

**THE RIGHT TO EQUALITY BEFORE THE LAW:  
THE ASPECT OF DIFFERENTIAL TREATMENT –  
JAPAN AND SRI LANKA \***

**Introduction**

This article sets out to examine the attitudes of the Japanese and Sri Lankan courts in interpreting the fundamental right of equality before the law guaranteed by the Constitutions of these two countries. It covers the period from 1947 up to the present date. The year 1947 is of significance both to Japan and Sri Lanka. In that year Japan "received" her Constitution from the Allied Powers. This Constitution which is still in force repealed the Meiji Constitution of 1889. It is based on Western democratic concepts and includes a declaration of fundamental rights. The fundamental right of equality before the law which is enshrined in the American Constitution, also appeared in the Chapter recognizing fundamental rights in the Japanese Constitution.

In 1947 Sri Lanka achieved Dominion Status and the Soulbury Constitution based on the Westminster Parliamentary model was adopted. The Constitution did not contain a Bill of Rights, so that the occasion did not arise for the courts to interpret the right to equality before the law. In 1972 the Soulbury Constitution was replaced by a Republican Constitution which for the first time contained a declaration of fundamental rights and freedoms including the guarantee of equality before the law. In September 1978 the Republican Constitution was replaced by a new Constitution entitled, "The Constitution of the Democratic Socialist Republic of Sri Lanka". This Constitution preserves intact the right to equality before the law recognized by the previous Constitution.

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In the interpretation of the Constitution there is a divergence of approach. In Japan, judicial review is similar to that prevalent in the United States. There is judicial supremacy with the Supreme Court possessing ultimate power to decide on the constitutionality of laws passed by the Diet. Thus, any infringement of the right to equality before the law could be challenged by a person affected by such infringement. But to adjudicate on such an issue, the Supreme Court has to await an accident of litigation. In other words unless there is a concrete legal dispute the court cannot adjudicate on the denial of fundamental rights including the right to equality. In Sri Lanka under the Republican Constitution of 1972 and the present Constitution, judicial review of enacted legislation is not an acceptable doctrine. Instead provision was made in 1972 for a separate Constitutional Court to examine whether a Bill before it is passed into law was inconsistent with the Constitution.<sup>1</sup> In Japan there is always a dispute before the Court when a person alleges an infringement of a fundamental right while the Supreme Court in Sri Lanka only examines a Bill vis-a-vis the Constitution and hands down an opinion regarding any inconsistencies evident in the Bill in relation to the Constitution. This difference in approach in the two jurisdictions is set out, since it is essential to understand the attitudes of the courts in Japan and Sri Lanka in upholding or invalidating legislation which is challenged as being repugnant to the right to equality before the law.

As regards the aspect of differential treatment, three main areas are dealt with. These cover the area of Criminal Liability, Electoral Reappropriation and Press Freedom. Legislation which is deemed "reasonable" does not violate the right to equality guaranteed by the Japanese and Sri Lanka Constitutions. Reasonableness is a relative term. In this regard while in certain areas the attitude of the Japanese courts coincides with the attitude adopted by the Sri Lanka courts, in other areas their attitudes differ. These attitudes are highlighted and commented upon.

<sup>1</sup>The present Constitution of Sri Lanka has abolished the Constitutional Court. However the jurisdiction vested in the earlier Constitutional Court is now exercised by the Supreme Court. On this aspect see H.M. Zafrullah, "The Judicial Power and the Separation of Power Doctrine in Sri Lanka" 1980 *Lawasia* (N.S.) 177, 183.

### **A Brief Outline of the Guarantee of Fundamental Rights in Japan and Sri Lanka**

Until the advent of the Meiji Era, Japan did not have a written Constitution. But in the early years of the Meiji regime the idea of having a written Constitution was conceived. The Meiji Constitution also known as the Constitution of the Empire of Japan was promulgated in 1889. Most of its provisions were based on ideas borrowed from the Constitutions of continental Europe especially the Prussian Constitution then in force. The Meiji Constitution did in fact contain a declaration of the Rights and Duties of the subjects.<sup>2</sup> However, in that chapter "the right to equality before the law" was not included. This omission was only to be expected. The subordination of the people to the rule of the Emperor, the privileged position of the Imperial Family and the nobility, a strong bureaucracy consisting of civil and military branches together with social prestige and honours, and the inferior status of women in society would have had to be abolished if the Meiji Constitution was to recognize the fundamental right of equality before the law. Even the meagre rights recognized under Chapter II of the Meiji Constitution was restrictive in its operation since they were to be exercised, "according to the provision of law". The phrase "according to the provisions of law" could be an empty promise since in the final analysis the exercise of the rights conferred on the subjects by the Meiji Constitution would depend on the state of the ordinary law. If the forces of the State are conferred wide and arbitrary powers by law then the rights of the subjects could be severely curtailed. The reference to the Japanese people as subjects under the Meiji Constitution was also significant. It connotes the subordination of the people to the will of the Emperor. Even the Meiji Constitution itself was said to be a gift from the Emperor to his subjects. The net result was that the right to equality before the law was neither recognized nor enforceable under the Meiji Constitution.

The present Constitution (hereinafter referred to as the Constitution of Japan) which became effective on May 3, 1947 was designed to eliminate such features of Japan's cons-

<sup>2</sup> Meiji Constitution, Chapter II

titutional structure which were termed "militarism, imperialism, feudalism and police state".<sup>3</sup> These features were sought to be eliminated by accepting a Parliamentary system of government based on the rule of law and the separation of powers. The Constitution embodied a Bill of Rights based on but not identical with the rights embodied in the American Constitution. The Chapter embodying these fundamental rights has been termed the "Rights and Duties of the People".<sup>4</sup> The individual's guarantee of equality is embodied in Article 14 which reads:

- (1) All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.
- (2) Peers and peerage shall not be recognized.
- (3) No privilege shall accompany any award of honour, decoration of any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

Together with article 14 should be read article 24 which aims at eliminating the traditional inferior status of Japanese women by conferring equal rights on the female sex. Article 24 reads:

- (1) Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as the basis.
- (2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters

<sup>3</sup> See the initial U.S. Post-Surrender Policy for Japan, released by the White House on 22 September 1945, Part I

(b) The authority of the militarists and the influence of militarism will be totally eliminated from her political, economic and social life

(c) The Japanese people shall be encouraged to develop a desire for individual liberties and respect for fundamental human rights, particularly the freedom of religion, assembly, speech and the press.

<sup>4</sup> Constitution of Japan, Chapter 3

pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of sexes.

The rights including the right to equality guaranteed to the people by the Constitution of Japan are not guaranteed as "rights which cannot be restricted except in accordance with law" but as "rights which are inviolable even in accordance with law". Article 97 of the present Constitution declares :

The fundamental human rights by this constitution guaranteed to the people of Japan are the fruits of the age old struggle of man to be free, they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

Sri Lanka (formerly Ceylon) was a British Colony. Independence was granted on 4 February 1948. The Ceylon (Constitution) Order-in-Council of 1947 commonly called "The Soulbury Constitution" came into effect in 1947 and after suitable amendments, became the first Constitution of Independent Ceylon. The Constitution however, did not embody a Bill of Rights. This was seen by many as a serious defect of the Constitution especially in a multi-racial country like Ceylon where protection of minority rights was essential. Hence, the demand arose for constitutional reform and as early as 1957 the House of Representatives set up a Joint Select Committee of the two Houses of Parliament to revise the Soulbury Constitution.<sup>5</sup> By March 1959 the Select Committee had proposed a number of changes to the Constitution including a Bill of fundamental rights.<sup>6</sup> However, the assassination in September 1959 of Ceylon's Prime Minister Mr. S.W.R.D. Bandaranaike, who had been the prime-mover of the establishment of the Select Committee, sent the Committee into abeyance.

<sup>5</sup> J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka (Ceylon)* (1973) 66.

<sup>6</sup> *Id.* 68

In the General Election held on 27th May 1970 the parties constituting the United Front<sup>7</sup> emerged victorious securing well over a two-thirds majority. One of their immediate tasks was to set up a Constituent Assembly consisting of members of Parliament to draft, adopt and operate a New Constitution which will declare Ceylon to be a free, sovereign, and independent Republic pledged to realize the objectives of a socialist democracy and to secure the fundamental rights and freedoms to all citizens.<sup>8</sup>

On the 22nd May 1972 the new Constitution (hereinafter referred to as the Republican Constitution) came into operation. On that day after 2,500 years of Monarchy, Ceylon became the Republic of Sri Lanka. The new Republic remained within the Commonwealth of Nations.

One of the novel features of the Republican Constitution of Sri Lanka was the enumeration of fundamental rights and freedoms in Chapter VI of the Constitution. Section 18(1)(a) of the Constitution like Article 14 of the Constitution of Japan guarantees the right to equality. However, the phraseology used is slightly different from that of Article 14 of the Constitution of Japan, though the gist of the right guaranteed is the same. According to section 18(1)(a) "In the Republic of Sri Lanka all persons are equal before the law and are entitled to the equal protection of the law". An important difference in approach between the two Constitutions is that unlike in Japan, the fundamental rights and freedoms guaranteed by the Constitution of the Republic of Sri Lanka are not inviolate. Under the Republican Constitution of 1972 it was possible for the State in Sri Lanka to abridge or restrict these freedoms including the rights to equality in view of the provisions in section 18(2) which read:

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

<sup>7</sup>The United Front was composed of the Sri Lanka Freedom Party (S.L.F.P.) a moderate socialist party, the Lanka Sama Samaja Party (L.S.S.P.) and the Communist Party (Moscow Wing), the latter two being left oriented

<sup>8</sup>J.A.L. Cooray, *op. cit.*, 10-11

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.

It could be argued that the above categorization covers practically the entire field of legislation of any Parliament so that whatever law is passed infringing fundamental rights it can be interpreted to be a law in the interests of one of the various subjects referred to in the clause. This approach of the Constitution makers in Sri Lanka is reminiscent of the guarantee of rights under the Meiji Constitution where the qualifying phrase "according to the provisions of law" was used.

On the 9th of September 1978 the Constitution of the Republic of Sri Lanka was replaced by a New Constitution entitled "The Constitution of the Democratic Socialist Republic of Sri Lanka". The New Constitution has enlarged the scope of fundamental rights.<sup>9</sup> Article 12(1) of the Constitution preserves intact "the right to equality" recognized in section 18(1) of the previous Constitution. It further goes on to state that "No citizen shall be discriminated on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds".<sup>10</sup> Like the previous Constitution, the guarantee of equality under the New Constitution shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.<sup>11</sup>

#### **Judicial Review and the Right to Equality Before the Law**

Under the Meiji Constitution judicial review of the constitutionality of enacted legislation was not an acceptable

<sup>9</sup> Constitution of Sri Lanka, Chapter III

<sup>10</sup> Constitution of Sri Lanka, Article 12(2)

<sup>11</sup> Constitution of Sri Lanka, Article 15(7)

doctrine.<sup>12</sup> Therefore the rights granted to the subjects by the Emperor were not enforceable. Neither could the subjects complain in case of infringement of these rights by the legislative or executive branch of government. In this regard the present Constitution of Japan effected a revolutionary change. By vesting the Supreme Court with the power to determine the constitutionality of any law, order, regulation or official act,<sup>13</sup> the principle of judicial supremacy was established. The declaration of fundamental rights and freedom guaranteed to the Japanese people are therefore justiciable.

In Ceylon the Soulbury Constitution did not expressly confer on the courts the powers of judicial review of enacted legislation. But this power was assumed by the Courts, as in the United States of America,<sup>14</sup> as being incidental or implied from the written and rigid nature of the Constitution.<sup>15</sup> However, as pointed out earlier the Soulbury Constitution did not contain a declaration of rights, so that the occasion did not arise for the interpretation of the right of equality.<sup>16</sup> Under the 1972 Constitution of the Republic of Sri Lanka the Judiciary had no power to review the constitutionality of a law passed by the National State Assembly.<sup>17</sup> The Constitution expressly provided that no institution administering justice, and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question the validity of any law of the National State Assembly.<sup>18</sup> This in effect meant that the Declaration of Fundamental Rights and Freedom enumerated in Chapter VI of the Constitution was not enforceable in the ordinary courts.

<sup>12</sup> Great Court of Judicature Judgment, 3 March 1937 16 *Keishu* 193

<sup>13</sup> Constitution of Japan, Article 81

<sup>14</sup> Its famous enunciation was by Chief Justice Marshall in *Marbury v. Madison* 1 Cranch 137.

<sup>15</sup> *Liyanage v. R.* [1967] 1 A.C. 259

<sup>16</sup> See however s. 29(1) of the Ceylon (Constitution) Order in Council [The Soulbury Constitution] Chapter 379 [Legislative Enactments of Ceylon] which provided some form of protection to the minorities against discriminatory legislation.

<sup>17</sup> The 1972 Republican Constitution of Sri Lanka adopted a uni-cameral legislature with the National State Assembly as the Supreme Instrument of State Power (s. 5)

<sup>18</sup> Republican Constitution of Sri Lanka, s. 48(2)

However, the Constitution made provision for a separate court called the Constitutional Court<sup>19</sup> to examine whether any Bill or any provision of a Bill is inconsistent with the Constitution. Inevitably while performing this task the Constitutional Court was called upon to decide whether a Bill contravenes the declaration of fundamental rights and freedom set out in section 18(1) of the Constitution. A Bill which is pronounced by the Constitutional Court to be inconsistent with the Constitution could nevertheless be validly passed by the National State Assembly provided the special majority required for constitutional amendment is adhered to.<sup>20</sup>

The present Constitution of Sri Lanka does not provide for a separate Constitutional Court. However, the jurisdiction vested earlier in the Constitutional Court is now vested in the Supreme Court, the highest court in the land with exclusive jurisdiction in constitutional matters.<sup>21</sup> The Constitution further states that every person shall be entitled to seek relief from the Supreme Court in respect of the infringement or imminent infringement by executive or administrative action, of a fundamental right to which such person is entitled to.<sup>22</sup>

#### Differences in Approach in Constitutional Interpretation in Japan and Sri Lanka

In Japan under article 81 of the Constitution the Supreme Court adjudicates on the question of constitutionality after a law has been duly enacted by the National Diet, whereas in Sri Lanka a citizen's remedy before the Supreme Court acting as a Constitutional Court is confined to challenging a Bill before it becomes law. Therefore, the function of the Constitutional Court to decide whether a Bill is inconsistent with the Constitution is quite different from the function of the Japanese Supreme Court to decide whether a law as enacted by the National Diet is invalid. Indeed as the Constitutional Court of Sri Lanka observed in delivering its opinion in the *Sri Lanka*

<sup>19</sup> Republican Constitution of Sri Lanka, s. 54(2)

<sup>20</sup> Republican Constitution of Sri Lanka, s. 55(4)

<sup>21</sup> Constitution of Sri Lanka, articles 118(a), 120, 121, 122 and 123.

<sup>22</sup> Constitution of Sri Lanka, article 17

*Press Council Bill* in October 1972,<sup>23</sup> it is entitled to take into consideration the social, economic, cultural and political forces that contributed to the enacting of the Constitution and also the social, economic, cultural and political objectives which the Constitution was designed to achieve.<sup>24</sup> The correct approach therefore was to examine the provisions of the Bill vis-a-vis the constitution and in doing so the court is entitled to look at all the attendant circumstances.<sup>25</sup>

The above factors place the Constitutional Court of Sri Lanka in a position different to that of the Supreme Court of Japan. The Supreme Court is concerned with single instances and breach of particular laws by particular individuals. The Constitutional Court on the other hand, is concerned with the entirety of the Bill and the entirety of the Constitution and examines the Bill with a broad perspective in hypothetical circumstances. An ordinary court is concerned with specific situations while there being no case before the Constitutional Court, its decisions are not coloured by the merits of the particular instance.

That the Supreme Court of Japan is concerned only with specific instances and that it cannot play the role of a constitutional court has been emphasised by the Court itself in a number of decisions. In the *Suzuki Decision*,<sup>26</sup> the plaintiff contended that the Supreme Court could both as a court of original jurisdiction and as a court of last resort determine in the abstract without adjudging any concrete legal dispute, the constitutionality of laws, ordinances, and regulations. The Grand Bench in rejecting this contention said.

What is conferred on our courts under the system now in force is the right to exercise the judicial power, and for this power to be invoked a concrete legal dispute is necessary.

<sup>23</sup> National State Assembly Debates Official Report Vol. 5 No. 5 at Column 750

<sup>24</sup> *Id.* Column 755

<sup>25</sup> *Id.* Column 759

<sup>26</sup> Grand Bench Division, 8 October 1952 *Hanreishu* vi No. 9, 783 (Civil) — See John M. Maki, *Court and Constitution in Japan* (1964) 362, 363. See also Grand Bench Division, 15 April 1953 (concerning the power of the Cabinet to dissolve the House of Representatives) Maki *op. cit.* 366, 367; The Sunakawa Decision, Grand Bench *Hanreishu*, XIII No. 12, 3225 (Criminal) Maki *op. cit.* 298.

Our courts do not possess the power, in the absence of such a concrete legal dispute, to hand down abstract decisions covering the future and relating to doubtful disputes concerning the interpretation of the Constitution and other laws, orders, and the like.

Under the present Constitution of Sri Lanka, the Supreme Court is called upon to play a dual role. The Constitution while conferring on the Court the powers previously exercised by the Constitutional Court, has also vested the Supreme Court with power to adjudicate on the infringement or imminent infringement by executive or administrative action of fundamental rights guaranteed to the people. In its latter role unless there is a concrete legal dispute the Supreme Court of Sri Lanka cannot be called upon to adjudicate on the question of the violation of fundamental rights. In this respect the role of the Supreme Court in Sri Lanka would be similar to the task performed by its counterpart in Japan, in protecting the fundamental rights guaranteed by the Constitution.

#### **Interpretation of the Guarantee of the "Right to Equality Under the Law" in Japan and Sri Lanka**

The right to Equality under the law consists of two aspects — a negative and a positive aspect. In the negative aspect it guarantees the absence of privileges in favour of any person and the equal subjection of all classes to the law. In the positive aspect it 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.<sup>27</sup> It also contemplates that among equals whether between persons or classes of persons, there should be no discrimination.

Although the right to equality under the law forbids class legislation based on race, religion, wealth, social status, political influence etc., it does not automatically rule out legislation which involves classification of persons and things into groups. Equality under the law does not mean that persons who are

<sup>27</sup> Sir Ivor Jennings, *The Law and the Constitution* (5th ed.) 50

different must be treated as if they are equal. Differentiation between classes must, however, be on a classification which is reasonable; therefore "unreasonable" differential treatment would render a law or a provision of a law invalid. It has been suggested that for differential treatment based on the power of the State to classify persons for legitimate purposes to be valid it must fulfil two tests namely (i) it should not be arbitrary.

It should be based on intelligible differentia which distinguishes persons or things grouped together in the class from others left out of it. The classification should be based on some real and substantial distinction and (ii) the differentiation adopted as a basis of classification must have a rational or reasonable relationship to the objects sought to be achieved by the statute in question.

The above principles in relation to the right to equality under the law have been applied both by the courts of Japan and Sri Lanka in deciding whether a law or a particular provision of a law is discriminatory. Thus, the Supreme Court of Japan observed:<sup>28</sup>

Article 14, Paragraph 1 does not guarantee absolute equality to all of the people. It is to be construed as prohibiting differentiation without reasonable ground therefor. It does not prohibit some differential treatment being regarded as reasonable in view of the nature of the matter.

Similarly the Constitutional Court of Sri Lanka in the *Associated Newspapers of Ceylon, Ltd., (Special Provisions) Bill*<sup>29</sup> expressed the opinion that the equal protection of the law clause does not take away from the State the power to classify persons for legitimate purposes. The classification may be on a different basis; it may be geographical or according to objects or occupation. The court went on to state that whether a classification adopted by a law is reasonable or not is a matter for it to decide using as a criteria the test of "reasonableness".

In the *Fukuoka Patricide* decision<sup>30</sup> the Supreme Court was

<sup>28</sup> Supreme Court Judgment, 27 Mau 1964, 18 *Minsbu* 676

<sup>29</sup> N.S.A. Debates of Official Reports Vol. 6 No. 11 (Part D), Column 1987

<sup>30</sup> John M. Maki, *op. cit.*, 129

called upon to decide whether article 205(2) of the Penal Code which provides a more severe penalty on those found guilty of inflicting bodily injury upon lineal ascendants was violative of article 14 of the Constitution which guarantees the right of equality under the law.

The majority held that article 205(2) of the Penal Code which was challenged as unconstitutional did not violate the right to equality guaranteed by the Constitution on the basis that the law cannot be deterred from laying down in appropriate circumstances, concrete provisions as required by morality, justice or the specific purposes to be served by the law, taking into consideration within the scope of the principle of equality of the people such circumstances as age, natural qualities, occupation or special relations with others.<sup>31</sup> According to the majority opinion the reason for the provisions for the more severe penalty for injury causing death of a lineal ascendant in the Penal Code is the importance attached by the Code to the moral duty of the child towards its parents and that "morality, controlling such relations as those between husband and wife, parent and child, or brother and sister is the great fountainhead of human ethics, a universal moral principle recognized by all mankind without regard to past or present or East and West. In other words, it must be said that this principle belongs to what in theory is called natural law".<sup>32</sup>

Article 14 of the Constitution of Japan after enunciating the principle of equality goes on to state that there "shall be no discrimination in political, economic or social relations because of . . . social status . . .". The majority considered whether the relations between parents and children fits into the category of social status and therefore the more severe punishment prescribed in Article 205(2) of the Penal Code is discriminatory. They answered this in the negative because in their opinion "the relations between parents and children do not fit under any of the categories, such as social status, and so forth, which are mentioned therein as reasons for discriminatory treatment".<sup>33</sup>

<sup>31</sup> *Id.* 131

<sup>32</sup> *Id.* 131-132

<sup>33</sup> *Id.* 132

The final opinion of the majority was that article 14 of the Constitution which states that all of the people must in principle be treated equally in their political, economic and social relations considers their position in regard to basic rights and duties from their place as subjects of those rights. It does not prohibit the treatment of persons that varies according to their respective differences as objects in the several legal relationship applying to them.<sup>34</sup>

Justice Mano Tsuyoshi in a strong dissenting opinion expressed the view that there was a violation of the principle of equality when the law differentiates *a priori* between penalties for the same act according to various types of conditions.<sup>35</sup> According to him when the Penal Code imposes a more severe punishment for injury resulting in the death of lineal ascendants it falls within the ambit of discrimination because of social status and on that ground unconstitutional. He completely disagreed with the majority that in the name of morality the provisions in the Penal Code were not in violation of the principle of equality.<sup>36</sup>

The rationale of articles 200 and 205(2) of the Japanese Penal Code is to deter people from murdering their own or their spouse's lineal ascendant by inflicting a heavier penalty upon such an act than in the case of ordinary murder. It hereby makes it clear the highly reprehensible character of the act.<sup>37</sup>

It is therefore relevant to consider whether it is unreasonable to impose a heavier penalty for the acts which are deemed criminal under article 200 and 205(2) of the Penal Code. In this regard it is necessary to consider the social context in which the penal laws of Japan operate. The purpose of a Penal Code is to maintain the order of State and society, to preserve the rights of the people and to punish those who infringe such order or rights in accordance with the circumstances of their crimes. In the traditional Japanese social context the members of a family are united by the ties of mutual respect and natural affection. The

<sup>34</sup> *Ibid*

<sup>35</sup> *Id.* 135

<sup>36</sup> *Id.* 138

<sup>37</sup> *Aizawa v. Japan*, Supreme Court Judgment, 4 April 1973, 27 *Keishu* 265

younger members of the family give precedence to their elders. Generally, descendants are brought up under the custody of parents or grandparents and the lineal ascendants are held legally or morally responsible for the acts of their descendants. The moral indebtedness and the respect paid to lineal ascendants by descendants is a fundamental moral principle of Japanese social life.

The Supreme Court of Japan in the more recent case of *Aizawa v. Japan*<sup>38</sup> when called upon to decide the same issue of constitutionality as that which arose in the *Fukuoka Patricide* case took into account the factors stated in the preceding paragraph and concluded that it is perfectly legitimate for the penal law to take into account the morality of children towards parents (*filial piety*) and to regard the maintenance of such natural ties as one of the objectives of the criminal law.

Taking into account the above objectives of the penal law a majority of Justices in *Aizawa's* case were of the opinion that it is not unreasonable to have the high degree of moral blameworthiness and thereby a heavier punishment prescribed when the victim of the criminal act was a lineal ascendant of the accused. According to the majority such a provision is not *ipso facto* void in terms of Article 14(1) of the Constitution.

However, according to the majority opinion if the extent of the penalty for such an offence is augmented to such an extent that it loses sight of the legitimate objects of the criminal code, then it would be unreasonable and therefore repugnant to Article 14.

The majority opinion considered the penalty prescribed under Article 200 of the Penal Code (murder of the offender's lineal ascendant) vis-a-vis the penalty prescribed for ordinary murder under Article 199. Under the former provision a court has to impose the death penalty or life imprisonment while under the latter provision a judge could decide between death, life imprisonment or imprisonment for a term not exceeding fifteen and not less than three years. In the opinion of the majority the imposition of the death penalty or life imprisonment under article 200 is much heavier than the penalty

<sup>38</sup> *Supra*, note 37. For a summary of the case see H. Tanaka and M.D.H. Smith, *The Japanese Legal System* (1978) 725-728

prescribed for ordinary murder under article 199 and therefore the classification is without any substantial or reasonable basis. Article 200 was therefore declared void as against Article 14 of the Constitution on the basis that it makes an unreasonable distinction between ordinary murder and murder of one's lineal ascendant.<sup>39</sup>

In a subsequent case<sup>40</sup> the First Petty Bench of the Supreme Court held that Article 205(2) (injury to a lineal ascendant resulting in death) was valid on the basis that the difference between the penalties provided in sub-section 2 and in sub-section 1 of the section were not unreasonably large.

The above decisions show that the Supreme Court of Japan has adopted one attitude in relation to Article 200 which deals with punishment for the murder of the accused's lineal ascendant and another attitude in respect of Article 205(2) which lays down the punishment for injury to a lineal ascendant causing his death. In the former case the Court has held that Article 200 which provides only for the death penalty or life imprisonment metes out unreasonable differential treatment to an offender who happens to kill a lineal ascendant of his own or of his spouse whereas a person who kills another person not being a lineal ascendant could be punished either with death or with life imprisonment or imprisonment for a term not exceeding fifteen and not less than three years.

On the other hand the decisions which concerned Article 205(2) of the Penal Code have held that it is not unreasonable differential treatment to impose a higher punishment on an offender who inflicts an injury to a lineal ascendant causing his death, though a person who engages in similar criminal conduct but not in relation to his own lineal ascendants is made to undergo a lesser punishment.

Two questions arise in this context. First, is the Penal Code of Japan justified in making a distinction as regards punishment where the victim of the offence happens to be the wrongdoer's lineal ascendant and secondly, could the attitude taken by the courts in holding Article 200 unconstitutional but not Article

<sup>39</sup>Tanaka and Smith, *op. cit.* 727

<sup>40</sup>Supreme Court Judgement dated 26 September 1974, 28 *Keisbu* 3329

205(2) be supported on the basis of the principles of differential treatment set out earlier.

Generally the penal laws of a country are based on the objective theory of liability which involves the test of the reasonable man. This theory postulates the uniform application of liability to all persons alike. Therefore, if the Penal Code of a country is intended to uphold the objective theory of liability, the imposition of different standards of punishment for the same offence could amount to unfair or unreasonable differential treatment and therefore violative of the guarantee of equality. An illustrative case is *R. v. Drybones*,<sup>41</sup> where the Supreme Court of Canada held that a law which imposed a far more severe punishment on Indians found intoxicated in a reserve was violative of the right to equality guaranteed by the Canadian Bill of Rights. The basis of the decision was that the higher punishment imposed on Canadian Indians was not meted out to fellow Canadians who were also guilty of the same offence.

The majority of the Court in the *Fakuoka Patricide* case rationalized their decision in terms of moral and ethical considerations. The concept of filial piety (one of the most admired virtues under Confucianism) which demands blind, absolute subordination of children to parents was held to justify the differential treatment i.e. the harsher punishment meted to a person guilty of murdering his or her lineal ascendant. However, it is submitted that it is difficult to justify such a concept under the Constitution of 1947 which is based upon the principle of individual dignity and equality.

It is interesting to consider what the attitude of the courts in Sri Lanka would be should the Penal Code impose a higher punishment to certain categories of offenders. In Sri Lanka section 293 of the Penal Code<sup>42</sup> defines the offence of culpable homicide while section 294 lays down the circumstances in which culpable homicide would amount to murder. Section 294 is also subject to certain exceptions which if proved would

<sup>41</sup> (1970) S.C.R. 282 (Canada)

<sup>42</sup> Penal Code of Ceylon enacted in 1889 based on the Indian Penal Code with minor modifications. See Legislative Enactments of Ceylon Vol. 1, Chapter 9

reduce the offence of murder to culpable homicide not amounting to murder. Exception I states:

Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

One of the essential requisites for the successful plea of provocation as a mitigatory factor in murder is that it should be "grave". The question therefore arose as to how this test of gravity was to be measured — was it to be in terms of the hypothetical reasonable man known to the criminal law in which case the test would be a universal one or was it to be a subjective test which would take into account the particular temperament and disposition of the person receiving the provocation.

In *R. v. K.D.J. Perera*<sup>43</sup> a majority of the Full Bench of the Court of Criminal Appeal observed "Provocation would be grave where an ordinary or average man of the class to which the accused belongs, would feel annoyed or irritated by the provocation given, . . . retaliate against the provocation given".<sup>44</sup> Here what the majority sought to justify was the extension of the ordinary test of gravity to an ordinary villager in Sri Lanka who was known to lose his temper quicker than others, under a provocation which would generally be not considered grave. The majority therefore, imposed a subjective element to the "gravity" test and the criteria laid down was that the test of gravity should be measured in relation to the average man in the class to which the accused belongs.

However, subsequent Sri Lanka cases have rejected in unequivocal terms the test of gravity formulated in *K.D.J. Perera's* case. In *R. v. David Appabamy*<sup>45</sup> a majority of the Court of Criminal Appeal held that the element of gravity of provocation would be satisfied in circumstances where the

<sup>43</sup>(1951) 53 N.L.R. 193

<sup>44</sup>*Ibid*

<sup>45</sup>(1952) 53 N.L.R. 313

reasonable man would resent deeply the provocation made.<sup>46</sup> Nagalingam S.P.J. justified the rejection of a subjective test of gravity in the following terms.<sup>47</sup>

It is easy to conceive of cases where the same act of grave provocation may produce different results in different individuals. In the case of a man who has cultivated self-restraint, he would not lose his power of self-control, while a man of quick temper would lose his powers of self-control. Is it, then, to be held that the identical act of provocation is grave in the latter case while not in the former case? Can it be said that the policy of the law is to deal lightly with a man who has a quick temper as against a man who has control of his passions?

The objective test of gravity in relation to the mitigatory plea of provocation was established by the judgment of *R. v. David Appabamy*. It was by reference to the reaction of the reasonable man and not to the accused's own susceptibilities that the gravity of provocation was to be assessed. In other words the liability of the accused would be determined independent of his idiosyncrasies or his background.

What is evident from this stand of the Sri Lanka courts is their reluctance to adopt different tests of criminal liability with a view to imposing different sets of punishment. This position is in clear contradiction to that adopted by Japanese courts towards differential treatment. It therefore leads the writer to submit that if provisions similar to sections 200 or 205(2) of the Japanese Penal Code were to be present in a Sri Lankan legislative Bill they would be struck down on the ground of an infringement of the right to equality as guaranteed in the Constitution as well as because of the general aversion of the Sri Lankan courts towards recognition of differential treatment in punishment.

<sup>46</sup> *Id.* 316

<sup>47</sup> *Id.* 317

### Electoral Demarcation and Equality

In Japan the electoral system fails to give effect to the principle of "one man, one vote, one value", by not allocating electoral districts in proportion to the population. It has been pointed out that in 1974 the most favoured House of Representatives district elected one member per 80 thousand eligible voters, and the least favoured district elected one member per 424 thousand — a ratio of 1 to 5.3.<sup>48</sup> It is therefore clear that there is a disparity in the demarcation of electoral districts. Would this violate the right to equality guaranteed by the Japanese Constitution?

In *Koshiyama v. Chairman, Tokyo Election Administration Commission*<sup>49</sup> the plaintiff sought to set aside the election of members of the House of Councillors held on 1st July 1962, on the basis that the electoral system did not give effect to a fundamental principle of democracy, namely the principle of one man one value. It was alleged that the value of each vote cast by the voters in Tottori Prefecture was worth 4.088 times as much as those of the voters in Tokyo Prefecture, and therefore the voters in the latter Prefecture were denied the equal protection of the law.

A Grand Bench of the Supreme Court affirming the judgment of the Tokyo District Court dismissed the plaintiff's suit. The Court admitted that in terms of the constitutional principle of equality it is desirable to apportion seats for each electoral district in proportion to population. But the Court went on to state that it is permissible to take into account other factors in apportionment.<sup>50</sup> As examples of these other factors the Court said that in the demarcation of electorates it is permissible to take into consideration the geographical size of each district, its historical background and the legislature is also entitled to keep a balance in numbers to be elected from various districts<sup>51</sup>. In

<sup>48</sup>Tanaka and Smith, *op. cit.*, 40

<sup>49</sup>Supreme Court Judgment dated 5 February 1964, 18 *Minshu* 270. For an English translation of the judgment see Hiroshi Itoh and Lawrence Ward Beer, *The Constitutional Case Law of Japan, Selected Supreme Court Decisions 1961 — 70*, 53

<sup>50</sup>Itoh and Beer, *op. cit.*, 54

<sup>51</sup>*Ibid.*

the court's opinion Article 4 which guarantees the right to equality before the law does not specifically lay down that the seats in each House be allocated in proportion to the number of electors in each electoral district.<sup>52</sup>

It is the writer's view that the Court in *Kosbiyama's Case* adopted the correct attitude in upholding the electoral demarcation as set out in the Election of Public Officials Act of 1950. If the election law was declared unconstitutional on the ground that it is repugnant to the right to equality guaranteed by the Constitution, the practical consequences would be far reaching. In *Kosbiyama's case* if the election was held invalid it would stop the functioning of the National Diet since one half of the members of the House of Councillors would lose their seats. A second election would have to be held within 40 days. Now within these 40 days the electoral system would have to be amended to remove all inconsistencies with the equality clause. But it is legally impossible to effect such an amendment since one-half of the Councillors are deemed to have lost their seats, it (i.e. the amendment) would not conform to the manner and form of legislation prescribed by the Constitution. The net result would be to create a legal vacuum in Japan which nobody could fill since no election would be valid unless the Election Law is duly amended but to secure that amendment the Diet lacks competence on the ground of insufficiency of legally elected members to enact a law. In the light of the above submissions, the view of the majority in *Kosbiyama's case* which conceded that there might be an extreme situation which might call for holding the election law unconstitutional is open to review.

In Sri Lanka, both under the Soulbury Constitution and the Republican Constitution adopted in 1972 provision was made for a Delimitation Commission which was responsible for the demarcation of electoral districts.<sup>53</sup> Under the Republican Constitution it was expressly provided that the Delimitation Commission shall divide each Province of Sri Lanka into a

<sup>52</sup> *Ibid.*

<sup>53</sup> For the provisions relating to the demarcation of electorates under the Republican Constitution see ss. 77-81. The present Constitution of Sri Lanka has replaced these provisions by a system based on proportional representation, see articles 95-99

number of electoral districts ascertained as follows: The total number of persons who according to the last 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 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. Further where there is in any area of a Province a substantial concentration of citizens of Sri Lanka united by a community of interests 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. Provision was also made for the creation of multi-member constituencies.

The above provisions regarding the delimitation of electoral districts was not conducive towards the attainment of the principle of "one man, one vote, one value." The electoral system as it existed under the Soulbury and Republican Constitution of Sri Lanka did not therefore give equal value to each person's vote. For example, in the General Elections of 1970 the electorate of Kotte (an urban area adjoining the capital city of Colombo) had a voting strength of 68,383 registered voters, while Uduvil (a semi urban electorate in the North-east of Sri Lanka) had a voting strength of 36,690 whereas the voting strength of Passara (a rural electorate in the Central Highlands of Sri Lanka) was only 16,461. Thus, one voter in the electorate of Passara had the electoral power of 4.2 voters in Kotte and 2.3 in Uduvil.

The provisions pertaining to the demarcation of electoral districts were contained in Sri Lanka's written and rigid Constitution of 1972. The Constitution being the fundamental law of the land, its provisions could not be called in question in any court of law. Therefore the provisions laying down the criteria for the demarcation of electorates could not be challenged on the ground of inequality. Even if these provisions were contained in a separate law like in Japan where the principles of demarcation of electoral districts are laid down in

the Election of Public Officials Act any challenge to it would have been unsuccessful. As the Minister of Constitutional Affairs said during the debate of the constitutional provisions dealing with the electoral system, "the people were gravely, unevenly developed while also being underdeveloped. 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".<sup>54</sup> If a court of law in Sri Lanka takes into account the above factors its decision is likely to be the same as that of the Japanese Supreme Court in *Koshiyama's* case. The rationale for such a decision could be sought in terms of legislative policy meaning that it should be left to the legislature to decide how to apportion the number of members to be elected from each Province.

#### Press Freedom and the Equal Protection of the Law

In 1975 the Government of Sri Lanka tabled before the National State Assembly, *The Associated Newspapers of Ceylon Ltd. (Special Provisions) Bill*. This Bill envisaged the take-over of the biggest newspaper printing establishment in the island. The Bill was challenged before the Constitutional Court on the ground of the infringement of fundamental rights including Section 18(1) of the Republican Constitution which stated that all persons are equal before the law and are entitled to the equal protection of the law. The Petitioners argued *inter alia* that the impugned Bill denied them the fundamental right of equality before the law and equal protection of the law, not merely to the shareholders of the Associated Newspapers of Ceylon Ltd., but also to the Company<sup>55</sup> named Associated Newspapers of Ceylon Ltd. In their view the Bill sought to single out and discriminate this particular Company by imposing on it duties, disabilities and liabilities to which other persons, shareholders of other Companies, and in particular other Newspaper

<sup>54</sup> Constituent Assembly Debates, Vol. 1, Column 1715

<sup>55</sup> Corporate bodies are "persons" within the meaning of this article — see *Yick Wo v. Hopkins* (1886) 118 U.S. 356; *Quaker City Cab Co. v. Penn* 277 U.S. 389

Companies were not subject to. The final submission on behalf of the Petitioners was that no reasonable basis existed for the differential treatment of Associated Newspaper of Ceylon Ltd., that no reasonable basis exists to justify the discriminatory treatment meted out to the Company by the Bill.

The Constitutional Court held that the *Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill* was not violative of the equal protection clause. In the Court's opinion the classification upon which the Bill was based was neither arbitrary nor capricious but was rather based on a reasonable differential treatment on the following broad grounds:

- (1) Government policy from 1960 onwards was to take over the newspapers controlled by the Associated Newspapers of Ceylon Ltd., and to broadbase the shareholding of this Company. The Bill was therefore designed to end monopoly ownership and to place it on a broader and more secure basis and to eliminate anti-social malpractices of monopoly ownership.
- (2) The Press Commission (in its Interim Report in 1964) considered the question whether Associated Newspapers of Ceylon Ltd., had monopolistic tendencies and answered this question in the affirmative. Thus, the activities of the Company is so far as it related to the publishing of news and news comments had in the course of time given this Company very powerful and influential position in the public life of this country.
- (3) A Royal Commission of 1970 under the chairmanship of Mr. T.S. Fernando ( a former Chief Justice of Ceylon and later President of the Court of Appeal), found that certain shareholders of the Associated Newspapers of Ceylon Ltd., had contravened the Exchange Control Act and the Inland Revenue Act.

All these matters in the opinion of the court justified the objects of the Bill.

In the event that a newspaper company in Japan had acquired a monopoly in the publishing of news and news comments, the question arises whether a Bill similar in intent to

the *Associated Newspapers of Ceylon Ltd. (Special Provisions) Bill* would be held to be valid. In Japan article 21 of the Constitution guarantees freedom of expression. The only restriction on freedom of expression appears to be the public welfare standard laid down in Article 13. In Sri Lanka on the other hand when the *Associated Newspapers'* case was decided the State was pledged to carry forward the progressive advancement towards the establishment of a socialist Democracy.<sup>56</sup> The Constitutional Court also took into account the Principles of State Policy set out in Chapter V of the Republican Constitution especially section 16(2)(e) which states as one of the objectives of a socialist Democracy, 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, and section 16(5) which lays down that "the State shall endeavour to eliminate economic and social privilege disparity and exploitation and ensure equality of opportunity to all citizens". Thus taking into account the Principles of State Policy as set out in Section 16(2) and in particular Articles 16(2)(e) and 16(5) and also because of the effect of Section 18(2)<sup>57</sup> which lays down the circumstances in which fundamental rights could be abridged or restricted, the Constitutional Court in the *Associated Newspapers* case held the differential treatment meted out to the Company to be reasonable.

In Japan there are no Principles of State Policy laid down in the Constitution. Neither is the State pledged to establish a socialist Democracy. Japan is a democratic State where the right to own or to hold private property is deemed inviolable and the fundamental human rights guaranteed by the Constitution are inviolate rights. In these circumstances the vesting in the government of the largest newspaper establishment in the Japanese context would be seen by the courts in Japan as a threat to the freedom of expression which cannot even be justified by the public welfare standards as laid down by the Supreme Court. Taking into account these factors it is most likely that in the Japanese social context a Bill which is similar

<sup>56</sup> Republican Constitution of Sri Lanka, s. 16(2)

<sup>57</sup> *Supra*, p. 104-5

to the *Associated Newspapers of Ceylon (Special Provisions) Bill*, would be held to be invalid on the basis that it is an arbitrary and unreasonable classification.

In conclusion the different criteria which may be used as a basis of classification by the State in Japan and Sri Lanka may be laid down.

- (1) Classification could be on a geographical basis. Thus, the guarantee of the equal protection of the law does not prevent the State from applying different systems of laws or different systems of Judicature to different parts of the country according to local circumstances. In Sri Lanka for example, the existence of different legal systems governing the various communities and in Japan a local ordinance which deemed certain acts criminal though the same act was not criminal in many other localities<sup>58</sup> would fall within this category.
- (2) Age could form a rational basis for differential treatment in relation to the object of particular subjects of legislation. Both in Japan and in Sri Lanka persons who have not attained the age of majority are precluded from entering into a valid contract.
- (3) Differences in the nature of the trade or calling or occupation which the legislature seeks to regulate is another possible basis for classification. In Sri Lanka the *Associated Newspapers of Ceylon (Special Provisions) Bill* was justifiable on the basis that its object was to control and regulate mass media which showed distinct monopolistic tendencies. Industrial statutes both in Japan<sup>59</sup> and Sri Lanka<sup>60</sup> which provide various forms of preferential treatment in favour of women like limitation on overtime work than in the case of male

<sup>58</sup> Supreme Court Judgment, 15 October 1958, 12 *Keisbu* 305

<sup>59</sup> Labour Standards Act, 1947

<sup>60</sup> Employment of Women, Young Persons and Childrens Act No. 47 of 1956 and the Factories Ordinance, Legislative Enactment of Ceylon, Chapter 131

workers, prohibition on night shift work etc., would come within this category.

- (4) Special legislation may also be founded upon differences in the degree of public injury or harm. The Legislature may therefore, be justified in enacting legislation which provides separate treatment to habitual offenders provided there is no discrimination interse. Thus in Japan an act providing for a heavier penalty on habitual gamblers than on non-habitual gamblers<sup>61</sup> and a local ordinance prohibiting prostitution by imposing sanctions only as to the female party to the act<sup>62</sup> have been upheld as not infringing the "equality" provisions in the Constitution.

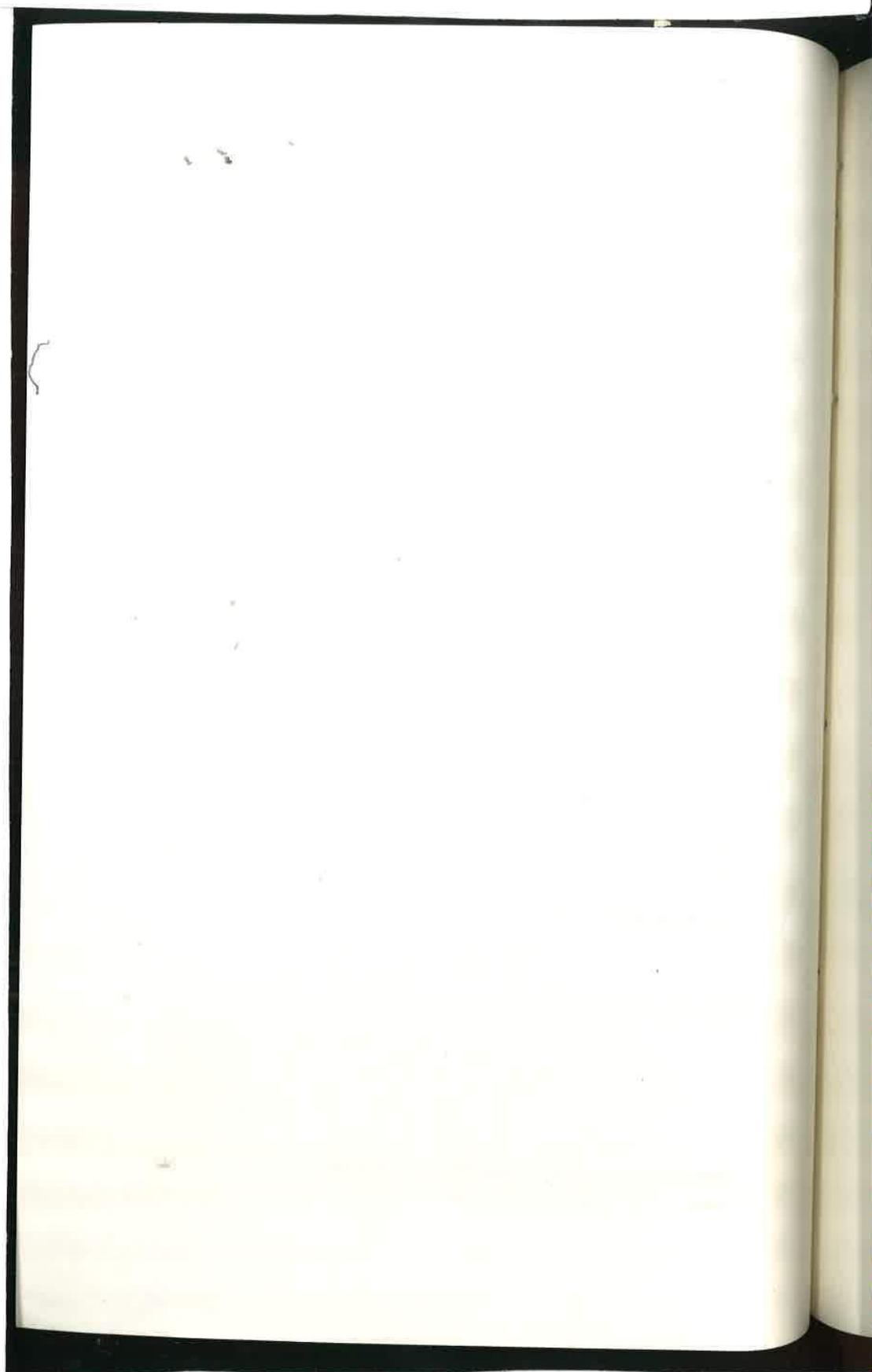
The above is a list of possible classifications which a Legislature is entitled to make in the process of legislation. However, it is difficult to predict with certainty when a court of law would hold differential treatment to be reasonable, for a court in arriving at a conclusion has to take into account a large number of possible differences between persons or situations and which factor will be decisive will depend on the circumstances of each case. Thus a law like the *Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill* which was held to be reasonable in the Sri Lanka social context may be held to be unreasonable in Japan where the socio-economic context in which the constitutional structure operates is quite different.

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<sup>61</sup> Supreme Court Judgment, 1 August 1951, 5 *Keishu* 1709

<sup>62</sup> Supreme Court Judgement, 8 June 1957, 11 *Keishu* 217



## PLUCKING THE FRUITS OF DIVORCE

The recent case of *Viswalingam v. Viswalingam* [1980]1 M.L.J. 10 raises the question of the recognition in England of Muslim Law in Malaysia, especially in relation to the dissolution of Muslim marriages. In England fundamental changes have been made in the rules for the recognition of foreign divorces by the Recognition of Divorces and Legal Separations Act 1971. Section 2 and 3 of the Act read as follows:

"2. Sections 3 to 5 of this Act shall have effect subject to section 8 of this Act as regards the recognition in Great Britain of the validity of overseas divorces and legal separations, that is to say, divorces and legal separations which (a) have been obtained by means of a judicial or other proceedings in any country outside the British Isles and (b) are effective under the law of that country.

3. (1) The validity of an overseas divorce or legal separation shall be recognised if at the date of the institution of the proceedings in the country in which it was obtained (a) either spouse was habitually resident in that country; or (b) either spouse was a national of that country.

(2) In relation to a country the law of which uses the concept of domicile as a ground of jurisdiction in matters of divorce or legal separation, subsection (1) of this section shall have effect as if the reference to habitual residence included a reference to domicile within the meaning of that law.

(3) In relation to a country comprising territories in which different systems of law are in force in matters of divorce or legal separation, the foregoing provisions of this section (except those relating to nationality) shall have effect as if each territory were a separate country."

It must be remembered that the Courts in England have power to make orders as to financial support, rights to the matrimonial home and property, custody of the children and the like only where the Court grants a decree of divorce, nullity or judicial separation. In England jurisdiction in divorce, nullity or judicial proceeding can now be exercised where either party is domiciled or has been habitually resident for one year in England. Thus where one of the parties, in most cases the wife, wishes to claim financial relief in England, it is necessary to show that the marriage between the parties is still subsisting and that the court