

THE SECOND CONSTITUTION OF THE REPUBLIC
OF SRI LANKA*
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The Constitution, inaugurated on 7th September, 1978, cannot be studied without examining the attitude adopted by the United National Party (UNP) to the Republican Constitution which was promulgated in May, 1972. The UNP, which constituted the main segment of the Opposition in the Parliament of 1970, opposed the enactment of the Constitution and the reasons attributed in support of this stand deserved to be mentioned because of their relevance in the context of the enactment of the Constitution of 1978. They, while accepting that the Soulbury Constitution did not have a purely indigenous character, decided to extend their 'unstinted cooperation in the processes and the procedures determined by the Government to formulate a new Constitution'.¹ Though this position remained the official stand of the UNP during the course of the proceedings of the Constituent Assembly it did not prevent them from stating that the political climate in the country was not conducive to the work involved in formulating a Constitution. Another reason was that the people of the country were not provided with ample opportunities to be involved in the process of constitution making, and this, in other words, meant that there was no 'fullest consultation with all sectors of the people'.² The next reason was their opposition to an erosion of rights and liberties of the people. Though they enumerated the 12 points on which they rejected the acceptance of the constitution they stated 'the Government thought fit to proceed with undue haste in the formulation of the Constitution'.³ The restrictions on the rights and liberties, which immediately followed the 1971 insurrection, impaired the capacity of the people to 'concentrate meaningfully on the new constitutional proposals'. The UNP further argued that the opportunities

1. Constituent Assembly Debates. Vol.2, No.11, 22nd May, 1972, Column 888.

2. Ibid, Column 888.

3. Ibid, Column 889.

* This article was prepared for publication in March, 1979.

afforded to the people to study the proceedings of the Constituent Assembly were 'most meagre' and that reasonable provision had not been made⁴ to keep the people informed of the constitutional changes. It was on the basis of these views that they stated that the 1972 Constitution did not reflect 'the wishes of the people as consultation with and involvement of the people, have been most inadequate'.⁵ The authors of the Constitution denied the relevance of these criticisms and gave facts and figures to prove that all sections of the people⁶ truly participated in the formulation of the Constitution. The arguments advanced by the UNP in 1972 are therefore relevant because the constitutional changes of 1977 and 1978 have been introduced without providing opportunities for the people to discuss them. The Second Amendment, with which the Presidential system was inaugurated, was tabled in the National State Assembly on 22nd September, 1977 and the debate on the amendment took place on 4th October, 1977. Article 55 of the Constitution, which empowered the Cabinet of Ministers to refer 'urgent bills' to the Constitutional Court, was utilised and this prevented the people from examining the implications of the amendment.⁷ Article 54(2) provided that a leader of a recognised political party in the National State Assembly, a group of members in the NSA and a citizen of Sri Lanka could raise the question of the inconsistency of a bill within a week of its being published in the agenda of the NSA.⁸ Though this procedure offered ample opportunities for the organised political interests to examine the aspects of inconsistency in the amendment, it was not followed because of the decision of the Government to take refuge in Article 55 of the Constitution. The UNP, which rejected the Constitution of 1972 on the ground that it was formulated with 'undue haste' gave no opportunities for the people to involve themselves in the

4. Ibid, Column 889.

5. Ibid; Column 889.

6. See Wiswa Warnapala, W.A. 'The New Constitution of Sri Lanka, in Asian Survey, Vol.XIII, No.12, 1973, pp. 1179-1192.

7. Article 55 of the Constitution of 1972.

8. Article 54(2) of the Constitution of 1972.

discussion of the constitutional proposals.⁹ The debate on the Second Amendment was ineffective as a result of the weak Opposition in the present Parliament, and consumed only three hours of parliamentary time and six speeches in all were made. This, in fact, has been partially attributed to the failure on the part of the Opposition to debate the Amendment, they walked out of the Chamber, and the discussion, therefore, was confined to five speeches from members of Cabinet rank. The only private member to speak on the subject was S.Thondaman who represents the Indian Tamil community in Sri Lanka.

The inauguration of the Presidential system in February, 1978 on the basis of the Second Amendment demonstrated the desire of the Government to introduce constitutional changes within the context of the 1972 Constitution. The Manifesto of the UNP, which was placed before the electorate in 1977, sought 'a mandate to draft, adopt and operate a new Republican Constitution in order to achieve the goals of a democratic socialist society'.¹⁰ This, in effect, meant that arrangements would be made to promulgate a new Constitution and the conversion of the elected National State Assembly to a Constituent Assembly was to form the basis of the process of constitution making. Such a procedure, though a protracted method was to involve the people and it was perhaps this which encouraged the UNP to rush the Second Amendment through the National State Assembly. The appointment of the Select Committee on the Revision of the Constitution in November, 1977 as in the case of the Second Amendment, created the impression that the constitutional strategy of the Government was to amend the Constitution of 1972, and the report of the Select Committee, it was thought, would be embodied in the

9. Unlike in the case of the Constitution of 1972, the Second Amendment was not published in all the national newspapers; free copies were not made available to organisations and it was not published in the Government Gazette. The Government Publications Bureau, which sold a limited number of copies, made it available to the public only after the Amendment had been passed by the National State Assembly.

10. A Programme of Action to create a just and free society. UNP, 1977, p.10.

Third Amendment. The Select Committee, appointed on 3rd November, 1977, included ten members; seven members from the UNP, two from the SLFP and one from the Ceylon Workers Congress. The members of the TULF, just as they did in relation to the Second Amendment, refused to participate in the deliberations of the Select Committee. A questionnaire on 21 matters was prepared by the Select Committee and the public was asked through the national newspapers to obtain a printed copy of it from the Clerk of the NSA which was to be returned duly completed before 26th December, 1977. The politically conscious citizens, who responded to this invitation by the Select Committee, were summoned before the Committee only if it desired to hear 'oral evidence in amplification of any views' expressed by them.¹¹ Yet another limitation was that these citizens were expected to return the questionnaire within two weeks. The adoption of this procedure, therefore, restricted the involvement of the people in the formulation of the constitutional proposals.

The issues such as the Vice President, fundamental rights, the District Ministers, Consultative Committees in the NSA, the judiciary, the system of proportional representation, the Commissioner of Elections, the parliamentary scrutiny of appointments to high posts, public security and emergency powers, which were included in the questionnaire, constituted the areas intended to be revised by the Select Committee. The Committee held the first meeting on 18th November, 1977 and it, according to the Report of the Select Committee held 16 sittings to examine the 281 written replies to the Questionnaire.¹² On the basis of the written memoranda, the Select Committee summoned deputations from sixteen organisations, the majority of which represented racial minorities and the militant Buddhists.¹³ The only individual who was summoned

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11. See Questionnaire of the Select Committee on the Revision of the Constitution.
 12. Report of the Select Committee on the Revision of the Constitution. Parliamentary Series. No.14 of June, 1978, p.141.
 13. There were seven organisations representing the interests of the racial minorities; six organisations represented the interests of Sinhala Buddhists. The political parties, which were before the Select Committee, included the SLFP and Jathika Vimukthi Balavegaya.

before the Select Committee was the Ven.Madihe Pannaseeha Maha Nayaka Thera of Vajiraramaya of Colombo. There was limited involvement of the people in the deliberations of the Select Committee, and this was partly due to the haste with which the Committee wanted to conclude proceedings. Though, the Select Committee had been appointed to report on the areas of the 1972 Constitution which need amendment, it subsequently expressed the need to fundamentally change the basic structure of the Constitution.¹⁴ The Committee therefore, stated that 'it was more convenient to formulate the principles according to which the Constitution should be revised in the form of a Draft, rather than to attempt to formulate a multitude of specific amendments to a number of sections of the 1972 Constitution'.¹⁵ This for the first time, revealed that the Government had deviated from its previous strategy to bring about a revision of the Constitution of 1972. It was this strategy of the Government which created a problem for the Sri Lanka Freedom Party which, though it participated in the proceedings of the Select Committee, opposed the utilisation of the proceedings of the Select Committee for the promulgation of a new Constitution.¹⁶ The members of the SLFP, who were constituent members of the Select Committee, stated in their dissenting report that the Select Committee, by attempting to draft a new Constitution, was acting ultra vires and outside the scope of the authority given to it by the National State Assembly.¹⁷ They further stated that they would not have participated in the proceedings of the Select Committee if it had been revealed that the purpose was to draft a new Constitution. Mrs.Sirimavo Bandaranayake, in her capacity as the leader of the SLFP, in a letter to the President dated 19th May, 1978, stated that it was only on 19th May, 1978 that they discovered that the Government was

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14. Report of the Select Committee on the Revision of the Constitution, p.141.
15. Ibid; p.142.
16. See 'Dissenting Report of the members of the SLFP in the Select Committee', in the Report of the Select Committee, pp. 149-155.
17. Ibid; p.149.

planning to draft a new Constitution.¹⁸ The reply of Mr. J.R.Jayawardena, while referring to the Election Manifesto of the UNP, stated that 'the Select Committee has the right to recommend to the NSA proposals for amendment or repeal of the new Constitution; or to enact a new Constitution to replace the existing Constitution'.¹⁹ The SLFP, therefore, opposed the Report of the Select Committee on the ground that it had prepared a new Draft Constitution and not amendments to revise the 1972 Constitution.

The relationship between the Second Amendment and the Constitution of 1978 needs to be examined as a prelude to the discussion of the nature of the Constitution of 1978. The introduction of the Second Amendment in October, 1977 could not be justified in the context of the subsequent developments relating to the appointment of the Select Committee to revise the Constitution and the promulgation of a new Constitution on the basis of the recommendations of the Select Committee. The utilisation of Article 55 of the Constitution of 1972 relating to urgent bills to rush the Second Amendment through the NSA became a meaningless exercise in the light of the promulgation of a new Constitution. The reason for the Second Amendment to precede the promulgation of the Constitution of 1978 was perhaps the immediate need to replace the Nominal Presidency with an Executive Presidency. The view that this was an immediate need is contestable because though the Second Amendment, became law on 20th October, 1978 with the appointment of J.R.Jayawardena as the Executive President during the period of barely seven months between the inauguration of the Presidential system and the promulgation of the new Constitution there occurred no great change and improvement except for the fact that President assumed responsibility for certain departments like Civil Aviation which had hitherto remained under a Minister. In the case of the Department of Civil Aviation the President acted under Clause 14(2) of the Second Amendment.²⁰ The inauguration of the Presidential system was not accompanied by a reshuffle of the Cabinet of

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18. Vide Mrs.Sirimavo Bandaranaike's letter to President dated 19th May, 1978.
19. Vide President's letter to Mrs.Sirimavo Bandaranaike dated May, 23, 1978.
20. Clause 14(2) of the Second Amendment.

Ministers and though this became a subject of political speculation, was postponed till the promulgation of the new Constitution. Though the Second Amendment, referred to such matters as President's Staff and Acting President, effected no such changes. Clause 10 of the Amendment stated that 'the President shall, with the approval of the Cabinet of Ministers, have the power to appoint such officers and advisers as are in his opinion necessary to assist him in the exercise of the powers, functions and duties of his office'.²¹ The appointment of a set of advisers was certain to result in the creation of a super Cabinet, and this by virtue of its close association with the President, could have emerged as one of the important centres of the executive leadership of the President. The possible development of a conflict between the Presidential Advisers and the Cabinet of Ministers was perhaps the reason which later compelled the authors of the Second Amendment to abandon it. The weakening of the role of the Cabinet was yet another reason. No immediate appointment of Presidential Advisers was made because the authors of the Second Amendment were not sure of the role of these advisers vis-a-vis the Cabinet of Ministers and this was amply demonstrated in the changes which they made in regard to this innovation in the Constitution of 1978. Though it incorporated a substantial portion of Clause 10 of the Second Amendment dealing with President's Staff, it dropped the reference to 'advisers', and mentioned 'secretaries' and other officers and staff who are in his opinion necessary to assist him in the exercise, performance and discharge of the powers, duties and functions.²² According to the revision made in article 41(1) of the Constitution of 1978, the officers who are to be appointed 'in consultation with the Cabinet of Ministers', are in the category of public servants.²³

The Constitution of 1978, on the question of an acting President, deviated from the Second Amendment, according to

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21. Clause 10 of the Second Amendment.
 22. Article 41(1) of the Constitution of 1978.
 23. Article 41(4) of the Constitution of 1978.

which the Prime Minister could act in the office of the President.²⁴ The occasion of the President's visit to Australia in February, 1978 to take part in the Commonwealth Regional Conference could have been used to test this clause on 'the acting President' in the Second Amendment by appointing the Prime Minister to act in the office of the President. No such acting appointment was made and Sri Lanka, for the first time after independence, was left without a Head of State resident in the country. The political and constitutional reasons, which led to the abandonment of the idea of appointing an acting President, conditioned the thinking on this matter, which, in the Constitution of 1978, has undergone a considerable change.²⁵ Article 37(1) of the Constitution of 1978 assign the role of an acting President to the Prime Minister. This innovation was in article 37(2), according to which the Chief Justice, in consultation with the Speaker, could make a communication that 'the President is unable to make an appointment' in terms of the conditions in article 37(1) of the Constitution. Then the Prime Minister, on the basis of article 37(2) can assume the role of an Acting President. This shows that in the eventuality of a situation in which the President cannot make the acting appointment due to sudden death or serious illness it is the Chief Justice who makes the communication for the need to make Prime Minister the acting President. The failure to provide for the office of Vice-President has resulted in this cumbersome procedure relating to the appointment of an acting President.

The Constitution of 1978, unlike its predecessor, consists of 24 Chapters which contain a total of 172 articles.²⁶ This document running to 135 pages, has certain unique characteristics, some of which were not included in the Constitution of 1972. The Constitution, which has been formulated in pursuance of the mandate obtained on 21st July, 1977, has given a constitutional status to the (a) twenty four administrative districts, (b) the national flag, (c) the national anthem and (d) the national day - 4th of February. Chapter II, which

24. Clause 10 of the Second Amendment.

25. Article 37 of the Constitution of 1978.

26. The Constitution of 1972, which consists of 26 Chapters containing 134 articles, ran to 56 pages.

deals with Buddhism, is more or less the same as in the Constitution of 1972 except for the inclusion²⁷ of the word 'Sasana' meaning the Buddhist dispensation. The use of the traditional description 'Sasana' has given more effectiveness to the Chapter on Buddhism. Such innovations indicate that the Constitution of 1978 has gone beyond the conventional framework of a Constitution.

The Constitution of 1978 brought about changes in the executive role of the President and some of them, in my view, represented a significant departure from the changes incorporated in the Second Amendment. It has been clearly stated that the President shall be 'the Head of the State, the Head of the Executive and of the Government, and Commander in Chief of the Armed Forces'.²⁸ The President, who holds office for a term of six years, is elected by the people, and he is qualified to seek election only if he has been nominated by a recognised political party. No citizen can aspire to be the President as an independent candidate and this, though provides strength to the organised political parties, restricts the right of the ordinary individual. Though the provision that no person is allowed to seek election to this office on more than two occasions is a salutary one procedure relating to the election of the President seems protracted and cumbersome. The Constitution states that the poll for the election of the President needs to be taken one or two months before the expiration of the term of the incumbent President. Another vital innovation has been the nomination of an Inauguration Day; the 4th February succeeding the date of the election of the President has been nominated for this purpose and this idea has been borrowed from the United States. The interim period, which intervenes before the assumption of office by the new President, and the vacation of office by the outgoing President, is certain to become a politically tense period because policies and directions unacceptable to the new incumbent could be implemented. If the newly elected President fails to assume office on this appointed day in February, the President in office could perform the functions till the Parliament under article 40 of the Constitution elects one of its members as President. This means that the

27. Chapter 11 of the Constitution of 1978.

28. Article 30(1) of the Constitution of 1978.

President in office, in the context of such an eventuality gets his term of office extended and this, according to article 31(4), is implicit in the particular provision. Several important changes came to be introduced in respect of the election of the President. Article 94, which is included in Chapter XIV of the Constitution, has given recognition to a preferential system of voting, according to which the voter enjoys second and third preferences depending on the number of candidates seeking election. This, in other words, means that the voters will have to indicate their preferences in the ballot paper if there are more than two candidates in the field. The election of the President is therefore on the basis of an absolute majority of the valid votes cast by those on the electoral register. The introduction of the preferential system of voting for the purpose of the election of the President represents a departure from the voting tradition with which the country was associated in the last several decades. The adoption of the preferential system of voting with a view to getting the President elected by an absolute majority has been contested by opponents of the Constitution on the ground that the people of this country have been used to a form of election where they were called upon to mark a cross against a symbol identified with a candidate and a recognised political party.²⁹ The Commissioner of Elections, in his observations on the proposed scheme, stated that the preferential system for the election of the President and the continuance of the system of marking a cross against the symbol of a candidate at elections to Parliament and Local Government institutions are certain to confuse the electorate, nearly 20 percent of which is still illiterate. Voters, all of whom are not fully capable even of marking a simple cross against a candidate, are now being asked to state their preference and this, as Dr. N. M. Perera has predicted, is sure to result in spoilt ballots.³⁰ The realisation that difficulties can develop in the future in respect of this form of voting perhaps led to the appointment of a Select Committee of Parliament to revise the Election Law, and some of the matters,

29. Report of the Select Committee, p.151.

30. Perera, N.M. 'President's Powers', in Socialist Nation of 6th August, 1978.

which come within its purview, demonstrate the necessity to change the election procedure relating to the election of the President.

Equally cumbersome is the procedure relating to the removal of the President. Article 38(2) of the Constitution states that 'any Member of Parliament may, by a writing addressed to the Speaker, give notice of a resolution', seeking his removal on the ground that the President has been guilty of (1) violation of the Constitution (2) treason, (3) bribery (4) the abuse of powers of his office and (5) moral turpitude. This kind of a resolution needs the support of two-thirds of the whole number of Members of Parliament and above all, the Speaker must be satisfied that such allegations merit inquiry and report by the Supreme Court. The Speaker will not entertain such a resolution unless it is signed by two thirds of the membership of the whole Parliament. If, however, he is satisfied that allegations merit inquiry and report by the Supreme Court, he will accept the resolution with a majority of the full membership supporting it. This, in effect, means that the Speaker has an important role in respect of this matter. The mere passage of the resolution with a two-thirds voting in support of it is insufficient and the Constitution stipulates that the resolution needs to be referred by the Speaker to the Supreme Court for inquiry and report.³¹ The decision of the Supreme Court is conveyed to the Parliament which, with a two-third majority, votes for the removal of the President. The whole procedure is both cumbersome and complicated and it can have grave political consequences. The initial debate on the resolution in Parliament is certain to take the form of a protracted discussion depending on the extent of support the President commands in the legislature. The President can appear before the Supreme Court and plead his case; he can retain counsel for the purpose. The role of the Attorney General, in this context, has not been defined and it is not known whether he will appear on behalf of the members of Parliament. The inquiry by the Supreme Court, therefore, can take years, and this, in my view, injects uncertainty into the political life of the country. Neither the President nor the legislature can function amicably in the

31. Article 38(2) of the Constitution of 1978.

context of the conflicting situation. The utilisation of this procedure, on the other hand, to remove the President is not in the interest of the growth of conventions associated with an Executive Presidency. The examination of the procedure for the removal of the President shows that it has been done in such a way so as to see that it takes several years and Dr.N.M.Perera, criticising this procedure, thought that it would take nearly two years to complete the process of removal.³² Several critics have argued that the passage of the resolution with a two thirds majority is more than sufficient for the purpose and they saw no necessity to refer the matter to the Supreme Court.

An equally complicated procedure has been adopted in respect of the appointment of an Acting President. Article 40(1) of the Constitution states that if the office of the President falls vacant by death or inability to function in the post due to physical infirmity, Parliament shall elect one of its members as President to function for the unexpired period of the term of office of the President vacating office. This election, which is held within one month from the date of occurrence of the vacancy, will be by secret ballot and an absolute majority of the votes cast is necessary for a person to be elected President. Article 37(1) of the Constitution stipulates the conditions under which the Prime Minister assumes the role of Acting President. According to this article, if the President is out of the island or if he is of opinion that he is not physically fit to carry out the functions of his office, he may appoint the Prime Minister to act for him. It may be suggested that the Prime Minister under the present Constitution assume the role of Prime Minister cum Vice-President. This change is certain to give a different status to the office of the Prime Minister.

The President, in addition to the exercise of the executive power of the people including the defence of Sri Lanka, enjoys a series of powers in terms of articles 33 and 34 of the Constitution. Article 33 enumerates six important areas in respect of which he exercises powers; they included the making of a statement of Government Policy at the commencement of each session of Parliament, presiding at the

32. Perera, N.M. op. cit., p.2.

ceremonial sittings of Parliament receiving, recognizing, appointing and accrediting diplomatic representatives, the making of appointments such as that of the Prime Minister, Ministers and Judges of the Supreme Court and the declaration of war and peace. Article 34 stipulates the conditions under which the President grants a pardon and this included the substitution of less severe punishment. There are two Chapters dealing with the powers of the Executive in the Constitution and the provisions in Chapter VIII relate to the powers and functions of the President. According to Article 40 of the Constitution, the President is made responsible to Parliament for the discharge of his powers, duties and functions. The President, who is the head of the Cabinet, appoints the Prime Minister who, in his opinion, commands the confidence of Parliament. The determination of the size of the Cabinet, the assignment of subjects and functions and the appointment of members of Parliament as Ministers are done by the President in consultation with the Prime Minister. The Second Amendment, though it covered this aspect of the Presidential powers, did not refer to the need to consult the Prime Minister.³³ Consultation of the Prime Minister, in this context, is not a constitutional requirement; the observance of this practice depends on the understanding between the Prime Minister and the President. A change in the size of the Cabinet and the changes in the assignment of subjects and functions are done by the President and such changes do not affect the continuity of the Cabinet of Ministers.

While the formation of the Cabinet of Ministers is an important function of the President, the Constitution also provides for the appointment of several categories of Ministers. Article 44 provides for the appointment of the Cabinet of Ministers and the present Cabinet, including the Prime Minister who is in charge of the specific subject of Local Government and Construction, consists of 26 Ministers.³⁴ In addition, the President is in charge of two Ministries - the Ministry of Defence and the Ministry of Plan Implementation and this, therefore, means that there are 28 Ministries in all. No Cabinet of this size has ever functioned in Sri Lanka

33. See Second Amendment, pp. 7-8.

34. The Cabinet of July, 1977 consisted of 24 Ministries.

since the inception of Cabinet Government.³⁵ The next innovation in the area of Cabinet formation is the provision in the Constitution for the appointment of Ministers in charge of specific subjects, but who are not members of the Cabinet.³⁶ Three such appointments have been already made and they are the Minister for Proscribed Movements, the Minister for Colombo Hospitals and the Minister for the Coconut Industry. These Ministers, though enjoying the status of a Minister, are really Deputy Ministers in charge of a subject and they are expected to work through the Cabinet Minister under whose general authority the respective subject falls. For instance, the Minister in charge of Colombo Hospitals is expected to work through the Minister of Health. This procedure has to be maintained in respect of the submission of Cabinet memoranda. The appointment of District Ministers under article 45(1) of the Constitution created yet another set of Ministers who are responsible and answerable to the Cabinet of Ministers and to Parliament.³⁷ Though there are twenty four districts in the island, only 22 Ministries have been appointed. The constitutional change of 1978, therefore, resulted in the appointment of 51 members of Parliament with the rank of Minister. In addition, there are 28 Deputy Ministers, appointed under article 46(1) of the Constitution, to 'assist the Ministers of the Cabinet of Ministers in the performance of their duties'.³⁸ This, therefore meant that a total of 79 members of Parliament enjoy ministerial rank of one kind or another and this was more than half of the membership of the UNP in Parliament.

The Powers relating to the delegation of functions to Ministers who are not members of the Cabinet have been widened under this Constitution and this represented a vital innovation. The Parliamentary Secretaries of the Soulbury Constitution complained that they were not entrusted with any responsibility and the Constitution of 1972, more in the form of a rectification of this anomaly, provided for the appointment of Deputy Ministers to 'assist the Ministers in the performance of their duties pertaining to the NSA and

35. Eight Parliaments of Sri Lanka, 1977. Lake House Publication, pp.8-20..

36. Article 45(1) of the Constitution of 1978.

37. Article 46(1) of the Constitution.

38. Ibid.

to their departments and to exercise and³⁹ perform such powers and duties which are delegated to them. Article 95(2) of the Constitution of 1972 provided for an extension of the responsibility of the Deputy Ministers. The function of delegation is now expanded to cover the Ministers who are not members of the Cabinet of Ministers and Article 45(4) of the Constitution empowers any Minister of the Cabinet to delegate 'any power or duty⁴⁰ pertaining to any subject or function assigned to him'. The same power has been conferred upon the Cabinet of Ministers in respect of delegation of powers and duties to the Deputy Ministers. The expansion in the activities of Government and the decentralisation of the administrative apparatus through the medium of the District Minister provided added impetus to this form of distribution of responsibility.

The power of dissolution, in the context of the Soulbury Constitution, created certain political problems and it therefore led to the introduction of specific provisions relating to this issue. The 1972 Constitution, in articles 96 to 100, provided for political stability by carefully enumerating the conditions under which a Prime Minister shall be deemed to have resigned at the conclusion of a General Election. The rejection of the Appropriation Bill, the passage of a Vote of No Confidence in the Government and the rejection of the Statement of Government Policy by the NSA were situations calling for the resignation of the Prime Minister and they, in my view, were written into the Constitution to prevent a Prime Minister from remaining in power without the confidence of the legislature.⁴¹ Article 100(1) of the Constitution of 1972 introduced a constitutional safeguard against the dissolution of Parliament in the case of a rejection of the Statement of Government Policy at the first session of Parliament. The provision was made in the same section for the President to reject the advice of the Prime Minister and thereby prevent a premature dissolution of Parliament. These sections, which were inserted in view of certain experiences

39. Article 95(1) of the Constitution of 1972.

40. Article 45(4) of the Constitution of 1978.

41. Article 99(2) of the 1972 Constitution.

in the past relating to parliamentary stability, have undergone certain changes under the Constitution of 1978. Section 70 of the Constitution of 1978 states that the President shall not dissolve Parliament, which has been elected at a General Election, until the expiration of a period of one year from the date of the preceding General Election.⁴² The Parliament, may however, request the President to dissolve it. Such a resolution needs to be supported by a two-thirds majority. Article 49 of this Constitution states that the resignation or the removal of the Prime Minister⁴³ necessitates the dissolution of the Cabinet of Ministers. One wonders why this procedure was thought necessary because the Cabinet of Ministers though except for the President, it consists of the members of Parliament, is primarily the creation of the President who is the head of the Cabinet. The role of the Prime Minister as the Chief Minister and the agent of the President in Parliament is probably the reason for this provision incorporated in the Constitution. The Prime Minister, who combines the role of a Minister with that of the Leader of the House, is the leader of government business in Parliament. The position of the Prime Minister under the Constitution of 1978 can be compared with the office of the Vice President created in Tanganyika under the Constitution of 1962.⁴⁴ The situation, however, is different if the Prime Minister ceases to function in the course of a General Election and the Cabinet of Ministers can continue to function till the conclusion of the General Election. In the absence of a Minister who can fill the role of Prime Minister article 48(2) states that 'the President shall himself exercise, perform and discharge the powers, duties and functions of the Cabinet of Ministers. This means that in such an eventuality the President can establish a Presidential autocracy in the interim period. The rejection of the statement of Government Policy and the passage of a Vote of No Confidence in the Government became conditions for the Cabinet of Ministers to be dissolved under the 1972 Constitution and they are now incorporated in Article 49(2) of the Constitution of 1978. A safeguard against the adoption of this procedure is incorporated in article 70(1)b of the Constitution. The aim

42 Article 70(1) of the Constitution of 1978.

43. Article 49(1) of the Constitution of 1978.

44. Smith, S.A. The New Commonwealth and Its Constitutions. London, 1964, p.250.

has been to avoid a dissolution of Parliament and thereby prevent political instability in the period immediately after the General Election.

The changes introduced in the Constitution of 1978 in respect of representation represented a total break with the past. The Constitution of 1972 sought no changes in the conditions of representation incorporated in the Soulbury Constitution, it introduced an element of democracy into article 70(5) of the Constitution, according to which a person is disqualified if he stands nominated for election⁴⁵ for more than one electoral district at a General Election. Yet another salutary feature was that a member of the NSA could not stand as a candidate for election for any electoral district. Article 91(1) of the Constitution of 1978 included these provisions with one exception, and it stated that a person is disqualified if he 'stands nominated as a candidate for election by more than one recognised political party⁴⁶ or independent group in respect of any electoral district.' The retention of the mode of representation devised by the Soulbury Commission by the authors of the 1972 Constitution showed that they did not take into account either the growth in population or its density. The First Amendment, which became law in February, 1975,⁴⁷ brought about a change in the basis of delimitation.⁴⁷ The introduction of the system of the proportional representation, with no relationship to the form of representation based on the single member constituency system, is an improvement, the implications of which need to be closely examined. Though the twenty four districts have now been given a constitutional status in article 5 of the Constitution, article 96(1) provides for the delimitation of 'Sri Lanka into not less than⁴⁸ twenty and not more than twenty four electoral districts'. Each province may consist of two or more electoral districts. Another consideration has been the recognition of an administrative district as an electoral district. In addition to the number of members which an electoral district is entitled to return on the basis of the number of registered electors, each province, according to clause 4 of Article 96, is entitled to return four members, and this, which

45. Article 70(1) of the Constitution of 1972.

46. Article 90(1) of the Constitution of 1978.

47. First Amendment to the Constitution. 11th February, 1975.

48. Article 95(1) of the Constitution of 1978.

results in an increase of another thirty six members, is an arbitrary increase made without merits or demerits being examined by a Delimitation Commission. The Delimitation Commission is expected to distribute the four seats equitably among the electoral districts of each province and the criterion, which needs to be adopted by the Commission, has not been specified. Article 98(1), therefore, states that all electoral districts will together be entitled to return 196 members. The Constitution, however, provides a scheme of appointment of members in the case of the thirty six members and Article 98(4) stated that 'the total number of electors whose names appear in the registers of electors of all the electoral districts shall be divided by one hundred and sixty. The whole number resulting from such division is referred to as the 'qualifying number' with which the total number of electors whose names appear in the electoral register of the respective electoral district is divided in order to determine the number of members entitled to be returned by an electoral district. A final allocation for each electoral district cannot be obtained on the basis of this scheme because the dividing formula will not result 'in a rounded quotient without a surplus'.⁴⁹ The existence of a surplus indicates that the preliminary allocation, as stated in article 198(4) of the Constitution, has not filled all the 160 seats, and these surpluses, therefore, are used to fill the vacant balance. The electoral district which has 'the highest balance' is to get the first vacancy and in this way the vacancies will be filled until all the 160 seats are filled.⁵⁰ Dr.N.M.Perera, criticising this formula, stated that the electoral district which has an electoral roll lower than 'the qualifying quota' is certain to get priority.⁵¹ Another criticism is that the annual increase in the electoral register has not been taken into consideration and this increase is certain to be reflected in the final 'qualifying quota'. The same change cannot be found in the sparsely populated areas. The preparation of nomination lists on the basis of such changes cannot be undertaken by the political parties because

49. Perera, N.M. 'Proportional Representation', in Socialist Nation, 25th October, 1978. p.3.

50. Article 198(6) of the Constitution of 1978.

51. Perera, N.M. op. cit; p.3.

they need to wait for the Commissioner of Elections, in terms of Article 98(8), to make the final calculations. The novel procedure in respect of the determination of the number of members, therefore, is certainly cumbersome and complicated and above all, it deviates from the electoral tradition of the country.

Article 99 of the Constitution provides the basis for the scheme of proportional representation, the discussion of which needs to be prefaced with an examination of the major objectives which guided the introduction of this scheme. The Select Committee argued that the simple majority principle, which operated for more than a period of four decades in Sri Lanka, was a failure in terms of the accuracy with which it reflected political opinion in the electorates.⁵² The view of the Select Committee was that though the major political parties, secured a sizable part of the total vote, they failed to obtain an equal number of seats in the legislature. For instance, the SLFP, with 36.9 percent of the total vote, obtained 60.3 percent of the total number of seats, while the UNP with 37.9 percent of the total vote secured only 11.3 percent of the total number of seats. The General Election of 1977 reversed this process, and the UNP with 50.9 percent of the total vote was able to obtain 83.3 percent of the seats whereas the SLFP with 29.7 percent of the total vote secured, only 4.8 percent of the seats in the legislature.⁵³ This form of representation, while it distorted the nature of the political opinion in the total electorate was not conducive to political stability.⁵⁴ Though the simple majority principle introduced this distortion it operated in such a way that there were violent swings from one party to the other and such changes always affected the party in power. The authors of the Constitution in devising this scheme of proportional representation, took the performance of the respective political parties at elections into consideration, and the fact that the UNP in particular maintained a basic support base of nearly 30 percent of the total vote. In 1956, where this party experienced its worst debacle it had still secured nearly 29 percent of the votes cast at the election. It was therefore devised to make use of this support base and thereby to ensure 'a reasonable following in the

52. Report of the Select Committee, p.143.

53. Ibid; p.143

54. Ibid; p.143.

legislature in proportion to its strength in the country'. Though this scheme of representation inhibits the emergence of clear majorities, there is the possibility inherent in the system of negotiating and manoeuvring the formation of a Coalition Government.

There are many schemes of proportional representation. One method is to regard the whole country as an electorate and to allot to the political parties a number of seats in proportion to the votes cast for them all over the country. The parties, in the context of such a system, issue lists of candidates in order of preference and they fill the seats obtained by their party. The voters are expected to vote for a party list and this system gives the voter no personal contact with the candidate. In addition, it places greater power in the hands of the central party organisations. The need to reduce the local influence of the candidate could also be attributed to the introduction of proportional representation. The identification of an elected member with a particular electorate led to the development of various pressures on the member and these, like the distribution of political patronage, interfered with his role as a legislator. The list system, however, cannot totally eliminate the emergence of similar trends and the most known and the influential man in the list is certain to be chosen by the voter as the member who must attend to the numerous grievances of the voter. At the same time, the partymen in various local associations are certain to play the role of 'intermediaries' in this connection and it can lead to various kinds of problems including corruption. The reason is that the party organisations, both at national and local levels are primarily interest groups extending loyalty to a numerous variety of parochial interests. A modification of the system of proportional representation usually operates whereby a country is divided up into multi-member constituencies and candidates are elected if they obtain the requisite proportion of the votes cast. This system, as anticipated by the authors of the Constitution, gives rise to an unrepresented surplus of votes and they are collected together and allotted to certain party candidates. It is this system which has been adopted in the Constitution and article 99(1) provides that any recognised political party or any group of independents can submit a list of names in order of priority. The party or the group which polls the highest number of votes in an electoral district is entitled to have the candidate whose name appears first in the nomination list elected. Article 99(2) states

that a political party, which nominates a number of candidates equivalent to the number of seats in the respective electoral district, can increase by one third. The question is whether a party is allowed to produce an incomplete list of candidates and there is no provision in the Constitution to prevent such a deficient list of nominations. Any attempt to impose such a requirement is likely to interfere with the resources of the political parties. Such deficiencies are certain to be examined by the Select Committee which has been appointed to revise the election laws.

The independent candidates, though they have been given recognition in article 99, cannot be expected to form themselves into a group because such candidates profess different political views. Dr.N.M.Perera rightly questioned the necessity to extend recognition to independents in a system in which it could not survive and stated that 'a person is an independent precisely because he cannot fit himself into a group'.⁵⁵ He does not envisage such persons the possibility of being able to form themselves into a group. It is therefore very unlikely that the independent candidate can survive under the scheme of proportional representation. Article 99(5) provides for the cut off point of one eighth of the total votes polled and this means that those parties and groups polling less than this amount are disqualified from having any candidate being elected for the particular electoral district.⁵⁶ The political parties, which do not expect to obtain this qualifying quota, may not enter the election and this, as the Select-Committee mentioned, tends 'to reduce the intensity of the rivalries between candidates of different political parties'.⁵⁷ Though this argument has been advanced with a view to discouraging the formation of mushroom political parties, the cut off point is too high and it 'exceeds the lower limit imposed by any other country with proportional representation'.⁵⁸ The high percentage naturally favours the major political parties at the

55. Perera, N.M. op. cit; p.3

56. Article 99(5) of the Constitution.

57. Report of the Select Committee, p.144.

58. Perera, N.M. op. cit; p.4.

expense of the multiplicity of smaller political parties which have played a significant role in the political system of Sri Lanka. The Select Committee, justifying the introduction of the cut off point of one eighth of the total votes polled, stated that this was adopted because 'under the present system any candidate receiving less than one eighth of the total number of valid votes cast is not entitled to the return of his deposit.'⁵⁹ There is no foundation in this argument because the two systems of representation are so different, and above all, the forfeiture of the deposit under the simple majority principle was needed to discourage the numerous individuals contesting the elections. It is in this article 99(5) of the Constitution that one sees the features which go counter to the very concept of proportional representation. The small political parties, especially those of the Left, which hitherto played a role in Government in association with major political parties, have been cut off permanently from the arena of parliamentary politics. The authors of the Constitution, as the speeches at the debate on the Constitution demonstrated, happily anticipated the elimination of the leftwing political parties.⁶⁰ This, though it serves a purpose from their stand-point in politics, is certain to strengthen the extra-parliamentary roles of these political parties. A cumbersome procedure has been devised to reject the votes polled in support of the disqualified minority parties. The votes polled by these disqualified political parties would not be included in the total number of votes which form the basis for the distribution of seats in the electoral district. According to article (5)b of this article, the reduced total is called 'the relevant number of Votes', and the rejection of a substantial slice of the votes on the basis of this formula amounts to a virtual disenfranchisement of a section of the voting population. This, in itself, is a violation of the principle of proportional representation. The process does not end with the computation of 'the relevant number of votes' and this figure is then divided by the number of seats allowed to an electoral district to obtain 'the

59. Hansard, NSA. Vol.28, No.14 of 8th August, 1978. Columns 1549-1551.

60. Ibid.

resulting number' which, in fact, becomes the quota necessary for a party to secure a seat. The adoption of the criteria incorporated in articles 5 and 6 of article 99 is certain to result in a surplus of votes, which are used in the determination of the extra seats required to fill the vacancies in the first distribution of seats. The party with the highest surplus is entitled to the first vacancy and this means that the scheme has been devised in such a way as to confer an undue advantage on the major political parties. Clause 12 of Article 99 gives yet another concession to the political parties by allowing them 'to change the order of priority of the persons whose names appear in the nomination paper'.⁶¹ It further empowers the party to 'substitute the names of other persons in place of those who have died or ceased to be members of such party'.⁶² The next important clause deals with the right of the party to nominate a person in place of a member who ceases to be a member of the party as a result of resignation or expulsion.* This anti-defection clause, though it strengthens the party machine, is certainly not in the interest of the rank and file of the political parties because the party leadership, based on both family and parochial interests, can assume the character of a party autocracy. The political parties, due to their weakness as loose organisations consisting of numerous interest groups, cannot be expected to check the emergence of this trend within the leadership of the major political parties. Another innovation intertwined with this same feature is the abolition of by-elections and this, though it provided an advantage to the party in power, is not at all a democratic feature in a country where people have shown enthusiasm at elections. The argument has been made that by-elections do not represent the mood of the total electorate and Professor A.J.Wilson, despite his understanding of the island's political system, quoted the example of the by-election at Mulkirigala in 1976 in support of the same contention.⁶³

61. Article 99(12) of the Constitution.

62. Ibid;

63. Wilson, A.J. 'New Constitution', in Tribune, Vol.23, No.14 of September, 30, 1978, p.2.

* The courts have the power to divide on the validity of the expulsion for member from a political party. Article 99(13).

The advantages of a by-election are that it offers the voters an opportunity to register their satisfaction or the dissatisfaction with the party in power and it makes the Government responsive and responsible. The authors of the Constitution, however, thought that this democratic principle weakens the confidence of the people in the Government. Such views were not expressed before the Constituent Assembly in 1972. The introduction of the principle of nomination, as demonstrated in the case of the Wattala electorate, is certain to erode the confidence of the people in the institutions of parliamentary government.

Though the supporters of the Constitution hailed the provisions relating to fundamental rights as an 'extensive charter of freedom', the minority communities have not adopted the same view, and it is therefore necessary to examine the relevant provisions to see whether they represent an improvement on the rights enjoyed by the people in the past. The Constitution of 1972 contained three Chapters, which dealt with language, principles of State policy and fundamental rights and freedoms and merely this order has been changed in the Constitution of 1978, which has four Chapters dealing with fundamental rights, language, citizenship and directive principles of state policy and fundamental duties. The Constitution of 1972, in the Chapter on the principles of State policy, adumbrated ten broad objectives which formed the guidelines in the preparation of legislation. Article 16(2) included seven objectives which, taken together crystallised the fundamental perspective of taking steps to 'carry forward the progressive advancement towards the establishment in Sri Lanka of a socialist democracy'.⁶⁴ Article 17 made it clear that provisions contained in Article 16 are not enforceable in any Court, and the Select Committee made the criticism that the enforcement of the fundamental rights was not guaranteed in the Constitution.⁶⁵ Yet another criticism was that they were limited in scope and the Select Committee therefore, stated that they intended to enlarge the scope of the fundamental rights, particularly by recognising the right

64. The Constitution of Sri Lanka, 1972, p.9.

65. Report of the Select Committee, p.147.

to freedom from arbitrary arrest, detention and punishment and the right to freedom from torture.⁶⁶ The principles of State policy in the Constitution of 1972 were a set of social and economic objectives and the fifteen principles, which have been embodied in Chapter VI of the present Constitution are of the same character. The basic aim as stated in article 27(2) of the Constitution, is the realisation of a democratic socialist society. The establishment of a just and free society is integral to this basic objective. The economic philosophy, however, is different from that of the Constitution of 1972, which the UNP rejected on the ground that 'it makes a particular economic ideology a constitutional principle'.⁶⁷ The reference to 'the development of collective forms of property' in the Constitution of 1972 has been replaced with a clause which refers to both public and private economic activity. The means of production, distribution and exchange are not to be concentrated and centralised in the State, in the interest of the establishment of a just social order. The objectives included certain characteristics of a socialist society such as equality of opportunity, the elimination of economic and social privileges, the eradication of illiteracy, the abolition of exploitation of man by man, the provision of social security, the promotion of international peace and cooperation and the creation of an equitable international economic order. The question is whether these objectives, which transcend all areas of the State, can be realised by the proposed economic organisation. Another feature of the Constitution is the introduction of a set of fundamental duties and they have been listed as the defence of the Constitution and the law, the promotion of national interest and national unity, the preservation of public property, the respect, for rights and freedoms⁶⁸ of others and the conservation of national riches. This has been devised with a view to educating the people of the need to perform certain obligations to the State.

66. Ibid; p.147.

67. Constituent Assembly Debates. Vol.2, No.11 of 22nd May, 1972. Column 890.

68. Article 28 of the Constitution.

The exercise of the fundamental rights and freedoms was made subject to restrictions, and this was done to give effect to the principles of State policy in the Constitution of 1972.⁶⁹ The enlargement in the scope of fundamental rights and the inclusion of nine basic rights and freedoms in article 14(1) of the Constitution made certain changes in respect of the restrictions. The exercise of the fundamental rights recognised in this section have been made subject to restrictions in 'the interests of racial and religious harmony'.⁷⁰ The freedom of associations and the freedom to engage in a profession have been treated in the same way in the interest of the national economy. The most significant innovation in respect of the fundamental rights is the conferment of the rights to seek remedy from the Supreme Court on any infringement of a fundamental right by executive or administrative action.

The language problems, which agitated the minds of legislators in Sri Lanka in the last two decades, attracted the attention of the authors of the Constitution of 1972 and they, in addition to the constitutionalisation of certain pieces of language legislation, introduced three basic divisions known as (1) official language (2) language of legislation and (3) the language of the courts.⁷¹ These changes, represented certain vital concessions but they, as Dr.N.M.Perera stated, did not go far enough due to the predominance of Sinhala chauvinism within the Sri Lanka Freedom Party.⁷² The Constitution of 1978, incorporating certain features of the Constitution of 1972, brought about a number of significant changes, the most important of which was the recognition of Sinhala and Tamil as the national languages of Sri Lanka. This, in effect, means that both Sinhala and Tamil enjoy parity of status and certain segments of the Tamil community considered this a step in the direction of communal amity.⁷³ The recognition of Tamil as a national language has been interpreted as acceptance

69. Report of the Select Committee, p.147.

70. Article 15(3) of the Constitution of 1978.

71. Chapter III of the Constitution of 1972.

72. Socialist Nation of 16th August, 1978.

73. Satyendra, N. 'The Language Provisions of the New Constitution', in Tribune of 14 October, 1978, p.29.

of 'the Tamil community as a distinct nationality with its own language and culture'.⁷⁴ This recognition incorporated in article 19, in the context of the position of Sinhala as the official language, could be interpreted in association with the provisions relating to the use of the national language in Parliament and Local Government institutions, education, administration and the courts. The use of the national languages in Parliament and local government institutions came to be recognised in the early fifties and the Standing Orders, in the case of the Parliament, were amended to provide for it. The significance of this provision is that it guarantees the right of a member of the Tamil community to use his own language in any local authority, irrespective of the area in which this is situated. The medium of instruction in education provided for the use of both Sinhala and Tamil since the introduction of Swabasha. Article 21(2) of the Constitution provides for the introduction of facilities to conduct courses in the medium through which the students were educated prior to their admission to the University. These conditions, which have been given a constitutional status, were in existence in the past but they were not part of the language rights written into the Constitution. The language of administration, which found no place in the previous Constitution, is an innovation of great significance. The Tamil language has been recognised as 'the language of administration for the maintenance of public records and transaction of all business by public institutions in the Northern and Eastern Provinces. This demonstrates that a special status has been given to Tamil Language in the administration of these two provinces. Article 22(2) confers a constitutional right on any citizen, irrespective of the place of his residence in Sri Lanka, to communicate with, receive communications from and transact business with any official of the administration in one of the national languages. This means that the use of Tamil is not confined to the two provinces specifically mentioned in the Constitution. A person, on the basis of the same provision, is entitled to obtain copies of documents, circulars and forms in the respective national language or with a translation. This provision, though certain to impose a burden on the administrative apparatus, ensures the right of a member of a minority

74. Ibid; p.29.

community to deal with the administration without experiencing difficulties due to the absence of a knowledge of the official language. This change is certain to facilitate the transaction of business between the administration and citizens belonging to the Tamil community. The language regulations pertaining to 'examination for the admission of persons to the public and judicial services' have been given constitutional recognition through the provisions incorporated in Article 22(5) of the Constitution. Though a person is entitled to seek admission to the public service through the medium of his national language, he is expected to 'acquire a sufficient knowledge of the official language within a reasonable time after admission to any such Service', and this, therefore, makes no change in the requirement that proficiency in the official language is necessary for a Tamil public servant to remain in the public service. A matter, which the Tamil community resisted, has now been given constitutional protection. The provisions relating to the language of the courts have given a status to the Tamil Language in the courts of the Eastern and Northern provinces. Article 24(2) enables a person to initiate proceedings in Tamil in a court in any part of the country and this is an important innovation because it gives equality of status to the Tamil language.⁷⁵ According to Article 25, the State is expected to provide adequate facilities for the use of the languages, and this provides a safeguard against any attempt to undermine the implementation of the provisions relating to language.

Another novel feature of the Constitution is the inclusion of a Chapter on Citizenship. Article 26(1) states that 'there shall be one status of citizenship known as the status of a citizen of Sri Lanka'.⁷⁶ The distinction between citizenship by descent and by registration came to be introduced by the Citizenship Act, No.18 of 1948, and this piece of legislation, which disenfranchised the Indian community in the island, reached the statute book during the period of office of the UNP. Article 26(3) clearly states that no distinction needs to be drawn between citizens of Sri Lanka for any purpose by reference to the mode of acquisition of such status, and this, in effect,

75. Hansard, NSA. Vol. 28, No.12, Column 1194.

76. Peiris, L.L.T. The Citizenship Law of the Republic of Sri Lanka, Government Press, 1974.

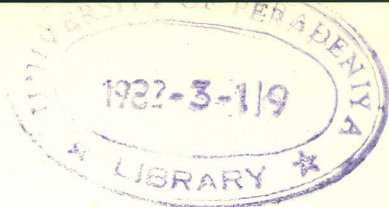
amounts to the complete elimination of the status of a registered citizen. The leaders of the Indian community, though welcoming this provision, thought that no attempt has been made to eradicate the iniquities in the existing citizenship laws.⁷⁷ Article 26(6) of the Constitution imposes a secondary status on the existing citizenship laws. These innovations, which provoked no opposition from the forces of Sinhala chauvinism, did not satisfy certain elements within the party in power. The Government, in introducing these changes in such areas as language and citizenship, has taken steps to rectify the mistakes for which they were partially, if not totally, responsible in the past.

The 1972 Constitution brought about a series of important changes in the Judiciary, and they, in the period of their implementation in the last five years, came to be criticized. The main criticism was that both the structural and procedural changes interfered with the independence of the judiciary. The Select Committee, therefore, stated that 'the independence of the Judges of the Superior Courts should be effectively secured', and with this in view several important changes were recommended in the organisation of the judicial institutions.⁷⁸ They recommended the establishment of Superior Courts, namely the Supreme Court and the Court of Appeal and the abolition of the Constitutional Court created by the Constitution of 1972. The argument advanced in support of the latter recommendation was that 'there was no valid reason for the exercise of this jurisdiction by a body other than one of the Superior Courts' and wanted this jurisdiction to be exercised by the Supreme Court. The Select Committee, arguing further on the need to widen the jurisdiction of the Supreme Court, wanted such matters as jurisdiction pertaining to the Constitution, interpretation of the Constitution, the protection of fundamental rights against infringement by executive action and consultative jurisdiction.⁷⁹ The Constitution adopted in September, 1978 further widened the jurisdiction of the

77. Vide S.Thondaman's Memorandum in the Select Committee Report. 1978.

78. Report of the Select Committee, p.146.

79. Report of the Select Committee, p.146.



Supreme Court entrusting it with extensive powers of judicial review, and the characteristics of Presidentialism in the Constitution perhaps justified this role.

Chapter XVI of the Constitution, which deals with the Superior Courts, consists of 29⁸⁰ articles, and this includes the part on the Court of Appeal. Articles 118 to 136 deal with the jurisdiction of the Supreme Court, which is 'the highest and the final superior Court of record in the Republic of Sri Lanka', and it, according to article 118, is empowered to exercise jurisdiction in respect of (a) constitutional matters, (b) protection of fundamental rights, (c) election petitions, (d) breach of privilege and final appellate and consultative jurisdiction is vested in the Court. The jurisdiction on constitutional matters, as incorporated in Article 120 of the Constitution, deserves close examination in the light of the abolition of the Constitutional Court. The Supreme Court has been given 'the sole and exclusive jurisdiction to determine any question' in order to see whether any Bill or any provision in such a Bill is inconsistent with the Constitution. A Bill, which proposes to amend the Constitution needs to be approved by the people at a national referendum, and it is the Supreme Court which decided whether such a Bill needs to be approved by a referendum. The Cabinet of Ministers on the basis of article 120, can decide that a bill needs to be passed with a special majority required by article 83 and referred to the people by the medium of the referendum and the Supreme Court exercises no jurisdiction over such a Bill, which, according to the Cabinet of Ministers, needs to be passed with a special majority and the Supreme Court, regarding such a Bill, is required to determine whether this Bill needs the approval by the people at a referendum. It was this which the Supreme Court examined in the case of the Special Presidential Commission Amending Bill in November, 1978.

The Constitution of 1972 laid down the procedure which needs to be followed in referring matters which are inconsistent with the Constitution for decision by the Constitutional

80. ^AIbid; p.146. Also see Sections 118 to 147 in Chapter XVI of the Constitution.

Court, and it provided that a leader of a recognised political party in the NSA, a group of members in the NSA and any citizen of Sri Lanka can raise such a question with the Speaker who, in turn,⁸¹ is expected to refer the matter to the Constitutional Court. This provision, which widened the process of people's participation in the legislative process, has been narrowed by the present Constitution, according to which the Supreme Court 'may be activated by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court'. This needs to be done within one week of the Bill being placed on the Order Paper of the Parliament. The 'citizen' in this Section includes a 'body', which, in effect, means an organisation consisting of citizens. Article 12(2) provides that a Bill, which has been referred for the determination of the Supreme Court, cannot be discussed in Parliament till the decision of the Supreme Court is communicated to the President and the Speaker. The Supreme Court is expected to communicate its decision within a period of three weeks. These provisions closely followed the procedure adopted under the Constitutional Court of the Constitution of 1972. Article 55(1) of this Constitution empowered the Cabinet of Ministers to refer certain Bills 'urgent in the national interest' to the Constitutional Court for expeditious decision within twenty four hours, and the purpose was to prevent the delay in introducing legislation deemed to be urgent. A slight improvement has been made on the time limit which can be extended⁸² from twenty four hours to a maximum period of three days. This provision, with minor changes, has been included in the Constitution of 1978, which, as in the Constitution of 1972, states that such a Bill, if decided inconsistent with the Constitution, can only be passed by a special majority which, here, in this context, means a two thirds majority of the members of the House. The Supreme Court, by its decision on the Universities Bill conveyed to the Speaker on 1st November, 1978, held that three clauses of the Bill were inconsistent with the Constitution.

81. Article 54(1) of the Constitution of 1972.

82. Article 122(1)c of the Constitution of 1978.

83. Vide Supreme Court's Decision on the Universities Bill. SC No.1 of 1978 in Hansard Vol.1, No.9 of 1st November, 1978. Column 781-785.

The Government, amidst protests from the Opposition, decided to retain the relevant sections and pass the Bill with a two-thirds majority. As in the Constitution of 1972, the decisions of the Supreme Court on constitutional matters are final and conclusive and under article 124 of the Constitution they cannot be questioned before any other institution administering justice. Article 125(1) of the Constitution empowers the Supreme Court with 'sole and exclusive jurisdiction' to hear and determine matters relating to the interpretation of the Constitution and the subordinate courts, dealing with such matters, are subject to this provision. The jurisdiction of the Supreme Court in matters relating to fundamental rights has already been discussed and all these powers, including those pertaining to the role of the Supreme Court in the country, demonstrate the status of the Supreme Court under the Constitution. It was this pre-eminent position which provoked certain writers to characterise the Supreme Court as a third Chamber of Government and this role, as in the United States, is acceptable in a Federal system. The abolition of the Constitutional Court was a deviation from the French model. The SLFP, in its memorandum to the Select Committee, categorically opposed the detailed provisions relating to the Judiciary and they, in fact, stated that 'one need not incorporate the many provisions of the Court ordinance into the Constitution in order to guarantee independence of the judiciary'.⁸⁴ The dismissal and the appointment of Judges, on the basis of Article 163, attracted the attention of the opponents of the Constitution. Article 163 states that 'all the Judges of the Supreme Court and the High Courts established by the Administration of Justice Law of 1973' cease to hold office with the enactment of the Constitution and this provision, according to Dr. Colvin R. de Silva, was 'an invasion of the innermost sanctum of the judiciary's independence'.⁸⁵ The argument was that the term of office of a Judge of the Supreme Court cannot be terminated prematurely in any circumstances. Yet another view was that the article 163 opened the road to discriminatory selection of Judges for appointment and interfered with the

84. Report of the Select Committee, p.152.

85. See Socialist Nation, Vol. 3, No.3 of 9th August, 1978.

principle of continuity of judicial appointments. This, in effect, was an attempt to pack the upper echelons of the Judiciary. There is a section on 'The independence of the judiciary' and article 107(2), in particular, stated that a judge shall not be removed except by an order of the President made after an address of Parliament and the Speaker will not entertain a resolution for the presentation of such an address unless it is signed by a two third of the total number of members of Parliament. This provides some form of protection for the judges.

The Constitution of 1972, by laying down the requirement of a two-thirds majority for the amendment of the Constitution, injected some rigidity into the Constitution. The Constitution of 1978 incorporated two such rigid requirements; article 82(5) refers to the requirement of a two-third majority while section 83 states that such a bill needs to be approved by the people at a referendum. According to the Select Committee, certain fundamental provisions of the Constitution, though they have been passed with a two-thirds majority, are not to be amended without 'the approval of the people obtained by the employment of the device of the referendum. This procedure needs to be adopted in order to introduce changes in the basic structure of Government (Articles 1-4), the place of Buddhism (Article 9), fundamental rights incorporated in articles 10 and 11, and the extension of the term of office of the President and the life of President (Article 82), and this indicates that certain vital aspects of the Constitution cannot be amended by the legislature. Chapter XIII of the Constitution deals with this question of the referendum, and there are two ways by which a Bill is submitted to the people. The President, on his own, can submit a bill with the certification of the Cabinet of Ministers and the Supreme Court, as stated elsewhere, can rule on that the necessity to obtain the approval of the people through a referendum. Any bill, with certain exceptions, which has been rejected by Parliament, can be submitted to the people by referendum by the President at his own discretion. This is certain to create a conflict between the legislature and the President who, in this context, may have to take a decision to dissolve Parliament. The next important thing is that under this provision, the president submits ordinary bills, and he appeals to the total electorate to give a verdict. This provision has been devised with a view to

preventing conflict between the Government and Parliament. Article 85(3) states that 'an absolute majority of the valid votes cast at a referendum' is necessary to obtain the approval of the people.⁸⁶ Any matter which in the opinion of the President is of national importance can be submitted to the people by the President. This shows that the referendum procedure is not confined to proposals which originate in the legislature in the form of bills. Whether this provision will include issues on which legislation being contemplated is still not clear. All these provisions relating to the device of the referendum, though interfering with supremacy of the elected legislature, enhances the role of the executive Presidency. A measure which has been passed with a two thirds majority, can be repudiated by a verdict of the people at a referendum and this, in effect, derogates from the supremacy of the legislature. The device of the referendum has been made operative in the constitutional systems of the advanced countries. Great Britain made use of this device to solve an issue which cut across political parties, and this provides ample testimony to the fact that the referendum procedure cannot be utilised for all ordinary bills not dealing with fundamentals. The procedure written into the Constitution does not prevent it from being used for such bills. Above all, the use of this procedure demands a certain degree of sophistication and a level of political development, and this, the authors of the Constitution thought, is found in the electorate which is used to changing Governments. The maturity, which the people displayed at General Elections, cannot be expected at a referendum, which, in my view, will not generate the same enthusiasm as in a General Election. The Select Committee, however, thought that the device of the referendum provided 'further recognition' to the sovereignty of the people.⁸⁷ No referendum has been held so far and this, therefore, prevents us from making an assessment of this objective of strengthening the sovereignty of the people.

Certain important changes have been introduced in the area of the public services. The two institutions - the State Services Advisory Board and the State Services Disciplinary

86. Article 85(3) of the Constitution.

87. Report of the Select Committee, p. 148.

Board - have been replaced with a Public Service Commission. Control of disciplinary matters, as under the Soulbury Constitution, has been handed over to the Public Service Commission. The appointment of committees to deal with disciplinary matters became the practice during the period of the Soulbury Constitution, and the same technique, with a few changes, has been written into the Constitution of 1978. The Cabinet of Ministers, under Article 57 of the Constitution, directs the Chairman of the PSC to appoint a committee of the Commission to deal with specific categories of public officers, and even appeals from among public officers could come within the purview of such a committee. The ultimate authority for altering, varying or rescinding any appointment order of transfer or dismissal or any matter relating to disciplinary control was vested in the Cabinet of Ministers, which, as in the Constitution of 1972, enjoys overall control on all matters relating to the public bureaucracy of the island. The next significant innovation is the transplantation of the institution of the Ombudsman. The growth in the activities of the Government and the related expansion in the structures in the first two decades after independence demanded the introduction of this device as a means of safeguarding the interests of the people. The politicisation of the bureaucracy in the last two decades gave further encouragement to this demand for an Ombudsman. The Report of the Select Committee admitted that the existing judicial remedies were inadequate to redress the grievances of the people, and Chapter XIX of the Constitution, which includes the section on the Parliamentary Commissioner for Administration, states that the PCA is 'charged with the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices by public officers, and officers of public corporations, local authorities and other like institutions'.⁸⁸ The PCA is to be appointed by the President and holds office during good behaviour. His salary will be determined by Parliament and it cannot be diminished during his term of office. This indicates, that he, in reality, will be independent of the Government, and removal is only on the basis of an address of Parliament. The success of the PCA depends to a large extent on the nature of his independence and things such as the remuneration and the prestige conferred on the holder of

88. Ibid; p.146

the office are, therefore, important. In the case of the United Kingdom, the members of Parliament act as 'filters' for the PCA who investigates the complaints and reports back to the respective member of Parliament. This procedure could have been successful in the context of the single member constituency system where the member of Parliament came to be identified with certain local interests. The introduction of proportional representation diminishes 'the local role' of the member of Parliament and this development, in my view, will not make him the 'filter' for the PCA. The PCA has to build a strong tradition of impartial criticism of Government administration, the emergence of which depends largely on the first holder of this office. The adoption of the device of the Ombudsman, in the context of a growth of political controls over the bureaucracy, as a part of the parliamentary process is certain to result in a loss of efficiency and an erosion of responsibility of the Minister. The innovation, however, is acceptable for Sri Lanka in the context of the erosion of the parliamentary opportunities hitherto enjoyed by the members of Parliament.

Certain features of the economic philosophy of the Constitution were found in the section dealing with the directive principles of state policy. The protection for private enterprise has been given a constitutional status in Chapter XX, which refers largely to foreign investment. The economic philosophy of the Government and the proposal to establish a Free Trade Zone, with foreign investment demanded constitutional provisions such as those incorporated in Article 157 of the Constitution. Any agreement or treaty with a foreign state, which has been passed by Parliament with a two thirds majority as 'being essential for the development of the national economy', has the force of law in Sri Lanka.⁸⁹ It further states that investments in Sri Lanka by foreign States, nationals, corporations, companies and associations are given protection. According to this article in the Constitution, no written law can be enacted, and no executive or administrative action can be taken in contravention of the provisions of such Treaty or Agreement. The security, which the foreign investors seek, has been given constitutional recognition, and this provision derived some inspiration from Investment Guarantee Law which the SLFP wanted enacted a few weeks before

89. Article 157 of the Constitution of 1978.

the dissolution of Parliament in 1977. Article 157 of the Constitution therefore, has been criticised as a neo-colonialist feature which constitutionally establishes 'national enslavement to foreign capital'.⁹⁰ This article, apart from its novelty, is yet another retrogressive aspect of the Constitution.

The strategy of Constitution-making, adopted by the Government of the UNP, demonstrated no faith in generating a discussion on the nature of the changes which they were introducing and this, perhaps was due to the failure to follow the procedures of a Constituent Assembly. The introduction of the Second Amendment created the impression that their constitutional strategy was to introduce amendments and this objective suddenly underwent a change with the appointment of the Select Committee, which, instead of reporting on the areas which need revision and amendment, produced a Draft Constitution. Opportunities were not made available to discuss and examine the various aspects of the draft Constitution and no national newspaper published the document in its entirety. This further curtailed the discussion of the issues by the general public and the discussion in the legislature did not display the characteristics of a debate on a fundamental law. All this was primarily due to the attitude of the Government which, in effect, introduced the famous article 157 of the Draft Constitution. This article, which the Government was forced to withdraw due to the united opposition of the political parties, made it a serious offence to advocate an amendment of the Constitution otherwise than in the manner provided in the Constitution and the punishment of such an offence was ten years imprisonment and mandatory forfeiture of all property of any such person. This provision, which is draconian in character, was included in the Draft Constitution with a view to emasculating any discussion after it has been adopted. The changes, which are incorporated in the Constitution, bear no relationship to the traditions established in the last four decades and the characteristics of three major constitutional systems of USA, France and the United Kingdom have been brought together to formulate the Constitution. The mixture of constitutional provisions unique

90. Socialist Nation. Vol.3, No.28 of 26th July, 1978.

to the history and traditions of different countries is certain to result in anomalies and they are sure to interfere with the smooth working of the Constitution. The two amendments the Government introduced within six months of the enactment of the Constitution demonstrated this aspect. The First Amendment dealt with Article 140 of the Constitution and the immediate reason for its introduction was the writ of prohibition issued by the Court of Appeal against the Special Presidential Commission. The Amendment, which declared the judgement and the order of the Court of Appeal in Mrs. Sirimavo Bandaranaike's writ null and void, was criticised as an attempt to invade the independence of the judiciary. The Second Amendment, which became law in February, 1979 introduced a new element into the parliamentary system of Sri Lanka. The most unprecedented provision in the Constitution is the one which debar a Member of Parliament from shifting allegiance from one party to another without forfeiting his membership in Parliament. The Second Amendment, which was introduced with a view to creating a special advantage to the party in power, made it possible for a member of the Opposition⁹¹ to resign from his own party and join the party in power. This amendment applies only to the present Parliament and the aim has been to strengthen the ranks of the Government.

91. Perera, N.M. Critical Analysis of the New Constitution of Sri Lanka Government, 1979, p.109.