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Criminal Law in the New Millennium

Policy Reform in the Health Sector

Put Not Your Trust in Princes: Hence the Rule of Law

(A Comment on Victor Ivan and others v. Sarath Silva and others)

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Editor's Note...

This month's issue of the LST Review begins with an article on **Criminal Law in the New Millennium** by ***Ranjit Abeysuriya P.C.*** The article discusses the advances in science and technology that have taken place during the last few decades. These advances have paved the way for new and sophisticated forms of crimes to be committed, with minimal chances of detection. The author goes on to suggest amendments to the Criminal Justice System in Sri Lanka, by drawing examples from developments in other jurisdictions. He concludes by emphasising that law reform should be followed by strong and prudent enforcement. As the author states, this is the best way forward for the Sri Lankan Criminal Justice System to sustain its integrity in the face of new and advanced forms of challenges in the new millennium.

An article on **Policy Reform in the Health Sector** by *Ms.* ***K.S. Atulugama*** follows. Here she reports on a discussion organized by the Trust on challenges faced by the Health Sector when initiating policy reforms. Some important points are raised with regard to the interests of all stakeholders i.e. the State, the Professionals and the Consumers. These interests should be addressed so that any reform that is introduced would have a greater chance of success with these factors being taken into consideration.

The issue ends with an article by ***Shantha Jayawardena*** - **Put Not Your Trust in Princes: Hence the Rule of law** *(A Comment on Victor Ivan and others v. Sarath Silva and others)*- where he engages in a detailed analyses of the approach of the Sri Lankan Judiciary in upholding the rule of Law, in the light of recently decided cases. The article is based on a comment of the recent Fundamental Rights case before the Supreme Court challenging the appointment of the Chief Justice. The discussion is strengthened further by the analyses in the Post Script, through the citation of subsequent judicial decisions and Constitutional developments, thereby shedding light on the discussion that preceded.

Criminal Law in the New Millennium

Ranjit Abeysuriya, P.C.

Introduction

There is an immediate need to modernise Criminal Justice in the wake of new and organised forms of crime, some of which are internationally interconnected.

Criminal justice systems are no match for sophisticated criminal groups and it is widely recognised that counter strategies must be put in place taking advantage of, inter alia, technological advances and thereby achieve improvements in the investigative and prosecutorial levels. Concern has been voiced that organised crime poses a direct threat to national and international security and stability as it disrupts and compromises social and economic institutions causing loss of faith in the democratic processes.

According to a publication of a United Nation's Agency, the 1993 estimate of the extent of worldwide business of all Mafia organisations in the world amounted to billions of US dollars. Crime is said to be the world's predominant business activity, drug and arms trafficking take 1st and 2nd place, ahead of the oil industry.

Crime Syndicates and drug cartels cross borders at will. Every nation must oppose them individually and additionally, strong International Co-operation and material support is necessary to contain these activities. Perpetrators of organised transnational crime are becoming a major force to be reckoned with and if they continue to flourish, their activities could affect the economic and social development, particularly of the developing countries. Law enforcement agencies in many countries are ill prepared to control or combat organised crime, particularly in its trans national dimensions.

Organised transnational crimes pose a real threat to the criminal justice system. Countries have been alerted and warned that they should put aside matters of sovereignty in the face of global criminality. If coordinated action is not swiftly undertaken, the world community would be a slave to organised crime, which would come to control economic conditions. Organised crime, it has been revealed has also resulted in corruption of public officials and where the stakes are high, even political corruption has followed.

This paper seeks to examine, though not exhaustively, the various forms of organized crime posing a threat to criminal justice systems across national borders, and to make recommendations for their effective control.

ORGANIZED CRIME

Money Laundering

The scale of money laundering is immense and the investment of illicit profits in legal undertakings is estimated at US$ 500 billion a year, a sum exceeding the gross national product of a large number of member states of the United Nations.

The corrosive effects of money laundering on democratic and political institutions cannot be overstated. Presently, efforts to prevent and contain money laundering have been hindered by variations in criminal codes and criminal justice practices as well as the desire to protect national sovereignty.

Anti money laundering measures should be seen as a part of a coherent and global crime control policy which should give priority to the fight against serious crime. Steps should be taken towards establishing an effective and comprehensive global anti money laundering net that would prevent money launderers from moving their activities from one country to another or from one financial sector to another in order to avoid detection.

Some of the measures suggested for combating this growing menace are:-

- Criminalisation of the laundering of criminal proceeds regardless of their origin.
- Assets forfeiture
- Limitation of Bank Secrecy
- Identification and reporting of suspicious transaction.

Environmental Law

At present, the role of Criminal Law in protecting the environment is fairly under developed, and therefore penal sanctions have been considered to curb these harmful activities; which pose a danger to the environment.

Environmental criminal law should formulate certain core criminal environmental offences to criminalise deliberate, reckless or negligent assaults on the environment that cause or create serious damage, harm or injury.

Concern has been expressed over the hazardous waste disposal industry functioning as a "legitimate" business. Therefore criminal law must move into criminalising such effects, which impose a health hazard to man and serious harm to the environment. Air Pollution, climatic changes, deforestation, loss of biological diversity and land degradation are some of the environmental consequences which require measures to be safeguarded against.

A major concern of environmental law is striking a balance between the need for development and the problem of environmental degradation. It must be borne in mind that the environment and development are not separate issues which are mutually contradictory. Development cannot subsist upon a deteriorating environmental resource base. The concept of sustainable development i.e. development designed to meet the needs of the present and future generations, provides a framework for the integration of environment policies and development strategies. As we take strides towards economic development, environmental law will play an important and vital role in ensuring that such development is ecologically sustainable.

Ramifications of the Information Superhighway

The information superhighway has been aptly described as:-

> *An advanced high speed, interactive, broad band digital information system, capable of delivering to anyone, almost anywhere, information and entertainment resources unheard and unimagined just a few years ago.*

Continued development in this regard will entail the consideration of increasing legal implications arising there from which could call for penal sanctions when such activity impinges on the rights of others.

The Internet has provided a mechanism to capitalise on information access and bridge a gap despite an enormous physical distance. It has been recognized that the Internet raises legal issues concerning privacy protection, copyright infringement, pornography and obscenity, trade practices law and fraud. There is cause for concern over issues regarding exclusiveness and/or

ownership of an E-mail message, interception by persons other than the intended recipient and even liability for defamation.

Undoubtedly, there is a need for a growing body of law intended to apply to such activities concerning the information superhighway. However, the challenge will be to establish laws, which are relatively consistent in different countries, and to find ways to police and enforce such laws across territorial boundaries without suppressing the benefits which can flow from the dissemination of information.

Computer Crime

Computer technology, which has pervaded almost every aspect of economic and organised social activity and even the day-to-day life of the community, has offered new and sophisticated opportunities for law breaking in hitherto unknown ways. It is said that it provides the potential to commit traditional types of crime in non-traditional ways.

Some of the criminal activities which involve the use of computers are:-

- Unauthorised manipulation of computers;
- Use of computer programmes or data for an illegal purpose;
- Computer sabotage i.e. access to a computer system by the introduction of new programmes known as viruses, worms or logic bombs;
- Industrial espionage i.e. stealing another's ideas, designs or trade secrets;

Where data stored in a computerised form is altered it would amount to forgery. Alternatively, computers can be used as instruments with which to commit forgery.

The invisibility of computer crimes makes their detection extremely difficult. Accordingly, those engaged in the task of bringing such offenders to justice have to possess specialised skills which would equip them to search for, gather, analyse and preserve computer evidence to be presented in Court.

Violence Against Women

Violence against women has become the focus of increasing attention and measures to combat and to eliminate this menace is being pursued with added vigour. It has been recognised that

violence against women in the family and society is pervasive and has crossed lines of status – financial, social etc, and also culture which had therefore become necessary to take all appropriate measures to protect women against all forms of physical or psychological violence.

CONSPICUOUS TRENDS IN CRIME PATTERNS AND TECHNIQUES ADOPTED BY CRIMINALS TO AVOID BEING BROUGHT TO JUSTICE

There is no doubt that increasingly sophisticated methods are being adopted by those who indulge in criminal activities and that they do not lack in resources to carry out their evil designs; which are executed with professional skill. In the early stages of the last century the prevalent idea was that an accused person was at the mercy of the State, which utilised all resources at its disposal to clamp down on the alleged offender. Therefore the criminal justice system needed to, virtually, protect him from the rigours of the system.

Over the years, the situation has altered materially and the seeming imbalance has almost transposed the roles, showing the predominance and resourcefulness of the criminal against the state mechanism which is whittling under pressure from such ingenious offenders adopting highly intricate modus operandai.

SUGGESTED AMENDMENTS TO THE CRIMINAL JUSTICE SYSTEM

(a) Increased use of technological advances in the investigative processes, including the use of DNA

It is now firmly recognised that DNA profiling is a very powerful diagnostic technique, which has proved to be highly useful in establishing guilt or innocence. Therefore, the investigator should be permitted to take non intimate samples such as saliva, hair etc. from all those who have committed serious crime. The relevant DNA data or samples could be retained for subsequent use and would serve as a database.

(b) The Accused's right to Silence. Is it being too rigidly applied?

Firmly embedded in our criminal justice system based on the adversarial model is the salutary principle that the onus of proof is on the prosecution to establish by evidence all the facts necessary to bring home the charge. The Accused is presumed to be innocent till the contrary is

proved by the prosecution and in discharging that onus the accused cannot be compelled to give evidence for the prosecution. A clear exposition of the traditional notion was laid down by Lord Sankey in his celebrated dictum in ***Woolmington*** v. ***DPP***[1] as follows:

> *Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the Prosecution to prove the prisoner's guilt.*

Whilst applying this well known precept, due recognition should also be given to another well known yet sparsely used principle enunciated by Lord Ellenborough in the case of ***Rex*** v. ***Lord Cochrane and others***;

> *No person accused of crime is bound to offer an explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless if he refuses to do so where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.*

In concluding whether the prosecution has discharged their burden, the court is permitted to resort to this principle referred to as the Lord Ellenbourough's dictum of 1814 in ***R.*** v. ***Lord Cochrone and others***. The principle has found favour with the Sri Lankan judiciary for over 50 years. It has also been expressed in statutory enactments.

As has been noted by Tennakoon C.J. in ***Lionel*** v. ***Republic of Sri Lanka***;[2]

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[1] 1935 AC 462.
[2] 1979 (1) NLR 553 at 563.

In the 1960's there appears to have been a body of opinion in England that the effect of the law relating to procedure at criminal trials was to load the scales heavily against the prosecution.

Presently it is statutorily enacted in England in Section 35 of the Criminal Justice and Public Order Act of 1994 that:-

At the conclusion of the evidence of the prosecution... if he chooses not to give evidence... it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence... in determining whether the Accused is guilty of the offence charged, may draw such inferences as may appear proper from the failure of the Accused to give evidence...

In Ceylon, in the very first case decided by the Criminal Court of Appeal, ***King*** v. ***Seeder De Silva***, this principle was expressly recognized by Howard C.J;[3]

A strong prima facie case was made against the Appellant on evidence which was sufficient to exclude the reasonable possibility of someone else having committed the crime. Without an explanation from the appellant the jury were justified in coming to the conclusion that he was guilty.

In several cases thereafter this rationale was followed, eg. ***King*** v. ***Duraisamy***;[4] ***King*** v. ***Peiris***;[5] ***King*** v. ***John Silva***;[6] ***King*** v. ***Endoris***.[7]

In an illuminating exposition of this important aspect of law, T.S. Fernando J. in *Seetin* v. *Queen*[8] stated that whether the evidence was circumstantial or even direct, it was permissible to have recourse to this principle and that the failure of an accused person to give or offer evidence was a legitimate matter for comment at the discretion of the trial Judge.

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[3] 41 NLR 337 at 344.
[4] 43 NLR 241.
[5] 43 NLR 418.
[6] 46 NLR 73.
[7] 46 NLR 499.
[8] 68 NLR 316.

In ***Lionel*** v. ***Republic of Sri Lanka*** Tennakoon C.J. stated in 1976 that:-

> *It was always implied in our law that the jury may draw such inferences as appear proper from the failure of the accused to give evidence.*

Statutory recognition was given to this principle in the Administration of Justice Law No. 44 of 1973 in which it was enacted, in Sections 184 and 213, that:

> *If upon the Judge calling for the defence the Accused does not give evidence then in determining whether Accused is guilty of the offence charged the Judge may draw such inferences from such failure as appear proper.*

With the repeal of the Administration of Justice Law and the enactment of the Code of Criminal Procedure Act in 1979 this significant provision was excluded from the statute books.

However it is heartening to note that in a recent judgement of the Court of Appeal the validity of this important principle has been reaffirmed. In ***L. Ariyaratne and M.S. Sumathipala*** v. ***The State***[9] Amir Ismail, J (with J.A.N. de Silva, J. agreeing) has recounted with approval not merely the Lord Ellenbourough dictum but also the earlier leading cases on the applicability of this principle. It is hoped that this well established and logical principle will continue to be applied by judges in the years to come.

(c) The Need for Corroboration of evidence of victims of rape and other sexual offences – Is it iniquitous?

It has been laid down consistently, throughout the past half century in numerous judicial pronouncements in this country that in all cases relating to sexual offences, judges should caution themselves and that juries should be given the customary warning that it is dangerous to convict an accused on the uncorroborated evidence of the victim and that there should be corroboration with regard to the factum as well as with regard to the connection of the accused as the perpetrator of that particular sexual offence. Some of these cases are - ***King*** v. ***Atukorale***;[10] ***Karunasena*** v. ***Republic of Sri Lanka***;[11] ***Rajaratnam*** v. ***Republic of Sri Lanka***.[12]

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[9] CA Minutes of 10.11.1997.
[10] 50 NLR 256
[11] 78 NLR 63.
[12] 79(1) NLR 73.

It appears that the rationale for this rule of prudence had been founded on pronouncements of judges in England which is best exemplified by the dictum of Salmon C.J. in ***R.*** v. ***Henry and Manning***;[13]

> *Human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all.*

However, in India as well as in the United Kingdom there has been a marked and distinct departure from this line of reasoning. Today, judges have come to recognise the totally iniquitous discrimination implicit in the previous cautionary rules. Forthright condemnation of the previous rule requiring such corroboration is very much evident in the well known judgement of the Indian Supreme Court in ***Bhogindhai Hirijibhai*** v. ***State of Gujarat*** as well as in the equally forthright denunciation of the rule in the judgement in England in ***R.*** v. ***Terrance Easton Chance***.[14]

Now the clock has turned full circle in relation to this matter with the enactment of the Criminal Justice and Public Order Act 1994 wherein it is stated in Section 32 that the requirement which made it obligatory for the court to give the jury a warning about convicting on the uncorroborated evidence of the person in respect of whom the sexual offence is alleged to have been committed is now abrogated which renders it unnecessary, as a matter of course, to give that customary warning.

As far as Sri Lanka is concerned, we must not be out of step with the timely trend in India and the United Kingdom. A recent judgement of the Court of Appeal which has taken note of this discernible change is a welcome step in the right direction.[15]

(d) The rule excluding confessions to Police Officers: Is it rational and should it continue to be applied rigidly?

For over a century, Sections 25 and 26 of the Evidence Ordinance has enshrined an inflexible mandate that a confession made to a Police Officer by a person accused of an offence is

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[13] 53 Cr. A.R. 150.
[14] 87 CAR at 403.
[15] *P.W. Rajaratne* v. *A.G.* CA minutes of 23.01.1996.

inadmissible to be proved against him. However, the statutory provision covers not only confessions made directly to a Police Officer but also those made to any person whilst the accused had been in Police custody, unless it has been made in the immediate presence of a Magistrate.

The rationale of these twin prohibitions is the elimination of the danger inherent in giving credence to self incriminating statements made to a policeman or made whilst in Police custody. The blanket prohibition and its rigid application is not necessary because of suspicion that improper pressure may have been brought to bear for the purpose of securing a conviction. It has been sought to rationalise the fact that Police authority itself, however carefully controlled, can at times be a threat to those brought under its shade and hence to guard against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying.

However, Section 27 of the Evidence Ordinance envisages an exception to the prohibition stipulated above, where the circumstances themselves vouch for the truth of the statement when such a statement, though confessionary, actually leads to the discovery of a fact.

The provision enunciates;

> *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved.*

The point made is that if the law permits the reception of evidence of a confession where its truth is vouched for, why not allow the same to the prosecution in a given case? This of course could be made possible, provided they initially satisfy the court that the particular confession is free of any inducement, threat or promise proceeding from a person in authority or from another person in the presence of such person.

Often in criminal cases, the Prosecution adduces evidence of a confession made to a Judicial Officer or other person in authority having proved beyond reasonable doubt, on voir dire, that there was no appearance of any vitiating inducement, threat, or promise and therefore it is a voluntary confession. It seems illogical not to allow a confession made to a Police Officer to

pass through the same sieve if the prosecution can satisfy the court that it is a voluntary confession. It is submitted that it would not be unjust or harsh to an accused person if this facility is granted to the prosecution because the burden will have to be borne by the prosecution to prove to the satisfaction of the judge that the particular confession made to the Police is voluntary, in that it is free of any inducement, threat or promise. Additionally, the judge would strike it down if it *appears* to him to have been caused by such an inducement, threat or promise.

(e) Trial in the absence of the accused person

The normal rule is that all evidence in a criminal trial shall be taken in the presence of the accused and that, as of right, he is entitled to be present throughout the trial. However salutary this traditional rule is, the question does arise whether an accused person can thwart the course of justice by not being present at the trial.

No proper system of Criminal Justice can countenance such a situation, and it should, with adequate safeguards for the Accused, be enabled to proceed with the processes of law despite the absence of the Accused in the given circumstances. Accordingly where

I. the Accused is absconding or has left the country; or
II. he is unable to attend or remain in court by reason of illness and has consented to the commencement or continuance of the trial in his absence; or
III. he is unable to attend or remain in court by reason of illness and in the opinion of the judge prejudice will not be caused to him by the commencement or continuance of the trial in his absence; or
IV. by reason of his conduct in court, he is obstructing or impending the progress of the trial,

the trial may commence and proceed or continue in the absence of the Accused if the court is satisfied that one of the foregoing circumstances exists.

Despite the fact that a trial would take place in the absence of the Accused, he would continue to be ensured of the right to be defended by an Attorney-at-Law at the trial. Another safeguard provided is that subsequently, if he can satisfy the court that his absence from the trial was bona fide, the trial would take place de novo, or if it is pending, the Accused would be permitted the opportunity to cross-examine the witnesses who had given evidence in his absence.

In Sri Lanka, provisions to the above effect have been statutorily enacted since 1974 in the Administration of Justice Law (since repealed) and in the present law-Code of Criminal Procedure Act, No 15 of 1979 – Sections 192 and 241.

(f) Concept of community service as a suitable alternative mode of dealing with offenders

At a criminal trial, upon the accused person being found guilty, the conventional punishment has been incarceration or the imposition of a monetary penalty. Apart from these time worn modes of punishment there are in various jurisdictions other available options for the court to penalise the Accused.

The making of a Community Service Order by a court when it finds the Accused guilty would be an appropriate alternative in lieu of a short sentence in prison and in fact this concept has been hailed as a "great current success story in modern Penology". Statutory provision enacted in this regard in Sri Lanka i.e. Section 18 of the Code of Criminal Procedure Act as amended by Act No. 49 of 1985, states:

> *The court may, in lieu of imposing a sentence of imprisonment on conviction of an accused person, or in lieu of imposing a sentence of imposing a sentence of imprisonment on a convicted person in default of payment of a fine, enter an order referred to as a Community Service Order directing such convicted person to perform such services as may be specified in such order at a named place –*
>
> *a) in a State or State sponsored project;*
> *b) in a Government Department, Public Corporation, Statutory Board or any Local Authority, or*
> *c) in a Charitable Institution, Social Service Organisation or a place of Religious Worship, with the consent of the person in charge of such institution, organisation or place as the case may be, under the direction and supervision of an authorised officer.*

The duration of the Community Service Order would be not less than 40 hours and not more than 240 hours and is to be served within a period of 1 year of the date of the order.

Further steps have been taken to meaningfully implement this concept by the enactment of the Community Based Corrections Act, No 46 of 1999.

(g) The strain on courts of law to deal with the increasing backlog of cases

In the past few years there has been a remarkable rise in the number of criminal cases which the courts have been called upon to adjudicate. It is accepted that Courts will not be able to effectively and expeditiously dispense justice if every such case were to go through the regular court procedure. In this situation the available option seems to be to give serious consideration to alternate methods of resolving such complaints.

Apart from this purely mundane way of looking at this problem there is yet another strong imperative to resolve the complaints which relate to the less serious category of crimes. It has been found that the adjudication of a criminal case in court does not bring about an end to the causes which originally led to the commission of that crime. On the other hand, resort to conciliation and mediation could effectively bring about a lasting solution.

Presently in Sri Lanka, the Mediation Boards Act No. 72 of 1988 provides the machinery for the settlement of a number of offences set out in the schedule thereto. However, certain misgivings have been expressed as to the manner in which this machinery actually operates. Therefore it is necessary to consider ways and means of eliminating those deficiencies in order to enable the proper functioning of these alternate methods of dispute resolution.

(h) Compensation for the victims of crime and victims of miscarriages of justice

Although every jurisdiction is committed to ensuring a fair trial to an accused person while making the Criminal Justice System effective in the task of bringing offenders to justice, relatively little attention is paid to the helpless victims of crime who both physically and psychologically suffer as a result of various forms of violence inflicted upon them by criminals.

Proper mechanisms should be put in place to implement a scheme of compensation for criminal injuries suffered by victims of the crime, which should cover physical as well as psychological damage, disease and even pregnancy resulting from rape.

Provision has been made in Section 260 of the Code of Criminal Procedure Act No. 15 of 1979, for lawyers to appear on behalf of victims of crime. Although this enabling provision has been

in existence for almost twenty years, it is a matter of great regret that it has not been utilised to an extent commensurate with the need for looking after the interest of aggrieved parties. In two landmark judgements, ***Bandaranaike*** v. ***Jagathsena***[16] and ***Abeysundere*** v. ***Abeysundere***,[17] it has been clearly recognised that an aggrieved party has a right to be heard through a lawyer in the Appellate Courts as well as in the original courts. More frequent and effective use of this mechanism in court will ensure that justice is done to these victims of crime.

Similarly, in a situation where an accused person is convicted of a crime and deprived of his liberty by being incarcerated, if it can be proved subsequently that such a conviction was brought about by a miscarriage of justice, provision should be made available to endeavour to compensate that person for the grave wrong done to him in the name of society, through the use (or misuse) of the Criminal Justice System.

Likewise, when a person has been convicted of a criminal offence and subsequently his conviction is reversed or he is pardoned on the ground that freshly discovered facts establish beyond reasonable doubt that there has been a miscarriage of justice, the State should similarly compensate the person who had suffered the injustice.

Criminal law and indeed the Criminal Justice System itself has to gear up to meet the challenges in this Millennium. Entirely new measures have to be put in place to deal with the dangers posed by the new trends in the criminal behaviour patterns whilst making the entire justice system more effective.

It is essential that the Supremacy of the Law be established firmly so that all citizens can hope to have the protection of the Rule of Law, which is their birthright.

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[16] [1984] 2 SLR 397 and [1992] 1 SLR 371.
[17] 1998(1) SLR 185.

Policy Reform in the Health Sector

K. S. Atulugama

Introduction

The opinions in this article are based on a discussion organized by the Law & Society Trust, Colombo, held on 11th June 2001 under the topic "Policy Reform: Challenges faced by the Health Sector", where the guest speakers were Dr. Nalaka Mendis and Dr. Amala de Silva.

The health sector has seen little or no reform for several years. Its dormant state is inter alia the result of an insufficient economic infrastructure, which is vital for development. Though it may be easy to overlook the health sector in terms of allocating government funds due to the internal armed conflict, it does not justify giving it less priority. Therefore the health sector has faced many setbacks owing to insufficient funding; for example, the inability to set up effective monitoring mechanisms that would regularly monitor the standard and quality of service provided by health care professionals.

The most fundamental and legitimate public policy objective is to maintain and provide a good health care service. However, it is also the most problematic socio-economic function of any modern state. The main reason for this is the lack of basic factors, which are vital for a policy to be beneficial to a community. For example, government participation has been minimal and regulations are weak, not to mention the reluctance of professional accountability – whether it is a doctor, nurse or hospital management. Professionals have secured a position of trust and reverence throughout the years. Hence, claims and allegations of negligence have given reason to doubt their integrity.

The recent claims of professional negligence against doctors[1] have aroused public interest and various issues have been brought to the forefront for debate. There are two aspects that require consideration, i.e. the patient's feeling of being hard done by denied value for money as against the health care provider's plight under stressful situations and lack of resources. This is a hard

[1] *Soysa* v. *Arsecularatne* (2000) SC Appeal No. 89/99.

scale to balance, particularly when the applicable standard is that of reasonableness under the given circumstances.

Considering the fact that little interaction has taken place between working professionals and those concerned with the social implications of a liberalized economy, as mentioned above, the Law & Society Trust, Colombo[2] along with International Centre for Ethnic Studies, Colombo[3] and Centre for Policy Alternatives, Colombo[4] have embarked on a project with the aim of facilitating a dialogue which involves the public sector, private sector and civil society with the hope of developing a coherent civil society goal for a better health service and with a view to influencing a future health policy reform process. The main focus, therefore, is to understand the challenges. Civil society needs to be aware of the wider picture – the crisis at hand and the economical consequences – behind the challenges faced by the health sector. The objective is not merely to list out problems but to consider the concepts and ideological debates that outline these problems, so as to arrive at an achievable goal. When considering reform for the future we need to first consider the resources available at hand so that not only would the policy reform be feasible theoretically but also practically and most importantly it should be cost effective.

The Present Situation

The health sector, as it stands, is primarily concerned with the maintenance of hospitals and promoting health care; but there is much to be desired in relation to the standard of care and the quality of service provided. For example, there is a deficiency in skilled specialists and support staff. The main reason for this is the fact that professionals in the health sector prefer greener pastures overseas. As a result, the health sector faces an additional problem of losing trained professionals apart from the lack of financial support. Consequently, meeting the needs of society, while balancing it against state control, available resources and the market economy, becomes a formidable task.

Another issue that has a major impact on the health sector is the fact that these services are neither accessible nor consumer oriented to the fullest extent, especially in the rural and severely war-affected areas. Although there are several campaigns around the country that deal with the

[2] LST
[3] ICES
[4] CPA

prevention of various diseases, for example – the inoculation of children, vaccination, the eradication and prevention of diseases like malaria and dengue – the services do not always reach every quarter of the country. The contending issues that arise out of this is whether the health sector is in a position to meet the needs of the consumer, and whether the resources available are sufficient to continue maintaining an efficient health service.

Influencing Factors

It is accepted that resources for health care in Sri Lanka are limited compared to the rapid increase in demand. According to the World Health Report 2000 compiled by the World Health Organisation, four essential components have been identified to determine the performance of a good health system. They are:

1. How services are selected, prioritized and rationed
2. How investments are made to generate resources
3. How the services are financed, and
4. The nature of the stewardship role of the Ministry

The report goes on to illustrate how health systems worldwide under-perform. It further stresses the importance of realizing the potential of a system. Whether the existing health system in Sri Lanka incorporates these components is debatable, but it is clear that it is time for us to explore the available alternatives and to formulate a plan of action.

External factors that increase demand

One of the most important factors that influence the demands made of the health sector in Sri Lanka today, is the ethnic conflict. This has a direct bearing on the population as well as on the increasing demands on health services such as, increases in suicide rates, welfare of displaced persons and civilians in war affected areas and rehabilitation of soldiers etc, and civilians in war affected areas, to name a few.

Another factor is the scientific development and advancements in technology around the world. Advancement in medical science has seen an increase in demand for innovative surgery.

Innovative methods of treatment, and modern technology which have resulted in the discovery of many solutions to age old medical problems such as, the cure for leprosy and the ongoing research for a cure for cancer, raises hope and expectations.

The public is now more aware of the level and quality of care provided in other countries, and as such demand the same locally. Nevertheless, people are treated as consumers rather than patients, hence the market influence. The allocation of resources is never equal in its distribution throughout the country. Therefore it is unfair to demand that local standards should be in line with standards overseas, as the situations and circumstances differ from country to country, and financial restraints need to be considered. Nevertheless the attitude that the standards and facilities overseas should be mirrored in Sri Lanka, is deeply embedded in the minds of people. Yet, what is important is that the standards and facilities should be in keeping with the resources Sri Lanka can accommodate.

Internal factors that inhibit progress

Apart from the internal imbalances the health sector also suffers from political intervention. This interference has brought about a tug-of-war between the major stakeholders, i.e. the State and the professional, including their respective institutions. The two players work as separate entities, and as a result, the development process of the health sector as a whole has been inhibited. Bureaucracy has an enormous impact and professional institutions are unable to function independently and efficiently. Unfortunately, neither stakeholder has arrived at a solution as to how Sri Lanka could overcome this problem. Nor have they endeavored to compromise.

Warning signs

The recent growth in liability claims against health care providers are warning signs, indicating the weaknesses in the health system.[5] The sudden increase in consultation fees of doctors has also contributed to the strained relationship between the provider and the consumer. Higher premiums of insurances are also an increasing problem owing to the economic instability of the country and anticipation of liability claims. All these contribute to increase the existing burden on society.

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[5] *Supra* n. 2

Financial component

We cannot ignore the possibility of health care becoming a market commodity and, therefore, need to focus on how we could control and monitor the service so that it is market oriented. Amidst many other concerns, Sri Lanka as a developing country, faces many constraints. Particularly, the lack of policy implementation, trained staff and insufficient funds are major contributory factors to the slow development of the health sector.

It is important that health care service is geared not only to promote the quality of service provided but also to facilitate equal access to such care. Higher income groups have a wide choice of health care services available to them while the lower income groups are denied facilities owing to high lost of consultation fees, drugs, hospital bills and after care expenses. Free health care is available in the country. However the standards of treatment and even the attitudes of support staff towards patients, leave much to be desired. Merely because the treatment is free, it does not necessarily follow that the standards have to be slack. If so, higher income groups would opt for the private sector with the expectation of receiving value for money. This type of conventional and trained thinking must be changed. Therefore it is up to society to start looking ahead not just for the benefit of a few, but for all persons accessing the health services. It is important that the service is accessible without causing undue financial hardships. Every household should be in a position to fulfill essential health care needs at a reasonable rate, so that it constitutes a practical and affordable portion of the total household expenses. Consumers should not be placed in a situation where they would have to sacrifice some other essential need(s), such as a child's education, in order to obtain health care services. The introduction of a system that subsidizes the purchasing of health care services or a 'prepayment scheme' would be appropriate to deal with the present situation. There are several forms of prepayment schemes; for example:

1. **Private insurance** which is for profit, where a consumer is entitled to more than the value of the amount paid;
2. **Community insurance** which is organized by the community, not for profit and a consumer is entitled to health care services for the value indicated on the policy;

3. **Health Card** which is a card that can be purchased from the health care provider i.e. hospital, for a certain value which will then be set against the consumer's medical needs.

Financing the health sector has been difficult owing to the varying agendas of the donor institutions. The area that needs attention, the type of aid to be given etc, are decided not according to the needs in Sri Lanka, but according to the instructions of donor institutions. Therefore, the next step would be to identify an agenda, so that the people become the ultimate beneficiaries of a better and efficient health care service.

Conclusion

The above issues may be resolved by introducing stricter regulatory systems, policy reforms and restructuring of regulations in accordance with current demands and acceptable standards that would assist in the smooth functioning of the health care sector. Legislative and institutional frameworks need redefinition and alterations so that they can keep up with today's demands. These are however, ideological solutions, which need to be practically applicable.

The role of the law in reshaping the health sector must be given careful attention. The key function of law would be to provide a framework for the conduct of health care providers, not to mention the need to interpret and implement existing policies. However the reshaping process would involve much more, which the law alone cannot accomplish. Defining and structuring the curriculum for the education of health care professionals would perhaps be successful with the collaboration of the institutions concerned. The education and training should reflect the realities that health care providers will face, when utilising their training/education practically.

Legislation that vaguely outline the policy objectives and powers invested in delegated bodies, such as the Nurses' Union or the Medical Council, are vague and wide in their interpretation. The proposed reforms should compel all stakeholders to achieve public ends by shaping social processes. One of the main challenges is the fact that the Ministry of Health is the main institution that has control over resources and also the implementation of policy reform. The professional institutions on the other hand are better equipped to identify areas that require attention, but not to take the initiative. Given the circumstances within which these two

stakeholders, (i.e. the State and the professional institutions) function, it appears that the consumer has been overlooked. The consumer plays a vital role in this issue because, the service is designed to raise the quality of his life. Good management of skilled professionals and the distribution of equipment, need to go hand in hand with the policy decision presented by the government and the health sector. Therefore, the areas that need attention are-

- access to health care on an equitable basis;
- service providers being more responsive to consumers;
- resources to be deployed in an optimal fashion; and
- a variety of choices being offered to the poor.

The ideal health care service should not only be cost effective, but also be accessible and of good quality. This is not to say that health care professionals need to be entirely consumer oriented. But since the service they provide is for the benefit and well being of the consumer, the service should reflect the consumer's needs.

Education and training will need considerable reform and restructuring to cater to the changing demand. Policies need to be formulated and enforced with suitable and functional mechanisms for the purpose of maintaining and monitoring the continuance of these systems. This in turn leads to the issue of financing. Therefore, it is important to ensure that Sri Lanka receives aid with the latitude of determining for itself how the funds are to be allocated and also which areas of the system require immediate attention.

The cumulative effect of all that was discussed above makes it clear that the task before us is colossal, yet achievable; provided all stakeholders join their resources. There is uncertainty with regard to the outcome owing to unpredictable external factors that influence the demands (i.e. ethnic conflict and the unstable economy). But it could well set the process in the right direction.

Put Not Your Trust In Princes: Hence the Rule of Law

(A Comment on Victor Ivan and others v. Sarath Silva and others)

Shantha Jayawardena[*]

Introduction

The International Bar Association in its report, *Sri Lanka: Failure to Protect the Rule of Law and the Independence of the Judiciary*[1], identifies the Sri Lanka Supreme Court[2] decision in ***Victor Ivan and others*** v. ***Sarath Silva***[3] as one of the instances where Sri Lanka has failed to protect the rule of law.[4] Conversely, the Court had stated in ***Victor Ivan and others*** v. ***Sarath Silva and others*** that:

> *I need hardly stress that our Constitution is the paramount law of the land, and that this Court has a sacred duty and a solemn obligation to uphold the Constitution.* ***We would therefore be failing in our duty of upholding the Constitution, and thus the Rule of law,*** *if we were to accede to the request of the petitioners and grant relief as prayed for, without being clothed with the necessary jurisdiction therefore.*[5]

However, the International Bar Association Report does not give reason as to why that particular decision was considered as a failure to protect the rule of law. This article aims to discuss some of the pronouncements of the Court with regard to the immunity of the President, discretion of the President in appointing the Chief Justice under Article 107(1) of the Constitution and natural justice, in the context of the rule of law. The postscript of the article deals in brief with a few subsequent judicial and constitutional developments.

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[1] International Bar Association, November 2001.

[2] Hereinafter referred to as the Court.

[3] [2001] 1 Sri L R, 309. Here the Petitioners alleged that the Appointment of the then Attorney General Hon. Sarath N. Silva as the Chief Justice by the President, pending disciplinary inquiry against him, was violative of their fundamental rights under Articles 12(1) and 17 of the Constitution. The Petitioners sought declarations to that effect and further for the appointment of the Chief Justice to be declared null and void.

[4] *Supra* note 1 pp.26-27

[5] *Supra* note 3 per Wadugodapitya J. at pp 363-364 (Emphasis added)

1. The Rule of Law and the Constitutional Provisions

The rule of law has not been precise as to its connotations.[6] Nevertheless, according to Wade, its primary meaning is that every thing must be done according to law.[7] Therefore, a necessary corollary of the rule of law is that no body is above the law. Further, as Wade states:

> *...the rule of law demands something more; since otherwise it would be satisfied by giving the government unrestricted discretionary powers, so that everything that they did was within the law. Qoud principi placuit legis habet vigorem (the Sovereign's will has the force of law) is perfectly a legal principle,* ***but it expresses rule by arbitrary power rather than rule according to ascertainable law. The secondary meaning given to the rule of law, therefore, is that the government should be conducted within a framework of recognised rules and principles, which restrict discretionary power.***[8]

It is axiomatic that Article 12(1) of the Constitution imbibes the rule of law into the Constitution of Sri Lanka.[9] Additionally, Article 1 of the Constitution of Sri Lanka states:

> *Sri Lanka is a Free, Sovereign, Independent and* ***Democratic*** *Republic and shall be known as the Democratic Socialist Republic of Sri Lanka.*[10]

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[6] According to Dicey's traditional formula, it has three meanings. Firstly, it means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Secondly, it means equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. And thirdly, that the law of the Constitution is not the source but the consequence of the rights of the individual as defined and enforced by the court. See: The Law of the Constitution, Dicey A.V., 10th Ed. pp. 202-204. However, Dicey's three meanings have been found fault with in the modern context of public law.

[7] Administrative Law, Wade H.W.R, 7th Ed. at p.24

[8] *Ibid* at p.24 (Emphasis added)

[9] Priyangani v. Nanayakkara (1996) 1 Sri LR 399 at p.404. See also: Emerging Trends in Public Law, Mario Gomez, 1st Ed. pp.311-313.

[10] Emphasis added.

Accordingly Sri Lanka is a **Democratic** Republic. A democracy is based upon the rule of law.[11] Therefore Article 1 should also be considered as one which incorporates the rule of law into the Constitution of Sri Lanka.

2. Immunity of the President

As it was the President who appointed the 1st Respondent as the Chief Justice, the Respondents raised a preliminary objection that the immunity of the President under Article 35 of the Constitution prevents the appointment of the 1st Respondent being questioned in a court of law. The Court held with the Respondents and upon doing so, based its decision on the reasoning in *Karunathilaka* v. *Commissioner of Elections*[12] where, Article 35 of the Constitution was in issue. Article 35 of the Constitution provides:

> *(1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.*
>
> *(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds office of President shall not be taken into account in calculating any period of time prescribed by that law.*
>
> *(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130(a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under*

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[11] *Infra* note 28
[12] (1999) 1 Sri L R 157

Article 144 or in the Supreme Court relating to the election of a Member of Parliament. Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney General.

In ***Karunathilaka*** v. ***Commissioner of Elections,*** after considering the immunity provision in depth, His Lordship Justice M.D.H. Fernando held:

> *What is prohibited is the institution (or continuation) of proceedings against the President. Article 35 does not purport to prohibit the institution of proceedings* ***against any other person****, where it is permissible under any other law.... I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President.... Immunity is a shield for the doer, and not for the act. Article 35, therefore, neither transforms an unlawful act into a lawful one nor renders it one which shall not be questioned in any court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit:* ***as, for instance****, a defendant or respondent who relies on an act done by the President in order to justify his own conduct.*[13]

Accordingly, where a respondent relies on an act of the President in order to justify his own subsequent conduct, is **only one instance** where Article 35(1) of the Constitution does not exclude judicial review of a President's act.

It is submitted with respect, that in ***Victor Ivan and others*** v. ***Sarath Silva and others*** the Court's construction of its decision in the *Karunathilaka case* is problematic. The Court, in Sarath Silva's case reasoned that the **proposition** laid down in the *Karunathilaka case* was that the **"instance"** (where a respondent relies on an act of the President to justify his/her own

[13] *Ibid* at pp.176-177 (Emphasis added)

conduct) suggested by Justice Fernando is **the only circumstance** in which an act of the President could be challenged. This is evident in the following observation of the Court:

> *This case (**Karunathilaka** v. **Commissioner of Elections**) confirms **the proposition** that the President's acts cannot be challenged in a court of law in proceedings against the President. However where some other official performs an executive of administrative act violative of any person's fundamental rights and in order to justify his own conduct, relies on the act done by the President, then, such act of such officer, together with its parent act is reviewable in appropriate Judicial Proceedings.... It is **only in such circumstances** that the parent act of the President may be subjected to judicial review.*[14]

Based on this Construction the Court went on to hold that, as the 1st Respondent has not "invoked" the President's act of appointment to rely on or justify anything the act of appointment cannot be questioned in a court of law.[15]

Additionally, the Court cited with approval the following statement made by Justice Sharvananda in ***Mallikarachchi*** v. ***Attorney General:***[16]

> *The principle upon which the President is endowed with this immunity is **not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong**.... **If such immunity is not conferred, not only the prestige, dignity and status of the high office will be adversely affected, but the smooth and efficient working of the Government of which he is the head will be impeded.** That is the rationale for the immunity cover afforded for the President's actions, both official and private.*[17]

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[14] *Supra* note 3 per Wadugodapitiya J. at p.324 (Emphasis added)
[15] *Supra* note 3 at p.326
[16] (1985) 1 Sri LR 74
[17] *Supra* note 3, at pp. 321-322

According to Justice Sharvananda (as approved by the Court in ***Victor Ivan and others*** v. ***Sarath Silva and others***), there is no presumption that the President can do no wrong. In other words law concedes that the President can do wrong. The rationale for the immunity of the President is safeguarding of the prestige, dignity and status associated with the high office and the assurance of smooth and efficient working of the Government.

It is submitted with respect that as long as the doer (the President) is immune from Court proceedings the prestige, status and the dignity of the office and the smooth functioning of the government will be preserved. Therefore the Court's rationale would not suffice to justify the conferring of immunity on the acts of the President, irrespective of whether or not a third party has relied on the President's act.

Moreover, to concede that the President can do wrong and yet to confer immunity on his/her wrongful acts is conceptually inconsistent with the rule of law. How can the President's **wrongful acts** be conferred with immunity if law is to prevail above all? That is unacceptable in a democracy premised on the rule of law. It is submitted that it is for this reason that His Lordship Justice Fernando went on to hold that Article 35 (immunity) neither transforms an unlawful act into a lawful one, nor renders it one which is unquestionable in a court of law.[18]

It should also be noted that it is the people's judicial power that is being exercised by the Judiciary.[19] The Judiciary is also the guardian of the fundamental rights recognized by the Constitution. Judicial power and fundamental rights are components of Sovereignty, which lies in the people.[20] Further, public law remedies are no longer considered prerogative. Therefore, it is submitted that wherever the rights of the people are affected, the Judiciary as the guardian of the fundamental rights of the people should dispense justice with a view to safeguard the rule of law and sovereignty. The Indian Supreme Court has taken the stand that the concept of immunity has no application in a case of fundamental rights violation.[21] The Sri Lankan Judiciary should also take up this wider and rights based approach.

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[18] *Supra* note 12
[19] Article 4(c) of the Constitution
[20] Article 3 of the Constitution
[21] *Nilabati Behera v. State of Orissa* AIR 1993 SC 1960.

3. Discretion of the President under Article 107 of the Constitution

The Court also held that the appointment was in accordance with Article 107(1) of the Constitution and hence both lawful and valid; therefore, no way can it be held as unconstitutional. Article 107(1) of the Constitution provides:

> *The Chief Justice, the President of the Court of Appeal and every other judge of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand.*

The Court commented on the nature of the President's discretion under Article 107(1) of the Constitution in appointing the Chief Justice as follows:

> *Thus, whereas Articles 41(1), 44(1), 45(1), 46(1) and 113(1) contain specific provisions, expressly, provided, requiring the President to make the appointment in consultation with or upon the recommendation of the stated bodies or persons, Articles 44(3), 45(2), 51, 52(1), 54, 56(1), 65(1), 103(1), 107(1), 109(1), 109(2), 111(2), 112(1), 153(1), 154B(2) and 156(2)* ***do not impose any such qualification or restriction upon the power of the appointment of the President.*** *Thus one finds that, in the same enactment, (the Constitution), whereas just five Articles expressly impose some sort of restraint, as many as sixteen Articles (including Article 107(1) under discussion) specifically,* ***refrain from imposing any guidelines or from imposing any restraint or restriction (by way of cooperation or consultation or otherwise) on the power of appointment of the President.***[22]

It is submitted that the question whether the President should follow any guidelines or consult any other person in appointing the Chief Justice under Article 107(1) is consequential upon the deep-seated question whether the President has an unlimited and unfettered discretion in appointing the Chief Justice.

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[22] *Supra* note 3 at p.317 (Emphasis added)

The Court decided upon the aforementioned question – namely, whether there are any guidelines that the President should follow in appointing the Chief justice. In the absence of such guidelines and the failure of the parties to suggest any, the Court held that the President's discretion under Article 107(1) is unfettered.[23]

It is axiomatic that there are no absolute and unfretted discretions in public law. Public power is held in trust for the public. Further, unfettered discretions are obnoxious to the notion of the rule of law.

According to Wade:

> *Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely-that is to say, it can validly be used only in the right and proper way pertinent when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language conferred discretion, the truth is that in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow and where the line is to be drawn.*[24]

This principle is well recognised by the Supreme Court of Sri Lanka. In ***Premachandra*** v. ***Major Montegue Jayawickrama***,[25] the Supreme Court held:

> *There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good and the propriety of the exercise of such discretions is to be judged by reference to the purpose for which they were entrusted.*[26]

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[23] *Supra* note 14
[24] *Supra* note 7 at p.391
[25] (1994) 2 Sri LR 90. See also: *De Silva v. Athukorala, Minister of Lands* (1993) 1 Sri LR 283, at pp.296-297, Gunarathna v. Petroleum Corporation (1996) 1 Sri LR 315 at pp 324-325.
[26] *Ibid* at p.105

Justice Fernando quoted the above proposition with approval in ***Silva*** v. ***Banadaranayake***[27] and went on to hold that in common with Courts in other democracies founded on the rule of law, this Court has consistently recognised that powers of appointment are not absolute.[28]

Hence it is submitted with respect that to hold that the President's discretion under Article 107(1) is unfettered is contrary to the rule of law.

4. Natural Justice

The Court commented in passing, that to question an appointment made by the President in circumstances where the President is not made a party (respondent) is a violation of natural justice as it contravenes the principle of *audi alteram partum.*[29] The Court held:

> *A comment I wish to make in this connection, is that these rulings regarding the subjection to judicial review of the acts of the President, in circumstances where the President cannot only, not be made a party, but cannot also be defended by the Attorney General, raises a serious question regarding the applicability or otherwise of the principle, audi alteram partem, which principle of natural justice even a President is surely entitled to. After all, she is the only person who really knows why she appointed the 1st respondent as Chief Justice.*[30]

It is submitted with respect that regrettably, the Court turned a blind eye to the other aspect of natural justice, namely, ***nemo judex in sua causa***, which, means that a person should not be the judge of his own case.[31]

Under the Supreme Court Rules of Sri Lanka, when a fundamental rights petition under Article 126 of the Constitution is filed in the Supreme Court, the Chief Justice nominates the Bench to

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[27] (1997) 1 Sri L R 92
[28] *Ibid* at p. 95 (Emphasis added)
[29] This principle requires that before a decision is arrived at, the parties affected should be given an opportunity to be heard.
[30] *Supra* note 3, per Wadugodapitiya J. at p. 325.
[31] Legitimate expectation and right to reasons are increasingly been regarded as aspects of natural justice.

hear such case.[32] Here the 1st Respondent was the Chief Justice. Despite the Petitioner's request to appoint the Bench in the order of seniority, the Chief Justice appointed the bench in the ascending order of seniority. The Court rejected the preliminary objections raised by the Petitioners as to the constitution of the Bench.[33]

The Court's failure to consider whether the constitution of the Bench by the 1st Respondent as Chief Justice, is contrary to the principle of *nemo judex in sua causa*. The possibility that a respondent may influence the court or even the appearance of such a possibility is a violation of the principle of *nemo judex in sua causa.*[34] Therefore it is submitted with respect that, the Court's failure to ensure that there is not even the appearance of a possibility of the Respondent Chief Justice influencing the constitution of the Bench, is violative of the principles of natural justice.

Its significant to note in this connection that natural justice is regarded as part of the rule of law. Wade states:

> *The right to natural justice should be firm as the right to personal liberty. This is a vital part of the rule of law*[35]

Judicial pronouncements have also recognized that natural justice is a vital part of the rule of law.[36] Thus the Court's failure to uphold the principle of *nemo judex sua causa* amounted to a failure to protect the rule of law.

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[32] Rule 45(1) of the Supreme Court Rules provides, "*Every application, by way of a petition in writing under and in terms of Article 126(2) of the Constitution, shall be referred to a Bench of not less than two Judges of the Supreme Court, nominated by the Chief Justice within four days of filing on a date fixed by the Chief Justice or in accordance with such directions as may be given by him from time to time, or a decision whether leave to proceed be granted or not....*"

[33] SC Minutes 28.02.2001.

[34] Cooper v. Wilson (1937) 2KB 696

[35] Administrative Law, Wade H.W.R., 5th Ed. at p.470

[36] Mahinder Singh Gill v. The Chief Election Commissioner, AIR 1978 SC 851 at p.870. See also: Penumbra of Natural Justice, Choudhury T.G. 2nd Ed. Eastern Law House, 2001 at pp.4and 5.

5. Postscript

I. Priyantha Mendis and others v. Attorney General and others[37]

Although as discussed above, the reasoning of the Court in ***Victor Ivan and others*** v. ***Sarath Silva and others*** *is* contradictory to the notion of the rule of law, the Court's conclusion that the appointment of the Chief Justice could not be challenged by way of a fundamental rights petition under Article 126 of the Constitution is defensible. The plain meaning of Article 107(2) of the Constitution is that the Chief justice could **only be removed** by the Parliament. It reads:

> *Every such judge shall hold office during good behaviour, and* ***shall not be removed except*** *by an order of the President made after an address of Parliament, supported by a majority of the total number of the Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity:*
>
> *Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is singed by not less than one-third of the total, unless notice of such resolution is singed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.*

However, one week after the decision in Sarath Silva's case, in ***Priyantha Mendis and others*** v. ***Attorney General and others*** the Court issued an interim order restraining the Speaker from appointing a Parliamentary Select Committee in terms of Standing Order 78 A of Parliament to investigate and report to the Parliament on the allegations of misbehaviour against the Chief Justice.[38] This was totally contradictory to its decision in ***Victor Ivan and others*** v. ***Sarath Silva and others***, which held:

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[37] SC FR Application Nos. 297/2001 and 299/2001
[38] SC. Minutes 06.06.2001.

It seems to me, upon a proper construction of paragraphs (2) and (3) of Article 107 and upon various dicta cited above, that it is quite clear that paragraphs (2) and (3) of article 107 of the Constitution provide the ***only*** *way in which the Chief justice (1st Respondent) could be removed from office. I would therefore say that the framers of the Constitution, in their endeavour to make the position of the Judges independent and assure their security of tenure, "invested them with the status of irremovability save on the limited grounds and manner specifically set out in its provisions," viz., paragraphs (2) and (3) of Article 107 of the Constitution.*[39]

These two decisions resulted in the deprivation to the people with whom sovereignty lies and whose judicial power is exercised by the judiciary, of an avenue to ensure that judicial power is exercised in the proper manner.

II. 17th Amendment to the Constitution

By the 17th Amendment to the Constitution, a Constitutional Council was established with the power of making appointments in the Superior Courts. Accordingly, Article 41C of the Constitution reads as follows:

(1) No Person shall be appointed by the President to any of the Offices specified in the Schedule to this Article, unless such appointment has been approved by the Council upon a recommendation made to the Council by the President.

Part I of the Schedule to Article 41C of the Constitution includes:[40]

(a) The Chief Justice and the Judges of the Supreme Court.
(b) The President and the Judges of the Court of Appeal.
(c) *The Members of the Judicial Service Commission other than the Chairman.*

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[39] *Supra* note 3 per Wadugodapitiya J. at p.332.
[40] Part II of the Schedule includes: (a) The Attorney General (b) The Auditor-General (c) The Inspector-General of Police (d) The Parliamentary Commissioner for Administration (Ombudsman) (e) The Secretary-General of Parliament.

More importantly, Article 41H provides:

> *Subject to the provisions of paragraphs (1), (2), (4) and (5) of Article 126, no court shall have the power or jurisdiction to entertain, hear or decide or call in question on any ground whatsoever, or in any manner whatsoever, any decision of the Council or any approval or recommendation made by the Council, which decision, recommendation or approval shall be conclusive and final for all purposes.*

Therefore an appointment made to the Supreme Court or the Court of Appeal could be challenged by a citizen by way of fundamental rights petition under Article 126(2) of the Constitution provided that there is an infringement or an imminent infringement of his/her fundamental rights guaranteed under Chapter III of the Constitution.

III. Stanley Jayaweera and others v. Lucky Kodithuwakku and others[41]

The Court of Appeal of Sri Lanka in the pending case of ***Stanley Jayaweera*** v. ***Lucky Kodithuwakku and Others*** where a writ of Certiorari was sought to quash the extension of services of the Inspector General of Police by the President, notice was issued on the Respondents, despite the Attorney General's objection on the ground of immunity of the President.[42] However, it should be noted that this appointment had been made by the President subsequent to the 17th Amendment to the Constitution.

[41] CA Application No.167/2002
[42] Court of Appeal Minutes 05.02.2002