a period of one year immediately preceding such election; or

(m) is disqualified from being elected, or from sitting or voting as a member of any local authority by reason of the operation of section 9 (2) or section 83 of this Ordinance; or

(n) is disqualified by section 5 of the Public Bodies (Prevention of Corruption) Ordinance, from being elected, or from sitting or voting, as a member of a public body as defined in that Ordinance, by reason of a conviction, or of a finding of a commission of inquiry, referred to in that section; or

(o) is serving, or has during the period of five years immediately preceding completed the serving of, the whole or part of a sentence of imprisonment of either description for a term of three months or any longer term on conviction of any crime within the meaning of the Prevention of Crimes Ordinance; or

(p) is disqualified by conviction or finding of guilt under section 29 of the Bribery Act.

Nominations. Any person who is qualified for election as a member of a local authority may be nominated as a candidate for election for any ward of the electoral area of such authority by means of not more than two nomination papers. Objection may be lodged against a nomination paper of a candidate on all or any of the following grounds: (a) that the description of the candidate is insufficient to identify the candidate;

(b) that the nomination paper does not comply with or was not delivered in accordance with the provisions of the Ordinance; (c) that it is apparent from the contents of the nomination paper that the candidate is not qualified to be elected; (d) that the provisions of section 29 of the Ordinance relating to deposits have not been duly observed. This section provides that each candidate must, between the publication of the notice of nomination under section 26 and 1 p.m. on the day immediately preceding the nomination day appointed for that ward, make a deposit with the returning officer.[23] The deposit required is (i) where the electoral area is a Municipality, a sum of two hundred and fifty rupees, (ii) where such area is a town, a sum of one hundred rupees, (iii) where such area is a village area, a sum of ten rupees.

It is provided in the Ordinance (s. 32 (2)) that "no objection to a nomination paper of a candidate shall be entertained by the returning officer unless it is lodged during the hour of nomination and the half hour immediately succeeding the hour of nomination". The language of the sub-section is mandatory, not directory, and therefore no objection can be entertained after the time fixed by the sub-section.[24] If after the decision of all objections, more than one candidate stands nominated for a ward, a notice of the date on which a poll will be taken must be published. The votes at every election must be given by ballot. After the closure of the poll at the time fixed for it, the count takes place and the result is declared.

Offences relating to Elections. The validity of the qualification for holding office as a member of a local authority may be tested by the writ of quo warranto.[25] By this method the validity of the election itself is sometimes indirectly determined. Any person who is convicted of any of the following offences, in addition to his becoming liable to any other penalty for the offence, becomes disqualified from being elected or from sitting or voting as a member of any local authority for a period of five years from the date of conviction: (a) contravention of provisions of section 76 of the Ordinance regarding maintenance of secrecy at elections; (b) offences in respect of nomination papers and ballot papers specified

23. A deposit with the Municipal Treasurer in the case of a Municipal election make the nomination bad: *Liversz* v *Kannangara* (1943) 45 N.L.R. 55.
24. *Perera* v *Kannangara* (1943) 45 N.L.R. 29.
25. See *ante*, pp. 354-357.

in section 78; (c) giving or receiving gratification at any election to a local authority; (d) personation;[26] (e) undue influence;[27] (f) commission of certain acts on the date of poll (s. 81A); (g) contravention of provisions of section 81B relating to transport to or from the poll; (i) publication of false reports in newspapers (s. 81D); (j) plural voting (s. 82).

6. ACTIONS AGAINST LOCAL AUTHORITIES

We have already discussed the liability of statutory authorities to pay damages for injury caused to individuals by acts done outside their legal powers.[28] An *ultra vires* contract being void, a local authority would not be liable on such a contract. In the case of delicts committed by its servants, we have seen that the general rule is that such authority is liable in the same way as any other employer.

No action can be instituted against any Municipal Council, Urban Council, or Town Council or any member or any officer of the Council or any person acting under the direction of the Council for anything done or intended to be done under its powers or of any by-law made thereunder, until the expiration of one month next after notice in writing shall have been given to the Council or to the defendant. The notice must state with reasonable certainty the cause of such action, and the name and place of abode of the intended plaintiff and of his proctor or agent, if any, in such action. Every such action must, in a case against a Municipal Council or other defendant, be commenced within three months after the accrual of the cause of action, and in the case of an Urban Council or Town Council or other defendant, be commenced within six months after its accrual. If any person to whom such notice of action is given tenders before such action is brought sufficient amends to the plaintiff, such plaintiff cannot recover in any such action when brought, and the defendant is entitled to be paid his costs by the plaintiff. If no tender of amends is so made the defendant in such action, by leave of the Court before which the action is pending, at any time before issue is joined, may pay into Court such sum of money as he may think fit, and thereupon

26. Where the majority of the successful candidate was small, and the number of cases of personation was larger than the majority and consisted of votes in favour of successful candidate it was held that the election was void on the ground of general personation: *Piyasena* v *de Silva* (1951) 53 N.L.R. 460.
27. General undue influence or general treating is not a ground to challenge the validity of an election: *Perera* v *Madadombe* (1969) 73 N.L.R.26.
28. See *ante*, pp 378 - 380.

such proceedings will be had as in other cases where defendants are allowed to pay money into Court. Nothing done under the direction of the Council by any member or officer of the Council or by any other person, if it is done bona fide for the purpose of carrying out the provisions of any enactment relating to its powers and duties, shall subject such person personally to any action liability, claim or demand.

7. LOCAL GOVERNMENT SERVICE

The Local Government Service Act, No. 18 of 1969, was passed (a) to establish the Local Government Service Commission for the purpose of making appointments of officers and servants of local authorities and for exercising other powers in respect of such officers and servants; (b) for the constitution and regulation of a Local Government Service; (c) to provide for the establishment of a Local Government Service Pension Fund, a Local Government Service Widows' and Orphans' Pension Fund and a Local Government Service Provident Fund; (d) to provide for the repeal of the Local Government Service Ordinance.

The Local Government Service Commission is a body corporate and has perpetual succession and a common seal and may sue and be sued in its name. The Commission consists of a Chairman and four other members all of whom must be appointed by the Minister. Members of the National State Assembly and of local authorities are disqualified for membership of the Commission. The Minister is empowered, without assigning any reason, to remove the Chairman or any other member of the Commission from office.

The Commission has the following powers:

(a) to determine all matters relating to methods of recruitment to, and conditions of employment in, the service, and the principles to be followed in making appointments to the service and in making promotions and transfers from one post in the service to another;

(b) to recruit, appoint, promote, transfer, dismiss, retire, interdict, or otherwise punish, members of the service and generally to maintain discipline in the service;

(c) to conduct examinations for appointments to the service or to appoint boards of examiners for the purpose of conducting such examina-

tions, and to charge fees from candidates presenting themselves for such examinations;

(d) to classify the posts in the service into classes or grades, determine the qualifications necessary for appointment to any such post or to posts in any class or grade, to fix the scale of salaries to be attached to any such post or posts in any class or grade, and to revise or adjust with effect from such date as the Commission may determine any scale so fixed;

(e) to determine the cases in which disciplinary action against members of the service may be taken by local authorities generally or by local authorities of any specified description, or by any particular local authority, and the punishments which such authorities or authority may impose on such members;

(f) to call upon any local authority to keep the prescribed records relating to members of the service;

(g) to call upon any local authority to furnish before a specified date such files, other documents or information as the Commission may require in respect of any member of the service in the employment of that local authority;

(h) upon the failure of any local authority to furnish any files, other documents or information required under paragraph (g), to authorise with the approval of the Minister, any member or officer of the Commission to enter the office of the local authority and to obtain such files, other documents or information, as the case may be, and for the purpose of obtaining such files or other documents or information, to search that office and to remove such files or other documents from that office to the office of the Commission and to keep such files and other documents in the office of the Commission for such period as the Commission may deem necessary, and to inspect and take copies of any books, accounts or other documents kept in the office of the local authority;

(i) to regulate in the prescribed manner a scheme for providing medical facilities to members of the service and their wives and children and for providing financial assistance or relief to members of the service who are in debt;

(j) to authorise any member or members of the Commission or any retired civil list officer or officers to hold an inquiry, in any case involving the exercise of the disciplinary powers of the Commission or in any such case of any specified class or description, for the purpose of making recommendations to the Commission in regard to the exercise of such powers in such case;

(k) to delegate, subject to such terms and conditions as may be determined by the Commission, and subject to the provisions of such regulations as may be made for the purpose, to local authorities of any specified description or to any particular local authority any of the powers (other than the power to appoint or dismiss members of the service), duties or functions conferred or imposed upon or vested in, the Commission by or under this Act;

(l) to make rules under this Act;

(m) to exercise such other powers as may be vested in the Commission by Order made by the Ministry under this section and published in the Gazette.

The Minister may call upon the Commission to furnish such files, other documents or information as the Minister may require in respect of the performance of the duties and the exercise of the powers of the Commission.

PART V

THE ADMINISTRATION OF JUSTICE

CHAPTER 24

THE COURTS OF JUSTICE

INTRODUCTION

For over two thousand years of Sri Lanka's long history the Courts of Law have occupied a unique place in the Island's system of government. One of the dominant characteristics of the ancient Sinhalese kingdom, which existed unbroken until the British occupation of Kandy in 1815, was its hierarchical system of judicature. Under that system the Maha Naduwa or the Great Court not only had original jurisdiction but also acted in an advisory capacity to the King.

Under the Dutch occupation of the maritime provinces of the Island there were three superior Courts of Justice, at Colombo, Jaffna and Galle, with a President at the head of each Court. "In each of these Courts there was an officer called the Fiscal, who in some respects might be considered a Judge; in other respects, as the *Calumniator Publicus*. He was nominated by the Supreme Government of Batavia. In civil cases he deliberated and voted as a Judge; in criminal cases he was considered the public accuser. The functions of this officer were numerous and important, especially in Colombo. Besides his duty as Fiscal in criminal cases, he was obliged to superintend the carrying out of orders of Government, and to him was committed the inspection of the police of the town, of which he was Justice of the Peace".[1]

After the British occupation of the Maritime Provinces of Sri Lanka in 1796, a Proclamation of 14 October 1799 established a Court, called the Supreme Court of Criminal Jurisdiction, for the trial of the offences of "treason, murder or other felony, forgery, perjury, trespass or other crime, misdemeanour or oppression". There was established by the Charter of Justice of 1801 a "Supreme Court of Judicature in the Island

1. *Cleghorn's Minute.*

of Ceylon" and an independent Judiciary. The Supreme Court consisted of the Chief Justice and one other Judge called the Puisne Justice. It is significant that in addition to its ordinary civil and criminal jurisdiction the Court had, from its inception, power to issue mandates in the nature of writs of mandamus, certiorari, procedendo and error directed to certain public authorities with a view to the prevention of an excess or abuse of their legal powers.

A Charter of 1810 introduced the English system of trial by jury. In fact some of the principles of this mode of trial had for a long time previously been observed in the Sinhalese Courts of the Maha Naduwa and the Gamsabhawas or Village Councils.

By the Charter of Justice of 1833, the Crown revoked all earlier Charters and reorganised the judicial system. By Clause 4 of that Charter, the entire administration of justice, both civil and criminal, was vested exclusively in the Courts of law set up under it. The Clause further provided that it should not be competent for the Governor, by any law or ordinance, to establish any Court for the administration of justice save as expressly provided by the Charter. Clause 5 established one Supreme Court, to be called "The Supreme Court of the Island of Ceylon".

Under the terms of the Charter, the Supreme Court was to be a Court of appellate jurisdiction for the correction of all errors in fact or in law committed by the District Courts. It was to exercise an original jurisdiction for the trial of all charges for offences committed throughout the Island; and the civil and criminal sessions of the Court were to be held by one Judge in each of the circuits into which the Island was to be divided. The criminal sessions were to be held before a Judge and a jury of thirteen men. The Charter empowered the Supreme Court to issue, in addition to the writs of the old Supreme Court, writs of habeas corpus, which were intended to secure the release of persons illegally or improperly held in custody.

The Charter of Justice of 1833 in effect separated the judicial power from the legislative and executive powers and vested it in the judicature, that is in the Supreme Court and the other established Courts of the country.[2] Later statutes, particularly the Court Ordinance of 1889,

2. *The Queen* v *Liyanage and others* (1962) 64 N.L.R. 313, at p. 350; *Liyanage and others* v *The Queen* (1965) 68 N.L.R. 265, at p. 281.

continued the jurisdiction and procedure of these established Courts. This Ordinance enacted that "there shall continue to be within Ceylon one Supreme Court called 'The Supreme Court of the Island of Ceylon'." and that it "shall continue to be the only superior court of record."[3] The Courts Ordinance further declared that the Supreme Court "shall have and enjoy all powers, privileges and jurisdictions not specifically mentioned therein which were conferred upon it by the Royal Charter of 1833 or of any subsequent date and which are not inconsistent with the Ordinance or with the Civil Procedure Code."[4] As De Sampayo J. has observed: 'The Charter (of 1833) is the foundation of the judicial system and the parent of the Administration of Justice Ordinance 1868, and of the present Courts Ordinance 1889, which must be read in the light of that Charter'.[5]

THE JUDICIAL POWER

The grant of independence to Ceylon and the enactment of the Constitutions of 1946 and 1947 necessitated changes in the legislative and executive powers. So far as the judicial power under the previous (Soulbury) Constitution was concerned, according to the view which was taken by the Courts in a leading case, since it had previously been vested in the Judicature and had been wielded by the Supreme Court as well as the other established Courts in their daily process under the Courts Ordinance, there was no compelling need to make any specific vesting of it under the Soulbury Constitution.[6] It remained 'where it had lain for more than a century, in the hands of the judicature'.[7] In another case, the Court stated that at the same time the importance of securing the independence of the Judges and of maintaining the dividing line between the Judiciary, the Executive and the Legislature had been appreciated by those who framed that Constitution, which had significantly been divided into separate parts: Part 3 of the Constitution had been headed "The Legislature:" Part5,"The Executive:" and Part 6,"The Judicature."[8]

The Courts took the view that judicial power under the previous Constitution could not be taken away from the established Courts or

3. Legislative Enactments, Chap. 6, ss. 6 and 7.
4. Section 41.
5. *Re Hewavitarana* (1915) 18 N.L.R. 334, at p. 338.
6. *Liyanage and others* v *The Queen* (*ante*), at p. 281.
7. *Ibid.*, at p. 282.
8. *The Bribery Commissioner* v *Ranasinghe* (1964) 66 N.L.R. 73, at pp. 74-75.

eroded in the course of ordinary legislation enabling the Executive to appoint new Tribunals exercising various aspects of that power.[9] Nor could the Legislature itself exercise the judicial power which was vested in the Courts. Where, for example, an Act amounted to a legislative judgment with the aim of inflicting punishment on named individuals and depriving Judges of their normal discretion in that regard, the Act could under the previous Constitution be declared invalid as being tantamount to an unwarranted exercise of judicial power.[10]

Under the present republican Constitution, on the other hand, there is no longer any separation of powers nor the vesting of the judicial power solely in the established Courts, such as was held to have existed under the previous Constitution. As provided in section 5 of the present Constitution, the National State Assembly is the supreme instrument of State power. It exercises the judicial power of the people, however, through Courts and other institutions created by law, except in matters relating to its powers and privileges.

The words 'judicial power' have been said to mean "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."[11] It has also been said that "there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also."[12]

The Constitution provides that, subject to its provisions, the National State Assembly may by law create and establish institutions for the

9. *The Bribery Commissioner* v *Ranasinghe* (*ante*),at p. 76. See also *Aziz* v *Thondaman* (1959) 61 N.L.R. 217, at pp. 222-223.
10. *Liyanage and others* v *The Queen* (*ante*).
11. *United Engineering Workers Union* v *Devanayagam* (1967) 69 N.L.R. 289 (P.C.), at p. 294, citing with approval the definition of Griffiths C.J. in *Huddart, Parker & Co.* v. *Moorhead* (1908) 8 C.L.R. 330, 357.
12. *Labour Relations Board of Saskatchewan* v *John East Iron Works* (1949) A.C. 134 (P.C.), at p. 149

administration of justice and for the adjudication and settlement of industrial and other disputes and institutions vested with the power of making decisions of a judicial or quasi-judicial nature. The Courts established by the Court of Appeal Act, No. 44 of 1971, the Court of Criminal Appeal Ordinance, the Courts Ordinance and the Rural Courts Ordinance and all other Courts and institutions created and established by existing written law for the above purposes continue to function subject to the provisions of the Constitution. Such Courts and institutions are deemed, *mutatis mutandis*, to derive their jurisdiction and powers under the Constitution.[13]

THE COURT OF APPEAL

The Court of Appeal Act, No. 44 of 1971, provided for the establishment, constitution and jurisdiction of the Court of Appeal. This Appellate Court has "exclusive ultimate appellate civil and criminal jurisdiction and such other jurisdiction as may be vested in the Court by the Act or by the National State Assembly." The judgment of the Court is, in all cases, final and conclusive.

Composition. The Court of Appeal consists of a President and of not more than six other Judges, all of whom may sit to hear and determine appeals under the Act. The minimum number of Judges necessary to constitute the Court is three. If the President so directs, the Court may sit in two divisions. No judgment can be delivered by the Appellate Court except with the concurrence of a majority of the Judges present at the hearing of the case. A Judge who does not concur may, however, deliver a dissenting judgment or opinion. The Appellate Court is a superior Court of record and has all the powers of such a Court for the purpose of doing justice in the case before it, including the power to punish for contempt of itself.

The President and other Judges of the Court of Appeal are appointed to their office by the President, on the advice of the Prime Minister. The Judges are appointed for a period of five years. They hold office during good behaviour and are not removable except by the President on an address of the National State Assembly. The salaries of the Judges

13. Section 121 (1) and (2).

are determined by the National State Assembly, are charged on the Consolidated Fund and cannot be diminished during their term of office.

Jurisdiction. The jurisdiction of the Appellate Court has been provided as follows:

An appeal lies to the Appellate Court, at the instance of an aggrieved person:

(a) with the leave of the Court (i) from any judgment of the Court of Criminal Appeal; (ii) from any judgment of the Supreme Court given in the exercise of its appellate jurisdiction in any criminal cause or matter;

(b) from any judgment of the Supreme Court granting or refusing to grant a mandate in the nature of a writ under the powers vested in such Court under section 42[14] or section 45[15] of the Courts Ordinance, being an appeal on a question of law;

(c) from any judgment of the Supreme Court given under the powers vested in such Court under section 47[16] of the Courts Ordinance, being an appeal on a question of law;

(d) with the leave of the Appellate Court, from any judgment of the Supreme Court given in the exercise of its appellate jurisdiction in any civil cause or matter in which is involved, in the opinion of the Appellate Court, a question of general or public importance;

(e) from any judgment of the Supreme Court on any question as to the interpretation of any provision of the Constitution.

The Appellate Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary "for doing complete justice in any cause or matter pending before it." The Court has power to make

14. Section 42 (*inter alia*)empowers the Supreme Court to issue writs of mandamus, quo warranto, certorari, procedendo and prohibition.
15. Section 45 empowers the Supreme Court to issue writs of habeas corpus.
16. Section 47 empowers the Supreme Court to punish in summary manner for contempt.

any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

If at any time it appears to the President of the Republic of Sri Lanka that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Appellate Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion on it.

The President of the Appellate Court may, from time to time, with the concurrence of the Minister of Justice, make rules of Court for regulating generally the practice and procedure of the Appellate Court including (a) rules as to the persons practising before the Appellate Court; (b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Appellate Court are to be entered; (c) rules as to the costs of and incidental to any proceedings in the Appellate Court and as to the fees to be charged in respect of proceedings therein; (d) rules as to the granting of bail; (e) rules as to stay of proceedings and the disposal of productions; (f) rules providing for the summary determination of any appeal or application which appears to the Appellate Court to be frivolous or vexatious or brought for the purpose of delay.

Every rule of Court must be published in the Gazette and comes into operation on the date of such publication or on such later date as may be specified in such rule. All rules of Court made under the Act must, as soon as convenient after their publication in the Gazette, be brought before the National State Assembly for approval. Any such rule which is not so approved shall be deemed to be rescinded as from the date of disapproval, but without prejudice to anything previously done under it.

THE SUPREME COURT [17]

Original Criminal Jurisdiction of the Supreme Court. The Supreme Court has an original criminal jurisdiction over all crimes and offences

17. See the author's article on "The Supreme Court of Ceylon" in the *Journal of the International Commision of Jurists* (1968) Geneva, pp.96-113.

committed throughout Sri Lanka. This jurisdiction is exercised at criminal sessions of the Supreme Court held as prescribed in the Criminal Procedure Code and the Courts Ordinance. Criminal sessions of the Supreme Court are held by one of its Judges or by a Commissioner of Assize appointed by the President of the Republic of Sri Lanka for each of the five circuits for the trial of prosecutions. The Chief Justice first chooses the circuit on which he intends to proceed and the Puisne Justices then make their choice according to the priority of their appointment.

A Judge, before or on holding any criminal sessions of the Supreme Court, issues his mandate directed to all Fiscals and other keepers of prisons within the limits of the circuit for which the sessions are held, to furnish him with certified lists of the persons in their custody charged with offences.

Criminal sessions of the Supreme Court are held before a Judge and jury in the manner prescribed in the Criminal Procedure Code. The Chief Justice may in his discretion direct that an accused committed for trial before the Supreme Court be tried before three Judges at Colombo with a jury. It may be mentioned as a matter of historical interest that it was held under the previous Constitution that the right to trial by jury, although it was embodied in the Charter of 1833, was not an entrenched provision of that Constitution and could be restricted or repealed by that Parliament in the course of ordinary legislation.[18] In the case of sedition and certain other offences against the State, the Minister of Justice may direct that the trial shall be held before the Supreme Court at Bar by three Judges without a jury.[19]

If a prisoner committed for trial before the Supreme Court is not brought to trial at the first criminal session after the date of his commitment at which he might properly be tried, the Court must, if twenty-one days have elapsed between the date of commitment and the first date of the sessions, admit him to bail unless good cause is shown to the contrary or unless the trial is postponed on the application of the prisoner. If he is not brought to trial at the second sessions after his commitment, unless it be by reason of his insanity or sickness or his

18. *The Queen* v *Abeysinghe* (1965) 68 N.L.R. 386, at p. 399.
19. Criminal Procedure Code (Legislative Enactments, Chap. 20), s. 440A.

application for a postponement of the trial, the Judge must, unless good cause is shown to the contrary, order his discharge from imprisonment, provided that six weeks have elapsed since the close of the first sessions and six months have elapsed between the date of commitment and the commencement of the second session. As the Supreme Court has observed, the above provisions of the law contain an important principle safeguarding the liberty of the subject who has a right to be brought to trial with reasonable dispatch.[20]

A Commissioner of Assize holds office for such period and for such criminal session or part of a criminal session of the Supreme Court, as is specified in the commission appointing him. During that period he is invested with all the rights, powers, privileges and immunities of a Judge of the Supreme Court and takes rank and precedence immediately after the Judges of the Supreme Court.[21]

Appellate Jurisdiction of the Supreme Court. The appellate jurisdiction of the Supreme Court is ordinarily exercisable only in Colombo. It extends to the correction of all errors in fact or in law committed by a Judge of the Supreme Court sitting alone on circuit, by any District Court, Court of Requests, Magistrate's Court or by the Court of a Municipal Magistrate. Although the Supreme Court has jurisdiction to review on appeal the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand, this jurisdiction is exercised with caution.[22]

On the hearing of any case in appeal or in revision from any original Court, the Supreme Court may affirm, reverse, correct or modify any judgment, sentence, decree or order or give such directions to the Court below or order a new trial or a further hearing upon such terms as it thinks fit. The Supreme Court, if need be, may receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of first instance touching the matters at issue, as justice may require. In the exercise of its appellate jurisdiction the Court must, in

20. See *Premasiri* v *The Attorney-General* (1967) 70 N.L.R. 193, at p. 199. See also *De Mel* v *The Attorney-General* (1940) 47 N.L.R. 136, at p.137;*Leon Singho* v. *Attorney-General* (1959) 62 N.L.R. 222.
21. *Courts Ordinance* (Chapter 6 of Legislative Enactments), s. 23.
22. *Munasinghe* v *Vidanage* (1966) 69 N.L.R. 97, at p. 103.

regard to substantive rights, apply the law which was in force during the earlier proceedings.[23]

Appeals in civil cases from the decision of a single Judge as provided in section 37 of the Courts Ordinance and appeals from judgments of District Courts in civil and criminal cases must be heard by at least two Judges of the Supreme Court. Appeals from Court of Requests and Magistrates' Courts can be heard by any one Judge of the Court.

In the event of any difference of opinion between two Judges, the decision of the Court is suspended until three Judges are present. The decision of two Judges when unanimous or of the majority of the three Judges in case of any difference of opinion is deemed to be the judgment of the Supreme Court. A Judge of the Supreme Court sitting alone in appeal may also reserve any appeal or question for the decision of more than one Judge of the Court. Any appeal or question so reserved must be decided by a Bench of two or more Judges of the Court constituted in accordance with an order made by the Chief Justice. The latter may also order in writing that any case brought before the Supreme Court by way of appeal, review or revision shall be heard by all the Judges of the Court or by any five or more of the Judges named in the order, including himself.

General Powers of the Supreme Court. With increasing governmental regulation of the economic life of the people and the resulting grant of legislative and judicial powers to administrative authorities, the judicial remedies for the review of administrative action have assumed an added importance. Among the most popular of the remedies for the redress of abuses of administrative powers are the writs issued by the Supreme Court. By this machinery of review the Court, whilst not seeking to interfere with the freedom of the administration to carry on its functions efficiently and in accordance with its policy, reviews the powers conferred on administrative officials and bodies with a view to ensure that they are exercised in accordance with the principles of law and the fundamentals of fair procedure.

The Constitution provides that the powers of the highest Court with original jurisdiction established by law for the administration of

23. *Nawadun Korale Cooperative Stores Union Ltd.* v *Premaratne* (1954) 55 N.L.R. 505, at p. 507; *Guneratne* v *Appuhamy* (1906) 9 N.L.R. 90.

justice shall, except in matters expressly excluded by existing laws or laws enacted by National State Assembly, include the power to issue such mandates in the nature of writs as the Supreme Court is empowered to issue under the existing law. The National State Assembly has the power to enact such laws by a majority of members present and voting. (s. 121(3)) The writs which the Supreme Court is authorised to issue under the Courts Ordinance are those of habeas corpus, mandamus, quo warranto, certiorari, procedendo and prohibition. Disobedience to these writs is treated as contempt of court and is punishable by fine or imprisonment.

Other Powers of the Court. The Supreme Court has power to grant injunctions to prevent any irremediable mischief which might ensue before the party making application for such injunction could prevent it by bringing an injunction in any original Court.[24] In a fit case it may even grant an injunction after only *ex parte* hearing and without prior notice to the opposite party.[25] Apart from these special powers conferred by the Courts Ordinance, the Supreme Court has no inherent power to issue injunctions.[26]

The Court also grants the Roman-Dutch remedy of *restitutio in integrum*, although it is not provided for in the Courts Ordinance, the Civil Procedure Code or other written law, because it has taken deep root and been recognised for a long period in the practice and procedure of the Courts.[27] The object of this remedy under the Roman-Dutch law was to undo what legally had been done and had come into existence and to place the parties (either altogether, or as far as they had suffered loss) in the same condition as they were in at the time when the contract was entered into. Under the Roman-Dutch law the grounds for restitution were fear, violence, fraud, minority, capitis diminutio, absence and justifiable error and such equitable grounds as justified the cancellation of the contract.[28] The restitution was not granted unless the loss or damage suffered (a) was considerable (b) had occurred through negligence and not by accident (c) had been fully proved; while (d) no other remedy

24. For the effect of the Interpretation (Amendment) Act, No. 18 of 1972, see p. 357 (*ante*)
25. *Arnolis Silva* v *Tambiah* (1961) 63 N.L.R. 228.
26. *Mahamadu* v *Ibrahim* (1895) 2 N.L.R. 36.
27. *Abeyesekere* v *Harmanis Appu* (1911) 14 N.L.R. 353.
28. Voet, 4. 1. 26; Van der Linden 1.18.10.

such as appeal and review was available[29]; and (e) the person who had suffered loss was not already protected by mere operation of law.[30] The application for restitution is by way of summary procedure and is governed by the provisions of Chapter XXIV of the Civil Procedure Code.[31]

The Supreme Court may call for and examine the record of any case, whether already tried or pending trial, in any Court for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such Court; it may upon revision of the case so brought before it pass any judgment or make any order which it might have made had the case been brought before it in due course of appeal instead of by way of revision.[32] Although there is a limitation as regards the order the Court may pass, it nevertheless has power to deal in revision even in a matter which cannot be brought up by way of appeal.[33]

The Courts Ordinance also empowers the Supreme Court to admit and enrol as advocates or proctors of the Court persons of good repute and of competent knowledge and ability. This power must be exercised subject to the rules set out in the Ordinance constituting the Council of Legal Education. Any three judges of the Supreme Court sitting together may suspend from practice or remove from office an advocate or proctor who is guilty of any deceit, malpractice or criminal offence.

The Court may also take cognizance of and punish any offence of contempt committed against itself or any other Court which has no jurisdiction to punish for contempt. On conviction the offender may be committed to gaol until he has purged his contempt or for such period as it may seem fit. He may also be sentenced to pay a fine not exceeding five thousand rupees.

The Judges of the Supreme Court or any five of them, of whom the Chief Justice must be one, may frame general rules and orders of Court

29. *Dodwell* v *Rowter* (1899) 3 N.L.R. 325; *Perera* v *Wijewickreme* (1912) 15 N.L.R. 411
30. *Harmanis Appu's* case (*ante*) citing Burge, *Commentaries on Colonial and Foreign Laws*, Vol. IV (2nd ed.)
31. *Sootihamy* v *Charles* (1921) 22 N.L.R. 383.
32. Civil Procedure Code, s. 753.
33. *Perera* v *Agidahamy* (1946) 48 N.L.R. 87.

for regulating any matters relating to the practice and procedure of the Courts and other matters specified in the Courts Ordinance, so long as such rules and orders are not inconsistent with the provisions of the Courts Ordinance or any other enactment.

CRIMINAL JUSTICE COMMISSIONS

Establishment. The Criminal Justice Commissions Act, No. 14 of 1972, enables the appointment of Criminal Justice Commissions and prescribes their powers and procedure. The President of the Republic has power, by warrant under the Public Seal, to establish a Criminal Justice Commission consisting of such number of Judges of the Supreme Court not exceeding five whenever he is of opinion:

(*a*) that, within a specified period, whether generally or in a particular area or district, there have been committed, before or after the date of commencement of the Act (i) offences in connection with, in the course of, or during, any rebellion or insurrection, or (ii) offences in relation to currency or foreign exchange of such a scale and nature as to endanger the national economy or interest, or (iii) widespread offences of destruction, damage or destroying of factories, industrial plant and other installations, whether public or private, and

(*b*) that the practice and procedure of the ordinary Courts are inadequate to administer criminal justice for the purpose of securing the trial and punishment of the persons who committed such offences.

Where a warrant establishing a Commission is issued by the President in consequence of his opinion, such opinion and such warrant are final and conclusive and cannot be called in question in any Court or Tribunal, whether by way of action, application in revisions, appeal, writ or otherwise.

A Criminal Justice Commission is deemed to be a superior Court of record. Subject to the other provisions of the Act, the terms of reference of a Commission are:

(*a*) to inquire into generally the circumstances which led to, and all other matters connected with or incidental to, the commission during such period of offences of the description and character set out in the warrant establishing the Commission;

(*b*) to inquire and determine whether any person or persons and if so what persons were or were not guilty of such offences; and

(*c*) to deal with the persons so found guilty or not guilty in the manner prescribed by the Act.

Appointment of members. In every case where a Commission is established, the Chief Justice is required to appoint by name the Judges of the Supreme Court (of whom he may be one) who shall be members of the Commission. Where the Chief Justice is a member, he is the Chairman of the Commission. Where he is not a member, the Chief Justice must name one of the members to be such Chairman. At any inquiry before a Commission, the determination of any question is according to the opinion of the majority of members.

Powers. A Commission has the following powers:—

(*a*) to procure and receive all such evidence and to examine all such persons as witnesses, as the Commission may think it necessary or desirable to procure or examine;

(*b*) to require the evidence of any witness to be given on oath or affirmation, such oath or affirmation to be that which could be required of the witness if he were giving evidence in a Court of law, and to administer or cause to be administered by an officer authorized in that behalf by the Commission an oath or affirmation to every such witness;

(*c*) to summon any person residing in Sri Lanka to attend any sitting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession;

(*d*) notwithstanding any of the provisions of the Evidence Ordinance or of any other written law, to admit any evidence which might be inadmissible in civil or criminal proceedings;

(*e*) to regulate the admission of the public to the inquiry before the Commission;

(*f*) to regulate the admission of the Press to such inquiry;

(*g*) to exclude the public from the inquiry or any part thereof;

(*h*) to exclude the Press from the inquiry or any part thereof;

(*i*) to require by written order the manager of any bank in Sri Lanka to produce, as specified in the order, any book or document of the bank containing entries relating to the account of any such person specified in the order as the Commission considers necessary, or to furnish, as so specified, certified copies of such entries;

(*j*) to prohibit by written order the manager of any bank in Sri Lanka from permitting or allowing the withdrawal of any funds standing to the credit of any account in that bank of any such person specified in the order as the Commission considers necessary, except any such reasonable withdrawal of such funds as may, from time to time, be approved in writing by the Commission.

(*k*) to require by written order the Commissioner of Inland Revenue or the Controller of Exchange to furnish, as specified in the order, all information available to any such officer relating to the affairs of any such person specified in the order as the Commission considers necessary, and to produce or furnish, as so specified, any document or a certified copy of any document relating to such person which is in the possession or under the control of any such officer;

(*l*) to require by written order the Controller of Immigration or Emigration to impound the passport and other travel documents of any such person as shall be specified in the order, being a

person whose evidence may be necessary at any inquiry before the Commission, until such time as such order is revoked by the Commission by a subsequent written order, if any, issued to such Controller;

(*m*) to require by written order any such police officer as shall be specified in the order whether by name or by office, to take all such steps as may be necessary to prevent the departure from Sri Lanka of any such person as shall be so specified, being a person whose evidence may be necessary at any inquiry before the Commission, until such time as such order is revoked by the Commission by a subsequent written order, if any, issued to such officer;

(*n*) to require by written order any such telecommunication authority or officer (within the meaning of the Telecommunications Ordinance) as shall be specified in the order, whether by name or by office, to produce, as so specified, any book or document containing entries relating to any message (within the meaning of that Ordinance), including any telex message, which is in the possession or under the control of any such authority or officer as the Commissioner considers necessary, or to furnish, as so specified certified copies of such entries.

Procedure. The proceedings at any inquiry before a Commission are free from the formalities and technicalities of the rules of procedure and evidence ordinarily or normally applicable to a Court of law and may be conducted by the Commission in any manner not inconsistent with the principles of natural justice, which to the Commission may seem best adapted to elicit proof concerning the matters that are being investigated.

A person whose conduct is the subject of inquiry in proceedings before a Commission is entitled to be represented by one or more advocates or proctors; and any other person who may consider it desirable that he should be so represented may, by leave of the Commission, be represented in the aforesaid manner. The Attorney-General, the Solicitor-General, a State Counsel or pleader, generally or specially authorized by the Attorney-General, is entitled to appear in proceedings before a Commission and assist the Commission in the conduct of the inquiry. The Attorney-General may, at any time before or after the commence-

ment of any inquiry before a Commission but before the conclusion of such inquiry, with a view to obtaining at such inquiry the evidence of any person, tender a pardon to such person, on the condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to any offences which are the subject of such inquiry. If the person who has accepted such tender has not complied with the condition on which the tender was made, a finding concerning such person for the offence in respect of which the pardon was so tendered may be made by the Commission at such inquiry.

Where in the course, or at the conclusion, of any inquiry before a Commission, it is satisfied, having regard to the proceedings and upon consideration of the matters before it at such inquiry, that any person has not committed any offence which is the subject of such inquiry, the Commission shall make a finding that he is not guilty of such offence and shall acquit him.

Where, at the conclusion of any inquiry before a Commission, it is satisfied beyond reasonable doubt, having regard to the proceedings and upon consideration of the matters before it at such inquiry, that any person has committed any offence which has been the subject of such inquiry, the Commission must make a finding that he is guilty of such offence and sentence him to any punishment, other than death, to which he might have been sentenced if he had been tried and convicted by the Supreme Court. Where the only sentence provided by law for any such offence is death, the Commission has the power and jurisdiction to sentence any person found guilty of any such offence to imprisonment of either description for life. Any finding made or any sentence imposed by a Commission is final and conclusive, and cannot be called in question in any Court or Tribunal, whether by way of action, application for revision, appeal, writ or otherwise.

The Act continues in force only for a period of eight years. However the National State Assembly may, at any time thereafter, by a resolution passed by a simple majority, cause such Act to be brought into force for a period not exceeding five years at a time.

THE COURT OF CRIMINAL APPEAL

Constitution. The Court of Criminal Appeal Ordinance, No. 23 of 1938, established a Court of Criminal Appeal consisting of the Chief

Justice and the other Judges of the Supreme Court. (s. 2 (1)). The Court is summoned in accordance with directions given by the Chief Justice. It is duly constituted if it consists of not less than three Judges and of an unequal number. (s.2 (2)). Where the Court is constituted of a number of Judges which is more than the quorum that is necessary to constitute the Court a Full Court would be constituted, provided the Judges assemble for the purpose of reviewing or reconsidering a previous decision of the Court.[34] The president of the Court is the Chief Justice and in his absence, the senior member of the Court (s. 2 (3)). A Judge before whom the appellant or applicant was tried cannot sit as a Judge of the Court. (s. 2 (4)). The determination of any question before the Court is according to the opinion of the majority of the members sitting. (s. 2 (5)).

Right of Appeal. A person who is convicted on a trial before the Supreme Court under Chapter XX or section 440A of the Criminal Procedure Code or in pursuance of an order made by the Chief Justice under section 29 of the Courts Ordinance may appeal to the Court:

(*a*) against his conviction on any ground which involves a question of law alone.

(*b*) with the leave of the Court or upon the certificate of the Judge who tried him that it is a fit case for appeal against his conviction on any ground which involves a question of fact alone, or a question of mixed law and fact or any other ground which appears to the Court to be sufficient. The grant of a certificate by a trial Judge is not a ground by itself for quashing a conviction where the verdict of the jury is reasonable and there has been no misdirection.[35]

(*c*) with the leave of the Court against the sentence unless it is one fixed by law. (s. 4). A wrong direction as to the law which obtains generally in the class of cases to which the particular case belongs, or as to the law applicable to the special facts of the case, is a misdirection of law. A mistake of fact or an

34. *K. D. J. Perera* v *The King* (1951) 53 N.L.R. 193.
35. *The Queen* v *Appuhamy* (1960) 62 N.L.R. 484.

omission to refer to some point in favour of the accused is not a misdirection of law but falls under "any other ground" within the meaning of section 4 (b).[36] The Court will not interfere with the discretion of the trial Judge with regard to the sentence unless that discretion has been exercised on a wrong principle or unless the sentence is manifestly excessive.[37]

Determination of Appeals. The Court will allow the appeal against conviction if

(*a*) the verdict is unreasonable or cannot be supported having regard to the evidence, or
(*b*) the judgment of the trial Court should be set aside on the ground of a wrong decision of any question of law; or
(*c*) there was a miscarriage of justice on any ground.

In an appeal involving questions of fact, it is not the function of the Court to retry the case but only to say whether the verdict of the jury is unreasonable or whether it cannot be supported having regard to the evidence.[38] The Court will not interfere with the verdict of a jury unless it has a real doubt as to the guilt of the accused or is of opinion that on the whole it is safer that the conviction should not be allowed to stand.[39] The Court will, however, quash the conviction if it is of opinion that the case was not proved with that certainty which is necessary to justify the verdict of the jury.[40] So far as a judicial discretion is concerned it will not be reviewed by the Court unless an injustice to the appellant is disclosed.[41]

The Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. (s. 5 (1)). The proper test to determine whether

36. *The King* v *L. Seeder de Silva* (1940) 41 N.L.R. 337.
37. *The King* v *de Saram* (1941) 42 N.L.R. 528; *The King* v *W. F. Fernando* (1946) 47 N.L.R. 261; *The King* v *Edwin* (1946) 47 N.L.R. 575; *Weerasinghe* v *The Queen* (1956) 58 N.L.R. 177.
38. *The King* v *Andris Silva* (1940) 41 N.L.R. 433; *The King* v *Buckley* (1942) 43 N.L.R. 474; *The King* v *Velupillai* (1945) 46 N.L.R. 424.
39. *The King* v *Musthapa Lebbe* (1943) 44 N.L.R. 505.
40. *The King* v *Fonseka* (1946) 47 N.L.R. 424.
41. *The King* v *Beyal Singho* (1946) 48 N.L.R. 25.

there has been a substantial miscarriage of justice within the meaning of the proviso is whether a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt convict.[42] The onus of satisfying the Court that no substantial miscarriage of justice has actually occurred in a case in which the point raised in appeal is decided in favour of the appellant is upon the State.[43] If there is any evidence upon which a reasonable jury could have found a verdict of guilty it is not the function of the Court, in the absence of any misdirection by the trial judge, to enquire whether, in its own opinion, the offence is established beyond reasonable doubt.[44] Where there is a misdirection on such a fundamental point as the burden of proof[45] or where a confession has been improperly admitted[46] the Court will not dismiss the appeal acting under the priviso. The Court may order a new trial if they are of opinion that there was evidence at the trial upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed. (s. 5 (2)).

On an appeal against sentence the Court must, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict in substitution for it. (s. 5 (3)). Although the appellant cannot as of right rely on a ground not stated in the notice of appeal, the Court may in an exceptional case permit such a ground to be argued where it is in the interests of justice to do so.[47]

If it appears to the Court that an appellant, though not properly convicted on some charge or part of the indictment has been properly convicted on some other charge or part of the indictment, the Court may either affirm the sentence or pass such sentence in substitution for it as it thinks proper and as may be warranted in law by the verdict on the charge or part on which the appellant has been properly convicted. (s. 6 (1)). Where an accused has been convicted on several counts but the

42. *The King* v *Dharmasena* (1950) 51 N.L.R., 481; *The King* v *Karthigesu* (1946) 47 N.L.R. 234; *The King* v *Wijedasa Perera* (1950) 52 N.L.R. 29. *Pauline de Croos* v *The Queen* (1968) 71 N.L.R. 169.
43. *The Queen* v *Ramasamy* (1962) 64 N.L.R. 433.
44. *Ebert Silva* v *The King* (1951) 52 N.L.R. 505.
45. *Dionis* v *The King* (1951) 52 N.L.R. 547.
46. *Seyadu* v *The King* (1951) 53 N.L.R. 251.
47. *The Queen* v *Hemapala* (1961) 64 N.L.R. 1; *The Queen* v *Gunawardene* (1955) 57 N.L.R. 126.

trial Judge has passed sentence in respect of one or more counts and omitted to pass sentence in respect of the remaining counts, the Court of Criminal Appeal is entitled to pass the appropriate sentences on the latter counts if it acquits the appellant on the counts in respect of which sentence was passed and considers that the appellant has been properly convicted on the remaining counts.[48]

DISTRICT COURTS

Jurisdiction. District Courts were established by the Charter of Justice, 1833, and proceedings were held before a Judge and three assessors. The Judges were appointed by Letters Patent and held office during His Majesty's pleasure. The District Courts had unlimited civil jurisdiction, and criminal jurisdiction to hear and determine prosecutions for all crimes and offences except those punishable with death, transportation, banishment, imprisonment for more than twelve months, whipping exceeding one hundred lashes or fine exceeding £10 (ss. 24 & 25 of the Charter).

The Courts Ordinance provides that all District Courts are Courts of record and have original jurisdiction in all civil, criminal, revenue, matrimonial, insolvency and testamentary matters, except such matters as are assigned by any law by way of original jurisdiction to the Supreme Court. District Courts also have jurisdiction over the persons and estates of persons of unsound mind, minors and wards, over the estates of cestuis que trust and over guardians and trustees and in any other matter in which jurisdiction is given to them by law.

District Courts have full power and authority to hear and determine all pleas, suits and actions in which a party defendant is resident within the district in which the suit or action is brought or in which the cause of action has arisen within the district or where the land in respect of which the action is brought lies wholly or partly within the district.

With regard to their testamentary jurisdiction, District Courts have full power and authority (1) to appoint administrators of the estates and effects of any persons dying within its district, either intestate, or who may not by any last will or testament have appointed any executor or trustee for the administration of such estates or effects whether these

48. *The Queen* v *Edirimanasingham* (1961) 62 N.L.R. 452.

are within the district or any other district; (2) to inquire into and determine upon the validity of any alleged last will and testament of any person who has died within the district and to grant probate of it; (3) to appoint administrators for the administration or execution of the trusts of any such last will or testament in cases where the executors or trustees do not appear and take out probate or having appeared and taken out probate have resigned their office or have by death or otherwise become incapable of carrying any such trusts fully into execution; and (4) to take proper securities from all executors and administrators or from the attorneys of executors for the faithful performance of trusts and for the proper accounting for what has come to their hands or being expended by them.

When a person dies outside Sri Lanka leaving property here the Supreme Court may appoint such District Court as appears to it most expedient to exercise sole testamentary jurisdiction in respect of the property of such person. Where any District Court has issued probate or letters of administration and the deceased has left property within the jurisdiction of any other Court or where any application for probate or letters of administration have been made to any Court, the Supreme Court may, on application showing good grounds, transfer any cause or matter in regard to such probate or administration so pending in any Court to such other Court.

District Courts have the care and custody of the persons and property of idiots and persons of unsound mind and others or insane and non-sane mind, of minors and wards, resident within their districts. These Courts have full power to appoint guardians and curators of all such persons and their estates, to make order for the maintenance of such persons and the proper management of their estates, to take proper securities for such management and to call them to account. Where a minor or person of unsound mind is not resident in Sri Lanka the Supreme Court may direct and appoint a District Court which appears to be most expedient to exercise jurisdiction in respect of the appointment of a fit and proper person to take charge of the property in this country of such minor or person of unsound mind.

The District Judge may in his discretion, at his own instance or upon the application of any party in any cause or proceeding in the District Court, have three assessors associated with him at the hearing and deci-

sion of such cause or other proceeding. In case of any difference of opinion between the Judge and assessors, the decision of the Judge prevails.

District Courts have power to hear, try and determine in the manner provided in the Criminal Procedure Code, all prosecutions and charges against any person in respect of any crime or offence committed wholly or in part within the district, and which crime or offence is by any law made cognizable by the District Court.

In any action instituted in any District Court (or Court of Requests):

(*a*) where it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act or nuisance the commission or continuance of which would produce injury to the plaintiff; or

(*b*) where it appears that the defendant during the pendency of the action is doing or committing, or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or commit.ed, an act of nuisance in violation of the plaintiff's rights respecting the subject-matter of the action and tending to render the judgment ineffectual; or

(*c*) where it appears that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff,

it is lawful for the Court, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, to grant an injunction restraining any such defendant from:

(1) committing or continuing any such act or nuisance;

(2) doing or committing or procuring or suffering to be done or committed any such act or nuisance;

(3) removing or disposing of such property.

COURTS OF REQUESTS

Jurisdiction. Courts of Requests were first established by Ordinance No. 10 of 1843. Under section 5 of the Ordinance these Courts were empowered to "hear and determine in a summary way, and according to equity and good conscience" all actions for the recovery of debts, demands, damages or matters not exceeding £5 in value, unless the matter in question related to the title of any land, or to anything whereby rights in future might be bound.

The Courts Ordinance provides that every Court of Requests is a Court of record. It has power and original jurisdiction to hear and determine (1) all actions in which the debt, damage or demand does not exceed seven hundred and fifty rupees, and in which the defendant is resident within the jurisdiction of the Court, or the cause of action arises within such jurisdic ion; (2) all hypothecary actions in which the amount claimed does not exceed seven hundred and fifty rupees and the land hypothecated or any part of it is situated within the jurisdiction of the Court; (3) all actions in which the title to, interest in, or right to the possession of any land is in dispute and all actions for the partition or sale of land provided the value of the land or the particular share, right or interest in dispute or to be partitioned or sold does not exceed three hundred rupees and the same or any part of it is within its jurisdiction.

A Court of Requests has no jurisdiciton to entertain any action for criminal conversation, or for seduction or for breach of promise of marriage, or for separation a mensa et thoro, or for divorce a vinculo matrimonii or for declaration of nullity of marriage.

A Court of Requests has jurisdiction in respect of all claims for any sums due to any person for wages, or for piecework, or for work as a servant artificer, or labourer, whatever is the amount claimed, provided the Court has in other respects jurisdiction in that behalf. Any such claim may be prosecuted by a minor as if he were of full age.

MAGISTRATES' COURTS

Magistrates' Courts were first established by Ordinance No. 11 of 1843. The Courts Ordinance, 1889, now provides that a Magistrate's Court has all powers and authorities which are conferred by the

provisions of the Penal Code or of the Criminal Procedure Code or of any other enactment. The Criminal Procedure Code (s. 9) confers on every Magistrate's Court power to hear, try, determine and dispose of in a summary way all suits and prosecutions for offences committed wholly or in part within its local jurisdiction and which by law are made cognisable by a Magistrate's Court. The First Schedule of the Criminal Procedure Code specifies the offences under the Penal Code which are triable by a Magistrate's Court.

A Magistrate's Court may pass any of the following sentences: (a)imprisonment of either description for a term not exceeding six months; (b) fine not exceeding one hundred rupees (c) whipping, if the offender is under sixteen years of age;(d) any lawful sentence combining any two of the sentences aforesaid. In addition, special powers of punishment granted by the provisions of any enactment may be exercised by Magistrate's Courts. (s. 15).

Magistrates' Courts have jurisdiction to issue warrants to search or cause to be searched all places wherein any stolen goods or any goods, with which or in respect of which any offence has been committed, are alleged to be kept or concealed, and to require persons to furnish security for the peace or for their good behaviour according to law. A Magistrate has also jurisdiction, under and subject to the provisions of the Criminal Procedure Code, to inquire into all cases in which any person dies in any prison or mental or leprosy hospital or comes to his death by violence or accident, or when death occurs suddenly, or where the body of any person is found dead without its being known how such person came by his death. (s. 9).

RURAL COURTS

In 1871 the Village Communities Ordinance established Village Tribunals. This Ordinance and the subsequent amending Ordinances were repealed by Ordinance No. 24 of 1889. The Village Communities Ordinance, No. 9 of 1924, consolidated the law relating to Village Communities. The Ordinance provided for the constitution of Village Tribunals and the jurisdiction and procedure of Village Tribunals and Village Committees. In 1945 the Rural Courts Ordinance provided for the establishment of Rural Courts, declared existing Village Tribunals to be Rural Courts and defined their jurisdiction and powers.

Constitution Part 1 of the Rural Courts Ordinance deals with the constitution of Rural Courts. The Minister of Justice may by Order published in the Gazette establish a Rural Court for any revenue division or for any part of it or for any combination of the whole or of parts of two or more revenue divisions specified in the Order. (s. 2 (1)).

Jurisdiction. Rural Courts have both civil and criminal jurisdiction. The Minister of Justice may, however, restrict any Rural Court either solely to criminal jurisdiction or solely to civil jurisdiction or impose such limits on the criminal or civil jurisdiction of any Rural Court as he may think fit. (s. 8).

The civil jurisdiction of a Rural Court extends to

(*a*) all actions in which the debt, damage or demand does not exceed one hundred rupees, and in which either the party defendant is resident within the local jurisdiction of the Rural Court, or the cause of action arises wholly or in part within the local jurisdiction; and

(*b*) all actions in which title to, interest in, or right to the possession of, any land or immovable property is in dispute, but only if the value of such land or immovable property, or of the particular share, right or interest in dispute in such action, does not exceed one hundred rupees, and the land or any part of it is situated within the local jurisdiction of the Rural Court.

No Rural Court, however, can permit the institution of, or have or exercise jurisdiction in, any action or proceedings of any class or description included for the time being in the First Schedule to the Ordinance, irrespective of the amount of the demand or the damage claimed or of the value of the subject-matter. Among the actions excluded from the jurisdiction of Rural Courts are those for the partition of immovable property; mortgage actions; actions for the specific performance or rescission of contracts, for the rectification or cancellation of instruments, or for obtaining injunctions; actions relating to trusts or partnership; actions for damages for wrongful arrest, restraint or for malicious prosecution; actions for seduction or for breach of promise of marraige; actions for divorce and maintenance actions. (s. 9 (1)).

The Minister of Justice may by Order published in the Gazette enlarge the civil jurisdiction of any Rural Court by directing that the pecuniary limit of its civil jurisdiction be increased from one hundred rupees to such higher amount as may be prescribed in the Order. The jurisdiction cannot be so enlarged unless the National State Assembly has by resolution made a declaration to that effect. (s. 9).

The criminal jurisdiction of a Rural Court extends to the trial of the following offences committed within its local jurisdiction;

(*a*) all breaches of by-laws made or deemed to be made under the Village Communities Ordinance,

(*b*) offences included in the Second Schedule to the Ordinance subject to any limitations, restrictions or conditions set out in that Schedule,

(*c*) all offences in respect of which jurisdiction is expressly conferred on a Rural Court by this or any other enactment. (s. 10).

The jurisdiction conferred by the Ordinance on Rural Courts is exclusive and cases within that jurisdiction cannot be entertained, tried or determined by any Court established under the Courts Ordinance[49]. (s.11)

Procedure. No advocate, proctor, agent or other person is entitled to appear on behalf of any party in any case before a Rural Court. The prohibition does not apply to the appearances of (a) a husband on behalf of his wife, (b) a guardian or curator on behalf of the person for whom he acts, (c) an agent resident within the jurisdiction on behalf of a principal who is not so resident, or (d) any person (not being an advocate or proctor)expressly authorised thereto by the President of the Rural Court, on behalf of a minor who is not represented by any person legally entitled to represent him or on behalf of any other party in the special circumsances of any case (s. 21).

In every civil action and in every prosecution instituted in a Rural Court for any offence, other than an offence which under the Criminal

49. See *William Singho* v *Edwin Singho* (1957) 59 N.L.R. 18; *Bempy* v *Peter* (1966) 71 N.L.R. 95.

Procedure Code is not compoundable or is compoundable only with the sanction of the Attorney-General, it is the duty of the Rural Court to endeavour to bring the parties to an amicable settlement and to remove, with their consent, the real cause of grievance between them. For this purpose the Rural Court has power, on the application of the parties, to refer the matter in issue to arbitration, and to give judgment in accordance with the finding of the arbitrator. Such judgment is final and not subject to appeal. (s. 23).

A Rural Court, in the exercise of its criminal jurisdiction, may sentence any person convicted of an offence by the Rural Court:

(*a*) to imprisonment of either description for a period not exceeding fourteen days or to a fine not exceeding fifty rupees; and

(*b*) in the case of a continuing offence, to a further fine not exceeding ten rupees for each day such offence is continued after notice is given to the offender that such offence is being committed by him or after he is once convicted of such offence.

A Rural Court cannot sentence any person to imprisonment for a term which is less than seven days.

Appeal. A person aggrieved by any final order or sentence of a Rural Court may within fourteen days of the date of the order or sentence appeal by written petition to the District Judge having appellate jurisdiction over the Rural Court. On such appeal the District Judge may:

(*a*) affirm, reverse, or vary the order or sentence appealed from,
(*b*) direct further inquiry, or the taking of further evidence,
(*c*) order a new trial of the matter in issue,
(*d*) grant such further or other relief as the circumstances may require.

The District Judge has no power, however, to enhance any sentence or to reverse or in any way interfere with any order of acquittal made by a Rural Court. No appeal lies to the Supreme Court or to any other authority from the decision of a District Judge on any appeal. But on a question of law arising out of any appeal, the District Judge may, if he thinks fit, state a case for the opinion of the Supreme Court after giving

notice thereof to the parties. The District Judge may, at any time, of his own motion call for and examine the record of any pending or decided case for the purpose of satisfying himself as to the propriety of the proceedings or of any order, decision or sentence of a Rural Court and issue any directions which may appear necessary or make any order which the District Judge might have made if the case had come before him in due course of appeal.

JUSTICES OF THE PEACE

The President and the officers enumerated in the Third Schedule of the Courts Ordinance are *ex-officio* Justices of the Peace for Sri Lanka or for portions of Sri Lanka respectively as shown by the statements in the Schedule severally set opposite to their respective denominations. The President may from time to time by notice in the Gazette appoint such persons as are named in the notice to act as Justices of the Peace for Sri Lanka or within such districts or portions of Sri Lanka. Every Justice of the Peace must take and subscribe the oath of allegiance and office in the form prescribed by the Promissory Oaths Ordinance before a District Judge, Commissioner of Requests or Magistrate. The Judge, Commissioner or Magistrate before whom such oaths are taken must enter in the records of his Court that the oaths were duly administered and forthwith transmit a copy of such entry to the Registrar of the Supreme Court to be entered in the records of that Court. The President may at any time remove a Justice of the Peace from office. (s. 82).

The President may by notice in the Gazette appoint any Justice of the Peace to be an Unofficial Magistrate for any district. Any Justice of the Peace so appointed has all the powers and authority vested in Magistrates' Courts by the Criminal Procedure Code except the power and authority to take proceedings with regard to, or hear, try, or determine, any offence which is summarily triable before a Magistrate's Court. (s. 83).

The President may delegate to the Minister of Justice

(i) those of the powers vested in him by section 82 of the Courts Ordinance which relate (a) to the making of utility appointments as Justices of the Peace for any district or districts; and (b) to the removal from office of any person holding any such utility appointment as Justice of the Peace; and

(ii) those of the powers vested in him by section 83 which relate to the appointment as an Unofficial Magistrate of any person holding a utility appointment as a Justice of the Peace. A "utility appointment" means an appointment which is of utility to the public or necessary for the administration of justice or for any purpose incidental to such administration or connected with it. (s. 83B).

QUAZIS

Tenure. The Muslim Marriage and Divorce Act which has made provision with respect to the marriages and divorces of Muslims in Sri Lanka has also conferred certain powers and functions of a judicial nature on Quazis and Boards of Quazis. The Constitution provides that the appointment, dismissal and disciplinary control of Quazis exercising jurisdiction under the Muslim Marriages and Divorce Act or under the laws for the time being relating to Muslim marriage and divorce shall be governed by sections 125 to 131 relating to Judges and other State Officers administering justice. (s. 124 (2)).

Powers. The powers of Quazis under section 47 of the Muslim Marriage and Divorce Act include the power to inquire into and adjudicate upon (a) any claim by a wife for the recovery of *mahr;*[50] (b) any claim for maintenance by or on behalf of a wife; (c) any claim for maintenance by or on behalf of a legitimate child; and any claim for maintenance by or on behalf of an illegitimate child where the mother of such child and the person from whom maintenance is claimed are Muslims; (d) any claim by a divorced wife for maintenance until the registration of the divorce or during her period of *iddat,*[51] or, if such woman is pregnant at the time of the registration of the divorce, until she is delivered of the child; (e) any claim for the increase or reduction of any maintenance ordered under this section or under section 21 of the Muslim Marriage and Divorce Registration Ordinance, 1929 (repealed by Act. No. 13 of 1951); (f)any claim for *kaikuli;*[52](g)any claim by a wife or a divorced wife

50. *Mahr* or dower is a sum of money or other property to which the wife becomes entitled by marriage (see Mulla, *Principles of Mohamedan Law* (16th ed.), p. 270
51. When a marriage is dissolved by death or divorce, the woman is prohibited from marrying within a specified time. This period is called *Idda(t)* (Fyzee, *Outlines of Mohamedan Law* (2nd ed), p. 89
52. *Kaikuli* is a marriage gift which is made to a bride by her parents. It is handed to and remains in the charge of the husband during the subsistence of the marriage and may be claimed from him by the wife or her heirs.

for her lying-in expenses; (h) any application for mediation by the Quazi between a husband and wife; (i) any application for a declaration of nullity of marriage either by a husband or by a wife; (j) any application for authority to register the marriage of a girl who has not passed the age of twelve years.

A Quazi may also inquire into and deal with any complaint by or on behalf of a woman against a *wali*[53] who unreasonably withholds his consent to the marriage of such woman, and may if necessary make order authorising the marraige and dispensing with the necessity for the presence or consent of a *wali*. Where a woman has no *wali*, a Quazi may, after such inquiry as he may consider necessary, make order authorising the marriage and dispensing with the necessity for the presence or the consent of a *wali*. Where an order is so made, a permit authorising the registration of the marriage must be issued by the Quazi.

Appeals. Any party aggrieved by any final order made by a Quazi under the rules in the Third Schedule or in any inquiry under section 47 of the Act. has a right of appeal to the Board of Quazis. There is, however, no appeal from an order absolute made in accordance with the rules in the Fourth Schedule in any inquiry under the section. All appeals under this section must be heard and disposed of in accordance with the rules under the Fifth Schedule. (s. 60). Any party aggrieved by any order of the Board of Quazis on any appeal may, with the leave of the Supreme Court, appeal to that Court from such order. (s. 62 (1)).

53. A marriage guardian see Fyzee, *op. cit.*, p. 170.

CHAPTER 25

THE CONSTITUTIONAL POSITION OF THE JUDGES

The republican Constitution does not provide for a strict separation of powers or the vesting of the judicial power exclusively in the Courts. But it does provide that the National State Assembly exercises the judicial power through Courts and other institutions created by law, except in the case of matters relating to its own powers and privileges. (s. (5. c))

It is difficult to make a clear and rigid distinction between the judicial functions of the ordinary Courts of law and those of the numerous Administrative Tribunals which have been set up by various statutes to decide disputes between citizens or between citizens and the Administration. Moreover, the Courts, like the Administrative Tribunals, derive their powers and functions from ordinary law and not directly from the Constitution. The Constitutional Court is ofcourse in a special category. Its powers and functions are derived directly from the Constitution itself.

The Appointment of Judges. The Judges of the Court of Appeal, of the Supreme Court or of the Courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding or substantially similar to the powers and functions exercised and performed by such Courts are appointed by the President. (s. 122 (1)). Similarly, Commissioners of Assize or such persons as the National State Assembly may provide for by law to exercise and perform powers and functions corresponding or substantially similar to the powers and functions exercised and performed by such Commissioners are also appointed by the President. (s. 123). In the exercise of his above powers of appointment, the President must, as required under section 27 of the Constitution, act on the advice of the Prime Minister or of such Minister as has been authorised by the Prime Minister to advise the President with regard to these functions. Appointments to the Supreme Court are made from other ranks of the Judiciary as well as from the Bar.

The appointment of (a) Judges of other Courts established under the Courts Ordinance, Presidents of Rural Courts and Judges of Courts which may be created by the National State Assembly under section 121, (b) State officers constituting Labour Tribunals and (c) all State officers the principal duty or duties of whose office is the performance of functions of a judicial nature, are made by the Cabinet of Ministers after receiving the recommendation of the Judicial Services Advisory Board. Whenever the occasion arises for making any of the above appointments the Judicial Services Advisory Board must forward to the Cabinet of Ministers a list of persons recommended for appointment together with the list of applicants. The Cabinet may appoint an applicant not in the recommended list and, if such appointment is made, the Cabinet must table in the National State Assembly the name of the person appointed and the reasons for not accepting the recommendation of the Judicial Service Advisory Board and the list of persons recommended by the Judicial Services Advisory Board. The power to make acting appointments of such Judges and State officers may, however, be delegated to the Secretary to the Judicial Services Advisory Board, subject to such limitations and conditions as may be prescribed by the Cabinet of Ministers. (s. 126).

The Judicial Services Advisory Board consists of five members. The Chief Judge of the highest Court with original jurisdiction is the Chairman of the Board. If such Chief Judge is unable to function as Chairman the next senior Judge of that Court becomes Chairman. The members of the Board other than the Chairman are appointed by the President. Of the members appointed by the President, one must be from amongst Judges (other than those of the Supreme Court and the Commissioners of Assize) of the Courts established under the Courts Ordinance, Presidents appointed under the Rural Courts Ordinance and Judges of Courts which may be established by the National State Assembly under section 121 of the Constitution. Another member must be appointed from amongst the State officers constituting Labour Tribunals under the Industrial Disputes Act or from such persons as may be empowered by law to perform the powers and functions of such Labour Tribunals. Members of the National State Assembly are disqualified for membership of the Judicial Services Advisory Board. The members of the Board hold office for a period of four years from the date of appointment. The office of a member becomes vacant (a) upon his death (b) on his resignation by a writing addressed to the President (c) on his removal from office by the President (d) on a member appointed from amongst the State officers, as stated earlier,

ceasing to be such a State officer. A member of the Board may be paid such salary or allowance as may be determined by the National State Assembly. Such salary or allowance must be charged on the Consolidated Fund and cannot be diminished during his term of office. There is a Secretary to the Board appointed by the Cabinet of Ministers in consultation with the Chairman of the Board. The Cabinet of Ministers may in consultation with the Board make (a) rules regarding schemes of recruitment and procedures for the appointment of Judges and other State officers referred to in section 124 of the Constitution and (b) provision for such other matters as are necessary or expedient for the exercise, performance and discharge of the powers, functions and duties of the Board. (s. 125).

In favour of the establishment of the Judicial Services Advisory Board, it was argued in the Constituent Assembly that the previously existing independent Judicial Service Commission was not responsible to the House for appointments made by it to the subordinate Judiciary whereas under the new Constitution the Cabinet of Ministers would be so responsible. It was also argued that with the establishment of Cabinet responsibility to the National State Assembly for such judicial appointments, there was at the same time a safeguard against outside pressure and influence being brought to bear on the Ministers. If the Cabinet appointed an applicant who was not in the recommended list, it was required under the Constitution to table in the National State Assembly the reasons for not accepting the recommendation. The question naturally arose whether such pressure and influence would not be lessened much further if provision was made for the submission by the Judicial Services Advisory Board, instead of a list of persons, the name of the applicant whom the Board considers most suitable for his appointment by the Cabinet. Cabinet responsibility to the National State Assembly would be maintained by the power to reject the candidate recommended by the Board and to appoint another, while tabling in the National State Assembly the reasons for not accepting the recommendation of the Board.

The Function of the Judges. The function of the Judges is to apply and interpret the law, enacted or unwritten, in relation to the matters that are brought before them for their determination. In matters which arise for determination by the Courts, interpretation or the ascertainment of the true meaning of the relevant instrument is, under

our Constitution, the function of the Judges alone. In the interpretation of the Constitution or of ordinary statutes, the object is to ascertain the intention which is conveyed by the language used in the instruments. Where no intention is clearly expressed, the intention to be imputed to the enacting body must be determined by inference based on certain principles.[1] If there appears to be a conflict between a provision in a statute and that of the Constitution, what is sometimes called "the principle of harmonious construction" will be followed. In other words, effect will, as far as possible, be given to both provisions with a view to the avoidance of conflict.[2] It is a fiction that the Courts merely "interpret" legislation in order to ascertain the intention of the Legislature. By "creative" interpretation the Courts have, under the present rules, to arrive at their own decision as to the meaning of a statute without the aid of Parliamentary documents. The British Law Commission and the Scottish Law Commission have recently recommended that such documents should be considered in the interpretation of statutes. There is much to be said for the view that these external aids should be used by the Courts for the purpose of what Professors Hart and Sacks of Harvard University have called "attribution of purpose" to the statute.[3]

So far as the Administration is concerned, the Courts secure that public authorities act in accordance with law and do not exceed or abuse their legal powers. The Courts control the powers of administrative authorities and grant relief where those authorities act outside the scope of their jurisdiction or fail to perform their duties. Administrative Tribunals are required to observe the principles of natural justice by acting in good faith and listening fairly to both sides. A decision of an administrative authority may also be quashed for an error of procedure or for an error on the face of the record. The exercise of an administrative discretion may be interfered with if improper or extraneous considerations have been taken into account or if there has been bad faith.

The Independence of the Judiciary. The realisation of the rights and freedom of all citizens in this country to which the Republic is pledged under the Constitution depends to a large extent on the degree of realisa-

1. Maxwell, *Interpretation of Statutes* (10th ed.), p. 2.
2. See *Warburton* v *Loveland* (1832) 2 D & Cl. 480, 5 E.R. 499; *Sri Venkataramana Devaru* v *State of Mysore* (1958) S.C.R. 895, at p. 918.
3. *The Legal Press.* See Harry Bloom (1970) 33 *Modern Law Review*, p. 197.

tion of the principle of equal justice under the rule of law. This principle clearly demands that the persons administering justice should be free to carry out their functions without fear or favour. It has been said on high judicial authority that it "is essential in all Courts that the Judges, who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear."[4] Similarly, the International Congress of Jurists meeting at New Delhi in January 1959 concluded: "An independent Judiciary is an indispensable requisite of a free society under the Rule of Law."[5]

Judges should, therefore, in the exercise of their judicial functions be immune from outside control and influence. Such immunity is sought to be established by such provisions as those relating to the security of their tenure and the manner of their removal. They should also be immune from liability for acts done or words spoken in the execution of such functions. The establishment of these legal principles and forms cannot of course ensure absolute impartiality because, being men, each Judge is also moved by his sub-conscious views. Mr. Justice Holmes has described such sub-conscious judicial preference as the "inarticulate major premise".[6] So far as statutes are concerned, according to common law principles of interpretation, the intention of the Legislature is ascertained, not from its proceedings, but according to certain canons of interpretation which give the Courts a certain amount of discretion. It has been stated by the Supreme Court:[7]

> "While we are bound by a series of decisions.....to exclude from consideration the proceedings of the Legislative Council itself in regard to them, we are entitled by the rules in *Heydon's Case*[8] and by many later authorities to look 'not merely to the words of an Act of Parliament, but to the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign, meaning extraneous, circumstances so far as they can justly be considered to throw light upon the subject'."

4. *Scott* v *Stanfield* (1868) L.R. 3 Ex. 220, *per* Kelly, C.B., at p. 223.
5. Committee IV, clause 1.
6. *Lochner* v *New York* (1905) 198 U.S. 45, at p. 74.
7. *Bahappu* v *Don Andris* (1910) 13 N.L.R. 273, at p. 277.
8. (1584) 3 Coke Rep. 8.

Many pre-1937 judgments of the Supreme Court of the United States in the field of Constitutional Law have been explained on the basis of the Court's acceptance of the *laissez-faire* theory of governmental functions.[9] In 1921 Justice Holmes commented on the tendency of the Courts to accept "the economic doctrines which prevailed about fifty years ago."[10]

In the past few decades, however, American Judges have acted with a remarkable degree of what has been called "judicial self-restraint." This has also been true of Judges in Sri Lanka whose approach to the interpretation of statutes has been based on the English tradition. Their approach has never been one of "policy-making".[11] On the other hand, as Francois Geny, the famous French jurist, has shown from the experience of France, the application of deductive logic alone to a new case, without creative interpretation, cannot make law conform to the changing social circumstances and needs, and thereby to the ideals of justice and utility.[12] Even according to the English tradition and the principle of *Heydon's Case*,[13] it is the duty of the Judge to interpret a statute in such a way as to suppress the mischief and advance the remedy provided by the statute to cure that mischief. In so construing a statute, what Mr. Justice Holmes called the "inarticulate major premise" of the Judge will sometimes play a part in determining the intention he attributes to the Legislature.[14] As Professor Harold J. Laski has pointed out, "Legal rules are always seeking to accomplish an end deemed desirable by some group of men and it is only by constant formulation of what that end is that we can obtain a realistic jurisprudence".[15] The life of the law, it has been said, is not logic but experience.[16]

Sir Ivor Jennings has stated that "the Judges do seek to maintain impartiality, and are clearly less biassed than a Government which has come into power by capitalising the prejudices of a majority of the electors. This is particularly the case where the Government is an interested party in the litigation. Many Governments have confounded

9. See Bernard Schwartz, *American Constitutional Law* (1955), pp. 208-212.
10. *Collected Legal Papers*, p. 295.
11. See, for example, *Kariapper* v *Wijesinghe* (1966) 68 N.L.R. 529, at p. 537.
12. See *Methode d'interpretation et sources en droit prive positif* (1899)
13. *Ante*
14. See Professor Harold J. Laski's comments in the annex to the *Report of the Committee on Ministers' Powers*(Cmd. 1932), pp. 135-136.
15. Introduction to *Representative Opinion of Mr. Justice Holmes*, p. xv.
16. Holmes, *The Common Law* (1881), p.1..

sedition or treason and criticism of themselves. All Governments have an interest in favouring one group of persons at the expense of another. Freedom of speech means freedom to criticise the established order (including, of course, the Judges). Freedom of association means freedom to combine against those in power. The right of public meeting means the right to organise protests against the Government. Freedom from arrest except for breaches of the law means freedom from arrest at the hands of the agents of the Government. If these most important rights are to be maintained, they must be maintained by those who have freedom to decide against the Government and its agents".[17]

One of the chief means by which judicial independence is secured is in the tenure of office and manner of removal of Judges and other State officers administering justice, as provided in the Constitution.

The Judges of the Court of Appeal, of the Supreme Court, or of the Courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding or substantially similar to the powers and functions exercised and performed by those Courts, hold office during good behaviour. They cannot be removed except by the President upon an address of the National State Assembly. (s. 122 (2)).

The holder of the office may be so removed for "any form of misconduct which would destroy public confidence in the holder of the office."[18] No procedure for removal has been laid down by law. It would seem, however, that the charges must be specifically alleged and if the facts alleged are sufficient, the House may proceed to refer the matter for inquiry either to a select Committee or to a Committee of the Whole House.[19]

Unless the National State Assembly otherwise provides, the term of office of a Judge of the Court of Appeal is as provided by the Court of Appeal Act, No. 44 of 1971, and the age for the retirement of Judges of the Supreme Court is sixty-three years. (s. 122 (3)). Under the previous Soulbury Constitution the Executive could permit a Judge who had reached the retiring age of sixty-two years to continue in office for a

17. *The Law and the Constitution* (5th ed.) pp. 245-6.
18. Anson, *Law and Custom of the Constitution* (4th ed. Keith), Vol. II Pt. 1., pp. 234-235, cited in Hood Phillips, *Constitutional and Administrative Law* (4th ed.), pp. 354-355.
19. Halsbury's *Laws of England* (2nd ed.) Vol. VI, p. 610.

period not exceeding twelve months. This power of the Executive to extend the retiring age of Judges had been criticised on the ground that it was not in conformity with the principle of judicial independence.[20]

The salaries of such Judges must be determined by the National State Assembly and charged on the Consolidated Fund. (s. 122 (4)). The salary payable to or the age of retirement of, any such Judge cannot be reduced during his term of office. (s. 122 (5)). The result of the constitutional prohibition against the reduction of their salaries is that such salaries are not discussed and voted in the National State Assembly every year, unlike those Heads of estimates of expenditure which are required to be voted annually.

With regard to the tenure of other Judges, State officers constituting Labour Tribunals and all other State officers the principal duty or duties of whose office is the performance of functions of a judicial nature, the Constitution provides for a Judicial Services Disciplinary Board to exercise the powers of dismissal and disciplinary control over them. The Board consists of three members. The Chief Judge of the highest Court with original jurisdiction is Chairman of the Board. Two other Judges of that Court nominated by the President are the other two members of the Board. The Cabinet of Ministers is empowered in consultation with the Judicial Services Disciplinary Board to make (a) rules of conduct for such Judges and other State officers (b) rules of procedure for matters connected with the holding of disciplinary inquiries; and (c) provision for such other matters as are necessary or expedient for the performance of the duties of the Judicial Services Disciplinary Board. Where the Judicial Services Disciplinary Board exercises its powers of dismissal over such a Judge or other State officer, the Board must forward through the Minister in charge of the subject of Justice a report thereon to the Cabinet of Ministers. A copy of such report must also be transmitted to the Speaker (s. 127). Such Judge or State officer found guilty of misconduct must be removed from office. (s. 128). There may be removal of such Judge or State officer for misconduct by the President on an address of the National State Assembly. No motion for such removal can be placed on the Agenda of the National State Assembly until the Speaker has obtained

20. See, J.A.L. Cooray, "The Supreme Court of Ceylon", (1968) *Journal of the International Commission of Jurists* (Geneva), p. 99, and also *The Revision of the Constitution* (1957), p. 15.

a report from the Judicial Services Disciplinary Board on such particulars of the charge as are alleged in the motion against the Judge or State officer. The findings of the Judical Services Disciplinary Board on the particulars of the charge is final and cannot be debated by the National State Assembly. (s. 129).

The transfer (not involving an increase of salary) of such Judges and other State officers is effected by the Judicial Services Advisory Board. Subject to the procedures determined by the Cabinet of Ministers, an appeal lies from an order effecting a transfer to the Minister in charge of the subject of Justice. The Board may, with the concurrence of the Cabinet of Ministers and subject to such conditions as may be prescribed, delegate to its Secretary such powers as may be necessary to deal with incidental matters relating to such transfers. (s. 130).

The independence of persons administering justice is sought to be provided for in section 131 of the Constitution. That section states: (1) Every Judge, State officer or other person entrusted by law with judicial powers or functions shall exercise such judicial powers and functions without being subject to any direction or other interference proceeding from any other person, except a superior Court or institution entitled under law to direct or supervise such Judge, State officer or person in the exercise or performance of such judicial powers and functions; and (2) every person who, without legal authority therefor, interferes or attempts to interfere with the exercise or performance of the judicial powers or functions of any Judge, State officer or person referred to above shall be guilty of an offence punishable with imprisonment of either description for a term which may extend to one year or with fine or both.

Another provision which exists to secure the independence of the Judiciary is the rule embodied in the Standing Orders of the National State Assembly that the conduct of the Judges and other persons engaged in the administration of jutsice cannot be raised except on a substantive motion.[21] A motion for a cut in the salary of such a person during the consideration of the Appropriation Bill is not a substantive motion on which a discussion can take place. Questions reflecting on the character or conduct of these persons cannot be asked in the National State Assembly.[22]

21. Standing Order No. 89 See also Official Report, House of Representatives, 20 August, 1958: vol 32 cc 1129-30.
22. Standing Order No. 36 (9).

The independence and impartiality of the Judiciary is essential for the existence of a democratic system under the Rule of Law. It is also an accepted fact that the success of Parliamentary democracy is dependent to a large extent on the right to create public opinion. This right cannot exist in any appreciable measure without freedom of meeting and of discussion. On the guarantee of these and other similar rights of the citizen depends the effectiveness of government by opinion. The extent to which these rights are safe at any time against executive encroachment and abuse rests on the proper administration of justice by an independent Judiciary. The maintenance of the independence of the Judges and of the quality of the administration of justice requires that adequate provision is made in the law and the Constitution in order to ensure it. Its maintenance depends even more on the Judges themselves and the state of public opinion in the country which demands their independence and impartiality.

In the Constituent Assembly, during the debate on the Basic Resolution dealing with the administration of justice, Mr. J. R. Jayewardene expressed himself in the following terms:

"We know that ultimately, whatever rules and words you may put into a Constitution, the working of it lies with the men and women who work it. You may have all the precautions to make the Judiciary independent, but unless the men who man the Judiciary are men of courage, men of wisdom, the Judiciary will never be independent. We have had such men in the past. We have such men in the present. Now the object of all of us is to see that in the future too, in the written Constitution, we create the conditions for such men to live, thrive and prosper. If they feel that they will be subject to pressures from governmental forces or from those elected to Parliament, they will not be able to perform their duty".[23]

Judicial Immunity. The independence of the Judges is further secured through their immunity from legal proceedings for acts done or words said within their jurisdiction, however malicious, corrupt or oppressive they may be.[24] It is probable that Judges of superior Courts are not liable

23. *Constituent Assembly Debates*, Vol. 1, 2813.
24. *Anderson* v *Gorrie* (1889) 1 Q.B. 668; *Scott* v *Stansfield* (1868) L.R. 3 Ex. 220; Wade and Phillips, *Constitutional Law* (8th ed.), p. 330; Hood Phillips, *Constitutional and Administrative Law* (4th ed.). p. 360.

in respect of the exercise of their judicial functions, even if they exceed their jurisdiction.[25] In the case of Judges of inferior Courts, they would be liable if they knew or had the means of knowing that they were acting outside their jurisdiction.[26] A similar immunity to that of Judges attaches to statements made in the course of judicial proceedings by the parties, counsel, juries and witnesses.[27] In this matter our law has departed from the Roman-Dutch law, under which absolute privilege did not attach to such statements and they were actionable if actuated by an *animus injurandi*.

Contempt of Court. Any act, statement or behaviour on the part of any person in disrespect of the authority of a Court, such as has the effect or is calculated to have the effect either (1) of preventing or disturbing the orderly course and seemly conduct of the public business of the Court, or (2) of obstructing, hindering or preventing the impartial action of the Court in the administration of justice, is a contempt of Court.[28] In order to constitute the offence there must be involved some "act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority" or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts."[29] No intention to interfere with the due course of justice or to prejudice a fair trial need be established as long as the act or statement has that effect or tends to do so.[30] Any act done or writing published which brings a Court or a Judge of the Court into contempt or lowers his authority constitutes the offence of contempt known as "scandalising a Court or Judge".[31] The purpose for which the law of contempt of Court exists is not for the gratification of the Bench but for the protection of the public.[32]

25. *Hammond* v *Howell* (1657) 2 Mod. 219. Hood Phillips, *op. cit.*, Wade and Phillips, *op. cit.* See also *Mendis* v *Lima* (1858) Lorenz 44.
26. *Calder* v *Halkett* (1839) 3 Moo P.C. 28.
27. *Leisa* v *Siyatuhamy* (1925) 27 N.L.R. 318; *Wijegunatilake* v *Joni Appu* (1920) 22 N.L.R. 231, at p 234. *Silva* v *Balasuriya* (1911) 14 N.L.R. 452; *Attenaike* v *Juanis* 2 Lor. 122; *Munster* v *Lamb* (1883) 11 Q.B.D. 588 (Counsel); *Bushell's Case* (1670) 6 St. Tr. 999 (Juries).
28. *Sera Mudaly* v *Ismail* (1878) 1 S.C.C. 61, at p. 62, *per* Phear C.J; *Bawa* v *Ashmore and Van Houten*, (1882) Wendt 110, at p. 114.
29. *Reginald Perera* v *The King* (1951) 52 N.L.R. 293.
30. *Veerasamy* v *Stewart* (1941) 42 N.L.R. 481; *Superintendent of Legal Affairs, Behar* v *Murali Manohar* (1941) 42 Cr.L.J. 225; *Metropolitan Music Hall* v *Lake*, (1889) 58 L.J. Ch. 513.
31. *In the matter of Rule on P. Ragupathy, Advocate* (1945) 46 N.L.R. 297. *Reg* v *Grey* (1900) 2 Q.B. 36. *In re S. A. Wickremasnghe* (1954) 55 N.L.R. 511.
32. *Kandoluwe Sumangala* v *Mapitigama Dharmarakitta* (1908)11 N.L.R.195, at p.201.

Judges and judgments are not, however, above criticism. But such criticism is not unbounded. As Abrahmas C.J. has stated,[33] the rights of such criticism and the limitations imposed upon these rights are well-defined in the concise and trenchant words of Lord Atkin in *Ambard* v *Attorney-General of Trinidad*:[34] "Whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men". Wood Renton C.J. stated *In the Matter of Armand de Souza*:[35] "There is no kind of doubt as to the right of any member of the public to criticise, and to criticise strongly, judicial decisions or judicial work, and to bring to the notice of the proper authorities any charge whatever of alleged misconduct on the part of a Judge. But it is a very different matter to claim that irresponsible persons, upon *ex parte* statements are at liberty to invite themselves into the judgment seat, and to scatter broadcast imputations....The law of contempt exists in the interests, not of the Judges, but of the community".

In April 1959 a Report on an investigation into the law relating to contempt of Court in England was published by Justice, the British Section of the International Commission of Jurists.[36] The object was to determine how far complaints in the Press and by lawyers against the exercise of this jurisdiction was justified, and what remedial action, if any, was necessary. The Report called attention to the "chaotic" nature of the substantive law of criminal contempt, which proved "a serious handicap to free discussion" and to the procedural defects contained within the law. The Report recommended that there should be a right of appeal

33. *In the Matter of a Rule on H. A. J. Hulugalle* (1936) 39 N.L.R. 294, at p. 308.
34. (1936) A.C. 323, at p. 335.
35. (1914) 18 N.L.R. 33, at p. 41.
36. The following summary of the Report is based on a review by Jean Flavien Lalive in the *Journal of the International Commission of Jurists* (1959) Vol. II No. 1.

against any conviction or sentence for contempt of Court. The Report also recommended that the criticism of a Judge should not amount to contempt of Court unless prejudice, corruption or other improper motive is alleged against him. Another recommendation was that there should be a defence that there was no knowledge or no reason to suspect that a proceeding had begun. Another procedural reform which was recommended was that no prosecution for criminal contempt outside the Court should be initiated except by, or with the consent of, the Attorney-General.

Some of the recommendations have been given legal effect by the Administration of Justice Act, 1960. Section 11 provides that no one shall be guilty of contempt of Court on the ground that he has published any material likely to interfere with the course of justice in pending proceedings if at the time of publication he, having taken all reasonable care, did not know, and had no reason to suspect, that proceedings were either pending or imminent. Section 13 provides that an appeal lies from any order or decision of a Court punishing for contempt.

The rule of publicity of proceedings is one of the safeguards of judicial impartiality and of the public interest.[37] The Courts Ordinance[38] provides that the sitting of every Court in Sri Lanka shall be public and that all persons may fully attend the same. This provision for publicity is subject to the exception that in all proceedings and trials in cases for divorce on account of adultery, or for seduction, abortion, rape, assault with intent to commit rape, criminal conversation, unnatural offences, and bastardy, the Court may, in its discretion, exclude from it all persons who are not directly interested in it, excepting advocates, proctors, jurors, assessors, witnesses and officers of the Court.

The Courts must necessarily occupy a high position of power, prestige and importance in the life of a nation. But the Judiciary is only one of the three branches of Sri Lanka's democratic system of government. The Courts cannot, of course, remedy every kind of injustice or abuse in the complex governmental process.

37. See *Scott* v *Scott* (1913) A.C. 417; *McPherson* v *McPherson* (1936) A.C. 177.
38. Legislative Enactments, Chapter 6, section 85. Constitution of Sri Lanka, Section 62.

Nevertheless, in the mixed and changing society of Sri Lanka, the Courts have quite justly come to be regarded as a symbol of the reconciliation between the expanding powers of government and the fundamental rights of the citizen under the law and the Constitution. Within the limits of their power and jurisdiction, the Courts are required to perform a dynamic role as the fearless upholders of the principle of equal justice under the Rule of Law.

CHAPTER 26

SETTLEMENT OF DISPUTES THROUGH CONCILIATION: CONCILIATION BOARDS

Background. In Sri Lanka there has been an increasing tendency in recent times to use conciliation as a cheap and expeditious means of settling disputes, especially in the rural areas. Conciliation, in its strict sense, involves the settlement of disputes primarily by the participation of the parties themselves. It is a more democratic way of settling disputes than having them adjudicated in a Court of law. Conciliation along with arbitration, which is a reference made by consent of parties for decision and settlement by a third party, are two of the most ancient ways of settling disputes.

Even from the times of the ancient Sinhalese Kings, dating from 425 B.C., there were gamsabha or village councils.[1] The gamsabhava consisted of the principal men of the village who met at an ambalama (resting place) or under a shady tree or other central place and whose endeavours were directed to the informal, speedy and peaceful settlement of disputes, rather than to punishment.[2] After the establishment of British rule in the Island, the influence of gamsabha declined steadily, although as a result of Colebrooke's endeavours the Charter of Justice of 1833 which reorganised the judicial system provided for the continuance of the arbitration of the gamsabha. But, as Goonesekere and Metzger have pointed out, "dispute settlement by a body of village elders sitting as a gamsabhava was not the only form of extra-judicial dispute settlement at the time. During this period (the early years of British rule) in which the Gansabhava's power was being eroded both in the court and villages,

1. Mahawansa, X. 103; F.A. Hayley, *The Laws and Customs of the Sinhalese* (1923), at p. 59.
2. John D'Oyly, *A Sketch of the Constitution of the Kandyan Kingdom* (1835) (ed. L.J. B. Turner), at p.28; Robert Knox, *Historical Relation of the Island of Ceylon* (1681), at p. 84.

it was common for parties to come to court and agree to abide by the decision of one or more arbitrators who were normally local chieftains like the *ratemahatmayas* or other persons of standing".[3]

Conciliation Machinery. The Conciliation Boards Act, No. 10 of 1958, now provides for the establishment of Conciliation Boards for the settlement of civil disputes and for the compounding of certain offences. The Act was intended to provide a speedy and inexpensive method for the amicable settlement of civil and criminal disputes. So far as disputes or differences between employers and workmen are concerned, the Industrial Disputes Act, No. 43 of 1950, provides for their settlement, among other methods, by conciliation. This Act enables the Commissioner of Labour to make an endeavour to settle an industrial dispute by conciliation or to refer the dispute to an authorised officer for settlement by conciliation. There are various other Acts where disputes are settled by consent. The more the procedure tends to be friendly and informal, the more valuable does conciliation become in the settlement of disputes. This democratic method of settlement of disputes has the advantage of securing that the individual actively participates in the process of settlement.

Conciliation Boards. Under the Conciliation Boards Act, the Minister of Justice has power to appoint a Panel of Conciliators of not less than twelve persons for each Conciliation Board Area. The Conciliation Boards for the areas are constituted from these Panels. Where the area of administrative authority or activity, as the case may be, of any local authority, Rural Development Society, Praja Mandalaya or Co-operative Society, Divisional Revenue Officer or Grama Sevaka is situated within any Conciliation Board area, such body or person may recommend in writing to the Minister of Justice persons fit to be members of the Panel. Each member of a Panel, unless he earlier vacates or is removed from office by the Minister, holds office for a period not exceeding three years as may be determined by the Minister. (s. 3).

3. R. K. W. Goonesekere and Barry Metzger, "The Conciliation Boards Act: Entering the Second Decade". (1971) 2 *The Journal of Ceylon Law* 41. This article gives an excellent account of the historical background and the working of the Conciliation Boards Act since its enactment.

The Chairman of the Panel may, and must on application made to him, refer for inquiry to Conciliation Boards the following disputes and offences: (a) any dispute in respect of any movable property that is kept, or any immovable property that is wholly or partly situate, in that Conciliation Board area; (b) any dispute in respect of any matter that may be a cause of action arising in that Conciliation Board area for the purpose of the institution of an action in a civil Court; (c) any dispute in respect of a contract made in that Conciliation Board area; (d) such offences specified in the Schedule to the Act as are alleged to have been committed in that Conciliation Board area (s. 6). Persons who give evidence before a Conciliation Board are, in respect of such evidence, entitled to all the privileges enjoyed by witnesses before a Court of law. (s. 11).

Where a dispute is referred to a Conciliation Board for inquiry, it is the duty of the Board to summon the parties to the dispute to appear before it and after inquiring into the dispute make every effort to induce them to settle it. Where the parties agree to a settlement, the Board must record it and issue to each party a copy of it signed by the President. Where an offence is referred to a Conciliation Board for inquiry, the Board must summon to appear before it the alleged offender and the party against whom such offence is alleged to have been committed and inquire into the allegation of the offence. If, after the inquiry, the Board is satisfied that the offence has been committed, it must make every effort to induce the offender and the other party to agree to compound the offence. (s. 12).

A party to a civil dispute which is settled by a Conciliation Board may, in writing, within thirty days after the date of settlement of such dispute notify the Chairman of the Panel of Conciliators that, with effect from such date as shall be specified in the notification, the settlement effected by the Board will be repudiated by him for the reasons stated in the notification. If no such notification is received by the Chairman within that period, the Chairman must forthwith transmit to the District Court or the Court of Requests or the Rural Court, as the case may be, having jurisdiction to adjudicate upon such dispute, a copy of the settlement signed and certified by the President of the Board. Immediately upon receipt of the copy by the Court, it must be filed of record. With effect from the date of the filing, the settlement is deemed to be a decree of the Court. (s. 13).

Where a Panel of Conciliators has been constituted for any Conciliation Board no proceedings in respect of any civil dispute referred to in section 6 can be instituted in, or entertained by, a civil Court unless the person instituting it produces a certificate from the Chairman of the Panel (i) that such dispute has been inquired into by a Conciliation Board and (ii) that it has not been possible to effect a settlement of the dispute or that a settlement has been repudiated. Similarly no prosecution for any offence specified in the Schedule to the Act can be instituted in, or entertained by, any Court unless the person instituting it produces a certificate from the Chairman of the Panel that the alleged offence has been inquired into by the Board and has not been compounded or, in the case of offences in the Schedule which are compoundable only with the Attorney-General's consent, that the Board has or has not recommended to the Attorney-General that his consent may be given to its compounding. (s. 14).

In *Nonahamy* v. *Halgrat Silva*[4] a Divisional Bench of the Supreme Court held (by two to one) that the effect of sections 6 and 14 of the Act is to make the production of a certificate from the Chairman of the Panel of Conciliators a condition precedent to the institution of an action in respect of any dispute or offence referred to in section 6 even where no reference to conciliation has been made under the Act by the Chairman or by the parties. Objection relating to the want of jurisdiction in a Court to hear a case may be waived by the defendant, if the want of jurisdiction is not apparent on the face of the record but depends upon the proof of facts[5]. When a party relies on a plea that the Court has no jurisdiction to entertain a plaint without a certificate from the Conciliation Board, the burden is on him to show the existence of facts which deprive the Court of such jurisdiction.[6]

The former Law Commission in 1971 expressed the view that since "acceptance of conciliation or compounding is a matter left solely to the whim of either party.....there seems to be no purpose whatsoever in insisting on a prior formal reference to a Conciliation Board, where both parties are not agreeable to such procedure, and where neither party has invoked it".[7] The Commission suggested that section 14 be amended to give effect to this recommendation.

4. (1970) 73 N.L.R. 217.
5. *Fernando* v *Fernando* (1971) 74 N.L.R. 57.
6. *Gunawardena* v *Jayawardena* (1971) 74 N.L.R. 248.
7. Working Paper, No. 4, on Amendments to the Conciliation Boards Act.

In Nonahamy's Case,[8] it was also held that the Court had no jurisdiction to grant an injunction in the absence of a certificate issued in terms of section 14 of the Act, since the grant of the injunction was a step in the action which could not be entertained by the Court. The Law Commission suggested that cases "in which an early application to a Court for speedy relief is essential", such as "those in which the issue of an injunction or the appointment of a receiver is applied for" should be excluded from the purview of the Act.....If a party is required by law to go before a Conciliation Board and face an inquiry before he can file his action, the remedies provided by the law will be rendered valueless".[9] The Law Commission in its Working Paper suggested also the exclusion of actions under the Partition Act, actions relating to immovable property under the Mortgage Act, matrimonial actions, actions arising out of seduction or breach of promise of marriage and actions to which a person who is under a disability such as minority or unsoundness of mind, is a party.

An evaluation. In making an evaluation of the Conciliation Boards scheme, Messrs Goonesekere and Metzger[10] have stated that "the settlement of nearly half of all cases presented during the most recent period is a quite satisfactory performance record, even if it falls far short of the records set earlier in the decade". The authors have also stated that the scheme "has contributed to a decrease in formal litigation and has contributed to increased social harmony through the settlement of non-legal disputes and disputes which are legal in character but which would not ordinarily find their way to a court of law". They have, however, warned that "this generally positive assessment of the Conciliation Boards scheme must be tempered by the authors' conviction that the scheme is in immediate need of certain statutory and administrative reforms. The scheme is still capable of failure, most likely as the victim of political interference, increasing case-loads and Ministry neglect".

8. *Ante.*
9. *Ibid.*
10. *Op. cit.*, p. 85.

PART VI

THE CITIZEN–HIS RIGHTS AND DUTIES

CHAPTER 27

CITIZENSHIP AND ALIENAGE

It has been said on high judicial authority that it is a perfectly natural and legitimate function of the Legislature of a country to determine the composition of its citizens or nationals[1]. In Sri Lanka, after the attainment of independence, the Citizenship Act, No. 18 of 1948, was passed to make provision for citizenship of this country. According to the present Constitution, unless the National State Assembly otherwise provides, the laws relating to citizenship and to rights of citizens which were in force immediately before the commencement of the Constitution continue to remain in force. No law can, however, deprive a citizen by descent of the status of citizen. (s. 67).

Under the Citizenship Act a person becomes entitled to the status of a citizen of Sri Lanka either by right of descent or by virtue of registration.

(a) Citizenship by Descent. A person born in Sri Lanka before the appointed date, namely 15 November 1948, became a citizen of Sri Lanka by descent if (a) his father was born in Sri Lanka, or (b) his paternal grandfather and paternal great-grandfather were born in Sri Lanka. (s. 4 (1)). A person born outside Sri Lanka before that date became a citizen of Sri Lanka by descent if (a) his father and paternal grandfather were born in Sri Lanka, or (b) his paternal grandfather and paternal great-grandfather were born in Sri Lanka. (s. 4 (2)). A person born in Sri Lanka on or after the appointed date has the status of citizensip by descent if at the time of his birth his father is a citizen of Sri Lanka. (s. 5 (1)). If he was born outside Sri Lanka the birth must in addition be registered within one year, or such further period allowed by the Minister for good cause, at the office of a consular officer of Sri Lanka in the country of birth or at the office of the Minister in Sri Lanka. (s.5(2)).

1. *Kodakan Pillai* v *Mudanayake* (1953) 54 N.L.R. 433, at p. 439 (P.C.)

At the time the Citizenship Act was enacted, there were in Sri Lanka, particularly in the tea plantation areas, about 800,000 persons, most of them labourers of Indian descent. Some of them regarded India or Pakistan as their home but they had become entitled to the franchise as "British subjects". The Citizenship Act (as well as the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949) were directed partly to meet this situation. In 1949 the franchise was restricted by law to citizens of Sri Lanka. It is of some historical interest to note that in *Kodakan Pillai* v *Mudanayake*[2] it was argued that sections 4 and 5 of the Citizenship Act were *ultra vires* under the provisions of the previous Constitution as they made persons of the Indian Tamil Community liable to a disability or restriction within the meaning of section 29 (2) (b) of that Constitution. It was further argued that a large number of Indian Tamils who were resident in Sri Lanka could not become citizens of this country because neither their fathers nor their grandfathers were born in Sri Lanka. The submission was that the Act was colourable and that it disclosed when its pith and substance or its true character was ascertained the intention of the Legislature to do indirectly what admittedly it could not do directly, namely to make persons of the Indian Tamil Community liable to a disability to which persons of other communities were not made liable. It was held that the Citizenship Act did not offend against the previous Constitution and that "the migratory habits of the Indian Tamils (see paragraphs 123 and 203 of the Soulbury Report) were facts which were directly relevant to the question of their suitability as citizens of Ceylon and had nothing to do with them as a community".

(b) Citizenship by Registration. Under the Citizenship Act citizenship by registration may be conferred on an applicant who has the following qualifications: (a) that he is of full age and of sound mind; (b) that he (i) is a person whose mother is or was a citizen of Sri Lanka by descent or would have been a citizen of Sri Lanka by descent if she had been alive on the appointed date, and who, being married, has been resident in Sri Lanka throughout a period of ten years immediately preceding the date of the application, or (ii) is a person, whose father was a citizen of Sri Lanka by descent, and who would have been a citizen of Sri Lanka under section 5 (2) if his birth had been registered in accordance with its provisions or, (iii) is a person whose father, having been a citizen of Sri Lanka by

2. (1953) 54 N.L.R. 433.

descent ceased to be such a citizen; (c) that he is, and intends to be, ordinarily resident in Sri Lanka (s. 11 (1)). There is also provision under the Act for the grant of citizenship by registration by the Minister to a spouse, widow or widower of a citizen of Sri Lanka who has the specified qualifications. (s. 12).

Under the Act, citizenship by registration may also be granted by the Minister on not more than 25 persons a year. Such a person must be (a) a person to whom section 11 or 12 does not apply, (b) a person who to the satisfaction of the Minister (i) has rendered distinguished public service or is eminent in professional, commercial, industrial or agricultural life or (ii) has been granted a certificate of naturalization, and (iii) is and intends to continue to be ordinarily resident in Sri Lanka.

The Indian and Pakistani Residents (Citizenship) Act which was enacted on 5 August 1949 made provision for the grant of the status of a citizen by registration to Indians and Pakistanis who had the qualification of past residence in this country for a certain minimum period. The minimum period of residence was ten years in the case of an unmarried person or a widow or widower, and seven years in the case of a married person. The privilege conferred by the Act could be exercised before the expiry of a period of two years from the appointed date. 5 August 1949 being the appointed date, the privilege was exercisable until 5 August 1951. The Act provided that no application made after the expiry of that period was to be accepted or entertained, whatsoever the cause of the delay.These provisions were imperative and restricted the jurisdiction of the Commissioner under the Act.[3]

The Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, provides that any person to whom the Indo-Ceylon Agreement applies may make an application in writing to the Minister through the Commissioner to be granted the status of a citizen of Sri Lanka by registration under this Act. Such person may include in his application the names of his wife and minor children. (s. 7 (2)). Every application under section 7 (2) must be made in the prescribed form and so as to reach the Commissioner for the Registration of persons of Indian origin at any time during

3. *Mohamed Sahib* v *Commissioner for Registration of Indian and Pakistani Residents* (1968) 71 N.L.R. 265.

the notified period. (s. 7 (d)). Where an applicant has any minor child he may in his application or by subsequent letter make a request for the inclusion of the name of that child in the certificate of registration which may be issued to him under the Act. In the event of such a request being made, the Minister must comply with such request if the applicant is so registered. (s. 7 (4)). No application for the grant of the status of a citizen of Sri Lanka by registration under the Act made by any person to whom the Indo-Ceylon Agreement applies, which reached the Commissioner otherwise than during the notified period, can be accepted or entertained by the Minister unless he is satisfied that the application could not be made within the notified period for good reason. (s. 7 (5)).

Subject to the provisions of section 7 (3) and (4), upon the receipt by the Minister of an application duly made to him under the Act by any person for the grant of the status of a citizen of Sri Lanka by registration under the Act, the Minister may, in his absolute discretion, decide to grant or refuse such application. (s.8(1)) The decision of the Minister on any such application is final and conclusive. In the disposal of applications, the Minister must ensure that as far as possible the number of persons who are granted such status of a citizen of Sri Lanka by registration and the number of persons who have been or are recognised as citizens of India after 30 October 1964, at all times bears the ratio of 4 : 7. In the computation of such ratio, no account is taken (a) of persons so granted such status or so recognised who were born after 30 October 1964 and (b) of persons to whom the Indo-Ceylon Agreement does not apply. In the disposal of applications under section 8 (1) the Minister must ensure that not more than 300,000 persons to whom the Indo-Ceylon Agreement applies and who were born before October 30, 1964, are granted such status. In the computation of such number, no account is taken of children born to such persons after such date who may be granted such status. (s. 8).

Nothing in the provisions of section 7 or section 8 can be construed (a) as imposing on the Minister, either directly or indirectly, any form of duty or liability enforceable before any Court or Tribunal, whether by way of action, appeal, application in revision, writ or otherwise, to grant the status of a citizen of Sri Lanka by registration under the Act to any person; or (b) as conferring on such person, either directly or indirectly, any right or privilege to such status enforceable before any Court or Tribunal, whether by way of action, appeal, application in revision, writ or otherwise. (s. 9).

Loss of Citizenship. (i) Under the provisions of the Citizenship Act, if a citizen of Sri Lanka of full age and of sound mind desires to renounce citizenship he must make a declaration of renunciation in the prescribed manner.[4] Upon registration of the declaration, the declarant ceases to be a citizen. The Minister may, however, instead of causing the declaration to be registered, withhold registration if it is made during the continuance of any war in which Sri Lanka is engaged and if, by the operation of any law enacted in consequence of that war, the declarant is deemed for the time being to be an enemy.[5] (s. 19).

(ii) A person who is a dual citizen, that is a citizen of Sri Lanka who is or becomes a citizen of any other country, ceases to be a citizen of Sri Lanka unless he renounces citizenship of that other country in accordance with its law and notifies such renunciation to a prescribed officer (ss. 20 and 21).

(iii) A citizen by registration ceases to be a citizen of Sri Lanka if he resides outside Sri Lanka for five consecutive years or more, unless he (1) is employed abroad as an officer in the service of the Government, or (2) is abroad as a representative of the Government, or (3) being the spouse or minor child of a citizen of Sri Lanka who is abroad in any of the capacities specified in (1) or (2) above, resides abroad with that citizen, or (4) resides abroad on a holiday or for reasons of health, or (5) is a student at an educational institution abroad, or (6) resides abroad with a spouse who is a citizen of Sri Lanka by descent, or (7) is abroad for any prescribed purpose.

(iv) The Minister may by order declare that a citizen of Sri Lanka by registration shall cease to be such a citizen in circumstances specified in section 24.

Status of Aliens.[6] An alien owes a local allegiance to the Republic in return for the protection afforded to him, so long as he continues to

4. See the English cases of *Freyberger, ex parte* (1917) 2 K.B. 129; and *Gschwind* v *Huntington* (1918) 2 K.B.420, with regard to the position in England in time of war.
5. Any attempt by a citizen to become naturalised in an enemy country in time of war may constitute an offence under section 114 of the Penal Code. See *R* v *Lynch* (1903) 1 K.B. 444.
6. A special class of aliens, namely Heads of States and diplomatic agents recognised by the Government of Sri Lanka, enjoy immunity from suit and legal process and also exemption from rates and taxes. Diplomatic immunity from judicial process is extended also to the diplomatic agent's family, suit and servants: *Appuhamy* v *Gregory* (1953) 55 N.L.R. 235.

remain in Sri Lanka. Aliens do not have the full rights of citizens of Sri Lanka. An alien cannot, for example, exercise the franchise nor is he qualified to be a member of the National State Assembly or of a local authority.

An alien has no right under the law to enter Sri Lanka or to remain here except by leave of the Government. He can do so only if he has in his possession a valid passport bearing an endorsement in the prescribed form granted to him by an authorised officer under the Immigrants and Emigrants Act,[7] and, if so required by regulations made under the Act, a *visa* issued to him under such regulations.[8] The Minister is empowered by the Act to declare certain persons to be prohibited immigrants or prohibited visitors. They include those deemed by the Minister to be undesirable persons for the purposes of admission, such as persons unable to support themselves; idiots and lunatics; persons sentenced outside Sri Lanka for extraditable crimes; those certified by a medical officer to be undesirable persons to be admitted into Sri Lanka; convicts in any country who have been sentenced to imprisonment and who are deemed by the Minister to be undesirable persons for admission into Sri Lanka. The Minister may, if he deems it expedient in the public interest, by order impose restrictions on the movements or activities of non-citizens, during their stay in Sri Lanka. The Minister is empowered also to direct the removal from Sri Lanka of non-citizens for reasons specified in the Act.

Wide powers have also been given to the Minister to order the deportaton of aliens.[9] In any of the following cases he may make a deportation order against an alien:

(*a*) where that person is shown, by evidence which the Minister may deem sufficient, to be (i) a person incapable of supporting himself and his dependants; (ii) a person of unsound mind or a mentally defective person; (iii) a prostitute, procurer or person living

7. Chapter 351, of the Legislative Enactments, section 10.
8. It is worth noting, so far as the United Kingdom is concerned, that until the enactment of the Commonwealth Immigrants Act 1962 citizens of Ceylon and of other Commonwealth countries were free to enter that country unconditionally.
9. It is of interest to note that in the United Kingdom, under the Commonwealth Immigrants Act 1962 and the Immigration Appeals Act 1969, the Home Secretary may in certain circumstances make an order to deport a Commonwealth citizen unless he belongs to a category of persons excluded under the Acts; such as those born in the U.K.

on the prostitution of others; (iv) a person whom, for medical reasons, it is undesirable to allow to remain in Sri Lanka;

(*b*) where that person has been convicted in Sri Lanka or in any other country and has not received a free pardon in respect of an offence for which a sentence of imprisonment has been passed and, by reason of circumstances connected therewith, is deemed by the Minister to be an undesirable person to be allowed to remain in Sri Lanka;

(*c*) where that person has been sentenced outside Sri Lanka for an extradition crime;

(*d*) where the Minister deems it to be conducive to the public interest to make a deportation order against that person.

If there has been a competent and bona fide exercise of the lawful authority vested in the Minister, the power not having been used for an illegitimate or improper purpose or for an "ulterior motive", then the Court will not go into the further question of the reasonableness of the order and whether the Minister had material before him which a Court of law would consider sufficient for exercising that power.[10] In practice it is very difficult to prove such motives and Courts are unable to quash deportation orders. However, the alien must be given an opportunity of making representations as long as "he has some right or interest or some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say".[11]

In time of war, the rights of enemy aliens are severely curtailed.[12] The Government may intern or deport enemy aliens who are found in this country. An alien enemy, unless he is recognised in some way by the Republic has no *locus standi* in the Courts and cannot maintain an action so long as hostilities last.[13] He has no right to resort to the Courts except

10. *Sudali Andy Asary* v *Vanden Dreesen* (1952) 54 N.L.R. 66, at p. 83; *Jobu Nadar* v, *Grey* (1956) 58 N.L.R. 85; *Liversidge* v *Anderson* (1941) 3 All E.R. 338 at p. 358. *per* Lord Atkin. *Ex parte Venicoff* (1920) 3 K.B. 72. *R* v *Governor of Brixton Prison, ex parte Soblen* (1963) 2 Q.B. 243.
11. *Schmidt* v *Secretary of State for Home Affairs* (1969) 2 Ch. 149, at p. 170, *per* Lord Denning; *Ridge* v *Baldwin* (1964) A.C. 40.
12. See Mc Nair, *Legal Effects of War*, for a full discussion of this topic.
13. *Hagenbeck* v *Vaitilingam* (1914) 18 N.L.R. 1, 3. *Ertel Bieber* v *Rio Tinto* (1918) A.C. 260.

by special permission given by the Government.[14] The task of enemy status is not nationality but the place where the person resides and carries on business.[15] But an action is not suspended merely because an alien enemy is a defendant and there is no rule of law which prevents an alien enemy from appearing and conducting his defence.[16]

Extradition. Deportation of an alien should be distinguished from extradition. The latter consists of "the delivery of an accused or convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of, a crime, by the State on whose territory the alleged criminal happens for the time to be".[17]

The Fugitive Persons Act, No. 29 of 1969, provides for the return of fugitive persons from Sri Lanka to other countries with which extradition arrangements for such return have been made by the Government of Sri Lanka, and in respect of which there is a declaratory Order of the Minister applying the provisions of the Act. An "extradition arrangement" means any arrangement, treaty or agreement made by the Government of Sri Lanka with any other country for the return to that country of "fugitive persons", meaning persons found in Sri Lanka (a) who are accused of having committed in that country any offences which fall within the First Schedule and are specified in such arrangement, treaty or agreement or (b) who are persons alleged to be unlawfully at large after conviction for any such offence in that country. The fugitive offender, having committed an offence in one place, flies from it to another to escape the consequences.[18] The Act does not seem to apply to a person who in one country of the Commonwealth commits an offence in another part and who was not in that part at the time of the offence, and has not since been there.[19]

A fugitive person cannot be returned under the Act to any designated country, or committed to or kept in custody for the purposes of such return:

14. See *Yokkomuttu* v *Saminathan* (1944) 45. N.L.R. 316.
15. *Bogstra* v *Co-operative Condensed Fabrik* (1943) 44 N.L.R. 272. *Porter* v *Freudenberg* (1915) 1 K.B. 857.
16. *Yokkomuttu* v *Saminathan* (1944) 45 N.L.R. 316; *Robinson & Co.* v *Continental Insurance Co. of Mannheim* (1915) 1 K.B. 155.
17. Oppenheim, *International Law*, Vol. 1, (8th ed.), p. 696.
18. *Alles* v *Palaniappa Chetty* (1917) 19 N.L.R. 334, at p. 337.
19. *Alles* v *Palaniappa Chetty* (1917) 19 N.L.R. 334, at p. 338.

(1) if it appears to the Minister of Foreign Affairs, to the Court of committal, or to the Supreme Court on an application for habeas corpus or for review[20] of the order of committal:

(*a*) that the offence of which that person is accused or was convicted is an offence of a political character. Such an offence does not include an offence against the life or person of the Head of the Commonwealth or the Head of any country, other than a Commonwealth country, by whatsoever name or designation called or any related offences described in s. 5 (3) of the Act.

It has been said[21] that the idea behind the phrase "an offence of a political character" is "that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country.....It does indicate that the requesting State is after him for reasons other than the enforcement of the criminal law in its ordinary....aspect". It is not always easy to determine in each case whether the offence is political. Even murder may in certain circumstances be a political offence, for example, if it is caused in and forms part of a political insurrection.[22] But an isolated explosion caused by an anarchist in a political disturbance may not amount to a political offence.[23]

(*b*) that the request for his return, though purporting to be made on account of a relevant offence, is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, caste or political opinions; or

20. See *In Re Ganapathipillai* (1920) 21 N.L.R. 481 (Supreme Court's jurisdiction to revise the orders made by the Magistrate under the old law.)
21. *Schtraks* v *Government of Israel* (1962) 3 All E.R. 529, at p. 540, *per* Viscount Radcliffe.
22. *Re Castioni* (1891) 1 Q.B. 149. See also Stephen *History of the Criminal Law in England*, ii, p. 71.
23. *Re Meunier* (1894) 2 Q.B. 415.

(*c*) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, caste or political opinions;

(2) if it appears, as provided in (1) that if charged with that offence in Sri Lanka he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction;

(3) unless provision is made by the law of that country or by the extradition arrangement with that country, for securing that he will not, unless he has first been restored or had an opportunity of returning to Sri Lanka, be dealt with in that country for any offence committed before his return under the Act, other than

(*a*) the offence in respect of which his return under the Act is requested,

(*b*) any lesser offence proved by the facts established before the Court of commital,

(*c*) any other offence, being a relevant offence in respect of which the Minister may consent to his being so dealt with.

Subject to the provisions of the Act relating to provisional warrants, a fugitive person of any designated country cannot be dealt with under the Act except in pursuance of an order of the Minister (an "authority to proceed") issued in pursuance of a request made to the Ministry by the Government of that country. A warrant for the arrest of the fugitive person may be issued (a) on the receipt of an authority to proceed, by a competent Magistrate's Court, or (b) without such an authority, by such Court or by any other Magistrate's Court upon information that such person is or is believed to be in or on his way to Sri Lanka. A fugitive person arrested in pursuance of such a warrant must be brought as soon as practicable before any such competent Magistrate's Court ("Court of Committal") as may be directed by the warrant.

Where an authority to proceed has been issued in respect of the fugitive person arrested and the Court of committal is satisfied, after hearing any evidence tendered in support of the request for the return

of that person or on behalf of that person that the offence to which the authority relates is a relevant offence, and is further satisfied

(*a*) where that person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it has been committed within the local limits of the jurisdiction of the Court; or

(*b*) where that person is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large,

the Court must, unless his committal is prohibited by any other provision of the Act, commit him to custody to await his return under it. On the other hand, if the Court is not so satisfied or if the committal of that person is so prohibited, the Court must discharge him from custody.

Where a fugitive person is committed to custody the Court must inform him in ordinary language of his right to make an application for *habeas corpus*, or to apply for review of the order of committal, to the Supreme Court, and must forthwith give notice of the committal to the Minister. If he is not discharged by order of the Supreme Court, the Minister may by warrant order him to be returned to that country unless the return is prohibited under any provision of the Act or the Minister decides under section 11 to make no such order in his case.

CHAPTER 28

FUNDAMENTAL RIGHTS AND FREEDOMS

I. THEIR GENERAL NATURE AND BACKGROUND

Meaning. By fundamental human rights is meant "the equal and inalienable rights of all members of the human family".[1] These rights belong to every person, it has been said, by virtue of his inherent dignity and worth as a member of the human family. The Preamble of the Universal Declaration of Human Rights states:

"Recognition (of such dignity and human rights) is the foundation of freedom, justice and peace in the world....It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

This concept of human rights is, in fact, part of the religious and cultural heritage of man. It is derived from ancient philosophies and religions of both the East and the West. The basis of human rights lies as much in the Eastern concept of "Dharma", meaning sense of right or duty binding on everyone, as in the Scholastic theory of law, where natural law is sought to be equated with right reason. According to Dharma and natural law, the ruler himself is subject to the law. The foundation of this Rule of Law is the intrinsic worth of the human person and therefore all persons without exception must respect and obey this law.[2] As far back as twenty-three centuries ago Asoka, the Buddhist

1. Preamble of the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations.
2. Professor Lauterpacht has stated that the inclusion of the charge of crimes against humanity in the Charter of 1945 defining the jurisdiction of the International Military Tribunal for the trial of Major War Criminals "affirmed the existence of fundamental human rights superior to the law of the State and protected by international criminal sanctions, even if violated in pursuance of the law of the State, (Oppenheim's *International Law* 7th. ed., p, 576 Lauterpacht, *International Law and Human Rights*, (1949), pp. 35-37.) See, Cooray, *Constitutional Government and Human Rights in a Developing Society* (1959), pp. 26-27.

Emperor of India, proclaimed to his subjects some of the important human rights as found in Hindu and Buddhist teachings. For instance, with regard to freedom of conscience and religious toleration, he said:

"He who exalts his own belief, discrediting all others, does so surely to obey his religion with the intention of making a display of it. But behaving thus, he gives it the hardest blows. And for this reason concord is good only in so far as all listen to each other's creeds and love to listen to them".

In the Middle East, the Jewish, Christian and Islamic beliefs in the making of man "in God's own image and likeness" also recognised the unique dignity and value of the human person. It has been said, God "in creating human nature, didst most wonderfully dignify it, and has still more wonderfully renewed it".

In the West too, the important natural rights of man were elaborated by great thinkers and laid down as being of universal application. In the Middle Ages, philosophers like St. Thomas Aquinas stressed the intrinsic superiority of natural law and natural rights over legal rights created by mere positive laws—the natural law being, as he expressed it, "the participation in the eternal law of the mind of the rational creature".

The rights of man which constitute the foundation of justice imply the duty of everyone in relation to others—the duty, as St. Thomas puts it, "to give to each man his due". In a letter to Julian Huxley, who was at the time Director-General of UNESCO, Mahatma Gandhi has written much to the same effect: "I learnt", wrote Gandhi, "from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done". Rights, therefore, cannot be conferred in absolute terms but must be restricted in the interests of society as a whole.

Rule of Law. So far as the protection of fundamental human rights in Sri Lanka is concerned, we have had, as compared with many other countries, a great initial advantage. For over two thousand years of the Island's long history the Courts of Law have occupied a unique place in its system of government. A hierarchical system of judicature was one of the dominant characteristics of the ancient Sinhalese kingdom which existed unbroken up to the British occupation of Kandy in 1815. It is also a well-known fact that from the beginning of the British occupation

the Courts which were established in this country have played a dynamic role as the fearless upholders of the principle of equal justice under the Rule of Law. According to judicial decisions in Sri Lanka, the essence of the Rule of Law may be said to be that the Administration is bound by the law and it cannot interfere with the rights of the individual except in accordance with the law.[3]

The concept of the Rule of Law has been subject to various interpretations. According to Dicey, the Rule of Law has three meanings; (1) "The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and the exclusion of the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government"; (2) "Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts"; (3) "A formula for expressing the fact that with the British the law of the Constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the sources, but the consequence of the rights of individuals, as defined and enforced by the courts".

The Rule of Law has, however, no formal or static meaning except as referring to any legal order enforced by the State in order to safeguard fundamental human rights and freedoms. It is incorrect to consider the Rule of Law, as Dicey seems to have done,as having any necessary connection with the individualist or *laissez faire* State or with the absence of Administrative Courts and Tribunals and of wide discretionary or decision-making powers vested in administrative authorities. As long as these powers are not arbitrary and are required to be exercised subject to adequate safeguards provided against their abuse, the Rule of Law is not violated. Considered as a dynamic concept, the Rule of Law is therefore compatible with the planning and regulatory functions of any modern State, such as Sri Lanka, with public enterprise and with discretionary powers exercised by public authorities as long as there are safeguards to secure political and social justice and to prevent the abuse of public and private power.

The Rule of Law was formulated as a dynamic concept by the International Commission of Jurists in the Declaration of Delhi, 1959, as follows:

3. See *In re Bracegirdle* (1937) 39 N.L.R. 193.

(i) The function of the Legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality.

(ii) The Rule of Law depends not only on the provision of adequate safeguards against abuse of power by the Executive, but also on the existence of effective government capable of maintaining law and order and of ensuring adequate social and economic conditions of life for the society. In other words, as the South-East Asian and Pacific Conference of Jurists held in Bangkok in 1965 concluded, the Rule of Law requires "the establishment and observance of certain standards that recognise and foster not only the political rights of the individual but also his economic social and cultural security".

(iii) An independent Judiciary and a freely organised legal profession are essential requisites for the maintenance of the Rule of Law. Judicial independence implies, as stated by the Delhi Conference, "freedom from interference by the Executive or the Legislature with the exercise of the judicial function."[4]

With regard to the procedural machinery for the enforcement of the Rule of Law and the rights of persons and the prevention of the abuse of powers, in addition to the ordinary legal remedies the Supreme Court may grant, it has the power to issue mandates in the nature of writs. The Constitution (s. 121 (3)) expressly provides that the powers of the highest Court with original jurisdiction, except in matters expressly excluded by law, shall include the power to issue such writs. Of these writs, mandamus, certiorari and prohibition are frequently issued to public authorities to prevent them from exceeding or abusing their legal powers. So far as the writ of habeas corpus is concerned, it has almost from the inception of the Supreme Court been regarded as

4. *The Rule of Law in a Free Society* (Report of the International Congress of Jurists, New Delhi, 1959).See also N. S. Marsh in *Oxford Essays in Jurisprudence*, at p. 223.

one of the most important safeguards of personal freedom in Ceylon. Two other judicial remedies, namely the Injunction and the Declaration, have also been used to challenge the abuse of power by public bodies and to enforce the rights of citizens. The availability of these two remedies has been curtailed by the Interpretation (Amendment) Act, No, 18 of 1972.

Under the doctrine of the Rule of Law which prevails in Sri Lanka, where a person's fundamental rights, such as those of personal freedom, freedom of speech, of peaceful assembly and of association, are infringed without legal justification, he may always seek his remedy according to the law of the land. In accordance with the doctrine of the Rule of Law the Courts interpret strictly any statute which purports to interfere with the freedom of the citizen. The rule of construction adopted by the Courts is in favour of such freedom. In the Bracegirdle case, Chief Justice Abrahams said:[5]

"We have heard this case with most anxious care, and I approach the question of our decision with equally anxious consideration as must always be done by judges where the liberty of the subject is concerned.... It (the jurisdiction of the judges) is now frequently the only refuge of the subject, or more frequently of the subordinate officials. I hope it will always remain the duty of the judges to protect these people".

In the *Bracegirdle* case the Supreme Court held that the power of the Governor to issue an order for arrest, detention and deportation under the Order in Council of 1896 was not absolute and could be exercised only in a state of emergency contemplated by the preamble to the amending Order in Council of March 1916. The Court held that in this country no person could be deprived of his liberty except by judicial process. It accordingly ordered the release of Bracegirdle.

In 1964, notwithstanding the fact that the previous (Soulbury) Constitution, unlike the present Constitution, did not guarantee the right to freedom of movement, the Supreme Court observed that no unreasonable restrictions should be placed by the Executive on a person's freedom of movement and that the holder of a valid passport and a

5. (1937) 39 N.L.R. 193, at p. 205.

return ticket to travel abroad has the right to leave the Island and return without hindrance.[6] This striking example illustrates the extent to which the Courts in Sri Lanka have been ready to use their power of judicial review in order to check the excessive or abusive exercise of power by the Administration.

The International Congress of Jurists held in Rio de Janeiro in December 1962 has expressed the view that where there is a complaint of an infringement affecting human rights the Courts should be entitled to take into consideration, at least as an element of interpretation and as a standard of conduct in civilised communities, the provisions of the Universal Declaration of Human Rights. So far as the Supreme Court is concerned, it has recognised the Declaration as being "of the highest moral authority",[7] although it has not imposed any legal obligation on Sri Lanka as a member of the United Nations. This view of our Courts is in consonance with that expressed by the Congress of Rio and with the expression of our determination under the Charter as a member of the United Nations "to reaffirm faith in fundamental human rights".

Constitutional Recognition. In modern times, fundamental human rights are sought to be recognised and protected also by the incorporation of Bills of Rights in written Constitutions. Bills of Rights are found in most of the post-World War II Constitutions of Asian representative democracies as well as in many Constitutions of European countries. They are also found in the Constitutions of the Soviet Union and of other Socialist States. Where fundamental rights are incorporated in a Constitution these same rights can no longer be said to exist in the common law side by side with the written Constitution.[8] When rights are so declared in a written Constitution and legally protected by procedural machinery, the rights become "positive". Under English law, on the other hand, they are "negative", in the sense that a right is merely a liberty to so much freedom as is not taken away by law; that is to say, "it asserts the principle of legality, that everything is legal that is not illegal".[9]

6. See *Digest of Judicial Decisions*, L. G. Weeramantry (Journal of the I.C.J., Vol. VI, pp. 319-320).
7. *Leelawathie* v *Minister of Defence and External Affairs* (1965) 68 N.L.R. 487, at p. 490. On the desirability of recognising the Declaration in the Courts, see T. S. Fernando, "Human Rights as a Tradition of the East", *Ceylon Daily News*, 10 December 1964.
8. See *The State* (*Walsh*) v *Lennon and Others* (1942) I.R.112, at p. 117; *The State* (*Burke*) v *Lennon and Attorney-General* (1940) I.R. 136.
9. Sir Ivor Jennings, *The Law and the Constitution* (5th ed.), p. 263.

This practice of the constitutional recognition, guarantee and enforcement of fundamental human rights goes back to the American "Bill of Rights" of 1791 and the French Declaration of "the Rights of Man" in 1789. More recently, as in the case of Sri Lanka, much of the inspiration has come from the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948. This Declaration is important also for the reason that it contains not only the traditional civil and political rights but also a group of economic, social and cultural rights. Under this group are included the right of everyone to work, to free choice of employment, to just and favourable conditions of work and remuneration, to protection against unemployment, to equal pay for equal work, to form and join trade unions, and to an adequate standard of living, including food, clothing and housing. Similar rights have been inserted in some Constitutions such as those of the Irish Republic, India and Sri Lanka, as Directive Principles of State Policy.

The agitation for a constitutional Bill of Rights in Sri Lanka really commenced after the 1943 Declaration of the British Government on Constitutional Reform. When the Board of Ministers were drafting their constitutional scheme in terms of that Declaration, the Ceylon National Congress, at the request of some Congress Ministers, submitted to the Board for its consideration a draft Constitution prepared by the author and embodying also a comprehensive Bill of Rights.[10] The view was expressed that a Constitutional Bill of Rights with procedural remedies for their enforcement would help considerably in protecting fundamental human rights in a country, such as ours, with conditions and traditions so different from those of Britain.[11] Mr. D. S. Senanayake was very keen that the new Constitution should contain comprehensive guarantees of fundamental human rights so that the fears of various communities with regard to their position in the new political order might be allayed. At that time Sir Ivor Jennings was, in addition to his work as Vice-Chancellor of the Ceylon University, the chief unofficial constitutional adviser to the Ministers. Although Sir Ivor made a remarkable contribution towards the making of what was later called the Soulbury Constitution, he held strong views with regard to the constitutional incorporation of a Bill of Rights. As he wrote later:

10. See "25 *Years—but Yet!*" (Congress 1945), p. 29.
11. See my article on "The Constitution in the making", *Times of Ceylon*, 16 October 1943. See also A. J. Wilson, Ceylon Journal of Historical and Social Studies (1958), 73-95.

"In Britain we have no Bill of Rights; we merely have liberty according to law, and we think—truly, I believe—that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man".[12]

It is of interest to note that Sir Ivor changed his views on this subject in later years after observing for a considerable period of time the working of the previous (Soulbury) Constitution. In a talk over the British Broadcasting Corporation's Overseas Service in 1961 he candidly admitted that a comprehensive chapter of fundamental rights was very desirable in Ceylon's Constitution, particularly in the heterogenous society of Ceylon. After admitting that the Constitution he helped to draft had had only a limited success, Sir Ivor added: "If I knew then, as much about the problems of Ceylon, as I do now, some of the provisions would have been different".

As a matter of fact, with regard to fundamental liberties Sir Ivor had written earlier in England in Chapter 8 of his book on *The Law and the Constitution:* "The object of most Constitutions is to set up machinery by which the wishes of the governed may determine the nature of the government. It is never entirely successful. But even if it were it would leave unsolved one most important problem. The wishes of the governed mean at best the wishes of a majority of them. Yet the minority, too, is composed of excellent persons, perhaps more intelligent and certainly less orthodox. The problem of government, therefore, is not only to provide for government by the majority, but also to protect the minority".

The Board of Ministers eventually decided in 1944, on Sir Ivor Jennings' advice, not to incorporate in their draft Constitution a Bill of Rights but, instead, to include a provision which, according to Sir Ivor, was based on section 5 of the Government of Ireland Act, 1920.

12. *Approach to Self-Government* (1958), p. 20. It is relevant to note that even in Britain there is now a growing body of opinion favouring a constitutionally entrenched Bill of Rights: S. A. de Smith, *Constitutional and Administrative Law* (1971), p. 32. See also O. Hood Phillips, *Reform of the Constitution* (1970). For a cogent justification for placing civil liberties in the United States beyond the reach of ordinary majorities in the Legislature, see Norman Dorsen, *Frontiers of Civil Liberties* (Pantheon Books, 1968); see also *West Virginia State Board of Education* v *Barnette* (1943) 319 U.S.624: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts".

It prohibited only legislation infringing religious freedom or discriminating against persons of any community or religion. This particular provision subsequently became part of the controversial section 29 (2) of the Soulbury Constitution. Incidentally the Judicial Committee of the PrivyCouncil stated in a judgment in 1964 that section 29(2) of that Constitution represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution and it was therefore unalterable under that Constitution.[13] This statement was used among other arguments to urge the inexpediency of merely revising the previous Constitution in order to provide for a republic and to make other necessary changes in the Constitution.

There had been, almost from the inception of the previous Constitution, a strong body of opinion that the individualrights guaranteed in section 29 (2) were not sufficient and that a comprehensive Bill of Rights should be incorporated in the new Constitution. The fact that India had incorporated a comprehensive list of fundamental rights in her republican Constitution also had a great influence here. It was no surprise, therefore, that when a Joint Committee of Parliament was appointed in 1957 on a motion of the Prime Minister, Mr. S. W. R. D. Bandaranaike, to consider a revision of the Constitution, one of the specific matters referred to it was the guaranteeing of fundamental rights.[13a]

Their Incorporation in the Republican Constitution. The joint election manifesto of the United Front which was issued in connection with the general election held on 27 May 1970 sought a mandate to permit the elected members of the House of Representatives to function as a Constituent Assembly to draft, adopt and operate a new Constitution. The Constitution would declare Ceylon to be a free, sovereign and independent Republic pledged to realise the objectives of a socialist democracy and it would also secure fundamental rights and freedoms to all citizens. Of the Basic Resolutions submitted by the Minister of Constitutional Affairs and approved by the Steering and Subjects Commitee of the Constituent Assembly, No. 5, stated: The Constitution shall contain a statement of fundamental rights and freedoms, and such statement shall include the following rights and freedoms:—(i)Equality before the law, (ii) Right to life, liberty and security of person, (iii) Right to personal liberty, (iv) Right to freedom of thought,

13. *The Bribery Commissioner* v *Ranasinghe* (1964) 66 N.L.R. 73, at p. 78.
13a. *Parliamentary Series, No.* 12 *of Third Parliament: Report from the Joint Select Committee.*

conscience and religion, (v) Right to freedom of peaceful assembly and association, (vi) Right to freedom of speech and expression, (vii) Freedom from discrimination in the public service, (viii) Right to freedom of movement and of choice of residence. Basic Resolution No. 4 stated that the Constitution shall contain a statement of the Principles of State Policy which shall guide the making of laws and the governance of Sri Lanka but which shall not be justiciable in any Court of Law.[14] The statement in the Constitution was to include the Principles that were enumerated in the Resolution.

These Principles of State Policy as well as the Fundamental Rights and Freedoms were later embodied in the new republican Constitution. The right to equality before the law and the right to life, liberty and security of person are conferred on all persons, while the other rights and freedoms are conferred only on citizens. However, all laws existing immediately before the commencement of the Constitution operate notwithstanding any inconsistency with the provisions relating to Fundamental Rights and Freedoms. (s. 18 (3)).

There has been some criticism that the Chapter of fundamental rights and freedoms is not sufficiently comprehensive. It has been said that the Universal Declaration of Human Rights recognises the right of the individual to own property alone as well as in association with others and that no one should be arbitrarily deprived of his property. Those in favour of the omission of the right to own property have argued that, unlike in the case of other fundamental rights, here not only the exercise of the right but the right or entitlement itself to own property was subject to the requirements of public interest.It has also been said, that the omission of the right to property in the Chapter did not mean that the individual had no right to any personal property which is necessary for his own use.

The Declaration of Fundamental Rights and Freedoms in the Constitution provided a radical break from the British tradition. It is reminiscent of the Constitutions of the United States, Ireland and India and of certain countries of Europe. The provisions in our Constitution embodying

14. This does not mean that the Courts are not obliged to take cognisance of the general tendency of these principles in the decision of cases relating to the subject-matter of such principles. See Kohn *The Constitution of the Irish Free State* (1932), p. 110n.

fundamental rights are not exhaustive of the rights of citizens of Sri Lanka under the law. There are also certain freedoms to which the citizen is entitled under the ordinary law, in the absence of legal restrictions imposed by the National State Assembly.[15] Under our law "there is a definite body of well-known legal principles, excluding arbitrary executive action".[16] No member of the executive can interfere with the liberty of the citizen "except on the condition that he can support the legality of his action before a Court of justice".[17]

In the debate on the Basic Resolutions relating to Fundamental Rights in the Constituent Assembly, Mr. A. Aziz moved that the right to freedom from arrest, the right to freedom of thought, conscience and religion and the right to freedom of peaceful assembly and association should be extended to every person and not be confined to citizens. Mr. V. Dharmalingam, on behalf of Mr. S. J. V. Chelvanayakam, moved further that throughout Basic Resolution 5 (which dealt with fundamental rights and freedoms) the word 'citizen' should be replaced by the word 'person'. According to Mr. Dharmalingam the clause guaranteeing freedom from arrest to citizens contradicts the earlier clause which guarantees liberty of person to everyone, whether he is a citizen or not.[18] Mr. Aziz stated that the agreement which is popularly called the "Sirima-Shastri Pact" recognised "that there are in this country 975,000 persons who are called "stateless" people. Of these 975,000 persons, 300,000 persons should be given citizenship of Ceylon on a phased basis and over a period of 15 years (from 1964); 525,000 persons would acquire Indian citizenship again over a phased period of 15 years (from 1964); and there would be a residue—a recognised residue—of 150,000 persons, whose future was to be decided by further negotiation and discussion between the Prime Minister of India and of Ceylon". Mr. Aziz went on to state that "the position is that not only the citizens of India, not only the potential citizens of India, but also the potential citizens of Ceylon would not enjoy the protection of the fundamental rights."[19] The Minister of Constitutional Affairs, Dr. Colvin R. de Silva, stated in reply that "if you want

15. See, for example, the *Bracegirdle* case (1937) 39 N.L.R. 193.
16. *Bracegirdle* case (*supra*), at p. 209.
17. At p. 212, See also *Aseerwatham* v *Permanent Secretary, Ministry of Defence and External Affairs and Others* (L. G. Weeramantry, *Digest of Judicial Decisions* Journal of the I.C.J. Vol. VI, pp. 319-320).
18. *Constituent Assembly Debates*, Vol. 1, 1134, 1137.
19. *Constituent Assembly Debates*, Vol. 1, 1087-88.

to arrest a man, then a non-citizen cannot have the same rights as a citizen, for a citizen is entitled to certain things; but in fact the ordinary law..... kept alive gives to the non-citizen also the protection of the law of the land, the only difference is that it is changeable by a simple majority in terms of the present Constitution".[20] The proposed amendments were eventually rejected by the Assembly.

Mr. J. R. Jayewardene proposed, *inter alia*, an addition to the list of fundamental rights and freedoms in the Basic Resolution, namely, that "no person shall be deprived of his property save by law". Mr. Jayewardene said that a Joint Select Committee of the Senate and House of Representatives including Mr. S. W. R. D. Bandaranaike on 5 March 1959, generally approved for inclusion in the Constitution certain rights including "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.[21] Mr. Jayewardene's amendment was also rejected, by 71 votes to 13.

There cannot be any doubt that the incorporation of fundamental rights and freedoms in the Constitution along with machinery for their enforcement enables the Courts and other State institutions to guarantee them within the limits imposed by the Constitution and the law. But in the ultimate analysis what will be decisive in this regard is the will and vigilance of the Sovereign people to safeguard their fundamental rights and freedoms to the realisation of which the Republic is pledged, as stated in the Preamble of the Constitution. Fundamental rights are secure in their protection to the extent that they acquire a place in the people's imagination and regard. By the declaration of fundamental rights in the written Constitution, these rights tend to acquire such a place in the public mind. This process will be heightened if respect for fundamental rights is developed further, commencing from the village level. It is ultimately the people's own determination and will that can make fundamental rights effective in practice and secure for all persons freedom, equality and justice, irrespective of race, religion or caste.

20. *Constituent Assembly Debates*, Vol. 1, 1150.
21. *Constituent Assembly Debates*, Vol. 1, 1154-58. See Minutes of 10th Meeting.

II. RIGHT TO EQUALITY BEFORE THE LAW

Meaning. All persons[22] are equal before the law and are entitled to equal protection of the law.[23] These are two aspects of the same principle of equal justice. Equality before the law is the negative aspect and guarantees the absence of privileges in favour of any person and the equal subjection of all classes to the law. Equal protection of the law is the positive aspect and means that persons similarly situated should receive similar treatment by the law, both in rights and duties. It assumes that among equals the law should be equal and should be equally administered, that like should be treated alike.[24] Among equals, whether between persons or classes of persons, there should be no discrimination.[25] "No impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits of others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."[26] The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status, or political influence. The right also implies equal access to the Courts for adjudication of disputes.

Although the section forbids class legislation, it does not automatically rule out legislation which involves classification of persons and things

22. Corporations are "persons" within the meaning of the Article. See *Yick Wo* v *Hopkins* (1886) 118 U.S. 356; *Quaker City Cab Co.* v *Penn* 277 U.S. 389; *Seshadri* v *I. T. Officer* A.I.R. 1954 Mad 806, 809; *Chiranjit Lal* v *Union of India* A.I.R. 1951 S.C. 41.

23. Section 18 (1) (a) of the Constitution. See also section 1 of 14th Amendment of the Constitution of the United States and Art. 14-18 of the Indian Constitution. According to Dicey the second meaning of the "rule of law" was "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts". By "equality" Dicey was not referring to rights or duties but merely to the fact that in England actions for civil wrongs against public officers committed in the course of their employment were tried in the ordinary civil Courts and not in the Administrative Courts as in France. On the other hand, equality before the law should really mean equal justice under the law, including its administration.

24. Sir Ivor Jennings, *The Law and the Constitution* (5th ed.), p. 50; *Ram Prasad* v *Bihar* (1953) S.C. 215.

25. *Ibid.* See also *Yick Wo* v *Hopkins* (*ante*); *Truax* v *Corrigan* (1921) 257 U.S. 312

26. *Barbier* v *Connelly* (1885) 113 U.S. 27, *Ram Prasad Narayan Sahey* v *Bihar* A.I.R. (1953) S.C. 215.

into groups.[27] Equality under the provision does not mean that persons who are different must be treated as if they are equal. Differentiation between classes must, however, be on a classification based on an intelligible differentia or a real and substantial difference, having a just and reasonable relation to the object or purpose sought to be achieved by the statute in question.[28] In other words, the classification for the purpose of legislation must be reasonable and cannot be made arbitrarily and without any substantial basis. Persons in one class should be treated equally, in like circumstances and conditions. The class may even consist of one person if the classification has been made on a reasonable basis, having regard to the objects of the legislation.[29]

The principle of equality does not mean therefore that every law must have universal application for all persons who are not, by nature, attainment and circumstances, in the same position; the varying needs of different classes require separate treatment and the principle does not take away from the State the power of classifying persons for legitimate purposes.[30]

There must also be no discrimination, however, on grounds solely of race, caste, religion, sex or place of birth. Such distinction, if based on an unreasonable classification would amount to a denial of the equal protection of the law provided for in the Constitution.[31] The guarantee is aimed at undue favour and privilege on the one hand and at hostile discrimination or the oppression of inequality, on the other.[32] There may be circumstances in which intended legislation though framed so as not to so discriminate directly, yet will indirectly achieve the same result. Such a colourable expedient which in substance seeks

27. *Lindsley* v *Natural Carbonic Gas Co.* 220 U.S. 61 (1911).
28. *Power Manufacturing Co* v *Saunders* (1927) 274 U.S. 490; *Bayside Fish Co.*, v *Gentry* (1936) 297 U.S. 422 (429); *Bombay* v *Balsara*, A.I.R. 1951 S.C. 327; *Ram Krishna Dalmia* v *Justice Tendolkar* A.I.R.(1958) S.C. 538. *State of West Bengal* v *Anwar Ali* (1952) S.C. 75, 93.
29. *Chiranjit Lal* v *Union* A.I.R. 1951, S.C. 41. *Travancore Rayon Ltd.* v *Peramvoor Municipality* A.I.R. (1958) Ker. 149. *Magoun* v *Illinois Trust* 170 U.S. 283.
30. *Bombay* v *F.N. Balsara* A.I.R.(1951) S.C.318;*Chiranjit Lal* v *Union (ante)*;*State of West Bengal* v *Anwar Ali* (1952) S.C. 75.
31. See *Brown* v *Board of Education* 347 U.S. 483 (1954), where it was held by the American Supreme Court that the segregation of negro children in public schools, solely on the basis of race, was a denial of the equal protection of the laws guaranteed by the U.S. Constitution.
32. *Truax* v *Corrigan* 257 U.S. 312. *Pembina Co* v *Penn* 125 U.S. 181.

to effect discrimination is not permissible.[33] A Bill which is "fair on its face and impartial in appearance, but which indirectly makes unjust and illegal discrimination between persons in similar circumstances, material to their rights" would be inconsistent with the right to equality before the law and to equal protection of the law guaranteed in section 18 (1) (a) of the Constitution.[34]

Prevention of Social Disabilities. In 1957 the Prevention of Social Disabilities Act was passed by the Legislature. The Act makes punishable by fine and imprisonment the imposition of social disabilities on any person. The intention of the Act was not merely to prevent the imposition of fresh social disabilities but also to make illegal as from the date of the Act the imposition of any social disability by reason of caste upon any person.[35] Any person who imposes any such disability is guilty of an offence punishable by imprisonment for a term not exceeding three years with or without a fine not exceeding three thousand rupees. Where an offence under the Act is committed on, or in relation to, any premises where any business is carried on under the authority of a licence and the person who is the proprietor or manager of such business is convicted of such offence, the Court may, in addition to any other punishment it may lawfully impose for that offence, cancel such licence. A person is deemed to impose such a social disability:

(a) if he prevents or obstructs another person from or in (i) being admitted as a student to, or being employed as a teacher in,any educational institution, (ii)entering, or purchasing any article at a shop, market or fair, (iii) entering, or being served at, any public hotel, resthouse, eating house restaurant or any other place where articles of food or drink are sold to the public, (iv) obtaining any room for residence in a public hotel, rest-house or lodging-house, (v) obtaining or using water from any public well, spring, water-pipe or any other source of supply of water to the public, (vi) entering, or obtaining the service provided at, a hairdressing saloon or laundry, (vii) entering any public cemetery and attending or taking part in any burial or cremation therein, (viii) wearing any kind

33. *Kodakan Pillai* v *Mudanayake* (1953) 54 N.L.R. 433, at p. 438. *Morgan Proprietory Ltd.* v *Deputy Commissioner of Taxation for N.S.W.* (1940) A.C. 838, 858. *Yick Wo* v *Hopkins* 118 U.S. 356 (1886). See also *Attorney-General for Alberta* v *Attorney-General for Canada* (1939) A.C. 117.
34. See *Yick Wo's Case* (*ante*).
35. *Suntharalingam* v *Inspector of Police, Kankesanturai* (1971) 74 N.L.R. 457.

of clothes, head-covering or foot-covering at any place to which the public have access, whether on payment or otherwise, or at the place of such other person's employment, or in the course of such other person's trade, business or employment, (ix) being carried as a passenger in any public vehicle or vessel, (x) entering, or being present in, any place to which the public have access, whether on payment or otherwise, other than a temple, *devale*, *kovila*, church, mosque or other place of any religious worship, or (xi) being engaged in any lawful employment or activity;

or (b) if he prevents or obstructs another person, being the follower of any religion, from or in entering, being present in, or worshipping at any place of worship or any portion of it to which followers of that religion have or have had access. In *Suntharalingam* v *Herath*[36] it was held that a person who prevents or obstructs, at the instance of the High Priest and hereditary trustee of a Hindu temple which constitutes a public religious trust, a Hindu worshipper of a different caste from entering into or beyond the inner court-yard of the temple in breach of the constitution of the religious trust and of the custom or ancient usage observed in that temple, contravenes the Act;

or (c) if he, being a public officer, does not perform or exercise any duty or power which he is legally bound to perform or exercise for the benefit of such other person;

or (d) if he, being the proprietor of, or a person having control over, or a person employed as a worker in, a place to which the public have access whether on payment or otherwise, subjects another person to any discrimination;

or (e) if he corrupts or fouls the water of any public well, spring, tank or reservoir so as to make it less fit or unfit for the purpose for which it is ordinarily used by such other person;

or (f) if he prevents or obstructs such other person, being a teacher or student or an employee in any educational institution, from or in obtaining or using water from any well, spring, tank, reservoir or water-pipe in that institution or in the precincts of that institution;

or (g) if he prevents or obstructs such other person, being a teacher or a student or an employee in any educational institution, from or in participating in any activity in that institution.

36. (1969) 72 N.L.R. 54.

A police officer may remove any barricade or obstruction erected or placed in any place if he has reasonable ground to believe that it was so erected or placed in order to be used for the purpose of committing an offence under the Act. The officer may also open any gate or door if he has reasonable ground to believe that it was closed for the purpose of committing an offence under the Act. Whenever a police officer has reasonable ground to believe that any person is likely to commit an offence under the Act, he may arrest such person without a warrant and deliver him into the custody of the officer in charge of a police station who may either release him on his executing a bond for his appearance before a Magistrate's Court or within 24 hours take him before a Magistrate.

Prohibition of Discrimination in Public Employment. According to section 18 (1) (h) of the Constitution no citizen otherwise qualified for appointment in the central government, local government, public corporation services and the like, shall be discriminated against in respect of any such appointment on the ground of race, religion, caste or sex. However, in the interests of such services, specified posts or classes of posts may be reserved for members of either sex.

The Constitution thus forbids race, religion, caste or sex (subject to the stated qualification) as grounds for classification for public employment. On any of these enumerated grounds there must be no bias disclosed.[37]

III. RIGHT TO LIFE, LIBERTY AND SECURITY OF PERSON

Scope. The Constitution enacts that no person shall be deprived of life, liberty or security of person except in accordance with the law. (s. 18 (1) (b)). Deprivation of 'life' does not refer only to death. The prohibition against its deprivation "extends to all those limbs and faculties by which life is enjoyed".[38] "Life" may also possibly be said to include "livelihood".[39] Liberty of the person means freedom from subjection to imprisonment, arrest or other physical coercion.[40]

37. See *Kathi Raning Rawat* v *Saurashtra* A.I.R. (1952) S.C. 123.
38. *Munn* v *Illinois* 94 U.S. 113. (1876)
39. See *In re Sant Ram* (1960) 3 S.C.R. 499. (India)
40. Dicey, *Law of the Constitution* (10th ed. E.C.S. Wade), pp. 207-208.

The object of this provision of the Constitution is to protect the individual from arbitrary execution, arrest or detention, that is to say, at the discretion or by the fiat of the Executive. In fact, section 18 (1) (c) of the Constitution expressly provides that no citizen shall be arrested, held in custody, imprisoned or detained except in accordance with the law. If the Executive curtails his rights, except in accordance with the law, he may move the highest Court of original jurisdiction for their enforcement by writ of habeas corpus as provided for in the Constitution (s. 121 (3)). It has always been a predominant part of the Rule of Law as followed in Sri Lanka that no person could be deprived of his life or liberty except under the law and that there was a definite body of well-known legal principles excluding arbitrary executive action.[41] Confinement "is *prima facie* unlawful and it is for a person directing imprisonment to justify his act".[42]

The justification must be that the deprivation of the right is in accordance with law. The meaning of the phrase "in accordance with law" is important in this context. This phrase, which occurs in a similar context in the Irish Constitution, has been interpreted to mean "in accordance with the law as it exists at the time when the particular Article is invoked and sought to be applied. It means the law as it exists at the time when the legality of the detention arises for determination".[43] It was also said in an earlier Irish case: "The law may, therefore, make provisions in accordance with which a person may be deprived of his liberty. It is for the legislature to prescribe those provisions, and for the Courts to enforce them".[44] The law need not incorporate the principles of natural justice nor the concept of procedural due process, as understood in the United States[45], involving an examination of the reasonableness of the law.[46] Even special Courts may be established by law for the trial of offences.[47]

41. *The Bracegirdle Case* (1937) 39 N.L.R. 193, at p.209; *Eshugbayi Eleko* v *Government of Nigeria* (1931) A.C. 662.
42. *Liversidge* v *Anderson* (1942) A.C. 206, at p. 245.
43. *In re Article* 26 *and the Offences against the State* (*Amendment*) *Bill*, (1940).I.R 470, 482, *per* Sullivan C.J. See also *R*(*O'Connell*) v *Military Governorof Hare Park Camp* (1924) I.R. 104; J.M. Kelly, *Fundamental Rights in the Irish Law and Constitution* (1961), pp. 46-47.
44. *The State* (*Ryan and Others*) v *Lennon and Others* (1935) I.R. 170.
45. Cf. the 5th Amendment of the U.S. Constitution which provides (*inter alia*) that no person shall be deprived of his life, liberty or property, without due process of law.
46. *Gopalan* v *Madras* A.I.R. (1950) S.C. 27. *Ram Singh* v *Delhi* (1951) S.C. 270.
47. See *King-Emperor* v *Benoari Lal* A.I.R. (1945), P.C. 48, 52.

The right to travel, like other constituents of the liberty of the person which is provided for in section 18 (1) (b) of the Constitution, can only be exercised in accordance with the law. The Passport (Regulation) and Exit Permit Act, No. 53 of 1971, provides that it is in the discretion of the competent authority to issue or renew a passport or emergency certificate or to refuse to issue or renew a passport or emergency certificate. The discretion to issue or refuse a passport (or exit permit) should not be exercised arbitrarily but should be based on relevant considerations. The rule of construction adopted by the Courts is in favour of the freedom of the person,[48] including the right to leave Sri Lanka and return without hindrance.[49]

Deprivation of Liberty in accordance with Law. There are various types of detention which are permitted by law and which may deprive a person of his liberty.

(*a*) *Detention under the Public Security Ordinance.* The Public Security Ordinance provides for the enactment of emergency regulations in the interests of the public security, the preservation of public order, the suppression of mutiny, riot or civil commotion or for the maintenance of supplies and services essential to the life of the community. The Ordinance goes on to enact that such regulations may, so far as appears to the President to be necessary or expedient for any of those purposes *inter alia*, authorise and provide for the detention of persons during the period when the Proclamation of emergency is in force.[50] These powers of detention without trial granted under the law do not thereby suspend or supersede the writ of habeas corpus. An emergency regulation which provides that "section 45 of the Courts Ordinance (which confers jurisdiction on the Supreme Court to issue writs of habeas corpus) shall not apply in regard to any person detained or held in custody under any emergency regulation", is not applicable in the case of a person unlawfully detained under an invalid detention order.[51]

48. *Bracegirdle Case* (1937) 39 N.L.R. 193, at p.205.
49. *Aseerwatham* v *Permanent Secretary, Ministry of Defence and External Affairs* (L. G. Weeramantry, *Digest of Judicial Decisions, Journal of the I.C.J.*, Vol. VI pp. 319-320, *per* T. S. Fernando J.)
50. Chap. 40 of the Legislative Enactments, s.5. Under the Indian Constitution, preventive detention is provided for even in normal times.
51. *Hirdaramani* v *Ratnavale* (1971) 75 N.L.R. 67.

(*b*) *Arrest with Warrant.* Under the provisions of the Criminal Procedure Code (ss. 53, 54) the person executing a warrant of arrest issued by a Court under the Criminal Procedure Code must notify the substance of it to the person arrested and if so required show him the warrant or a copy of it signed by the person issuing it. The person arrested must be brought without unnecessary delay before the Court before which such person is required by law to be produced.

(*c*) *Arrest without Warrant.* Any peace officer[52] may under section 23 of the Criminal Procedure Code, without an order from a Magistrate and without a warrant, arrest:

(*a*) any person who in his presence commits any breach of the peace;

(*b*) any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. Whenever a police officer arrests a person on suspicion without a warrant, "common justice and common sense" require that he should inform the suspect of the nature of the charge upon which he is arrested;[53]

(*c*) any person having in his possession without lawful excuse (the burden of proving which excuse shall lie on such person) any implement of house-breaking;

(*d*) any person who has been proclaimed as an offender;

(*e*) any person in whose possession anything is found which may reasonably be suspected to be property stolen or fradulently obtained and who may reasonably be suspected of having committed an offence with reference to such thing;

(*f*) any person who obstructs a peace officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody;

(*g*) any person reasonably suspected of being a deserter from the Navy, Army or Air Force;

52. This term includes police officers and Grama Sevaka (formerly headmen).
53. *Muttusamy* v *Kannangara* (1951) 52 N.L.R. 324.

(*h*) any person found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence;

(*i*) any person who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed at any place out of Sri Lanka which if committed in Sri Lanka would have been punishable as an offence and for which he is under any law relating to extradition or under the Fugitive Persons Act or otherwise liable to be apprehended or detained in custody in Sri Lanka.

Any private person may arrest[54] any person who in his presence commits a cognizable offence or who has been proclaimed as an offender, or who is running away and whom he reasonably suspects of having committed a cognizable offence, and shall without unnecessary delay make over the person so arrested to the nearest peace officer or in the absence of a peace officer take such person to the nearest police station. A peace officer making an arrest without warrant must, without unnecessary delay and subject to the provisions as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case. No peace officer can detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate. Officers in charge of police stations must report to the Magistrates' Courts of their respective districts the cases of all persons arrested without warrant by any police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise.

Remedies for wrongful deprivation of freedom. Where there has been a wrongful deprivation of the freedom of a person the following remedies are available to him under our law:

(1) A civil action for damages, such as for assault, bodily harm, malicious prosection and false imprisonment or arrest;

54. See Criminal Procedure Code, s. 23, as to how arrest should be made. See also *Gooneratne* v *Abeyratne* (1879) 2 S.C.C. 89.

(2) A criminal prosecution for causing hurt, wrongful restraint, wrongful confinement, criminal force and assault, kidnapping, abduction and other offences against the person specified in the Penal Code and other law;

(3) Private defence.[55] Section 90 of the Penal Code states that every person has a right, subject to the restrictions contained in section 92, to defend his own body and the body of any other person against any offence affecting the human body. The right of private defence does not extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence. (s.92 (4)). There is no right of private defence against an act which does not reasonably cause an apprehension of death or of grievous hurt, if done or attempted to be done, by or by the direction of a public servant acting in good faith under colour of his office, though that act or that direction may not be strictly justifiable by law. (s. 92 (1) and (2)). The right is not available also in cases where there is time to have recourse to the protection of the public authorities. (s. 92 (3)).

(4) The writ of habeas corpus for obtaining his release from custody.

Habeas corpus. The writ of habeas corpus has almost from the inception of the Supreme Court been regarded as the most important safeguard of personal freedom. The writ, available against any person[56] detaining another without legal justification, is used to secure the detainee's release from unlawful confinement. As far back as 1864 it was stated by the Supreme Court:

> "The right to issue a writ of habeas corpus was one of the most sacred functions entrusted to a Judge and unless a cause, and sufficient cause, was shown at once for a person's detention he was entitled to his liberty".[57]

The power to issue the writ of habeas corpus is at present conferred upon the Court by section 45 of the Courts Ordinance.[58] Under the

55. See sections 89 to 99 of the Penal Code.
56. Includes a Minister or any other member of the Executive: *Bracegirdle* Case (1937) 39 N.L.R. 193: *Home Secretary* v *O'Brien* (1923) A.C. 603 (H.L.)
57. *In the matter of McSweeny* (1864) Legal Miscellany 58, at p. 61,*per* Creasy C.J See also *Re Shaw* (1860-62) Ramanathan's Rep. 116, at p. 119.
58. Legislative Enactments, Chap. 6.

provisions of that section the Supreme Court or any Judge thereof,whether at Colombo or elsewhere, is authorised to issue mandates in the nature of writs of habeas corpus to bring up before the Court or Judge (a) any person who is to be dealt with according to law (b) any person illegally or improperly detained in custody, and to discharge or remand the person so brought up, or otherwise deal with him according to law.

The Judge may direct the District Judge, Commissioner of Requests or Magistrate of the nearest Court to inquire into and report upon the cause of the alleged imprisonment or detention and may make appropriate provision for the interim custody of the person produced. Upon the receipt of the report, the Supreme Court or Judge makes an order discharging or remanding the person detained or otherwise deals with him according to law.

The question whether a writ should issue under the above-mentioned section 'to bring up before the Court the body of any person' must be determined in the same manner as it would be by a Court in England.[59] The Supreme Court has power to review by the issue of this writ the legality of arrests and detentions under the ordinary naval and military law.[60]

The writ of habeas corpus is not used exclusively as a method of testing the legality of detentions by public authorities. It is frequently used in the domestic sphere as well. Since the Court is authorised to issue the writ and deal with any person according to law, the Court grants the writ to determine also the custody of minor children. In settling such custody in relation to the right of parents, the Court is guided by Roman Dutch Law, being the common law of Sri Lanka, and, in the case of Kandyan Sinhalese, Muslims and persons under the Thesawalamai,[61] by their own personal laws[62]. In the exercise of this power, the Court has the discretion to over-ride the fundamental right of a parent to the custody of his child if such a course is necessary in the interest of the child's health, welfare and happiness.[63] This does not mean that a Court will

59. *Gooneratnenayake* v *Clayton* (1929) 31 N.L.R. 132, at p. 133.
60. *In re W. A. de Silva* (1915) 18 N.L.R. 277.
61. The personal law applicable to the Jaffna Tamils.
62. *In re Wappu Markar* (1911) 14 N.L.R. 225; *Junaid* v *Mohideen* (1932) 34 N.L.R. 141; Walter Pereira, *Laws of Ceylon* (1913), p. 116.
63. *Ran Menika* v *Paynter* (1932) 34 N.L.R. 127; *Ivaldy* v *Ivaldy* (1956) 57 N.L.R. 568. See also Thompson, *Laws of Ceylon*, Vol. 1. p. 214.

deprive a parent of the custody of a child for the reason only that it would be brought up better and have a better chance in life if given to another.[64]

Habeas corpus is not available against an order of committal of a Commissioner of Assize or other superior Court or against a committal by any Court acting within its jurisdiction, even though it has come to a wrong decision on the facts or upon the law.[65]

Closely allied to the power of the Supreme Court under section 45 of the Courts Ordinance to issue writs of habeas corpus is its power under section 46 of the same Ordinance to direct:

(*a*) that a prisoner detained in any prison be brought before a court-martial or any Commissioners acting under the authority of any commission from the President of the Republic for trial or to be examined touching any matter pending before such court-martial or Commissioners respectively;

(*b*) that a prisoner be removed from one custody to another for the purpose of trial; or

(*c*) that the body of a defendant be brought in on the Fiscal's return of cepi corpus to a writ of attachment.

Application to the Supreme Court for habeas corpus may be made by the person detained or by another on his behalf. The procedure is by way of petition and affidavit setting out the allegations relating to the unlawful confinement. Habeas corpus is a writ of right and will be issued when the applicant has satisfied the Court by affidavit that his detention is unlawful.[66] The Supreme Court, acting on certain dicta in a Privy Council decision,[67] has decided that successive applications for the writ can properly be made to different Judges, although they must not be made vexatiously and frivolously.[68] These dicta have not been followed in later

64. *Ran Menikas' case* (*ante*); *Endoris* v *Kiripetta* (1968) 73 N.L.R. 20.
65. *Re Thomas Perera alias Banda*(1926) 29 N.L.R. 52. *In re Liyane Aratchie* (1958) 60 N.L.R. 529.
66. *In re Liyane Aratchi* (1958) 60 N.L.R. 529, at p. 531.
67. *Eshubayi Eleko* v *Government of Nigeria* (1928) A.C. 459.
68. *Weerasinghe* v *Sumarasinghe* (1966) 69 N.L.R. 262. *In re P.C. Siriwardene* (1929) 31 N.L.R. 111.

English and Irish decisions which have held that the applicant for the writ has no such right.[69] According to these decisions, once the proper Court has decided the application the matter ended and no further application can be made on the same evidence and same grounds to another Judge or division of the same Court.[70] The later English cases did not decide, however, that there is no right in England during vacation to go from Judge to Judge, as the Judges did not sit there *in banc*.

IV. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Under the Constitution (s. 18 (1) (d)) every citizen has the right to freedom of thought, conscience and religion. This right includes the freedom to have or to adopt a religion or belief of his choice and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[71] In actual practice the degree of religious freedom which exists in a society depends on the degree of its permissible manifestation in that society. Every citizen has under the Constitution also the right by himself, or in association with others, to enjoy and promote his own culture. (s. 18 (1) (e).

Religion: Meaning. It is difficult to give a completely satisfactory legal definition of the word 'religion'. Broadly speaking, religion may be said to consist in a system of moral and ethical principles prescribing a code of conduct; it involves a statement of doctrine and a form of ritual and religious observance; all of which a man honestly believes in and approves of and thinks it his duty to inculcate on others, whether with regard to this world or the next.[72] "Religion" is not necessarily theistic. It "includes faith, belief, religious practices; performances of acts in pursuance of religious belief, doctrines regarded as conducive to spiritual well-being, a code of ethical rules, ritual, observances, ceremonies and modes of worship; what constitutes an integral part of a religion must be ascertained from its own doctrines and no outside authority may say

69. *Re Hastings* (No. 2) (1959) 1 Q.B. 358; (No.3) (1959) Ch.368. See also *The State (Dowling)* v *Kingston* (No. 2) (1937) I.R. 699.
70. *Ibid.* See Administration of Justice Act, 1960, of U.K.
71. See United Nations Declaration of Human Rights, Art. 18.
72. *Baxter* v *Langley* 38 L.J.M.C.5; *Adelaide Co. of Jehovah's Witnesses Inc.* v *The Commonwealth* (1943) 67 C.L.R. 116, 123; *Commissioner, Hindu Religious Endowments* v *Swamiar* A.I.R. (1954) S.C. 282.

that a particular rite or ceremony is a secular activity not essential to the religion on the ground that it involves expenditure".[73] The manifestation of religion in worship, observance, practice and teaching covers acts done in pursuance of religious belief.[74]

Freedom of belief and manifestation of the religion of one's choice precludes any form of compulsion to accept other creeds or practices [75]. On the other hand, such freedom includes the freedom to propagate one's religious beliefs. [76] All these concepts of religious freedom are, however, subject to the limitations in the public interest which are specified in section 18 (2) of the Constitution. For example, as it has been said, no person under the cloak of religion may, with impunity, commit frauds upon the public.[77]

Buddhism. The title of Chapter II of the Constitution is "Buddhism." This Chapter comprises section 6, which states:

> "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to foster Buddhism while assuring to all religions the rights granted by section 18 (1) (d)".

The words "foremost place" were substituted at a later stage in the drafting of the Constitution. The earlier drafts, following the United Front Manifesto, contained the words "rightful place". The insertion of these religious rights in the Constitution followed a pledge given in the general election manifesto of 1970 by the United Front. The Manifesto stated:

> "Buddhism, the religion of the majority of the people, will be ensured its rightful place. The adherents of all faiths will be guaranteed freedom of religious worship and the right to practice their religion. The necessary economic and social environment will be created to enable people of all religious faiths to make a living reality of their religious principles".

73. Alen Gledhill, *India* (2nd ed.), p. 203; *Ratilal* v *Bombay* A.I.R (1954) S.C. 388.
74. *Adelaide Co. of Jehovah's Witnesses Inc.* v *Commonwealth* (1943) 67C.L.R.116.
75. *Cantwell v Connecticut* (1940) 310 U.S. 296, at p. 303.
76. *Murdoch* v *Pennsylvania* (1943) 319 U.S. 105; *Ratilal* v *Bombay* A.I.R. (1954) S.C. 388.
77. *Cantwell* v *Connecticut* (1940) 310 U.S. 296, at p. 306, *Reynolds* v *United States* (1878) 98 U.S, 145.

In the Constituent Assembly, in the course of a discussion of a motion by Mr. A. Aziz seconded by Mr. M. Falil A. Caffoor to insert the words "Hinduism, Islam, Christianity and" between the words "assuring to" and the words "all religions", the Minister of Constitutional Affairs, Dr. Colvin R. de Silva said:

"It was after very careful consideration that the particular mode of reference to religions and Buddhism in particular was arrived at in respect of Basic Resolution 3 (since enacted as section 6 of the Constitution). It is intended, and I think in all fairness it should be so stated, that the religion, Buddhism, holds in the history and tradition of Ceylon a special place and the specialness thereof should be recognised in the Resolution. It was at the same time desired that it should be stressed that the historical specialness, the traditional specialness and the contemporary specialness which flows from its position in the country should not be so incorporated in the Constitution as in any manner to hurt or invade the susceptibilities of those who follow other religions in Ceylon or the rights that are due to all who follow other religions in Ceylon...."[78]

V. FREEDOM OF SPEECH AND EXPRESSION

Its importance. Every citizen has the right to freedom of speech and expression, including publication. (s. 13 (1) (g)). One of the most precious freedoms of the citizen is the right to express and propagate freely his ideas and opinions. Democratic government itself is based on freedom of discussion and the free exchange of ideas. Contending parties try their best to appeal to reason. "Without freedom of speech", as Sir Ivor Jennings has stated "the appeal to reason which is the basis of democracy cannot be made".[79] The exercise of such freedom lies at the

78. *Constituent Assembly Debates, Vol.* 1, p. 633 It has been pointed out by an Indian jurist that, from the point of view of "the ideal of the secular State envisaged by the framers of the Indian Constitution," that Constitution is "more secular" than certain other Constitutions in which the State recognises "the special position" of a particular religion as that professed by the greater majority of the citizens. (Basu, *Commentary on the Constitution of India* (3rd ed.), Vol 1, p. 317). Cf also the secular Constitution of the United States, where it has been held by the Supreme Court that under the Constitution that the State cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another." *McCollum* v *Board of Education* (1948) 333 U.S. 203, 210.

79. *Cabinet Government*, p. 14. See also *Schneider* v *Irvington* (1939) 308 U.S. 147; *Stromberg* v *California* (1930) 282 U.S. 359, 369: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the People and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

foundation of free government of a free people and the purpose of such a guarantee is to prevent public authorities from assuming a guardianship of the public mind through regulating the press, speech and religion. This freedom rests upon the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.[80]

In a famous foreign judgment it has been said. "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."[81]

Peaceful demonstration and peaceful persuasion may be regarded as manifestations of freedom of speech and expression as long as they are not "set in a background of violence", and are not against the interests of public order or the other interests specified in section 18 (2) of the Constitution.

Legal restrictions. Freedom of speech and expression, like the other fundamental rights and freedoms, is also subject to such restrictions as the law prescribes in the interests of the various matters specified in section 18 (2) of the Constitution. This freedom, which has existed under the common law, has been controlled by the ordinary law of the land, particularly the law relating to such matters as sedition, defamation, obscenity, contempt of Court and offences against the Official Secrets Act. A seditious statement is one that (i) excites or tends to excite feelings of disaffection to the Republic or to the Government or brings the administration of justice into hatred or contempt;or (ii) excites or tends to excite the subjects to procure otherwise than by lawful means, the alteration of any matter by law established; or (iii) tends to raise discontent or disaffection amongst the subjects or to promote feelings of ill-will and hostility between

80. *Associated Press* v *U.S.* (1945) 326 U.S. 1, 20. *Express Newspaper Ltd.* v *Union of India* A.I.R. (1958) S.C. 578, citing *Terminiello* v *Chicago* (1949) 93 Law Ed. 1131, at p. 1157.
81. *Thornhill* v *Alabama* 310 U.S. 88, *De Jonge* v *Oregon* 299 U. S. 353,365.

different classes of subjects.[82] The offence of criminal defamation is committed by anyone who makes or publishes any imputation concerning another intending to harm the reputation of that person.[83] The burden is on the prosecution to establish, *inter alia,* (a)that the accused person made or published the particular imputation complained of; and (b) that he did so with the requisite intention or knowledge.[84]

The following cases are exceptions to the offence of criminal defamation: (1) the imputation of any truth which the public good requires to be made or published, (2) an opinion expressed in good faith respecting the conduct of a public servant in the discharge of his public functions, (3) an opinion expressed in good faith respecting the conduct of any person touching any public question, (4) the publication of a substantially true report of proceedings of a Court of justice or of the result of such proceedings, (5) an opinion expressed in good faith respecting the merits of any decided case or the conduct of any party, witness or agent in that case, (6) an opinion expressed in good faith respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, (7) a censure passed in good faith over another, (8) an accusation preferred in good faith against a person to one having lawful authority over that person with respect to the subject-matter of the accusation, (9) an imputation made in good faith by a person on the character of another for the protection of the interests of the person making it or of any other person or for the public good.

Defamation is also a delict or civil wrong and an action lies to recover damages for the loss sustained. Defamation as a civil injury consists of the publication of false and defamatory matter concerning another without lawful justification. A defamatory statement has a tendency to injure the good name or reputation of the person to whom it refers and exposes him to the hatred, contempt or ridicule of his fellow-men. Under our law there is no distinction as in England between libel and slander and. whether written or spoken, the same principles apply. In certain exceptional cases the law protects a person who makes a defamatory statement. Those occasions are said to be privileged. Those privileged occasions

82. Section 120 of the Penal Code.
83. Section 479 of the Penal Code.
84. *Vaikunthavasan* v *The Queen* (1954) 56 N.L.R. 102.

are, generally speaking, occasions in which freedom of speech is necessary for the discharge of a duty or the protection of an interest. Privilege is of two kinds, absolute and qualified. When a statement is absolutely privileged no action will lie in respect of it under any circumstances, however false, malicious and defamatory it may be. Qualified privilege, on the other hand, exists when immunity from action is given only conditionally, that is, if the statement has been made honestly and without malice. Communications which are absolutely privileged include the following: (a) those connected with freedom of speech and debate in the National State Assembly, and reports, papers, minutes, votes or proceedings published by order or under the authority of the House or Committee;[85] (b) statements made in the course of judicial proceedings by Judges, jurymen, parties, witnesses and counsel.;[86] (c) communications relating to matters of State between one official of State and another in the course of official duty;[87] (d) proceedings at courts-martial or military inquiries and reports made in pursuance of military duty. The following are the chief instances in which there is qualified privilege: (a) communications made in the performance of duty; (b) communications made in the protection of an interest; (c) reports of parliamentary, judicial and quasi-judicial proceedings.

The Penal Code[88] prohibits the singing, recitation or utterance of obscene songs, ballads or words in or near a public place to the annoyance of others. The Code also makes it an offence to sell, distribute, import or print or to have in one's possession for such purpose any obscene publication. An obscene statement is one that has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands such matter is likely to fall.[89]

85. National State Assembly (Powers and Privileges) Act (Chapter 383), ss.3 and ff.
86. *Silva* v *Balasuriya* (1911) 14 N.L.R. 452; *Wijegunatileke* v *Joni Appu* (1920) 22 N.L.R. 231, at p. 234; *Leisa* v *Siyatuhamy* (1925) 27 N.L.R. 318. *Munster* v *Lamb* (1883) 11 Q.B.D. 588; *Bushell's* case (1670) 6 St. Tr. 999.
87. See ss. 123 and 124 of the Evidence Ordinance (Chapter 11). Absolute privilege does not attach, however, to all communications between officials. For example, the report of a Headman (Grama sevaka) to the Government Agent in response to an order to report upon a petition enjoys only a qualified privilege; *Dahanayake* v *Jayasekera* (1902) 5 N.L.R. 247; *Saranamkara* v *Kapuralay* (1927) 19 N.L.R 471.
88. See sections 285-287.
89. *George* v *Velupillai* (1904) 8 N.L.R. 67, following Cockburn C.J. in *Queen* v *Hicklin* (1868) L.R. 3 Q.B. 360, 371; *Sub-Inspector of Police* v *Dharmabandu* (1931) 33 N.L.R. 114; *Perera* v *Agalawatte* (1936) 39 N.L.R. 22.

Obscenity is something that affects morals and not mere conventional manners.[90]

It is also an offence under the Penal Code to disturb a religious assembly or make any utterance or sound with the deliberate intention of wounding the religious feelings of any person. (ss. 291 to 291 B).

Under the Official Secrets Act[91] it is an offence for any person entrusted with any official secret or secret document to communicate it to an unauthorised person. It is also an offence for any person to receive such unauthorised communication. A prosecution for an offence under the Act cannot be instituted except by, or with the sanction of, the Attorney-General.

Freedom of the Press. *Meaning*. The Constitution (S. 18(1) (g)) states explicitly that the right to freedom of speech and expression includes publication. In the words of Article 19 of the International Covenant on Civil and Political Rights, the right to freedom of expression includes "freedom to seek, receive and impart information and ideas of all kinds." It thus includes freedom of propagation of ideas or of circulation for "without circulation, the publication would be of little value".[92] The right includes therefore freedom of the Press and for this reason no express mention of it was necessary in the Constitution. The Press has no special rights or privileges. The freedom of the Press therefore merely means that, as in the case of any citizen, it may publish, without obtaining any previous licence, anything it pleases so long as there is no infringement of the law. The Press must be free to publish so long as such publication is not against the public interest, fully and fearlessly and without previous restraint, facts and opinions concerning public matters for the information of the people in whom sovereignty resides in terms of the Constitution. Without such information the sovereign people cannot properly exercise the powers vested in them. The freedom of the Press does not,however, mean that adequate safeguards

90. *Collette* v *Perera* (1916) 3 C.W.R. 136. Cf. the recommendation of the Longford Committee of the United Kingdom made in 1972 that there should be a change in the legal definition of obscenity to include anything which "outrages contemporary standards of decency or humanity accepted by the public at large".
91. Chapter 39 of the Legislative Enactments.
92. *Ex parte Jackson* (1877) 96 U.S. 727, 736. *Romesh Thappar* v *Madras* A.I.R. (1950) S.C. 124. *Brij Bhushan* v *Delhi* A.I.R. (1950) S.C. 129; *Sakal Papers* v *Union of India* (1962) S.C. 305.

should not be provided by law to secure that the enormous power and authority of the Press is used for the furtherance, and not for the suppression, of individual and collective freedom. As Blackstone has said, "the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiment he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity".[93]

Press Council Law. The Sri Lanka Press Council Law, No. 5 of 1973, provides for the appointment of a Sri Lanka Press Council to regulate and tender advice on matters relating to the Press in Sri Lanka, for the investigation of offences relating to the printing or publication of certain matters in newspapers and for incidental and connected matters.

The statute provides that the Council shall consist of:

(1) the person for the time being holding office as the Director of Information; and

(2) six other members appointed by the President of whom (a) one shall be a person to represent the working journalists, such person being selected from a panel of not more than seven persons nominated by the journalists' associations in Sri Lanka, and (b) one shall be a person to represent the interests of the employees of newspaper businesses, such person being selected from panels of not more than three persons nominated by each registered trade union of such employees. (s. 3 (1)).

Where, on receipt of a complaint made to it or otherwise, the Council has reason to believe that there has been published in a newspaper a statement, picture or other matter which is untrue, distorted or improper, as the case may be, or that an editor or a working journalist of a news-

93. *Commentaries* IV, 151. See also *Lovell* v *Griffin* (*ante*), where the U.S. Supreme Court extended Blackstone's condemnation of censorship to a Municipal ordinance forbidding distribution of literature of any kind within the city limits, without permission of the city manager, See Edward S. Corvin's *U.S. Constitution* (1954), p. 260. See also *Brij Bhusan's* case (*ante*), at p. 134; *Near* v *Minnesota* 283 U.S. 697, 713ff; *Thornhill* v *Alabama* 310 U.S. 88, 101 ff.

paper has committed any professional misconduct or breach of the code of journalistic ethics, the Council may hold an inquiry in the prescribed manner and if the Council is satisfied, after giving the newspaper, the proprietor, printer, publisher, editor or journalist concerned an opportunity of being heard, that it is necessary so to do, it may either:

(a) order that a correction approved by the Council be published in the appropriate newspaper; or
(b) censure the proprietor, printer, publisher, editor, journalist or other officer or authority of such newspaper; or
(c) order that an apology be tendered by such officer or authority to the appropriate party (s. 9 (I)).

Every person who publishes, or causes the publication of, in any newspaper, (a) any profane matter; (b) any statement or matter concerning a person which will amount to defamation of such person within the meaning of section 479 of the Penal Code; or (c) any advertisement which is calculated to injure public morality; or (d) any indecent or obscene statement or matter, is guilty of an offence and is liable, upon conviction, to be punished with a fine not exceeding five thousand rupees, or with imprisonment for a term not exceeding two years or with both such fine and imprisonment (s. 15 (I)).

No person shall publish, or cause to be published, in any newspaper:

(1) any matter which purports to be the proceedings of a meeting of the Cabinet of Ministers;

(2) any matter which purports to be (a) the contents of any document sent by or to all or any of the Ministers to or by the Secretary to the Cabinet of Ministers; or (b) a decision of the Cabinet of Ministers, unless it has been approved for publication in the newspapers by the Secretary to the Cabinet;

(3) any official secret within the meaning of the Official Secrets Act or any matter relating to military, naval, air force or police establishments, equipment or installation which is likely to be prejudicial to the defence and security of the Republic of Sri Lanka, unless such matter has been approved for publication in the newspapers by the Secretary to the Ministry in charge of the subject of Defence;

(4) any statement relating to monetary, fiscal, exchange control or import control measures alleged to be under consideration by the Government or by any Ministry or by the Central Bank, the publication of which is likely to lead to the creation of shortages or windfall profits or otherwise adversely affect the economy of Sri Lanka, unless such matter has been approved for publication in the newspapers by the Secretary to the Ministry in charge the subject in question;

(5) any proposal or other matter alleged to be under consideration by any Minister or any Ministry or the Government, when it is false that such proposal or matter is under consideration by such Minister, Ministry or by the Government.

Any person who contravenes any of the above provisions is guilty of an offence and is liable, upon conviction, to be punished with a fine not exceeding five thousand rupees, or with imprisonment for a term not exceeding two years or with both such fine and imprisonment.

VI. FREEDOM OF ASSEMBLY AND ASSOCIATION

Its Nature and Importance. All citizens have the right to freedom of peaceful assembly and of association.[94] This right includes the right to form and to join political parties, trade unions and other organisations of persons for the protection of their interests.[95] The right to form an association includes the right to the continuance of the association.[96] Without freedom of assembly and association, as without freedom of speech there cannot exist the fundamental liberty of free elections where people make a choice of common policies that have previously been formulated, by political Parties and placed before them.[97] From this point of view, freedom of peaceful assembly and of association, which includes the right of public meeting, is of even greater importance in Sri Lanka than in

94. Section 18 (1) (f). of the Constitution of Sri Lanka. See also Article 20 (1) of the Universal Declaration of Human Rights. This is a right cognate to that of free speech and expression and is equally fundamental: *De Jonge* v *Oregon* 299 U.S. 353, 364.
95. See European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Art. 11 (1). See also *National Labour Relations* v *Jones* (1937) U.S. 301, *Kulkarani* v *Bombay* A.I.R. (1951) Bom. 105.
96. *Row* v *Madras* A.I.R. (1951) Mad. 147, 179; *Madras* v *Row* (1952) S.C. 196.
97. Sir Ivor Jennings, *Cabinet Government*, p. 14; *De Jonge* v *Oregon* 299 U.S. 353, 364-365.

other democratic countries where the mass media of communication are more highly developed. Further, as it has been observed, "the very idea of government, republican in form, implies a right on the part of its citizens to meet peacefully for consultation in respect of public affairs and to petition for a redress of grievances."[98]The right of assembly and association has been considered so fundamental from these points of view that it has been inserted in the Constitution to prevent it being changed by an ordinary majority, as in the case of other rights not so incorporated.

In England, on the other hand, as Dicey has stated "the right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech".[99] This right, according to Dicey, is the right to meet together so long as the law is not thereby broken. It has been held in England that where people assemble for a lawful purpose and the assembly or meeting is conducted in a peaceful manner, it does not become unlawful merely because they have reason to believe that the opponents of the meeting will cause a breach of the peace.[100] But a lawful assembly may be dispersed by the police on the ground that others are likely to cause a breach of peace, if that is the only way of preserving the peace.[101] Those who refuse to disperse after such order may be guilty of obstruction of the police in the execution of their duty.[102]

Legal Restrictions. The actual extent of this right will appear from a consideration of the restrictions imposed on its exercise by the law. Unlawful entry upon private land will constitute a breach of the law of trespass. By meeting in a public thoroughfare a nuisance may be committed.

Conspiracy. Conspiracy is both a crime and a civil wrong. The crime of conspiracy is committed whenever two or more persons agree to commit,or act together with a common purpose to commit,an offence.[103] The civil wrong of conspiracy is committed "where two or more persons

98. *U. S.* v *Cruikshank* (1876) 92 U. S. 542.
99. Dicey, *Law of the Constitution* (10th ed.), p. 271.
100. *Beatty* v *Gillbanks* (1882) 9 Q. B. D. 308
101. *O'kelly* v *Harvey* (1883) 14 L. R. Ir 105, 109.
102. *Duncan* v *Jones* (1936) I. K. B. 218.
103. Section 113 A (1) of the Penal Code.

combine to injure the plaintiff by unlawful means, and damage actually results, but in such cases the use of unlawful means will in itself normally involve the doing of acts tortious in themselves and in respect of these the plaintiff can in any case recover damages".[104]

Unlawful assembly. An assembly of five or more persons is unlawful if the common object of the persons composing that assembly is:

(i) to overawe by criminal force or show of criminal force the Government of Sri Lanka or the National State Assembly or any State officer in the exercise of the lawful power of such officer or

(ii) to resist the execution of any law or of any legal process; or

(iii) to commit any mischief or criminal trespass or other offence; or

(iv) by means of criminal force, or show of criminal force to any person, to take possession of any property or to deprive any person or the public of the enjoyment of a right of way or of the use of water or other incorporeal right of which such person or public is in possession or enjoyment, or to enforce any right or supposed right; or

(v) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do; or

(vi) that the persons assembled, or any of them, may train or drill themselves, or be trained or drilled to the use of arms, or practising military movements or revolutions without the consent of the President of the Republic of Sri Lanka.[105]

Power to control meetings and processions. The Police Ordinance[106] provides that no procession can be taken out or held in any public place in any urban area, unless notice of it has, at least six hours before the

104. *Winfield on Tort* (8th ed.), p. 554 See also *Crofter Hand Woven Harris Tweed Co Ltd.* v *Veitch* (1942) A. C. 435, 444, *per* Viscount Simon L. C.
105. Section 138 of the Penal Code.
106. Chapter 53, (s. 77.) of the Legislative Enactments.

time of its commencement, been given to the officer in charge of the police station nearest to the place at which the procession is to commence. This provision does not apply in the case of any procession of such description as may be exempted from the provision by Order made by the Minister and published in the Gazette. Where a procession is taken out or held in contravention of the provision every person organising it or doing any act in furtherance of its organisation or assembling is guilty of an offence.

An officer of police of a rank not below the grade of Assistant Superintendent, if he considers it expedient to do so in the interests of the preservation of public order, may give directions prohibiting the taking out of any procession, or imposing upon the person or persons organising or taking part in it such conditions as appear to him to be necessary, including conditions prohibiting or restricting the display of flags, banners or emblems. A person who acts in contravention of any such directions is guilty of an offence.

Officers of police not below the grade of Sub Inspector may, as occasion requires, direct the conduct of all assemblies and processions in any public place, prescribe the routes by which and the times at which such procession may pass, and direct all crowds of twelve or more persons to disperse, when they have reason to apprehend any breach of the peace. (s. 78 (1)). Any person who, while present at any public meeting or on the occasion of any procession, has with him any offensive or dangerous weapon otherwise than in pursuance of lawful authority is guilty of an offence. (s. 79 (1)). For the above purposes a "public meeting" has been defined to mean any meeting in a public place and any meeting (irrespective of the place at which it is held) which the public are permitted to attend, whether on payment or not. "Public place" means any high way, public park or garden, any sea beach, and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not; and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise.

Power to disperse assemblies and meetings. Under the provisions of the Criminal Procedure Code *(Chapter VIII)* any Magistrate and any peace officer not below the rank of Inspector, Korala, Muhandiram or Udaiyar may command any unlawful assembly or any assembly of five

or more persons likely to cause a disturbance of the public peace to disperse. If, on such command, the assembly does not disperse or if without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or such peace officer may proceed to disperse the assembly by force. A Magistrate or peace officer would be liable under the law if he fails to perform his duty to disperse an unlawful assembly [107]. If such assembly cannot be otherwise dispersed and if it is necessary for the public security that it should be dispersed, the Government Agent or any Magistrate having jurisdiction who is present or the Inspector General of Police may cause it to disperse by military force. For this purpose he may require any commissioned or non-commissioned officer in command of any soldiers of the Army to disperse such assembly by military force and to arrest and confine persons forming part of it as he may direct or as may be necessary in order to disperse the assembly or to have them punished according to law. When the public security is manifestly endangered by such assembly and the specified officers cannot be communicated with, any commissioned officer of the Army may disperse such assembly by military force and may arrest and confine any persons forming part of it in order that such assembly may be dispersed or that they may be punished according to law.

Trade Unions. So far as combinations of persons are concerned, trade unions have been given special recognition by law. The Trade Unions Ordinance, No. 14 of 1935, provides that no legal proceeding is maintainable in any civil Court against any registered trade union or any of its officers or members in respect of any act done in contemplation or in furtherance of a trade dispute to which a member of the trade union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills. An action against a trade union or against any of its members or officers on behalf of the members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union in contemplation or in furtherance of a trade dispute cannot be entertained by any Court. The objects of a registered trade union are not, by reason only that they are in restraint of trade, deemed to be unlawful so as to

107. See *R* v *Pinney* (1832) 5 C & P 254.

render any member of the trade union liable to criminal prosecution for conspiracy or otherwise or to render void or voidable any agreement or trust. A registered trade union may sue and be sued and be prosecuted under its registered name. It is liable to be sued in contract.

A trade union has been defined to mean any association or combination of workmen or employees having one or more of the following objects: (a) the regulation of relations between workmen and employers or between workmen or between employers; (b) the imposing of restrictive conditions on the conduct of any trade union or business; (c) the representation of either workmen or employers in trade disputes; (d) the promotion or organisation of financing of strikes or lockouts in any trade or industry or the provision of pay or other benefits for its members during a strike or a lockout.

A strike has been defined in the Ordinance to mean the cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are, or have been so employed, to continue to work or to accept employment. A "lock-out" means the closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with a view to compelling those persons, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.

No employee or workman can commence or continue or participate in or do any act in furtherance of a lock-out or strike respectively in connection with any industrial dispute in any essential industry, unless written notice of intention to commence the lock-out or strike repectively had, at least twenty-one days before the date of the commencement, been given in the prescribed manner by the employer to the workmen affected or by the workmen to the employer as the case may be.[108]

VII. FREEDOM OF MOVEMENT AND OF RESIDENCE

Under the Constitution every citizen has the right to freedom of movement and of choosing his residence within Sri Lanka. (s. 18 (1) (i)).

108. Section 32 of the Industrial Disputes Act, No. 43 of 1950.

The object of our Constitution in providing for this right is to protect not the general right of free movement which emanates from the freedom of the person but an independent and additional right, namely the special right of a citizen to move freely throughout, and reside anywhere within, the territory of Sri Lanka. [109] In other words, the sub-section guarantees the right of all citizens to go or reside wherever they like in the entire territory of the country which is one unit so far as the citizens are concerned. [110] The right is a protection against provincialism and a guarantee against unfair discrimination in the matter of free movement and residence of citizens throughout the country. [111]

An International Conference of Jurists discussed the right to freedom of movement in Bangalore (India) from January 10-14, 1968. The Conference brought together nearly a hundred jurists from 18 countries of the Asian and Pacific Region as well as observers from various international organisations. The Conference resolved that freedom of movement of the individual within a country, in leaving his own country, in travelling to other countries and in entering his own country is a vital human liberty, whether such movement is for the purpose of recreation, education, trade or employment or to escape from an environment in which his other liberties are suppressed or threatened. The Conference also resolved that, considering the need to maintain a balance between the freedom of the individual and the general welfare of the community, reasonable restrictions may be imposed by or under the authority of law on the enjoyment of the right to freedom of movement and residence.

VIII. RESTRICTIONS ON FUNDAMENTAL RIGHTS AND FREEDOMS.

Fundamental rights and freedoms are not absolute and unlimited. Even in the United States where under the Constitution the fundamental rights are not restricted by a constitutional provision such as is found here, the Supreme Court of that country has held that such rights are nevertheless not absolute. They must be compatible with the claims of national security and the preservation of other freedoms enshrined in the Constitution. For the purpose of such interpretation the U.S. Supreme

109. See *Gopalan* v *Madras* A. I. R. (1950) S.C. 27.
110. See *Khare* v *Delhi* (1950) S.C. 211, 216.
111. *Gopalan's* case (*supra*). Externment and preventive detention are deprivations of the right.

Court invented the theory of the so-called inherent "police power" of the State to restrict fundamental rights in the interests of such matters as public health, safety, morals and general welfare. As our Constitution has explicitly set out the restrictions on fundamental rights, it is not permissable for us to rely on any so-called inherent limitations under any doctrine of "police power" of the State.

Our Constitution (s.18(2)) provides that the exercise and operation of fundamental rights and freedoms are subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy as set out in section 16. There has been some criticism that the restrictions, particularly that which relates to giving effect to the Principles of State Policy, are too wide to confer sufficient practical value to the exercise of fundamental rights.

In any case, the restrictions prescribed by law must not be arbitrary. They must be reasonable or objectively seen by the average prudent man to be in the interests of one or more matters specified in section 18 (2) of the Constitution.[112]In other words, the restrictions must, having regarded to the circumstances of each case, have a reasonable and substantial relation to any of the interests enumerated in section 18(2) of the Constitution and which are sought to be protected.[113] The Bill may not under the guise of protecting the public interest, arbitrarily or unreasonably interfere with, or impose unnecessary restrictions on, fundamental rights and freedoms.[114]

It has been said that in the application of the test of reasonableness, which is adopted under the Indian Constitution, "the nature

112. See *Nebbia* v *State of New York* (1934) 291. U.S. 502. *Panhandie Pipeline* v *State Highway* (1935) 79 L. Ed. 1090; *Khare* v *Delhi* A.I.R. (1950) S.C. 211, 217.

113. See *Muglar* v *Kansas* (1887) 123 U. S. 623; *New State* see *Co* v *Liebmann* (1932) 285 U. S. 262 at 278; *Nebbia's* case *(Supra); De Jonge* v *Oregon* (1937) 299 U. S. 353; *Thomas* v *Collins* (1945) 323 U. S. 513; *Chintaman Rao* v *Madhya Pradesh* (1951) S.C. 118.

114. *Wolff Packing* Co v *Court of Industrial Relations* (1923) 262 U.S.522; *Nebbia* v *State of New York* (1934) 291 U.S. 502; *De Jonge* v *Oregon* (1937) 299 U.S. 353; *Thomas* v *Collins* (1945) 323U.S. 513; *Chintaman Rao* v *Madhya Pradesh* (1950) S.C.R 759, 763.

of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.[115]

In discussing these restrictions on fundamental rights, the Minister of Constitutional Affairs, Dr. Colvin R. de Silva, pointed out in the Constituent Assembly, that there was what he called "a built-in limitation to the limitations". "First", he said, "it must be prescribed by law; and secondly, what is prescribed by law must be objectively in the interests of any of these tests that are given there".[116] The Minister also stated: "The first point is this: the limitation must be in a law. It is not just a limitation which will be introduced into the interpretation. If a Bill is introduced into the National State Assembly, let us say, seeking to prescribe certain limitations or certain things, then you will look at that law. (bill). The words are 'as the law prescribes in the interests of.....', the words are not 'as the Government declares is in the interests of....."[117]

The expression in the interests of, as compared with "for the maintenance of" makes the ambit of the protection wider. Where a restriction on fundamental rights is contained in a Bill, for example, in the interests of public order, "the connection contemplated between the restriction and public order must ..... be real and proximate and not far-fetched or problematical."[118]

If provisions in a Bill containing restrictions against fundamental rights are inconsistent with the Constituution, the existence of such restrictions will not render the whole Bill inconsistent where such provisions stand detached and are not inextricably woven into the pattern of the Bill; the doctrine of severability, therefore, applies. Where a Bill purports to authorise restrictions on fundamental rights in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action, it cannot be

115. *State of Madras* v *V.G. Row* (1952) S.C. 196, 200.
116. *Constituent Assembly Debates*, Vol. 1, 1328.
117. *Ibid*, 1327.
118. *Supdt., Central Prison, Fategarh* v *Ram Manohar Lohia* A. I. R. (1960) S. C. 633. For an analysis of the term "public order", see *Romesh Thappar* v *State of Madras* A. I. R. (1950) S. C. 124.

upheld, not even so far as it is applied within the constitutional limits, as it is not severable and the principle of severability cannot apply.[119]

The Constitution also provides that all existing law shall operate notwithstanding any inconsistency with the provisions relating to fundamental rights. (s. 18 (3)). The expression "existing law" refers to all laws, written[120] and unwritten,[121] in force immediately before the commencement of the Constitution which, under the provisions of the Constitution, continue in force. (s. 12 (1)).

119. *The Queen* v *Abeysinghe* (1965) 68 N. L. R. 386, 399; *Thambiayah* v *Kulasingham* (1948) 50 N. L. R. 25, 37 *Romesh Thappar's* case (*supra*), at p. 129.
120. Written laws include subordinate legislation.
121. For example, custom or usage having the force of law.

CHAPTER 29

PRINCIPLES OF STATE POLICY

Their Nature. The Constitution sets out, in the manner of the Irish,[1] Indian[2] and other Constitutions, certain Principles of State Policy. These Principles have been set down for guidance in the making of laws and the governance of Sri Lanka. (s.16 (1)). The actual extent of the guidance at any particular time will naturally depend to a large extent on the political, social and cultural values prevailing at the time among the various social groups forming the nation.

The functions of modern government are no longer confined to defence, foreign affairs, maintenance of law and order and other similar matters mentioned by jurists and other writers of the eighteenth and nineteenth centuries. Today it is considered to be the duty of the State also to promote economic and social progress. It is its duty to achieve economic democracy and social justice. The directive Principles are laid down in the Constitution so that the State may be under a duty to apply them in the making of laws and in the administration of the country. Although these Principles, unlike Fundamental Rights and Freedoms, are not justiciable, they are nevertheless of educative, moral and political value. They are in the nature of instructions which the National State Assembly and the Executive are expected to follow. Where a provision in the Constitution is not clear, a Court may take congnisance of the Principles of State Policy for the purpose of interpretation of the Constitution.[3]

Most of the Principles set out in the Constitution are inspired by "socialist democratic" ideas and had been included in the 1970 Joint Election

1. Article 45 of the Irish Constitution provides for Directive Principles of Social Policy "intended for the general guidance of the Oireachtas."
2. Articles 36 to 51 lay down Directive Principles of State Policy as "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."
3. See *State of Bombay* v *Balsara* A.I.R. (1951) S.C. 318.

Manifesto of the Parties forming the United Front as part of its policy. The Principles, along with the Fundamental Rights and Freedoms, seek to embody some of the concepts of political democracy as well as of socialism, as understood by the Parties forming the United Front. These Principles, Rights and Freedoms are in their nature, therefore, not only civil and political but also economic, social and cultural. Their enumeration in the Constitution is an admission of the fact that justice is necessarily both political and social in nature.

The Constitution provides that the provisions embodying the Principles of State Policy do not confer legal rights and are not enforceable in any Court of law. Nor may any question of inconsistency of a Bill with such provisions be raised in the Constitutional Court or any other Court. (s. 17) The sanction of these Principles is mainly political because the Government is answerable to the National State Assembly and ultimately to the people. It has been held in India that the Principles of State Policy cannot override the constitutional provisions relating to Fundamental Rights and Freedoms which, unlike the former, are enforceable in the Courts.[4] The Principles have to conform to and run subsidiary to the Chapter on Fundamental Rights.[5]

The Principles are, nevertheless, of importance in the legal interpretation of Fundamental Rights and Freedoms. The latter must be interpreted in such manner as to harmonise them with the Principles of State Policy.[6] A harmonious interpretation means that the State should certainly implement the directive Principles, but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise their protecting provisions will be "a mere rope of sand".[7] Harmonious interpretation is particularly necessary in Sri Lanka in view of the fact that the exercise and operation of the Fundamental Rights and Freedoms provided in our Constitution are subject to such restrictions as the law prescribes (*inter alia*) for giving effect to the Principles of State Policy.

The Principles. The Constitution (s. 16) provides that the following Principles of State Policy shall guide the making of laws and the governance of Sri Lanka:

4. See *State of Madras* v *Champakam Dorairajan*, A.I.R. (1951) S.C. 226.
5. *Ibid.*
6. *In re Kerala Education Bill*, A.I.R. (1958) S.C. 956, *Bihar* v *Kameshwar*, A.I.R. (1952) S.C. 252.
7. *Quareshi* v *Bihar*, A.I.R. (1958) S.C. 731.

(1) The Republic is pledged to carry forward the progressive advancement towards the establishment in Sri Lanka of a socialist democracy, the objectives of which include (a) full realisation of all rights and freedoms of citizens including group rights; (b) securing full employment for all citizens of working age; (c) the rapid development of the whole country; (d) the distribution of the social product equitably among citizens; (e) the development of collective forms of property such as State property or co-operative property, in the means of production, distribution and exchange as a means of ending exploitation of man by man; (f) raising the moral and cultural standards of the people; and (g) the organisation of society to enable the full flowering of human capacity both individually and collectively in the pursuit of the good life.

(2) The State shall safeguard the independence, sovereignty, unity and the territorial integrity of Sri Lanka.

(3) The State shall endeavour to strengthen national unity by promoting co-operation and mutual confidence between all sections of the people of Sri Lanka including the racial, religious and other groups.

(4) The State shall endeavour to eliminate economic and social privilege, disparity and exploitation and ensure equality of opportunity to all citizens.[8]

(5) The State shall strengthen and broaden the democratic structure of Government and democratic rights of the people by affording all possible opportunities to the people to participate at every level in national life and in government, including the civil administration and the administration of justice.[9]

(6) The State shall assist the development of the culture and the language of the people.

(7) The State shall endeavour to ensure social security and welfare.

(8) The State shall endeavour to create the necessary economic and social environment to enable people of all religious faiths to make a living reality of their religious principles.

(9) The State shall promote peace and international co-operation.[10]

8. See the observations of Das J in *Bihar* v *Kameshwar*, A.I.R. 1952 S.C. 252.
9. For agencies established for securing such popular participation, see *ante*, pp. 248-256, and chap. 26.
10. Cf Art 51 of the Constitution of India.

CHAPTER 30

OFFICIAL LANGUAGE

Background. During the course of the freedom movement of the nineteen forties there was an insistent demand by all major political Parties that English, which was the official language of government administration, should be replaced by 'swabasha' (the people's own languages), namely Sinhala and Tamil. According to the figures that were available during the subsequent 1953 Census, 58.9 per cent of the population of three years or over spoke only Sinhala, 21.6 per cent spoke only Tamil, 13.1 per cent spoke both Sinhala and Tamil and 9.4 per cent spoke English along with Sinhala or Tamil or both.[1] The ability to speak a language was defined as "the ability to conduct a short conversation or understand and answer questions put in that language". Political leaders made it a point to emphasize the undesirability of governing a people in a language which a large majority of them did not understand and thus of maintaining a wide gap between the governors and the governed.

In 1944 a resolution was moved in the State Council by Mr. J. R. Jayewardene to make Sinhala the official language of Ceylon "within a reasonable number of years". The resolution was subsequently amended to include also Tamil and was passed by twenty-seven votes to two. In 1945 a Select Committee of the State Council, with Mr. J. R. Jayewardena as Chairman, was appointed on a motion of Mr. S. W. R. D. Bandaranaike to recommend the steps to be taken for the gradual replacement of English by Sinhala and Tamil. The Report of the Committee recommended a ten-year transition period, at the end of which English would cease to be the language of government.[2]

When Mr. S. W. R. D. Bandaranaike resigned from the United National Party in 1951 and founded the Sri Lanka Freedom Party, he

1. Census of Ceylon, 1953, Vol. III Part 1, p. 604, Table 17 (Colombo: Government Press, 1960); See Robert N. Kearney, *Communalism and Language in the Politics of Ceylon* (Durham, N.C: Duke University Press). pp 16-17.
2. *Sinhalese and Tamils as Official Languages*, p. 12; Kearney op. cit., p. 63.

placed great emphasis on the early adoption of Sinhala and Tamil as the official languages. He also criticised the delay of the U.N.P. Government in the implementation of its language policy. In 1953 in a rider attached to the report of the Official Language Commission, the Chairman (Mr. E. A. L. Wijewardene) stated: "The replacement of English by Swabasha would have been very much easier if instead of two Swabasha Languages as Official Languages one alone had been accepted".[3]

In 1955 the Sri Lanka Freedom Party under the leadership of Mr S. W. R. D. Bandaranaike started a campaign to make Sinhala the official language of the country. At its Conference held in that year the Party changed its language policy to one of Sinhala as the sole official language. The United National Party followed suit at its Conference held in February 1956 and adopted the resolution that "Sinhalese alone should be made the State Language of Ceylon". At the General Election of April 1956, both the U.N.P. and the Mahajana Eksath Peramuna (People's United Front), a coalition led by Mr. Bandaranaike, campaigned in favour of their "Sinhala only" policies. The Federal Party and the Tamil Congress as well as the Lanka Sama Samaja Party and the Communist Party supported parity of status for Sinhala and Tamil. The election resulted in a resounding victory for Mr. Bandaranaike's M.E.P. In accordance with its pledge to the voters the M.E.P. Government introduced the Official Language Act as its first legislative measure. It was passed by the House of Representatives despite the opposition of the Federal Party and the Tamil Congress. In 1958 the language controversy led to communal riots and soon after, the Tamil Language (Special Provisions) Act was passed, providing for the use of Tamil for certain specified purposes.

Official Language. Under the Constitution, it is specifically provided that the official language of Sri Lanka shall be Sinhala as provided by the Official Language Act, No. 33 of 1956. (s. 7). This Act declares that the Sinhala language shall be the one official language of Sri Lanka. There is a proviso which states that where the Minister considers it impracticable to commence the use of only the Sinhala language for any official purpose immediately on the coming into force of the Act, the language or languages used previously to the Act for that purpose may be continued

3. *Final Report of the Official Language Commission* (Sessional Paper XXII, 1953 p. 26. For a Contrary view, see S. Nadesan, *Comments on the Constituent Assembly*, pp. 84 ff.

to be so used until the necessary change is effected as early as possible before the expiry of the 31st day of December 1960. It is also provided in the Act that if such changes cannot be effected by administrative order, regulations may be made under the Act to effect such a change.

Use of the Tamil Language. The Constitution (s. 8) provides that the use of the Tamil language shall be in accordance with the Tamil Language (Special Provisions) Act No. 28 of 1958. The section also provides that any regulation for the use of the Tamil language made under the Tamil Language (Special Provisions) Act and in force immediately before the commencement of the Constitution shall not in any manner be interpreted as being a provision of the Constitution but shall be deemed to be subordinate legislation continuing in force as existing written law under the provisions of section 12. According to the provisions of the Tamil Language (Special Provisions) Act, a Tamil pupil in a Government school is entitled to be instructed through the medium of the Tamil language in accordance with the regulations under the Education Ordinance relating to the medium of instruction. A person educated through the medium of the Tamil language is entitled to be examined through such medium at any examination for the admission of persons to the Public Service subject to the condition that he must, according as regulations made under this Act may require, (a) have a sufficient knowledge of the official language of Sri Lanka or (b) acquire such knowledge within a specified time after admission to the State Services. There is a proviso to the effect that, when the Government is satisfied that there are sufficient facilities for the teaching of the Sinhala language in schools in which the Tamil language is a medium of instruction and that the annulment of the above clause (b) will not cause undue hardship, provision may be made by regulation under the Act that such clause shall cease to be in force. Correspondence between persons, other than officials in their official capacity, educated through the medium of the Tamil language, and any official in his official capacity or between any local authority in the Northern or Eastern Province and any official in his official capacity may, as prescribed, be in the Tamil language. In the Northern and Eastern Provinces the Tamil language may be used for prescribed administrative purposes, in addition to the purposes for which that language may be used in accordance with the other provisions of the Act, without prejudice to the use of the official language of Sri Lanka in respect of those prescribed administrative purposes.

Language of Legislation. The Constitution provides that all laws shall be enacted or made in Sinhala. It is also provided that there shall be a Tamil translation of every law so enacted or made. (s. 9).

All written laws, including subordinate legislation in force immediately prior to the commencement of the Constitution, must be published in the Gazette in Sinhala and in Tamil translation as expeditiously as possible under the authority of the Minister in charge of the subject of Justice. The laws so published must be laid before the National State Assembly at the meeting next following the date of such publication. Unless the National State Asembly otherwise provides, the law published in Sinhala under the above provisions will, as from the date of such publication, be deemed to be the law and supersede the corresponding law in English. (s. 10).

Language of the Courts. Section 11 of the Constitution provides that the language of the Courts and Tribunals empowered by law to administer justice and of Courts, Tribunals and other institutions established under the Industrial Disputes Act and of Conciliation Boards established under the Conciliation Boards Act, No. 10 of 1958, is Sinhala throughout Sri Lanka and accordingly their records, including pleadings, proceedings, judgments, orders and records of all judicial and ministerial acts, must be in Sinhala. The National State Assembly may, however, by or under its law, provide otherwise in the case of institutions exercising original jurisdiction in the Northern and Eastern Provinces and also of Courts, Tribunals and other institutions established under the Industrial Disputes Act and of Conciliation Boards established under the Conciliation Boards Act, No. 10 of 1958, in the Northern and Eastern Provinces. The above provisions apply to any institution which under any future law has a jurisdiction or function corresponding or substantially similar to the jurisdiction or function of any institution referred to in these provisions. The Language of the Courts (Special Provisions) Law, No 14 of 1973 was subsequently passed by the National State Assembly to provide for the use of Tamil in the case of certain institutions exercising original jurisdiction in the Northern and Eastern Provinces. Under the Law, the Minister may, with the concurrence of the Cabinet of Ministers, determine that the language of any specified Court, tribunal or other institution established uuder the Industrial Disputes Act, and of any Conciliation Board established under the Conciliation Boards Act, in the Northern and Eastern Provinces shall be Tamil (S. 2)

Upon such a determination, the Minister may direct the court, tribunal, institution or Board in respect of which the determination was made:

(a) that their records, including pleadings, proceedings judgments, orders and records of all judicial and ministerial acts shall be in Tamil; provided that the Minister may by Order direct a Sinhala translation shall be caused to be made;

(b) that parties, applicants and persons legally entitled to represent such parties or applicants may (i) submit their pleadings, applications, motions and petitions in Sinhala, and (ii) participate in the proceedings in Sinhala; provided, however, that in all such cases a Tamil translation shall be caused to be made for the purposes of the record; and

(c) that, in the event of an appeal from such court, tribunal, institution or Board, other than a Rural Court, a record in Sinhala shall be prepared for the use of the court hearing such appeal. (S.3.)

Every party, applicant, judge, juryman or member of a tribunal not conversant with the language used in a court, tribunal or other institution referred to in section 2, shall have the right to interpretation, and to translation into Sinhala provided by the State to enable him to understand and participate in the proceedings. Such person shall also have the right to obtain in Sinhala any such part of the record as he may be entitled to obtain according to law. The provisions of this law shall apply to any institution in the Northern and Eastern Provinces which under any future law shall have a jurisdiction or function corresponding or substantially similar to the jurisdiction or function of any institution referred to in section 2. The Minister may make regulations to give effect to the principles and provisions of this Law. No regulation made under subsection (1) shall have effect until it is approved by the National State Assembly and notification of such approval is published in the Gazette. (ss 4, 5 and 6)

In the Northern and Eastern Provinces and in proceedings before Quazis under the Muslim Marriage and Divorce Act, parties, applicants and persons legally entitled to represent such parties or applicants before any court, tribunal or other institution referred to above may under the

Constitution (a)submit their pleadings, applications, motions and petitions in Tamil; and (b) participate in the proceedings in Tamil. In all such cases a Sinhala translation must be caused to be made by such court, tribunal or other institution referred to above for the purposes of the record.

Every party, applicant, judge, juryman or member of a tribunal not conversant with the language used in such court, tribunal or other institution has the right under the Constitution to interpretation and to translation into Sinhala or Tamil provided by the State to enable him to understand and participate in the proceedings before such court, tribunal or other institution. Such person has also the right to obtain, in Sinhala or Tamil, any such part of the record as he may be entitled to obtain according to law. A person legally entitled to represent a party of an applicant may participate in the proceedings of any such court, tribunal or other institution in Sinhala or Tamil, and is entitled for that purpose, to interpretation, in Sinhala or Tamil provided by the State. Subject to the above provisions, the Minister in charge of the subject of Justice may, with the concurrence of the Cabinet of Ministers, issue Orders, Directions and Instructions permitting the use of a language other than Sinhala or Tamil by a Judge or other state officer administering justice or by a pleader appearing before such court, tribunal or other institution. Every judge and other state officer administering justice is bound to implement such Orders, Directions and Instructions.

CHAPTER 31

EMERGENCY POWERS AND THE CITIZEN

State of Emergency. The exercise of fundamental rights and freedoms by individuals and groups cannot obviously be unrestricted. They cannot be exercised, for example, to destroy the rights and freedoms of others. Above all the security of the State is paramount. The Constitution itself provides that the exercise and operation of fundamental rights and freedoms provided in it are subject to such restrictions as the law prescribes in the interests of (*inter alia*) national security and public safety. Even under the ordinary law in time of riot or insurrection wide powers, including the use of necessary force, may be exercised by the citizen as well as the State and which may result in interference with the rights and freedoms of individuals and groups, for the sake of preserving peace. Even troops may be called in by the Government when necessary in order to aid the civil authorities to suppress riots and other serious civil disorders. Such military action is sometimes referred to as "martial law". For the sake of greater certainty, special powers have been given by statute in Sri Lanka to the Executive to be exercised in times of emergency to maintain public order and security.

Public Security Ordinance. In 1947 the Public Security Ordinance was passed, to provide for the enactment of emergency regulations or the adoption of other measures in the interests of the public security, the preservation of public order and for the maintenance of supplies and services essential to the life of the community.

The Constitution states that unless the National State Assembly otherwise provides, the Public Security Ordinance is, *mutatis mutandis*, and subject to the provisions of the Constitution, deemed to be a law enacted by the National State Assembly. Upon the Prime Minister advising the President of the existence or the imminence of a state of public emergency, the President must declare a state of emergency. The President must act on the advice of the Prime Minister in all matters

legally required or authorised to be done by the President in relation to a state of emergency. (s. 134)

Section 2 of the Public Security Ordinance provides that where the President is of opinion in view of the existence or imminence of a state of public emergency that it is expedient to do so in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, he may declare by Proclamation published in the Gazette that the provisions of Part II of the Ordinance shall, forthwith or on such date as may be specified in the Proclamation, come into operation throughout Sri Lanka or in such part or parts of Sri Lanka as may be so specified. Where the provisions of Part II have come into operation on any date by virtue of such a Proclamation, they continue to be in operation for a period of one month from that date. The Proclamation may, however, be revoked earlier or a further Proclamation may be made at or before the end of that period. (s. 2 (1) and (2)).

The Ordinance provides a safeguard against abuse of emergency powers and arbitrary action by the Executive, through the establishment of the National State Assembly's control over emergency powers. Where a Proclamation of emergency is made, the occasion for it must forthwith be communicated to the National State Assembly. If the Assembly is separated at the time by an adjournment or prorogation which will not expire within ten days, a Proclamation must be issued for the meeting of the Assembly within ten days. The Assembly must accordingly meet and sit upon the day appointed by the Proclamation and must continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day. The fact that the occasion of the making of a Proclamation cannot be communicated to the Assembly by reason that it does not meet when summoned to do so does not in any way affect the validity or operation of the Proclamation or of the provisions of Part II or anything done under that Part. In such event the Assembly must again be summoned to meet as early as possible thereafter. (s. 2 (3)).

Where the provisions of Part II are or have been in operation during any period by virtue of a Proclamation, the fact of the existence or imminence, during that period,of a state of public emergency cannot be called in question in any court. (s. 3). The expiry or revocation of any Proclamation does not affect nor be deemed to have affected (a) the past

operation of anything duly done or suffered to be done under Part II while that Part was in operation (b) any offence committed, or any right, liberty or penalty acquired or incurred while that Part was in operation, (c) the institution, maintenance or enforcement of any action, proceeding or remedy under that Part in respect of any such offence, right, liberty or penalty. (s. 4).

The President is empowered, upon the recommendation of the Prime Minister or any other Minister authorised to act on his behalf in case of his temporary absence or incapacity, to make such emergency regulations as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.[1] (s. 5 (1)) Such emergency regulations may:

(*a*) authorise and provide for the detention of persons;

(*b*) authorise (i) the taking of possession or control of any property or undertaking, (ii) the acquisition of any property other than land;

(*c*) authorise the entering and search of any premises;

(*d*) provide for amending any law, for suspending the operation of any law and for applying any law with or without modification;

(*e*) provide for charging, in respect of the grant or issue of any licence permit, certificate or other document for the purposes of the regulations any prescribed fee;

(*f*) provide for payment of compensation and remuneration to persons affected by the regulations;

(*g*) make provision for the apprehension and punishment of offenders and for their trial by such courts, not being courts-martial,

1. Compare the somewhat similar provisions of the Emergency Powers (Defence) Acts 1939 and 1940 of the United Kingdom which were in operation during World War II

and in accordance with such procedure, as may be provided for by the regulations, and for appeals from the orders or decisions of such Courts and the hearing and disposal of such appeals (s. 5 (2)).

Any emergency regulation may be added to, or altered or revoked by resolution of the National State Assembly or by regulation made under the Ordinance. (s. 5 (3)). Emergency regulations may provide for empowering specified authorities or persons to make orders and rules for any of the purposes for which such regulations are authoriesd by the Ordinance. (s. 6)

Emergency regulations and orders or rules made in pursuance of such regulations have effect notwithstanding anything inconsistent with them in any law. (s. 7). Emergency regulations and orders, rules or directions made or given under such regulations cannot be called in question in any Court. (s. 8). In an application for a writ of habeas corpus, the Supreme Court may, nevertheless, inquire into the bona fides and validity of a detention order, purporting to have been made under an Emergency Regulation.[2] When an emergency regulation authorised the Permanent Secretary to make an order for the taking into custody and detention of a person if the Permanent Secretary was of opinion that such order was necessary with a view to preventing that person from acting in any manner prejudicial to the public safety and to the maintenance of public order, it was held that if the detention order was produced and was valid on its face, it was for the detainee to establish a prima facie case against the good faith of the Permanent Secretary; the detainee must prove facts necessary to controvert the matter stated in the detention order, namely, that the Permanent Secretary was of opinion that it was necessary to make the detention order for the purpose specified in the order itself.[3]

Under the Interpretation (Amendment) Act, No 18 of 1972, a statutory provision that an order cannot be called in question in any Court prevents the Court from having jurisdiction to pronounce upon the validity or legality of the order, except that a writ may be issued

2. *Hirdaramani* v *Ratnavale* (1971) 75 N.L.R. 67, *Gunasekera* v *De Fonseka* (1972) 75 N.L.R. 246. See also *Hirabayashi* v *United States* 320 U.S. 81 (1943) and *Korematsu* v *United States* 323 U.S. 214 (1944).
3. *Hirdaramani Case* (*supra*); see also *Greene* v *Secretary of State for Home Affairs* (1942) A.C. 284.

by the Supreme Court (1) in the case of a writ of habeas corpus in the exercise of its powers under section 45 of the Courts Ordinance, (2) in the case of other writs in the exercise of its powers under section 42 of the Courts Ordinance where (a)the order is *ex facie* not within the powers conferred upon such person, and (b) where such person has not conformed to the rules of natural justice or has not complied with any mandatory provision of any law, as he was bound to do.[4] If a person is unlawfully detained under an invalid detention order made in abuse of the powers conferred by an emergency regulation, a provision in another regulation that "section 45 of the Courts Ordinance (which confers jurisdiction on the Supreme Court to issue writs of habeas corpus) shall not apply in regard to any person detained or held in custody under any emergency regulation" is not applicable.[5]

No prosecution or other criminal proceeding against any person for any act purporting to be done under any emergency regulation or any order or direction thereunder can be instituted in any Court except with the sanction of the Attorney-General; and no civil or criminal proceeding lies against any person for any act done in good faith in pursuance of such provision. (s. 9).

By Act No. 8 of 1959, a new Part, namely Part III, was added to the Public Security Ordinance giving special powers to the Prime Minister during a period of emergency. Where circumstances endangering the public security in any area have arisen or are imminent and the Prime Minister is of opinion that the police are inadequate to deal with such situation in that area, he is empowered by Order published in the Gazette to call out all or any of the members of the armed forces for the maintenance of public order in that area. The members of the forces so called out have the powers, including the powers of search and arrest, conferred on police officers under any written law other than the powers specified in Chapter XII of the Criminal Procedure Code relating to the investigation of offences. Any police officer or any member of the armed forces so called out may, if a written authorisation to do so is issued to him by the Prime Minister or by any person duly appointed by him, seize and remove any gun or explosive in the possession of any person in the area

4. Interpretation Ordinance s. 22; see also the English case of *Anisminic Ltd. Foreign Compensation Commission* (1969)2 A.C. 147.
5 *Hirdaramani Case* (*supra*), *per* Silva S. P. J. and Samerawickrama J (Fernando C.J., dissenting).

to which the Order applies and keep it in such custody as may be determined by the person issuing such authorisation. For this purpose such officer or member may enter and search, with such assistants as may be necessary, any premises or place in such area and any person present therein. Any police officer may remove any offensive weapon or substance which any person, without legal authority or reasonable excuse, has in his possession or under his control in any public place in any area. Where the Prime Minister considers it necessary to do so for the maintenance of public order in any area, he is empowered by order published in the Gazette to direct that subject to such exemption as may be made by Order no person in the area shall,between the hours specified in the Order, be on any public road, railway, public park, public recreation ground or other public ground, or the seashore except under the authority of a written permit granted by such person as may be specified in the Order.

Part III of the Act also privides that where the Prime Minister considers it necessary in the public interest to do so for the maintenance of any service which, in his opinion, is essential to the life of the community, he is empowered by Order published in the Gazette, to declare that service to be an essential service. Where any service is so declared

(a) any person who on or after the preceding date was engaged or employed on any work in connection with that service is guilty of an offence if he fails or refuses to attend at his place of work or employment or at such other place as may be designated by his employer or

(b) any person who, by violence to person or property or by threat, intimidation or insult or by molestation or in any other manner whatsoever (i) impedes, obstructs, delays or restricts the carrying on of that service or (ii) compels, incites, induces or encourages any other person employed in or in connection with the carrying on of that service to surrender or depart from his employment or (iii) prevents any other person from offering or accepting employment in or in connection with the carrying on of that service; or

(c) any person who incites, induces or encourages any other person to commit any act specified in paragraph (b), is guilty of an offence.

Any cessation of work in consequence of a strike commenced by a registered trade union solely in pursuance of an industrial dispute is not to be deemed to be an offence.

Martial Law. There are certain authorities which tend to support the proposition that where the statutory powers conferred by the Ordinance on the Executive to deal with an emergency are adequate, to that extent the general "martial law" powers of the Executive under the Common Law to deal with an emergency are restricted.[6] Of course if the emergency powers under the Ordinance are inadequate to deal with an insurrection, riot or rebellion amounting to war, the common law right to use force against force and to take all necessary measures may be used by the Executive through the military, even to the extent of taking life.[7] Whether such a 'war' situation exists or existed conferring unlimited powers to the Executive to deal with the situation through the military would be a matter to be determined by the Courts,[8] unlike the question of the existence of a public emergency under the Public Security Ordinance. Although it is provided that the Emergency Regulations themselves cannot be called in question in any Court the acts of the civil and military authorities which are not done in good faith and are outside the scope of the regulations are justiciable in the Courts.

If by so-called martial law is meant "the suspension of the ordinary law (during an emergency) and the substitution therefor of discretionary government by the Executive exercised through the military",[9] the situation that exists in Sri Lanka during a period of emergency following a Proclamation by the President of the Republic cannot correctly be described as "martial law." The Proclamation of emergency is also different from a decree of an *etat de siege* (a state of siege) of European countries such as France. According to the Constitution of the Fifth Republic (Art. 36) a state of siege is decreed in the Council of Ministers to transfer powers of maintaining order from the civil to military authorities. Its prolongation beyond twelve days can be authorised by Parliament. The declaration of a state of siege, as well as the declaration of a state of emergency under our law, bear a certain difference from the English common law conception of martial law. The latter is merely the common law right and duty of the Government and the citizen to

6. See *Egan* v *Macready* (1921) 1 I.R. 265; *Attorney-General* v *De Keyser's Royal Hotel* (1920) A.C. 508.
7. See *Tilonko* v *A.G. of Natal* (1907) A.C. 93, at p. 94. see also *Re Clifford and O'Sullivan* (1921)2 A.C. 570.
8. See *King* v *Strickland* (1921) 2 I.R. 317.
9. Hood Phillips, op.cit. p, 511. See also *Ex parte Marais* (1902) A.C. 109; *Tilonko* v *Attorney-General of Natal* (1907) A.C. 93; *Re Clifford and O'Sullivan* (1921) 2 A.C. 570; *Johnstone* v *O'Sullivan* (1923) 2 Ir.R. 13.

maintain public order by the use of any necessary amount of force. Under the former on the other hand, the state of siege or of emergency is declared under specified legal rules and is subject to certain statutory safeguards. Even under conditions of public disturbance in Sri Lanka emergency regulations made under the Public Security Ordinance may provide for the trial of offenders only by such Courts which are not courts - martial and in accordance with such procedure as may be provided for by regulations. In other words, in Sri Lanka, although during a public disturbance or rebellion, in order to suppress it, the necessary force may be used by the military and the police even to the extent of taking life, yet under the Public Security Ordinance even after a declaration of a public emergency the judicial system of the State is maintained in order to prevent the exercise of military jurisdiction over the civil population by the establishment of Military Courts. On the other hand, under the English conception the essentially political function of deciding as a question of fact whether there is a state of emergency amounting to war justifying the use of armed force under martial law is left to the civil Courts. While this martial law situation actually exists the acts of the military and of military tribunals are not justiciable by the Courts of law.[10] In spite of the danger of its abuse by the Executive there is much to be said for our system where the emergency powers to be exercised through the police and military organs are provided in a permanent statute containing the safeguard of Parliamentary control.

10. *Ex parte Marais* (1902)A.C. 109. *King* v *Allen* (1921) 2 I.R. 241; *King* v *Strickland* (1921) 2 I.R. 317 at p. 329.

APPENDIX

The Constitution of Sri Lanka

SVASTI

WE THE PEOPLE OF SRI LANKA BEING RESOLVED IN THE EXERCISE OF OUR FREEDOM AND INDEPENDENCE AS A NATION TO GIVE TO OURSELVES A CONSTITUTION WHICH WILL DECLARE SRI LANKA A FREE SOVEREIGN AND INDEPENDENT REPUBLIC PLEDGED TO REALIZE THE OBJECTIVES OF A SOCIALIST DEMOCRACY INCLUDING THE FUNDAMENTAL RIGHTS AND FREEDOMS OF ALL CITIZENS AND WHICH WILL BECOME THE FUNDAMENTAL LAW OF SRI LANKA DERIVING ITS POWER AND AUTHORITY SOLELY FROM THE PEOPLE DO ON THIS THE TENTH DAY OF THE WAXING MOON IN THE MONTH OF VESAK IN THE YEAR TWO THOUSAND FIVE HUNDRED AND FIFTEEN OF THE BUDDHIST ERA THAT IS MONDAY THE TWENTY-SECOND DAY OF MAY ONE THOUSAND NINE HUNDRED AND SEVENTY-TWO ACTING THROUGH THE CONSTITUENT ASSEMBLY ESTABLISHED BY US HEREBY ADOPT ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

CHAPTER I

THE PEOPLE, THE STATE AND SOVEREIGNTY

Republic of Sri Lanka.

1. Sri Lanka (Ceylon) is a Free, Sovereign and Independent Republic.

Unitary State.

2. The Republic of Sri Lanka is a Unitary State.

Sovereignty of the people.

3. In the Republic of Sri Lanka, Sovereignty is in the People and is inalienable.

National State Assembly.

4. The Sovereignty of the People is exercised through a National State Assembly of elected representatives of the People.

Supreme instrument of State power.

5. The National State Assembly is the supreme instrument of State power of the Republic. The National State Assembly exercises —

(*a*) the legislative power of the People;

(*b*) the executive power of the People, including the defence of Sri Lanka, through the President and the Cabinet of Ministers; and

(*c*) the judicial power of the People through courts and other institutions created by law except in the case of matters relating to its powers and privileges, wherein the judicial power of the People may be exercised directly by the National State Assembly according to law.

CHAPTER II

BUDDHISM

Buddhism.

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),

CHAPTER III

LANGUAGE

Official Language

Official Language Sinhala.

7. The Official Language of Sri Lanka shall be Sinhala as provided by the Official Language Act, No. 33 of 1956.

Use of Tamil Language.

8 (1) The use of the Tamil language shall be in accordance with the Tamil Language (Special Provisions) Act, No. 28 of 1958.

(2) Any regulation for the use of the Tamil language made under the Tamil Language (Special Provisions) Act, No. 28 of 1958, and in force immediately before the commencement of the Constitution shall not in any manner be interpreted as being a provision of the Constitution but shall be deemed to be subordinate legislation continuing in force as existing written law under the provisions of section 12.

Language of Legislation

Language of Legislation.

9. (1) All laws shall be enacted or made in Sinhala.

(2) There shall be a Tamil translation of every law so enacted or made.

Laws in English superseded on publication in Sinhala.

10. (1) All written laws, including subordinate legislation in force immediately prior to the commencement of the Constitution, shall be published in the *Gazette* in Sinhala and in Tamil translation as expeditiously as possible under the authority of the Minister in charge of the subject of Justice.

(2) The laws so published shall be laid before the National State Assembly at the meeting next following the date of such publication.

(3) Unless the National State Assembly otherwise provides, the law published in Sinhala under the provisions of subsection (1) of this section, shall, as from the date of such publication, be deemed to be the law and supersede the corresponding law in English.

Language of the Courts

Language of the courts.

11. (1) The language of the courts and tribunals empowered by law to administer justice and of courts,

tribunals and other institutions established under the Industrial Disputes Act and of Conciliation Boards established under the Conciliation Boards Act, No. 10 of 1958, shall be Sinhala throughout Sri Lanka and accordingly their records, including pleadings, proceedings, judgements, orders and records of all judicial and ministerial acts, shall be in Sinhala:

Provided that the National State Assembly may, by or under its law, provide otherwise in the case of institutions exercising original jurisdiction in the Northern and Eastern Provinces and also of courts, tribunals and other institutions established under the Industrial Disputes Act and of Conciliation Boards established under the Conciliation Boards Act, No. 10 of 1958, in the Northern and Eastern Provinces.

(2) The provisions of subsection (1) of this section shall apply to any institution which under any future law shall have a jurisdiction or function corresponding or substantially similar to the jurisdiction or function of any institution referred to in that subsection.

(3) In the Northern and Eastern Provinces and in proceedings before Quazis under the Muslim Marriage and Divorce Act, parties, applicants and persons legally entitled to represent such parties or applicants before any court, tribunal or other institution referred to in subsection (1) or subsection (2) of this section may—

(*a*) Submit their pleadings, applications, motions and petitions in Tamil; and

(*b*) Participate in the proceedings in Tamil.

In all such cases a Sinhala translation shall be caused to be made by such court, tribunal or other institution referred to in subsection (1) or subsection (2) of this section for the purposes of the record.

(4) Every party, applicant, judge, juryman or member of a tribunal not conversant with the language used in a court, tribunal or other institution referred to in subsection (1) or subsection (2) of this section, shall have the right to interpretation, and to translation into Sinhala or Tamil, provided by the State to enable him to understand and participate in the proceedings before the court, tribunal or other institution referred to in sub section (1) or subsection (2) of this section.

Such person shall also have the right to obtain, in Sinhala or Tamil, any such part of the record as he may be entitled to obtain according to law.

(5) A person legally entitled to represent a party or an applicant may participate in the proceedings in any court, tribunal or other institution referred to in subsection (1) or subsection (2) of this section, in Sinhala or Tamil, and shall be entitled for that purpose, to interpretation, in Sinhala or Tamil provided by the State.

(6) Subject to the provisions contained in the preceding subsections of this section, the Minister in charge of the subject of Justice may, with the concurrence of the Cabinet of Ministers, issue Orders, Directions and Instructions permitting the use of a language other than Sinhala or Tamil by a judge or other state officer administering justice or by a pleader appearing before a court, tribunal or other institution referred to in sub section (1) or subsection (2) of this section. Every judge and other state officer administering justice shall be bound to implement the Orders, Directions and Instructions issued under this subsection.

CHAPTER IV
GENERAL PROVISIONS

12. (1) Unless the National State Assembly otherwise provides, all laws, written and unwritten, in force imme- **Existing law.**

diately before the commencement of the Constitution, except such as are specified in Schedule 'A' shall *mutatis mutandis*, and except as otherwise expressly provided in the Constitution, continue in force. The laws so continuing in force are referred to in the Constitution as "existing law".

All written laws including subordinate legislation so continuing in force are referred to in the Constitution as "existing written law".

(2) Save as otherwise provided in the Constitution, existing laws are not and shall not in any manner be deemed to be provisions of the Constitution.

(3) Wherever the Constitution provides that any provision of any existing written law or of the Constitution shall continue in force until or unless the National State Assembly otherwise provides, any law of the National State Assembly so providing may be passed by a majority of the membership present and voting.

(4) Whenever the Constitution provides that any provision of any existing written law shall continue in force until or unless the National State Assembly otherwise provides and the existing written law referred to consists of subordinate legislation, the provision that such existing written law shall continue in force until or unless the National State Assembly otherwise provides shall not in any manner be deemed to derogate from the power of the person or body on whom the power to make and, when made, to amend, vary, rescind or revoke such subordinate legislation is conferred to exercise the power so conferred until or unless the National State Assembly otherwise provides.

ers, leges, ies and igations the Republic.

13. Unless the National State Assembly otherwise provides, the Republic of Sri Lanka shall possess and exercise all powers, privileges, immunities and rights

whatsoever possessed, exercised or exercisable by Elizabeth the Second Queen of Ceylon and of Her other Realms Territories, Head of the Commonwealth and shall have all such obligations and duties, howsoever arising, of Elizabeth the Second Queen of Ceylon and of Her other Realms and Territories, Head of the Commonwealth as were in existence immediately prior to the Constitution coming into operation.

Rights, duties and obligations of the Republic.

14. All rights and all duties or obligations, howsoever arising, of the Government of Ceylon and subsisting immediately prior to the commencement of the Constitution shall be rights, duties and obligations of the Government of the Republic of Sri Lanka under the Constitution.

Past operation of laws, previous acts, offences, and pending actions etc.

15. (1) Unless the Constitution otherwise provides, the past operation of any law in force prior to the commencement of the Constitution or anything duly done or suffered or penalty acquired or incurred under any law in force prior to the commencement of the Constitution shall not in any manner be affected or be deemed to be affected by the Constitution coming into force.

(2) All actions, prosecutions, proceedings, matters or things, including proceedings of Commissions appointed or established by or under any existing written law, pending or uncompleted immediately before the commencement of the Constitution shall, subject to the provisions of the Constitution and *mutatis mutandis*, be deemed to continue and may be carried on and completed after the commencement of the Constitution.

CHAPTER V
PRINCIPLES OF STATE POLICY

Principles of State Policy.

16. (1) The Principles of State Policy contained in the sub-sections which follow shall guide the making of laws and the governance of Sri Lanka.

(2) The Republic is pledged to carry forward the progressive advancement towards the establishment in Sri Lanka of a socialist democracy, the objectives of which include—

(*a*) full realization of all rights and freedoms of citizens including group rights:

(*b*) securing full employment for all citizens of working age;

(*c*) the rapid development of the whole country;

(*d*) the distribution of the social product equitably among citizens;

(*e*) the development of collective forms of property such as State property or co-operative property, in the means of production, distribution and exchange as a means of ending exploitation of man by man;

(*f*) raising the moral and cultural standards of the people; and.

(*g*) the organization of society to enable the full flowering of human capacity both individually and collectively in the pursuit of the good life.

(3) The State shall safeguard the independence, sovereignty, unity and the territorial integrity of Sri Lanka.

(4) The State shall endeavour to strengthen National unity by promoting co-operation and mutual confidence between all sections of the people of Sri Lanka including the racial, religious and other groups.

(5) The State shall endeavour to eliminate economic and social privilege disparity and exploitation and ensure equality of opportunity to all citizens.

(6) The State shall strengthen and broaden the democratic structure of Government and democratic rights of the people by affording all possible opportunities to the people to participate at every level in national life and in government, including the civil administration and the administration of justice.

(7) The State shall assist the development of the cultures and the languages of the people.

(8) The State shall endeavour to ensure social security and welfare.

(9) The state shall endeavour to create the necessary economic and social environment to enable people of all religious faiths to make a living reality of their religious principles.

(10) The State shall promote peace and international co-operation.

Principles of State Policy not justiciable.

17. The provisions of seetion 16 do not confer legal rights and are not enforceable in any court of law; nor may any question of inconsistency with such provisions be raised in the Constitutional Court or any other Court.

CHAPTER VI
FUNDAMENTAL RIGHTS AND FREEDOMS

Fundamental Rights and Freedoms.

18. (1) In the Republic of Sri Lanka—

(*a*) all persons are equal before the law and are entitled to equal protection of the law;

(*b*) no person shall be deprived of life, liberty or security of person except in accordance with the law;

(*c*) no citizen shall be arrested, held in custody, imprisoned or detained except in accordance with the law;

(*d*) every citizen shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching;

(*e*) every citizen has the right by himself or in association with others, to enjoy and promote his own culture;

(*f*) all citizen have the right to freedom of peaceful assembly and of association;

(*g*) every citizen shall have the right to freedom of speech and expression, including publication;

(*h*) no citizen otherwise qualified for appointment in the central government, local government, public corporation services and the like, shall be discriminated against in respect of any such appointment on the ground of race, religion, caste or sex;

Provided that in the interests of such services, specified posts or classes of posts may be reserved for members of either sex;

(*i*) every citizen shall have the right to freedom of movement and of choosing his residence within Sri Lanka.

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

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

CHAPTER VII

THE PRESIDENT OF THE REPUBLIC

Head of State.

19. There shall be a President of the Republic of Sri Lanka who is the Head of the State.

Head of Executive and Commander-in-Chief.

20. The President is the Head of the Executive and the Commander-in-Chief of the armed forces.

Powers and functions of President.

21. The President has the following powers and functions:—

(*a*) he declares war and peace;

(*b*) he summons, prorogues and dissolves the National State Assembly;

(*c*) he appoints the Prime Minister, the other Ministers of the Cabinet of Ministers and Deputy Ministers;

(*d*) he appoints the Judges referred to in section 122, other state officers and Commissioners who may under the Constitution or any other law, be appointed by the President;

(*e*) he receives and recognizes, appoints and accredits Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents;

(*f*) he presides at ceremonial sittings of the National State Assembly;

(*g*) he performs such other functions pertaining to the office of the President of Sri Lanka as are prescribed by the Constitution or by any other law, and subject to the Constitution and to any other law, such functions as are by international usage performed by a Head of State; and

(*h*) he keeps the Public Seal of the Republic of Sri Lanka and makes and executes under the Public Seal grants and dispositions of such lands and immovable property vested in the Republic of Sri Lanka as may be lawfully granted by the President, and uses the Public Seal for sealing all things whatsoever that shall pass the said Seal.

Grant of Pardon.

22. (1) When any offence has been committed for which the offender may be tried within the Republic of Sri Lanka, the President may grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender or of any one of such principal offenders, if more than one.

(2) The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka—

(*a*) grant a pardon, either free or subject to lawful conditions; or

(*b*) grant any respite, either indefinite or for such period as the President may think fit, of the execution of any sentence passed on such offender; or

(*c*) substitute a less severe form of punishment for any punishment imposed on such offender;

(*d*) remit the whole or part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence:

Provided that where any offender shall have been condemned to suffer death by the sentence of any court, the President shall cause a report to be made to him by the judge who tried the case and shall forward such report

to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister whose function it is to advise the President on the exercise of the said powers.

Immunity of President from suit.

23. (1) While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted of continued against him in respect of anything done or omitted to be done by him either in his official or private capacity.

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which such person holds the Office of President of the Republic of Sri Lanka shall not be taken into account in calculating any period of time prescribed by that law.

Salary of President,

24. The President shall receive such salary and allowances and on retirement such pension or gratuity as may be determined by resolution by the National State Assembly, and such salary, allowances, pension or gratuity shall be charged on the Consolidated Fund. The salary,allowances, pension or gratuity of a President may not be altered to his disadvantage.

Appointment of President and assumption of office.

25. Any citizen who is qualified to be an elector at an election for the purpose of electing a Member of the National State Assembly may be nominated by the Prime Minister for the Office of President of the Republic of Sri Lanka and the person so nominated assumes office as President of the Republic of Sri Lanka upon his taking the following oath before the Cheif Judge of the highest Appellate Court or other Judge of that Court:—

"I .....,do $\frac{\text{solemnly declare and affirm}}{\text{swear}}$

that I will be faithful and bear true allegiance to the Republic of Sri Lanka, that I will uphold the Cons-

titution of Sri Lanka and shall faithfully perform the duties and functions of the Office of President of the Republic of Sri Lanka in accordance with the Constitution and with the law.":

Provided that the first President of the Republic of Sri Lanka shall take the oath before the Members of the National State Assembly present at that time.

President's term of office.

26. (1) Subject to the provisions of subsection (2) of this section, the President holds office for a period of four years:

Provided that, notwithstanding the expiration of this period, the President shall remain in office until the next President assumes office.

(2) The Office of President of the Republic of Sri Lanka becomes vacant—

(*a*) upon the death of the President; or

(*b*) on the President resigning his office by a writing addressed to the Prime Minister; or

(*c*) on the determination by the Prime Minister that the President is incapable of performing the functions of his office by reason of mental or physical infirmity; or

(*d*) on the National State Assembly passing a resolution of no-confidence against the President, proposed by the Prime Minister; or

(*e*) on the National State Assembly passing by at least two-thirds of the whole number of members of the National State Assembly (including those not present) voting in its favour a resolution of no-confidence against the President, introduced by any Member by a written notice, addressed to the Speaker and signed by such Member and by at least half the total number of members of the National State Assembly.

President to act on advice.

27. (1) The President shall always except as otherwise provided by the Constitution, act on the advice of the Prime Minister, or of such other Minister to whom the Prime Minister may have given authority to advise the President on any particular function assigned to that Minister.

(2) 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 any act or omission on the part of the President on the ground that the provisions of subsection (1) of this section have not been complied with.

Acting President.

28. (1) Whenever the President is prevented by illness or any other cause from performing the duties of his office, or is absent from Sri Lanka, or during any period in which the Office of President of the Republic of Sri Lanka would otherwise be vacant, such other person as the Prime Minister may nominate, or in the absence of such nomination, the person for the time being lawfully performing the functions of the Chief Judge of the highest Appellate Court shall act in the office of President of the Republic of Sri Lanka; such person shall, before assuming office take the oath in the form and manner prescribed in section 25.

(2) Any person so acting in the Office of President of the Republic shall not continue to act after the President or some other person having a prior right to act in the said office has notified that he has assumed or resumed or is about to assume or resume the said office.

(3) The provisions of the Constitution relating to the President shall apply, in so far as they can be applied to an acting President.

CHAPTER VIII
NATIONAL STATE ASSEMBLY

Number and designation of Members of National State Assembly.

29. The National State Assembly shall consist of such number of elected representatives of the people as a Delimitation Commission established under section 77 may determine in accordance with the provisions of the Consititution. The Members of the National State Assembly shall be designated Members of Parliament.

National State Assembly validly constituted notwithstanding vacancies.

30. The National State Assembly shall be deemed to be validly constituted and shall have power to act notwithstanding any vacancy in the membership thereof and any proceedings in the National State Assembly shall be valid notwithstanding that it is discovered subsequently that a person not entitled so to do sat or voted or otherwise participated in the proceedings.

Oath of Allegiance.

31. Except for the purpose of electing the Speaker of the National State Assembly, no Member of the National State Assembly shall sit or vote in the National State Assembly until he has taken the following oath of allegiance to the Consititution before the National State Assembly:—

"I, ..., do solemnly declare and affirm/swear that I will be faithful and bear true allegiance to the Republic of Sri Lanka and that I will uphold the Constitution of Sri Lanka."

Speaker, Deputy Speaker and Deputy Chairman of Committees.

32. (1) The National State Assembly shall, at its first meeting after a general election, elect three Members to be respectively the Speaker, the Deputy Speaker and Chairman of Committees (hereinafter referred to as the "Deputy Speaker") and the Deputy Chairman of Committees thereof.

(2) A Member holding office as the Speaker or the Deputy Speaker or the Deputy Chairman of Committees of the National State Assembly shall, unless he earlier resigns the office or ceases to be a Member, vacate his office on the dissolution of the National State Assembly.

(3) Whenever the office of Speaker, Deputy Speaker or Deputy Chairman of Committees becomes vacant otherwise than as a result of a dissolution of the National State Assembly, the National State Assembly shall at its first meeting after the occurrence of the vacancy elect another Member to the Speaker, Deputy Speaker or Deputy Chairman of Committees, as the case may be.

(4) If the National State Assembly, after having been dissolved, is summoned under subsection (2) of section 40, each of the members mentioned in subsection (2) of this section shall, notwithstanding anything therein, resume and continue to hold his office while that National State Assembly is kept in session.

Persons presiding at sittings of National State Assembly.

33. The Speaker, or in his absence the Deputy Speaker or in their absence the Deputy Chairman of Committees, shall preside at sittings of the National State Assembly. If none of them is present, a Member elected by the National State Assembly for the sitting shall preside at that sitting of the National State Assembly.

Quorum.

34. If at any time during a meeting of the National State Assembly, the attention of the person presiding is drawn to the fact that there are fewer than twenty Members present, the person presiding shall, subject to any Standing Order of the National State Assembly, adjourn the sitting without question put.

Clerk to the National State Assembly.

35. There shall be a Clerk to the National State Assembly who shall be appointed by the President.

(2) The members of the staff of the Clerk to the National State Assembly shall be appointed by him with the approval of the Speaker.

(3) The Clerk to the National State Assembly shall not be removed except by the President upon an address of the National State Assembly.

(4) The age of retirement of the Clerk to the National State Assembly shall, unless the National State Assembly otherwise provides, be sixty years.

Vacation of seats in National State Assembly.

36. (1) The seat of a Member of the National State Assembly shall become vacant—

(*a*) upon his death; or

(*b*) if, by a writing under his hand addressed to the Clerk to the National State Assembly, he resigns his seat; or

(*c*) if he becomes subject to any of the disqualifications mentioned in sections 68 and 70; or

(*d*) if he becomes a member of a state service or, being a member of a state service, does not cease to be a member of such service before he sits in the National State Assembly ; or

(*e*) if, without the leave of the National State Assembly first obtained, he absents himself from sittings of the National State Assembly during a continuous period of three months; or

(f) if his election as a Member of the National State Assembly or, in the case of a Member of the first National State Assembly, his election as a Member of Parliament or as a Member of the National State Assembly is declared void under the law in force for the time being; or

(g) upon the dissolution of the National State Assembly

(2) Whenever the seat of a Member of the National State Assembly falls vacant, except under the provisions of paragraph (*f*)or paragraph (*g*) of subsection (1) of this section the Clerk to the National State Assembly shall inform the President who shall within one month

by notice in the *Gazette* order the holding of an election to fill the vacancy.

Standing Orders.

37. (1) Subject to the provisions of the Constitution, the National State Assembly may by resolution or Standing Order provide for—

(*a*) the election and retirement of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees; and

(*b*) the regulation of its business, the preservation of order at its sittings and any other matter for which provision is required or authorized to be so made by the Constitution.

(2) Until the National State Assembly otherwise provides, the Standing Orders of the House of Representatives operative immediately prior to the commencement of the Constitution shall, *mutatis mutandis*, continue in force as the Standing Orders of the National State Assembly.

Privileges of National State Assembly and remuneration of Members.

38. (1) Until the National State Assembly otherwise provides, the privileges, immunities and powers of the National State Assembly and of its Members shall be the same as those of the House of Representatives and of its Members immediately prior to the commencement of the Constitution, and accordingly, the Parliament (Powers and Privileges) Act shall as far as applicable and *mutatis mutandis*, continue in force.

(2) The Ministers, the Deputy Ministers, Members of the National State Assembly including the Speaker, the Deputy Speaker and the Deputy Chairman of Committees shall be paid such remuneration and allowances as may be provided by the National State Assembly.

(3) Until the National State Assembly so provides, the remuneration payable to Ministers, the Speaker,

the Deputy Speaker, the Deputy Chairman of Committees and other Members of the National State Assembly shall be the same as the remuneration paid to Ministers, the Speaker, the Deputy Speaker, the Deputy Chairman of Committees and other Members of the House of Representatives immediately before the commencement of the Constitution. The Deputy Ministers of the National State Assembly shall, until the National State Assembly otherwise provides, be paid the same remuneration as were paid to Parliamentary Secretaries of the House of Representatives immediately before the commencement of the Constitution.

Proceedings of National State Assembly outside jurisdiction of courts.

39. (1) Except as otherwise expressly provided in the Constitution no court or other institution administering justice shall have power or jurisdiction in respect of the proceedings of the National State Assembly or of any thing done, purported to be done or omitted to be done by or in the National State Assembly.

(2) Unless the National State Assembly otherwise provides, the provisions of subsection (1) of this section shall not affect the operation of the Parliament (Powers and Privileges) Act.

Duration of the National State Assembly

Duration of National State Assembly.

40. (1) Unless the National State Assembly is sooner dissolved, every National State Assembly elected under the Constitution shall continue for a period of six years from the date of its first meeting and no longer, and the expiry of the period of six years shall operate as a dissolution of the National State Assembly.

(2) If at any time after the dissolution of the National State Assembly an emergency is declared under subsection (2) of section 134, the Proclamation declaring the emergency shall operate as a summoning of the National State Assembly to meet on the tenth day after such Proclamation unless the Proclamation appoints an earlier date for the meeting which shall not be less than three days

from the date of the Proclamation. The National State Assembly so summoned shall be kept in session until the termination of the emergency or the conclusion of the general election whichever occurs earlier and shall thereupon stand dissolved.

Sessions of National State Assembly.

41. (1) The National State Assembly shall be summoned to meet at least once in every year. The summoning of the National State Assembly shall be by Proclamation of the President.

(2) The National State Assembly may not be prorogued for any period longer than four months, and the date for the next session shall be stated in the Proclamation proroguing the National State Assembly.

(3) When the National State Assembly is prorogued, any Bill introduced before such prorogation may be proceeded with during the session immediately following such prorogation.

(4) At any time while National State Assembly stands prorogued, the President may by Proclamation summon the National State Assembly for a date earlier than the date referred to in subsection (2) of this section, such earlier date not being earlier than three days from the date of the Proclamation.

(5) At any time while the National State Assembly stands prorogued, the National State Assembly may be dissolved.

(6) When the National State Assembly is dissolved, the Proclamation by which the National State Assembly is dissolved shall fix a date or dates for the election of Members of the National State Assembly and shall summon the new National State Assembly to meet on a date not later than four months from the date of the Proclamation.

(7) When the National State Assembly stands dissolved by the expiry of the period of six years fixed for its continuance, the dissolution shall operate as a statutory direction for the election of Members of the National State Assembly to be held before a period of four months, commencing on the date of the dissolution, elapses, and the President shall after consultation with the Prime Minister fix dates within such period for the holding of the elections and for the first meeting of the National State Assembly.

First National State Assembly.

42. (1) The Members of the first National State Assembly shall be—

(*a*) persons who were Members of the Constituent Assembly immediatly piror to the commencement of the Consitution ; and

(*b*) such persons as may be elected under the provisions of subsection (4) of this section.

(2) The electoral districts relating to the House of Representatives existing immediately prior to the commencement of the Constitution shall be the electoral districts in relation of the first National State Assembly.

(3) Where a Member of the first National State Assembly represented an electoral district in the House of Representatives existing immediately prior to the commencement of the Constitution, he shall be deemed to be a Member for that electoral district in the first National State Assembly.

(4) Where any electoral district relating to the first National State Assembly is not represented in the first National State Assembly there shall be deemed to be a vacancy in the membership of the first National State Assembly and such vacancy shall be filled in accordance with the law relating to elections to the National State Assembly in force for the time being.

(5) Unless sooner dissolved, the first National State Assembly shall continue for a period of five years commencing on the date of the adoption of the Constitution by the Constituent Assembly.

(6) The provisions of the Constitution relating to a National State Assembly elected as provided by the Constitution shall apply to the first National State Assembly unless any of such provisions are inapplicable by reason of the special provisions in the Constitution relating to the first National State Assembly.

The First Prime Minister

First Prime Minister

43. The holder of the office of Prime Minister immediately before the commencement of the Constitution, shall be the first Prime Minister under the Constitution and assumes office as Prime Minister upon taking the following oath before the Members of the National State Assembly present at that time:—

"I, ..., do solemnly declare and affirm/swear that I will be faithful and bear true allegiance to the Republic of Sri Lanka, that I will uphold the Constitution of Sri Lanka and shall faithfully perform the duties and functions of the Office of Prime Minister in accordance with the Constitution and with the law."

Legislative Powers of the National State Assembly

Legislative powers of National State Assembly

44. The legislative power of the National State Assembly is supreme and includes the power—

(*a*) to repeal or amend the Constitution in whole or in any part; and

(*b*) to enact a new Constitution to replace the Constitution.

Provided that such power shall not include the power—

(i) to suspend the operation of the Constitution or any part thereof; and

(ii) to repeal the Constitution as a whole without enacting a new Constitution to replace it.

No delegation of principal law-making power.

45. (1) The National State Assembly may not abdicate, delegate or in any manner alienate its legislative power, nor may it set up an authority with any legislative power other than the power to make subordinate laws.

(2) It shall not be a contravention of the preceding provisions of this section for the National State Assembly to make any law containing—

(*a*) any provision empowering any authority to appoint a date on which a law passed by the National State Assembly is to come into effect or to cease to have effect;

(*b*) any provision empowering any authority to make by order any law enacted by the National State Assembly or any part thereof applicable to any locality or to any class of persons; and

(*c*) any provision empowering any authority by an order or an act prescribed by law to create legal persons.

(3)(*a*) The National State Assembly may by law confer the power of making subordinate legislation for prescribed purposes on any person or body.

(*b*) Wherever any provision in an existing written law confers the power of making subordinate legislation for prescribed purposes on any person or body such power shall be deemed to have been conferred by a law of the National State Assembly.

(4) The National State Assembly may as an exception to the provisions of subsection (1) of this section, delegate to the President the power to make, in accordance with the law for the time being relating to public security and for the duration of a state of emergency, emergency regulations in the interest of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion or for the maintenance of supplies and services essential to the life of the community. The power to make such emergency regulations shall include the power to make regulations having the legal effect of overriding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution.

CHAPTER IX
PROCEDURE FOR ENACTING LAWS AND FOR PASSING RESOLUTIONS

Publication and passing of Bills.

46. (1) Every Bill for a law shall be published in the *Gazette in Sinhala and in Tamil translation at least* seven days before it is placed on the Agenda of the National State Assembly.

(2) The passage of Bill through the National State Assembly shall be in accordance with the Standing Orders of the National State Assembly and the provisions of this Chapter.

(3) The National State Assembly may in circumstances to be prescribed in the Standing Orders, suspend the operation of Standing Orders.

Voting in National State Assembly.

47. Except in the case where the special majority is prescribed by sections 51 and 52 any question proposed for the decision of the National State Assembly shall be decided by a majority of votes of members present and voting. The Speaker shall not vote in the first instance but shall exercise a casting vote in the event of an equality of votes.

When Bill becomes law.

48. (1) A Bill passed by the National State Assembly shall become a law of the National Stae Assembly when the certificate, as provided by section 49 is endorsed upon it. Such law may provide for the retrospective operation of any or all of its provisions or for the appointment of a date on which the law or any provision thereof shall come into operation.

(2) No institution administering justice and like wise 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.

Speaker's Certificate

49. (1) The Speaker or, when he is unable to perform the functions of his office, the Deputy Speaker shall endorse on every Bill passed by the National State Assembly, the Certificate prescribed by subsection (2) of this section.

(2) The Certificate, signed by the Speaker or the Deputy Speaker, as the case may be, shall be in the following form:—

"This law (here include the short title of the law) has been duly passed by the National State Assembly."

(3) The Certificate under subsection (2) of this section shall be conclusive for all purposes. 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 any such Certificate.

Resolutions

50. All resolutions of the National State Assembly, including resolutions required or authorized to be made under the provisions of the Constitution or of any law, may be passed in accordance with the procedure prescribed therefor by the Standing Orders of the National State Assembly.

CHAPTER X
SPECIAL PROCEDURE FOR LAWS AMENDING THE CONSTITUTION AND LAWS INCONSISTENT WITH THE CONSTITUTION

Amendment or repeal of Constitution must be express.

51. (1) No Bill for the repeal or amendment of any provision of the Constitution shall be placed on the Agenda of the National State Assembly unless the provision to be repealed or amended and consequential amendments, if any, are expressly stated in the body of the Bill, and the long title of the Bill expressly states that the Bill is for the amendment of the Constitution.

(2) No Bill for the repeal of the Constitution shall be placed on the Agenda of the National State Assembly unless the Bill contains provisions replacing the Constitution to be repealed and the long title of the Bill expressly states that the Bill is for the repeal and replacement of the Constitution.

(3) If in the opinion of the Speaker or when he is unable to perform the functions of his office in the opinion of the Deputy Speaker, a Bill does not satisfy the conditions in subsection (1) or subsection (2) of this section, he shall direct that such Bill be not proceeded with unless it is amended so as to satisfy the required conditions.

(4) No provision in any law shall have the legal effect of repealing or amending any provision of the Constitution by implication.

(5) No Bill for the replacement, repeal or amendment of the Constitution shall be certified under section 49 unless it is passed by two-thirds at least of the whole number of members of the National State Assembly (including those not present) voting in its favour.

Enactment of laws inconsistent with Constitution.

52. (1) The National State Assembly may enact a law, which, in some particular or respect, is inconsistent

with any provision in the Constitution without amending or repealing such provision of the Constitution provided that such law is passed by the majority required for the amendment of the Constitution.

(2) A law passed under the provisions of subsection (1) of this section shall not be interpreted as amending the provisions of the Constitution with which such law is inconsistent.

Examination of Bills

Duties of Attorney-General in regard to published Bills.

53. (1) It shall be the duty of the Attorney-General to examine every Bill for any contravention of the requirements of subsections (1) and (2) of section 5f and for any provision which cannot be validly passed except by the special majority prescribed by the Constitution; and the Attorney-General or any officer assisting the Attorney-General in the performance of his duties under this subsection and subsection (4) of this section shall be afforded all facilities necessary for the performance of his duties.

(2) If the Attorney-General is of the opinion that a Bill contravenes any of the requirements of subsections (1) and (2) of section 51 or that any provision in a Bill cannot be validly passed except by the special majority prescribed by the Constitution, he shall communicate such opinion to the Speaker.

(3) If the Attorney-General is of the opinion that the Speaker should refer to the Constitutional Court the question whether a Bill contravenes any of the requirements of subsections (1) and (2) of section 51 or the question whether any provision in a Bill cannot be validly passed except by the special majority prescribed by the Constitution, he shall communicate such opinion to the Speaker.

(4) The duty of the Attorney-General under the preceding provisions of this section shall include the

duty of examining all amendments proposed to a Bill and of communicating his opinion at the stage when the Bill is ready to be put to the National State Assembly for its acceptance.

Constitutional Court

Constitutional Court.

54. (1) There shall be a Constitutional Court for the performance of the functions assigned to it by the Constitution. The President shall appoint, for a term of four years, five persons to be members of the Constitutional Court. Whenever occasion arises for the determination of any matter arising under subsection (2) of this section or of section 55, three members of the Constitutional Court chosen in accordance with the rules of the Constitutional Court shall determine such matter.

(2) Any question as to whether any provision in a Bill in inconsistent with the Constitution shall be referred by the Speaker or, when he is unable to perform the functions of his office, the Deputy Speaker to the Constitutional Court for decision if—

(*a*) the Attorney-General communicates his opinion to the Speaker under section 53; or

(*b*) the Speaker receives within a week of the Bill being placed on the Agenda of the National State Assembly a written notice raising such a question signed by the leader in the National State Assembly of a recognized political party; or

(*c*) the question is raised within a week of the Bill being placed on the Agenda of the National State Assembly and signed by at least such number of members of the National State Assembly as would constitute a quorum of the National State Assembly; or

(*d*) the Speaker or, when he is unable to perform the functions of his office, the Deputy Speaker takes the view that there is such a question; or

(*e*) the Constitutional Court on being moved by any citizen within a week of the Bill being placed on the Agenda of the National State Assembly, advises the Speaker that there is such a question.

(3) No proceedings shall be had in the National State Assembly in relation to a Bill referred to the Constitutional Court under subsection (2) of this section or of section 55 until the decision of the Constitutional Court under subsection (4) of this section or its opinion under section 55 has been given.

(4) The decision of the Constitutional Court upon a reference under subsection (2) of this section shall bind the Speaker and shall be conclusive for all purposes. 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 a decision of the Constitutional Court.

Urgent Bills

55. (1) In the case of a Bill which is, in the view of the Cabinet of Ministers, urgent in the national interest, and bears an endorsement to that effect, the provisions of subsection (1) of section 46 and of subsection (2) of section 54 shall have no application.

(2) Such a Bill shall be referred by the Speaker or, when he is unable to perform the functions of his office, by the Deputy Speaker to the Constitutional Court which shall advise the Speaker whether—

(*a*) in its opinion the provisions of the Bill are consistent with the Constitution; or

(*b*) in its opinion the Bill or any provision therein is inconsistent with the Constitution; or

(*c*) it entertains a doubt that the Bill or any provision therein is consistent with the Constitution.

The Constitutional Court shall communicate its advise to the Speaker as expeditiously as possible and in any case within twenty-four hours of the assembling of the Court.

(3) Such Bill shall not be placed on the Agenda of the National State Assembly until the Speaker has received from the Constitutional Court its advice as provided for in subsection (2) of this section.

(4) If the Constitutional Court advices the Speaker that this Bill or any provision therein is inconsistent with the Constitution or that the Constitutional Court entertains a doubt whether the Bill or any provision therein is consistent with the Constitution such Bill may not pass into law except with special majority required for the amendment of the Constitution.

Vacancies in the Constitutional Court

56. (1) A vacancy in the membership of the Constitutional Court shall arise—

(*a*) upon the death of a member; or
(*b*) on the resignation of a member by a writing addressed to the President; or
(*c*) on the removal of a member by the President on account of ill-health or physical or mental infirmity; or
(*d*) on the determination of the term for which the members of the Constitutional Court are appointed.

(2) Any vacancy referred to in subsection (1) of this section may be filled in accordance with the provisions of subsection (1) of section 54.

(3) Whenever a member of the Constitutional Court is absent from Sri Lanka, the President may appoint a person to be a member of the Court during such absence.

(4) Except as provided in the preceding provisions of this section, the membership of the Constitutional Court shall remain unaltered during the period for which it was appointed.

Remuneration of members of the Constitutional Court

57. Prior to the appointment of the members of the Constitutional Court, the National State Assembly shall fix the remuneration to be paid to its members. The remuneration so fixed shall remain unaltered throughout the period of its term and shall be charged on the Consolidated Fund.

Procedure of the Constitutional Court.

Convening of Constitutional Court

58. The Clerk to the National State Assembly shall be the Registrar of the Constitutional Court and shall convene the Court.

Constitutional Court to regulate its own procedure

59. (1) The Constitutional Court may, from time to time, subject to the provisions of the Constitution make rules of Court for regulating generally the practice and procedure of the Constitutional Court.

(2) Every rule of Court shall be published in the *Gazette* and shall come into operation on the date of such publication or on such later date as may be specified in such rule.

(3) All rules of Court made under this section shall as soon as convenient after their publication in the *Gazette*, be brought before the National State Assembly for approval. Any such rule which is not so approved shall be deemed to be rescinded as from the date of disapproval but without prejudice to anything previously done thereunder.

Chairman

60. The Chairman of the Constitutional Court for any occasion shall be chosen in accordance with the rules of the Constitutional Court.

Decisions of Constitutional Court

61. (1) The decision of the Constitutional Court shall be by majority vote.

(2) No member of the Constitutional Court present at a session shall refrain from voting.

Sittings of Constitutional Court

62. All hearings before the Constitutional Court shall be open to the public.

Constitutional Court to hear arguments and who may appear before it

63. (1) The Attorney-General shall have the right to be heard on all matters before the Constitutional Court.

(2) The Constitutional Court may in its discretion grant to any person such hearing as may appear to the Court to be necessary before dealing with any question referred to it under subsection (2) of section 54.

(3) The Constitutional Court may if it thinks it necessary or expedient summon and hear witnesses and order the production before it of any document or other thing.

(4) No Member of the National State Assembly shall appear as an Advocate or a Proctor before the Constitutional Court.

Contempt of Constitutional Court

64. (1) The Constitutional Court shall have full power and authority to take cognizance of and to try in a summary manner any offence of contempt committed against or in disrespect of its authority and on conviction to commit the offender to jail until he shall have purged his contempt or for such period as to the Court shall seem meet; and such imprisonment shall be simple or rigorous as the Court shall direct and the offender may in addition thereto or in lieu thereof in the discretion of the Court be sentenced to pay a fine not exceeding five thousand rupees.

(2) The state officers enforcing or carrying out the orders of the Supreme Court made under its contempt

jurisdiciton shall in like manner enforce and carry out the orders of the Constitutional Court made under subsection (1) of this section.

Time within which decision and reasons of Constitutional Court must be given

65. The decision of the Constitutional Court shall be given within two weeks of the reference together with the reasons. A dissentient member of the Constitutional Court may also state his reasons for his dissent and these shall be forwarded together with the majority decision and reasons.

CHAPTER XI
CONSTITUTION OF THE NATIONAL STATE ASSEMBLY

The Franchise

Age of voting

66. Every citizen of the age of eighteen years and over, unless disqualified as hereinafter provided, is qualified to be an elector at elections to the National State Assembly.

Citizenship laws

67. Unless the National State Assembly otherwise provides, such laws relating to citizenship and to rights of citizens as were in force immediately before the commencement of the Constitution shall *mutatis mutandis* continue in force:

Provided that no law of the National State Assembly shall deprive a citizen by descent of the status of citizen of Sri Lanka.

Disqualifications to be an elector

68. No person shall be qualified to be an elector at an election of members of the National State Assembly if he is subject to any of the following disqualifications, namely—

(*a*) if he is not a citizen of Sri Lanka; or

(*b*) if he is under any law in force in Sri Lanka found or declared to be of unsound mind; or

(*c*) if he is serving or has during the period of five years immediately preceding completed the serving of a sentence of imprisonment (by whatever name called) for a term of six months or longer for an offence punishable with imprisonment for a term of two years or longer or is under sentence of death or is serving or has during the period of seven years immediately preceding completed the serving of a sentence of imprisonment for a term of six months or longer awarded in lieu of execution of any such sentence:

Provided that if any person disqualified under this paragraph is granted a free pardon such disqualification shall cease from the date on which the pardom is granted:

(*d*) if a period of seven years has not elapsed since—

(i) the last of the dates, of any, of his being convicted of any offence under section 52 (1) or 53 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or of such offence under the law for the time being relating to the election of Members to the National State Assembly as would correspond to an offence under either of the said two sections; or

(ii) the last of the dates, if any, of his being convicted of a corrupt practice under the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or of such offence under the law for the time being relating to the election of Members to the National State Assembly as would correspond to the said corrupt practice; or

(iii) the last of the dates, if any, being a date after the commencement of the Constitution of a

report made by an Election Judge finding him guilty of any corrupt practice under the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or under any law for the time being relating to the election of Members to the National State Assembly; or

(iv) the last of the dates, if any, of his being convicted or found guilty of bribery under the provisions of the Bribery Act or of any future law as would correspond to the Bribery Act;

(*e*) if a period of five years has not elapsed since—

(i) the last of the dates, if any, of his being convicted of any offence under the provisions of sections 77 to 82 (both inclusive) of the Local Authorities Elections Ordinance or for such offence under any future law as would correspond to any offence under the said sections; or

(ii) the last of the dates, if any, of his being convicted of an offence under the provisions of sections 2 and 3 of the Public Bodies (Prevention of Corruption) Ordinance or of such offence under any future law as would correspond to the said offence; or

(iii) the publication in the *Gazette* under the provisions of subsection (4) of section 5 of the Public Bodies (Prevention of Corruption) Ordinance or under the provisions of any future law as would correspond to such subsection of a finding against him by a Commission of Inquiry; or

(*f*) if a period of three years has not elapsed since—

(i) the last of the dates, if any, of his being convicted of an illegal practice under the Ceylon

(Parliamentary Elections) Order-in-Council, 1946, or of such offence under the law for the time being relating to the election of Members to the National State Assembly as would correspond to the said illegal practice; or

(ii) the last of the dates, if any, being a date after the commencement of the Constitution of a reoprt made by an Election Judge finding him guilty of any illegal practice under the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or under any law for the time being relating to the election of Members to the National State Assembly.

Qualification for membership of National State Assembly

69. Every person who is qualified to be an elector is qualified to be elected as a member of the National State Assembly unless he is disqualified under the provisions of section 70.

Disqualifications for membership of National State Assembly

70. (1) No person shall be qualified to be elected as a Member of the National State Assembly or to sit or vote in the National State Assembly—

(*a*) if he becomes subject to any of the disqualifications specified in section 68; or

(*b*) if he—

(i) stands nominated as a candidate for election for more than one electoral district at a General Election; or

(ii) stands nominated as a candidate for election for an electoral district and before the conclusion of the election for that electoral district he stands nominated as a candidate for election for any other electoral district; or

(iii) being a member of the National State Assembly stands nominated as a candidate for election for any electoral district; or

(c) if he is—

(i) a Judge or other state officer referred to in section 124; or

(ii) the Clerk to the National State Assembly or a member of his staff; or

(iii) the Commissioner of Elections; or

(iv) the Auditor-General; or

(v) a state officer holding any office the initial of the salary scale of which is not less than Rs. 6,720 per annum; or

(vi) an officer in any public corporation holding any office the initial of the salary scale of which is not less than Rs. 7,200 per annum; or

(vii) a member of the Regular Force of the Army, Regular Naval Force or the Regular Air Force; or

(viii) a police officer or a state officer exercising police functions; or

(d) if he has any such interest in any such contract made by or on behalf of the State or a public corporation as may be prescribed by or under a law of the National State Assembly; or

(e) if he is an undischarged bankrupt or insolvent, having been declared bankrupt or insolvent; or

(*f*) if during the preceding seven years he has been adjudged by a competent court or by a commission appointed under the Commission of Inquiry Act or by a Commission appointed with the approval of the National State Assembly or by a Committee of the National State Assembly to have accepted a bribe or gratification offered with a view to influencing his judgment as a Member of the National State Assembly.

(2) A "public corporation" for the purposes of the Constitution means any corporation, board or other body which was or is established by or under any written law other than the Companies Ordinance with capital wholly or partly provided by the Government by way of grant, loan or other form.

(3) For the purposes of paragraph (*f*) of subsection (1) of this section, the acceptance by a Member of the National State Assembly of any allowance or other payment made to him by any trade union or other organization solely for the purposes of his maintenance shall not be deemed to be the acceptance of a bribe or gratification.

Penalty for sitting or voting in the National State Assembly when disqualified

71. Any person who—

(*a*) having been elected a Member of the National State Assembly but not having been at the time of such election qualified to be so elected, shall sit or vote in the National State Assembly; or

(*b*) shall sit or vote in the National State Assembly after his seat therein has become vacant or he has become disqualified from sitting or voting therein,

knowing or having reasonable grounds for knowing that he was so disqualified or that his seat has become vacant, as the case may be, shall be liable to a penalty

of five hundred rupees for every day upon which he so sits or votes to be recovered as a debt due to the Republic by an action instituted by the Attorney-General in the District Court of Colombo.

Election of Members to the National State Assembly

Election to be free and secret

72. The election of Members to the National State Assembly shall be free and shall be by secret ballot.

Powers of National Assembly in respect of elections.

73. Subject to the provisions on this Chapter the National State Assembly may by law make provision for—

(*a*) the registration of electors;

(*b*) the preparation and revision of electoral lists;

(*c*) the procedure for the election of Members to the National State Assembly;

(*d*) the creation of offences relating to elections and punishment therefor;

(*e*) the grounds for avoiding elections; and

(*f*) such other matters as are necessary or incidental to the election of Members to the National State Assembly:

Provided, however, that a law made under this section shall not add to the disqualifications enumerated in section 70.

State officer not to function during period of election

74. When a state officer is a candidate at any election, he shall be deemed to be on leave from the date on which he stands nominated as a candidate until the conclusion of the election. Such a state officer shall not during this period exercise, perform or discharge any of the powers, functions or duties of his office.

75. Until the National State Assembly provides for the matters referred to in section 73, such laws relating to or connected with the election of members of Parliament and the determination of disputed elections as were in force immediately before the commencement of the Constitution shall, subject to the provisions contained in this Chapter, apply, *mutatis mutandis*, to the said matters.

Continuance of existing laws relating to elections

Delimitation of Electoral Districts

76. The provisions of sections 77 to 81 (both inclusive) shall apply in regard to the delimitation of electoral districts.

Delimitation of electoral districts

77. (1) Within one year after the completion of every general census commencing with the first general census completed after the commencement of the Constitution, the President shall establish a Delimitation Commission.

Establishment of Delimitation Commission

(2) Every Delimitation Commission established under this section shall consist of three persons appointed by the President who shall select persons who he is satisfied are not actively engaged in politics. The President shall appoint one of such persons to be the Chairman.

(3) If any member of a Delimitation Commission shall die, or resign, or if the President is satisfied that any such member has become incapable of discharging his functions as such, the President shall, in accordance with the provisions of subsection (2) of this section, appoint another person in his place.

78. (1) Every Delimitation Commission established under section 77 shall divide each Province of Sri Lanka into a number of electoral districts ascertained as provided in subsection (2) of this section and shall assign names thereto.

Duties of Delimitation Commission

(2) The total number of persons who, according to the last preceding general census, were for the time being resident in the Province shall be ascertained to the nearest 75,000. In respect of each 75,000 of this number the Delimitation Commission shall allot one electoral district to the Province and shall add a further number of electoral districts (based on the number of square miles in the Province at the rate of one additional electoral district for each 1,000 square miles of area calculated to the nearest 1,000) as follows:—

Western Province	...	1
Central Province	...	2
Southern Province	...	2
Northern Province	...	4
Eastern Province	...	4
North-Western Province	...	3
North-Central Province	...	4
Province of Uva	...	3
Province of Sabaragamuwa	...	2

(3) Subject to the provisions of subsections (4) and (5) of this section, each electoral district of a Province shall have as nearly as may be an equal number of citizens of Sri Lanka:

Provided that in dividing a Province into electoral districts, every Delimitation Commission shall have regard to the transport facilities of the Province, its physical features and the community or diversity of interest of its inhabitants.

(4) Where it appears to the Delimitation Commission that there is in any area of a Province a substantial concentration of citizens of Sri Lanka united by a community of interest, whether racial, religious or otherwise but differing in one or more of these respects from the majority of the inhabitants of that area, the Commission may make such division of the Province into electoral districts as may be necessary to render possible the

representation of that interest. In making such division the Commission shall have due regard to the desirability of reducing to the minimum the disproportion in the number of citizens of Sri Lanka resident in the several electoral districts of the Province.

(5) Notwithstanding anything in subsection (1) or subsection (4) of this section, the Delimitation Commission shall have power to create in any Province one or more electoral districts returning two or more members if the racial composition of the citizens of Sri Lanka in that Province is such as to make it desirable to render possible the representation of any substantial concentration of citizens of Sri Lanka in that Province who are united by a community of racial interest different from that of the majority of the citizens of Sri Lanka in that Province:

Provided that in any such case the number of electoral districts for that Province, as ascertained in accordance with the provisions of subsection (2) of this section, shall be reduced so that the total number of members to be returned for that Province shall not exceed the total number of electoral districts so ascertained.

Decisions of *Delimitation* Commission

79. In the event of a difference of opinion among the members of any Delimitation Commission, the opinion of the majority of the members thereof shall be deemed to be the decision of the Commission. Where each member of the Commission is of a different opinion, the opinion of the Chairman shall be deemed to be the decision of the Commission.

Notification of electoral districts

80. The Chairman of every Delimitation Commission shall communicate the decision of the Commission to the President who shall by Proclamation publish the names and boundaries of the electoral districts as decided by the Commission and the number of members to be returned by each such district. The districts specified in the Proclamation for the time being in force shall be the electoral

districts of Sri Lanka for all purposes of the Constitution and of any law for the time being in force relating to the election of members to the National State Assembly.

Re-division of electoral districts

81. Any re-division of the Provinces of Sri Lanka into electoral districts effected under the provisions of section 78 and any alteration consequent upon such re-division in the total number of the members of the National State Assembly shall, in respect of the election of members thereof, come into operation at the next General Election held after such re-division and not earlier:

Provided, however, that if a National State Assembly is dissolved before the publication of the Proclamation referred to in section 80, the General Election consequent on such dissolution shall be held on the basis of the electoral districts existing at the time of such dissolution.

Commissioner of Elections

Commissioner of Elections

82. (1) There shall be a Commissioner of Elections who shall be appointed by the President and who shall hold office during good behaviour.

(2) The salary of the Commissioner of Elections shall be determined by the National State Assembly, shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(3) The office of the Commissioner of Elections shall become vacant—

(*a*) upon his death; or

(*b*) on his resignation in writing addressed to the President; or

(*c*) on his attaining the age of sixty years; or

(*d*) on his removal by the President on account of ill-health or physical or mental infirmity; or

(*e*) on his removal by the President upon an address of the National State Assembly.

(4) Whenever the Commissioner of Elections is unable to perform the functions of his office, the President may appoint a person to act in the place of the Commissioner of Elections.

(5) The President may in exceptional circumstances permit a Commissioner of Elections who has reached the age of sixty years to continue in office for a period not exceeding twelve months.

Powers, functions and duties of the Commissioner of Elections

83. The Commissioner of Elections shall exercise, perform or discharge all such powers, functions or duties as may be conferred or imposed on or vested in him by the laws for the time being in force relating to elections to the National State Assembly or any other written law.

CHAPTER XII
CONTROL OF FINANCE

Control of National State Assembly over public finance

84. The National State Assembly shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local government body or any other public authority, except by or under the authority of a law passed by the National State Assembly.

Consolidated Fund

85. (1) The funds of the Republic not allocated by law to specific purposes shall form one Consolidated Fund into which shall be paid the produce of all taxes, imposts, rates and duties and all other revenues and receipts of the Republic not allocated to specific purposes.

(2) The interest on the public debt, sinking fund payments, the costs, charges and expenses incidental

to the collection, management and receipt of the Consolidated Fund and such other expenditure as the National State Assembly may determine shall be charged on the Consolidated Fund.

Withdrawal of sums from Consolidated Fund

86. (1) Save as otherwise expressly provided in subsection (3) of this section, no sum shall be withdrawn from the Consolidated Fund except under the authority of a warrant under the hand of the Minister in charge of the subject of Finance.

(2) No such warrant shall be issued unless the sum has by resolution of the National State Assembly or by any law been granted for specified public services for the financial year during which the withdrawal is to take place or is otherwise lawfully charged on the Consolidated Fund.

(3) Where the President dissolves the National State Assembly before the Appropriation Bill for the financial year has passed into law, he may, unless the National State Assembly shall have already made provision, authorize the issue from the Consolidated Fund and the expenditure of such sums as he may consider necessary for the public services until the expiry of a period of three months from the date on which the new National State Assembly is summoned to meet.

(4) Where the President dissolves the National State Assembly and fixes a date or dates for a general election, the President may unless the National State Assembly has already made provision in that behalf, authorize the issue from the Consolidated Fund and the expenditure of such sums as he may, after consultation with the Commissioner of Elections, consider necessary for such elections.

Contingencies Fund

87. (1) Notwithstanding any of the provisions of section 85, the National State Assembly may by law create a Contingencies Fund for the purpose of providing for urgent and unforeseen expenditure.

(2) The Minister in charge of the subject of Finance, if satisfied—

(*a*) that there is need for any such expenditure, and

(*b*) that no provision for such expenditure exists

may, with the consent of the Prime Minister, authorize provision to be made therefor by an advance from the Contingencies Fund.

(3) As soon as possible after every such advance, a Supplementary Estimate shall be presented to the National State Assembly for the purpose of replacing the amount so advanced.

Special provisions as to Bills affecting public revenue

88. No Bill or motion, authorizing the disposal of or the imposition of charges upon, the Consolidated Fund or other funds of the Republic, or the imposition of any tax or the repeal, augmentation or reduction of any tax for the time being in force shall be introduced in the National State Assembly except by a Minister, nor unless such Bill or motion has been approved either by the Cabinet of Ministers or in such manner as the Cabinet of Ministers may authorize.

Auditor General

89. (1) There shall be an Auditor-General who shall be appointed by the President and who shall hold office during good behaviour.

(2) The salary of the Auditor-General shall be determined by the National State Assembly, shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(3) The office of the Auditor-General shall become vacant—

(*a*) upon his death; or

(*b*) on his resignation in writing addressed to the President; or

(*c*) on his attaining the age of sixty years; or

(*d*) on his removal by the President on account of ill-health or physical or mental infirmity; or

(*e*) on his removal by the President upon an address of the National State Assembly.

(4) Whenever the Auditor-General is unable to perform the functions of his office, the President may appoint a person to act in the place of the Auditor-General.

Duties and functions of Auditor-General

90. (1) The Auditor-General shall audit the accounts of all Departments of Government and the accounts of local authorities and of public corporations and of any business or other undertaking vested under any written law in the Government. The Auditor-General shall also perform such duties and functions as may be prescribed by law by the National State Assembly.

(2) The Auditor-General or any person authorized by him shall in the performance of the duties and functions under subsection (1) of this section, be entitled—

(*a*) to have access to all books, records, returns and other documents;

(*d*) to have access to stores and other property; and

(*c*) to be furnished with such information and explanations as may be necessary for the purposes of the audit.

(3) The Auditor-General shall report to the National State Assembly annually and as and when he deems necessary on the performance of his duties and functions under the Constitution.

CHAPTER XIII
EXECUTIVE GOVERNMENT
The President and the Cabinet of Ministers

Responsibility of President in regard to the executive

91. The President shall be responsible to the National State Assembly for the due execution and performance of the powers and functions of his office under the Constitution and under other law, including the law for the time being relating to public security.

Cabinet of Ministers

92. (1) There shall be a Cabinet of Ministers charged with the direction and control of the government of the Republic which shall be collectively responsible to the National State Assembly and answerable to the National State Assembly on all matters for which they are responsible.

(2) Of the Ministers, one who shall be the Head of the Cabinet of Ministers shall be the Prime Minister. The President shall appoint as Prime Minister the Member of the National State Assembly who, in the President's opinion, is most likely to command the confidence of the National State Assembly.

Occasions for the appointment of a Prime Minister

93. Upon the death or the resignation of the Prime Minister, the President shall appoint a Prime Minister who shall assume office as Prime Minister upon taking the following oath:—

> "I,....., do solemnly declare and affirm/swear that I will be faithful and bear true allegiance to the Republic of Sri Lanka, that I will uphold the Constitution of Sri Lanka and shall faithfully perform the duties and functions of the Office of Prime Minister in accordance with the Constitution and with the law."

Ministers and their subjects and functions

94. (1) The Prime Minister shall determine the number of Ministers and Ministries and the assignment of subjects and functions to Ministers.

(2) The President shall appoint from among the members of the National State Assembly Ministers to be in charge of the Ministries so determined.

(3) The Prime Minister may at any time change the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet of Ministers. Such changes shall not affect the continuity of the Cabinet of Ministers, including the continuity of its responsibility to the National State Assembly.

Deputy Ministers

95. (1) The President may appoint from among the Members of the National State Assembly Deputy Ministers to assist the Ministers in the performance of their duties pertaining to the National State Assembly and to their departments and to exercise and perform such powers and duties of the Ministers under written law as may be delegated to the Deputy Minister under subsection (2) of this section.

(2) A Minister may, by notification in the *Gazette* delegate to his Deputy Minister any of the powers or duties conferred or imposed on the Minister by any written law, and it shall be lawful for the Deputy Minister to exercise or perform any power or duty delegated to him under this subsection notwithstanding anything to the contrary in the written law by which that power or duty is conferred or imposed on the Minister.

Tenure of office of Ministers and Deputy Ministers

96. A Minister or a Deputy Minister shall continue to hold office throughout the period during which the Cabinet of Ministers continues to function under the provisions of the Constitution unless he—

(*a*) is removed by a writing under the hand of the President; or

(*b*) resigns his office by a writing under his hand addressed to the President; or

(*c*) ceases, save in the circumstances set out in section 97, to be a Member of the National State Assembly.

Cabinet of Ministers during dissolution of National State Assembly

97. The Cabinet of Ministers functioning immediately prior to the dissolution of a National State Assembly shall continue to function during the period intervening between dissolution and the conclusion of the General Election.

Dissolution of Cabinet of Ministers

98. (1) On the death or the resignation of the Prime Minister or when the Prime Minister is deemed to have resigned, the Cabinet of Ministers shall stand dissolved and the other Ministers shall cease to hold office.

(2) The provisions of subsection (1) of this section shall not operate if the death or resignation of the Prime Minister occurs in the period referred to in section 97 and in that event, the Cabinet of Ministers shall continue to function with the other Ministers as its members. The President shall appoint one from smong such Ministers to be the Prime Minister.

(3) If on the death or resignation of a Prime Minister in the period referred to in section 97 there is no other Minister, the President shall exercise and perform the powers and functions of the Cabinet of Ministers functioning under section 97 until the conclusion of the General Election.

Occasions when Prime Minister is deemed to have resigned

99. The Prime Minister shall be deemed to have resigned—

(1) at the conclusion of a General Election; or

(2) if the National State Assembly rejects the Appropriation Bill or the National State Assembly passes a vote of no-confidence in the Government or the National State Assembly rejects the Statement of Government Policy at any session other than the first session of the National State Assembly and the Prime

Minister does not within forty-eight hours of such rejection of the Appropriation Bill or of such passage of a vote of no-confidence in the Government or of such rejection of the Statement of Government Policy advise the President to dissolve the National State Assembly, upon such forty-eight hours having elapsed.

Further occasions when Prime Minister is deemed to have resigned

100. (1) If the National State Assembly rejects the Statement of Government Policy at its first session and the Prime Minister within forty-eight hours of such rejection advises the President to dissolve the National State Assembly, the President may notwithstanding such advice decide not to dissolve the National State Assembly. Upon the President so deciding, the Prime Minister shall be deemed to have resigned.

(2) If the National State Assembly rejects the Statement of Government Policy at its first session and the Prime Minister does not within forty-eight hours of such rejection advise the President to dissolve the National State Assembly, the Prime Minister shall be deemed to have resigned upon such forty-eight hours having elapsed.

Acting Minister and Acting Deputy Minister

101. Whenever a Minister or a Deputy Minister is unable to perform the functions of his office, the President may appoint any Member of the National State Assembly to act in the place of the said Minister or Deputy Minister.

Secretary to Cabinet of Ministers

102. There shall be a Secretary to the Cabinet of Ministers who shall be appointed by the President. The Secretary shall, subject to the directions of the Prime Minister, have charge of the office of the Cabinet of Ministers, and shall discharge and perform such other duties and functions as may assigned to him by the Prime Minister or the Cabinet of Ministers.

Secretaries to Ministers.

103. (1) There shall be for each Minister a Secretary who shall be appointed by the President.

(2) The Secretary to the Ministry shall, subject to the direction and control of his Minister, exercise supervision over the departments of Government or other institutions in the charge of his Minister.

(3) For the purpose of this section the Office of the Clerk to the National State Assembly, the Department of the Commissioner of Elections, the Department of the Auditor-General and the office of the Secretary to the Cabinet of Ministers shall be deemed not to be departments of Government.

(4) The President may transfer any Secretary to a Ministry to any other post in the State Service.

Form of oath

104. No person appointed to any office referred to in this Chapter shall enter upon the duties of his office unless he takes the special oath prescribed for his office or where no such oath is prescribed, the oath set out in, Schedule 'B'

State Officers

Definiton of state officer

105. A "state officer" means any person who holds a paid office as a servant of the Republic, but does not include—

(*a*) the President;

(*b*) a Minister or a Deputy Minister; and

(*c*) a Member of the National State Assembly by reason only of the fact that he receives any remuneration or allowance as a Member.

Responsibility of Cabinet of Ministers

106. (1) The Cabinet of Ministers shall be responsible for the appointment, transfer, dismissal and disciplinary control of state officers and shall be answerable therefor to the National State Assembly.

(2) Subject to the provisions of the Constitution, the Cabinet of Ministers shall have the power of appointment, transfer, dismissal and disciplinary control of all state officers.

(3) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to state officers including the constitution of state services, the formulation of schemes of recruitment and codes of conduct for state officers, the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of state officers.

(4) The Cabinet of Ministers may notwithstanding any delegation of powers as is referred to in this Chapter exercise its powers of appointment, transfer, dismissal and disciplinary control of state officers.

(5) No institution administering justice shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory Board, the State Services Disciplinary Board, or a state officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of state officers.

Tenure of office of state officers

107. (1) Save as otherwise expressly provided by the Constitution, every state officer shall hold office during the pleasure of the President. The National State Assembly may however in respect of a state officer holding office during the pleasure of the President provide otherwise by a law passed by a majority of those present and voting.

(2) Subject to the provisions of the Constitution, and unless the National State Assembly otherwise provides, the Services of the Government of Ceylon existing immediately prior to the commencement of the Constitution shall, *mutatis mutandis*, continue and shall be deemed to be State Services constituted under the provisions of subsection (3) of section 106.

(3) Subject to the provisions of the Constitution and until the National State Assembly otherwise provides

the rules, regulations and procedures relating to the Services of the Government of Ceylon referred to in subsection (2) of this section that were in force immediately prior to the commencement of the Constitution shall, *mutatis mutandis*, be deemed to continue in force as rules, regulations and procedures relating to state services as if they had been made or provided under the Constitution.

(4) Until provision is made under subsection (3) of section 106 in regard to the delegation of authority for appointment, transfer, dismissal and disciplinary control of state officers, the authorities to whom such powers had been delegated by the Public Service Commission immediately prior to the commencement of the Constitution, shall continue to exercise such powers.

State officers appointed by President

108. The following state officers shall be appointed by the President:—

(*a*) state officers required by the Constitution or by or under the authority of a written law to be appointed by the President;

(*b*) the Attorney-General; and

(*c*) heads of the Army, Navy and Air Force and of the Police Force.

Pensions and Gratuities

109. (1) All pensions, gratuities or other like allowances payable to persons who have ceased to be in the Service of the Government of Ceylon or cease to be in the services of the Republic of Sri Lanka, or to widows, children or other dependants of such persons, shall be governed by the written law under which they were granted, or by any subsequent written law which is not less favourable.

(2) All pensions gratuities and other like allowances referred to in this section shall be a charge on the Consolidated Fund.

Applicability of sections 111 to 120

110. (1) The provisions of the succeeding sections in this Chapter shall apply to all state officers other than—

(*a*) the state officers referred to in section 35 and in section 108;

(*b*) every state officer, the principal duty or duties of whose office is the performance of functions of a judicial nature;

(*c*) the members of the Army, Navy and Air Force; and

(*d*) the members of the President's Office or of his personal staff.

(2) Subject to the provisions of any law of the National State Assembly, any question as to whether or not an office falls within paragraph (*b*) of subsection (1) of this section shall be decided by the Cabinet of Ministers. Such decision shall be final and conclusive. 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 any such decision.

State Services Advisory Board

State Services Advisory Board

111. (1) There shall be a State Services Advisory Board to exercise, perform or discharge such powers, functions, or duties as are required of the State Services Advisory Board under the Constitution.

(2) The State Service Advisory Board shall consist of three members appointed by the President, one of whom shall be designated Chairman.

(3) No person shall be appointed or shall remain a member of the State Service Advisory Board:—

(*a*) if he is a Member of the National State Assembly; or

(*b*) if he is a member of the State Services Disciplinary Board; or

(*c*) if he is a state officer.

(4) Every member of the State Service Advisory Board shall, subject to the provisions of subsection (5) of this section, hold office for a period of four years from the date of his appointment.

(5) The office of a member of the State Services Advisory Board shall become vacant—

(*a*) upon the death of such member; or

(*b*) on such member resigning his office by a writing addressed to the President; or

(*c*) on such member being removed from office by the President.

(6) Where the office of any member of the State Services Advisory Board becomes vacant, the President shall appoint another person in place of the member who dies, or resigns or is removed from office and the person so appointed shall hold office during the unexpired period of the term of office of the member last mentioned.

(7) Where any member of the State Services Advisory Board becomes for any cause temporarily unable to perform the duties of his office, the President may appoint another person to act in the place of such member.

(8) A member of the State Services Advisory Board may be paid such salary as may be determined by the National State Assembly. The salary payable to any

such member shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(9) There shall be a Secretary to the State Services Advisory Board appointed by the Cabinet of Ministers.

State Services Disciplinary Board

State Services Disciplinary Board

112. (1) There shall be a State Services Disciplinary Board to exercise, perform or discharge such powers, functions or duties as are required of the State Services Disciplinary Board under the Constitution.

(2) The State Services Disciplinaty Board shall consist of three members appointed by the President one of whom shall be designated Chairman.

(3) No person shall be appointed or shall remain a member of the State Services Disciplinary Board:—

(*a*) if he is a Member of the National State Assembly; or

(*b*) if he is a member of the State Services Advisory Board; or

(*c*) it he is a state officer.

(4) Every member of the State Services Disciplinary Board shall, subject to the provisions of subsection (5) of this section, hold office for a period of four years from the date of his appointment.

(5) The office of a member of the State Services Disciplinary Board shall become vacant—

(*a*) upon the death of such member; or

(*b*) on such member resigning his office by a wirting addressed to the President; or

(c) on such member being removed from office by the President.

(6) Where the office of any member of the State Services Disciplinary Board becomes vacant, the President shall appoint another person in place of the member who dies, or resigns or is removed from office and the person so appointed shall hold office during the unexpired period of the term of office of the member last mentioned.

(7) Where any member of the State Services Disciplinary Board becomes for any cause temporarily unable to perform the duties of his office, the President may appoint another person to act in the place of such member.

(8) A member of the State Services Disciplinary Board may be paid such salary as may be determined by the National State Assembly. The salary payable to any such member shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(9) There shall be a Secretary to the State Services Disciplinary Board appointed by the Cabinet of Ministers

Appointment of State Officers

Appointment of Heads of Departments and to prescribed posts

113.(1) Except where the Constitution otherwise provides, appointments to posts of Heads of Departments and to such other posts as may be prescribed by the Cabinet of Ministers shall be made by the Cabinet of Ministers after receiving the recommendation of the Minister in charge of the Ministry or the Department to which the posts are attached. No such recommendation shall be made by a Minister except after consultation with the State Services Advisory Board.

(2) In case the recommendation for such appointments is from amongst the state officers in service in another Ministry or Department, the recommendation of the Minister referred to in subsection (1) of this section shall be made only after consultation with the Minister in charge of that other Ministry or Department.

Appointment to other posts

114. Appointments to posts which do not fall under section 113 and which may be prescribed by the Cabinet of Ministers under this section may be made by the Cabinet of Ministers only after having received through the Minister in charge of the Ministry or Department to which the posts are attached, the recommendation of the State Services Advisory Board.

Delegation of powers of appointment

115. (1) The Cabinet of Ministers may in accordance with the assignment of subjects and functions by the Prime Minister and subject to such conditions as may be prescribed by the Cabinet of Ministers, delegate to any Minister all or any of its powers of appointment under section 106 except the power to make the appointments referred to in sections 113 and 114.

(2) A Minister exercising the powers of appointment delegated to him under subsection (1) of this section shall do so only after receiving the recommendation of the State Services Advisory Board, and if the person to be appointed is a state officer in another Ministry or Department only after consultation with the Minister in charge of that other Ministry or Department.

Appointments by state officers.

116. A Minister may with the concurrence of the Cabinet of Ministers delegate to any state officer subject to such conditions as may be prescribed any of the powers of appointment delegated to such a Minister under subsection (1) of section 115. Notwithstanding any such delegation, the Minister shall with the concurrence of the Cabinet of Ministers be entitled to act in regard to any matter so delegated to a state officer.

Dismissal and Disciplinary Control of State Officers

Disciplinary action against state officers

117. The Cabinet of Ministers shall exercise its powers of dismissal and disciplinary control of state officers only after receiving through the Minister in charge of the Ministry or Department to which a state officer is attached, a recommendation from the State Services Disciplinary Board.

Delegation of disciplinary powers to Ministers

118. (1) The Cabinet of Ministers may in accordance with the assignment of subjects and functions by the Prime Minister and subject to such conditions as may be prescribed by the Cabinet of Ministers, delegate to a Minister its powers of dismissal and disciplinary control of state officers.

(2) A Minister shall exercise the powers delegated to him under subsection (1) of this section only after receiving a recommendation from the State Services Disciplinary Board. An order made by a Minister in the exercise of his powers under this subsection shall, except where the order is one of dismissal, be final. Where the order is one of dismissal and no appeal is made against such an order in terms of subsection (3) of this section such order of dismissal shall be final.

(3) A state officer aggrieved by an order of dismissal made under subsection (2) of this section shall, subject to the procedures determined by the Cabinet of Ministers, have the right to make a single appeal against such order of dismissal to the Cabinet of Ministers who shall have the power either to confirm or vary in any manner such order of dismissal.

Delegation of disciplinary powers to state officers

119. (1) A Minister may with the concurrence of the Cabinet of Ministers delegate to any state officer subject to such conditions as may be prescribed any of the powers of dismissal and disciplinary control delegated to such a Minister under subsection (1) of section 118 Notwithstanding any such delegation the Minister

shall with the concurrence of the Cabinet of Ministers be entitled to act in regard to any matter so delegated to a state officer.

(2) A state officer aggrieved by an order relating to a disciplinary matter including an order of dismissal made under the powers delegated under the preceding subsection of this section shall, subject to the procedures determined by the Cabinet of Ministers, have the right to make a single appeal against such an order to the State Services Disciplinary Board. The order of the State Services Disciplinary Board on such an appeal shall, except when it is one of dismissal, be final.

Where the order is one of dismissal and no appeal is made in terms of subsection (3) of this section such order of dismissal shall be final.

(3) A state officer aggrieved by an order of dismissal of the State Services Disciplinary Board under subsection (2) of this section shall, subject to the procedures determined by the Cabinet of Ministers, have the right to make a single appeal to the Minister referred to in subsection (1) of this section, who shall have the power to vary such order of dismissal.

Transfer of State Officers

Transfer of state officers

120. (1) The Cabinet of Ministers shall exercise its powers of transfer of state officers in accordance with the procedures to be prescribed by the Cabinet of Ministers.

(2) The Cabinet of Ministers may subject to such conditions as may be prescribed by the Cabinet of Ministers delegate to a Minister all or any its powers under subsection (1) of this section.

(3) A Minister may with the concurrence of the Cabinet of Ministers delegate to any state officer subject

to such conditions as may be prescribed by the Cabinet of Ministers any of the powers delegated to such Minister under subsection (2) of this section. Notwithstanding any such delegation the Minister shall with the concurrence of the Cabinet of Ministers be entitled to act in regard to any matter so delegated to a state officer.

(4) "Transfer" for the purpose of this section shall mean the moving of a state officer from one post to another post in the same service or in the same grade of the same Ministry or Department with no change in salary.

CHAPTER XIV
ADMINISTRATION OF JUSTICE

Creation of Courts

Creation of courts by National State Assembly

121. (1) Subject to the provisions of the Constitution the National State Assembly may by law create and establish institutions for the administration of justice and for the adjudication and settlement of industrial and other disputes and institutions vested with the power of making decisions of a judicial or quasi judicial nature.

(2) Unless the National State Assembly otherwise provides, the courts established by the Court of Appeal Act, No. 44 of 1971, the Court of Criminal Appeal Ordinance, the Courts Ordinance and the Rural Courts Ordinance and all other courts and institutions created and established by existing written law for the purposes referred to in subsection (1) of this section, shall continue to function, subject to the provisions of the Constitution. Such Courts and institutions shall be deemed, *mutatis mutandis*, to derive their jurisdiction and powers under the Constitution.

(3) The powers of the highest court with original jurisdiction established by law for the administration

of justice shall, except in matters expressly excluded by existing laws or laws enacted by the National State Assembly, include the power to issue such mandates in the nature of writs as the Suprme Court is empowered to issue under the existing law. The National State Assembly shall have the power to enact such laws by a majority of the Members present and voting.

(4) Subject to the provisions of the Constitution, existing written law shall, unless the National State Assembly otherwise provides, regulate the procedure of the courts and institutions referred to in subsection (2) of this section.

Judges of the Court of Appeal and the Supreme Court

Judges of the Court of Appeal and the Supreme Court

122. (1) The Judges of the Court of Appeal, of the Supreme Court or of the courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding or substantially similar to the powers and functions exercised and performed by the aforesaid courts shall be appointed by the President.

(2) Every such Judge shall hold office during good behaviour and shall not be removed except by the President upon an address of the National State Assembly.

(3) Unless the National State Assembly otherwise provides, the term of office of a Judge of the Court of Appeal shall be as provided by the Court of Appeal Act, No. 44 of 1971, and the age for the retirement of Judges of the Supreme Court shall be sixty-three years.

(4) The salaries of such Judges shall be determined by the National State Assembly and shall be charged on the Consolidated Fund.

(5) The salary payable to or the age of retirement of any such Judge shall not be reduced during his term of office.

Commissioners of Assize

123. Commissioners of Assize under the Courts Ordinance or such persons as the National State Assembly may provide for by law to exercise and perform powers and functions corresponding or substantially similar to the powers and functions exercised and performed by the Commissioners of Assize shall be appointed by the President.

Appointment of Judges and other State Officers administering Justice

Appointment, transfer, dismissal and disciplinary control of Judges and other State Officers administering justice

124. (1) Except as otherwise provided in sections 122 and 123, the appointment, transfer, dismissal and disciplinary control of—

(*a*) Judges of the Courts established under the Courts Ordinance, Presidents appointed under the Rural Courts Ordinance and Judges of Courts which may be created and established by the National State Assembly under section 121;

(*b*) state officers constituting Labour Tribunals under the Industrial Disputes Act or such persons as the National State Assembly may empower by law to exercise and perform powers and functions exercised and performed by such Labour Tribunals; and

(*c*) all state officers the principal duty or duties of whose office is the performance of functions of a judicial nature,

shall be made or exercised in accordance with the provisions of the succeeding sections of this Chapter.

(2) The provisions of the succeeding sections of this Chapter shall apply also to the appointment, dismissal and disciplinary control of Quazis exercising jurisdiction under the Muslim Marriage and Divorce Act or under the laws for the time being relating to Muslim marriage and divorce.

Judicial Services Advisory Board

125. (1) There shall be a Judicial Services Advisory Board to exercise, perform and discharge such powers, functions and duties as are required of the Judicial Services Advisory Board under the Constitution.

(2) The Judicial Services Advisory Board shall consist of five members. One of such members shall be the Chief Judge of the highest court with original jurisdiction who shall be the Chairman. If the Chief Judge of the highest court with original jurisdiction is unable to function as Chairman the next senior judge of that court shall be the Chairman.

(3) The members of the Judicial Service Advisory Board other than the Chairman shall be appointed by the President. Of the members appointed by the President one shall be from amongst the state officers referred to in paragraph (*a*) of subsection (1) of section 124 and another shall be from amongst the state officers referred to in paragraph (*b*) of subsection (1) of section 124.

(4) No person shall be appointed as or shall remain a member of the Judicial Services Advisory Board if he is a Member of the National State Assembly.

(5) Every member of the Judicial Services Advisory Board other than the Chairman shall, subject to the provisions of subsection (6) of this section, hold office for a period of four years from the date of his appointment.

(6) The office of a member of the Judicial Services Advisory Board other than that of the Chairman shall become vacant—

(*a*) upon the death of such member;
(*b*) on such member resigning his office by a writing addressed to the President;
(*c*) on such member being removed form office by the President; or

(*d*) on a member appointed from amongst the state officers referred to in paragraphs (*a*) and (*b*) of subsection (1) of section 124 ceasing to be such a state officer.

(7) Where the office of any member of the Judicial Services Advisory Board becomes vacant under subsection (6) of this section, the President shall appoint another person in place of such member and the person so appointed shall hold office during the unexpired period of the term of office of the member last mentioned.

(8) Where any member of the Judicial Services Advisory Board other than the Chairman becomes for any cause temporarily unable to perform the duties of his office, the President may appoint another person to act in the place of such member.

(9) A member of the Judicial Services Advisory Board may be paid such salary or allowance as may be determined by the National State Assembly. Any salary or allowance payable to such member shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(10) There shall be a Secretary to the Judicial Services Advisory Board appointed by the Cabinet of Ministers in consultation with the Chairman of the Judicial Services Advisory Board.

(11) The Cabinet of Ministers may in consultation with the Judicial Services Advisory Board make—

(*a*) rules regarding schemes of recruitment and procedures for the appointment of judges and other state officers referred to in section 124; and

(*b*) provision for such other matters as are necessary or expedient for the exercise, performance and discharge of the powers, functions and duties of the Judicial Services Advisory Board.

Appointment of Judges and other state officers administering justice

126 (1) The appointment of judges and other state officers referred to in section 124 shall be made by the Cabinet of Ministers after receiving the recommendation of the Judicial Services Advisory Board.

(2) Whenever the occasion arises for making any of the appointments referred to in section 124 the Judicial Services Advisory Board shall forward to the Cabinet of Ministers a list of persons recommended for appointment together with the list of applicants.

(3) The Cabinet of Ministers may appoint any person in the recommended list.

(4) The Cabinet of Ministers may appoint an applicant not in the recommended list and, if such appointment is made, the Cabinet of Ministers shall table in the National State Assembly the name of the person appointed and the reasons for not accepting the recommendation of the Judicial Services Advisory Board and the list of persons recommended by the Judicial Services Advisory Board.

(5) The Cabinet of Ministers may delegate to the Secretary to the Judical Services Advisory Board, subject to such limitations and conditions as may be prescribed by the Cabinet of Ministers, the power to make acting appointments of Judges and other state officers referred to in section 124.

Dismissal and Disciplinary Control of Judges and other State Officers administering justice

Judicial Services Disciplinary Board

127. (1) There shall be a Judicial Services Disciplinary Board to exercise the powers of dismissal and disciplinary control over the judges and other state officers referred to in section 124.

(2) The Judicial Services Disciplinary Board shall consist of three members. The Chief Judge of the highest

court with original jurisdiction shall be the Chairman of the Board. Two other judges of that court nominated by the President shall be the other two members of the Board.

(3) Where any member of the Judicial Services Disciplinary Board other than the Chairman becomes for any cause temporarily unable to perform the duties of his office, the President may appoint another judge of the highest court with original jurisdiction to act in the place of such member.

(4) The Secretary to the Judicial Services Advisory Board shall be the Secretary to the Judicial Services Disciplinary Board.

(5) The Cabinet of Ministers may in consultation with the Judicial Services Disciplinary Board make—

(*a*) rules of conduct for such judges and other state officers as are referred to in section 124;

b) rules of procedure for matters connected with the holding of disciplinary inquiries; and

(*c*) provision for such other matters as are necessary or expedient for the performance of the duties of the Judicial Services Disciplinary Board.

(6) Where the Judicial Services Disciplinary Board exercises its powers of dismissal over a judge or other state officer referred to in section 124, the Judicial Services Disciplinary Board shall forward through the Minister in charge of the subject of Justice a report thereon to the Cabinet of Ministers. A copy of such report shall also be transmitted to the Speaker of the National State Assembly.

Removal for misconduct

128. A Judge or a state officer referred to in section 124 found guilty of misconduct shall be removed from office.

Removal of Judges and other state officers administering justice

129. (1) Any judge or state officer referred to in section 124 may be removed for misconduct by the President on an address of the National State Assembly.

(2) The provisions of section 127 shall operate without prejudice to the provisions of subsection (1) of this section.

(3) No motion for such removal shall be placed on the Agenda of the National State Assembly until the Speaker has obtained a report from the Judicial Services Disciplinary Board on such particulars of the charge as are alleged in the motion against a judge or state officer who is the subject of such motion.

(4) The findings of the Judicial Services Disciplinary Board on the particulars of the charge referred to it under subsection (3) of this section shall be final and shall not be debated by the National State Assembly.

(5) It shall be the duty of the Judicial Services Disciplinary Board to report to the Speaker on any charge referred to it under subsection (3) of this section.

Provided that such report may consist of the findings of the Judicial Services Disciplinary Board upon an inquiry already held or commenced on any such charge.

Transfer of Judges and other State Officers administering Justice

Transfer of Judges and other state officers administering justice

130. (1) The Judicial Services Advisory Board shall effect the transfer of judges and other state officers referred to in section 124.

(2) Subject to the procedures determined by the Cabinet of Ministers, an appeal lies from an order effecting a transfer under this section to the Minister in charge of the subject of Justice.

(3) The Judicial Services Advisory Board may, with the concurrence of the Cabinet of Ministers and subject to such conditions as may be prescribed, delegate to the Secretary, Judicial Services Advisory Board such powers as may be necessary to deal with incidental matters relating to the transfer of judges and other state officers referred to in section 124.

(4) "Transfer" for the purpose of this section shall mean a transfer not involving an increase of salary.

Independence of Persons administering Justice

Independence of Judges and state officers administering Justice

131. (1) Every Judge, state officer or other person entrusted by law with judicial powers or functions shall exercise such judicial powers and functions without being subject to any direction or other interference proceeding from any other person, except a superior court or institution entitled under law to direct or supervise such judge, state officer or person in the exercise or performance of such judicial powers and functions.

(2) Every person who, without legal authority therefor, interferes or attempts to interfere with the exercise or performance of the judicial powers or functions of any Judge, state officer or person referred to in subsection (1) of this section shall be guilty of an offence punishable with imprisonment of either description for a term which may extend to one year or with fine or with both.

CHAPTER XV

CONTINUATION IN SERVICE OF JUDGES, PUBLIC SERVANTS AND OTHERS

Continuation in service of Judges, public servants and others

132. Until the National State Assembly otherwise provides, every person who immediately prior to the commencement of the Constitution—

(*a*) held judicial office in any court referred to in subsection (2) of section 121; or

(*b*) was in the service of the Government of Ceylon, any local authority or any public corporation; or

(*c*) held any office in any local authority or public corporation; or

(*d*) held any appointment under any written law,

shall continue in such service or hold such office or appointment under the same terms and conditions.

Oath of allegiance to be taken by state officers and others

133. (1) Every state Officer and such other person as is required by the Constitution to take an oath on entering upon the duties of his office, every holder of an office required under the existing law to take an official oath and every person in the service of every local authority and of every state corporation shall take the oath prescribed in Schedule'B'. Any such state officer, person or holder of an office failing to take the prescribed oath after the commencement of the Constitution within such time as may be prescribed by the Prime Minister shall cease to be in service or hold office.

(2) The Minister in charge of the subject of Public Administration may, in his sole discretion, permit any state officer, person or holder of an office referred to in subsection (1) of this section, to take the oath referred to in that subsection after the prescribed date if he is satisfied that the failure to take the oath within the time prescribed was occasioned by illness or some other unavoidable cause. On his taking such oath, he shall continue in service or hold office as if he had taken the said oath within the time prescribed in subsection (1) of this section

CHAPTER XVI

PUBLIC SECURITY

Public Security

134. (1) Unless the National State Assembly otherwise provides, the Public Security Ordinance, shall, *mutatis mutandis*, and subject to the provisions of the Constitution and subsection (2) of this section, be deemed to be a law enacted by the National State Assembly.

(2) Upon the Prime Minister advising the President of the existence or the imminence of a state of public emergency, the President shall declare a state of emergency. The President shall act on the advice of the Prime Minister in all matters legally required or authorised to be done by the President in relation to a state of emergency.

Devo vassatu kalena
sassasampattihetu ca
phito bhavatu loko ca
raja bhavatu dhammiko.

SIDDHIRASTU

SCHEDULE 'A'

(1) Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947.

(2) Royal Titles Act.

(3) Sections 1-10. 13A and Sections 14 and 15 of the Royal Executive Powers and Seals Act.

SCHEDULE 'B'

I,..... .....

do solemnly affirm that I will be faithful and bear true

swear

allegiance to the Republic of Sri Lanka and that I will well and truly serve the Republic of Sri Lanka and duly and faithfully execute the duties of my office as..... .....in accordance with the Constitution and with the law.

SUPPLEMENTARY NOTES

At page 16 footnote 24, substitute "222—225" for "215—218"; and in footnote 25, substitute "145—146, 232, 234—235" for "225ff".

At page 80, footnote 3, add at the end; The references to the Constituent Assembly Debates in the text are in some cases to the uncorrected official reports of those Debates issued by the Department of Government Printing, where only these were available at the time of going to Press.

At page 144, footnote 4, second line, substitute "Discretion" for "Dissolution".

At page 172, footnote 22, substitute "229—231" for "222—224

At page 197, footnote 14, substitute "Golak Nath", for "Colak Nath".

At page 210, footnote 2 substitute "231—236" for "224—229".

At page 222, under the sub-title "Committee of the Cabinet of Ministers" add a second paragraph, as follows:

The report of the inter-agency employment mission to Ceylon organised by the International Labour Organisation (popularly known as the Seers Report) issued in 1971 has stated in paragraph 506; "At the top policy level the crucial co-ordinating device is the Cabinet's Planning Committee. Some countries have found it convenient to make a rule that no papers on economic policy should go to the Cabinet without first being considered by a committee of this kind, and that its recommendations should normally be accepted by the Cabinet. After all, with twenty-three members, the Ceylonese Cabinet is probably too large for decisions at the level of detail necessary for the co-ordinated direction of economic policy".

At page 234, line I, substitute "The Cabinet of Ministers does not stand dissolved and the other Ministers do not cease to hold office, as it would otherwise happen". for "These provisions do not operate."

At page 245, footnote 5, substitute "380—381" for 371—372".

At page 263, under the sub-title "Rural Development Societies and Divisional Development Councils," at the end of the third sentence, add:

With regard to the Divisional Development Councils, which were established in 1971, the Five Year Plan of the Government published in November of the same year has stated at page 131; "In drawing up programmes of regional development the district and divisional organisations will play a major role. The Divisional Development Councils will be the main link between the network of government agencies on the one hand and the local community and its representative institutions on the other. The Councils consist of government officials and of representatives of institutions such as the co-operative societies, cultivation committees, People's Committees and the Village Committees. The function of these Councils includes the formulation of development projects and the preparation of a development programme for their areas. They will also assist in the co-ordination of development activity and the review of plan implementation in the Development Council areas.

The Seers Report has made the following comment on the Divisional Development Councils; "At present the responsibility for the DDCs is shared by the Ministry of Planning, the Ministry of Industries (Department of Small Industries) and the Industrial Development Board. In many industries ministerial responsibility is not clearly defined, with the result that unnecessary delays in the planning and implementation of these industries are likely to occur. Fruit—canning is one such case. While the cultivation of fruit crops is the responsibility of the Ministry of Agriculture, manufacture is looked after by the Ministry of Industries and marketing is controlled by the Ministry of Foreign and Internal Trade. This raises problems of co-ordination. Vesting the responsibility for the DDC programme and its co-ordination in a single agency deserves careful consideration" (para 584).

At page 276 ff, the term "Germany" in relation to Administrative Law has been used to refer to both West and East German Repubics.

FURTHER SUPPLEMENTARY NOTE
(Chapter 24: The Courts of Justice.)

The Administration of Justice Law, 1973, provides for the establishment and constitution of a new system of courts for the administration of justice, defines their jurisdiction and regulates the procedure in such courts.

The Law provides that the institutions for the administration of justice in the Republic shall be: (*a*) the Supreme Court; (*b*) High Courts; (*c*) District Courts; and (*d*) Magistrates' Courts.

(*a*) **The Supreme Court of Sri Lanka**. It is provided that there shall be a Supreme Court of the Republic of Sri Lanka which shall consist of the Chief Justice, and of not less than ten and not more than twenty other Judges. The Judges of the Supreme Court are appointed to their offices by the President of the Republic by Acts of Appointment under the Public Seal of the Republic. Every Judge may hold office until he attains the age of sixty-three years.

The Supreme Court is the only superior court of record and has jurisdiction for the correction of all errors in fact or in law committed by any subordinate court, and sole and exclusive cognizance by way of appeal, revision and restitutio-in-integrum of all actions, proceedings and matters of which such subordinate court may have taken cognizance, and such other jurisdiction as may be vested in the Supreme Court by law.

The Supreme Court may grant and issue, according to law, mandates in the nature of writs of *mandamus, quo warranto, certiorari, procedendo* and prohibition: Provided that no such mandate may be granted and issued against a Criminal Justice Commission established under the Criminal Justice Commission Act. The Supreme Court may, upon the application of a person resident within its jurisdiction, grant and issue mandates in the nature of writs of *habeas corpus* to bring up before such court (*a*) the body of any person to be dealt with according to law; or (*b*) the body of any person illegally or improperly detained in public or private custody, and to discharge or remand any person so brought up or otherwise deal with him according to law.

The jurisdiction of the Supreme Court in respect of judgments and orders of Magistrates' Courts shall be exercised by at least

two Judges, and its jurisdiction in respect of judgments and orders of District Courts and High Courts shall be exercised by at least three Judges. The Chief Justice may (*a*) of his own motion, (*b*) at the request of two or more Judges hearing an appeal, or (*c*) on the application of a party to the proceedings on the ground of general or public importance of the matter in dispute, direct that any case pending before the Supreme Court be heard by a Bench of five or more Judges. The judgment of the Supreme Court shall, in all cases, be final and conclusive.

The Supreme Court may admit and enrol as attorneys-at-law persons of good repute and of competent knowledge and ability. Every attorney-at-law shall be entitled to assist and advise clients and to appear, plead or act in every court or other institution established by law for the administration of justice. Every person who prior to the appointed date had been admitted and enrolled as an advocate or proctor of the Supreme Court shall be deemed to have been admitted and enrolled as an attorney-at-law of the Supreme Court under this Law.

(*b*) **High Courts.** The Minister may, by Order published in the Gazette, establish a High Court within each of the sixteen zones into which Sri Lanka will be divided for the purposes of the administration of justice. The High Court Judges are appointed to their offices by the President of the Republic by Acts of Appointment under the Public Seal of the Republic. A High Court Judge may hold office until he attains the age of sixty-one years.

A High Court has power to hear, try and determine in the manner provided for by written law, all prosecutions upon indictment instituted therein against any person in respect of (*a*) any offence committed within its jurisdiction; (*b*) any offence committed by any person on or over the territorial waters of Sri Lanka; (*c*) any offence committed by any person on the high seas where such offence is piracy by the law of nations; (*d*) any offence committed on the high seas on board any ship or upon any aircraft registered in Sri Lanka; or (*e*) any offence committed by any person who is a citizen of Sri Lanka on the high seas or upon any aircraft. Subject to the provisions of the Bill, every trial as aforesaid shall be by jury before a High Court Judge: Provided that the Chief Justice may, in his discretion, order that any trial shall be held, within a zone to be specified by him, by jury before three High Court Judges to be nominated by him.

A High Court may grant an injunction to prevent any irremediable mischief which might ensue within its jurisdiction before the party applying for such injunction could prevent the same by bringing an action in any District Court or Magistrate's Court.

The jurisdiction to try an election petition in terms of the provisions of the Ceylon (Parliamentary Elections) Order in Council, 1946, is vested in the High Court and may be exercised by any High Court Judge nominated for the purpose by the Chief Justice. The Minister may, by Order published in the Gazette, appoint any High Court to have admiralty jurisdiction.

(*c*) **District Courts.** The Minister may, by Order published in the Gazette, establish within each district of a zone the District Court of such district. District Judges are appointed to their offices by the Cabinet of Ministers after receiving the recommendation of the Judicial Services Advisory Board.

A District Court has jurisdiction in all civil, criminal, revenue, matrimonial, insolvency and testamentary matters, except such as are by written law exclusively assigned by way of original jurisdiction to any other court or vested in any other authority. The Public Trustee is the sole competent authority for the purpose of the grant of probate and all letters of administration in respect of the property of deceased persons and for dealing with all other matters connected therewith. A District Court has jurisdiction over the persons and estates of persons of unsound mind, minors and wards, over the estates of *cestuis que trust*, and over guardians and trustees, and in any other matter in which jurisdiction may be given by law.

A District Court has criminal jurisdiction to hear, try and determine in the manner provided for by written law, all prosecutions upon indictment instituted therein against any person in respect of any offence committed within its jurisdiction.

(*d*) **Magistrate's Courts.** The Minister may, by Order published in the Gazette, establish within each division of a zone the Magistrate's Court of such division. Magistrates are appointed to their offices by the Cabinet of Ministers after receiving the recommendation of the Judicial Services Advisory Board.

A Magistrate's Court has exclusive original jurisdiction to hear and determine all actions in which the debt, damage, demand or claim or the

value of the movable or immovable property or the particular share, right or interest in dispute or the land to be partitioned or sold does not exceed one thousand five hundred rupees.

A Magistrate's Court has jurisdiction to hear, try and determine in the manner provided by written law, all prosecutions instituted therein against any person in respect of any offence committed within its division. Nc Magistrate's Court can however try any offence in respect of which the maximum punishment prescribed is in excess of seven year's imprisonment or a fine of seven thousand rupees.

The Attorney-General and The Director of Public Prosecutions. It is the duty of the Attorney-General to represent the Republic in courts established under this Law, to give advice to the Government upon all legal matters and to discharge the functions conferred on him by written law. In the performance of his duties, the Attorney-General has the right of audience in all courts.

The Director of Public Prosecutions is subject to the directions of the Attorney-General. The Director may give advice to the police, any Government Department or Public Corporation or to such other person as he may think proper, in any criminal matter, and may intervene in such matter whenever it appears to him for any reason that his intervention is necessary. As soon as an investigation is completed the police officer in charge of the investigation must forward a report (*a*) if the offence investigated is one triable by a Magistrate's Court, to the appropriate Magistrate; (*b*) if the offence investigated is not one triable by a Magistrate's Court, to the Director of Public Prosecutions, and to the Magistrate within whose division the investigation was made. Upon such report being forwarded to him, the Director shall after considering the material submitted to him (*a*) indict the suspect for trial before a High Court or a District Court of appropriate jurisdiction; or (*b*) order the discharge of the suspect. Before acting under this provision the Director may, if he considers it expedient to do so, direct further investigation to be made in regard to any specified matter.

Repeals. The Law provides for the repeal (*inter alia*) of the Courts Ordinance, the Court of Criminal Appeal Ordinance, the Ceylon Courts of Admiralty Ordinance, the Court of Appeal Act, the Rural Courts Ordinance and the Criminal Procedure Code.

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