LST REVIEW

Volume 15 Issue 211 May 2005

JUDGES AND THE LAW

PUBLIC ACCOUNTABILITY OF THE ATTORNEY GENERAL, PROSECUTORIAL DISCRETION AND FAIR TRIAL

LAW & SOCIETY TRUST

CONTENTS

Law & Society Trust,
3, Kynsey Terrace, Colombo 8
Sri Lanka.
Tel: 2691228, 2684845 Telefax: 2686843
e-mail:lst@eureka.lk
Website: http://www.lawandsocietytrust.org

ISSN - 1391 - 5770

Editor's Note.....

This Issue of the LST Review deals with a number of issues concerning judges and the law in all their manifold aspects as well as with the question of review of the prosecutorial discretion of the Attorney General and the public accountability of the office.

Its first publication is a dispassionate analysis concerning the undeniably awesome powers of judges to punish for contempt. Contempt of Court has been the focus of the Review on earlier occasions, most particularly in Volume 14, Issue 200, June 2004 where two discussion papers examining the law of contempt from a domestic as well as an international perspective was published along with a draft Contempt of Court Act.

The outstanding need for enactment of a law on contempt of court taking into account modern principles relating to fair trial and freedom of opinion and expression still remains paramount.

Currently, this debate has been rejuvenated due to the recent decision of the United Nations Human Rights Committee concerning an individual communication brought under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) by a lay litigant Tony Michael Fernando who was sentenced to one year rigorous imprisonment by the Sri Lankan Supreme Court in February 2003 for talking loudly in court and persisting with his application.

The Individual Communication submitted by Fernando has been published in a previous Issue of the LST Review (vide Volume 15, Issue 202, August 2004). We publish on this occasion, the Communication of Views to the Sri Lankan State by the UN-HRC in respect of this petition. (Vide ***Anthony Michael Fernando vs Sri Lanka,*** Views of the Human Rights Committee in Communication No 1189/2003: Sri Lanka 29/4/2005 (CCPR/C/83/D/1189/2003) Jurisprudence).

The UN-HRC, in a unanimous ruling by fourteen jurists, held that his conviction and imprisonment resulted in a violation of ICCPR Article 9(1) inasmuch as it amounted to an 'arbitrary' deprivation of liberty.

Several matters are of special note in these Views. The UN-HRC concedes that courts, notably in common law jurisdictions traditionally enjoy authority to maintain order and dignity in court by the exercise of a summary power to impose penalties for 'contempt of court".

However, its view is that in this instance, the only disruption indicated by the State party is the repetitious filing of motions by the victim for which an imposition of

financial penalties would have been sufficient and one instance of 'raising his voice' in the presence of the court and refusing thereafter to apologise.

The jurists point out that no reasoned explanation has been provided by the court or the State party as to why such a severe and summary penalty was warranted in the exercise of the court's power to maintain orderly proceedings. Article 9(1) of the Covenant forbids any 'arbitrary' deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition.

Importantly, they reason that;

> *"an act constituting a violation of Article 9(1) is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole."*

The Sri Lankan State was directed to provide the author with an adequate remedy, including compensation, make such legislative changes as are necessary to avoid similar violations in the future and inform the UN-HRC within ninety days regarding what measures it had taken to give effect to these Views.

Affording another perspective on judges and the law, the third paper that is published engages in an incisive examination of decisions of the Court of Appeal and Supreme Court in the general context of expansion of rights.

The author's interpretation of the impact of another decision by the UN-HRC relevant to Sri Lanka (vide ***Victor Ivan v Sri Lanka,*** Views of the UN Human Rights Committee in Communication No. 909/2000: Sri Lanka 26/08/2004 (CCPR/C/81/D/909/2000 (Jurisprudence), published in the LST Review, Volume 15, Issue 202, August 2004) is particularly thought provoking.

Using Article 12(1) of the Constitution which mandates equal protection of the law as well as the Directive Principles of State Policy (Article 27(15) which requires the State to 'endeavour to foster respect for international law and treaty obligations in dealings among nations'), to imply a similar respect on the part of the State in its dealings with its own citizens, particularly when their liberty is involved, he takes the view that the

provisions of international covenants to which the country is subject to, including the ICCPR, must in future, be regarded as law binding on Sri Lanka.

Thus, any violation of any provision of those covenants will amount to a denial of the protection of the law; if it is by executive action, the fundamental rights jurisdiction of the SC can be invoked, and if it is by judicial action, the ordinary jurisdiction of any relevant court may be invoked.

The following observation is also pertinent in regard to the dilemmas that may arise in regard to the implementation of decisions of the UN-HRC within the domestic legal regime.

> *'Article 12(1) would extend to decisions of the HRC (and other international tribunals) as well. Accordingly, Victor Ivan (as well as others) would now be entitled to the "protection" of the HRC Decision – non-compliance (e.g. by the failure to give reasonable and effective relief, or to prevent similar delays in future) would amount to a new, and actionable, denial of the protection of the law.'*

The final two articles in this Issue offer a comparative look at the manner in which courts have asserted the power to review the exercise of powers by the Attorney General as reflected in domestic legal systems and the jurisprudence of the international and regional tribunals.

A common theme reflected in both papers is that notwithstanding its concession in theory by the Supreme Court in ***Victor Ivan v Sarath N.Silva,*** [1998] 1 SriLR 340, subjection of the prosecutorial discretion of the Attorney General to judicial scrutiny needs to be far more rigorously manifested in practice.

The re-iteration, in one paper that the Attorney General be divested of power to decide whether to initiate criminal proceedings in favour of a Director of Public Prosecutions having full prosecutorial discretion (subject to limited review) brings back to focus, an old debate. Guaranteeing the independence and fair scrutiny of whatever office in which is vested the powers of prosecution is fundamental therein.

Kishali Pinto-Jayawardena

THE CASE OF TONY MICHAEL FERNANDO – A NOTE ON THE LAW OF CONTEMPT

Justice H Suresh[♠]

Introduction; the concept of Contempt

The source of the law of contempt is the Common Law concept of the English Courts and their decisions. Its origin can be traced to the monarchy. The judges derived their authority from the monarch, and if disrespect was shown to a judge it followed that the monarch had not been venerated; a serious matter calling for action in law. Perhaps it can be traced back to the Ecclesiastical Courts, when ethics and law were not essentially distinct from each other, and any attack on the courts would be considered as malicious and mischievous. In England, this power has been enjoyed by the Superior Courts.

The power to commit summarily for contempt is considered necessary for the proper administration of justice. The English courts have held that the summary jurisdiction by way of contempt proceedings in which the court itself is attacked should be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt.

If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should be impelled to use them. It is not that every criticism of the court becomes contempt of court

The Law of Contempt in India

There was no statutory law of contempt till 1926. Indian courts followed the English Common Law. In 1926, the government enacted the Contempt of Courts Act XII of 1926, whereby the High Courts were given power to punish for contempt of courts "subordinate" to them. This was repealed and substituted by the Contempt of Courts Act XXXII of 1952, which has been replaced by the Contempt of Courts Act, No. 20 of 1971.

The courts have made a distinction between libel and contempt of court: One is a wrong done to the judge personally, while the other is a wrong done to the public. If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them. The general principle is that contempt jurisdiction should be sparingly used "with the greatest reluctance and the greatest anxiety on the part of judges".

Under Indian law, "contempt of court" has been divided into two categories: civil contempt and criminal contempt. Civil contempt means "willful disobedience to any judgment, decree, direction, order, writ, or other process of a Court, or willful breach of an undertaking given to a Court" (section 2.b).

[♠] Retired Judge of the Bombay High Court, India

Criminal contempt means

> *The publication (whether by words, spoken or written, or by signs, or by visible representations or otherwise) of any matter or the doing of any act whatsoever, which (i) scandalises or tends to scandalise or lowers or tends to lower the authority of, any court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other matter (section 2.c).*

Broadly, these are the two categories of contempt. It has always been held that the Supreme Court and the High Courts have inherent powers to punish anyone for contempt, for the purpose of safeguarding the dignity of the court (articles 129 & 215 of the Constitution of India).

Essentially, a civil contempt is a failure to obey the court's order issued for the benefit of the opposing party. A criminal contempt is conduct that is directed against the dignity and authority of the court.

Criminal Contempt

There is not much of a problem with regard to civil contempt, inasmuch as it is essentially a willful disobedience of the order of a court. However, in the case of criminal contempt, there has always been uncertainty with regard to the offennce of "scandalising" the court. Very often, the courts have not been able to distinguish between the scandalising of a judge and the scandalising of the court.

Under Indian law, the following are not contempt:

(a) Innocent publication and distribution of any matter by words, spoken or written, or by signs or visible representations, which may interfere, or tend to interfere with the administration of justice (section 3);
(b) Fair and accurate reporting of judicial proceedings (section 4);
(c) Fair criticism of a judicial act or any proceedings (section 5); and,
(d) A complaint against the presiding officers of subordinate courts, made in good faith (section 6).

Observance of the Principles of Natural Justice

In all cases of contempt, the principles of natural justice have to be observed before any one is held guilty. First, there should be a notice to show cause to be served on the person charged with contempt. Secondly, the notice must contain the affidavits and any other material relied on in support of the action initiated. Thirdly, the person charged with contempt has a right to file an affidavit in support of his defence, and also to produce such evidence as may be necessary. Fourthly, the court will then pass an order, after hearing both sides (section 17). Under the rules framed under the Act, such a person has a right to be defended by an advocate. In the case of subordinate courts, the High Court has power to punish for contempt.

There is a right of appeal from any order or decision of the High Court in the exercise of its jurisdiction to punish for contempt. If the order is of a single judge, the appeal is to a bench of not less than two judges. If the order is that of a bench, the appeal is to the Supreme Court (section 19).

In the case of criminal contempt, there are certain additional requirements. The cognisance of criminal contempt can only be taken on the motion made by the Advocate-General or by any other person with the consent in writing of the Advocate-General (section 15). If the court is satisfied it shall frame a charge, and thereafter the case proceeds like a criminal trial.

Powers of High Courts and the Supreme Court

Where the Supreme Court or a High Court are held in contempt, the court has the power to detain such a person in its custody before rising; but before proceeding the court shall -

(a) Cause him to be informed in writing of the contempt with which he is charged;
(b) Afford him an opportunity to make his defence to the charge;
(c) After taking such evidence as necessary, either forthwith determine the matter, or adjourn the matter and determine;
(d) Thereafter make an order of punishment or discharge him.

Notwithstanding the above, the contemnor has the right to apply to the court to have the charge against him tried by a judge other than the judge or judges in whose presence or hearing the offence is alleged to have been committed. The court must then decide whether in the interests of proper administration of justice the application should be allowed or not. If the application is allowed, the proceedings shall thereafter proceed before the other judge (section 14).

If a judge considers that the behaviour or conduct of any one in his presence amounts to contempt, he can (at most) detain him for the day, frame a charge against him, hold an inquiry—giving him an opportunity to defend—and only thereafter, if the judge thinks that he is guilty of contempt, punish him.

If the matter is not over within that day itself, he may release the contemnor after taking a bond from him that he would appear on a day fixed for a hearing. Since the charge is akin to a criminal charge, it is proper that he should be offered a chance to have an advocate of his choice. It is also proper that if he applies for the matter to be heard by another judge, the same should be granted on the principle that no one can be a judge of his own cause.

Apology for contempt

It should be noted that in every contempt law there is a provision for tendering an 'apology'. If the contemnor tenders an apology to the court, he can be discharged or the punishment awarded may be remitted. Under Indian law, an apology shall not be rejected merely on the ground that it is qualified or conditional, if the accused makes it bona fide. Very often the matter gets worked out when the contemnor apologises. However, this should not mean that he has no right to defend himself.

Punishment

Under Indian law the maximum punishment is simple imprisonment not extending beyond six months, or a fine which may extend to two thousand rupees, or both.

Reconsidering the Law of Contempt

Personally, I am against this law of contempt. We do not require any such law for the administration of justice. If any order of the court is breached, it should have machinery to execute its order. The Civil Procedure Code and Criminal Procedure Code provide for the execution and enforcement of orders.

As regards criminal contempt, the courts have generally failed to distinguish between scandalising the judge as a person, and scandalising the court. If a judge is criticised and the contemnor wants to justify his criticism on the basis that his allegations are true, he is not allowed to do so. Our courts have held that truth is not a valid defence in an action for contempt. In an action for libel, truth and public good could be a valid defence, but not in an action for contempt.

In the UK, the statutes have been amended on the recommendation of the Phillimore Committee to provide for truth as a defence to a charge of contempt by scandalising. In the US the courts have evolved a more liberal standard of "clear and present danger" to the administration of justice. In many countries, such as Norway and Sweden, there is no contempt law. If a judge is "scandalised" it is for him individually to take action for libel or slander under the ordinary law. The dignity of the court is in no way affected by any comment on the judges. Judges earn their reputation not by what others say, but by their own utterance, by their acts of commission and omission.

Conclusion

"Judge not lest ye be judged" is a Biblical maxim that should apply to judges as much as it applies to lay people. Just as judges have the right to judge litigants, litigants have the right to judge judges. They have a public interest to know how judges have conducted themselves in court, and in each case. In an open justice system, no judge and no court can avoid criticism, fair or foul.

Lord Atkin once said, "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

To speak one's mind is a right that cannot be denied to any citizen. To suppress this in the name of scandalising the court is no guarantee that the respect and dignity of the court will be enhanced.

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4 OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-third session concerning

Communication No. 1189/2003[**]

Submitted by : Anthony Michael Emmanuel Fernando (represented by counsel, Kishali Pinto-Jayawardena and Suranjith Hewamanne)

Alleged victim : The author

State Party : Sri Lanka

Date of communication: 10 June 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 2005,

Having concluded its consideration of communication No. 1189/2003, submitted to the Human Rights Committee on behalf of Mr. Anthony Michael Emmanuel Fernando under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Anthony Michael Emmanuel Fernando, a Sri Lankan national currently seeking asylum in Hong Kong. He claims to be a victim of violations by Sri Lanka of his rights under articles 7, 9, 10, paragraph 1, 14, paragraphs 1, 2, 3, (a), (b), (c), (d), (e), 5, and articles 19, and 2, paragraph 3, of the Covenant on Civil on Civil and Political Rights. He is represented by counsel, Kishali Pinto-Jayawardena and Suranjith Hewamanne.

1.2 A request for interim measures to release the author from prison in Sri Lanka, submitted at the same time as the communication, was denied by the Special Rapporteur on New Communications.

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 The author filed a workers compensation claim with the Deputy Commissioner of Worker's Compensation, for redress in respect of injuries he had suffered. According to the Court proceedings, the author was an employee of the Young Men's' Christian Association (Y.M.C.A). While engaged in that employment he suffered injuries as a result of a fall. The Deputy Commissioner of Workmen's Compensation held an inquiry into the incident. The author and the Y.M.C.A were represented by lawyers. A settlement was arrived at but when the matter was called before the Deputy Commissioner on 9 January 1998, the author refused to accept the settlement. The author's claim was thereafter dismissed and following the rejection of his claim, the author filed four successive motions in the Supreme Court. The first two motions concerned alleged violations of his constitutional rights by the Deputy Commissioner of Worker's Compensation. On 27 November 2002, the Supreme Court considered these two motions jointly and dismissed them. Thereafter, on 30 January 2003, the author filed a third motion, claiming that the first two motions should not have been heard jointly, and that their consolidation violated his constitutional right to a "fair trial". On 14 January 2003, this motion was similarly dismissed.

2.2 On 5 February 2003, the author filed a fourth motion, claiming that the Chief Justice of Sri Lanka and the two other judges who had considered his third motion should not have done so, as they were the same judges who had consolidated and considered the first two motions. During the hearing of this motion on 6 February 2003, the author was summarily convicted of contempt of court and sentenced to one year's "rigorous imprisonment" (meaning that he would be compelled to perform hard labour). He was imprisoned on the same day. According to the author, approximately two weeks later, a "second" contempt order was issued by the Chief Justice, clarifying that, despite earlier warnings, the author had persisted in disturbing court proceedings. The operative part of the Order stated as follows: "The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning, he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offence of contempt of Court and sentence him to one year rigorous imprisonment. The Registrar is directed to remove the Petitioner from Court and commit him to prison on the sentence that is imposed". The Order was based on article 105 (3) of the Sri Lankan Constitution, which confers on the Supreme Court "the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit.....".[1] According to the author, neither the Constitution nor any other statutory provisions regulate the procedure for informing the person in contempt of the charges against him, so as to enable him to consult a lawyer or appeal against the order of the Supreme Court, nor does it specify the sentence that may be imposed in cases of contempt.

2.3 Following his imprisonment, the author developed a serious asthmatic condition which required his hospitalization in an intensive care unit. On 8 February 2003, he was transferred to a prison ward

[1] "Article 105 (3), provides that "The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1) (c) of this article, whether committed in the presence of such court or elsewhere: Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution or punishment for contempt of itself."

of the General Hospital, where he was made to sleep on the floor with his leg chained, and only permitted to move to go to the toilet. He developed a chill from lying on the floor, which worsened his asthmatic condition. Neither the author's wife nor his father was informed that he had been transferred to hospital; they had to make their own enquiries.

2.4 On 10 February 2003, the author experienced severe pain all over his body but was not given medical attention. On the same day, he was returned to prison and was assaulted several times by prison guards during his transfer. In the police van, he was repeatedly kicked on the back, causing damage to his spinal cord. On arrival at the prison, he was stripped naked and left lying near the toilet for more than 24 hours. When blood was noticed in his urine, he was returned to the hospital, where he was subsequently visited by the United Nations Special Rapporteur on Independence of the Judges and Lawyers, who expressed concern about the case. After 11 February 2003, the author was allegedly unable to rise from his bed. On 17 October 2003, he was released from prison, after completing ten months of his sentence. The Sri Lankan authorities brought criminal charges against the prison guards accusing them of having been involved in the assault of the author. They have since been released on bail, pending trial.

2.5 On 14 March 2003, the author filed a fundamental rights petition under article 126 of the Constitution with respect to his alleged torture, which is currently pending in the Supreme Court. He also submitted an appeal against his conviction for contempt, on the grounds that no charge was read out to him before conviction and that the sentence was disproportionate. He also submitted that the matter should not be heard by the same judges, since they were biased. The appeal was heard by the same three judges who had convicted him and was dismissed on 17 July 2003.

The complaint

3.1 The author claims violations of his rights under article 14, paragraphs 1, 2, and 3 (a), (b), (c) and (e), and 5, in that: he was denied a hearing on the question of contempt, having been convicted summarily; conviction and sentence were handed down by the same judges who had considered his previous three motions[2]; he had not been informed of the charges against him, nor given adequate time for the preparation of his defence[3]; the appeal was heard by the same Supreme Court judges who had previously considered the matter; there was no proof that he had committed contempt of court or that "a deliberate intention" to commit contempt, required under domestic law, had been established; the term of one years imprisonment was grossly disproportionate to the offence which he was found to have committed.

3.2 The author claims that the fact that the same judges heard all his motions was contrary to domestic law. According to the author, Section 49 (1) of the Judicature Act No. 2 of 1978 (as amended) stipulates that no judge shall be competent, and in no case shall any judge be compelled to exercise jurisdiction in any action, prosecution, proceedings or matter in which he is a party or is personally interested. Sub-section (2) of the section provides that no judge shall hear an appeal from, or review, any judgment, sentence or order passed by himself. Sub-section (3) provides that where any judge who is a party or personally interested, is a judge of the Supreme Court or the Court of Appeal, the action, prosecution or matter to or in which he is a party or is interested, or in which an appeal from

[2] The author refers to *Karttunen v. Finland, Case No. 387/1989 and Gonzalez del Rio v. Peru Case No. 63/1987.* He also distinguishes the current case from that of *Rogerson v. Australia, Case No. 802/1998 and Collins v. Jamaica, Case No. 240/1987.*

[3] He refers to a press release of 17 February 2003, in which it is stated that the UN Special Rapporteur on the Independence of the Judges and Lawyers and the Sri Lankan Legal Profession, are of the view that contempt of court cases are not an exception to the right of an accused to present a defence.

his judgment shall be preferred, shall be heard or determined by another judge or judges of the court. In support of the author's view that the trial was unfair he refers to international and national concern regarding the conduct of the Chief Justice.[4]

3.3 The author argues that his imprisonment without a fair trial amounts to arbitrary detention, in violation of article 9 of the Covenant. He refers to the criteria under which the Working Group on Arbitrary Detention determines whether a deprivation of liberty is arbitrary.

3.4 The author claims that his freedom of expression under article 19 was infringed by the imposition of a disproportionate prison sentence, given that the exercise of contempt powers was neither "prescribed by law", (given the insufficient precision of the relevant provisions), nor "necessary to protect the administration of justice" or "public order" (article 19 (3) (b)), in the absence of an abusive behaviour on his part that could be considered as "scandalizing the court". He argues that his treatment and the consequent restrictions of his freedom of expression did not meet the three pre-conditions for a limitation:[5] it must be provided by law; it must address one of the aims set out in paragraphs 3(a) and (b) of article 19; and it must be necessary to achieve a legitimate purpose.

3.5 On the first condition, the author argues that the restriction is not provided by law, as the measures in question are not clearly delineated and so wide in their ambit that they do not meet the test of certainty required for any law. He invokes the case law of the European Court on Human Rights for the proposition that the legal norm in question must be accessible to individuals, in that they must be able to identify it and must have a reasonable prospect of anticipating the consequences of a particular action.[6] The State party's laws on contempt are opaque, inaccessible and the discretion for the Supreme Court to exercise its own powers of contempt is so wide and unfettered that it fails the test of accessibility and predictability.

3.6 On the second condition, it is argued that the latitude afforded to the judiciary regarding its powers of contempt under Sri Lankan law, and the extent to which they operate as a restriction on the right to freedom of expression, are not sufficiently closely related to the aims specified in article 19, namely the protection of "public order" and "the rights and reputation of others". On the third condition, while the right to freedom of expression may be restricted, "to protect the rights and reputations of others", and in this instance, to safeguard the administration of justice, the powers of the Supreme Court provided for under Sri Lankan law for contempt of court, including the power to impose prison sentences, are wholly disproportionate and cannot be justified as being "necessary" for this end. Even if the Committee were to find that there is a pressing social need in this case (to secure the administration of justice) and that the author was in fact in contempt, one year of imprisonment – with hard labour - is in no way a proportionate or necessary response.[7]

3.7 The author claims that article 105 (3) of the Sri Lankan Constitution is in itself incompatible with articles 14 and 19 of the Covenant. He claims violations of articles 7 and 10, paragraph 1, in relation to his assault and his conditions of his detention (paras. 2.3 and 2.4 above). He also claims that in

---

[4] Report of the United Nations Special Rapporteur on Independence of Judges and Lawyers to the United Nations Commission in April 2003, in which it states that "the Special Rapporteur continues to be concerned over the allegations of misconduct on the part of the Chief Justice Sarath Silva, the latest being the proceedings filed against him and the Judicial Service Commission in the Supreme Court by two district judges…." He also refers to the Report of the International Bar Association, 2001, Sri Lanka on failing to protect the rule of law and the independence of the judiciary.

[5] *Faurisson v. France, Case No. 550/93*

[6] Grigoriades v. Greece (24348/94) and Sunday Times v. the United Kingdom (6538/74) 1979.

[7] The author refers to the European Court of Human Right's case of De Haes & Gijsels v. Belgium.

having submitted his appeal against his conviction for contempt, he has exhausted all available domestic remedies.

The State party's admissibility submission

4.1 On 27 August 2003, the State party provided its comments on the admissibility of the communication. It submits that the appeal judgment, of 17 July 2003, of the Supreme Court on the author's conviction for contempt, deals with the entirety of the case; it is significant that the author failed to express regret for this "contemptuous behaviour", though given an opportunity to do so by Court, and thereby exhibiting his contempt of justice and the judiciary.

4.2 With regard to the alleged torture by the Prison Authorities, the State party confirms that it had taken measures to charge the persons held responsible, that the case is still pending and that the accused are currently on bail, pending trial. There are two cases pending before the courts. If the accused are convicted they will be sentenced. Further, it is confirmed that the author has filed a fundamental rights petition in the Supreme Court against the alleged torture, which remains pending. In the event that the Supreme Court decides the fundamental rights application in the author's favour he will be entitled to compensation. As such, the allegation of torture is inadmissible for failure to exhaust domestic remedies. Further, since the State took all possible steps to prosecute the alleged offenders there can be no cause for further complaint against the State in this regard.

4.3 The State party adds that the Sri Lankan Constitution provides for an independent judiciary. The judiciary is not under the State's control and as such the State cannot influence nor give any undertaking or assurances on behalf of the judiciary on the conduct of any judicial officer. If the State attempts to influence or interfere with the judicial proceedings, this would be tantamount to an interference with the judiciary and would lead to any officer responsible facing charges of contempt himself.

4.4 Although the State party requested the Committee to consider the admissibility separately from the merits of the communication, the Committee advised, through its Special Rapporteur on New Communications, that it would consider the admissibility and merits of the communication together, on the basis that the State party's future submissions on the merits would provide greater clarity on the issues of admissibility and that the information provided was too scarce for any final determination on these issues at that point.

Interim measures request

5.1 On 15 December 2003, following the receipt of death threats, the author requested interim measures of protection, requesting the State party to adopt all necessary measures to ensure his protection and that of his family, and to ensure that an investigation into the threats and other measures of intimidation be initiated without delay. He submits that on 24 November 2003, at about 9.35 a.m., an unknown person called his mother and asked her whether he was at home. When she answered in the negative, this person made death threats against the author and demanded that he withdraw his three complaints: The communication to the Human Rights Committee; the fundamental rights case in the Supreme Court regarding alleged torture; and the complaint filed in the Colombo Magistrate's Court against the two Welikade prison guards. The caller did not reveal his identity.

5.2 On 28 November 2003, the author's complaint against the two prison guards was taken up in the Colombo Chief Magistrate's court, and the author was present. The magistrate directed the police to charge the accused on 6 February 2004, as they had failed on three occasions to present themselves

before the Maligakanda Mediation Board, as directed by the court. Later that day on 28 November 2003, his mother told him that an unidentified person had come to the house at about 11.30 a.m. and, while standing outside the locked gate, had called out for the author. When the author's mother told him that he was not in, he went away threatening to kill him. Once again, on 30 November 2003, at about 3.30 p.m., the same person returned, behaved in the same threatening manner and demanded that the author's mother and father send their son out of the house. The author's parents did not respond and called the police. Before the police arrived, the person uttered threats against the author's parents and after once again threatening to kill the author left the premises. The author's mother filed a complaint at the police station on the same day.

5.3 On 24 November 2003, at 10.27 a.m., an unidentified person called at the office of a Sri Lankan newspaper, Ravaya, which had supported the author throughout his ordeal. The caller spoke to a reporter and leveled death threats against him and the editor of Ravaya, demanding that they cease publishing further news concerning the author. This newspaper had published interviews of the author on 16 and 23 February and 2 November 2003 regarding the alleged miscarriage of justice suffered by him. The threats were reported in the weekend edition of the Ravaya newspaper.

5.4 The author adds that, on 4 December 2003, he received information to the effect that the two prison guards who had been cited in the fundamental rights petition filed by the author as well as in the case filed in the Colombo Magistrate's court, had been reinstated: one of them was transferred to the New Magazine prison and the other remains at the Welikade prison. As a result, the author lives in daily fear for his life as well as for the life and safety of his wife, his son and his parents. In spite of his complaint to the authorities, he has not, to date, received any protection from the police and is unaware of what action has been taken to investigate the threats against himself and his family. He recalls that he had received death threats in prison as well; he invokes the Committee's Concluding Observations, of November 2003, which stated that, "The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases." He also refers to the Committee's Views in *Delgado Paez v Colombia* on the State party's obligation to investigate and protect subjects of death threats.[8]

5.5 On 9 January 2004, pursuant to rule Rule 86 of the rules of procedure and, on the behalf of the Committee, the Special Rapporteur on New Communications requested the State party to adopt all necessary measures to protect the life, safety and personal integrity of the author and his family, so as to avoid irreparable damage to them, and to inform the Committee on the measures taken by the State party in compliance with this decision within 30 days from the date of the Note Verbale, i.e. not later than by 9 February 2004.

5.6 On 3 February 2004, the author submitted that on the morning of 2 February 2004, he had been subjected to an attack by an unknown assailant who sprayed chloroform in his face. A van pulled up close by during the attack, and the author believes that it was going to be used to kidnap him. He managed to escape and was taken to hospital. Had he not escaped, he would have been the victim of an assassination or disappearance. On 13 February 2004, the Committee, through its Special Rapporteur on New Communications, reiterated his previous request to the State party under Rule 86 of the Committee's rules of procedure in his note of 9 January 2004.

---

[8] *Delgado Paez v. Colombia, Case no. 195/1985* - "States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them....."

5.7 On 19 March 2004, the State party commented on the attack against the author of 2 February 2004. It submits that the Attorney General's Department directed the police to investigate the alleged attack and to take measures necessary to ensure his safety. The police recorded his statement in which he was unable to either name the suspects or to provide the police with the number of the vehicle that the alleged assailants had traveled in. The investigations remain in progress and steps will be taken to inform the author of the outcome. If the investigations reveal credible evidence that the threats were caused by any person with a view to subverting the course of justice, the State party will take appropriate action.

5.8 With regard to the author's security, a police patrol book has been placed at his residence and police patrol have been directed to visit his residence day and night and to record their visits in the police patrol book. In addition to this, his residence is kept under surveillance by plaincloth policemen. There is no evidence to conclude that the author received threats to his life because of his communication to the Human Rights Committee.

The State party's merits submission

6.1 On 16 March 2004, the State party provided its submissions on the merits. On the alleged violations of articles 9, 14 and 19 of the Covenant, it concedes that the author has exhausted domestic remedies. It refers to the judgment of the Supreme Court of 17 July 2003, on appeal against the contempt order, and submits that it cannot comment on the merits of any judgment given by a competent Sri Lankan Court. The State party relies on the arguments set out in the judgment for its proposition that the author's rights were not violated. It submits that the manner in which the author behaved from the time he walked out on a settlement reached between himself and the Y.M.C.A, where both parties were legally represented, before the Deputy Commissioner General of Workman's Compensation, to the point of his refusal to express any regret for his behaviour, when his case for contempt was reviewed by the Supreme Court, demonstrates the author's lack of respect for upholding the dignity and decorum of a judicial tribunal. It refers to the judges' consideration of the powers vested in such Courts to deal with cases of contempt, noting that in such cases committed in the face of the Court punishment may be imposed summarily. While the author was given an opportunity to mitigate the sentence by way of apology, he failed to do so.

6.2 Freedom of speech and expression, including publication, are guaranteed under article 14, paragraph 1 (a), of the Sri Lankan Constitution. Under article 15, paragraph 2, it is permissible to place restrictions on rights under article 14; these may be prescribed by law in relation to contempt of court. The State party denies that the power of the Supreme Court under article 105, paragraph 3 of the Constitution is inconsistent with either the fundamental right guaranteed by Article 14, paragraph 1 (a) of the Sri Lankan Constitution or with articles 19 or 14 of the Covenant.

6.3 The State party reiterates that the author did not exhaust domestic remedies with respect to the claim relating to torture and ill-treatment as the case is still pending. Since the State cannot make submissions on behalf of the accused, it would be tantamount to a breach of rules of natural justice for the Committee to express its views on the alleged violation, as there is no opportunity for the persons accused of the assault to give their version of the incident. A determination of the case by the Committee at this stage would be prejudicial to the accused and/or the prosecution. It observes that the author has not submitted that such remedies are ineffective or that such remedies would be unreasonably prolonged.

6.4 The State party notes that the fundamental rights case filed by the author in the Supreme Court remains pending, and that a violation of the same rights as those protected under articles 7 and 10,

paragraph 1, of the Covenant will be considered in these proceedings. It further submits that it has declined to appear for the individuals against whom allegations of torture are made. The Attorney General who represents the State refrains, as a matter of policy, from appearing for public officers against whom allegations of torture are pending, since the Attorney General could consider filing criminal charges against the perpetrators even after such a case is concluded. In the present case such action (criminal prosecution) is pending.

The author's comments on admissibility and the merits

7.1 On 6 August 2004, the author commented on the State party's submission and reiterated his earlier claims. Following the attack on him of 2 February 2004, he lived in hiding. Despite having made complaints to the police, no investigations were made, and no one was prosecuted or arrested. Although the author concedes that police patrols did pass by his house he argues that this is insufficient protection from an attempted kidnapping and possibly attempted murder. He was diagnosed with post-traumatic stress disorder and his mental health deteriorated. Because of these events, he left Sri Lanka on 16 July 2004 and applied for asylum in Hong Kong, where he continues to receive treatment for his mental difficulties. His application has not yet been considered. He contests the State party's view that it has no role to play with regard to a judgment pronounced by a local court of law.

7.2 Contrary to his initial submission, the author now contends that no charges have been filed against the suspects of the alleged assault to date. According to him, preliminary reports called "B reports" have been before the Magistrate's Court in Colombo, but these are merely reports relating to the progress of the inquiries. The last time this report was heard by the Court was on 23 July 2004. Thus, even after one and a half years after the incident, the inquiry is supposed to be continuing. In the author's view, this failure by the State party promptly to investigate complaints of torture violates article 2, and the lack of witness protection makes it impossible to participate in any trial that may eventually take place.

7.3 The author also claims that the State party has failed to contribute to his rehabilitation. He states that four doctors have diagnosed him with psychological trauma caused by the above events, but that his fundamental rights and request for compensation application filed on 13 March 2003 has been postponed constantly. According to article 126 (5) of the Constitution, "[t]he Supreme Court shall hear and finally dispose of any petition or reference under this article within two months of the filing of such petition or the making of such reference". The author's petition remains pending. The State party's failure to consider these applications are also said to demonstrate that exhaustion of domestic remedies with respect to the alleged violations of articles 7 and 10, paragraph 1 has been unduly prolonged, and that the remedies are ineffective.

7.4 The author adds a new claim relating to his conviction for contempt, that he was not given an opportunity to be tried and defend himself in person, or through legal assistance of his own choosing and he was not informed of the right to have legal assistance, nor was legal assistance assigned to him. In this regard he claims a violation of article 14, paragraph 3 (d).

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the alleged violation of articles 7 and 10, paragraph 1, with respect to the author's alleged torture and his conditions of detention, the Committee notes that these issues are currently pending before both the Magistrate Court and the Supreme Court. Although it is unclear whether the individuals allegedly responsible for the assault have been formally charged, it is uncontested that this matter is under review by the Magistrates Court. The Committee is of the view that a delay of 18 months from the date of the incident in question does not amount to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The Committee therefore finds these claims inadmissible for non-exhaustion of domestic remedies in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

8.3 As to the claim that the author's detention was arbitrary under article 9, since it was ordered after an allegedly unfair trial, the Committee finds that this claim is more appropriately dealt together with article 14 of the Covenant as it relates to post-conviction detention. 8.4 As to the alleged violation of article 14, paragraph 3 (c), the Committee finds that this claim has not been substantiated for the purpose of admissibility and is therefore inadmissible under article 2 of the Optional Protocol.

8.5 As to the remaining claims of violations of articles 9, paragraph 1, and 14, paragraphs 1, 2, 3 (a), (b), (d), (e), and 5, and article 19, the Committee considers these claims are sufficiently substantiated and finds no other bar to their admissibility.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes that courts notably in Common Law jurisdictions have traditionally enjoyed authority to maintain order and dignity in court debates by the exercise of a summary power to impose penalties for "contempt of court." But here, the only disruption indicated by the State party is the repetitious filing of motions by the author, for which an imposition of financial penalties would have evidently been sufficient, and one instance of "rais[ing] his voice" in the presence of the court and refusing thereafter to apologize. The penalty imposed was a one year term of "Rigorous Imprisonment". No reasoned explanation has been provided by the court or the State party as to why such a severe and summary penalty was warranted, in the exercise of a court's power to maintain orderly proceedings. Article 9, paragraph 1, of the Covenant forbids any "arbitrary" deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition. The fact that an act constituting a violation of article 9, paragraph 1 is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole. The Committee concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1. In the light of this finding in the present case, the Committee does not need to consider the question whether provisions of article 14 may have any application to the exercise of the power of criminal contempt. Similarly, the Committee

does not need to consider whether or not there was a violation of article 19. 10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated articles 9, paragraph 1, of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2, of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

JUDICIAL DEVELOPMENT OF HUMAN RIGHTS; SOME SRI LANKAN DECISIONS

Justice Mark Fernando[♠]

There are several Sri Lankan decisions which demonstrate that the scope of human rights, as formulated in Constitutional provisions, is capable of significant expansions through judicial interpretation. Several avenues are open. Not only may rules of procedure be relaxed, without doing violence to the spirit of those rules, but in respect of substance, too, particular Constitutional provisions are capable of expansive or creative interpretation.

Thus the language of a particular provision may be capable of more than one interpretation (perhaps when considered in the context of other provisions), in which event that which is more consistent with the rights and freedoms of the citizen may legitimately be preferred.

Again, a provision may be expansively interpreted (a) in the light of fundamental principals underlying the Constitution and/or those provisions, or implicit in those provisions, or (b) having regard to the international obligations of the State.

1. Relaxing Procedural Rules: Access to Justice

After the insurgency of 1989-1990, there were a large number of suspected insurgents in custody, without access to lawyers (and sometimes even to family). They were unable to file applications to have their case reviewed, either by the courts or by executive authorities ("Advisory Committees") set up under Emergency Regulations.

Although the Supreme Court Rules required that a fundamental rights application should be made, within one month of alleged infringement, by way of a formal petition supported by affidavit (with six copies, court fees, etc), the Court on receipt of a large number of informal applications – often a simple letter – made a series of orders designed to facilitate access to justice.

The first order was made ***In re Perera*** (SC 1/90; Supreme Court Minutes ("SCM") 18.9.1990. The Attorney-General and two associations of lawyers agreed that the Registrar of the Supreme Court ("SC"), on receipt of any formal application, would furnish copies to the Attorney-General and to the two associations.

The Court directed the authority in charge of every place of detention to allow an Attorney-at-Law authorized by either association to have reasonable access to detenus in order to obtain instructions, to swear affidavits, and to prepare applications to Court or representations to Advisory Committees; to prepare and circulate a written statement describing the detenus' rights; and to acknowledge receipt of their applications and representations, and to forward them promptly to the addressee.

[♠] Retired Judge of the Supreme Court of Sri Lanka, Former President, ADB Administrative Tribunal, Former Judge, ILO Administrative Tribunal. Part V of this paper was first published in the Sri Lanka Journal of International Law, Volume 16, 2004, Faculty of Law, University of Colombo

Thereafter, formal petitions and affidavits in conformity with the Rules would be prepared and filed in Court, even after the lapse of one month. No objection was taken that such petitions has been filed out of time, because the SC had previously recognized that the time limit was subject to principle, *lex non cogit ad impossibilia.*

These procedural modifications enabled the SC to entertain about 5,000 applications (some made by several petitioners) during the period 1990-1993. Most detenus desired that they should be brought to trial or released without delay, and were not really concerned about compensation. A large number were released soon, or after a short period of "rehabilitation", while some were prosecuted in the High Court. No statistics are available, but it is likely that over 10,000 detenus benefited.

In ***Silva*** v. ***Iddamalgoda,*** SC 471/2000 SCM 8.8.2003 (discussed below), the provisions of Article 126 of the Constitution – that a fundamental rights application must be filed by an aggrieved *person* or by an Attorney-at-Law on his behalf – was interpreted as permitting an application to be filed by the widow and child of a deceased person whose right to life had been infringed – an infringement which would otherwise be irremediable.

II. Expansive Interpretation of Particular Provisions

(A) The Right to Life

In ***Silva*** v. ***Iddamalgoda,*** SC 471/2000 SCM 8.8.2003, the question was whether there was a constitutional right to life, even though such a right was not among those expressly enumerated as fundamental rights. A suspect in police custody was so severely tortured that he died whilst yet in custody, and before a fundamental rights applications could be filed on his behalf. Article 126 of the Constitution provides that a fundamental rights application must be filed by an aggrieved person or an Attorney-at-Law on his behalf. An application was filed by his widow and child. They seemed to face two obstacles: that the petitioners had no *locus standi*, and that the right which they claimed was not recognized by law.

However, Article 13 (4) provided that "no person shall be punished **with death** or imprisonment, except by order of a competent court…". It was held that the necessary implication of that provision was that everyone had the right to life, unless taken away by order of a competent Court. Subject to that exception, Article 13(4) by necessary implication did recognize a right to life. Additionally, Article 11 guaranteed freedom from torture and cruel, inhuman and degrading treatment or punishment. Depriving a person of his life was clearly inhuman treatment at least. Hence the right to life was implicit in Article 11 as well. thus for two independent reasons, the Constitution did recognize the right to life.

As for *locus standi*, it was held that if "*person*" in Article 126 was restricted to the victim, there could never be an action in respect of the actual infringement of the right to life (although there could be in respect of its *threatened* infringement); and that the words "punished **with death**" in Article 13(4) would have no meaning where death was actually caused.

Therefore, in cases where death was caused, either the Constitution *remedy* (under Article 126) had to be interpreted expansively or the fundamental rights (under Articles 11 and 13(4)) had to be

interpreted restrictively, so as to apply torture short of death (under Article 11) and to punishment with imprisonment but not with death (under Article 13(4)). Having regard to Article 4(d) – which requires the Judiciary, too, to respect, secure and advance fundamental rights – "person" was interpreted as permitting the heirs/dependents of the deceased to institute proceedings.

In coming to that conclusion, reference was also made to Article 14.1 of the Convention against Torture and Other Forms of Cruel, Degrading and Inhuman Treatment or Punishment, which provides that in the even of death of the victim as a result of an act of torture his dependents shall be entitled to compensation.

The expansive interpretation of Article 126 was thus fully in conformity with Sri Lanka's international obligations.

(B) Vicarious Liability of persons having authority over wrong –doers

In ***Banda*** v. ***Gajanayake***, [2002] 1 SriLR 365, several persons were detained under the Emergency Regulations at a camp of which the petitioners was the Officers in charge. A mob attacked and killed many of the detainees, and the police took no action, despite the petitioner's pleas.

It was held that the inaction of the police constituted illegal omissions; and that if the petitioner had authority over the police in regard to the safety of the inmates, and that if by the exercise of that authority he could have prevented such illegal omissions, his failure to exercise would have amounted to culpable inaction making him liable for the misconduct of his subordinates.

However, as the petitioner – though a captain in the Army – was functioning as a civil officer at all relevant times; and had no power to give orders to the police who were in charge of security at the camp, he was not liable.

Sanjeewa v. ***Suraweera,*** SC 328/2002 SCM 4.4.2003. The Officer in charge of the police station at which the petitioner was tortured was also held liable. Held that Article 4(d) imposes a duty on the Inspector-General of Police to respect, secure and advance fundamental rights, and accordingly a prolonged failure to give effective directions designed to prevent violations of Article 11 and to ensure the proper investigation of those which nevertheless take place, and subsequent disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation (if not also of approval and authorization). However , the petitioner did not pursue that point.

Deshapriya v. ***Weerakoon***, SC 42/2002 SCM 8.8.2003. The commanding officer of a naval establishment was held liable for the torture of a person in custody, because his responsibility and liability are not restricted to participation, authorization , complicity and/or knowledge. His duties and responsibilities as the Commanding Officer were much more onerous. In the Forces, command is a sacred trust, and discipline is paramount. He was under a duty to take all reasonable steps to ensure that persons held in custody were treated humanely and in accordance with the law. That included monitoring the activities of his subordinates, particularly those who had contacts with detainees. In ***Silva*** v. ***Iddamalgoda,*** SC 471/2000 SCM 8.8.2003 (above), the Officer in charge of the police station was held liable.

(C) Other Examples

Another example is ***Karunathilaka*** v. ***Dissanayake,*** [1999] 1 SriLR 157 (discussed below), where it was held that although the right to vote is not, as such, a fundamental right, yet the exercise of his vote by a person who is in fact duly registered is an exercise of his freedom of expression, guaranteed by Article 14(1)(a).

In ***Fernando*** v. ***Sri Lanka Broadcasting Corporation,*** [1996] 1 SriLR 157 (discussed below), it was held that the freedom of speech would include the right to obtain and record information, where such information was necessary for the exercise of the freedom of speech; and it was suggested that there was possibly even a privilege not to be compelled to disclose sources of information if that privilege was necessary to make the right information fully meaningful. It was also observed that although the freedom of information was not one of the fundamental rights expressly guaranteed, yet the right to information seemed to be implicit in the freedom of thought, as information was the staple food of thought.

III. Interpretation in the light of Fundamental Constitutional Principles

(A) The "Public Trust" Doctrine: Expanding Judicial Review of Executive Action

The Executive had consistently claimed that various discretions were absolute, unfettered, and unreviewable. However, from the early 1990's, relying on public law principles relating to powers and discretions, the SC in a series of cases gradually developed the "Public Trust" doctrine; namely, that whenever powers are conferred by the Constitution or by statute on various authorities, they are held in trust for the benefit of the public . Much reliance was placed on Article 12(1) – which guarantees equality before the law and the equal protection of the law; and which is itself based on the Rule of Law – as a guarantee against capricious, arbitrary , and unreasonable exercise of power.

As at present, that doctrine can be summarized as follows:

> *There are no absolute or unfettered powers or discretions in public law. Whenever the law confers powers or discretions on public bodies and officials (however high), such powers or discretions are treated as having been conferred in the public interest, and not for private or political benefit or advantage.*
>
> *Accordingly, such powers or discretions are held in trust for the people, and the exercise of such powers or discretions (or the refusal to do so) must be for their benefit; such powers or discretions must always be exercised lawfully and fairly, and not perversely , arbitrarily or unreasonably; and the exercise of such powers or discretions is subject to judicial review (and also to Parliamentary review, in terms of Articles 42 and 43(1) – **Perera** v **Pathirana**, SC 453/97 SCM 30.1.2003; **Senasinghe** v **Karunatilleke**, [2003] 1 SriLR 172; **Thavaneethan** v **Dissanayake**, [2003] 1 Sri LR 75) – by reference to the purpose(s) for which they were conferred.*

Even the acts of the President are liable to such review, despite the personal immunity from legal proceedings conferred by Article 35, because such "immunity is a shield for the doer, not for the act".

Although legal proceedings cannot be institute in any court or tribunal against the President, nevertheless such acts are liable to review in proceedings against other persons who rely on such acts in order to justify their own conduct – ***Karunatilleke*** v ***Dissanayake***, [1999] 1 SriLR157,177; ***Wickremabandu*** v ***Herath***, [1990] 2 SriLR 348; ***Silva*** v ***Bandaranayake***,[1997] 1 SriLR 92; ***Senasinghe*** v ***Karunatillake***,[2003] 1 SriLR 172, 186).

In any event, Article 35 does not confer immunity from parliamentary review under Article 42 and 43(1), for such review does not amount to proceedings in court or tribunal within the meaning of Article 35.

The following are some examples of the scope of the "Public Trust" doctrine:

Powers conferred on public officials and bodies are held in trust for the public.

> "……..the true intent and meaning of the amending Act was to empower the Minister to restore to the original owner land for the acquisition (or retention) of which there was originally (or subsequently) no adequate justification, upon the fulfillment of the stipulated conditions. It was a power conferred solely to be used for the public good, and not for his personal benefit; it was held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest."
> (de Silva v Athukorale, [1993] SriLR 283 at 297).

> "There is no absolute or unfettered discretion 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 purposes for which they were so entrusted."
> (***Premchandra*** v ***Jayawickreme,*** [1994] 2 SriLR 90 at 105)

> "Powers of appointment and dismissal are conferred by the Constitution on various authorities in the public interest, and for the public benefit, and their exercise must be governed by reason and not caprice. They cannot be regarded as absolute, unfettered, or arbitrary, unless the enabling provisions compel such a construction."
> (***Bandara*** v ***Premachandra***, [1994] 1 SriLR 301 at 312)

> "It is accepted today that powers of appointment and dismissal are conferred on various authorities in the public interest, and not got private benefit, that they are held in trust for public and that the exercise of these powers must be governed by reason and not caprice. I am of the view that this Court can, and indeed must, take judicial notice of the fact that, generally, a person holding an office which is public in character, is not removed without legal authority without cause, without complying with the *audi alteram partem* rule, and without notice. Since the petitioner was not treated in accordance with 'these essential requirements of justice and fair play' he was denied the equal protection of the law."
> (***Jayawardena*** v ***Wijayatilake,*** [2001] 1 SriLR 132 at 159)

"Public Trust" doctrine is not a mere matter of contract

> "We are not concerned with contractual rights, but with the safeguards based on the Rule of Law which Article 12 provides against the arbitrary and unreasonable exercise of discretionary powers. Discretionary powers can never be treated as absolute and unfettered unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have conferred – not at the whim and fancy of officials, for political advantage or personal gain. Education, as the transfer circular emphasises, concerns the child; the power to transfer teachers exists to promote the education of the child; a fair and reasonable system of teacher transfers, implemented according to established principles and criteria, will promote the education of the child, and the absence of such a system will undermine good education."
> (*Priyangani v Nanayakkara*, [1996] 1 SriLR 399 at 404-405)

Duty not to appoint person under a cloud

The appointment of the registrar by the University Council was challenged. It was held that "at the relevant time – both when the Council decided to appoint [the registrar], and when that decision came up for confirmation – there was an allegation against him of misrepresentation involving moral turpitude and /or serious misconduct, constituting a potential disqualification for any future appointment or promotion. That allegation certainly could not have appeared to the Council to be frivolous or insubstantial.

The Council could not have ignored the fact that the registrar has to deal with misrepresentations as to qualifications and otherwise] by staff and students, and that his ability to act properly and effectively in such cases would be impaired so long as a cloud hangs over him. The only proper course open to the Council was to have deferred its decisions until the matter had been resolved after due inquiry – especially considering that a finding adverse to the [registrar] could even have resulted in his dismissal. The decision of the Council to appoint [him] as registrar was arbitrary, unreasonable and contrary to established practice, and was thus in violation of the Petitioner's fundamental right under Article 12(1). It must therefore be quashed." (***Sumanasiri*** v ***University of Peradeniya***, [2000] 1 SriLR 213 at 216)

Duty not to appoint unqualified or disqualified persons

The power of the President to appoint judges to the Supreme Court under Article 107 is neither untrammelled nor unrestrained, and ought to be exercised within limits, for that power is discretionary and not absolute. If, for instance, the President were to appoint a person who is later found to have passed the age of retirement laid down in Article 107(5), the appointment would be flawed because it is the will of the people, which that provision manifests, that such a person cannot hold that office.

Article 125 would then require this Court, in appropriate proceedings, to exercise its judicial power in order to determine those questions of age and ineligibility. Other instances which readily come to mind are the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude (majority decision in ***Silva*** v ***Bandaranayake,*** [1997] 1 SriLR 92 at 95).

Any person is entitled to complain of a flawed appointment to high office.

The appointment of the Deputy Governor of the Central Bank was challenged by the petitioner. Rejecting the objection that the only person possibly prejudiced by that appointment was another officer and that he alone had the status to complain, it was held that the petitioner was nevertheless entitled to complain because Article 12(1) gives every candidate for appointment a right to be duly considered, i.e a right to fair selection process.

Besides, the office of Deputy Governor was very important to every citizen, having regard to the Central Bank's wide powers and responsibilities in regard to the economy, and it was very important that the Monetary Board should be allowed to chose the best person for the post. Nevertheless, that power was neither absolute nor arbitrary. Article 12 gives every citizen protection against arbitrariness or caprice and the petitioner was entitled, in his capacity as a citizen, to complain that the impugned appointment was arbitrary (***Pattiwidana*** v ***Monetary Board,*** SC 450/2000 SCM 30.4.2002).

(B) Natural Justice as one of the "Protections" of the Law

The scope of Natural Justice has been developed by re-examining common law and administrative law concepts in the context of the equal protection of the law guaranteed by Article 12(1), which itself is founded on the Rule of Law.

The earlier view, that Natural Justice is not a fundamental right (***Perera*** v ***Jayawickreme***, [1985] 1 SriLR 285) has given way to the recognition that Natural Justice is an important "protection" which the law affords to all persons.

Jayawickreme v ***Wijeyatilake***, [2000] 1 SriLR 132, 159: "since the petitioner was not treated in accordance with 'these essential requirements of justice and fair play' he was denied the equal protection of the law". "Respect for the Rule of Law requires the observance of minimum standards of openness, fairness and accountability; and this means – in relation to appointments to, and removal from , offences involving powers, functions and duties which are public in nature – that the process of making a decision should not be shrouded in secrecy, and that there should be no obscurity as to what the decision is and who is responsible for making it."

Dissanayake *v Kaleel*, [1993] 2 SriLR 135, 184; "an expansive, rather than a restrictive, interpretation of the protection afforded by the principles of natural justice is determined by the equality provision in Article 12 of the Constitution; fairness lies at the root of equality and equal protection."

Mundy v ***CEA***, SC 58-60/2003 SCM 20.1.2004: the protection of the law under Article 12(1) extends to notice and hearing.

Nethasinghe v ***Wickremanayake***, SC 770/99 SCM 13.7.2001: "one of the protections which the law provides, and which is implicit in Article 12(1), is the right to a hearing."

A person having legal authority to determine a question affecting the rights of individuals is, by necessary implication, required to observe the principles of Natural Justice when exercising that authority, and if he fails to do so, his purported decision is a nullity: ***Dissanayake*** v ***Kaleel*** (at 181-

183); Natural Justice is a living, growing and flexible concept, not to be confined within the stifling and static technicalities of form and procedure: ***Jayatillake*** v ***Kaleel***, [1994] 1 SriLR 319,345.

An authority must not act on material undisclosed to petitioner; ***Jayawickrema*** v ***Lakshman***, [1998] 2 SriLR 235,247. This applies both to the original authority as well as the appellate body: ***Nandadasa*** v ***Jayasinghe***, [2001] 1 SriLR 14.

Natural Justice requires that evidence produced and submissions made must be duly considered and properly evaluated without haste: ***Mendis*** v ***Perera,*** [1992] 2 SriLR 110,148.

Reasons must be given at least when a decision is challenged; if reasons are not given, a citizen cannot tell whether the decision is reviewable (by way of appeal, revision, writ, or fundamental rights application) and will thus be deprived of one of the protections of the law under Article 12(1): ***Karunadasa*** v ***Unique Gemstones Ltd***, [1997] 1 SriLR 256; ***Ceylon Printers*** v ***Commissioner of Labour***, [1998] 2 SriLR 29; ***Mendis*** v ***Perera***, [1999] 2 SriLR 110; and ***Lanka Multi-Moulds*** v ***Wimalasena,*** SC 60/2001 SCM 29.1.2003.

There must be written record of the decision and the reasons: ***Ayoob*** v ***IGP***, [1997] 1 SriLR 412, 418; ***Thavaneethan*** v ***Dissanayake***; [2003] 1 SriLR 75, 91-92.

Natural Justice applies also to the revocations of a decision: ***Wijepala*** v ***Jayawardena***, SC 89/95 SCM 30.6.95; ***Dhanu Contractors*** v ***Matale MC***, SC 461/2001 SCM 13.10.2003.

(C) Enlarging the Writ Jurisdiction

Perera v ***Edirisinghe***, [1995] 1 SriLR 148, 156: "....Article 12 ensures equality and equal treatment even when a right is not guaranteed by common law, statute or regulation, and this is confirmed by Articles 3 and 4(d). Thus ...Rules and Examination criteria, read with Article 12, confer a right on a duly qualified candidate to the award of the Degree, and a duty on the University to award such Degree without discrimination ; and even where the University has reserved some discretion, the exercise of that discretion would also be subject to Article 12, as well as the general principles governing the exercise of such discretions. The fact that by entrenching the fundamental rights in the Constitution the scope of the writs has become enlarged is implicit in Article 126(3), which recognises that a claim for relief by way of writ may also involve an allegation of the infringement of a fundamental right."

Mundy v ***CEA***, SC 58-60/2003 SCM 20.1.2004. The historical English Law limitations on "prerogative" writs are no longer applicable, because our courts are not the courts of the Sovereign, and no deference is due to the Crown or the Executive, which are bound by the public trust doctrine, and are subject to the fundamental rights.

> *"Constitutional principles and provisions have shrunk the area of Administrative discretion and Immunity, and have correspondingly expanded the nature and scope of the public duties amenable to Mandamus and the categories of wrongful acts and decisions subject to Certiorari and Prohibition as well as the scope of judicial review and relief."*

The Court of Appeal, in the exercise of its discretion, refused Certiorari and Mandamus (having regard to the national interest) although the rights of the petitioner had been infringed, and granted them no relief in respect of the acquisition of their lands. It was held that the petitioners should have been awarded compensation for the infringement for their rights.

(D) Fundamental Right to Vote.

The right to vote is not expressly enumerated as one of the fundamental rights in Chapter 3 of the Constitution.

Karunathilaka v ***Dissanayake*** [1999] 1 SriLR 157; The President suddenly declared a state of emergency and postponed, *sine die*, the five Provincial Council elections already scheduled. Two registered voters petitioned for infringement of fundamental rights, as they were denied the opportunity of voting, and asked the Supreme Court to quash the President's order and to direct the Commissioner of Elections to fix a date for the poll.

Held, that although the right to vote is not a fundamental right, if a person is in fact duly registered to vote the *exercise* of his vote is an *expression* of his choice of candidates; such exercise is therefore part of his fundamental right to freedom of speech and expression. Relief granted.

Mediwake v ***Dissanayake*** [2001] 1 SriLR 177; the petitioners' right to vote had not been infringed. They complained that others in the same electoral district had not been allowed to vote, and that the election had not been free or fair. Held, that the right to vote had an individual as well as a collective aspect: the value of one's vote was affected by preventing other like-minded persons from voting. Referred to ICCPR Art 25. Relief granted. Not only is a citizen entitled himself to vote at a free, equal and secret poll, but he also has a right to a genuine election guaranteeing the free expression of the will of the entire electorate to which he belongs.

ICCPR Article 25 recognises the right of everyone to take part in the conduct of public affairs, directly or through freely chosen representatives; the right to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will ***of the electors.***

Thavaneethan v ***Dissanayake***, [2003] 1 SriLR 75: For the General Election of 2001, arrangements had been made for persons in the "uncleared areas" (i.e those not controlled by the Government) to cross over through check points to the "cleared areas", where special polling booths had been set up for them to vote. On the morning of the polling day, without any prior notice and on the pretext of vague "security" concerns, the check points were closed; about 55,000 voters from two electoral districts were thereby prevented from voting. Held, that the election was not free or fair, and that there had been an infringement of the freedoms of speech and expression, and of movement.

Compensation was granted by way of relief. While those check points were being closed, unprecedented arrangement were being made for the President, Prime Minister, Speaker, Deputy Minister of Defence and one or two others to vote from the comfort of their homes! Held, that this was a violation of the right to equality.

Centre for Policy Alternatives v ***Dissanayake***, SC 26/2002 SCM 27.5.2003. Section 65 of the Provincial Council Elections Act, No 2 of 1998, provided that a vacancy in the membership of a Council shall be filled by nomination by the Secretary of the political party to which the outgoing member belonged. Two rival interpretation were advanced, one which confined the Secretary's choice to the persons whose names appeared on the original nomination paper, while the other imposed no restriction.

The former interpretation was preferred, particularly as it was in conformity with Article 25, ICCPR, which recognizes that every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives.

That was also consistent with the Directive Principles of State Policy (contained in Articles 27(2)(a) and 27(4)), which set out the obligations of the Sri Lankan State (of which the Judiciary was a part) to facilitate the full realization of the fundamental rights and freedoms, and to strengthen and broaden the democratic structure of government. The electorate was therefore entitled to be represented by persons who had faced the voters and obtained their support.

(E) Freedom of Speech & Expression

Fernando v ***Sri Lanka Broadcasting Corp,*** [1996] 1 SriLR 157. Consequent upon the sudden stoppage of the "Non-Formal Education Program", a listener who had occasionally participated in previous programs complained of the infringement of his rights. Held, it was not an infringement of his freedom of speech as a mere listener; but was an infringement of his rights as a *participatory* listener.

Held, further, that the petitioner might have complained that the arbitrary stoppage of the program was an infringement of his freedom of thought, as he was thereby denied information, information being the staple food for thought.

Held also that the freedom of speech could be invoked in combination with other freedoms, and that the freedom of speech extends to and includes implied guarantees necessary to make the express guarantees meaningful. Thus it may include the right to obtain and record information (through interviews and tape recordings), where such information was necessary for the exercise of the freedom of speech; "and, arguably, it may even extend to a privilege not to be compelled to disclose sources of information if that privilege is necessary to make the right to information fully meaningful."- of undoubted interest to journalists.

(F) Presidential Immunity

Karunathilaka v ***Dissanayake*** [1999] 1 SriLR 157 (supra). Although no proceedings can be instituted against the President, by virtue of Article 35, yet that immunity was only personal: it gave the President personal immunity, but did not protect the President's acts in proceedings against other persons who relied on such acts in justification of their conduct.

(G) Persons liable for breach of fundamental rights.

Faiz v ***AG***, [1995] 1 SriLR 372, 383: Liability for infringements extends not only to public officers, but even to private individuals:

> *"……the act of a private individual would render him liable, if in the circumstances that act is done with the authority of the executive: such authority transforms an otherwise purely private act into executive or administrative action; such authority may be express or implied from prior or concurrent acts manifesting approval, instigation, connivance, acquiescence , participation, and the like (including inaction in circumstances where there is duty to act); and from subsequent acts which manifest ratification of adoption...responsibility under Article 126 would extend to all situations in which the nexus between the individual and the executive makes it equitable to attribute such responsibility.*
>
> *The executive and the executive officers from whom such authority flows would all be responsible for the infringement. Conversely, when an infringement by an executive officer...is directly and effectively, the consequence of the act of a private individual...such individual is also responsible for the executive or administrative action and the infringement caused thereby..."*

IV. International Obligations

It has been recognized for many years that statutes may be interpreted in the context of Sri Lanka's obligations under International Law and Covenants. Thus in ***Sirisena*** v ***Perera***, [1999] 2 SriLR 97, it was held that an "arrest" includes not only a deprivation of liberty upon suspicion of having committed an offence, but also any arbitrary deprivation of liberty. The ICCPR recognizes that everyone has the right to liberty and security of person, and that no one shall be subject to arbitrary arrest and detention, and any ambiguity in Article 13(1) must be resolved accordingly.

In ***Centre for Policy Alternatives*** v ***Dissanayake,*** recourse was had to Article 25, ICCPR.

Wickremasinghe v ***de Silva***, SC 551/98 SCM 31.8.2001: "Article 7 of the ICESCR recognizes the right to an equal opportunity for everyone to be promoted in his employment to appropriate higher level subject to no considerations other than those of seniority and competence".

Perera v ***UGC***, SC 57/80 1 FRD 103, observed that the opportunity of education must be accessible to all on equal terms, citing Article 13, ICESCR.

In ***Hewage*** v ***UGC***, SC 627/2002 SCM 8.8.2003., reliance was placed on Sri Lanka's obligation to make higher education more accessible, as well as accessible on the basis of merit. So also in ***Farwin*** v ***Wijeyesiri***, SC 536/2002 SCM 12.9.2003, the right to higher education was recognized.

Where a statute was unambiguously inconsistent with international obligations, until recently the trend of the decision was that the statutory provision would prevail. However, it was held in ***Weerawansa*** v ***AG,***[2000] 1 SriLR 387, 409:

"A person deprived of personal liberty has a right of access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.

Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to 'endeavor to foster respect for international law and treaty obligations in dealings among nations'. That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty in involved. The State must afford to them the benefit of the safeguards which international law recognizes."

It was held by the Human Rights Committee established under Article 28 of the ICCPR in ***Victor Ivan*** v ***Sri Lanka*** (Communication No 909/2000, decision dated 27th July 2004) that Sri Lanka had violated Article 14(3)(c) of the ICCPR, even though the Constitution of Sri Lanka did not have any express provisions similar to Article 14(3)(c).

The provisions of such Covenants (and the decisions of such tribunals) must in future be regarded as "law", binding on Sri Lanka under Article 27(15), and also as "law" within the meaning of Article 12(1), and the "protection" thereof must be extended to every person.

Any violation of any provision of those Covenants will therefore amount to a denial of the protection of the law; if it is by executive action, the fundamental rights jurisdiction of the SC can be invoked , and if it is by judicial action, the ordinary jurisdiction of any relevant Court may be invoked.

V. A Note on Victor Ivan v Sri Lanka

(Communication No 909/2000, Decision dated 27th July 2004 of the Human Rights Committee (HRC) established under Article 28 of the International Covenant on Civil and Political Rights (ICCPR))

The recent decision of the HRC gives new life and vigour to human rights in Sri Lanka and indeed, opens up a new dimension to human rights with many implications for future development.

The facts briefly were these. Victor Ivan, a journalist and editor of the "Ravaya" newspaper – which enjoys a reputation for exposing misconduct and corruption – had published two articles, on 13th February 1994 and 19th January 1997, which were alleged to be defamatory of a former Minister and the then Inspector General of Police. The Attorney-General (AG) filed two indictments (dated 26th June 1996 and 31st March 1997) for criminal defamation in the High Court (HC).

Those two indictments had been served on Victor Ivan in January 1998. On 16th February 1998 (presumably within one month of such service) he filed a fundamental rights application in the Supreme Court (SC) claiming that the AG had indiscriminately, arbitrarily and for collateral purposes, without a proper assessment of the facts as required by law, and without regard to the constitutional guarantees given to journalists indicted him – thereby violating his fundamental rights to equality and the equal protection of the law under Article 12(1), to the freedom of speech and expression including publication under Article14 (1)(a), and to the freedom to engage in his lawful profession under Article 14(1)(g).

He prayed that the indictments be quashed. He claimed that those prosecutions were designed to harass him, and that as a result of those prosecutions he had been intimidated, his freedom of expression restricted and the publication of his newspaper restricted.

Victor Ivan's petition to the SC referred to four other indictments. Three of those, filed in 1993,1994 and 1996, had been withdrawn. The fourth had been filed in 1997 and proceedings in the HC were then pending. Nine other persons had complained of criminal defamation against Victor Ivan, but the AG had declined to Institute or sanction proceedings for criminal defamation.

The SC Decision

In the SC (*Victor Ivan v Sarath N.Silva*, [1998] 1 SriLR 340) the two main issues were: whether the SC had the power to review the exercise of the AG's discretion, and, if so, whether a *prima facie* case for review had been established.

(a) Jurisdiction to review

The SC stated that the important question was whether the AG's undoubted discretion to grant sanction to prosecute, or to file an indictment, or to refuse to do so , was absolute, unfettered and unreviewable.

It was held that the constitutional jurisdiction of the SC to grant relief for infringement of fundamental rights by executive or administrative action must necessarily apply to the exercise of any power or discretion conferred on a public officer by an Act of Parliament in the absence of a constitutionally valid derogation from that jurisdiction; that the AG's discretionary power was neither absolute nor unfettered, but was similar to other powers vested by law in public functionaries; that such powers are held in trust for the public, to be exercised for the purposes for which they have been conferred, and not otherwise' and that when such power or discretion is exercised in violation of a fundamental right, such exercise can be reviewed in a fundamental rights application.

The SC further observed that the pendency of proceedings in another court (the HC, in this instance) did not bar the exercise of the constitutional jurisdiction of the SC.

(b) Was there a case for review?

The SC made two general observations. Dealing with a submission that a journalist or a newspaper should be considered differently to others, the Court did not accept that the AG's decision to indict a newspaper editor must be scrutinized with any greater strictness than a similar decision to indict any other citizen:

> *"....I do not think that a newspaper enjoys any greater privilege of speech, expression and publication, or immunity from prosecution, than the ordinary citizen. The freedom of the press is not a distinct fundamental right, but is part of the freedom of speech and expression, including publication, which Article 14(1)(a) has entrenched for everyone alike. It surely does allow the pen of the journalist to be used as a*

mighty sword to rip open the facades which hide misconduct and corruption, but it is a two-edged weapon which he must wield with care not to wound the innocent while exposing the guilty."

The second observation was that a prosecution by the State relieved the victim of the expenses of litigation, as well as the risk of an action for malicious prosecution, if unsuccessful; and that the State should only undertake the burden of a prosecution where there was:

"...some distinct public interest and benefit, as, for instance, where the alleged defamatory statement is likely to disrupt racial or religious harmony, or to prejudice Sri Lanka's international relations, or to erode public confidence in the maintenance of law and order or in the administration of justice."

For those reasons the SC refused leave to proceed. Victor Ivan then complained to the HRC in Geneva on 17th December 1999 (Communication No.909/2000).

The Claims

In his complaint to the HRC, Victor Ivan alleged that –

(a) by transmitting indictments for criminal defamation to the HC, the AG failed properly to exercise his discretion and therefore acted arbitrarily, thereby violating his freedom of expression under Article 19, ICCPR, as well as his right to equality and equal protection guaranteed by Article 26'

(b) his rights under Article 2(3), ICCPR, were violated because the SC refused leave to proceed, thereby depriving him of an effective remedy; and

(c) Article 3 had been violated, but he did not explain how.

It must be noted that no violation of Article 14(3)(c) was alleged, although the HRC later observed that the complaint "appears to raise issues under Article 14(3)(c)".

The HRC Decision

The HRC noted that at the time the complaint was submitted, three indictments were pending before the HC – namely, the two indictments impugned in the SC, as well as a third indictment dated 30th September 1997; that at the time of the final submissions to the HRC, these were still pending; and that on 25th June 2004, just one month before the HRC Decision, Victor Ivan's Counsel informed the HRC that the outstanding indictments had been withdrawn.

(a) Procedural Aspects

(i) The state contended that the complaint was inadmissible because it related to facts that had occurred before the Optional Protocol entered into force for Sri Lanka (i.e. 3rd January 1998), and because Sri Lanka had entered a reservation recognizing the

competence of the HRC to consider only violations alleged to be the consequence of acts, omissions, developments or events that occurred after 3rd January 1998. Since the impugned indictments had been issued before that date, it was argued that the claims were covered by the reservation, and were therefore inadmissible.

The HRC rejected that contention, holding that the alleged violations had occurred not only at the time the indictment were issued but were continuing violations so long as there had not been a decision by a court acting on the indictments. "The consequences of the indictments for [Victor Ivan] continued, and indeed constituted new alleged violations so long as the indictments remained in effect."

It might have well have been considered that the issue of the indictments was only an imminent infringement, and that it was the service of the indictments on Victor Ivan on or after 16th January 1998 that constituted the actual and primary violation – which therefore occurred after the Optional Protocol, and which was the basis of Victor Ivan's application to the SC.

However, the HRC did not proceed on that basis and chose instead to deal with the "new alleged violations" which were the consequence of the indictments. It must be noted that the lapse of time between the service of the indictments and the application to the SC probably would not have exceeded one month, and accordingly could not have constituted "undue delay" within the meaning of Article 14(3)(c), ICCPR. Indeed, three months had not elapsed even when the SC gave its decision.

(ii) The state also argued that Victor Ivan had not exhausted all available domestic remedies (including representations to the AG's, the Ombudsman and the National Human Rights Commission), to which Victor Ivan replied that these were all appointed by the President, and in any event had no powers of enforcement.

The HRC recalled that an application to the SC – being the highest Court – constituted the final domestic judicial remedy, and the State had not demonstrated an effective remedy.

(b) The Merits

(i) Article 3. The HRC decided that this claim had not been substantiated , and was inadmissible.

(ii) Article 14(3)(c). The HRC held that:

"...according to the material submitted by the parties, three indictments were served on [Victor Ivan] on 26th June 1996, 31st March 1997, and 30th September 1997 respectively. At the time of the final submissions made by the parties, none of these [three] indictments had been finally adjudicated by the High Court. The indictments were thus pending for a period of several years from the entry into force of the Optional Protocol. In the absence of any explanation by the State party that would justify the procedural delays and although [Victor Ivan] has not raised such a claim in his initial communication, the

Committee, consistent with its previous jurisprudence , is of the opinion that the proceedings have been unreasonably prolonged, and are therefore in violation of Article 14, paragraph 3(c), of the Covenant."

(It must be pointed out that "served" is an error; the dates mentioned are the dates of the indictments (see para 2.2 of the Decision), which were served much later).

(iii) Article 19. The HRC ruled that all three indictments:

"...related to articles in which he allegedly defamed high State party officials and are directly attributed to the exercise of his profession of journalist and, therefore to the exercise of his right of freedom of expression. Having regard to the nature of [Victor Ivan's] profession and in the circumstances of the present case, including the fact that previous indictments against [Victor Ivan] were either withdrawn or discontinued, the Committee considered that to keep pending, in violation of Article 14, paragraph 3(c), the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left [Victor Ivan] in a situation of uncertainty and intimidation, despite [Victor Ivan's] efforts to have them terminated, and thus has a chilling effect which unduly restricted [Victor Ivan's] exercise of his right to freedom of expression. The Committee concludes that the facts before it reveal a violation of Article 19 of the Covenant, read together with Article 2(3)."

(iv) In view of the above conclusions, the HRC found it unnecessary to consider Victor Ivan's remaining claims.

The Order

The HRC made the following order:

(i) Sri Lanka is under an obligation to provide Victor Ivan with an effective remedy including appropriate compensation.

(ii) Sri Lanka is under no obligation to prevent similar violations in future.

(iii) Since, pursuant to Article 2, ICCPR, Sri Lanka has undertaken "to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views."

(iv) Sri Lanka is requested to publish the HRC's Views.

Implications of the HRC Decision

(a) Procedural and Admissibility

(i) The HRC took into consideration a new cause of action, namely the third indictment, although ti could have been, but was not, taken up before the SC. Besides, it held that the three indictments constituted a violation of Article 14(3)(c) by reason of undue delay, although that was a new point not taken up before the SC or even in Victor Ivan's complaint to the HRC as late as December 1999. Indeed, the point could not have been taken up in the SC because the lapse of time was only one month after service of the indictments, when the SC application was filed (and only three months when the SC refused leave). Exhaustion of remedies seems no longer to be a strict requirement.

(ii) The HRC entertained and upheld a claim in respect of a right not expressly recognized in the Sri Lankan Constitution, on the basis that Article 14(3)(c) was nevertheless binding on Sri Lanka. It did not proceed on the alternative basis that undue delay was impliedly forbidden either by article 12(1) as being an arbitrary denial of the protection of the law, or by Article 13(3) as being denial of a fair trial.

(iii) The delay in holding and concluding the trial as, *prima facie*, the responsibility of the HC, and was therefore judicial action, regardless of any procrastination by the prosecution. The HRC thus gave relief (which the SC could not have, in a fundamental rights application) in respect of judicial delay. Petitioners may in future seek relief not only in respect of executive action, but also in respect of judicial action, and even legislative action.

(b) Merits: Facts and Law

(i) A delay of about 6 ½ years (if the date of service of the indictments was the relevant criterion, or about 8 years if the dates of the alleged offences were relevant) is *per se* undue delay in any criminal trial, and is violation of Article 14(30(c), ICCPR. It would seem that in future criminal trials must be concluded within the above time-frames.

(ii) The prolonged pendency of criminal defamation charges, in relation to editors and journalists, affects their profession, and constitutes a violation of freedom of expression as well. On parity of reasoning, where other criminal trials against pubic officers (or where accused persons are on remand) are unduly prolonged, thereby affecting their employment , that too would constitute a violation of Article 14(1)(g).This confirms the decision in ***Jayasinghe*** v ***AG,*** [1994] 2 SriLR 74, 86, that an employee, interdicted without pay, is entitled to have disciplinary proceedings concluded without inordinate delay.

(C) Future Issues

(i) The HRC decision means that the provisions of International Covenants, such as the ICCPR, impose legal obligations on Sri Lanka, confirming ***Weerawansa*** v ***AG***, [2000] 1 SriLR 387,409:

"A person deprived of personal liberty hs right to access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.

Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to 'endeavour to foster respect for international law and treaty obligations in dealings among nations'. That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty in involved. The State must afford to them the benefit of the safeguards which international law recognises."

The provisions of such covenants must in future be regarded as "law", binding on Sri Lanka under Article 27(15), and also as "protectors" of the law under Article 12(1). Any violation of any provision of those covenants will therefore amount to a denial of the protection of the law; if it is by executive action, the fundamental rights jurisdiction of the SC can be invoked, and if it is by judicial action, the ordinary jurisdiction of any relevant court may be invoked.

(ii) By Article 2, each State party to the ICCPR undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized within the ICCPR, and to ensure an effective remedy to any person whose rights are violated. Such rights even if not expressly incorporated in Chapter III of the Constitution, can be considered nevertheless to be fundamental rights. That view is supported by Article 3 which does not purport to vest Sovereignty in the People, or to confer rights on the People. Article 3 instead proceeds on the basis that Sovereignty is already (and independently of the Constitution) vested in the People: accordingly, the People already possess certain rights. Article 3 refers to fundamental rights without any restriction or qualification, unlike Article 4(d) which refers to the narrower category of fundamental rights which are "by the Constitution declared and recognized". Therefore "Sovereignty" does not include other rights besides those specifically enumerated, and among them are the ICCPR (and ICESCR) rights. This is no different to the position under the Ninth and Tenth Amendments to the US Constitution, which recognize that the enumeration in the Constitution of certain rights must not be construed to deny that the People do have other rights as well.

(iii) Article 12(1) would extend to decisions of the HRC (and other international tribunals) as well. Accordingly, Victor Ivan (as well as others) would now be entitled to the "protection" of the HRC Decision – non-compliance (e.g. by the failure to give reasonable and effective relief, or to prevent similar delays in future) would amount to a new, and actionable, denial of the protection of the law.

(iv) Under Article 14(3)(c), ICCPR, as well as Articles 12(1) and 13(3) of the Constitution, the failure to conclude criminal trials expeditiously will now give rise to claims of fundamental rights violations.

PROSECUTORIAL DISCRETION AND FAIR TRIAL

Noel Dias and Roger Gamble[♠]

> *Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.*[1]

The principle (or right[2]) of a fair trial is a core precept that permeates any effective legal system. Without it, the proper administration of justice is impossible and many substantive rights are rendered nugatory. The principle has shaped some of our grander ideas—judicial independence and impartiality and the presumption of innocence—and is responsible for many of our procedural and evidentiary rules.

Fairness itself is an almost infinitely flexible concept, capable of application in a wide variety of situations where the conduct of one of the actors at the pre-trial or trial stage can be said to make the judicial process unfair. The principle is made the richer and more complex because it must be viewed through the eyes not only of an accused but also take into account the interests of the victim as well as the broader public interest.

It is a right that is recognised at both national and international levels. At a national level it may be enshrined in a Constitution or in a Bill of Rights; it may be a statutory creation with an overarching application; or, as in Australia, it may be more in the nature of a generic 'principle' recognised at common law and given meaning on a case by case basis by courts recognising that 'the processes and procedures of the courts which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice and unfairness'.[3]

In international law the right has been incorporated in a number of Conventions or Covenants[4] since it was first recognised by the UN Declaration of Human Rights as a significant human right.[5]

At both national and international level the concept of a 'fair trial' has been given content and meaning. Along with equality, impartiality, independence and transparency, one of the more subtle

---

♠ Noel Dias is a senior lecturer, Faculty of Law, University of Colombo, Roger Gamble is a senior Lecturer, School of Law, Deakin University, Melbourne, Australia

[1] Vice Chancellor Knight Bruce in *Pearse v Pearse* (1846) LR Ch App 361, 368 (cited in Spigelman J 'The truth can cost too much: the principle of a fair trial' (2004) 78 ALJ 29)

[2] In one sense, 'fair trial' is more than a 'right'. It is so fundamental to justice that to describe it as a 'right' (in the adversarial sense) does not honour its true importance. In her essay, 'Human Personality' Simone Weil distinguishes between a person saying 'what you are doing to me is not just' and saying, 'I have a right to…' or 'you have no right to...' She uses the example of a farmer saying to a buyer who wants his eggs cheaply, 'I have the right to keep my eggs if I don't get a good enough price'. 'But', she goes on, 'if a young girl is being forced into a brothel she will not talk about her rights. In such a situation the word would sound ludicrously inadequate'. A 'fair trial' is such a fundamental requirement of justice and a just society that to call it a 'right' also seems inadequate. The idea is developed in Gaita R, *A Common Humanity*, Text Publishing, 1999, ch 5.

[3] *Walton v Gardener* (1993) 177 CLR 378, 393. Or as Deane J has said … '..(I)dentification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment': *Jago v District Court (NSW)* (1989) 168 CLR 23, 57

[4] The International Covenant on Civil and Political Rights (hereafter ICCPR) and the European Convention on Human Rights (hereafter ECHR) are two prominent examples. Both (the Covenant (Art 14) and the Convention (Art 6)) refer to the right to a fair trial and elaborate on what this right means.

[5] GA Res 217 (III)(A) (Dec 10 1948)

but important ideas is that the proper administration of justice demands that a trial proceed without 'undue delay' or within 'a reasonable time'.[6] In other words, efficiency is a criterion to be taken seriously in all parts of the trial process, criminal and civil, including any appellate phase. In a criminal trial, the prosecutor is responsible for the running of the trial and it is he or she who may be called upon to exercise discretion at any stage of the proceedings. This discretion must be exercised after considering a range of competing interests, including that 'the public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly by state and citizen alike'.[7] This merely emphasises the point—the prosecutor *has* discretion powers and cannot rely on legal dogma that says that the truth must be revealed regardless or that the guilty be punished at all costs.

This article focuses on the national and international norms that govern the exercise of prosecutorial discretion and compares the position in Sri Lanka with the position in England and Australia, proffering some suggestions for reform in Sri Lanka in order that its trial processes may be fairer and more equitable for all.

I. INTERNATIONAL NORMS

General obligations of the prosecutor

The normative position is that the decision to initiate proceedings, the method by which they are to be commenced and the extent they are to be pursued at trial or on appeal is a matter for prosecutorial discretion. For the justice system to work fairly for all, this discretion must be used with absolute impartiality. 'Since he represents the state, the community at large and the interests of justice in general, the task of the prosecutor is more comprehensive and demanding than that of the defending practitioner'.[8] The importance of proper prosecutorial discretion in providing fair trial was asserted in a recent decision heard by the Human Rights Committee (HRC)[9] under the ICCPR, *Victor Ivan v Sri Lanka.*[10]

Unreasonable Delay

Many 'fair trial' cases brought to the HRC involve complaints of a breach of the undue delay provision in Art 14(3)(c) or Article 6(1). The determination of the question whether there has been an undue delay depends on the circumstances of each case.

In *Victor Ivan,* the HRC noted that three indictments had been served on a journalist (who had allegedly committed criminal libel of a Government official) in June 1996, March 1997 and September 1997. At the time of the final submissions made by the parties, none of these indictments

---

[6] see ICCPR Art 14(3)(c) and ECHR Art 6(1)

[7] *Moevao v Dept of Labour* [1980] 1 NZLR 464, 481 (CA) (per Richardson J)

[8] Jayawickrama N., The Judicial Application of Human Rights Law (Cambridge University Press 2002) 502, citing *Smyth v Ushewakunze*, Supreme Ct of Zimbabwe [1998] 4 LRC 120. In *Smyth* the court refused to allow the prosecutor to proceed because his behaviour had fallen short of the customary standards of fairness and detachment demanded of a prosecutor.

[9] The Optional Protocol to the ICCPR enables a state to recognise the competence of the HRC to receive and claims of violations of the rights set out in the ICCPR. A case may be brought to the HRC only after all domestic options have been exhausted.

[10] [Communication No. 909/2000: Sri Lanka. 26/08/2004. CCPR/C/81/D/909/2000.

had been finally adjudicated by the High Court. The indictments were thus pending over a period of several years since the entry into force of the Optional Protocol.

In the absence of any explanation by the State party that would justify the procedural delays and although the author had not raised such a claim in his initial communication, the HRC decided that the proceedings had been unreasonably prolonged, and were therefore in violation of Art 14(3)(c) of the ICCPR. The HRC considered that to keep open the indictments for several years the journalist in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression. The Committee concludes that the facts before it reveal a violation of Art 19.[11]

Many other cases that have come before the HRC involve the same question. The results indicate that each case must be decided on its own merits.[12]

Discontinuance of Proceedings and the Presumption of Innocence

The right of the prosecution to enter a *nolle prosequi* and of the court to enter a discharge (a non-suit not amounting to an acquittal) is acceptable both under the ECHR and the ICCPR and general International law. However, this discretion is not unlimited. The permissible discontinuance of proceedings are: (1) discontinuance of relatively insignificant charges in view of graver charges to be filed on the same or similar facts; or (2) discontinuance on account of the death of the accused or on grounds of limitation of time.

Permissible discontinuance of proceedings does not make a State liable for compensation, reimbursement of the necessary expenses of the accused and costs of proceedings on the basis of Art. 6 (2) which guarantees to the accused the right to be presumed innocent.

The position taken by Strasbourg is that discontinuation orders which amount to "disguised convictions" are outlawed by Art.6 (2). The first of such cases in which a disguised conviction was manifested was in *Minelli v Switzerland.* [13]

In this case, the applicant, a journalist, published an article containing accusations of fraud against certain persons. The latter instituted a private action against him for criminal defamation. The proceedings were, however, terminated on the ground that the statutory limitation period had expired. According to the Zurich Code of Criminal Procedure, the losing party (the plaintiffs) had in principle to bear the cost.

The domestic court, however, directed that the applicant should bear two thirds of the legal costs. The court considered that a departure from the statutory provisions was permitted on the footing that had it not been for the "limitation of time" requirement, the applicant would have been found guilty. The

---

[11] Art 19(1) states 'Everyone shall have the right to hold opinions without interference'. Art 19(2) states, 'Everyone shall have the right to freedom of expression…'

[12] See *Hill and Hill v Spain* HRC (526/93) an author's comlaint of a violation og 14(3)(c) was upheld after aninadequately explained delay of three years between arrest and final appeal. Similarly in *Sextus v Trinidad* HRC (818/98). Compare however *Wolf v Panama* HRC (289/88) where a delay of four and a half years between arrest and verdict in a fraud did not breach Art 14(3)(c) because of the complexity of the case.

applicant complained that the aforementioned order amounted to a punishment on suspicion in violation of Art 6 (2) of the ECHR. Both Convention organs upheld his claim. The Court reasoned as follows: the presumption of innocence would be violated if, without the accused having previously been proved guilty according to law and notably without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflected the opinion that he was guilty.

There is ample jurisprudence in Strasbourg to the effect that for the purpose of a fair trial securing a safety valve against the risk of "convictions and punishments in disguise" is essential.

The Powers of the Prosecutor and the Rights of an Accused at the Pre-Trial Stage.

The prosecutor performs a function that is required by public policy: to punish the violators of law and free the innocent. In order to do this he must be endowed with sufficient powers to gather evidence to formulate a valid charge and to procure a conviction according to the recognised criminal procedure of the land.

The safeguards in Art. 6 of the ECHR refer specifically to a fair trial; yet they apply to the stages that both precede and follow it. It is contended that under the ICCPR fair trial guarantees also apply at the pre-trial stage.[14] Certainly, the European Court has held that Art. 6 applies to criminal investigations carried out by the police.

In *Delcourt v Belgium,*[15] the issue of the proper use of prosecutorial discretion arose. In *Delcourt*, the applicant, a Belgian national, was convicted and sentenced for forgery and fraud. On appeal, his sentence was increased. Subsequently, the Court of Cassation, after deliberating in private, dismissed the appeal. The issue that was to be determined by the European Commission and the Court of Human Rights was whether the Belgian law, which allows the *Procureur General* to be present at the Court of Cassation in private deliberation of the Court, violates the requirement of Art 6(1) that the tribunal be 'independent and impartial'. In Belgium, the *Procureur General*'s department acts at two levels: first, at the level of original and appeal courts; second, at the level of the Court of Cassation. In the first case, it acts as the investigator and prosecutor exercising prosecutorial discretion. Before the Court of Cassation, it acts in an advisory capacity and sees whether the judges uphold and observe the law.

The European Court of Human Rights held that long standing practice and records show that the presence of the *Procureur General* in the Court of Cassation was not detrimental to the rights of the accused. Indeed the Court noted that the *Procureur* sometimes makes submissions in favour of the accused as well.

A conflict of interest issue was raised in *Tierce et al. v San Marino*[16] where the person who acted as the prosecutor (*Commissario della Legge)* for two years later became the judge in the same case. The European Court found that merging prosecutorial discretion with judicial decision-making is bound to

---

[13] *Minelli v Switzerland* (1983) 5 EHRR 554. See Stavros, S., The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights, Nijhoff, 1993, 118.
[Human Rights Committee *Reports of Libya, USSR and Finland*, A/33/44 and A/41/40]. In *Imbroscia v Switzerland* 17 EHRR 441.

[15] *Delcourt v Belgium* [(1970) 1 EHRR 355

[16] (2002) 34 EHRR 25

endanger a fair trial.

Safeguards against Coercive Measures

Presumption of innocence at the pre-trial stage is not expressly provided for either in the ECHR or in the ICCPR.[17] Nonetheless, human dignity, which is the conceptual basis for human rights, demands that suspects and the accused must be treated with dignity and should not be subjected to unnecessary prejudicial treatment.

Persons who are suspects cannot claim immunity from all coercive measures. Legitimate coercive measures at this stage would consist of interrogations, search and seizure, arrest, detention, blood and breathalyser tests and the like. Of course, torture and degrading and inhuman treatment to extract information would be anathema at all stages of the proceedings.

In *Dweer*[18] the applicant's establishment was closed, pending criminal proceedings for selling goods above the controlled price. The Commission found that there was no violation of Art 6 (2) since it prevented a possibly continuing offence and it did not affect the liberty or honour of the 'person' as such. The Commission Report, while agreeing with the Belgian government, nonetheless observed that the State could have refrained from closure once the suspect acknowledged his mistake and immediately agreed to reduce the price and gave an undertaking to comply with the applicable legislation. It is submitted that this harsh response would have been found to be in breach of Art 6 (2) if a proper balance between the public interest and the applicant's right were to be maintained.

From the Strasbourg jurisprudence, one could glean two types of excesses in the use of prosecutorial discretion. The first is a declaration by a public official that somebody is responsible for criminal acts before adjudication by a competent court. This would amount to a violation of Art 6 (2).[19] Nonetheless, the authorities are not precluded from informing the public about criminal investigations and their progress by disclosing information about the existence of a suspicion of arrests and confessions or about the dangerous character of the accused.[20] Secondly, statements that can lead to a misinterpretation of a suspect's innocence resulting in influencing judges and witnesses could fall foul of Art 6 (2) of the ECHR.

II. PROSECUTORIAL DISCRETION IN SRI LANKA, ENGLAND AND AUSTRALIA.

In Sri Lanka, Australia and, of course, England, criminal procedure is based on the common law adversarial model. Thus the police, the Attorney General and, at least in Australia and England, the Director of Public Prosecutions are generally speaking, the bodies charged with the responsibility of deciding whether to initiate proceedings and the extent to which they will be pursued or discontinued[21]

---

[17] Article 6 (2) of the ECHR guarantees the right of an individual to be presumed innocent until proven guilty

[18] *Dweer v Belgium* Series A, no.35 (1980): Series B, no.33 (1980) for the *Commission Report*.

[19] *Krause v Switzerland,* App.no.7986/77, 13 DR 73 (1978)

[20] *App. No.9077/80 v Austria*

[21] At common law generally, any citizen may bring a charge against another person for the benefit of the public at large. This rule is a legacy from the pre-police period when law enforcement was a matter for the citizenry.

Prosecutorial Discretion in Sri Lanka

The first Schedule of the Code of Criminal Procedure, No. 15 of 1979 Act (hereafter called 1979 Act) lists indictable and non-indictable offences. Generally, the Police exercise its discretion over non-indictable offences. These are triable summarily by the Magistrate, in pursuance of Chapter XVI of the 1979 Act. As regards indictable offences, after a Preliminary Inquiry conducted in pursuance of Chapter XV of the 1979 Act, and if the Magistrate finds that a *prima facie* case has been established, then such a case is committed for trial by the High Court.

In any case, the Attorney-General is the final arbiter in all prosecutions, including private prosecutions. Article 191(2) of the 1979 Act gives the Attorney General power to appear for the complainant (even in the case of private complaints) and to secure an acquittal by withdrawing the prosecution or by refusing to lead evidence (*nolle prosequi*) without the consent of the complainant. The courts have held that this power is given to the Attorney General to procure the administration of justice.

Thus, a *mala fide* determination of the Attorney General will be invalidated by the Court.[22] Nonetheless, there seems to have been violations of this salutary norm. In a controversial case pertaining to the alleged torture and murder of *Richard de Soyza* by the Police, his mother instituted private proceedings against the Police since she alleged the Police were trying to suppress the case.[23] The Attorney-General took on this private plaint and later entered a *nolle prosequi*. This is an obvious case of abuse of prosecutorial discretion.

In a different context, the petitioner challenged the discretion of the Attorney General in *Victor Ivan v Sarath N. Silva,*[24] a fundamental human rights case. Even though the Supreme Court asserted that the discretion of the Attorney-General in prosecution is reviewable, it did nothing about the injustice perpetrated upon the accused. This and several cases against him on charges of criminal defamation were subjects for determination by the Human Rights Committee[25].

Prosecutorial Discretion in England and Australia

Sir Hartley Shawcross QC, then Attorney General, summed up the attitude towards prosecutorial discretion when he said,[26]

> 'It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ...prosecute 'whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest'.

That sentiment is still alive today. Although the structural separation of the judicial power is the

---

[22] *AG v Sunderalingam,* (1971) 74 NLR 527

[23] See, Fair Trial, Symposium by Asia Human Rights Commission, Hong Kong, .247.

[24] *Victor Ivan v Sarath N. Silva,* (1998) 1 Sri LR 340: Supreme Court Application No. 89/98

[25] See above note 10.

[26] In a speech to the House of Commons in England on Jan 29, 1951

strongest protection, England and Australia have moved to create a (relatively) separate and independent prosecutorial arm that can operate without interference from government.

In England, the *Prosecution of Offences Act* 1985 deals with the powers of the Attorney-General exercised through the Director of Public Prosecutions (DPP) with regard to prosecutions.[27] In England there is a Code for Crown Prosecutors guiding the members of the Crown Prosecutor Service (CPS), which is under the supervision of the DPP. The Criminal Prosecution Service Code of 2000 provides for two tests to be applied in determining whether a case should be prosecuted or not; the first is the prospect of a successful conviction based on the available evidence; and the second is the public interest.[28]

Australia has a similar system with a similar policy objective.[29] Briefly, at both Federal and State level, virtually all prosecutions of indictable offences are conducted independently by or on behalf of the Director of Public Prosecutions (C'th)[30] or Office of Public Prosecutions (State)[31] with the Attorney General of the Commonwealth or the State as the responsible Minister. The Commonwealth Act allows for consultation between the Attorney General and the DPP and for the publication of guidelines both in relation to the prosecution of offences generally and in respect of particular cases.

The Commonwealth DPP has published guidelines in *Prosecution Policy of the Commonwealth*[32] and all State Directors and senior prosecutors have adopted guidelines based on the Commonwealth guidelines.[33] The guidelines state that the initial consideration in the exercise of the discretion is whether the evidence is sufficient to justify the institution or discontinuance of a prosecution. 'A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence..has been committed.'[34] Further the DPP must consider whether, in the light of the provable facts and the whole surrounding circumstances, the public interest requires a prosecution to be pursued. Although the factors that need to be considered in determining whether the public interest requires a prosecution will vary from case to case; the Guidelines list twenty relevant criteria.[35]

In England, the Attorney-General remains the ultimate authority over prosecutions. In England, under section 6(2) of the *Prosecutions of Offences Act*, he can enter a *nolle prosequi* in a private plaint. Nonetheless, he is susceptible to judicial review, which is very sparingly used.[36] The power to discontinue private prosecutions was the subject of judicial review. In this case, the police officers involved in the Hillsborough disaster failed to overturn a CPS decision not to discontinue a private

---

[27] Burton, 'Reviewing Crown Prosecution Service Decisions not to Prosecute' (2001) *Crim. LR* 374 ,.377

[28] Criminal Prosecution Service Code of 2000, para.4.1

[29] Indeed the quote from Sir Hartley Shawcross (see note 29 above) is included in the DPP's *Prosecution Policy of the Commonwealth*

[30] *Public Prosecutions Act* 1994 (C'th) s10

[31] *Public Prosecutions Act* 1994 (Vic) s12 & 23(6)

[32] Commonwealth DPP, *Prosecution Policy of the Commonwealth* (2nd ed) Canberra, 1990. The Guidelines can be found at www.legalonline.vic.gov.au

[33] The Guidelines contain, *inter* alia, a comprehensive statement of the criteria governing the decision to prosecute.

[34] Criteria 3 *Prosecutorial Guidelines Appendix A.*

[35] To emphasise that the decision whether or not to prosecute is one that must be taken in the interests of the victim, the suspected offender and the community at large the Office of Public Prosecutions in Victoria must take into account the interests of the victims of crime: *Public Prosecutions Act* s24

prosecution against the police officers. Laws LJ approved the CPS approach of applying an evidential test of 'no case to answer' to private prosecutions rather than the 'realistic prospect of conviction' test. There is a possibility of a civil action for damages as an alternative to failed private prosecutions. But this has the disadvantage that damages do not carry the same disapprobation as a criminal conviction.

In England, there has been considerable agitation over prosecutorial discretion in 'death custody' cases. Following upon two deaths of two ethnic minority suspects (Lapite and O'Brien) while in police and prison custody, the Honorable Gerard Butler was appointed as the Commissioner of Inquiry. He was critical of the CPS inquiry process though he did not find a bias in favour of or against the police or any section of the community.

The most recent of death in custody cases was that of Mr. Manning, a black person who died of respiratory impairment resulting in asphyxia following a struggle with prison officers. It was unclear whether the victim was properly restrained as claimed by the officers or held in a forbidden neck-lock as testified by some prisoners. Based on an inquiry of the CPS, the DPP decided not to prosecute. The High Court reviewed that decision and quashed it. This decision requires the CPS to give reasons for decisions not to prosecute at least in certain cases where there is a finding by a public body that in effect a crime has been committed.

Reviewing Prosecutorial Discretion

It must not be imagined that a DPP (or like body) once created is a Frankenstein monster that cannot be made accountable (and therefore potentially inimical to the very ideal it was set up to achieve). In England, a decision not to prosecute is subject to review by the Attorney General, if it was reached by the application of an unlawful policy (ie in contravention of the Code) or by judicial review if the decisions are so perverse that no reasonable prosecutor could have made them. However, this right of review is used sparingly.[37]

In the midst of adverse public opinion regarding the decisions of the CPS not to prosecute the law enforcement officers following deaths in police and custody cases (*La Pitte* and *O'Brien*) his Honour Gerald Butler, QC., was appointed as the inquirer.[38] Though Butler was critical of the decision-making process in the CPS, which involved unnecessary duplication of work and disclaiming responsibility for decision-making, he did not find any bias on the basis of ethnicity. On the other hand, Sir William Macpherson's finding was that there were deep feelings of distrust expressed by ethnic minorities regarding death in custody cases.

Furthermore, he observed that during the period of April 1998-March 1999, twelve out of sixty-seven deaths (18 per cent) were those of people from the ethnic minorities. The Amnesty International Report documents criticisms of the current CPS system of investigation and prosecution.[39] There is sufficient evidence to warrant that the present CPS system needs reforms so as to ensure a more independent procedure. Some of the most urgent reforms are: firstly, to require the CPS to give reasons for the decision not to prosecute; secondly, to lay down clearer criteria for identifying public

---

[36] *R v DPP ex parte C*, [1995] Cr. App. R. 136]. In *R v Duken field*, [1999] 2 *All ER.* 873.
[37] *R v Metropolitan Police Commissioner, ex parte Blackburn, (1968) QB 118*
[38] Burton, see above note 25.
[39] Amnesty International Report (2000) on *Deaths in Police Custody Cases*

interest; and thirdly, to allow courts to take up the judicial review of prosecutorial discretion more liberally than now.

In Victoria, there is also a mechanism in place to review the decisions of the DPP. The original legislation of 1982 was repealed and replaced by the *Public Prosecutions Act* 1994. This Act created an Office of Public Prosecutions and placed checks on the exercise of prosecutorial discretion by the DPP. The Act requires that a Director's Committee[40] be formed to advise the Director in relation to a range of 'special decisions'[41] including a decision to present a person for trial despite discharge at a committal; a decision to terminate proceedings by entering a *nolle prosequi* and a decision to present a person for trial without a committal.

In comparison, the Sri Lanka law has not been subject to such scrutiny in matters governing prosecutorial discretion of the Attorney-General. The recent cases that have been presented to the Human Rights Committee are only the tip of the iceberg.

There is urgent need for an enquiry to determine whether the appointment of an Office of the DPP, similar to that which has been established in Australia and England, would advance the principle of a fair trial in Sri Lanka. We believe it would. As occurs in England and Australia, the AG must retain overriding political responsibility for the administration of justice. The DPP would be answerable to the AG for the general performance of his or her statutory functions but his or her prosecutorial discretion would be exercised without political interference or, as importantly, the perception of interference.

---

[40] *Public Prosecutions Act* 1994 (Vic s23

[41] *Public Prosecutions Act* 1994 (Vic) s3

PUBLIC ACCOUNTABILITY OF THE ATTORNEY GENERAL – TO WHAT EXTENT SHOULD THE EXERCISE OF HIS STATUTORY POWERS BE REVIEWED BY COURT?

Kishali Pinto-Jayawardena♦

The public accountability of the office of the Attorney General is undoubtedly a matter of great constitutional principle. As remarked by Lord Denning MR;

> *" ...To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago "Be you never so high, the law is above you."*[1]

As far back as in 1969, commenting on the nature of the English Attorney General, it was perceptively observed that;

> *" the basic requirement of our constitutional arrangements are that however much of a political animal he may be when dealing with political matters, he must not allow political considerations to affect his actions in those matters in which he has to act impartially and even in a quasi-judicial way"*[2]

The "hybrid" nature of the chief law officer of the state in accommodating these qualities of judicial detachment and political partisanship has been the subject of much discussion in England. The discussion necessarily touches the fundamental issue of the independence of the office of the Attorney General and as to whether the Attorney General should wield an absolute discretion in his or her decision making, the nature of which cannot be reviewed by the courts.

This paper will examine some issues arising from this discussion within the framework of the constitutional status and the public eminence accorded to the office. The study will be with reference to debates focussing on similar questions in the legal systems of the United Kingdom and Israel.

1. The Evolution of the Office of The Attorney General of Sri Lanka

The Attorney General is vested with a special duty to assist the Court to reach the correct decision after balancing the rights of the State and the public interest. The function of an officer of the Attorney General's Department is thus different from members of the unofficial Bar.

> *"A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. Crown Counsel is a representative of the State; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind or try to*

♦ LL.B. (Hons), Attorney at Law; Deputy Director and head, Legal Unit, Law and Society Trust; Editorial (Legal) Consultant/Columnist, *The Sunday Times,* Colombo; Legal Consultant, Asian Human Rights Commission, Hong Kong. This paper is part of a wider discussion paper on "*'Justicising' the Law; Public Accountability of the Sri Lankan Legal Profession During the past Fifty Years*" written for a publication marking Fifty Years of Law, Justice and Governance in Sri Lanka by the Law and Society Trust in 2001. This portion of the paper has been updated for the purposes of publication in the Review.

[1] see the celebrated decision of the Court of Appeal in *Gouriet Vs Union of Post Office Workers* [1977] 1 AER, 696

[2] Sir Elwyn Jones, "The Office of the Attorney General", 1969, C.L.J. 50

shut out any legal evidence that would be important to the interest of the person accused. It is not his duty to obtain a conviction by all means but simply to lay before the jury the whole of the facts which comprise the case and to make these perfectly intelligible and to see that the jury are instructed with regard to the law and are able to apply the law to the facts.[3]

The precise nature of the office of the Attorney General in Sri Lanka has come under scrutiny in two judgements of the Court of Appeal[4] and of the Supreme Court[5] in 1981 in the now well known cases of Land Reform Commission Vs Grand Central Limited, which analysed the right of the Attorney General and State Counsel to appear in court for litigants in their private capacity and concluded that there was no such right.

In the Supreme Court, Samarakoon CJ, delivering the judgement, put the matter very bluntly when he pointed out that the Attorney -General is the Chief Legal Officer and adviser to the State and thereby to the sovereign and is in that sense an officer of the public. He is the Leader of the Bar and the highest Legal Officer of the State and as such, has a duty to the Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. That image will certainly be tarnished if he takes part in private litigation arising out of private disputes. No Attorney-General can serve both the State and private litigant.

Thus;

"(the Attorney General) cannot shed his office as and when the circumstances suit him. The law does not permit the Attorney General to play Jekyll and Hyde. He had taken his oath of office as required by the provisions of the Constitution. Once an Attorney-General, always an Attorney-General until he relinquishes office" (per Samarakoon C.J. in the Supreme Court)

The Attorney General (as one of the very few, if not the only one of officers appointed under the Constitution, who in the exercise of the functions and duties attached to the office, comes into direct contact with all three organs of government, the Parliament, the President and the courts) has been within a particular if not unique context.

As pointed out by Bonser C.J in *Le Mesurier Vs Layard*[6]

"The present Attorney General in the lineal successor of the old Advocate Fiscal and just as in the old days, actions against the Government were brought against the Advocate Fiscal as representing the local 'Fisc' or Treasury, so they may now be brought against the Attorney General."

Here, a dismissed officer of the Civil Service sued the Attorney General not in his personal capacity but as representing the government of Ceylon. It was held that the Attorney General was the correct party defendant, if the party sued was the Government of Ceylon.

---

[3] Vide. The Legal Profession and the Law, Journal of the International Commission of Jurists, Vol. 1, Autumn, 1957
[4] [1981], 2 SLR 147
[5] [1981], 1 SLR, 250
[6] [1898], 3 NLR 227

As time went on, the Advocate Fiscal was changed to 'Kings Advocate' and then to 'Queen's Advocate.' Ordinance No 1 of 1883 made the formal title change to the Attorney General of Ceylon with the change taking effect from 1884.

At this time, he was a member of the inner Cabinet, was responsible for the drafting of legislation, had supervisory authority over the minor judiciary and also practiced law in the courts. Critics who focussed on the contradictions inherent in this role during this period used the role of the Attorney General in England as 'a natural frame of reference' to strengthen their arguments for reform.[7]

The Donoughmore Reforms

Significant reforms of this office took place following the Report of the Special Commission on the Constitution (1928) under the Chairmanship of Rt. Hon. The Earl of Donoughmore. The Commissioners comment on the position of the Attorney General in the following manner.

> *"....the Attorney General will be the Legal Advisor to the Government with the full status of Minister and so able to participate in the deliberations of the Board of Ministers and of the Council. He will be responsible for advising the Heads of Departments and the Executive Committee on such matters as may be referred to him, as for example, the examination of contracts and the preparation of legal documents."*

The Donoughmore Constitution shifted the Attorney General out of the 'inner cabinet' and consequently out of active political involvement. The institution of criminal prosecutions and civil proceedings on behalf of the Crown was the duty of the Attorney General's Department while the Legal Secretary was assigned interalia, the tasks of the administration of justice and the drafting of legislation.

The Soulbury Reforms

The primary legal role of the Attorney General was emphasized further in the Soulbury Commission Report which could be said to contain the genesis of the modern Attorney General.

The Commissioners recommended that

.....the Attorney General should be charged with the duties now carried out by the Legal Secretary under this heading. We envisage that, under the Constitution we recommended, Ministers will require legal assistance in-

a) the day to day running of their departments
b) the passage of Bills through Parliament, specially at the Committee stage
c) the interpretation of existing law and in departmental matters which may involve legal proceedings, and
d) matters of high constitutional policy, on which the Cabinet as such may require advice.

The Commissioners recommended the appointment of a Minister of Justice to deal with the subjects then allocated to the Legal Secretary and also recommended that under the new Constitution, the

[7] Prof. Savitri Goonesekere, in "The Constitution and the Attorney General", Fourth Kanchana Abahayapala Memorial Lecture, 1994

Attorney General and the Solicitor General should not lose their status as public servants and become Ministers. They also recommended that the provision of legal advice to the Governor General should, in future, be a duty of the Attorney General.[8]

Further observations of the Soulbury Commission were as follows;

> *"We would therefore make it amply clear that in recommending the establishment of a Ministry of Justice, we intend no more than to secure that a Minister shall be responsible for the administrative side of legal business for obtaining from the Legislature financial provisions for the administration of justice and for answering in the Legislature on matters arising out of it. There can, of course, be no question of the Minister of justice having any power of interference in or control over the performance of any quasi-judicial function or the institution or supervision of prosecutions."*[9]

As regards legal advice to Ministers under the new Constitution, the Commissioners recommended that the question relating to the interpretation of existing law and departmental matters which may involve legal proceedings would continue to be referred to the Attorney General or the Solicitor General.

They also recommended that advice on matters of high constitutional policy, on which the Cabinet as such may require advice could be given by the Attorney General. Provided that the recommendation as to his non-political status was accepted.[10]

> *"..... in view of the ease with which the duty of advising the Governor General in these matters may be turned on political ends, we would express the hope that the Minister would hesitate to tender to the Governor General advice contrary to the recommendations he had received from the Attorney General, the Permanent Secretary and other non-political advisors."*[11]

The 1972 Constitution

Unlike the Soulbury Constitution which proceeded on the two cardinal principles of the independence of the judiciary and an independent public service, the 1972 Constitution diminished the authority of the judiciary and politicised the public service. This change in the constitutional environment reflected equally negatively on the office of the Attorney General.

The office was situated under the Ministry of Justice and moved away from its earlier status of a distinct department entrusted with the task of rendering non-political advice to the rulers of the day. This change in the role and status of the Attorney General had a long term impact.

The 1978 Constitution

The prevalent constitutional document continued to accord a very specific constitutional role to the Attorney General; the appointment by the President of the Republic (Article 54); the taking and

---

[8] Soulbury Report, at p 105
[9] *ibid*, at p 106
[10] *ibid*, at page 107
[11] *ibid*, at p108

subscribing of the oath (or affirmation) set out set out in the 4th schedule before entering upon the duties of his office (Article 61); duties with regard to published bills (Article 77); the right to be heard in all proceedings in the Supreme Court in the exercise of the Supreme Court's jurisdiction in respect of constitutional matters, of bills both ordinary and urgent, of the interpretation of the constitutional provisions relating to fundamental rights, of the expressions of opinions at the request of the President of the Republic and of the Speaker and of election petitions. (Article 134)

While the authority of the Attorney General was considerable both in terms of the constitutional as well as the statutory regime, his or her appointment remained by the executive alone. There was no security of tenure given to the office unlike in the case of officers of the superior judiciary. This remained a priority concern, given that a pervasive politicisation had detracted from the eminence of the office, a fact indeed acknowledged as such by past holders of the office.[12]

The 17th Amendment

Enacted with the ambitious objective of infusing new life into a politicised public service, this constitutional amendment revised the mode of appointment of holders to the office of the Attorney General and provided that such an appointment needed to be approved by the Constitutional Council upon a recommendation made to the Council by the President.

The Constitution Council, a creation of the 17th Amendment itself, is a semi political body in its composition, though balanced as it is sought to be, by the inclusion of persons of eminence and integrity. The Council comprises the Prime Minister, the Speaker, the Leader of the Opposition, one Presidential appointee, five appointees nominated jointly by the Prime Minister and the Leader of the Opposition and one appointee nominated upon agreement by the remaining political parties and independent groups in Parliament.

Consequential legislation to the 17th Amendment mandated that the holder of the office of the Attorney General shall not be removed from office except by the President on specified grounds as set out in the law.[13]

Where the removal was on grounds of misconduct or corruption, abuse of power, gross neglect of duty or gross partiality in office, this had to be after the presentation of an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) for the appointment of a Committee of Inquiry.[14]

The Committee thus constituted consists of the Chief Justice (as the Chairman) and two other persons appointed from among persons who have previously held the office of Attorney general or persons who have reached eminence in the field of law, appointed by the Speaker with the concurrence of the Prime Minister and the Leader of the Opposition. It has wide powers of inquiry including the authority to summon persons before it.

Its function is to inquire into and investigate the alleged grounds on which removal is sought and to arrive at appropriate findings in respect of the same. Once its findings are communicated to the

---

[12] see interviews given by former Attorney General, Thilak Marapana in The Sunday Times, 28th August, 1994 and former Attorney General, Shibley Aziz in The Sunday Island, March 1996. It is generally acknowledged that political interference with the office of the Sri Lankan Attorney General increased from the eighties.
[13] Vide Removal of Officers (Procedure), Act, No 5 of 2002
[14] *ibid*, section 5

Speaker and where there is a finding of guilt, a resolution will be placed in the Order Paper of Parliament.[15]

Once the resolution so placed is voted in favour of by a majority of the parliamentarians, the holder of the office to whom such resolution relates shall be forthwith removed from office by the President.[16]

While the amendments effected were theoretically an improvement from the former *status quo*, the actual working of the provisions of the 17th Amendment and its consequential legislation has not been tested so far in regard to the safeguarding of the office of the Attorney General.

Concern may be reasonably expressed as to whether the inclusion of a direct political authority in the removal process will aggravate the politicisation of such processes even further as has already been manifest in the past in regard to similar removal procedures pertaining to members of the superior judiciary.

In addition, the inherent limitations of attempted statutory exercises to safeguard the office of the Attorney General in the prevalent context where integrity has been compromised even at the very highest levels of Sri Lanka's public service and, specifically judicial service, are far too starkly evident.

11. THE ROLE OF THE ATTORNEY GENERAL IN OTHER JURISDICTIONS

Traditionally, the discretion of the Attorney General in English law, and in other legal systems as well, has been judicially considered to be beyond review or subject to review only where the decision in question has been absolutely perverse.

In commenting on the power of the Attorney General of England to enter a '*nolle prosequi*' whereby criminal proceedings are effectively brought to a halt, Viscount Dilhorne said that;

> *"He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers, he is not subject to direction by his ministerial colleagues or to control and supervision by the courts."*[17]

The case in point demonstrated very well, the reluctance of the English courts to go beyond the discretion of the Attorney General. It concerned a relator action, in which the Attorney General is called upon to assert civil public rights at the instance of a private individual or organisation which cannot bring the action.[18]

---

[15] *ibid*, at section 17

[16] *ibid*, at section 18

[17] *Gouriet Vs Union of Post Office Workers*, House of Lords, [1978], A.C. at 453

[18] of interest in this connection is the following observation 'The expanding scope of *locus standi* in English law has raised the question whether the need for relator actions will be reduced.' *(Wade, Administrative Law, Seventh Edition, p 607*

The refusal of the Attorney General to proceed in an action brought by a private citizen to restrain a threatened breach of the criminal law by trade unions was challenged. The Court of Appeal presided over by Lord Denning MR held that an injunction could be granted at the suit of a private plaintiff.

The House of Lords however strongly disagreed and upheld the exclusive right of the Attorney General to act in the public interest. The case was also characterised by acrimonious differences of opinion that prevailed on this issue between Lord Denning in the Court of Appeal and the House of Lords with regard to which provocative comments in retrospect have been offered by the Master of the Rolls.[19]

In other instances where the English courts have considered the issue of discretionary prosecutorial decisions, it has been stated that

> *".....(he) is called upon to make a value judgement. Unless his decision is manifestly such that it could not be honestly and reasonably arrived at, it cannot in our opinion, be impugned."*[20]

Trends towards a relaxation of this principle of judicial non-interference in English law have however been evident since of late. This is so particularly in respect of prosecutorial authorities who depart from pre-existing policies or guidelines in the exercise of their discretion.[21]

The English courts have thus indicated that if the applicant is able to establish that the Attorney General or any of the police officers against whom complaint was made had been guilty of abusing the process of court or acting in an oppressive manner towards the individual, the court would have power to dismiss the charge though this power would be welcomed in the most exceptional circumstances.[22]

Welcoming these signs of a judicial willingness to scrutinize the evidence on which a decision of the Attorney General is based, commentators have hoped that the courts might extend this willingness to acknowledge that the discretion of the Attorney General is not unfettered.

One analyst, for example, has no qualms in asking as to why should mandamus not be available to order the Attorney General to prosecute or to give his consent for others to prosecute, under statutes affording him exclusive control over the initiation of proceedings such as the Race Relations Act or the Official Secrets Act.[23]

Thus, persons suffering actual harm following inflammatory and regular racial invective against them by an organisation, the leaders of whom the Attorney General refused to prosecute, might assert that his refusal was based on political or general considerations and might seek mandamus to compel the determination of their application according to the intention of Parliament in enacting the Race Relations Act.[24]

---

[19] *R. V Heston Francis,* [1984] 1 AER 785, *R v Derby Crown Court exp p Brooks*, [1985] 80 Cr App R 164
[20] Lord Denning, *The Discipline of the Law*, p137
[21] *Raymond Vs the Attorney General*, [1982], 2 WLR, 849
[22] *R. Vs Chief Constable of Kent exp. L.*[1993], AER, 756 and *R vs DPP ex p. C* [1995], 1 Cr.App.R. 136
[23] The Attorney General's Consent to Prosecutions.' (ed. Prof. K.W. Wedderburn, MLR Vol 85, 1972
[24] *ibid*

While this is the position in English law, Israeli law has proceeded even further in ensuring the public accountability of the Attorney General. The Israeli legal system envisages the Attorney General in a manner very similar to Sri Lankan law.

The Attorney General is the head of the legal services of the government and as such, he (or she) presides over the litigious branch of the government and represents the State in all courts and all matters including criminal, civil and administrative matters. He has the power to institute or to stay all criminal proceedings. His nomination is by the Minister of Justice subject to approval by the Senate and is in general, a highly respected and professional lawyer who is expected to exercise his powers independently of the government.

In early decisions of the Israeli courts,[25] it was held that judicial intervention would be warranted only if the decision of the Attorney General was clearly contrary to the benefit of the public and was *malafide*.

These high standards of satisfaction however yielded to the court interpreting the strict meaning of mala fide in a more relaxed manner; in the process stating that the court would interfere in prosecutorial decisions if they are tainted by improper motives, arbitrariness, discrimination and where there is a material or grave distortion of reason.[26]

This later changed to an even more liberal attitude adopted by the Israeli Supreme Court that drew no difference in imposing standards of accountability between the Attorney General and other public officials. Both were enjoined to exercise their discretion with fairness, honesty, reasonableness, without arbitrariness and discrimination and by taking into account relevant considerations only. In the absence of these criteria, the Attorney General could be taken to task by the courts.[27]

Subsequent decisions of the Israeli courts exemplify the actual exercise of this power and not its mere announcement in the form of a principle. In two cases in particular, after examining the basis on which the Attorney General had exercised his discretion, the Israeli Supreme Court reversed the decision of the Attorney General not to prosecute, ordering that prosecution commence in the first instance[28] and directing that the case be sent back to the Attorney General for review in the second.[29]

The reasoning of the Israeli Supreme Court has been echoed in Canada[30] and the Bahamas.[31] In Canada in particular, expert committees have been set up to lay down guidelines for the exercise of prosecutorial discretion by the Attorney General[32]

Meanwhile, many African jurisdictions are now increasingly beginning to recognise the need to secure the political neutrality of the Attorney General's office and to ensure judicial oversight of the powers of the Attorney General in appropriate circumstances.[33]

---

[25] *Shor Vs Att. Gen*, [1956], 11 PD, 285 (PD – Law Reports of the Supreme Court of Israel (in Hebrew)

[26] *Vinograd Vs Att. Gen.* [1979], 34, PD, 634, *Mustafa vs State of Israel*, [1976], 30(3) P.D. 477, *Roe vs Doe* [1980] 35(3) PD 57

[27] *Nof. Vs Att. Gen.* [1981], 37(4) P.D. 326 at 334.

[28] *Tzofan & Others Vs Chief Military Attorney & Others,* [1989], 43(3) P.D. 718

[29] *Ganor & Others V Attorney General & Others* [1990], 44(2) P.D. 485

[30] *Rourke Vs R* [1977] 33 CRNS 268

[31] Commission of Police vs Carlos Tiberio Rubino Triana & Others, Supreme Court, 3 April, 1989, Commonwealth Law Bulletin, (CLB) [1990], pp49

[32] The Martin Report, 18 Canadian Rights Reporter, (2ed), pp 193- 209

[33] Discussion Paper, INTERIGHTS, Regional Conference on Constitutional and Public Interest Law and Litigation, Entebbe, Uganda, 1998.

In all these systems, the use and abuse of the prosecutorial powers of the Attorney General in areas of criminal law, public nuisance and realtor proceedings are notable. Both the Zimbabwan High Court and the Kenyan High Court have decided that the immunity from liability afforded to the Attorney General is limited and qualified. It is only applicable if he acts reasonably and without malice and without culpable ignorance or negligence.[34]

His discretion must moreover be exercised in a quasi-judicial way and not arbitrarily, oppressively or in a manner contrary to public policy.

111. REVIEW OF THE PROSECUTORIAL POWERS OF THE ATTORNEY GENERAL IN SRI LANKA

The nature of the prosecutorial discretion of the Attorney General was considered by the Supreme Court in *Victor Ivan vs Sarath N.Silva*[35] in 1998.

The editor of the 'Ravaya' (a Sinhala weekly newspaper engaging in critical reporting on government misconduct and corruption) had alleged that he had been successively indicted for criminal defamation by the Attorney General ".....indiscriminately, arbitrarily and for collateral purposes and without proper assessment of the facts."

In the circumstances, he pleaded that his fundamental right to equality (Article 12(1), his fundamental right to freedom of speech and expression including publication (Article 141(a)) and the fundamental right to engage in his lawful profession (Article 14(10(g)) had been violated. The Supreme Court did not grant leave to proceed in this case.

Under the law prevalent at that time[36], criminal defamation was defined in Section 479 of the Penal Code, was punishable under Section 480 and triable summarily by the Magistrates' Court or directly by the High Court. Section 135(1) (f) of the Criminal Procedure Code mandated that no prosecution for criminal defamation could be instituted except with the sanction of the Attorney General.

However, a later section (section 393(7)) allowed the Attorney General an alternative procedure of directly filing indictment in the High Court and directing the institution of non-summary proceedings "having regard to the nature of the offence or any other circumstance."

The primary question was whether a decision of the Attorney General to grant sanction to prosecute or to file an indictment or the refusal to do so, could be reviewed.

Answering this question in the affirmative, the circumstances in which the discretion to grant sanction could be reviewed is discussed by the court. It is concluded that such a power of review of the exercise of discretion of the Attorney General existed where the evidence was plainly insufficient, where there was no investigation, where the decision was based on constitutionally impermissible factors and so on.

---

[34] *N. V Minister of Justice* [1989] (1) ZLR 96 (HC)

[35] *Victor Ivan Vs Sarath N. Silva, Attorney General*, [1998] 1 Sri LR, 340. Judgement by Justice Mark Fernando (with Justices Wadugodapitiya and Bandaranayake agreeing)

[36] Criminal Defamation was removed from the statute book in the country in mid 2002 by Penal Code Amendment Act No 12 of 2002 in Parliament which repealed Chapter 19 of the Penal Code and made consequential procedural amendments to Section 135 (f) of the Criminal Procedure Code. Press Council Amendment Act No 13 of 2002 also repealed paragraph (b) of subsection (1) of Section 15 of the Press Council Law No 5 of 1973.

Similarly, the discretion of the Attorney General to file indictment in terms of Section 393(7) of the Criminal Procedure Code was after "....the nature of the offence or any other circumstance" had been duly considered. In other words, the decision of the Attorney General had to be guided by statutory criteria and could not be arbitrary.

Moreover, there must be some distinct public interest and benefit as for instance where the alleged defamatory statement is likely to disrupt racial or religious harmony or to prejudice Sri Lanka's international relations or to erode public confidence in the maintenance of law and order or in the administration of justice.

Among the general principles judicially articulated is the acknowledgement that the Attorney General's power to file (or not to file) indictment for criminal defamation is a discretionary power that is neither absolute nor unfettered. It is similar to other powers vested in law in public functionaries. They are held in trust for the public, to be exercised for the purpose for which they are conferred and not otherwise. Where such power or discretion is exercised in violation of a fundamental right, it can be reviewed by the Supreme Court under the exercise of its fundamental rights jurisdiction.

It is relevant also that the Court stated that the pendency of proceedings in another court would not bar the exercise of this constitutional jurisdiction of the Supreme Court but would be a circumstance that would make the court act with greater caution and circumspection.

The State argued that one indictment against the petitioner by the Attorney General was justified as it affected public confidence in the law enforcement process by alleging that the Inspector General of Police had abused his authority by interfering with the investigations into a case of sexual abuse of children. This argument was accepted.

In regard to another indictment, the Court found a lack of proper investigation and certain lapses on the part of the officers of the Crown. However, this was held to be a lapse on the part of those responsible for the investigation and not the Attorney General. The investigators had not been made parties. Neither was the Petitioner's case presented on the basis of a defective investigation. The Attorney General could therefore not be held to be accountable in this instance as well.

While this judgement of the Supreme Court is useful for the general principles it laid down, it is evident that the Court preferred to apply the "exceptional circumstances" test in actually intervening to set aside the decision of the Attorney General. This is seen in the extreme examples drawn by the Court as exemplifying instances where interference with the discretion of the Attorney General in granting sanction could be justified.

In addition, judicial reasoning proceeded on the basis that the faulty investigations on the part of the officers of the State could not be visited on the Attorney General. However, the contra argument to this would be that in cases involving violations of fundamental rights, the liability would be that of the State regardless of whether blame could be laid at the door of the investigating officers or the prosecuting officers.

If a wrong prosecution had been launched, the primary responsibility remained with the State, as represented in the instant case by the Attorney General. Such an approach, (which would have been clearly in consonance with judicial reasoning in earlier decisions), was however not adopted by Court in this case.

In *Victor Ivan vs Sarath N.Silva*, the fact that the Court preferred not to proceed so far, accords with the laying down of very high standards of "culpable ignorance or negligence" on the part of the Attorney General in order to justify intervention by court. This is reinforced by the assertion of the judges that errors and omissions by the Attorney General cannot themselves be proof of discrimination or a breach of the freedom of expression.

Whether such high standards ought to be maintained or more liberality adopted along the lines of the Israeli jurisprudence remains a moot point where the accountability of the Attorney General is concerned in Sri Lanka

IV. Conclusion

The preceding analysis examined the public accountability of the Attorney General as the chief law officer of the State. Its primary objective was not to engage in an academic discussion of the relevant issues. Such an analysis would be nothing short of cruelly insensitive in a context where consistently obnoxious patterns of political interference have impeded the healthy functioning of Sri Lanka's legal and judicial institutions, as evidenced particularly during recent years.

That this has been so despite much learned analysis and research papers on the imperative need to ensure the good working of the official and unofficial Bar as well as the independence of the judiciary, does not say much for our legal professionals, the academic community or civil society.

It is worthwhile to re-iterate in this regard, a point made earlier; that, notwithstanding the best of intentions, little can be done to safeguard the integrity of public office by statutory provision where basic belief in such integrity has been shaken to its very foundations. In such a context, changing the title of the office or vesting part of the powers of the Attorney General in an another office will necessarily have limited value.

This reality dominates other conversations as well. For instance; to contend that judicial review of the decisions of the Attorney General should be more expansive, it is necessary that such review must be reasonable, fair and apolitical. In the absence of such a fundamental, the consequences could well be disastrous for a country whose people have already lost significant faith in the ability of public institutions to deliver justice.

Fostering such belief anew is a painstaking task but nonetheless, may need to be the primary focus in nation building efforts in the coming years.

V. R. Krishna Iyer, a former judge of the Indian Supreme Court renowned for his adroit manipulation of legal language, once termed the cornerstone of any legal system to be "the integral yoga of justicing and lawyering."

He cautioned that;

> *"The bench and the bar must be mutually accountable and must fulfil the people's expectations since these two are the accredited constitutional mechanisms for the delivery of justice. If the bench or the bar chooses to indulge in grave vices and when exposed, bark and bite, it will unwittingly become its own grave digger."*[37]

These thoughts may be appropriate in conclusion.

---

[37] Judicial Accountability To The Community; a Democratic Necessity', Economic and Political Weekly, India, reproduced in the Law and Society Trust Review, 1 November, [1991]

Now Available

An Activist's Manual on the International Covenant on Economic, Social and Cultural Rights

This book is dedicated to the promotion of economic and social rights by means of parallel reporting to the United Nations Committee on Economic, Social and Cultural Rights. The Committee reviews state reports on the progress made in implementing the human rights set forth in the International Covenant on Economic, Social & Cultural Rights. Activists and NGOs are invited to help evaluate state reports by presenting alternative sources of information both in writing and in person. **Part I** of this book explains how to participate in the Committee's review process, the general nature of obligations under the Covenant and the basic scope of most rights. **Part II** consists of thematic chapters that may be of use for workshops, background reading and for those who draft special reports. **Part III** consists of annexes, including the full text of the Covenant, some practical guides to web research and addresses and full text of the Committee's General Comments as of 2003.

Price: Hard Cover Rs. 1250/- Soft Cover Rs. 1000/-

Fundamental Rights and the Constitution – II
- A Case Book -

The first casebook, Fundamental Rights and the Constitution was published by the Law & Society Trust in 1988 to give a background to human rights law through judgements of the Supreme Court. Fundamental Rights and the Constitution II, is an update of the earlier publication.

Most cases in the first book have been excluded in book II to find room for important new cases on Article 12 that found no place in the first book. Interpretation placed on "executive and administrative action" has been dealt with in a separate Chapter.

The contents of the book include state responsibility; executive and administrative action; president's actions and Article 35; torture, cruel inhuman and degrading treatment; appointments; promotions; transfers; extensions; award of tenders; terminations; termination of agreements; freedom from arbitrary arrest and detention and freedom of speech, assembly and association.

Price : Rs. 1250/-

Law & Society Trust
3, Kynsey Terrace, Colombo 8, Sri Lanka
Tel: 2691228, 2684845 Tele/fax: 2686843
E-mail: lst@eureka.lk Website: http://www.lawandsocietytrust.org.