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IN TRIBUTE TO A JUDICIAL COLOSSUS

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Editor's Note ... ...

It is not ordinarily the practice of the *LST Review* to engage in a Joint Issue so early on in the year. However, we depart from this practice with deserved reason in our memorial tribute to a most exceptional judge of our times, namely Justice Mark Fernando.

This Issue commences with a series of appreciations from people who knew Justice Fernando in an intimately personal sense as well as those who knew the 'public man', as it were. In sum, these appreciations (that are only a selection, constrained as we are by the number of pages for the Issue) from people across the board are characterized not only by the enormous respect in which they held this judicial personality, but also by their sense of admiration for the unflinching integrity that he demonstrated in judicial life, in an era where integrity counts for very little.

The Issue also publishes (with the kind permission from Media Services, the publisher of the business magazine *LMD*) a somewhat little known magazine interview given by Justice Fernando in 2005, where he deals with a range of questions, some of them probing at the heart of his reflections on the state of the judicial system. The distinctions that he draws between *true* peace (accompanied by justice) and the ceasefire that was prevalent at that time, is relevant even at this stage in the conflict that ravages Sri Lanka. His emphasis on the need for justice, which is a pressing concern for all Sri Lankans and not only a section of the people, reveals the importance of a properly functioning legal system and the institution of the judiciary in this context.

Equally, the significant place that he gives international human rights standards is not surprising, given that his rulings throughout the years demonstrated the manner in which he consistently attempted to enhance the rights of ordinary Sri Lankans by reference to these international norms. His call for Parliament to enact a law declaring that the rulings of the United Nations Human Rights Committee (UNHRC) shall have the force of law, binding on all organs of government, is worthy of explicit mention.

The interview illustrates his capacity—so clearly reflected in his judicial rulings—to break down even the most complex of legal and constitutional issues to basic terms, understandable simply in the sense of rights for people and individuals. The stress that he places on the due functioning of the 17th Amendment to the Constitution is situated within the context of the poignant warning by Judge Learned Hand, that we should not place too

much hope in Constitutions, laws and courts. Rather, liberty lies in the hearts of men and women and when that dies, there is no law, no constitution, and no court that can save it.

Lastly, we publish (with the permission of the United States Agency for International Development-Sri Lanka Anti-Corruption Program implemented by ARD, Inc.) a White Paper authored by Justice Fernando in August 2007. Aptly titled, *'Defeating the Dragon: Weapons for Fighting Corruption'*, this White Paper again indicates the clarity of his thinking in regard to the remedies available in law to individuals fighting the 'good fight' towards better systems of governance. The analysis strikes a crucial balance between 'fundamental rights' and 'fundamental duties.' The extension of the ambit of the constitutional guarantees to the private sector meanwhile, invites reflection as does the suggested new 'self-help' remedies.

The abiding interest that Justice Fernando showed, even consequent to stepping down from the Bench and whilst coping with ill-health, in regard to the effective and proper use of the law and of the Constitution, is illustrated in both the interview and in the White Paper that he found the time to author. The concerns that he raised therein in regard to the current state of our governance systems still remain pertinent. We can only hope that a braver and a brighter future will one day see their realization in a country that we can, without reservation, claim to be proud of.

Kishali Pinto-Jayawardena

Appreciation – JUSTICE MARK FERNANDO

Dr. R.K.W. Goonesekere[*]

Mark Fernando, P.C., after a successful career at the Bar was appointed a Judge of the Supreme Court in 1988, following in the footsteps of his distinguished father, Chief Justice H.N.G. Fernando. Justice Mark Fernando retired early when he felt that he could no longer serve on the Court in honour and dignity. Thus, the Court and the justice system of this country suffered an irreparable loss. During his entire tenure, I, a former teacher, appeared before him regularly, and the exchanges we had in Court confirmed for me that the Bench had gained what the Bar had lost. Mark's name was associated with the drafting of the Constitution of 1978. If there were important persons who expected him to show partisanship on the Bench, they were surely disappointed. Mark understood the judicial role perfectly, and what is more, understood the true meaning of the rule of law. He was faithful to both. He would be guided only by correct legal principles and moral values. He was the perfect Judge. When he was denied his rightful place as Chief Justice, he felt betrayed by all that he stood for. The entire Bar was at a loss to understand this undeserved treatment of a Judge who would have adorned the Chief Justice's Court as his father had done.

If we are to enumerate the qualities he displayed on the Bench that endeared him to all lawyers—both senior and junior who appeared before him—one must begin with the unfailing courtesy he showed to one and all. Lawyers would also remember him for the patience he displayed on the Bench, allowing them to develop their arguments, but also showing how his mind was responding so that they could elaborate. It was a pleasure to plead a case before him because you would know your careful preparation would not be in vain. You would be told politely what you had forgotten, and often with humour. Justice Fernando's ready grasp of the essential facts and the principles of law applicable would reduce the time taken to dispose of a case. He would take notes of what Counsel said and even their answers to pertinent questions he had put to them. If judgment was reserved you could be sure the facts and submissions would be carefully and fairly presented, with solid reasons for the decision. He together with Justice A.R.B. Amerasinghe worked tirelessly to lay the foundations of the human rights jurisprudence of the country.

On a personal note, I recall the surprise with which the Law Faculty in Peradeniya received Mark Fernando as a student. One expected him to go to Oxford, his father's University, especially as Mark had excelled in Maths. On the other hand, Peradeniya, a beautiful residential campus for a select few, had many advantages. The Faculty took only a few students because Latin was a requirement for admission, and had a high staff-student ratio. Peradeniya also had an excellent library that encouraged serious study. Mark made full use of all the facilities and emerged with a First Class Honours degree, the *only* one in his year, following *three* Firsts in the previous year. He immediately went in to practice, and it did not take long for his talent to be discovered. His submissions at the hearing of the Thirteenth Amendment in support of the Amendment were the most focused, and received the careful

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[*] Senior Attorney-at-Law.

considerations of Justice Wanasundera in his Order. But clearly his place was on the Bench. In February 1988, a new Chief Justice was sworn in, and a few days later Mark Fernando became a Judge of the Supreme Court.

Justice Fernando's death due to a cruel illness that nonetheless failed to diminish his intellect or faith, was received with sadness by many lawyers and sections of the public. They cherish the services that he has rendered the country.

Appreciation – MARK FERNANDO: A NATIONAL BENCHMARK

Sriyan de Silva[*]

I have had the privilege of having known the late Justice Mark Fernando for a period of 50 years and would like to highlight not only the achievements but also the outstanding personal and character traits of a person who should be regarded as a benchmark, whether in terms of competence or integrity, not only for judicial officers but others as well.

I first met Mark in 1959 when both of us entered the University of Peradeniya, where we belonged to the same Hall of Residence as well as the Law Faculty. From the outset it was obvious that Mark was destined for a great future. His brilliance was tempered with a caring for his fellow students—a caring which I was fortunate to experience at a very difficult time in my life. Before the Final examination I was having problems studying as my mother was dying of cancer and I had to travel to Colombo each weekend. Knowing this, from a week or two before the examination commenced, Mark insisted that I sit with him at meals whenever possible to discuss and assist me in regard to topics I did not have the time to study. He even insisted that I walk with him to the Examination Hall so that he could give me a few 'tips' on some topics in case I could not find the requisite number of questions to answer. He was disappointed when I told him at the end of the examination that I would pass but doubted I would obtain a class. Needless to say he obtained a First Class. When the results were announced and I had, to my surprise, gained a Second Class Upper Division and was informed that I had barely missed a First Class, I gave Mark the good news. Instead of congratulating me, he castigated me for not following his advice against spending so much time drinking in Kandy, but for which he felt I would have secured the requisite marks. The point I wish to make is that he was never in competition with anyone, not only because he was supremely confident of himself, but also because to be so would not have been consistent with his standards of behaviour. Jealousy was totally alien to him.

After leaving the University, Mark invited some colleagues and me to join him in assisting Father Peter Pillai of Aquinas University College to set up a Law Department to cater to external students who wished to acquire the LL.B. qualification. We lectured to a great number of students ranging from full-time students to those who were in employment. It is a matter of pride to us that most of them have had successful careers since gaining their law degrees. This experience was perhaps one of the—if not the most—rewarding experiences in my life. I recall Father Peter Pillai (who was a brilliant mathematician himself) once telling me about Mark's mathematical brilliance. I saw it in operation on one occasion when Mark and Father Peter Pillai commenced making a calculation and Mark finished well ahead of his master who thereupon said to me, "Remember, what I told you about Mark?"

Simplicity and sincerity were the keynotes of the lifestyle of this distinguished man. He was moved by what one of my close friends referred to as the original Christian ethic which he put into practice in his daily life. In fact, this friend who is also a Catholic and is moved and

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[*] Senior Attorney-at-Law.

influenced by a similar ethic, has told me that he has witnessed Mark at certain meetings showing a greater commitment to the basic tenets of Christianity and values than some of those in 'official' positions in his religion. I also recall that as far back as 1971 during the JVP uprising he suggested to me that we should all collect various items of food to be distributed to the poor and needy. Anybody who has read Mark's presentations on diverse topics would know that he had a deep-seated social conscience.

It is not necessary to labour the obvious fact that Mark was an outstanding judge and that he also applied his highly developed analytical skills in his approach to the law. Though everyone cannot be expected to be brilliant, it could be expected that everyone in authority should conduct himself or herself with integrity, especially persons who hold judicial office. Mark should have been the Chief Justice (his father was and his grandfather was also a Supreme Court judge), but he was by-passed. No doubt the individual responsible must now regret it for reasons many of us are aware of—poetic justice, one might say. When he left the Supreme Court prematurely, Mark never made public his reasons for doing so. When I mentioned to him that he should do so in the public interest, he told me that it would not be right or proper for him to do so for reasons he explained to me. For reasons many are aware of, he acted according to his conscience. One of the tragedies of our society is that the integrity and ethical conduct Mark exemplified are no longer appreciated or respected except by a few.

As a part of his contribution to society and the profession, when he was a member of the Council of Legal Education, Mark contacted my successor at the Employers' Federation of Ceylon with a request for help to bring the profession and persons passing out of the Law College closer to the private sector by enabling them to do a part of their internship in such institutions. Many potentially promising young lawyers as well as the institutions themselves profited thereby, including the Federation. In this endeavour, as my aforementioned friend told me, Mark was moved to go out of his way to help those who were less advantaged and did not have the 'contacts' in the profession others did. Mark also had an abiding interest in the development of legal education in Sri Lanka.

Not only did Mark have a strong sense of right and wrong, he also had a deep spirituality which gave him the strength to bear with great fortitude and uncomplaining patience the pain and suffering he had to endure as his illness took its course. It also enabled him to lead as "normal" a life as possible, continuing to meet and help people despite his condition.

Many of Mark's admirable personal traits are reflected in his wife and children who looked after him over the last 5 years with unswerving love and devotion. Perhaps they can at least take comfort in the fact that if there were more people like Mark, our society would be richer, and our standards would be higher.

Appreciation – DR. JUSTICE MARK FERNANDO: HOW HE FITTED IN TO THAT "MASTER PLAN"

Dr. J. de Almeida Guneratne[*]

He was a judicial colossus, a chief among justices, a man among men and women, mentor to thousands of law graduates and students in general, a social engineer through the times he served on the Council of Legal Education and as president of the Alumni Association of the Law Faculty of the University of Colombo.

Having had the opportunity to peruse in advance three appreciations[1] appearing in this publication, I resolved that it would be redundant for me to dwell on the aforesaid features of Justice Fernando's personality and life. Instead, I opted to take my mind through some personal memories of this exceptional personality and I hope that I may be forgiven for the intensely emotional aspects of some of these recollections.

My first impressions of Mark Fernando

I recall visiting Justice H.N.G. Fernando's (Mark's father) residence with my elder brother, who had been a classmate of Mark's at St. Joseph's College, and who wished to seek Mark's advice to select a "hall" at Peradeniya campus. Somebody had suggested "Hall-X" to my elder brother and upon hearing this Mark said, *"Hall-X is on a hill and all the energy which you need for cricket and tennis, will be spent going up and down. Besides, there will be* life's *hills and mountains to climb. Come to Hall-Y."*

The matter of the Hall being resolved, I remember Mark then turning to me and inquiring about my studies. When I said, *"Because my father is a doctor (medical) my ambition is also to be one"*, he replied, *"Sounds OK. Anyway I cannot find fault with that. But it is important that you select your career after discovering your potential. Give yourself time. You are still 10 years, right?"*

That was the first advice that I received in regard to my career. Anyway, years later at the O/Ls the matter was decided. I failed in Biology. Following that, I chose the combination of subjects, Applied Maths, Chemistry, Logic and Government (Political Science) for the A/Ls, somewhat comparable to Mark's own combination of Double Maths, Physics and English, his exceptional grasp of which has now become legend.

Coming back to that first meeting, I had discerned even as a child, two features in his personality. His reference to '*life's* hills and mountains', (therein exhibiting those aspects of his mind that were philosophical whilst being mixed with humour), and his concern in mentoring (advising) young persons, which became a hallmark in his professional cum

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[*] President's Counsel.

[1] See: Appreciations by Dr. R.K.W. Goonesekere, Chandra Jayaratne and J.C. Weliamuna in this issue.

academic career. Indeed, it was my good fortune and pride that in recent years I was afforded the opportunity to lecture to his son Suren at the Faculty of Law, Colombo.

St. Joseph's College and Mark Fernando

The good priest at the requiem mass held in memory of Mark Fernando on 27th January 2009 said, *"This school will forever be proud of this student... who was a Christian and lived up to Christian values"*.

I was there in the chapel making my own communion with a man in regard to whom words deserted me when I attempted to express my inner feelings. I felt, being a Buddhist, had he been born a Buddhist, he surely would have espoused Buddhist values. Apart from that, memories of how he had been the leader of the English debating team in school, which team had beaten all other schools, how he had secured a 1st division pass at the University entrance, his exemplary academic and professional achievements thereafter (securing 1st Class Honours at both the LL.B. and the then Advocates Examination at Law College, culminating in the University of Colombo awarding him an LL.D. around the year 2000 or so), passed through my mind. He was disarmingly unassuming about these achievements and one memory in particular, when I solicited his assistance to be the local supervisor for a Ph.D. that I was pursuing in or around 1996 (from Hawaii), came to mind. I recall that when I spoke to him about this, he said, *"Why are you coming to a mere LL.B.? You should ask somebody who holds a Ph.D."*, to which I replied: *"That is not an issue. You can surely dictate Ph.Ds if you wanted to. I'll take the risk in regard to my application."* That was the nature of this judicial personality.

Mark Fernando – the Counsel in the trial courts

I joined the unofficial bar having left the Attorney-General's Department where I served for about seven months. I was junior Counsel to the late Mr. Eric Amarasinghe, P.C. We were opposed to Mark in a case involving some complicated aspects touching on electricity (Kalvinators, etc). Having done Physics myself, I had briefed my senior in the touching belief that I had covered every aspect of any questions that may arise. We exposed our expert witness and at the end of his cross-examination by Mark, which was devastating, I knew it would take some time before Mr. Eric Amarasinghe would agree to have me as his junior in any other case thereafter!

Mark, the Justice – my experience in appearing before him as Counsel

There were many cases particularly in the sphere of public law, where I appeared as senior Counsel, some of which are reported cases. In one such case, I had concluded my submissions quoting an American writer and ending up with something to the effect, *"...such are the minds of men"*.

His Lordship quipped with that ever so amiable smile: *"What about women?"* *"I suppose men include women"* was my somewhat unfortunate response, which was met by an

immediate caustic query from Justice Fernando: *"What is the exact date and attribution of your quote?"*

I think I said, *"...somewhere in the 17th century"* and went on to say (even while sensing a judicial trap laid for me), *"But I should think it would apply even today, My Lord"*.

To which His Lordship rejoined: *"But that was at a point when women were not even allowed to vote. That is all archaic thinking now. Incidentally, does your learned junior agree with your observation?"* No reply was needed to the latter judicial query as annoyance if not outright disgust at my comment was writ all over the face of junior Counsel[2] in that case at that time.

"Never mind...", said His Lordship, adding, *"judgment reserved"*, which was in my favour. Obviously, and fortuitously, my linguistic excesses had not been weighed against me.

The abortive forensic attempt – in re: The Voluntary Organizations Bill

This effort must have been somewhere around 1999. I had argued, in the context of the relevant Articles in the Constitution that, initially, a Bill to control Voluntary Organizations having been placed on the order paper as envisaged in Article 78(1) of the Constitution, but, not being adjudicated upon and therefore losing its efficacy, a Petitioner was entitled to challenge it, if the same reappears on the order paper but after the 7-day limit imposed by the said Article.

However, His Lordship rejected the argument, adding, *"that, Dr. Guneratne's said submission is untenable"*. Some colleagues at the Bar, after reading the determination, more out of an inclination to fault His Lordship, I felt, rather than sympathize with me in being admonished by the Supreme Court for making 'an untenable submission', sought to strike a dialogue on the said issue. However, all what I said was, *"Before His Lordship said so, I was wondering myself whether what I had planned to say was going to be* untenable*"*.

In another losing case...

The judicial response had been negative to my submissions in yet another instance, due to, if my memory serves me right, the application being out of time. However, my client had suffered. I sought refuge in judicial adventurism[3] prompting me to make an emotional appeal in 'a last ditch effort.' So I submitted, quoting John Locke[4], *"should either the executive or legislative, when they have got power in their hands, design or go about to enslave or destroy*

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[2] Ms. Kishali Pinto-Jayawardena used that opportunity to berate me on my 'sexist thinking' (which allegation I did not accept) for many years thereafter.

[3] Notwithstanding, Professor G.L. Peiris's constant reminders in his jurisprudence lectures that the distinction between 'judicial adventurism' and 'judicial activism' must be clearly born in mind. This had been in the context of American and Scandinavian Realism.

[4] John Locke, *Two Treatises of Government,* Peter Laslet (ed.), Cambridge University Press, 1966.

them, the people have no other remedy than this, as in all other cases when they have no judge on earth, but to appeal to heaven," (apparently a euphemism for revolution, as Alpheus T. Mason has commented)[5].

Having so quoted, I submitted: *"Thankfully, we have Your Lordships on earth, to give the relief I am seeking".*

His Lordship smiled (closing the brief) and said politely, *"We agree. Your only hope is to appeal to the judges in heaven. We on earth cannot help you".*

That was the man, a model justice, even as he would refuse to respond, would so refuse in his typically intellectual way. No doubt I was disappointed and yet I felt no forensic remorse.

Then, there were other cases which I do not wish to dwell on here, where His Lordship (presiding) with other Judges of the Court when I was successful as counsel for the litigating party I was appearing for, which were marked by similar judicial observations characteristic of his phenomenal wit, all of which would take a volume to fill.

However, I would like to reflect on a particular case, arising out of a Section 66 (Primary Court Procedure Act), which I had this unfortunate experience of having to clash swords (as it were) with His Lordship. The case was, in brief, as follows. In the Primary Court, my client had been placed in possession. The High Court of the Province had approved the said order. In (Revision or Appeal) the Court of Appeal (a judgment of His Lordship Justice Gamini Amaratunge) the same had been affirmed.

In the course of submissions, His Lordship Justice Fernando asked me, *"There are three deeds in regard to ownership before us. Are we not supposed to look in to those?"* I said in response: *"No My Lord, these are new documents (new evidence), and if I were to respond to Your Lordship's query for that reason, and in turn should Your Lordship respond, then it would be* obiter *at the most, in regard to which therefore, in my submission (respectfully), the Court of Appeal cannot be faulted."*

At my comment, His Lordship looked taken aback if not embarrassed—so too, did Justices Ameer Ismail and T.B. Weerasuriya who were associated with him on the bench.

The case continued, and in the course of my submissions I ran into difficulty in regard to my client's two months possession in the context of the Primary Courts Procedure Act (which was a weak link in my client's case), at which point, when the said difficulty transpired, His Lordship queried: *"If we were to comment on that, would you consider that also being* obiter*?"* In response, I was only able to reply, *"No, I cannot say so."*

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[5] Alpheus T. Mason, "America's Political Heritage", in *Essays on the Constitution of the United States*, M. Judd Harmon (ed.), National University Publications, Kennikat Press, 1978.

I realized that I had offended his judicial mind. The question that arose in my mind, perchance too late, was whether I had exceeded my forensic role in being too exuberant? His further question then was: *"If so, aren't we entitled to take in to consideration the deeds of ownership in resolving this dispute, if on a balance, the question as to who was entitled to possession is in doubt?"* My response to this further query was weak. I lost the case (written by His Lordship T.B. Weerasuriya).

Mark Fernando and my daughter Shannelle

This must have been in the year 1997. It was at some function at which I found my daughter who was about 10 years then, having a dialogue with His Lordship. I observed Shannelle talking about the USA and how she would love to pursue her education in that country and I heard her saying, *"I want to be a part of the American dream one day".*

After listening intently to her, Mark responded: *"OK, but, do you realize that to work towards that dream, you would have to prove that, you are more equal than Americans, even to claim and indeed even to feel that, you are their equal. Remember, your country is Sri Lanka and the American dream shall remain a dream".*

I recall that Shannelle responded laughing: *"Oh yes! My country is Sri Lanka, alright. I have been hearing this same talk from my father. But I have been telling him and I am telling you, that at least America has a dream. In Sri Lanka, do we even have a dream?"*

Mark turned to me and said, *"you must bring this girl when my court is in session...",* which I did within a few days. Shannelle was impressed seeing the manner in which His Lordship was dealing with his list of cases for the day, and ended up telling me as I brought her back home: *"If you want me to remain here, at least try to be someone like him. He is simply great".*[6]

Final Reflections of a Judicial Colossus

His Lordship having announced his 'premature retirement' and some of us[7] in our efforts to have that decision reversed, also having failed (while the president and the prime minister of the country miserably failed to even tokenly respond to the said effort), we were compelled to resign ourselves to the fact that, we had lost a battle.

Yet, the fact remains that Mark's battle was not over, as he, even after being diagnosed with a dreaded disease, continued to impart his intellect through the limited venues that were on offer to contribute towards the improvement of the quality of life in our country. One

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[6] Shannelle at present is pursuing her 'dream' at an American University studying for a degree course in Applied Psychology.

[7] H.L. de Silva (P.C.), Desmond Fernando (P.C.), Nehru Goonathilake (P.C.), Dr. R.K.W. Goonesekere (senior Attorney-at-Law), and E.D. Wikramanayake (senior Attorney-at-Law), along with myself, Ms. Kishali Pinto-Jayawardena (Attorney-at-Law), J.C. Weliamuna (Attorney-at-Law) and Elmo Perera (Attorney-at-Law).

memory that is etched in my mind forever is of him in crutches, while aided by his wife, addressing a forum with his mental faculties as agile as ever.

Those ideas that he put forward remain in my mind. He is gone. Yet, we who are left here on earth must take the challenge which His Lordship so well met, to walk one more mile, as he himself did, right up to continuing to work with the welfare association of his *alma mater* St. Joseph's College to help the younger generation and the school in general.

As his daughter Tania reminisced in the hallowed chapel of St. Joseph's College at the service held after he passed away: *"Dadda's personality was such that he never questioned the fate that had visited him, for even Jesus Christ was crucified and put to death when he was just almost 30 years old."*

The theme of Tania's said reflection of her father's life thus became apparent to me.

Mark—His Lordship, Dr. Fernando—had fitted in to his Lord's Master Plan.

Appreciation – THE BEST OF "GOOD MEN"

Chandra Jayaratne[*]

"To save Sri Lanka only a tiny minority of just persons are required", said late Justice Mark Fernando in his keynote address, before the Organization of Professional Associations' annual sessions. He cited the following poem by Josiah Gilbert Holland to describe a 'just person'.

> *God, give us men! A time like this demands,*
> *Strong minds, great hearts, true faith and ready hands;*
> *Men whom the lust of office does not kill;*
> *Men whom the spoils of office cannot buy;*
> *Men who possesses opinions and a will;*
> *Men who have honour; men who will not lie;*
> *Men who can stand before a demagogue*
> *and damn his treacherous flatteries without winking!*
> *Tall men, sun-crowned, who live above the fog*
> *in public duty and in private thinking;*
> *For while rabble, with thumb-worn creeds,*
> *Their large professions and their little deeds, mingle in selfish strife,*
> *Lo! Freedom weeps, Wrong rules the land and Justice Sleeps!*

Justice Mark Fernando over his lifetime, from childhood to teenage years spent at St. Joseph's College; from his youthful years in the University to his professional life as practicing counsel; in his service to the cause of justice as member of the supreme judiciary bench in Sri Lanka; as a devoted Catholic in the service of his Redeemer; as a loving husband and father to his family and as a caring citizen in the service to society; displayed all of the above qualities of 'Good Men'.

He stands above his fellow 'good men' by his deeds, thoughts, expressions, and in his service to society. He epitomized the best human qualities, during a lifetime of integrity, transparency, intellectual brilliance, and unwavering commitment to justice, fair play, equity and equality. Thus, he stands high amongst his fellow 'good men' and equal amongst the best of 'good men' of Sri Lanka.

Unfortunately, I came to know him closely and also his lovely family, only in the last nine years of his life. Yet, I was most lucky that I had the chance to know him briefly at least and to be associated with and be guided by him in engaging in intellectual pursuits attempting to add value to this nation and its citizens. Above all, I value the opportunity to follow the path he set for 'good men' to take in the journey of life.

He had an intellect and clarity of mind that enabled him to analyze complex issues and reduce them to simple steps in order to determine the best possible options. He was remarkably

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[*] Former Chairman of the Ceylon Chamber of Commerce.

clever at reducing long winded minutes of meetings on Constitutional Reforms to just a few note cards recording the essence in a logical step by step way, using in his own micro calligraphy.

He was daring and was never afraid to express his opinion. He was never reluctant to openly challenge others. He did just this on two occasions, when I chaired public seminars where he was once the keynote speaker and a panellist. On both occasions, he challenged the private sector benchmarks of behaviour for effective corporate social responsibility and corporate ethics in practice. He was an inspiring mentor to me during my tenure as the Chairman of the Ceylon Chamber of Commerce. I relied on his valuable advice and guidance as I set about the task of getting the premier private sector Chamber to adopt a Code of Ethics and Conduct and in establishing the Institute of Directors. Justice Mark Fernando was the Chief Guest and delivered a brilliant oration on "Directors' Responsibility" at the first annual general meeting of the Institute of Directors.

Social consciousness formed the backdrop of thoughts, actions and judgments of Justice Mark Fernando. 'The Wise Old Owl', a columnist in *The Sunday Times* Business pages, once asked businesses to review and follow the guidelines in 'The Book of Mark' titled, *Defeating the Dragon; Weapons for Fighting Corruption,*[1] which concludes thus:

> *The dragon of corruption may breathe fire, but it is by no means invincible. Dragon-fighters already have a range of reliable weapons with which they can successfully attack that dragon from all sides.*

At times it was evident that he was stubbornly committed to his opinion as he repeatedly returned to it despite majority consensus on an alternative position. This made us sharper, more focussed and always alert in engaging with him in any discussion. I believe he did this deliberately to test the judgemental process and validate the best option.

There were only two young people who would always get the better of Justice Mark and they were his two grandchildren, both of whom he adored. Daniel the elder grandson would give us working in a team on complex constitutional reforms a sharp message some days when it was time for his grandfather to keep an appointment with him to play a game or read a book. Daniel even teased his grandfather that he was *only now* trying to work on reforms, which he should have attempted when he had the power and influence to do so.

Justice Mark Fernando was a great guide, an excellent teacher and a caring guru to young and old alike. If he was ever persistent with his requests for favours, it was always those dealing with securing support for the training and development of young graduates engaged in the field of law. I was amazed by his insightful mentoring in the way he guided my daughter as

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[1] A White Paper authored by Justice Mark Fernando for the USAID ARD Anti Corruption programme which clarifies the rights and duties and the way forward for business to operate, meeting commitments to stakeholders and good governance principles. (Ed. Note: This White Paper is reproduced in this Issue of the *LST Review* with kind permission from ARD.)

she took the first steps in legal education. He embedded qualities of humour and fun and at times a teasing innocent comment to challenge the intellect, attentiveness and open mindfulness of his mentee. My daughter will never fail to remember with gratitude, the caring fatherly way in which Justice Mark guided her as she was about to leave for Trinity College and how he presented her with a valuable out of print book recommended as a comprehensive guide for beginners on all branches of law.

Though a staunch believer and a faithful follower of the Catholic faith, he was never reluctant in quoting from other religious scripts and embodying their philosophies in reform recommendations. I never saw him angry, stressed nor remorseful despite the frustration and injustice he faced being unable to reach the zenith of his career. I believe his deep religious conviction, compassion and wisdom made him the man he was.

Finally, Justice Fernando was a worthy example of a great family man, who gathered his family around him in all his tasks and thoughts. They were a great strength to him not only during times of sickness but also in engagements for the benefit of society. He and his family were even concerned for my own health when I was sick despite his own long suffering illness which he coped with mindfully and pragmatically.

The cover page of the hymn sheet distributed at the 'Thanks-Giving Service' to his Life and Work held on 27th January 2009, most aptly described the present moment quoting 'Bishop Brent':

> *A ship sails, and I stand watching till she fades on the horizon and someone at my side says, "She is gone." Gone where? Gone from my sight, that is all; she is just as large as when I saw her. The diminished size and total loss of sight is in me, not in her, and just at that moment when someone at my side says, "She is gone", there are others who are watching her coming, and other voices take up a glad shout, "There she comes!" And that is dying.*

Justice Mark Fernando will remain large as life in our memories. The way he showed by his exemplary life will undoubtedly be the way for 'good men' to follow and to realize his eternal presence in our society.

I quote below from the work of Shakespeare's *Hamlet* in tribute to the life, work and contribution of this simple and caring, yet uniquely endowed intellect and a rare human being who enriched all who knew him as well as Sri Lankan society as a whole.

> *Good-night, sweet prince;*
> *And flights of angels sing thee to thy rest.*

Appreciation – JUSTICE MARK FERNANDO: THE HUMANE FACE OF THE LAW

Dr. Deepika Udagama[*]

As a student of law, I have been moved and awestruck by the capacity of legal concepts to bring about radical social change; to make societies more humane and just. I cannot, however, state with sincerity that there are many in the legal firmament of contemporary Sri Lanka who have used that potential in the law with imagination and creativity to bring about positive change. That is why I feel so fortunate to have known Justice Mark Fernado. He belonged to that rare breed of jurists who breathed life to the law through a profound empathy for the human condition and sound legal reasoning. That he had a heart of gold did indeed help. We were the richer for it.

But I cannot confine my memories or appreciation of Justice Fernando to his role as a jurist. That would be too unfair. His was a multi-faceted personality with multiple talents and interests. There will be many who will speak eloquently about Justice Fernando's contribution to the law. But for me, in addition to that, I remember him as a deeply committed legal educator who was very keen to see the institutions of legal education in the country impart legal education that was relevant and modern. He was a humanist who was very keen to ensure that rural students would not be disadvantaged because of their poor knowledge of English or class barriers. I also remember him as a social activist who ardently espoused transparent and accountable governance, respect for the rule of law and a fair deal for all. I remember him standing tall, not because of his considerable height, but because he was decent and ethical.

I first met Justice Fernando soon after my return to the island having completed my graduate studies. It was in the early 1990s. If my memory serves me well, I met him first at an event organized by the late Dr. Neelan Tiruchelvam. I remember being taken aback by the simplicity and humility of Justice Fernando, who by then was one of the most respected Supreme Court Justices. To be honest, I had not met many superior court Justices at that time. Like many mere mortals, I was quite awed by the presence of a Supreme Court Justice and was acting clumsy, unsure of the protocol. Justice Fernando put me at ease at once with his friendly demeanour and winning smile. He was like a kindly uncle, but making serious coversation about the law and legal education. I was so humbled and grateful.

What I wish to highlight here is the sterling role played by Justice Fernando in enriching the lives of both academics and students of the Law Faculty of the University of Colombo. That he did through his pioneering activities as the Patron of the Law Faculty Alumni Association. The vigour and commitment with which he threw himself into that work was amazing. His mission was to better the lot of the law students. He wanted to bring about changes to legal education and to modernize the mindset of the future lawyers and also of the legal academics. And for those efforts, we are forever in his debt.

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Justice Fernando mooted the idea of an LL.M. program in corporate law to be offered by the Law Faculty, long before anyone had thought of such a move. He was singularly responsible for the introduction of the internship program for our students. The program continues to benefit hundreds of students by placing them in law chambers and other professional settings. Many students met their future employers through that program. He commenced mentoring programs for law students with the assistance of legal practitioners, focussing on improving English proficiency and subject matter knowledge. He introduced the 'welcome dinner' for first year students and the 'farewell dinner' for final year students hosted by the Alumni Association. That was his way of creating a supportive and professional environment for the students, who were mostly from rural areas. The students got to hobnob with lawyers, stalwarts of industry and the private sector, not to mention Justices of the superior courts. Sometimes he would host groups of students to a meal at his residence. The students revelled in these encounters, their self-confidence boosted by these rare opportunties. He worked with young academics in organizing those events and became a mentor to many of them as well.

What was so touching and humbling was to see this man in plain shirt sleeves walking around the corridors of the Faculty, meeting people, attending to the minutest detail of a program, when in many a lecture hall, the jurisprudence that he had developed on the Bench was being taught and debated. It was a remarkable experience for both the academics and the students. Here was a man, who was reshaping the face of public law in the country, and thereby touching the lives of millions of people. Public law of Sri Lanka cannot be taught without adverting to the innovations of Justice Fernando. In my own human rights law class, I believe not a day passed when we did not take up for discussion judgments of Justice Fernando—expansion of the scope of fundamental rights, liberalizing of procedures, establishing the interface between administrative law and fundamental rights jurisprudence, use of international human rights standards as interpretive guides, and the list went on. Yet, here he was with us, a simple man, partnering a common endeavour to improve legal education, not wishing to stand on a pedastal and be venerated. It was this down-to-earth simplicity and humanism of Justice Fernando that endeared him to many of us. He was truly inspirational.

Justice Fernando left us early. The ways of life are a mystery that are hard to unravel. He contributed immeasurably to society, yet life did not treat him fairly. He prematurely retired from the Supreme Court, in unhappy circumstances. Soon thereafter he was diagnosed with a dreaded disease. He carried on with his work regardless, always positive and with a smile.

Although he is no more, Justice Fernando has left a rich and humane legacy for us to nurture and emulate. Whether the Sri Lankan polity, or at least the legal community, has the capacity or, indeed, the inclination at present to benefit from that legacy, remains to be seen. For we live in confused and troubled times. We have become a nation of survivors, often not willing to recognize and appreciate what is good, when to do so would not serve our immediate interests. There is no doubt, however, that history will remember him as a giant in the twentieth century legal firmament of Sri Lanka who shaped public law for the common good.

May he rest in peace. And may his beloved family find comfort in their faith and in the knowledge that Justice Fernando will live in our hearts forever.

Appreciation – IDEALISM IN LAW AND A TRULY GREAT JUDGE

Kishali Pinto-Jayawardena[*]

For those of us emerging starry-eyed from the Faculty of Law into the thrust and parry of professional legal practice in the mid nineteen nineties, the persona of Justice Mark Fernando had already reached near mythical proportions. Without a doubt there was a certain heady quality to practice in public law before the Supreme Court in those years. Ordinarily, clinging to any kind of idealism would have been greatly disadvantageous in the actual donning of the black cloak. But for those of us coming into Hulftsdorp at that time, idealism in law did indeed occupy its due and rightfully proud place.

The judicial development of fundamental rights jurisprudence had gradually freed itself from the shackles of conservatism that had previously balked at restraining a top heavy executive. And in this reasoned expansion of rights protections, idealism was protected by the simple yet powerful principle that judgments were delivered upholding rights not for ulterior reasons or for personal or political profit or motive. Instead, it was the law that was considered and justice was looked at as the first constitutional principle. This is not to say that judicial perfectionism reigned; undoubtedly there were aberrations in as much as judges are, like the rest of us, fallible human beings. However, by and large, both legal practitioners and the public rested content in the knowledge that justice was not only done but was seen to be done. It needs scarcely to be remembered that this is, after all, the most fundamental basis on which a legal system should function if not flourish.

During those years, the judgments that creatively interpreted the law and the Constitution to ensure the safeguarding of liberties were manifold. Many of these decisions were handed down by Justice Mark Fernando and I do not intend to dwell upon them except to stress, in passing, his stalwart opposition to arbitrary action, even under emergency law in the context of an ongoing armed conflict. His unwavering opinion, along with that of Justice A.R.B. Amerasinghe, was that the executive, whether the President or the Defence Secretary, did not have unfettered discretion in regard to restricting the rights to life and liberty of individuals. In many cases, the Court called for and perused the records of persons detained as well as the reasons put forward for detention on the basis that the *ipse dixit* of the Defence Secretary alone would not suffice. On that basis, persons unjustly detained were freed in many instances. At a time when Sri Lanka was gripped in the throes of not only the conflict in the North and East, but also the uprising against the State by the Janatha Vimukthi Peramuna (JVP) in other parts of the country, the Court remained the one strong bulwark against the worse of the excesses by government forces. At that point, it was a given that one could go to Court and expect one's case to be decided on the law and solely on the law. It was only later when such certainties were no longer absolute that one began to appreciate the worth of what we had once taken so laconically for granted.

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[*] Attorney-at-Law.

In many of Justice Fernando's later judgments, upholding *inter alia*, the right to vote (both as an individual as well as a collective right); the Public Trust doctrine; the right to freedom of movement; the right to freedom of expression, publication and information; the right to freedom against torture; and the upholding of minority rights, such as the right to vote of citizens in the then 'uncleared' areas in the North and East; he visibly demonstrated not only erudition but also tremendous consistency and integrity. He was a true 'rights friendly' judge, able to unerringly detect a rights violation and award relief even in the face of excruciatingly bad submissions by counsel.

In all those years, I did not see him once lose his temper with a practitioner or a litigant. Instead, the equanimity of his judicial temperament was legendary and he was able to chill even the most forward of conduct by a mere look and a few softly spoken words which was far more effective than the most unmannerly ranting and raving or indeed, the (judicial) throwing of books and files at counsel. He was also renowned for his peculiar ability to hone in on a legal point that even the most diligent study on the part of the unfortunate counsel appearing in the case had not unearthed. This was indeed, the single reason as to why lawyers appearing before him took the greatest pains to be as carefully prepared as was humanly possible.

What I remember most, while practicing in the chambers of, firstly, Mr. R.K.W. Goonesekere and thereafter, Dr. J. de Almeida Guneratne (P.C.), was the perpetually anxious if not frenzied study, on my part, of the brief during the days and nights before, as soon as one knew that the matter was to be taken up before him. At one point when presenting a case (as counsel for the respondents in a particularly bad brief) before him on the Bench sitting along with Justice C.V. Wigneswaran, I recall how he patiently heard my submissions defending a particular respondent and then, with a twinkle in his eye (before ruling against that respondent), remarked that I would have undoubtedly felt far more comfortable if I was appearing for the petitioner, a fact that I did not dispute. As in the case of the then Chief Justice G.P.S. de Silva, he was particularly kind to juniors. However, as much as he was gentle to juniors, he was also demonstrably stern to the one or two senior Counsel who attempted to take liberties with the Court.

Neither did he allow the slightest impropriety from the Bench. Expressing personal views favouring the petitioner or a particular respondent during the hearing of a case would have been unheard of. This was not a judge who would unashamedly hold with the executive for overt political reasons at one period of time and then engage in rash confrontations with politicians at other times, for equally obnoxious political motives. In fact, Justice Fernando strongly eschewed contact with politicians at all times, even to the extent of avoiding social contact. Such stern integrity was, of course, to bring a heavy cost in regard to his rightfully due promotion as Chief Justice in 1999 when he was passed over by the Executive in favour of an outside appointment. It was cruel irony that the country had a tantalizing glimpse of the cutting edge of principled and bold jurisprudence, only to have it cut short before it reached its peak. As history would surely judge, this was more Sri Lanka's collective tragedy than the personal drawback that it may have been for Justice Fernando.

At a different level meanwhile, it must be said that at some point of time, every thinking individual is compelled to question the very basis of his or her interaction with society and community. For me, that most agonizing dilemma was exemplified in the circumstances in which Justice Fernando was bypassed in the appointment as Chief Justice and in the most troubling developments that occurred thereafter. Some of us during those years carried on a lonely struggle, to restore integrity to the legal system. At one point, I remember one of our most loved colleagues, the late Suranjith Hewamanne remarking that he was compelled to speak out in order due to the small voice in his mind which cried to him not to be still. This was true indeed of each and every one of that small group of dissentient legal practitioners at that time. Yet we continued to be unsupported by the majority of the legal profession as well as by others who might have been expected to have taken a stronger stance in principled opposition. For me, the effects of that struggle continue to reverberate resulting in an almost irreversible loss of faith in some of those around me, to speak out against injustice. For others, such as for Suranjith whose death in part was due to the severe emotional and physical strains that he had subjected himself to physically, the impact was far deadlier.

Justice Fernando's premature retirement in early 2004 was preceded by a campaign of countrywide support that went far beyond Sri Lanka's legal community, even though he ultimately was not persuaded to change his mind. Such support had ultimately come, proverbially enough, too little too late. It would always remain an abstract question as to whether the tide of history might have changed if this support had been evidenced earlier. For this, the blame must surely be laid at our collective door, our reluctance to acknowledge the core importance of an independent judiciary and of the Rule of Law to rights protections and our perception that these matters are of concern to the legal profession alone.

Insofar as Justice Fernando himself was concerned however, he had realised with customary foresight that the damage done to the system could not be repaired in a few years. Thus, in writing to Presidents' Counsel Nehru Goonetilleke on 21st October 2003 in response to the public petitions urging him to reconsider his decision to retire, he pointed out that his priority had been, whilst in judicial office, to mould the law in order to protect the ordinary person against the abuse of State power. It was a source of much satisfaction that the expectations of the public as well as official attitudes had changed in this regard. However, he was of the view that despite the knowledge and experience accumulated during this period, he had experienced a sharp decline in the opportunities for service, as a Judge of the Supreme Court and as such, felt that he could better serve the country from outside.

The restrained nature of the language used by him in the letter disclosed more by what was unexpressed than by what was expressed. The wider context in which this decision was taken was reflected far more in the nature of the public petitions that urged him to reconsider his decision to prematurely retire, some of which requested the government to appoint a Select Committee of Parliament to consider as to why Justice Fernando had been consistently shut out from Benches of the Court hearing important constitutional matters from 1999. These petitions came to naught due to a typically expedient political culture and in circumstances that are of public record.

Despite the negative outcome, this campaign—as voluntary and as spontaneous as it was—remains one of my proudest memories. I recall at that time, a concerned relative advising me not to break our collective heads against stone; however, the fact that we stood up for a man who had done so much for his country and for the institution of the judiciary that he had once (for all its flaws) believed in, was manifestly enough of a reward by itself.

Following his retirement and despite the serious illness with which he was inflicted shortly thereafter, he continued with characteristic courage, to engage with the most pressing issues of the day. In one instance, when I had written about the need to reform the Prevention of Terrorism Act (PTA) in my regular column to the *Sunday Times*, he called me and asked as to whether I was aware of the fact that the Court had called for the release of some of these unjustly detained suspects and that these directions had never been complied with. I recall also, sometime in early 2005, when going to see him after he returned from hospital, how he methodically (if not ruthlessly) took apart a research study that I had engaged in for the (then constitutionally appointed) Human Rights Commission of Sri Lanka. This was occasioned by my emphatic (if not quite wise) disagreements with him at the start of the visit regarding certain points of view expressed in that paper on reform of the current statutory framework relating to the media. What was supposed to have been a courtesy call of a convalescent nature then rapidly changed to a stimulating discussion of quite a different character!

An even more poignant memory is related to the draft Contempt of Courts Act that Dr. J. de Almeida Guneratne (P.C.), Mr. J.C. Weliamuna (Attorney-at-Law) and I had worked on in the Bar Association during the presidency of Mr. Desmond Fernando (P.C.). After reading about it in the newspapers, Justice Fernando called me and requested a copy of the draft. Some days later, I received a call from him in the morning, just before he was due to re-enter hospital for tests, when he insisted on taking me over each and every clause of the draft while suggesting revisions at some places. I was astounded at the rigour of his mind and at his complete commitment to the issue despite full knowledge of what lay before him in terms of physical pain and suffering. He observed particularly that truth should be included as a defence to contempt actions as is now the case in India. Needless to say, the draft benefited greatly from his observations. My quip during that discussion that he appeared to have greatly liberalized his view in regard to contempt of court, as opposed to the manifestly more conservative viewpoint articulated by him when on the Bench in what is popularly referred to as the Divaina Case[1], was greeted with a chuckle. Of course, this effort, as in the case of many other attempts to reform the law, came to nothing.

Despite his difficulties in movement, he remained troubled by what he saw as the absence of moderate opinion in public debate. At one point, he specifically requested that the Law & Society Trust host a discussion in regard to constitutional reform, consequent to private discussions that he had been having with a few like-minded individuals, and in fact, he himself chaired the discussions attended by Mrs. Fernando. It was a matter for regret that these discussions were not taken further by us, primarily due to the disillusionment if not hopelessness that we felt at the unfolding political events.

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[1] [1991] 1 SLR 134.

Singularly, his calls were always critical of whatever I wrote, pointing out to this lacunae or the other. At one such instance I asked him, only half in jest, as to whether he could not interject one word of praise amidst the criticism or to stretch a point, find a particular piece of writing good in parts and bad in parts, even if this would be much like the curate's egg, to which observation he only replied, *"But then, what would be the point?"* When he came to my house for my mother's funeral in 2005 despite all his physical difficulties, this showed a caring quality to Justice Fernando that underscored many of his little known actions in life. His one abiding hope was in young minds and he frequently remarked that unlike the cynicism of adults, these were the minds that had to be infused with enthusiasm in to bringing about a better future for Sri Lanka. His efforts to reach out to the under privileged were not limited to flowing rhetoric; in fact, the work that he did with the Alumni Association of the Faculty of Law, with undergraduates and legal interns from rural areas was with this same objective in mind.

To have practiced before him, even for an all too brief period of only six years, was a privilege. It was also a bitter-sweet experience for we could never be satisfied with less thereafter. He would always remain the standard against which, sometimes even unwittingly, others would be measured. Perhaps Sri Lanka may never see a judge of this calibre for decades to come, if indeed, at all. We do not mourn his passing, for his extraordinarily acute judicial mind as well as his life needs to be celebrated, not mourned. However, we do mourn for what might have been for this country, the judicial system and the legal culture.

Appreciation – A RATIONAL MIND AMIDST MADNESS

Basil Fernando[*]

Justice Mark Fernando, who became a Supreme Court Judge in March 1988 and who served as a Judge until his premature retirement in 2005, passed away on 20th January 2009. His long career as a Judge of the Supreme Court left its mark by way of independent and thoroughly rational judgments. Perhaps the best of these judgments were in regard to the interpretation of the fundamental rights provisions of the Constitution of Sri Lanka.

Over a long period, he interpreted constitutional provisions relating to arbitrary arrest and detention, and the prohibition against torture in particular. Towards the latter part of his career, on various occasions, he often dealt with some of the major problems of the Sri Lankan policing system, by interpretation of the provisions on fundamental rights. He observed that in spite of many judgments given by the Supreme Court, violations by the police particularly in the area of torture were on the increase. In some judgments, he attempted to make the heads of the police service and the armed forces responsible for the violations of rights by their subordinates.

In the famous case of Gerard Mervin Perera,[1] he stated:

> *The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody shows no decline. The duty imposed by Article 4(d) to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At least, he may make arrangements for surprise visits by specially appointed police officers, and/or officers and representatives of the Human Rights Commission, and/or local community leaders who would be authorized to interview and to report on the treatment and conditions of detention of persons in custody. 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 followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation (if not also of approval and authorization).*

His cases should be studied carefully as they lay bare the jurisprudence that he was trying to evolve in order to deal with, perhaps the most disheartening development in Sri Lanka, in terms of the collapse of discipline in the police and the armed forces.

He also delivered several significant judgments relating to the freedom of expression and media freedoms. In several judgments, he expressed that criticism of the government is a

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[*] Attorney-at-Law.

[1] [2003] 1 SLR 317.

right of the people and that the media should not be allowed to be penalised for criticising the government. These judgments remain a barrier against arbitrary executive intervention into media freedoms.

Justice Mark Fernando's judicial career symbolises the tragedy of the Sri Lankan judiciary in general and the Supreme Court in particular. It is said that Justice Fernando, as a lawyer, also contributed to the drafting of at least some part of the 1978 Constitution of Sri Lanka. Whatever may have been the motive for contributing to that Constitution, the tragic events that were to develop in Sri Lanka (which also included the adverse environment in which the Supreme Court had to work) were propelled by this Constitution created by the first executive president, J.R. Jayewardene. The sole purpose of the Constitution was to safeguard the position and the ambition of Jayewardene himself. The unfortunate manner in which Justice Mark Fernando himself had to retire prematurely was made possible by this Constitution. This Constitution hangs as a noose over the rights of everyone and Justice Mark Fernando too, had to pay a heavy price due to internal contradictions within the judicial system because of this Constitution. It was a tragedy that a person who had devoted his entire life to the promotion of the jurisprudence of his country and the institution of the judiciary became trapped in circumstances in which that jurisprudence itself came to be regarded as being irrelevant. The 1978 Constitution created a one-man system and destroyed the supremacy of the Constitution along with the supremacy of the law. As a result, lawlessness in governance became the order of the day. Protection of the individual within the framework of the law became an impossible task.

In the contest between the executive and the judiciary in the early years of the formation of the United States, the chief justice, John Marshall, who was the 4th Chief Justice serving from 1801-1835, fought hard and laid the foundation for the supremacy of the Constitution and the sole responsibility of the judiciary for the interpretation of the Constitution. It is that foundation that has provided the basis for the separation of powers and the independence of the judiciary in the United States which has withstood the test of time, despite setbacks in some periods, such as during the administration of President George W. Bush. J.R. Jayewardene knowing that the Constitution would become a hindrance to his ambitions for unlimited power, distorted the Constitution itself. The adverse consequence of this strategy is now felt in the lives of every Sri Lankan including the Judges.

In extremely difficult circumstances, Justice Mark Fernando struggled to develop jurisprudence attempting to interpret the Constitution as if no discontinuity had been created in the tradition of the separation of powers. Thus, he reflected that there exists a contradiction between the political reality and the legal reality in the country, a contradiction that will need to be resolved sooner rather than later. In the 200-year-old tradition of the Supreme Court there is now a serious problem. Reflection in regard to the life and circumstances of Justice Mark Fernando must encourage Sri Lankans to undo the limitation on their freedoms created by their Constitution itself.

Appreciation – GOODBYE TO THE CHIEF OF THE JUSTICES![±]

J. C. Weliamuna[*]

In late 2003, upon hearing that the most respected judge of our times, Justice Mark Damian Hugh Fernando, had decided to resign from the Supreme Court, many lawyers spontaneously approached him. His response was simple: *"I have sent in my retirement papers and there are no reasons to withdraw it, because I feel I am no longer required for the Supreme Court."* Thousands of individuals, religious dignitaries, scholars, academics and professionals submitted appeal after appeal, to stop him from prematurely leaving the judiciary, but no one was persuasive enough to make him change his mind. A visionary judge thus departed.

I pause for a moment, to understand as to why there were such tremendous shock waves over his early retirement. He did not seek publicity; he did not preach politics, religion or values, in public. Then, why was he respected so much? The reasons are countless. Those of us who regularly appeared before him know that this respect was earned due to his knowledge, integrity, impartiality, fairness and judicial temperament. His incisive mind cut through to the core issue of any case, to create soundly argued and succinctly expressed judgments. He was never deterred by the volume of cases. In fact, he openly advocated case management, as a solution against unfair quick disposal of cases or the burdening of judges with unattainable targets. It is well known that friends, relations, clergy belonging to the churches or temples, politicians or fellow judges could not and have not influenced his judgment! No one would ever have imagined of getting 'so and so' to speak to him. To say that he was firm is an underestimation. He was inflexible on principles, strong and vigorous on professional and judicial ethics, and uncompromising on the quality of legal work.

I recall my first encounter with him outside the court room, around 1989. With him was his young son of about 5-7 years of age. It was at the Colombo Municipal Council. He was standing in a queue to make a payment. In the Sri Lankan context, it was most unusual for a Supreme Court Judge to be in a queue to make a payment to a cashier! I approached him, introduced myself as a lawyer and inquired whether I could stand in the queue for him. He firmly said, *"no."* Upon inquiring on the payment, he pointed to his young son and said it was to get the license for his son's bicycle. This was probably my first lesson in the Rule of Law—that all should go by the same rule.

Coming from a distant village in Hambantota District, Walasmulla, I did not know him personally. The most exciting experiences in my life as a lawyer was, firstly, to work as a junior under Mr. R.K.W. Goonesekere and secondly, to argue a case before Justice Mark Fernando—both of which gave me immense satisfaction and exposure. Those of us who came from far away, having to learn English the hard way and to start a practice from basics, found it extremely comfortable to appear before this great judge.

[±] The appreciation was written on 23rd January 2008, the day after Justice Fernando's funeral.

[*] Attorny-at-Law.

From the time he presided a bench, he sat in Court No.403 of the Supreme Court. His Court was well known for high integrity, firmness, politeness and for academic exposure. His was the most predictable court for three main reasons; firstly, it went by the rule; secondly, it maintained high ethical standards and decorum; and finally, no 'tricks of any magnitude' could mislead him. Counsel without exception studied the brief and they had equal opportunity to argue the case freely. I cannot recall a single instance of Justice Fernando losing temper or being rude to litigants or lawyers.

He was also capable of controlling the case and the court alike in the most unassuming way and without curtailing Counsel. When a lawyer lost a case before him, the lawyer was satisfied, because the Court had demonstrated to Counsel, that there was no merit in the case and justice had been served. Before him, all cases received equal attention. The highest of the land to the poorest of the litigants felt they were treated equally in a court of law. He encouraged detailed arguments and his probing questions undoubtedly sharpened the mind of any Counsel, be it senior or junior. He did not allow his gentle temperament to be exploited by lawyers, either in their applications for postponements of cases or upon realizing that the clients will be affected. He consistently encouraged every lawyer to argue every case fearlessly, effectively and in full. He had no favourites. He was, undoubtedly, the judge who handed down the majority of the landmark judgments of the country.

His erudition, wisdom and capacity were well recognized here and abroad. Once Mr. Desmond Fernando (P.C.) and I met a British jurist/scholar, who had served with Justice Fernando on the judicial panel of the International Labour Organization, who said that Justice Mark Fernando was the best legal brain he had come across in his life. Justice Fernando had served as the President of the Asian Development Bank Administrative Tribunal as well as a Judge of the International Labour Organisation's Administrative Tribunal.

He had a dream of contributing to the advancement of legal education in this country. He had an abiding interest in education generally. This was manifested both in endeavours to spread the benefits of education as widely as possible, as well as in initiatives to improve the depth and quality of education. We know that he was fully ready and committed to do his part for it. However, the avenues for him to do so were sadly limited in the political space available. When the 1994 government came to power, the first move by the new Minister of Justice was to remove Justice Fernando from the Council of Legal Education. Unmoved, he stood his ground—he refused to resign, as he was not a political appointee to the Council. But his term was not extended. He then turned to his alumni, the Law Faculty of the University of Colombo, where he had been a lecturer. He developed a mentoring scheme and an internship programme, which helped hundreds of young law graduates to get an early exposure to professional life.

In his retirement, even after he was diagnosed with cancer, he continued to make contributions to legal education, in any manner he could. He conducted lectures at the LLM Course at the Faculty of Law of the University of Colombo. When a team of lawyers organizing a felicitation volume on Mr. R.K.W. Goonesekere, approached him in early 2005, he promptly agreed to write an article titled, "A Fundamental Right to Education". His article

became one of the most widely quoted in this area, in the recent times. His speech made at the invitation of the Organisation of Professional Associations (OPA), was moving and influenced many, and his appeal to the public to stand for justice impacted many professionals and academics of the country. He reiterated, *"This country needs only a hundred good people to make a difference"*.

After his retirement, several senior lawyers and academics approached him with a view to organizing a felicitation ceremony for him. With continuous persuasion, he reluctantly agreed and a group of lawyers and other professionals commenced organizing the event, of course subject to many conditions imposed by him. His first condition was to make the event as simple as possible and to hold it at an ordinary location. The *tsunami* intervened and few days after the disaster, he wanted a few from the organizing committee to meet him as soon as possible. Both him and his wife were lost for words and were in fact in tears over the tragedy. He wanted an immediate cancellation of the event and said, *"Thousands are dead, millions displaced, children have lost their parents; the country has to change its focus immediately to protect the victims; rebuilding our country should be our priority and not the felicitations of individuals"*.

He had a life-long vision to improve the judiciary and legal education for the country. This was reflected in his judgments, in his exemplary conduct as well as in his selectively accepted speeches and writings. His contribution to public law enhanced the horizons of democracy extensively. He encouraged dissent. He believed in Voltaire who said, *"I may disapprove of what you say, but I will defend to the death your right to say it"*. In the celebrated case of *Amaratunga v. Sirimal,*[1] he was critical of executive action that attempted to prevent a peaceful protest in the form of "Jana-ghosha", which was organized by the present President Mahinda Rajapakse who was then an opposition politician during the Premadasa Era. He emphasized:

> *Stifling the peaceful expression of legitimate dissent today can only result, inexorably, in the catastrophic explosion of violence some other day.*

Months before the Chief Justice position fell vacant in 1999, albeit being the second senior most judge, Justice Fernando handed down the decision in yet another politically sensitive landmark case of *Karunatilaka v. Dissanayaka.*[2] He held that the constitutional immunity given to the President is a shield for the doer and not for the act:

> *Immunity neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any court.*

He set aside the emergency regulation imposed by President Kumaratunga postponing elections to five provincial councils.

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[1] [1993] 1 SLR 264.
[2] [1999] 1 SLR 157.

After the retirement of former Chief Justice G.P.S. de Silva, many changes took place in the Supreme Court. Among them was the listing of the cases, which became a serious matter of discussion in legal circles, particularly since it was apparent that Justice Fernando was not listed for constitutionally sensitive or important cases. Was the constitution of benches in the Superior Courts done on a rational basis? This was answered by Justice Wigneswaran in an interview. His answer was as follows:

> *And it was a fact that Justice Mark Fernando was kept out of important cases. Since I was more often accommodated with Justice Mark Fernando I was also spared the distinction of hearing socially or politically sensitive cases. Even if I was accommodated on a bench at the leave stage, once my views were known to be contrary to that of certain others, I would never be given that case thereafter.*
>
> *Therefore I am unable to refer to any rational basis, except to come to the conclusion that particular objectives were the only rational basis adhered to!*

In 1999, though Justice Fernando was the natural heir to the office of the Chief Justice, he was overlooked. I would be failing in my duty, if I do not explicitly state that the country would have been entirely different, had Justice Fernando been appointed to his due place. Thereafter, he continued with his judicial work with less important cases being assigned to him. Probably that was the single most reason that led to his early retirement. Unfortunately, Sri Lankan society, academics, jurists, judges and lawyers have hitherto failed to openly critique why Justice Fernando had to leave and have also failed to learn lessons from that experience for the benefit of the institution of the judiciary and for future generations. As the saying goes: *"a country gets what it deserves"*. And what the country has lost is another opportunity to rise to the demands of a working democracy and to march forward peacefully.

Farewell, and Thank You dear Sir, for being a judicial icon of today's time, from whom a nation has benefited; for standing firm and righteous against all odds; and for the explicit illustration of how justice should be administered fairly.

Appreciation – A "PEOPLE'S JUDGE" BIDS FAREWELL... TO A NATION HE LOVED... AND THE PEOPLE HE SERVED!

Chrishmal Warnasuriya[*]

It was a busy Sunday morning as usual in Chambers and people were queuing up in their numbers as *Arachchi* and *Nanda* had their hands full trying to direct them with their umpteen issues to different juniors. In the midst of this regular pandemonium my learned friend Tudor, who had taken oaths slightly before me then, was seen to be leading a procession of a rather "uncommon" set of clients; not uncommon in a general sense, but by appearance they just didn't fit that regular profile of our usual clients. I was to find out why! This was just a few days before a hotly contested Presidential election (or was it a General one?) and the air was filled with 'politics'. We had Counsel from 'both sides' working out of the same Chambers and it was a wonderful experience for a raw junior to be hobnobbing there. Those were the good days!

Soon came the familiar call from *Nanda* that 'Sir' was asking for me inside, and I only just managed to cram in to an already full room of Tudor's clients; who turned out to be from a location called *66-Watta* in *Wanathamulla*, a popular place for several activities, least of which may be judicial consciousness! Little did I realise however, that contrary to my first impressions and the prevalent common sentiment about these environs, these 'clients' would turn out to be some of the best human beings I have ever come across, and the first ones to stand by you (even uninvited) when the chips were down and regular 'friends' would rather remain in the sanctity of their safety zones!

The issue in brief was that our clients from *66-Watta* were to be relocated contrary to their wishes, as part of an initiative by the government of that time at slum clearance, and it so transpired that the formal handing over of keys were to be carried out at a public rally just a day or so before election by the then-head of State; seen by some as means to overcome the anti-campaigning regulations just prior to voting. This is not a discussion of the merits or demerits of the issue; suffice it to say that our friends from *66-Watta* did not wish to receive any keys, and they did not want to go! They alleged an infringement of their Fundamental Rights—and this is where I came in. At such a politically sensitive time, understandably not many wished to be perceived as 'taking sides'. So it was seen as strategically best that we settled papers immediately and decide as to who would appear 'later'; when that 'later' arrived, I was the privileged nominee to the slaughter, but then, I had very little to lose and so, with as much courage as I could muster, I took up the brief and walked into Court Room No.403; and I was before His Lordship!

The Courtroom was packed, understandably with almost everyone from *66-Watta* taking most of the space and their friends, relatives, the grocer, the candlestick maker, etc.—you name it, they were all there. Then there was the Bar table firing all cylinders. I could see President's Counsel, Senior Counsel, State Counsel, all opposed to us, big names who were known to

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[*] Attorney-at-Law.

give no quarter; and in to this undoubted torture I was only accompanied by good old Tudor; hoping to at least put in a word or two before being shot down—and then His Lordship spoke!

It was as if all our fears had just been rolled up in one heap and thrown away. We felt welcomed as much as, if not more than, all those heavyweights seated in the front row. In a gentle but firm voice we were invited to come forward, and a polite request was made of the seniors to *"give this young man some space"*! In his usual calm, precise and perfect judicial temperament and demeanour, His Lordship Justice Mark Fernando thereafter heard our arguments, conferred with his brother Judges and decided! These were my first impressions of this great man, superior human being, erudite judge and true friend.

I have just returned from Rosmead Place where his mortal remains lay, peaceful as ever, attired (in terms of his last wishes, I am told) in his usual charming style and I can only put these words down in exclamation—oh, what a great man has walked amongst us! In retrospect now, having had several more interactions with him much later and knowing what a truly amazing person he was, I would have been satisfied with the privilege of even that singular appearance. I consider it a great fortune to have been able to move much closer with him later, having the distinct benefit of even discussing intricate matters of Law one-to-one (well, most of it emanating from his wisdom and my attempt to grasp it with my limited capacity).

Much will be said of him in the coming days, many a verse written, many an Ode recited and Eulogy sung; all of it undoubtedly deserved. We can only speak from experiences as juniors regularly appearing before him. There was never a Counsel, junior or senior, who went away not having been heard in full; before him all were equal. That is not to say he was too lenient, he was not; but he heard what had to be heard and uttered only what had to be uttered; that too, impersonally, with no implied or express emotion, matter of fact and to the point. I have heard clients who had just lost their cases before him leaving his habitual Court Room 403 with a smile saying, *"apita hondata ehum kam dunna"* (he heard our case well)!

To Mark Fernando the concept of 'Sovereignty of the People' meant that all governmental power emanated from the people, and therefore government, whether legislative, executive or judicial were answerable to the people and exercised their power for the people in accordance with the 'Rule of Law'. I have had occasion to see appellate Judges in action overseas, and I can safely say that our Hon. Mark Fernando was as good as a bunch of them put together, if not better! If ever there is a judge whose demeanour on the bench, razor sharp intellect, judicial temperament and speed of comprehension that I should like to emulate (God forbid, if ever I am placed there); that would be His Lordship, Mark D.H. Fernando—a truly 'one of a kind' Judge that Sri Lanka was fortunate to have!

Someone once told me that his judgments are the most frequently reported in the Commonwealth Law Reports amongst Austral-Asian Decisions. I am not surprised. If I was asked to name another who could match his incisiveness, ease of grappling with the most complex of issues and crystallizing the crux of it, and elucidating all of it in a coherent and judicially sound judgment, I could only think of one other and that is His Lordship the

incumbent Chief Justice. These two judicial minds, though diametrically opposite personalities in many ways, in my humble opinion, is the *crème de la crème* that we would ever see in our lifetime. I am certain that much would be said against me for these very words, or I may very well end up in a soup for speaking my mind (as most often happens); but then again, as *Sinatra* sings: *"what is a man, what has he got... to say the things he truly feels... and not the words of one who kneels..."*. At times when in absolute dismay at the *status quo* of several things in this country, in absolute naivety and far divorced from the realists, I ponder, what great milestones we may have achieved with these two super-intelligent judicial brains working together; but this was not to be. Sri Lanka was once again not that fortunate to have the best of what she got!

Citing personal reasons Justice Fernando prematurely ended his tenure, and I still remember what a nostalgic and sombre day that was in 403 when Senior Counsel Deshamanya R.K.W. Goonesekera bid farewell with a short and emotional speech. I try to recall the exact words now, where, perhaps for just one split second over his entire tenure as a judge, that usually sedate, serene and composed voice of His Lordship quivered, ever so slightly, as he said (something to the context of): *"I've done the best I can, and when one realises that he can no longer contribute any more than that, he must leave"!*

Coincidentally, on 24th January 2004, writing a foreword to a collection of his judgments that we presented to him with as a retirement present, I wrote as follows:

> *...As the following pages of judgments unfold, the reader would undoubtedly discover what made Your Lordship so different to the many other judges. It would be seen how intricately Your Lordship's mind had traversed through the submissions placed, sifting laboriously through volumes of material; some even cumbersome and unnecessary, to extract what is relevant to the issue, temper it subtly with judicial argument and practical intellect, to finally create unparalleled precedent of sound authority, that are often cited in our courtrooms and even elsewhere in the world.*
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> *When Mr. R.K.W. Goonesekera very succinctly submitted prior to Your Lordship 'taking the final bow' on 20 January 2004, that, "courtroom no.403 would never be the same again", he was actually speaking much more than what he himself would have perhaps imagined. Your Lordship's premature retirement may spell many things to many; most importantly perhaps, a sudden death to the judicial dynamism that has been synonymous with this courtroom. 'What time will bring, only time will tell'. One thing that is certain of not being experienced there anymore, at least to the same magnitude, would be the contentment that both lawyers and litigants alike have experienced upon leaving your courtroom; that justice had been done there, that day, irrespective of whether they had won or lost their claim.*
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> *Your Lordship would be missed dearly, and your services much more. May we only wish you a content retirement and the blessings of the Almighty in all*

your future endeavours, and hope that you will remain connected, to some degree at least, to all that you have laboured to uphold, during your illustrious and sadly unappreciated tenure.

Now over almost exactly five years later, I am moved beyond emotion seeing you lying there motionless, yet so serene. We cannot wish the same for you anymore as we did then—we will bid you a final goodbye in a few hours from now. We only take solace in the fact that there is no more sorrow, no more pain for you, and that the unexplained rigors of humanity that you so bravely endured over the last few years cannot reach you anymore! You definitely left a 'mark' on us Justice Mark Fernando, and you certainly 'marked' your presence in undying ink over these years your Creator blessed you with!

Farewell dear Sir, generations of us who gained so much from you say 'thank you'... the common man that you so staunchly protected also says 'thank you'... your Nation salutes you... your Land cries for you... may the angels comfort you with eternal rest that you so richly deserve! I am reminded of *Macbeth: "Out, out, brief candle! Life's but a walking shadow; a poor player that struts and frets his hour upon the stage, and then is heard no more"*. Let us, whom you leave behind, try and prove Shakespeare wrong. Having so richly gained from you, let us continue in your footsteps and ensure that the voice you raised so resolutely for the citizens of this Republic remains heard—and is heard much more!

Until we meet again, Sir....

JUSTICE MARK FERNANDO: INSPIRATION PERSONIFIED

Lakmini Seneviratne[*]

As an undergraduate, I do not remember a day passing by at the Faculty of Law without someone referring to Justice Mark Fernando, often in the context of one of his ground breaking judgments. On the day of graduation in October 2001, I was privileged to witness the Faculty of Law, University of Colombo conferring Justice Mark Fernando an honorary Doctorate considering his outstanding contribution to the development of legal jurisprudence in this country. But it was not until the year 2003 that I had the opportunity to work with him closely as a committee member of the Alumni Association of the Faculty of Law (AAFL).

I still remember thinking how simple he is as a person, given the majestic nature of his work and career. As the President of the AAFL, at each monthly committee meeting, Justice Fernando would not only appear in person punctually but would also ensure that other members attended, often by giving some of us a personal phone call well ahead of the scheduled meeting, thereby setting an example for others to follow. His contributions at the meetings were exclusively geared towards upgrading the quality of education offered at the Faculty of Law, University of Colombo. To this end, the proposals he made, true to his style, were both bold and pragmatic. What was most inspiring about these programmes, especially those that he initiated after retiring from his role as Judge of the Supreme Court of Sri Lanka, is how he positively used his contacts and name in order to ensure wider and better opportunities for the students of the Faculty that would enhance their legal education. Be it activities for the students, e.g., assistance classes, internships, orientation programmes, clinical education programmes, offering funds through AAFL for mooting and debating competitions, welcome dinner for new entrants to the Faculty and farewell dinner to the final year students, etc.; or activities for the teachers, such as practising opportunities for junior staff members, Justice Fernando knew how to mobilize the past and present human resources of the Faculty towards upgrading the quality of education.

Justice Fernando was a visionary: he believed that legal education had to keep adapting to the changing needs of society. He foresaw that the face of legal education would change from being a privilege confined to an elite few to a subject embraced by hundreds. However, considering the difficulties that students would face in enhancing their skills, identifying opportunities and establishing contacts, he initiated several projects through the Alumni Association that would help law students to build successful careers. He often used the acronym 'CAKE' to describe the role of the AAFL vis-à-vis the students, when he addressed undergraduates at the First Year Orientation Programme: C for connections, A for attitudes, K for knowledge and E for experience. It was under his stewardship that the Internship Programme of the AAFL, which procured placements for undergraduates in the chambers of legal practitioners, law firms, private sector companies, banks, government institutions and in the non-governmental sector was begun. Some of the other programmes included the Mentor Programme, for mentoring students by senior practitioners; the Orientation to the Private

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Sector Programme, for introducing organisations and officials of the business sector to the second year undergraduates; Assistance Classes for final year students in the Faculty who were sitting for the Law College Final exam, etc. I remember how dedicated he was towards meaningfully implementing these programmes, often spending his own resources and time to this end. There were instances when I accompanied him on his personal visits to the organisations/persons who collaborated with the AAFL on these programmes, and having long phone conversations planning ahead for these event and meetings. Needless to say, these initiatives were of immense help to students to construct meaningful working relationships and networks that would serve them in good stead in future practice. Apart from this, he also offered constant and progressive suggestions for improving the LL.B and LL.M curricula at the Faculty of Law.

With a view to maintaining healthy relations within the legal fraternity, Justice Fernando also encouraged and ensured that a get-together was organized annually by the AAFL, bringing together alumni from around the country in a spirit of comradeship, to which those who are not alumni were also welcomed. Characteristically, he lead the way by example more than precept by getting personally involved in determining the venue, agenda, procuring sponsorships and ticket sales. And he would not fail to follow up on the progress of the delegated work, thereby keeping us on our toes to ensure that things are seen through to a successful end.

In addition to those inspiring moments gathered in working closely with this exemplary human being, my fondest memories of Justice Fernando are those that my colleague Naazima and I spent visiting him at his home, specially towards the latter part of his illness. When several weeks would pass by between these visits due to circumstances beyond our control, he would invariably give a call: *"Lakmini,"* comes the almost accusing tone, starting a conversation about a pending matter concerning the Faculty or AAFL. After a few minutes of 'business talk', he would fondly ask, *"so, when are you coming to see me?"* A few days later, both of us would be at his doorstep, often in the early evening, looking forward to seeing and having memorable and insightful conversations with 'Sir'. These conversations were no 'small talk'; he would interrogate us both on our individual work as well as on institutional matters related to AAFL and the Faculty. He would be quick to detect our weaknesses and make useful insights in to working things out for the better. Often, his involvement in these discussions was so intense and serious that he would get visibly tired, that 'Aunty' (as we fondly referred to Mrs. Fernando) would quietly suggest, *"Mark, shall we get some rest?"* I distinctly remember such an instance the last time we saw him at his home, when despite the disturbances of his grandchildren and Aunty's request, Sir was engrossed in proposing amendments to the LL.B curriculum at the Faculty.

In my career as an academic and activist, it was from Justice Fernando that I drew inspiration for selfless devotion to a cause. Indisputably, his contribution to the progress of legal jurisprudence in this country as an eminent jurist and Judge of the Supreme Court is unparalleled. But what I personally witnessed in having worked with him closely in the AAFL is his unwavering commitment to a cause, i.e., enhancing legal education in the Faculty, without an iota of personal benefit in mind other than self satisfaction. It is no

exaggeration to say that the future of thousands of LL.B undergraduates and graduates was stabilised with the grace of Justice Mark Fernando through his pioneering role in the AAFL. And it is the inspiration that was drawn under his leadership through his exemplary character that provide us the incentive to continue to struggle for the causes and values he believed in and we believe in.

Two roads diverged in a wood, and I –
I took the one less travelled by,
And that has made all the difference[1].

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[1] Robert Frost (1874–1963), Mountain Interval, 1920.

LATE JUSTICE MARK FERNANDO: A PILLAR OF PEACE[±]

An interview by Wijith DeChickera[*]

State of the Nation

Q: What, in your opinion, are the most serious issues facing Sri Lanka today?

A: One of the most serious problems is the lack of a permanent peace. The current ceasefire[#] is certainly *not* true peace. Another is the breakdown in law and order, the abuse of power, the denial of equal treatment and the loss of public confidence in the 'justice system' in the broadest sense. A third serious problem is the spiralling cost of living—without a corresponding increase in salaries and incomes, productivity and employment—aggravated by corruption, extravagance, waste and lethargy. A major cause of all these problems—and itself a serious problem—is the unrestrained politicisation, which pervades almost every sphere of activity. All this has resulted in a widespread breakdown of values, and 'ordinary people' all too often ask themselves: "If those in power and public office are looking after themselves first, in every way they can, why should we be different?"

Q: What are the three most pressing issues affecting national development and progress?

A: National development will continue to be hesitant and haphazard—unless and until there is stability, sufficient to enable people to make plans for their future. But there will be no stability if there is no peace, or just an uneasy ceasefire. That may mislead us into thinking that peace is the most pressing need. In truth, however, the 'justice issues' are even more crucial, for there can never be *true* peace without *real* justice.

The importance of justice will become clear when we consider why there has been a violent conflict since the 1970s. There has been, for 50 years, a widespread belief among members of all communities that their human rights were being infringed—particularly the right to fair and equal treatment, with regard to language, land, livelihood, education, university admissions, public employment, etc. Unfavourable economic conditions, increasing unemployment and land scarcity aggravated those grievances. The present shortcomings in the justice system also retard economic progress.

It is futile now to debate whether those grievances were real or merely fancied, and who was to blame. To resolve the conflict now, we must ensure that—*in future*—human rights will be protected and that wrong perceptions will be dispelled. But infringements will nevertheless

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[±] Originally published in the *LMD*, August 2005 issue. Reproduced with kind permission from Media Services, the publisher of Sri Lanka's pioneering business magazine LMD.

[*] In an exclusive interview by Wijith DeChickera, the late Justice Mark Fernando provides insights into what ails the legal and judicial systems of Sri Lanka, plus recommends judicio-legal and constitutional reform for pressing national issues. The interview was first published 17 months after Justice Fernando prematurely retired from the Supreme Court in January 2004.

[#] Ed. Note: This interview was conducted during the short-lived ceasefire in force during that period.

occur, as indeed they do in any democracy. Such infringements will pose no threat to peace if—*and only if*—the justice system ensures prompt and effective remedies, as well as the progressive reduction of future infringements.

Besides, a peaceful settlement of the conflict will necessarily involve complex arrangements for the sharing of governmental powers, whether in the form of federalism, devolution, decentralisation or otherwise. The experience of other nations shows that despite the most careful and sincere demarcation of powers, a host of disputes will arise concerning interpretation and implementation; and hence, credible guarantees are needed that all such disputes will be promptly, fairly and impartially resolved. Hence, minority groups—and indeed, all Sri Lankans—must have full confidence that all organs of government will sincerely respect, secure and advance human rights.

That will not happen unless the law guarantees that judicial and other institutions charged with the protection of rights and the resolution of disputes are competent, impartial and independent. If that foundation of justice does not exist, various groups will naturally demand more extensive powers and safeguards, in order to protect their rights and remedy their grievances. Such demands may delay, and even prevent, the realisation of a lasting peace.

Q: *What practical remedies or resolutions can you suggest for these pressing issues?*

A: By becoming a party to international human-rights covenants, Sri Lanka proclaimed its commitment to protect human rights. That was potentially a source of immense reassurance to all Sri Lankans. However, the government has failed to comply with some recent rulings by the Human Rights Committee (HRC), set up under the International Covenant on Civil and Political Rights (ICCPR). One immediate practical step would be for parliament (which is also required to 'advance' fundamental rights) to enact a law declaring that rulings of the HRC shall have the force of law in Sri Lanka, binding on all organs of government. That would place it beyond doubt that the 'protections of the law', which Sri Lankans now enjoy, include the benefit of the ICCPR and the rulings of the HRC. In the meantime, steps should be taken to enhance the effectiveness of all state institutions concerned with human rights, including the National Human Rights Commission and the ombudsman.

As far as achieving peace is concerned, it seems to me that more attention needs to be paid to identifying the specific everyday problems of ordinary people, and ascertaining what specific powers need to be transferred, at various levels, in order to solve those problems. That will enable people to understand why it is necessary to share powers, and that the powers being shared are no more than what is really necessary. The current debate about difficult legal concepts such as federalism may then become more intelligible to them. It is heartening to see many groups engaged in promoting understanding between people of all communities. *Such confidence-building measures need to be encouraged and expanded.*

Tsunami Aftermath – Model Nation in the Making?

Q: It has often been parroted that the Indian Ocean tsunami, which devastated Sri Lanka's coastline late last year, was a disaster with attendant opportunities. Do you agree with this view—and if so, what are the opportunities? Have we capitalised on them? If not, how can we do so with urgent pragmatism?

A: The *tsunami* was an unparalleled disaster. The loss of life, and the suffering and sorrow of family members, are irreparable. Compensation can never be enough. However, I agree that in other respects, the disaster created several new opportunities for peace, development and reform—as well as the financial and other resources needed.

Distrust, misunderstandings and lack of confidence among groups—which have been isolated from each other for about three decades—cannot be dispelled by laws and speeches. Personal communication, understanding each other's problems and joint action in solving them are much more effective. In the crucial first three days, ordinary people—individually, and in groups—responded in that spirit, and provided relief and shelter until the government machinery got going. Race, religion, caste—and even politics—were disregarded. It was even reported that members of the forces had worked together with LTTE members. If such initiatives had been encouraged and developed, there would have been by now an efficient *people's* joint mechanism, and lasting peace may have been a step closer. Unfortunately, extraneous issues took precedence.

Funds far exceeding what was actually needed for relief, rehabilitation and reconstruction were pledged. Transitional housing could have been provided rapidly, helping to restore morale and livelihood—but even after six months, some victims are still in camps. Despite pronouncements about new townships and the provision of new houses within months, it is now being reported that permanent housing may take up to two years. The delays in making state land available outside the buffer zone suggest that enough thought was not given to the possibility of permitting houses in that zone, with safety features (strengthened foundations and columns, etc.) appropriate to each area.

Many damaged houses would have been in poor condition, lacking the necessary facilities and amenities. Previously, there would have been no prospect of improving them. The tsunami created an opportunity and attracted the funds—not merely to restore what was damaged, but to provide something significantly better. There was also an opportunity to explore the provision of new, clean sources of energy—such as solar power, windmills, biogas, etc.

With regard to livelihood, too, emphasis should be placed on improving on—and not merely restoring—poverty-related conditions. Fishing communities should have better boats and equipment, enabling them to improve their catch; better facilities to store, refrigerate and process their catch; and better marketing arrangements, which would have benefited *both* producer and consumer.

It was charity and compassion that prompted the flow of aid. While world attention remained focussed on Sri Lanka, we should have raised issues of international social justice and equity, to touch the conscience of the world. Why should a Sri Lankan fisherman or farmer, for example, who takes the same risks and works as hard as his counterpart in a developed country, have a much lower standard of living? Developed countries are now seriously contemplating new measures, such as Third-World debt relief; and the public in those countries needs to be made aware that justice and equity demand fairness in the use of resources, trade and investment.

Q: Given the recent gestures of goodwill by the international (donor) community—to say nothing of the quanta of aid pledged for post-tsunami reconstruction—would you see an opportunity to rebuild Sri Lanka along the lines of a model nation? Or are we heading towards 'building back better' only selected coastal strips of Sri Lanka—in fact, probably replacing the same, old inadequate infrastructure that we had before?

A: I believe that the quantum of aid pledged and received will far exceed what is required for the mere replacement of what was destroyed. Prompt and efficient utilisation of aid will help maintain—and even increase—the flow of aid, and ensure "building back *much* better" in the affected coastal areas. That would create disparities between tsunami victims on the one hand, and other underprivileged Sri Lankans on the other hand—some affected for much longer and/or more seriously, by the ethnic conflict and various injustices and shortcomings. People elsewhere in the world will respond sympathetically to the need to ensure equal treatment for all such categories if they see that aid has been well utilised, and if they are made aware of the issues of international social justice and equity involved. If we can do that, the good 'physical quality of life' rating, which Sri Lanka already enjoys, will rise—even if not to the heights of a model nation.

State of Law and Order

Q: The state of law and order leaves much to be desired in this country today. How best can the rampant lawlessness at times and alarming rates of crime be curbed? Who must take what concrete steps to ensure that Sri Lankans can live safely?

A: Recently, a minister disclosed that for every 100 crimes committed, only about 50 prosecutions were launched and that only four succeeded. If those figures are correct, it means that criminals will be encouraged by a 50 per cent chance that they will not even be prosecuted, and a 96 per cent probability that they would escape conviction. On the other hand, victims of crime will be dismayed by the unlikelihood of obtaining redress through the law. Some will take the law into their own hands. Violence will increase.

The reasons for rampant lawlessness are known; the economic and social consequences are known; and the remedies are known. The direct and indirect benefits of curbing crime and enabling Sri Lankans to live safely far outweigh the financial costs of implementing those remedies. *What is lacking is political will and social pressure.*

The police service must be upgraded. Adequate personnel, vehicles, equipment and other resources must be provided—and utilised—for the prevention, investigation and prosecution of crime and the maintenance of public order. Vacancies must be filled; and promotions, extensions and transfers duly effected—promptly. The diversion of human and material resources for extraneous purposes must be reduced to the absolute minimum. Other arrangements may be made for purposes such as security for politicians. Police officers must receive more and better training, especially in relevant legal aspects, such as investigations and prosecutions—and even the mediation of minor civil disputes. More lawyers should be recruited, and serving police officers must be encouraged to acquire relevant legal qualifications. Law schools must provide relevant courses. Political interference, as well as links with criminals and organised crime, must be severely dealt with. It is true that there are many honest and competent officers, and the wrongdoings of a minority get disproportionate publicity. But it is nevertheless necessary that wrongdoings be—*and be seen by the public to be*—promptly and impartially investigated. A police officer must be seen as a friend of the law-abiding citizen, not as an oppressor to be feared.

The prison system needs reform. Our overcrowded and understaffed prisons become a training ground for criminals—instead of a means of rehabilitation—because remand prisoners, young offenders, first offenders and offenders imprisoned for failure to pay fines, are brought into close contact with hardened criminals. Overcrowding is aggravated by the incarceration of offenders who should really be undergoing rehabilitation or performing community service. Remand prisoners, particularly those unable to provide bail, must be brought to trial very quickly.

The Attorney-General's Department must be strengthened to enable state counsel to offer prompt advice to the police at every stage. Non-summary proceedings must be abolished.

When required by the courts, all government departments must submit reports and documents promptly. The necessary staff and resources needed must be provided.

Last, but not least, criminal proceedings must be concluded expeditiously—because undue delay sometimes results in denying a fair trial to the accused, and sometimes in making unavailable the evidence needed for a successful prosecution.

Q: Are the proceedings related to several incidents, which rocked the nation at the time, satisfactory today—for example: the Udathalawinna massacre, the Bindunuwewa trial, the Justice Sarath Ambepitiya murder case? Or is there something rotten in the state of the criminal-judicial system? And is politics at the core of this rottenness?

A: The Ambepitiya case shows that investigations and prosecutions *can* be concluded efficiently and quickly given the necessary determination, resources and facilities. The Udathalawinna case has taken much longer, but the delay cannot be regarded as undue—given its apparent complexity. The Bindunuwewa case reveals a failure of the system, in that the investigators failed to obtain satisfactory evidence to establish who was responsible for several murders committed in the presence of witnesses. Unfortunately, those murders may

now become a mere statistic, part of the 96 per cent of unsolved crimes. These three cases reveal both the shortcomings of the system as well as its potential. Whether politics played any part, I do not know.

Legal Reforms

Q: What else, in your opinion, ails the legal system and the legal profession today? What must be done to rectify the law's delays, alleged corruption, the inefficiency of the courts system and so on? Are lawyers to blame for these perceptions and realities, or must judges also be held culpable for painfully drawn-out litigation?

A: There are shortcomings in the law and in the legal system. A defective legal system, beneficially administered, is much better than a good legal system badly administered. It is mainly in relation to the implementation and administration of the law that the most serious problems arise.

Experience shows that whenever judges and lawyers are competent, and have the right attitudes, values and ethical standards, they will be able to overcome most deficiencies in the system. For instance, in the early 1990s, large numbers held in detention camps could not apply to the Supreme Court for relief—because they lacked the facilities to make formal applications in terms of the constitutional requirements. The Court's response was to adopt administrative measures to act on even a letter seeking relief. Later, the Rules were amended.

It is important to address the root causes of problems, not just the symptoms. A group of lawyers recently considered that some lawyers were bringing disrepute to the profession because they had not kept up-to-date with the law and had failed to maintain professional standards. Their recommendation was to introduce an annual licensing applicable only to *future entrants* to the profession. There was no discussion of the root causes and how to eliminate them. The root causes of many problems are related to deficiencies in legal education. The solution is to inculcate the necessary knowledge, skills, values and attitudes in the students as part of their academic studies; values, professional standards and traditions must be learnt as part of apprenticeship and practical training—preferably, 'caught' from good example by their seniors, rather than 'taught' by precept. And after enrolment, it is not *remedial* legal education, but systematic and comprehensive *continuing* legal education, that is required. *Licensing is an admission of defeat.*

The education of the student is most important, because law students become junior lawyers; junior lawyers constitute the pool from which junior judges, senior lawyers and state counsel emerge; and it is from those categories that, ultimately, senior judges are appointed.

In the final analysis, rectifying the law's delays, corruption and inefficiency in the system depends on the human factor. What we need are the right people with the right training, experience and values; and without that, flooding the system with material resources—in the form of buildings, computers, photocopiers, etc.—will be futile.

Lawyers and judges do contribute to the delays and inefficiencies of the courts system, although there are other contributors as well—and they can contribute to the solutions, too.

Q: The institutions of Chief Justice, Attorney-General, Solicitor General, etc., continue to be offices in which the highest authority has been invested—yet often, the officers charged with carrying out these duties reportedly fall short of the high standards of ethical behaviour expected of them. How does one lash the person but spare the office, so that standards are maintained and institutions don't suffer?

A: If you look at those institutions during the whole of the 20th century, it can be fairly said that the incumbents of those offices generally maintained the high standards expected of them—subject to infrequent minor lapses, inevitable in any human institution. When there are credible allegations of serious misconduct, resort must be had to the available legal remedies; and if these fail, the public has to think of other remedies.

One reason for declining standards is the lack of a clear and comprehensive code of ethics. Judges and lawyers are thereby deprived of clear guidance, and that results in mistakes and misunderstandings; and the public is left in doubt as to whether there has been a breach of ethics or not. But where misconduct is evident, and the statutory remedies are ineffective or are thwarted, the public—individually and collectively—civil society and the media (giving voice to public opinion) must expose, criticise and refuse to condone misconduct. Yes, that will damage some offices, but misconduct causes greater damage and condonation makes matters worse.

Q: Given the perception that the independence of the judiciary is probably at an all-time low—and that the legal profession is in crisis—what can be done (and by whom and how soon, practically speaking) to re-establish 'the awful majesty of the law'?

A: Given those perceptions, the public must realise that sovereignty is vested in the people, and that all the organs of government—including the judiciary—are only exercising the powers of the people.

The people of Sri Lanka have, therefore, the right to scrutinise the manner in which the judiciary has exercised judicial power—and that is why they enjoy the freedom of speech, subject to the limitations prescribed by law. That freedom is recognised in most democracies. Such scrutiny has two components: the review of judgments and orders, and the review of other aspects of judicial performance (such as unpunctuality, premature adjournments, unjustified postponements, discourtesy to court users and delay in delivering judgments).

The right to make reasoned criticisms of judicial orders (as distinct from abuse and vilification) is unquestionable. Every appellant asserts that the lower court was wrong; lawyers faced with adverse precedents criticise them; every dissenting judgment is an assertion that the majority is wrong—and a later Bench may agree. Law students are taught

to critically scrutinise judgments. If judgments are not scrutinised and criticised, the law will not develop. Lawyers, both practitioners and academics, must take the lead in these reviews.

As I said, *justice is the foundation for peace*, for development and then prosperity—in that sequence. I believe that the various actions I have outlined—reforms in legal education and in each component of the justice system, and review of judicial performance—are vital not only to ensure the independence of the judiciary, but also to restore public confidence in the independence of the judiciary and in the maintenance of law and order.

Q: *A member of the Bar recently remarked in a private conversation that, "no great legal points are debated in the superior courts anymore"—intimating that the Supreme Court functions as,* inter alia, *a rubber stamp for the appellate courts. Would you agree with this remark?*

A: That comment involves the Bar as well. Does the Bar raise great legal points any less frequently than before? Does it mean that such points are raised, and that the Bench fails to determine them? That comment *may* be factually correct, but what needs to be clarified is the factual basis for that comment. And that is why—instead of one person's perception—it is necessary to have a systematic review of judgments and judicial performance. If there had been provision for review of judicial performance, then it would be apparent, from year to year, whether and how often such points were raised, whether they were ignored, whether and what reasons were given, etc. Then, whether that comment was justified would be objectively ascertainable, and not just a matter of individual perception in isolated instances.

Judicio-Legal Issues

Q: *Not too long ago, Desmond Fernando PC broke with a customary practice (if not what is widely held to be a sacrosanct tradition) to contest the election to the Bar Association of Sri Lanka, challenging an incumbent—who, generally, is elected uncontested for a second term. He said his reason for doing so was that the independence of the Bar was at stake. Would you agree—and if so, what can and must be done about it? What realities about the legal system and/or the judiciary warranted (if at all) the break with tradition?*

A: Let me first say that Desmond Fernando is related to me. That election involved a conflict between two norms. The first, a 30-year 'tradition' that an incumbent president will not be contested for his second term; and the other, that a much older 'principle' of the independence of the Bar, etc., was at stake. It was essentially for the members of the Bar to decide which claim was correct—or, if they thought that both claims were correct, which should prevail.

The traditions of the Bar are practices handed down from the past. They are established, amended and replaced by the Bar itself. If the members of the Bar thought that it was time to change that tradition, or that maintaining it involved a serious risk to a more hallowed principle, that was their prerogative. So long as that decision was reached democratically—

without intimidation, undue influence, etc.—it must be accepted. Whether the public agreed with the majority is not crucial.

Having secured office on that basis, the new president must act accordingly. He would agree that as a young lawyer he benefited greatly (as I did) from the guidance and support received from seniors. Perhaps he would consider re-establishing and strengthening that tradition, by ensuring that the Bar takes a much greater interest in the education and training of law students and young lawyers.

Q: The independence and integrity of the Bench, too, has been a matter of some debate and discussion—and no little controversy, with even the highest executive powers in the land openly alleging that the judiciary is allegedly corrupt. How would you respond to such a provocative statement? Are judges, in fact, corrupt? Does the Bench turn a blind eye to some powers that be?

A: Such statements are justifiable and beneficial *if* they are both true and intended to be acted upon in the public interest. If credible allegations of corruption against anyone in public office are brought to the notice of those in high office who have the power to initiate investigations and other proceedings, they must be made public, the suspect named and given an opportunity of responding—and decisive action taken. But if they are made without particulars, and under cover of immunity or privilege, *and* no action is taken to investigate or prosecute, unjustified damage is done to the institution and its members. Some mud may stick, but more on the hands of the thrower.

Perhaps you have in mind an incident, five years ago, when the president openly stated that a sitting supreme-court judge had taken a bribe from an LTTE supporter in a fundamental-rights case, and that she had the file to prove it. The judges wrote, each denying the allegations. Having received no reply, they wrote again asserting that the absence of a reply controverting their denial confirmed that there was no basis for those allegations and that they were not even worthy of investigation. There was still no reply. If there *was* evidence of such bribery, the failure to initiate investigations was condonation. If there was not, it was an unworthy allegation to make.

The Bench was compelled to turn a blind eye beyond that point, because of presidential immunity from legal proceedings while in office.

Q: Justice—as much as peace, as you intimated—is a requisite for social harmony, political stability, progress and development. However, considering the presumed absence of an efficient, independent and impartial judiciary, how does one set the system right?

A: The Marga survey did not disclose any public perception as to a *total* lack of efficiency, independence and impartiality. The judiciary is one integral body and, like the human body, it consists of several parts. Defects in one part of the judiciary—like tumours in one part of

the body—initially affect only that part, without affecting the other parts or the overall health of the person. But if not promptly dealt with, it will spread all over.

A few minor lapses anywhere in the judiciary will be ignored as being unfortunate exceptions, which do not detract from the overall prestige of the judiciary. But if the lapses spread and become more frequent, at a certain point, people will no longer treat them as exceptions, but will treat them as the rule. Immediate and drastic surgery becomes vital.

Laws and professional standards must be improved, and offenders must be removed if they cannot be rehabilitated.

Q: Who should address the above issue? And does a better standard of legal education (a bottom-up approach) have a role to play in cleansing the Augean stables—or is that too harsh an indictment of the judicio-legal system extant today?

A: If the public accepts that that point has been passed, urgent action is needed—by the legislature, the executive, the professions, the private sector, civil society—and indeed, by everybody. Children should be taught, as part of social studies, what they are entitled to expect from the three organs of government and those in positions of leadership—and especially from the judiciary and the justice system. Improvements in legal education are also essential. The problem has to be tackled at all levels, and by all those who have a stake in the justice system, and both short-term and long-term remedial measures are needed.

Temple of Injustice?

Q: Is it true that the denial of justice is the primary contributor to a general breakdown in law and order? What contribution can be made by senior practitioners of the law—especially the Bar—some of whom have even referred to the judiciary as "what was formerly known as the temple of justice"?

A: Comments of that sort reflect public disenchantment with the justice system, including the judiciary. According to the Marga survey, even out of the judges who responded, only 47 per cent rated the services of judges as "good". Some 69 per cent of the respondents agreed that, at present, they are confident of obtaining justice to some extent, and that the position was better five years before. A majority believed that, to some extent, the system serves only the rich and the powerful. The four most-serious problems identified were lack of judicial training, delays in delivery of judgments, lack of English skills and prejudice. Curiously, unnecessary postponements were not included.

Even if these findings are not completely accurate, they reveal shortcomings in the system, which undoubtedly contribute significantly to the general decline in law and order. If the judicial system was working very well, it would have been able to remedy at least some of the shortcomings in other components of the justice system.

Senior practitioners have the knowledge, the skills and the influence to initiate and support much-needed reforms. Individually, they may be able to do little—but collectively, through their various associations and organisations, they can do much.

Constitutional Issues and Reforms

Q: Can there ever be a truly impartial Bench in a country under whose system the chief justice, for example, is appointed by the executive president? Doesn't such power countermand the checks and balances supposedly innate in our constitution?

A: The 17th Amendment provides for high appointments to be subject to dual control: Some by the president, on the recommendation of the constitutional council—and others, vice versa. This is an additional check and balance.

Speaking of checks and balances, experience in many democracies confirms what an American judge said: we rest our hopes too much upon constitutions, laws and courts; these are false hopes; liberty lies in the hearts of men and women; and when it dies there, no constitution, no law, no court can save it. That is true of justice and high appointments, too.

Constitutions and laws assume that those in public office will exercise their powers for the purposes for which they have been given, and for the benefit of the public. They provide checks and balances so that misuse of power by one institution or official can be restrained by another—and that will work under normal circumstances. But it will not work if competent persons with the right attitudes and values are not elected or appointed to those institutions.

Q: When, in your qualified opinion, should the next presidential election be held? Whose prerogative is it to make a final, legal and binding pronouncement on this matter?

A: The Constitution provides for the poll for the election of the president to be taken within a specified period, and that it is for the commissioner of elections to fix that date. That is his right and duty, and I do not wish to express any views as to what that date should be.

Q: And yet the Constitution is being quoted by both members of the government, as well as the opposition—to establish contradictory claims... to wit, that (according to Article 3 of the Constitution) the presidential poll must be held six years after the swearing in (i.e. in 2005)—as well as that, constitutionally, the president's full two terms of political office do not end until 2006. As a citizen, whose point of view would or could you more readily accept?

A: I do not wish to comment on this, for the same reasons stated before.

Q: What constitutional reforms would you like to see undertaken, debated and implemented in the short and medium terms, keeping Sri Lanka's best national interests in mind?

A: There is general agreement as to the need for amendments in several areas. Three of the least controversial are: curtailing the powers and immunities of the executive presidency; improving the electoral system in order to ensure free, fair and equal elections; and ensuring that the dual-control appointment system for high offices works.

Hung Jury on Capital Punishment

Q: In light of the seriousness of the increasing crime rate in Sri Lanka, are you in favour of reinstituting the execution of the death penalty? How would you respond to English statesman, Lord Halifax's dictum on capital punishment, that "men are not hanged for stealing horses—but that horses may not be stolen"?

A: I am relieved that I never had to decide whether the death penalty was lawful or not! That is a complex problem, balancing the rights of the individual against the rights of the community—with strong moral implications, too.

The dictum you cite evokes three questions. Is society entitled to impose the ultimate penalty unless it is sure that it had no responsibility for making men steal horses? What restitution can society make if it turns out later that it has hanged the wrong person? And finally, shouldn't society be sure that there is no hope of remorse and rehabilitation for the offender? Seldom, if ever, will those questions receive satisfactory answers. Society must promptly deal with the root causes of the increase in grave crime and the deficiencies with regard to the prevention and investigation of crime.

All religions deplore the taking of human life. A rare exception is *perhaps* justified where the death penalty is imposed as a matter of necessity, by way of self-defence, for crimes which strike at the foundations of the nation—such as terrorist acts, drug dealing, serial killings. But even that cannot be justified if the justice system leaves open a serious possibility of error.

Law-enforcement under the Microscope

Q: In a recent interview with BENCHMARK, the programme presented by LMD, Attorney-at-Law Arittha Wikramanayake said that the public had lost confidence in law-enforcement authorities—citing the truism that "nothing happens" (in relation to the recent spate of killings in the city). Can you comment on this?

A: Perhaps it could more accurately be said: "Nothing *much* happens." One cannot say that the system has completely broken down, but the disclosed rate of convictions suggests a very serious crisis. Instead of deterring criminals, law-abiding citizens are deterred from participating in the justice system. It does not encourage public cooperation with the authorities, but self-help and a recurring cycle of violence and crime. The resultant loss of public confidence also has implications for the peace process. If the public in the South lack confidence in the law-enforcement system, can one expect the public in the 'uncleared areas' to have confidence?

At times, after a serious crime, the media reports—seemingly with approval—that orders have been issued "from above" for a prompt and thorough investigation. That is not a cause for congratulation, but for alarm—that the law-enforcement system needs to be kick-started into action—whereas that system must be self-activated no sooner a crime is reported. What would we say of a doctor or a teacher who does not commence treating or teaching unless and until his superiors give him specific orders to get cracking?

The fact that there must always be a cabinet of ministers and a prime minister, that the direction and control of the government is vested in the Cabinet—and not the President—and that the whole Cabinet (including the President) is collectively responsible and answerable to Parliament, is not appreciated.

The President is also responsible to Parliament for the due exercise of powers vested by the Constitution or statute in the president alone—and that would include, for instance, powers under the Public Security Ordinance and, arguably, even the power to dissolve Parliament. The fact that presidential immunity does not extend to proceedings in parliament confirms that such control is available. There are also misunderstandings as to the extent of presidential immunity, which—in my view—is limited, both in content and in duration. Parliament should, by law or standing orders, ensure that these checks and balances are made clear and effective, and that immunity is kept within reasonable bounds.

The 17th Amendment does not adequately reflect the implications of pre-existing constitutional provisions, especially that elections must be free and equal, and the extensive powers and responsibilities of the commissioner of elections; and—to some extent—that Amendment devalues pre-existing safeguards.

Further, the present registration system effectively prevents a young citizen from voting for almost a year after reaching the age of 18. Provisional registration should be permitted at 17, effective at any election after he or she reaches 18. Another one million migrant workers who annually remit a billion dollars to Sri Lanka are denied the franchise recognised by the Constitution, simply because voting through embassies is not allowed. Thus, over 10 per cent of qualified voters are denied their franchise.

Again, the election laws must compel the declaration of assets, the disclosure of qualifications and disqualifications, and the registration of manifestos (including policies and promises) by political parties and candidates. Election violence and infighting between candidates will be greatly reduced if existing laws as to the display of posters, flags, cut-outs, etc., are enforced and tightened. Consideration should be given to restricting any form of canvassing—at least on polling day—and limiting public meetings and processions that disturb and disrupt the lives and livelihood of ordinary citizens—and sometimes provoke violence. The state should instead provide more facilities for canvassing through the media and the postal system.

The procedures of the Constitutional Council must be improved. The term of office of most members of the first Council expired in March, but no new appointments have been made. Further, the 17th Amendment provides, in the case of the Elections Commission, that "the

President shall, on the recommendation of the Constitutional Council, appoint one member as its chairman"—and "shall" means 'shall without undue delay'—*but no such appointment has been made*. Executive responsibility to Parliament must be enforced, even by means of amending legislation if necessary.

Q: All things considered, would you advocate constitutional reform tantamount to the abolition of the executive system of governance? What main elements would feature in an alternative model you could propose?

A: Your question is really this: is a parliamentary executive preferable to a presidential executive? Let me caution you again about placing too many hopes on constitutions and laws and courts! What is needed is some heart surgery to revive liberty and justice. Professor K. M. de Silva once described the parliamentary executive that existed previously as centralised democracy in which the dominant element is the political executive, which has few institutional checks on its use of political power. In a parliamentary executive system, there is no separation of powers as between the executive and the legislature—and correspondingly, checks and balances are very weak. The advantage of having an elected president is that there is a greater degree of separation of governmental powers, and more effective checks and balances are possible. The need is to have such checks and balances, and make them work. Besides, democracy—while providing for majority rule—must ensure minority rights, and the presidential system *is* fairer to minorities.

Other useful reforms would be constitutional provisions for the review of legislation, for a commission on judicial performance, for a mechanism periodically to determine national policy (at least on less-controversial subjects, such as education and health), and for equitable limitations on the perquisites of political office.

Q: Is the joint mechanism constitutional? Is it, legally and constitutionally speaking, a first step towards internal self-determination for a group of people in Sri Lanka today?

A: One of the Directive Principles of State Policy is that 'the State' is pledged to ensure an adequate standard of living—including food, clothing and shelter—for all its citizens, including those living in 'uncleared areas'. That applies to providing relief and rehabilitation in a small disaster in a small area, as well as an enormous disaster affecting several districts. If the government refuses to fulfil its legal obligations to its citizens in 'uncleared areas', that may well be construed as discrimination, and may also lend support to separatist demands. Allowing other foreign and local organisations to provide assistance would not have changed that position significantly, and would additionally have facilitated misuse of assistance.

A reasonable option, therefore, is to coordinate government assistance with those in control of the 'uncleared areas'. That is a matter involving the direction and control of the government, and is the responsibility of the Cabinet. The Cabinet is entitled to make arrangements to carry out that task using the services of government departments and agencies, public officers and advisers—and to cooperate with individuals and groups, local and foreign.

If *a* joint mechanism was entered into within that framework, it is not a step towards separation. I believe that in the past, too, governmental activities (such as child immunisation, public examinations, canvassing and voting at elections, etc.) have been carried out in coordination with those in control of the 'uncleared areas'.

The mechanism itself could have avoided controversy: for instance, as to the inadequacy of Muslim representation, Sinhalese non-representation, the seeming assumption that Sinhalese representation will be by the government, etc., and as to the decision-making process. The concept of communal or political representation may well have been reconsidered. How much better if provision can be made for the various committees to consist of a specified number of competent *Sri Lankans* acceptable to the parties? How much more independent and impartial such representatives would have been?

Q: It has often been wishfully said that Sri Lanka's administration should be handed over to a person, group or entity—to run for a specified number of years—until the nation has made the progress it has the potential to make, but may never otherwise make. What are the constitutional ramifications, should such a suggestion be taken seriously?

A: That suggestion—though it sounds outrageous, and seems politically unacceptable—may be constitutionally permissible, to an extent. Certainly, legislative and judicial powers cannot be exercised by other bodies. However, the cabinet often does—legally—procure the exercise of executive or administrative powers by other agencies.

Take the national carrier. First, it was Air Ceylon—a government agency, which proved to be unprofitable. Next, Air Lanka was set up as a government-owned and controlled entity. Despite being viable, a minority shareholding was sold to Emirates, which was given a management contract as well. I do not think it would be unconstitutional for that shareholding to become a majority. I believe that there are many 'build, operate and transfer' projects which are financed and implemented, and then operated for a period, and finally returned to government as going concerns. We have seen, during the past 50 years, numerous examples of enterprises taken over by the state—as their functions were regarded as governmental—but privatised in one form or another, years later; of government monopolies being diluted; and of private-sector expansion—estates, banks, insurance, transport, telecommunications, radio and television, health, education....

Q: Many attribute the political instability of recent times (say a decade or two) to inherent flaws in the electoral system. Would you be in favour of a meritocracy to replace our parliamentary democracy, a national council elected or appointed by a non-partisan college of electors? What measure of constitutional reform would be required for such a 'Board of Sri Lanka'?

A: In other words, parliamentary democracy seems to be working badly, so replace it with something else—a meritocracy. But whether it is parliament—or any other institution, public or private—it will consist of Sri Lankans; and, to a large extent, even a meritocracy will reflect the talents and the shortcomings of Sri Lankans. If Sri Lankans don't have the right

values and attitudes, a Sri Lankan meritocracy will not be very different—instead of corrupt inefficiency, we may have efficient corruption!

Besides, how would the people replace a meritocracy if it fails to respond to the needs of the underprivileged? Parliamentary democracy has, at least, the advantage that—once in six years—the people have the opportunity to review parliamentary performance. The problem is how to ensure that they exercise a wise and informed choice—and that is where reforms in the electoral process are important. Also, the sovereignty of the people must not mean that the people are 'monarchs for a day'—on polling day—and oppressed subjects for the next six years. There must be continuing and vigorous review of parliamentary and executive performance as well. Finally, democracy and meritocracy must co-exist; and, to ensure due recognition of merit and integrity, I would suggest that the Constitutional Council and the Public Service Commission (and the Ombudsman) may be given a wider jurisdiction in respect of other important offices, including state agencies, boards, corporations. That may be an acceptable compromise for the national council elected or appointed by a non-partisan college of electors, which you suggest.

Vision for Sri Lanka

Q: What are your personal aspirations for the land of your birth? What would you like to see changed in this island-nation of ours?

A: As I have outlined, I wish to see—in swift succession—*first* justice, law and order, and respect for human rights; *next,* peace and social harmony; and *finally,* development. Prosperity will follow. All that requires many changes.

An example must be set by all those in positions of leadership in the public sector, as well as those in the private sector, in the professions and in religious groups. They must be inspired by the desire to be of *service* to the people of Sri Lanka, and not driven by a craving to acquire power in order to reign over them for their personal advancement. That means they must respect human rights; exercise their powers for the public benefit; eradicate politicisation and corruption; give recognition to merit and competence; and reward excellence, innovation and initiative.

In return, people must fulfil their fundamental duties to further the national interest and to work conscientiously in their chosen occupations; respect the human rights of others; *and think of themselves as Sri Lankans first, and put Sri Lanka first.* "Your old men will dream dreams, your young men will see visions" (Joel 2:28)... Is this a vision for the young, or just an old man's dream?

DEFEATING THE DRAGON: WEAPONS FOR FIGHTING CORRUPTION[±]

Justice Mark Fernando[*]

Introduction

Many of those engaged in the battle against corruption believe, or act as if, they can only hope to succeed if the Legislature and the Executive—often the very persons against whom corruption is frequently alleged—will make concessions such as enacting Freedom of Information and whistle-blower protection legislation, and relaxing disciplinary codes regarding confidentiality. The truth, however, is that the warriors against corruption already have in their armoury powerful weapons, more than enough to overcome corruption. But they do not know it.

1 Corruption

What is "corruption""? Corruption may be narrowly defined as bribery and nepotism. To me, however, corruption extends to extravagance, waste, neglect, and every form of malpractice, dishonesty, and abuse, misuse and unreasonable exercise of power. It covers also the failure or refusal to exercise power, and indeed, anything and everything done or left undone, which results in the rights of the People being denied or impaired. One broad definition of "corruption" is to be found in Section 70 of the Bribery Act[1], which provides that:

> *Any public servant who, with intent to cause wrongful or unlawful loss to the Government, or to confer a wrongful or unlawful benefit, favour or advantage on himself or any person, or with knowledge, that any wrongful or unlawful loss will be caused to any person or to the Government, or that any wrongful or unlawful benefit, favour or advantage will be conferred on any person:*
>
> *(a) does, or forbears to do, any act, which he is empowered to do by virtue of his office as a public servant;*
>
> *(b) induces any other public servant to perform, or refrain from performing, any act, which such other public servant is empowered to do by virtue of his office as a public servant;*
>
> *(c) uses any information coming to his knowledge by virtue of his office as a public servant;*

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[1] Act No.11 of 1954 as amended.

(d) participates in the making of any decision by virtue of his office as a public servant;

(e) induces any other person, by the use, whether directly or indirectly, of his office as such public servant to perform, or refrain from performing, any act.

shall be guilty of the offence of corruption and shall upon summary trial and conviction by a Magistrate be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding one hundred thousand rupees or to both such imprisonment and fine."

The term "Public servant" is given a very wide definition.

It is my contention that the People of Sri Lanka enjoy a fundamental right, under the Constitution—quite independent of what the Legislature and the Executive may choose to concede—that all governmental powers be exercised by those to whom such powers have been entrusted, free of any form of corruption, whether defined widely or narrowly. That right may even extend to some of the powers of private sector institutions—after all, some multinational corporations are bigger and more powerful than governments, and some local companies are bigger than State departments and corporations.

That freedom from corruption extends to a right and a duty to expose corruption; includes the freedom of speech to expose corruption on which no restrictions can be placed; includes the right to information necessary to detect and expose corruption; the right of informants to disclose corruption; and includes also the privilege—where necessary—not to disclose sources of information about corruption..

2 Sovereignty of the People: Articles 3 And 4

It is necessary to begin by examining the foundations and the structure of the Constitution[2] in order to appreciate the amplitude of the Constitutional rights of the People. Articles 3 and 4 provide:

3. In the Republic of Sri Lanka Sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.

4. The Sovereignty of the People shall be exercised and enjoyed in the following manner:

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

[2] The Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law;

(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.

In some Constitutions (e.g., that of the United Kingdom) Sovereignty is not in the People but in the Legislature. Therefore whenever the rights or powers of the Legislature are in conflict with the rights of the People, the former will take priority. One finds an echo of that concept in the Sri Lankan Constitution of 1972. Although Section 3 did provide that Sovereignty was in the People, yet—inconsistently—Section 4 provided that Sovereignty would be exercised through the National State Assembly (NSA), and Section 5 referred to the NSA as the *"supreme instrument of State power of the Republic."* There was no definition of Sovereignty, and no clarification of the relationship between the rights of the People and Sovereignty on the one hand, and governmental powers on the other; and since all governmental powers were exercisable by the NSA there seemed to be nothing left for the People to enjoy or exercise. It is not surprising that not a single fundamental rights action or application succeeded during that period. The Constitution of 1978 made it unambiguously clear that Sovereignty is in the People and in no other person or body: there is no competing 'supreme' body, and fundamental rights and the franchise are retained by the People to be enjoyed by them. The difference in language must be given effect to, and will necessarily affect all questions of Constitutional interpretation.

2.1 What Flows from Sovereignty Being in The People?

First, it must be noted that Article 3 (or any other provision) did not confer Sovereignty on, or grant Sovereignty to, the People of Sri Lanka, but merely recognized a pre-existing fact, namely, that independently of the Constitution, and prior to the Constitution, Sovereignty (including fundamental rights and the franchise) was already vested in the People. Sovereignty of the People, inclusive of fundamental rights and the franchise, is thus the

grundnorm of the Constitution. It cannot be infringed or impaired even with a two-thirds majority unless approved by the People themselves at a Referendum.

Second, Sovereignty involves two categories of rights and powers: (i) the powers of government which are not directly exercised by the People (except at a Referendum) and which are by the People, through the Constitution, delegated to be exercised by (but not vested in) the Legislature, the Executive and the Judiciary, and (ii) the rights of the People which are directly exercised and enjoyed by the People and which the People by the Constitution have not delegated to any of the three organs of government (although they are given some limited powers in respect of these rights, as for instance the power of the Legislature to impose reasonable restrictions on some—but not all—fundamental rights).

That has two consequences.

Whenever there is a conflict or an inconsistency between the rights so retained by the People (to be enjoyed by them) and the powers delegated to those three organs, the former must always take precedence unless there is compelling language to the contrary in the Constitution itself.

2.2 The "Public Trust" Doctrine

Furthermore, governmental powers are delegated by the People to the Legislature, the Executive and the Judiciary, to be exercised in good faith for the benefit of the People for the purposes for which they had been delegated—and not corruptly, to the prejudice of the People or for the benefit of their delegates. That is the 'Public Trust' doctrine which is now fully recognized. The nature and extent of that principle can be seen from the wide range of persons, and acts and omissions, which have been held to be subject to the 'Public Trust' doctrine. In the course of the Ninth Ambalavaner Memorial Lecture delivered about 10 years ago, I referred to some of the decisions (dealing with executive action) up to that date:

In *Joseph Perera* v. *AG*[3] and again in *Wickremabandu* v. *Herath*[4] the Supreme Court invalidated Emergency Regulations, holding that they infringed fundamental rights. In other cases, the Courts have set aside or reviewed decisions by the Cabinet[5]; by Ministers and Deputy Ministers[6]; by Provincial Governors[7]; by the Public Service Commission[8]; by the Commissioner of Elections[9]; and by a whole host of other public officials: Secretaries to

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[3] [1992] 1 SLR 199.
[4] [1990] 2 SLR 348.
[5] *Ramupillai* v. *Festus Perera* [1991] 1 SLR 11.
[6] *Chandrasekeram* v. *Wijetunga* [1992] 2 SLR 293.
[7] *Premachandra* v. *Jayawickreme* [1994] 2 SLR 90.
[8] *Rajapakse* v. *Devanayagam*, SC App. No.274/94, SCM 19.10.95; *Wijesuriya* v. *Lal Ranjith* [1994] 3 SLR 274.
[9] *Gooneratne* v. *de Silva* [1987] 2 SLR 165.

Ministries[10]; Commissioner of Inland Revenue[11]; Surveyor-General[12]; Controller of Immigration[13]; Director-General of Customs.[14]

The Court had also reviewed the acts and omissions of other public corporations, agencies, and institutions: the University Grants Commission[15]; Banks[16]; the Monetary Board[17]; Universities[18]; Airlanka[19]; the Board of Investment[20]; and Telecom.[21]

The decisions reviewed in this way cover a very wide range of subjects: Emergency regulations[22] and Cabinet circulars[23]; the appointment and removal of officials, ranging from Chief Ministers[24] and Chief Executives to sub-postmasters and probationers[25]; pensions[26], promotions[27]; extensions of service[28]; scholarships[29]; tenders[30]; licenses, and forfeitures.[31]

There have been many more such decisions since then.

One necessary implication of that doctrine is that the People do have an entrenched Constitutional right to freedom from corruption in any and every exercise of legislative, executive and judicial power.

Hence the Constitutional right to freedom from corruption is a corollary of the 'Public Trust' doctrine which in turn is an intrinsic part of the Sovereignty of the People, which cannot be infringed even by Constitutional amendment unless approved by the People themselves at a Referendum.

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10 *Wijepala* v. *Jayawardena*, SC App. No.89/95, SCM 30.6.95, *Bandara* v. *Premachandra* [1994] 1 SLR 301.
11 *Amirtharajah* v. *C.G.I.R.*, SC App. No.64/95, SCM 14.12.95.
12 *Bandara* v. *Premachandra* [1994] 1 SLR 301.
13 *Perera* v. *Ranatunga* [1993] 1 SLR 39.
14 *Sarvodaya* v. *Heengama* [1993] 1 SLR 1.
15 *Perera* v. *U.G.C.* (1978-79-80) 1 SLR 128; *Seneviratne* v. *U.G.C.* (1978-79-80) 1 SLR 182; *Surendran* v. *U.G.C.* [1993] 1 SLR 344.
16 *Liyanapathirana* v. *People's Bank* [1993] 1 SLR 358; *Piyasena* v. *People's Bank* [1994] 2 SLR 65.
17 *Perera* v. *Monetary Board* [1994] 1 SLR 152; *Karunaratne* v. *Monetary Board* [1993] 2 SLR 1.
18 *Lankage* v. *University of Kelaniya*, SC App. No.125/94, SCM 23.2.95.
19 *Wijenaike* v. *Airlanka* [1990] 1 SLR 293.
20 *Jayawardene* v. *Board of Investment*, SC App. No.267/94, SCM 27.11.95.
21 *Wickramanayake* v. *Telecom*, SC App. No.222/94, SCM 12.12.95; *Gunaratne* v. *Telecom* [1993] 1 SLR 109.
22 *Joseph Perera* v. *AG* [1992] 1 SLR 199; *Wickremabandu* v. *Herath* [1990] 2 SLR 348.
23 *Ramupillai* v. *Festus Perera* [1991] 1 SLR 11.
24 *Premachandra* v. *Jayawickreme* [1994] 2 SLR 90.
25 *Bandara* v. *Premachandra* [1994] 1 SLR 301.
26 *Amirtharajah* v. *C.G.I.R.*, SC App. No.64/95, SCM 14.12.95.
27 *Perera* v. *Ranatunga* [1993] 1 SLR 39; *Gunaratne* v. *Telecom* [1993] 1 SLR 109; *Liyanapathirana* v. *People's Bank* [1993] 1 SLR 358; *Perera* v. *Monetary Board* [1994] 1 SLR 152; *Piyasena* v. *People's Bank* [1994] 2 SLR 65; *Karunaratne* v. *Monetary Board* [1993] 2 SLR 1.
28 *Wijepala* v. *Jayawardena*, SC App. No.89/95, SCM 30.6.95.
29 *Wickramanayake* v. *Telecom*, SC App. No.222/94, SCM 12.12.95.
30 *Ceylon Paper Sacks* v. *J.E.D.B.*, SC App. No.220/90A, SCM 2.7.93; *Swissray Medical AG* v. *Fernando*, SC App. No.51/94, SCM 25.7.94; *Munasinghe* v. *Fernando* [1996] 1 SLR 378.
31 *Sarvodaya* v. *Heengama* [1993] 1 SLR 1.

Third, Sovereignty 'includes' and is not confined to 'fundamental rights and the franchise'; and it includes not merely 'the fundamental rights declared and recognized by the Constitution'[32] or even 'the fundamental rights', but 'fundamental rights' without any qualification. Therefore 'fundamental rights' in Article 3 is a wider category of rights than 'the' fundamental rights enumerated in Chapter III. Hence the Constitution impliedly recognizes that People do have other fundamental rights besides the Chapter III rights. The Chapter III rights are given special recognition and a special remedy for enforcement, but that does not mean that those are the only fundamental rights to which the People are entitled.

A moment's reflection will confirm this. Can one enjoy any of the Chapter III rights if one is denied the right to life? Can it ever be contended that there is no fundamental right to life? Is not the right to life implied in almost every single one of the Chapter III rights—freedom from torture, freedom from unlawful arrest and detention, freedom of thought, freedom of speech, and freedom of movement? Can anyone deny that People have a right to marry and to found a family? That they have a right to freedom from slavery? The omission of such rights from Chapter III does not mean that they are not fundamental or constitutionally protected—only that the special remedy in the highest Court for infringement by executive action is not available, and enforcement must be by regular action in, or application to, other courts.

The concept that the People do possess or retain rights besides the rights expressly enumerated in the Constitution is not unique. The Ninth Amendment to the United States Constitution provides that:

> *IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People.*

Likewise, the enumeration in Chapter III of certain fundamental rights shall not be construed to deny or disparage others retained by the People of Sri Lanka.

That is an additional reason for concluding that the freedom from corruption is a right retained by the People under Article 3. Neither the People nor the Constitution delegated governmental powers to be used for any corrupt purpose. Such delegation was not made to enable Legislature, Executive or Judiciary to govern or to rule the People, but only to serve them. And it must not be forgotten that there can be no derogation from Article 3 except by law enacted with a two-thirds majority and approved by the People themselves at a Referendum.

3 The Rule of Law: Article 12(1)

One of the most important Chapter III rights is set out in Article 12(1):

> *All persons are equal before the law and are entitled to the equal protection of the law.*

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[32] *Cf.* Article 4(d) of the Constitution.

This has been interpreted to mean that the Constitution is founded on the Rule of Law: The high concept of the Rule of Law underlies the Constitution,[33] the Constitution rests on the Rule of Law,[34] and Article 12 is a necessary corollary of the Rule of Law which underlies the Constitution.[35]

The 'Rule of Law' has a number of different meanings. A primary meaning is that everything must be done according to law—that people must be governed by *laws* (i.e., general rules of uniform application), and not by the *arbitrary commands and dictates* of rulers and their officials. People are entitled to the *protection of equal laws*, applying equally to rulers and their officials—who enjoy no special privileges or exemptions.

Another meaning of the Rule of Law is that government must be conducted under a framework of recognized rules and principles which restrict the discretionary powers of public bodies and officials: absolute or unfettered discretions cannot exist where the Rule of Law reigns.[36]

Consequently, whenever the law confers powers (or discretions) on public bodies and officials those powers are treated as having been conferred on them in the public interest; and not for private or political benefit; such *powers are held in trust for the People*, and must be exercised for their benefit; and they must be exercised lawfully and fairly, and not perversely, arbitrarily or unreasonably. Where the Rule of Law prevails, there is no room for arbitrary exercise of power. The absence of arbitrary power is the first essential of the Rule of Law.[37] Respect for the Rule of Law requires the observance of minimum standards of openness, fairness and responsibility in administration.[38]

Interpreted in the context of its foundations, Article 12(1) establishes, expressly or by necessary implication, norms governing the exercise of (and the refusal to exercise) governmental powers—namely, the powers vested and delegated by Articles 3 and 4. Those norms apply to every public body and official, however high. Every person has therefore the fundamental right to be treated according to those norms and to enjoy the protection of those norms. Those norms relate both to substance and to procedure. The exercise or non-exercise of power in disregard of those norms, if without any basis, would be arbitrary and/or capricious; and if for a bad reason, would be unreasonable.

The Public Trust doctrine, therefore, can be justified on the basis of Article 12(1) and the Rule of Law – quite independently of the Sovereignty provisions.

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[33] *Perera* v. *Jayawickreme* [1985] 1 SLR 285, 321.
[34] *Bandara* v. *Premachandra* [1994] 1 SLR 301, 314; *De Silva* v, *Atukorale* [1993] 1 SLR 283, 293.
[35] *Gunaratne* v. *Ceylon Petroleum Corporation* [1996] 1 SLR 315, 324-5.
[36] *Premachandra* v. *Jayawickrema* [1994] 2 SLR 90, 103-105, citing Wade, *Administrative Law*, 5th ed. 22.
[37] *Perera* v. *Ranatunga* [1993] 1 SLR 39, 53; *Priyangani* v. *Nanayakkara* [1996] 1 SLR 399, 404.
[38] *Jayewardene* v. *Wijayatilake* [2001] 1 SLR 126, 143.

4 Fundamental Rights

While the Sovereignty provisions in the Constitution and Article 12(1) afford a solid foundation for the contention that freedom from corruption is a fundamental or constitutionally protected right, Chapter III affords an alternative basis which reinforces the Sovereignty provisions.

It is useful to elaborate some principles in regard to the interpretation of Chapter III rights.

First, they are not be interpreted narrowly or in isolation. Thus, the 'restrictions' on fundamental rights permitted by Article 15 must be interpreted as reasonable restrictions, and as not including unreasonable restrictions.[39]

Second, a right or freedom can be implied from one or more of the Chapter III rights. Thus the right to life has been implied from Article 13(4)[40] and the right to information implied from the freedom of thought.[41]

Third, it has been held that although rights are generally formulated in Chapter III as if they had only an individual aspect, they often have a collective aspect as well.[42]

Fourth, Chapter III rights have been invoked or applied in combination. Thus the freedom of speech and the right to equality can be applied in combination,[43] together with the right to information as well.

4.1 Corruption in the Electoral Process

It is useful to illustrate these principles from judicial decisions. I will deal first with decisions on elections as elections are fundamental to a democracy—because it is through free and fair elections that members of the Legislature as well as the Executive President are selected to exercise the powers which are part of the Sovereignty of the People. Although the decisions which I will cite do not expressly mention the right to freedom from corruption, every one of them upon scrutiny will be seen to support such a right.

The Chapter III rights in their applications to elections must be considered in the light of Article 93 which requires that voting shall be free, equal and secret.

> *The use of the resources of the State—including human resources—for the benefit of one political party or group, constitutes unequal treatment and political discrimination because thereby an advantage is conferred on one*

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39 *Wickremabandu* v. *Herath* [1990] 2 SLR 348.
40 *Sriyani Silva* v. *Iddamalgoda* [2003] 2 SLR 63.
41 *Wimal Fernando* v. *SLBC* [1996] 1 SLR 157.
42 *Mediwake* v. *Dissanayake* [2001] 1 SLR 177, and illustrations at pages 210-212.
43 *Wimal Fernando* v. *SLBC* at 174-175, discussing the Red Lion Broadcasting Co. case.

political party or group which is denied to its rivals: and such abuse was in probable derogation of the fairness and equality of a pending election to a representative body forming part of the democratic structure of Sri Lanka.[44]

In another case, the Petitioner was penalized for refusing to allow Corporation premises to be misused:

The attempt to influence the Petitioner to allow the misuse of Corporation premises occurred not just in general but in connection with a pending election. The use of State and Corporation resources (whether land, buildings, vehicles, equipment, funds or other facilities or human resources) directly or indirectly for the benefit of one political party or group, would constitute unequal treatment and political discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals. Penalizing the Petitioner for resisting improper influence in such circumstances aggravated the infringement of his fundamental right, and conveyed a wrong message, that improper political influence should not be resisted.[45]

One principle underlying those two decisions was that the misuse of State resources of every kind, including the State media, funds and other facilities, was not only discrimination but a form of corruption from which the citizen was entitled to be free: i.e., the freedom from corruption.

Whether the right to vote itself is a fundamental right was questioned by Counsel in a fundamental rights application challenging the indefinite (Presidential) postponement of Provincial Council elections.[46] The right to vote, not being enumerated in Chapter III, could not be relied on in a fundamental rights application—although it could in other proceedings (such as a Writ application to quash an order denying or impairing the franchise). However, in that case, it was not the right to vote which was actually in issue but the exercise of an undoubted right to vote. It was held that the freedom of speech and expression included the 'expression' of a registered voter's political preferences at an election by means of the exercise of his right to vote:

"When Article 14(1)(a) entrenches the freedom of speech and expression, it guarantees all forms of speech and expression. One cannot define the ambit of that Article on the basis that, according to the dictionary, 'speech' means

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[44] *Deshapriya* v. *Rukmani* [1999] 2 SLR 412, 418, where a public officer was reprimanded and suspended for refusing to accede to the demand of the Deputy Speaker to support and canvass for candidates of his party. It was held that the Deputy Speaker had infringed the Petitioner's fundamental right under Article 12, and was ordered to pay compensation and costs to him. However, a direction to the Attorney-General to consider whether the Deputy Speaker's conduct amounted to corruption as defined in the Bribery Act did not evoke a positive response.

[45] *Hettiarachchi* v. *Mahaweli Authority* [2000] 3 SLR 334, 342.

[46] *Karunathilaka* v. *Dissanayake*, [1999] 1 SLR 157.

'X', and 'expression' means 'Y'. Concepts such as 'equality before the law', 'equal protection of the law', and 'freedom of speech and expression, including publication', occurring in a statement of constitutionally entrenched fundamental rights, have to be broadly interpreted in the light of fundamental principles of democracy and the Rule of Law which are the bedrock of the Constitution.

I find it unnecessary to refer to the various authorities cited, because in my view the matter admits of no doubt. A Provincial Council election involves a contest between two or more sets of candidates contesting for office. A voter had the right to choose between such candidates, because in a democracy it is he who must select those who are to govern—or rather, to serve—him. A voter can therefore express his opinion about candidates, their past performance in office, and their suitability for office in the future. The verbal expression of such opinions, as, for instance, that the performance in office of one set of candidates was so bad that they ought not to be re-elected, or that another set deserved re-election—whether expressed directly to the candidates themselves, or to other voters would clearly be within the scope of 'speech and expression', and there is also no doubt that 'speech and expression' can take many forms besides the verbal. But although it is important for the average voter to be able to speak out in that way, that will not directly bring candidates into office or throw them out of office; and he may not be persuasive enough even to convince other voters. In contrast, the most effective manner in which a voter may give expression to his view, with minimum risk to himself and his family, is by silently marking his ballot paper in the secrecy of the polling booth. The silent and secret expression of a citizen's preference as between one candidate and another by casting his vote is no less an exercise of freedom of speech and expression, than the most eloquent speech from a political platform. To hold otherwise is to undermine the very foundation of the Constitution. The petitioners are citizens and registered voters, and the [Commissioner's] conduct has resulted in a grossly unjustified delay in the exercise of their right to vote, in violation of Article 14(1)(a).[47]

Implicit in that decision was that the improper Presidential postponement of a Provincial Council election was a corrupt exercise of power from which the citizen was entitled to be free. What is more, that act of corruption was the act of the President, and—notwithstanding the President's personal immunity from suit granted by Article 35—it was held that the act of the President was open to challenge in proceedings against other persons who sought to take cover under that act.

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[47] *Karunathilaka* v. *Dissanayake* [1999] 1 SLR 157, 173-174.

The exercise of the freedom of expression by voting is not only an individual right but also a collective right. In *Mediwake* v. *Dissanayake*[48] certain voters did not complain of any impediment or inconvenience in regard to the exercise of their own right to vote. They alleged irregularities, which directly infringed only the right to vote of other persons.

> *Do those infringements constitute in law an infringement of the Petitioner's fundamental rights under Articles 12(1) and 14(1)(a)? To answer that question, I must consider the true nature of a citizen's right to vote.*
>
> *Article 25 of the International Covenant on Civil and Political Rights (ICCPR) is a useful starting point:*
>
> > *Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:*
> >
> > *(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
> >
> > *(b) 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 exercise of the will of the electors; ....*
>
> *Sri Lanka is a party to that Covenant and its sister Covenant, which together constitute the international Bill of Human Rights. It would be idle to argue that our election laws pertaining to Provincial Council elections are not founded on guarantees to every citizen of the right to 'take part' in public affairs, through representatives freely chosen by him, at a genuine election, by universal and equal suffrage, held by secret ballot, ensuring the free expression of the will of the electorate. Article 27(15) requires the State 'to endeavour to foster respect for international law and treaty obligations in dealings among nations.*
>
> *Accordingly, in interpreting the relevant provisions of an enactment regulating any election a Court must, unless there is compelling language, favour a construction which is consistent with the international obligations of the State, especially those imposed by the international Bill of Human Rights. I hold that those guarantees are an essential part of the freedom of expression recognized by Article 14(1)(a).*
>
> *The citizen's right to vote includes the right to freely choose his representatives, through a genuine election which guarantees the free expression of the will of the electors; not just his own. Therefore 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*

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[48] [2001] 1 SLR 177.

the entire electorate to which he belongs. Thus if a citizen desires that candidate X should be his representative, and if he is allowed to vote for X but other like-minded citizens are prevented from voting for X, then his right to the free expression of the will of the electors has been denied. If 51% of the electors wish to vote for X, but 10% are prevented from voting—in consequence of which X is defeated—that is a denial of the rights not only of the 10% but of the other 41% as well. Indeed, in such a situation the 41% may legitimately complain that they might as well have not voted. To that extent, the freedom of expression, of like-minded voters, when exercised through the electoral process is a collective one, although they may not be members of any group or association.

That is by no means unique. A scrutiny of Article 14 reveals that many fundamental rights have both an individual and a collective aspect.

A citizen's freedom of speech guaranteed by Article 14(1)(a) is violated not only when he is not permitted to speak, but even when others are prevented from listening to him. A corollary of A's freedom of speech is A's right that those to whom he wishes to speak should be permitted to listen to him—provided of course that they want to listen to him. If part of his audience is driven away, the effectiveness of the exercise of his freedom of speech is impaired, and thereby his right is infringed.[49]

A citizen is therefore entitled to freedom from corruption at elections, not only in regard to himself but in certain circumstances even in respect of his fellow citizens.

4.2 The Election Commissioner's Powers

Such corruption is not without an existing remedy. In Mediwake's case it was clear that the statute did empower the Commissioner of Elections to annul the poll at any polling booth, because section 46A(1)[50] required that, *"having commenced at the scheduled time, the poll must continue until closing time"*. It was argued that the Commissioner of Elections had no power to make a qualitative assessment of the democratic nature of a poll and to annul the poll if in his opinion it was not free and fair; that the Commissioner was concerned only with three objective facts, namely, whether the poll commenced at 7AM, whether it concluded at 4PM, and whether all the ballot boxes were delivered to the counting officer; and that all other matters were for the courts and not for the Commissioner to decide. That contention would have reduced the Commissioner's powers to virtually nothing. I preferred the contrary interpretation:

What is a 'poll'? In my view, a poll is a process of voting that enables a genuine choice between rival contenders; necessarily, one that is free of any

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[49] *Mediwake* v. *Dissanayake* [2001] 1 SLR 177, 210-212; see also *Thavaneethan* v. *Dissanayake* [2003] 1 SLR 74, 100.

[50] Provincial Councils Elections Act, No.2 of 1988 as amended.

improper influence or pressure; equal, where all those entitled to vote (and no others) are allowed to express their choice as between parties and candidates who compete on level terms; and where the secrecy of the ballot is respected.

A mere semblance of a poll is not enough. The elaborate provisions of the Act, and especially Part III, compel the conclusion that Parliament had in mind a genuine poll, and not a mere charade. Such a poll must 'continue', i.e., voting must take place not sporadically, but without interruption; from beginning to end.

I therefore conclude that Section 46A(1)(b) requires a genuine poll, continuing uninterrupted from beginning to end, and compels the Commissioner to make a qualitative assessment as to whether the poll was free, equal and secret.[51]

Not only does the Commissioner have the power to annul an unfair poll but he can also order a re-poll.

The amplitude of the powers of the Commissioner is clear from the provisions of Article 4(e) (relating to the exercise of the franchise) and of Article 93 (relating to free, equal and secret voting):

Those provisions cannot be regarded as pious aspirations, conferring no powers and imposing no obligations. On the contrary, they necessarily confer rights on the Commissioner of Elections and impose correlative duties on the appropriate officials of the State, in regard to all aspects of an election, which are reasonably necessary to ensure a free, equal and secret election at which the franchise may be duly exercised.[52]

As I observed in *Karunathilaka* v. *Dissanayake*:

The Commissioner has been entrusted by Article 104 [of the Constitution] with powers, duties and functions pertaining to elections, and has been given guarantees of independence by Article 103, in order that he may ensure that elections are conducted according to law, not to allow elections to be wrongly and improperly cancelled or suspended or disrupted by violence or otherwise.[53]

...it is necessary to remember that the Constitution assures [the Commissioner] independence, so that he may fearlessly insist on due

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[51] p.201-202.
[52] SC Special Determination No.1/99 (Sri Lanka Postal Corporation Bill) of 22.2.99.
[53] p.170.

compliance with the law in regard to all aspects of elections—even, if necessary, by instituting appropriate legal proceedings in order to obtain judicial orders.[54]

There is no doubt that it is implicit in several provisions of Chapter III that elections must be free of corruption, when Chapter III is interpreted, not in isolation, but in the context of (i) the Sovereignty provisions in Articles 3 and 4(e), (ii) the Rule of Law, (iii) the stipulations in Article 93 that elections must be free, equal and secret, (iv) the Commissioner's powers and duties under Article 104, and / or (v) the provisions of Article 25 of the ICCPR.

A free election is not merely one that is free of corruption, but one that affords the voter an informed choice between candidates, which is not possible unless the voter has full and accurate information about the rival candidates—at least their assets and liabilities, and qualifications and disqualifications. Arguably, the Commission's implied powers extend to compelling candidates to satisfy the voter's rights to such information; and he is under a duty to exercise those powers for the benefit of the People.

4.3 The Right to Life

Taking a narrow view of Chapter III rights, human rights activists had long been agitating, from 1978 itself, for constitutional amendments to incorporate the right to life. In *Sriyani Silva* v. *Iddamalgoda* a broader view revealed that a right to life was impliedly recognized. Article 13(4) guaranteed that:

No person shall be punished with death or imprisonment except by order of a competent court made in accordance with procedure established by law.

The necessary corollary of that right, expressed positively, was that every person had the right to life (in the sense of existence if not in the sense of quality of life) unless that right was superseded by an order of a competent Court imposing a sentence of death.[55]

Although Article 13(4) does not use the word 'life', it differs little, in substance, from the Fifth Amendment to the US Constitution: *No Person shall be deprived of life...without due process of law.*

4.4 Freedom of Thought and Right to Information

Many other provisions of Chapter III must be interpreted liberally or expansively—because fundamental rights are an aspect of the Sovereignty of the People which are not delegated or entrusted to any of the three organs of government or any other body. Hence fundamental rights must be given precedence over governmental powers and any exercise of power, statutory or otherwise, by any other body.

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[54] p.182.
[55] See also, *Rani Fernando* v. *OIC Seeduwa Police* [2005] 1 SLR 40.

One important provision of Chapter III is Article 10, which can be amended only with a two-thirds majority and approval by the People at a Referendum. Such is the value attached to the freedom of thought, conscience and religion. (It is relevant to mention that the Constitutions of the United States and India do not guarantee the freedom of thought, apart from freedom of religion and conscience, and that makes it easier to imply certain rights in Sri Lanka).

In *Wimal Fernando* v. *SLBC* a question arose whether a regular listener to a SLBC radio program was entitled to complain of its sudden and arbitrary stoppage. The Petitioner placed the freedom of speech in the forefront of his case. It was held that a listener was not entitled, *qua* listener, to invoke freedom of speech (Article 14(1)(a)) because as a listener his freedom of speech was not impaired. However, in that case the Petitioner was more than a mere listener—as the program allowed listeners to participate in the program by telephone. The Petitioner was thus a 'participatory listener', his participation in the program was an exercise of his freedom of speech, and he was entitled to complain in that capacity of the stoppage of the radio program.

Such an exercise of freedom of speech was subject to reasonable restrictions imposed under Article 15. It was pointed out in that case that the Petitioner could have relied on an alternative basis which could not have been subject to any restriction—namely, the freedom of thought. The freedom of thought necessarily implies a right to relevant information, for otherwise thought cannot be meaningful: *information is the staple food of thought.*[56] The Petitioner as a listener, pure and simple, was entitled to complain of the arbitrary stoppage of the radio program because that impaired his freedom of thought.

4.5 Freedom of Speech, Right to Information and Non-disclosure of Sources

There is therefore a firm foundation for the right to information—it is implied in Article 10 even if the recipient of information does nothing to disseminate such information.

There is also implied in Article 14(1)(a), a right to such information as is relevant to the exercise of the freedom of speech (i.e., where the speaker wishes to disseminate such information). There is a right and a duty to speak about and to expose corruption: that right, to be effective, must be based on full and accurate information—and therefore there is an implied right to relevant information. If the disclosure of such information would result in victimization of the informer it is implicit in the right to information that the recipient of such information is not bound to disclose—as a general rule (which may perhaps be subject to limited exceptions)—his sources even to a Court, because without the privilege of not disclosing sources, his right to information would often be rendered nugatory. Hence the freedom of speech implies a right to information, and that right to information implies a privilege of non-disclosure of sources.

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[56] *Stanley* v. *Georgia*, 394 US 557.

4.6 Permissible Restrictions on Freedom of Speech

A word about the prescribed restrictions on the freedom of speech is necessary. Article 15(2) enables restrictions to be imposed by an Act of Parliament in the interests of racial and religious harmony, parliamentary privilege, contempt of court, defamation, or incitement to an offence. Article 15(7) enables further restrictions, by an Act of Parliament as well as by emergency regulations, in the interests of national security, public order, the protection of public health or morality, for securing due recognition of the rights of others, and for meeting the just requirements of the general welfare of a democratic society.

None of these provisions authorize the imposition of restrictions in order to prevent exposure of corruption: those are of concern to every member of the public, and not merely to those who are directly affected, and every member of the public is entitled to speak about them. All citizens are entitled to speak, to discuss, and to voice their opinions, on matters of public interest.[57]

Discussing an Emergency Regulation which prohibited all statements which affect the morale of servicemen, I observed that while statements which disclose the misconduct or negligence of members of the Services may indeed affect their morale, yet the concealment of such matters may much more seriously prejudice the security of the nation, and of servicemen themselves, and that therefore "*exposure may be the most effective and expeditious means of remedying a situation enormously prejudicial to national security*".[58]

5 Fundamental Duties

Chapter VI of the Constitution reinforces Chapter III. In regard to Fundamental Duties, Article 28 provides:

> *28. The exercise and enjoyment of rights is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka –*
>
> *(a) to uphold and defend the Constitution and the law;*
>
> *(b) to further the national interest and to foster national unity;*
>
> *(c) to work conscientiously in his chosen occupation;*
>
> *(d) to preserve and protect public property, and to combat misuse and waste of public property;*
>
> *(e) to respect the rights and freedoms of others; and*
>
> *(f) to protect nature and to conserve its riches.*

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[57] For example see, e.g., *Ratnasara Thero* v. *Udugampola* [1983] 1 SLR 461; *Ekanayake* v. *Herath Banda*, SC App. No.25/91, SCM 18.12.91; *Amaratunga* v. *Sirimal* [1993] 1 SLR 264.

[58] *Withanage* v. *Amunugama* [2001] 1 SLR 391, 405-6.

In order to fulfill the fundamental duties imposed by Article 28, every person must not only refrain from corruption and malpractice himself, but must conscientiously expose corruption of which he becomes aware—in order to uphold the law, to protect public property, or to preserve the environment, or to advance the national interest. At first sight these fundamental duties may appear not to be far-reaching. But can anyone who becomes aware of corruption in his work-place and nevertheless refrains from exposing it, claim that he has fulfilled his duty to uphold the law, to further the national interest or to work conscientiously in his chosen occupation?

Although Article 28 imposes fundamental duties on every person in Sri Lanka, Article 29 goes on to say that these do not confer legal rights or obligations and are not enforceable in any Court or tribunal. However, those duties are at least morally binding, and the Constitution cannot possibly be interpreted as permitting any person to be penalized for acting in the fulfilment of a moral duty imposed by the Constitution itself—to which, after all, every public officer takes an oath of allegiance.

The chain of rights and duties is thus longer and stronger than is popularly believed: it links the fundamental right and duty to expose corruption, the right to exercise the freedom of speech in order to fulfil that duty by exposing corruption, the right to obtain information necessary to fulfil that duty and to exercise that right, the right of informants to disclose such information to relevant persons, including the media, the right to make such disclosures on the condition of non-disclosure of identity, and the privilege of recipients of information not to disclose their sources. Parallel to those rights and freedoms there is the right of persons accused of corruption to reply to such allegations.

6 Directive Principles of State Policy

Chapter VI of the Constitution also provides:

> *27. (1) The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.*
>
> *(2) The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include –*
>
> *(a) the full realization of the fundamental rights and freedoms of all persons;*
>
> . . . . . .
>
> *(4) The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.*
>
> . . . . . .

(15) The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order, and shall endeavour to foster respect for international law and treaty obligations in dealings among nations.

Articles 27(2)(a) and 27(4) lend support to the contention that the People have fundamental rights and democratic rights (in addition to those enumerated in Chapter III), the full realization of which is the responsibility of the State. These Articles in any event justify the liberal and expansive interpretation of the Chapter III rights.

Article 27(15) which was relied on in *Karunathilaka* v. *Dissanayake* requires the State to endeavour to foster respect for international law and treaty obligations in dealings among nations. The State cannot merely preach to other States but must also set the right example by complying with international law and obligations under treaties (such as the ICCPR).[59] Hence, Article 27(15) not only compels interpretation of our constitutional provisions in the light of those obligations, but requires that effect be given by the State to those obligations. It must be stressed that it is not only *"Parliament, the President and the Cabinet of Ministers"* to whom this Directive Principle applies. It is the *"State"* to which it applies, and the State undoubtedly includes the Judiciary.

This is confirmed by Article 12(1) which provides that *"all persons are equal before the law and are entitled to the equal protection of the law"*. 'The law' is not confined to statute law, but includes subordinate legislation, custom, judicial precedents, rules and circulars, and even administrative practices. *Prima facie*, 'the law' also includes international law.

International law and treaties regarding corruption are therefore part of the 'law' to the protection of which the People of Sri Lanka are entitled. That is one of the unspecified rights which are included in the Sovereignty of the People.

It is true that Article 29 provides that Chapter VI does not confer legal rights or duties. However, those Directive Principles are binding—morally or in conscience—on the Judiciary, especially in the exercise of any equitable jurisdiction (e.g., Article 126).

7 *Wimal Fernando* v. *SLBC*

The decision in *Wimal Fernando* v. *SLBC* is relevant for at least three more reasons. The observations of the Supreme Court of India in *Secretary, Ministry of Information* v. *Cricket Association of Bengal*[60] are apposite:

> *Broadcasting media by its very nature is different from press. Airwaves are public property.... It is the obligation of the State... ...to ensure that they are used for public good.*[61]

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[59] See also, *Weerawansa* v. *AG* [2000] 1 SLR 387.
[60] (1995) 2 SCC 161.

The frequencies available for television and radio broadcasts are so limited that only a handful of persons can be allowed the privilege of operating on them. Abuse or misuse of power to license the use of the airwaves (and to revoke such licences) will therefore be corruption.

The US decision in *Red Lion Broadcasting Co.* v. *FCC*[62] was also cited with approval. There, a listener had been subjected to a personal attack by a guest speaker and it was held that the broadcasting station was bound to provide him with the tape, a transcript, or a summary of the broadcast, and equal time to reply, free of charge. It was observed that:

> *It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.*[63]

The decision, however, did not turn upon the broad principle of a listener's right, passively to receive information, but was based on two other rights: his right to equality, and his right to information needed to make his freedom of speech effective. The broadcasting station had permitted the guest speaker time to attack him; it was therefore bound to treat him equally; equal treatment demanded equal time to reply, and a reply through the very same medium; and that reply was an exercise of his freedom of speech. In order to exercise that freedom effectively, he needed information about the attack, and therefore he had a right to the tape or a transcript. So that case did not involve just the right to information, but a right to information ancillary to the freedom of speech. Thus the listener relied on three distinct rights collectively. The right to equality entitling him to equal time to reply, the freedom of speech to exercise that right to reply, and the right to information to make his freedom of speech effective. Upon scrutiny, the broadcasting company's refusal to allow a reply is seen to be nothing but a form of corruption.

8 Government Media Policy

Wimal Fernando's Case refers to the Cabinet decision of 26.10.1994 approving a 'Statement on PA Government's Media Policy' which included the following:

> *...The threats levelled in the recent past against journalists as well as media institutions have largely emanated in response to their attempts to expose and to bring to the notice of the public corruption and abuse of political power. In order to eradicate one major threat to media freedom, our government recognizes the media's right to expose corruption and misuse of power.*
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> .....
>
> *i. Freedom of Expression is already guaranteed to all media through the present constitution, and it shall be our endeavour to carry out all reforms*

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61 *Ibid*, at 292.
62 (1969) 395 US 367.
63 *Ibid*, at 390.

with regard to the media in keeping with this salutary provision in the Constitution. In future amendments to the constitution, the government shall seek to widen the scope of this constitutional guarantee by including the Right to Information.

. . . . . .

iii. Media personnel in the state-sector media institutions will have the freedom to decide the content of news bulletins and news feature programmes, based primarily on the newsworthiness of events. We will not use state-owned media for partisan political propaganda.

iv. In order to rescind or amend where necessary, the government will draft legislation, reforming the Press Council Law, the Official Secrets Act, Parliamentary Powers and Privileges Act, and the existing laws relating to Cabinet secrets and contempt of court so that the freedom of expression as well as the public right to information concerning the spheres of governmental activity [will] be ensured.

None of these promises or pronouncements was implemented. A subsequent government at least repealed the criminal defamation provisions of the Penal Code—which were valid notwithstanding inconsistency with the fundamental rights provisions being pre-Constitution legislation.[64] The media recently reported that some government politicians are in favour of re-introducing criminal defamation provisions. That would be inconsistent with the freedom of speech guaranteed by Article 14(1)(a), and would have to be justified as being a permissible reasonable restriction. *Prima facie*, Article 15(2) permits restrictions in the interests of 'defamation', which refers to the *civil* wrong; the permitted restrictions do not include the *criminal* offence. In case of doubt, Article 15(2) must be narrowly interpreted since it is a fundamental right, part of the Sovereignty of the People which is sought to be impaired.

Besides, it would appear that the re-introduction of criminal defamation provisions has been proposed in order to curb the publication of allegations of corruption and misuse of power—by proceedings which will involve no expense to the persons allegedly defamed, but at State expense. It is likely that such laws will be used mainly for the benefit of government supporters—and that would be in violation of the equality provisions.

9 Freedom from Corruption in the Private Sector

Article 12(1) applies to the private sector.

There is a school of thought that fundamental rights in general, and Article 12 in particular, only afford protection against governmental or executive action, but not against the acts and omissions of private bodies and individuals. This is based on two misconceptions. The first

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[64] See Article 16(1).

is the facile assumption that the language of Article 12(1) is the same as the corresponding section of the 14th Amendment to the American Constitution—which provides, *"...nor shall any State... deny to any person within its jurisdiction the equal protection of the laws"*. Thus the 14th Amendment is a limited guarantee, only against the acts of any State, while Article 12(1) applies to any act, whether of the State or of any other person or body. The second misconception flows, to some extent, from the first. Article 126(1) of the Constitution provides that the Supreme Court shall have sole and exclusive jurisdiction to determine questions relating to the infringement of fundamental rights by executive or administrative action. On the assumption that the fundamental rights are only a protection against executive action, it is often assumed that the only remedy is that under Article 126—for on that assumption, there is no need for any other remedy.

However, it is clear from Article 12 itself that the fundamental rights grant protection against private action as well. Thus Article 12(3) provides that no person shall, on the ground of race, religion, language, caste or sex, be subject to any disability or restriction with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion—quite clearly, these are almost wholly rights in respect of private, or 'non-executive' action.[65] If Article 12 is interpreted as being inapplicable to private acts, Article 12(3) will have no meaning. Article 12(3) does not add to Article 12(1): it only states expressly what is in any event implicit in Article 12(1). Article 12(1) would apply, to some extent at least, to the private sector.

Further, fundamental duties are imposed not only on public sector officials and employees but on every person in Sri Lanka, and that includes every person in the private sector as well. The nature of the fundamental duties is such that they cannot be restricted to the public sector.

10 Constitutional Remedies

The Constitution already provides remedies for corrupt acts and omissions.

Judicial remedies are provided by Article 126 (by application to the Supreme Court for the infringement of fundamental rights) and Article 140 (by writ application to the Court of Appeal).

Article 156 imposes on the Ombudsman the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices—which would cover corrupt acts by public officers or officers of public corporations, etc. This administrative remedy does not extend to Ministers.

Parliamentary remedies are provided by Article 42 and 43 which extend to the President and the Cabinet:

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[65] *Saman* v. *Leeladasa* [1989] 1 SLR 1, 22-24; *Jayagiri Transporters Ltd.* v. *Dharmadasa Banda*, SC App. No.152/94, SCM 15.9.94.

42. The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the constitution and any written law.

43. (i) There shall be a Cabinet of Ministers... which shall be collectively responsible and answerable to Parliament.[66]

It must be stressed that the President's personal immunity under Article 35 extends only to proceedings in any Court or tribunal, and not to proceedings in Parliament. These remedies need to be developed and used much more often.

10.1 *Locus Standi* and Public Interest Litigation

Human rights activists often complain that the law does not allow public interest litigation (PIL) and that meritorious applications fail for want of *locus standi*. However, this is a matter of presentation and emphasis. When applications are founded on the Sovereignty provisions, the Rule of Law, the Public Trust doctrine or Article 12, the picture that emerges is very different—the three organs of government owe a fiduciary duty to every citizen who is entitled to the benefit of one or the other of these principles and provisions. Compliance with these fiduciary duties results in good governance which benefits every citizen. Non-compliance results in detriment, direct or indirect. So what is at first sight public interest alone is seen to have a personal element too—which is sufficient to establish *locus standi*.

11 Perquisites of High Officials of the State

Some of the principles regarding corruption and the remedies for corruption are illustrated by the recent decision in *Senerath* v. *Chandrika Kumaratunga*.[67] Under the Presidents' Entitlements Act[68] every former President is entitled during his lifetime to –

(a) the use of an appropriate residence free of rent and if not provided, to a monthly allowance equivalent to one-third of his monthly pension;

(b) a monthly secretarial allowance; and

(c) official transport and all such other facilities as are for the time being provided to a Minister of the Cabinet of Ministers.

The Minister of Urban Development submitted a Cabinet Memorandum stating that the then President, the 1st Respondent, had requested a 1½ acre block of land at Madiwala for the construction of a residence for herself after retirement; that she wanted this land in lieu of her

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[66] See, *Perera* v. *Pathirana*, SC App. No.453/97, SCM 30.1.2003; *Senasinghe* v. *Karunatilaka* [2003] 1 SLR 172; and *Thavaneethan* v. *Dissanayake* [2003] 1 SLR 74.

[67] SC App. No.503/2005, SCM 3.5.2007.

[68] No.4 of 1986.

pension, official residence, and allowance for maintenance and electricity and water bills; and that she would take only her entitlement to a 'few vehicles', security personnel and vehicles for security, and office staff. He further stated that, "the value of the land is insignificant" when compared to the entitlements given up, and to be given up in future. That statement was held to be a misrepresentation by the Minister as the Madiwala land was what was originally intended for the construction of the 'Presidential Palace', on which—it was not denied—the State had already spent Rs. 800 million for development.

Within a fortnight of the Cabinet decision granting approval the Urban Development Authority made a free grant of that land to the 1st Respondent—even before she had ceased to hold office and become the 'former President' and entitled to benefits as such. The Court held that the decision was contrary to law and of no force or avail in law.

Before two months had elapsed after that grant the Minister of Public Security submitted a Cabinet Memorandum—not disclosing the allocation of the Madiwala land—recommending that a 'Retired Presidential Security Division IV' be established for the 1st Respondent, headed by a Senior Superintendent of Police with 198 personnel, 18 vehicles and 18 motor cycles; and that house No.27 Independence Avenue be allocated to her as she needs to reside in a house where adequate security can be provided, and that repairs be effected thereto. The 1st Respondent too submitted a Note to the Cabinet stating that she had selected No.27 Independence Avenue for her office, and that she required 62 staff to maintain that office—including 9 drivers, 5 butlers, 1 cook and 5 KKSS. While the Minister stated that the premises were required for her residence suppressing the fact that the Cabinet had already allocated the Madiwala land in lieu of her entitlement to a residence, etc., the 1st Respondent claimed the premises for her office—to which the Act gave her no entitlement.

Even before the Cabinet approved the allocation of the premises, steps were taken to obtain possession of the premises and the 1st Respondent herself set out to have repairs effected—at a cost of Rs. 35 million and in flagrant disregard of the guidelines she herself had laid down as Minister of Finance.

The Court held that the entire sequence of events relating to No.27 Independence Avenue was an abuse of authority by her, marked by a serious deception in that the previous free grant of the Madiwala land had been suppressed in the Cabinet Paper and Note, and that she was not entitled to any of the staff, security and personnel, claimed by her.

The judgment also contains a reiteration of the salutary principle, which should never be lost sight of, that, *"in official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a matter where he has a personal interest."* The Court, however, did not consider the liability of the members of the Cabinet, particularly of the two ministers who submitted Cabinet Papers.

It is not surprising that later it was reported that the Chief Justice had stated that the Judiciary did not do shoddy jobs like the Executive; that it did a [more] excellent job than both the

Executive and the Legislature; that it did not say one thing today, another tomorrow, and another lie the day after.[69]

That case must be compared with another fundamental rights application[70] challenging the recent pay hike—of well over 100%—granted to all Parliamentarians by resolution passed by Parliament in November 2006. According to a newspaper report of the proceedings,[71] Senior State Counsel took a preliminary objection that the Supreme Court was not the proper forum as the resolution was passed by Parliament, and submitted that although the increase did shock the conscience of everybody the question was one of law and not of morality. Leave to proceed was refused; and the petition was dismissed by a majority decision with the presiding Judge dissenting as she was of the view that it was an arguable point.

The pay hike was not a proper exercise of the powers of the Legislature, and was in violation of the Public Trust doctrine, and several fundamental issues which cried out for an authoritative decision in that case were not dealt with as leave to proceed was refused by the majority without any statement of the grounds and reasons on which that order was based.

Article 68(1) provides that Parliament may by law or by resolution determine the remuneration of the Ministers and Members of Parliament. That Article must be considered together with several other Articles providing for Parliament to determine salaries, etc.

Article 36(1) provides for Parliament by resolution to determine the salary, allowances, and pension entitlement of the holders of the office of President, while Article 36(4) provides that Parliament may by resolution increase but not reduce that entitlement. Article 36(2) stipulates that any subsequent law inconsistent with Article 36 should not have retrospective operation.

Article 108 provides that Parliament shall determine the salary and pension entitlement of Judges of the Superior Courts, which shall not be reduced after appointment.

Similarly, Articles 103(1), 153(1) and 156(3) provide that the salary of the Commissioner of Elections, the Auditor-General and the Ombudsman shall be determined by Parliament and shall not be diminished during their term of office.

If the pay hike case was dismissed on the basis of the preliminary objection, then the question arises whether an abuse of power by Parliament under any of the foregoing Articles either increasing remuneration in gross violation of the equality provisions in Article 12, or reducing remuneration in violation of the express prohibitions contained in those Articles, would be exempt from judicial review. The limited guarantee of independence achieved by the

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69 Susitha R. Fernando, "Judiciary doesn't do shoddy job like Executive: CJ", *Daily Mirror*, 30.6.2007.

70 *Lanka Railway Trade Unions Federation* v. *Wickramanayaka*, SC App. No.29/2007, SCM 30.1.2007.

71 S.S. Selvanayagam, "Parliamentarians' salary increase: SC refuses leave to proceed", *Daily Mirror*, 31.1.2007.

prevention of a reduction in remuneration would be rendered nugatory. Can the Supreme Court hold that the prohibition in Article 108(2) is unenforceable? Surely not. Can it ever be said that an unconscionable increase will be allowed to stand, but an unconscionable reduction will be annulled? That is a compelling argument for the contention that Article 68 is equally subject to review under the Public Trust doctrine.

The majority decision—or rather, order—in the Parliamentarians' Pay Hike Case, refusing leave to proceed, has given rise to many more questions than it has answered, in relation to the exercise of the judicial power of the People.

As a general issue, being a fundamental rights case, should the order refusing leave to proceed have set out the decisions of the majority on the questions which arose as well as the reasons for each of those decisions? Yes, certainly. An order granting leave to proceed is not a final decision on the rights of the parties but only a tentative decision that there is an arguable question, of law or of fact, which deserves further consideration; it would be enough to identify that question (e.g., "leave to proceed is granted upon the alleged infringement of Article XYZ") and reasons need not be stated. But an order refusing leave is a final decision—an unequivocal decision that there is no merit at all in the petitioner's case; that he has failed to make out even an arguable case. That order must set out the decision on each of the questions set out in the petition (and argued by Counsel). Natural justice requires also that supporting reasons be stated. Justice requires that a petitioner must know on what points he has failed, and why he has failed. A final order merely stating, "leave to proceed is refused", would not be an exercise of judicial power but an arbitrary order—unless a petition is plainly without merit.

This is particularly important in the highest Court because questions of binding precedent are also involved. In the instant case, one question—a serious, important question—was whether a resolution of Parliament can be reviewed in a fundamental rights case. The order does not afford any guidance to prospective litigants and to the public as to what the law is on that point; what the majority decided on that point; whether the majority decided the case on some other point (e.g., that in any event the salary increase was modest and/or justified). So when the next pay hike is granted another petitioner will try his luck, and neither he nor the judges will have any guidance from this order.

A second issue relates to the interpretation of Article 68, which enables Parliament to provide 'by law or by resolution' for the remuneration of MPs. Had Parliament attempted to fix remuneration by law, a Bill for that purpose would have had to be gazetted, citizens would have had the right to challenge the Bill on the ground that it was in violation of fundamental rights or was otherwise inconsistent with the Constitution, and the Supreme Court would have had to make a Determination on all those issues with reasons.[72] The Bill could thereafter have been passed only in accordance with that Determination, and once passed the resultant Act could not be further challenged.[73] A resolution fixing remuneration does not have any of

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[72] Article 123.
[73] Article 80(3).

those safeguards, and correspondingly does not enjoy the immunity from challenge which an Act of Parliament enjoys. A resolution under Article 68 is therefore a form of Parliamentary action inferior to legislation, and enjoys no immunity from judicial scrutiny.

Did the majority decide that vital question in regard to the jurisdiction of the Supreme Court? If it decided that the Court had no jurisdiction, what were the reasons? Could Parliament do by resolution what it could not do by legislation? If a Bill could have been challenged as discriminatory why should a resolution to the same effect be immune from challenge on the identical grounds? Can Parliament in future resort to resolutions as a means of short-circuiting the procedure for passing Bills? Delegated legislation even after approval by Parliament is subject to judicial review on numerous grounds—how then can resolutions be exempt? Resolutions under Article 68 have not been made constitutionally immune from judicial review unlike resolutions under Article 81—can such immunity be granted by judicial interpretation?

A third issue arises from submissions reportedly made by Senior State Counsel in answer to Court—that the pay hike involved issues of law and not of morality although the increase shocked the conscience of everybody. Under the fundamental rights jurisdiction the Court is empowered to make a 'just and equitable' order. Equity has traditionally and historically involved an appeal to conscience. Does the State wish the Court to ignore conscience in future?

A fourth issue arises from an alleged provision in the resolution that if the remuneration of Judges is increased, the remuneration of Parliamentarians will automatically increase correspondingly. If there was such a provision it involves a manifest abdication of power. If salaries of Judges are increased for reasons quite inapplicable to Parliamentarians, the latter will nevertheless receive another pay hike. Further, Parliament may by resolution directly increase the remuneration of Parliamentarians without increasing the salaries of Judges.

A fifth issue is that in any event the resolution could not have been given retrospective effect.

A sixth issue arises from the petitioners' complaints, that salary increases solemnly promised to public servants had not been paid and that (if the resolution was allowed to stand) public servants should be given salary increases proportionate to the Parliamentarians. Those complaints related to demands for equal treatment on the (alternative) basis that the resolution was valid. Why did the majority refuse leave to proceed at least on those points—differential treatment in that the Parliamentarian's pay hikes are both prospective and retrospective while public servants were even denied promised prospective increments, and that there is neither equality nor proportionality so far as public servants are concerned. If proportionality was permissible and proper as between Parliamentarians and Judges, why not between Parliamentarians and public servants?

The President, in his Budget speech delivered in Parliament, called upon every section of the nation to make sacrifices in the national interest. Parliament passed the Budget, but within days responded to the Presidential call for sacrifice by this pay hike resolution!

In that background, serious questions arise as to how appropriately the Court exercised the powers delegated to it by the People.[74]

12 Other Types of Corruption

There are, *prima facie*, many other forms of corruption which will require further scrutiny in future. Two examples are set out below.

Article 10 guarantees the freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of ones choice. Some have sought to argue that offering or giving material benefits in order to induce a person to change his religion, or his religious beliefs (if indeed an actual change of *belief* can be effected), is, apart from being unethical, a serious infringement of Article 10.

But Article 10 extends beyond religion. It covers all types of beliefs, including political beliefs: far more fundamental to the democratic process than the issue of conversion of religious beliefs.

If a life-long advocate of prohibition is persuaded to change his policy by material inducements that too may debatably be an infringement of Article 10.

Likewise, when a Parliamentarian or a politician is persuaded to change his political opinions or affiliations by the grant of ministries, ambassadorships, corporation appointments, etc., that, too, is arguably an infringement of Article 10, and is in any event a serious violation of the rights of his electors (as, even if he might not actually have changed his *inward belief*, a change of his *outward conduct* would have been procured, affecting in turn the rights of his electors). Equality before the law would seem to require that such forms of unethical conversion of beliefs too be prohibited, especially where the democratic rights (including collective rights) of the People are thereby affected.

But even if such attempts—successful or unsuccessful—at conversion of beliefs do not amount to infringement of Article 10, or are not prohibited by Statute, they would nevertheless constitute corruption or attempted corruption. Such corrupt attempts to procure changes of political beliefs may take many forms including threats to initiate investigations or prosecutions in respect of allegations (whether genuine or fabricated) of offences, and promises to withdraw pending criminal proceedings.

Another misuse of power, though probably without an evil intent, may occur in relation to the retirement benefits of employees. Article 9 of the International Covenant on Economic Social and Cultural Rights (ICESCR) recognizes the right of everyone to social security. Article 27(9) of the Constitution lists as one of the Directive Principles that the State shall

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[74] See also the survey conducted by the Marga Institute, *An Inquiry into the Judicial System of Sri Lanka* (2002), as to some public perceptions of the Judiciary.

ensure social security and welfare. Private sector employees in Sri Lanka are virtually compelled to join the State-run Provident Fund Scheme, to which they and their employers contribute. Very few have the option to join a private fund. The funds so contributed are managed by state agencies which invest such funds almost entirely in State securities. Such agencies are clearly in the position of trustees (to whom in any event the Public Trust doctrine applies) and their primary obligation is to ensure that the funds are so invested as to ensure an adequate return, and certainly not to provide cheap funds for governmental activity. The interests of employees in securing adequate social security for their retirement must outweigh the interests of government.

According to a recent newspaper report based on the Central Bank Report for 2006 there were over 11 million members' accounts, with Rs.472 billion in balances, of which over 96% was in government securities (Rs.450 billion); the Fund was unable to provide members with "a positive real return on a yearly basis"; however, from its small (0.8%) equity portfolio during the period 1998-2006 the Employees' Provident Fund (EPF) had earned on average 20% per annum. The failure to earn a real return would mean that each year the real value of a member's balance decreased—the longer he worked, the less he received.

If the report is correct, the question needs to be considered whether EPF investment policies fulfilled the fiduciary obligations of the EPF fund managers or in effect provided the government with funds at concessionary rates, at the expense of employees.

13 New Self-Help Remedies?

Some forms of corruption involving the abuse of power are particularly detrimental to the under-privileged and the voiceless, and have hitherto attracted little attention. However, for some time now a TV station (and more recently a newspaper) has been highlighting such incidents and pointing a finger at those who seemed to be responsible. In a few instances, such media publicity resulted in positive remedial action—confirming that publicity is yet another weapon for fighting corruption. But many more abuses of power have not been exposed to the healing glare of publicity.

Such instances are many, in variety and in number: roads and bridges remaining unrepaired and usable no longer, or only at grave risk of injury to person or damage to property, resulting in adults being unable to go to work and children to school; irrigation tanks and channels not maintained, depriving villagers and especially farmers of water; schools lacking essential furniture, equipment, books and other facilities, and/or with leaking roofs and dilapidated walls, putting children at risk of injury and depriving them of a proper education; health-care facilities of various types in a similar condition; damaged electrical installations posing a danger to the public; garbage dumped so as to be a danger to health, let alone a source of acute discomfort; other forms of environmental pollution and so on; the list is almost endless.

Government and provincial officials and politicians—especially when elections are approaching—visit from time to time, inspect, listen to people's grievances, make speeches and promises, give loud orders and categorical assurances but nothing happens. In the

meantime, either financial allocations are not made, or are made but voted funds are misspent on other items or are returned to the Treasury unspent. People send petitions, go in deputation and hold protests but still nothing happens. The government and its officials appear to be, in a sense, unjustly enriched; or at least the affected persons are unjustly impoverished.

What remedies do the sovereign People have as against their own elected or appointed agents?

They have, of course, legal remedies. Fundamental rights applications, writ applications, civil actions but all these take ages, and during that time people often suffer untold hardship and irremediable loss, damage and injury.

A fruitful subject for future research is whether the affected persons can themselves, at their own expense and with their own labour effect the repairs and/or supply the omissions necessary to prevent or to reduce the loss, damage and prejudice which they would otherwise suffer, and recover damages, expenses and costs.

Our law recognizes several principles, many derived from the Roman-Dutch Law (RDL) which are capable of being developed to recognize a new 'Self-Help' remedy.

Among those principles are the doctrine of unjust enrichment, the *actio negotiorum gestio,* and the duty to mitigate damages derived from the RDL, and agency of necessity from the English Law. It has been observed that the RDL can be developed on equitable lines[75] and that is the need of the hour. A good example of how this development can be effected appears from the judgment of Justice Weeramantry in *de Costa* v. *Bank of Ceylon,*[76] where for the first time a broad general principle of unjust enrichment was recognized.

Negotiorum gestio –

> *...occurs when a person, without previous mandate has managed another's affairs or rendered him some other service, not merely as an act of kindness, but in circumstances apt to create a legal relation. In such a case the volunteer (negotiorum gestor) is bound: (a) to manage the affairs of his principal with proper diligence and, (b) to render account of his administration; the principal (dominus negotiorum – dominus rei gestae) is bound to indemnify the agent in respect of expenses and liabilities usefully rendered.*[77]

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[75] *Appuhamy et. al.* v. *The Doloswala Tea and Rubber Company* (1921) 23 NLR 129, 133; *The Government Agent, Central Province* v. *Letchiman Chetty et. al.* (1922) 24 NLR 36, 41.

[76] (1969) 72 NLR 457, 529-545.

[77] R.W. Lee, *An Introduction to Roman-Dutch Law*, 5th Ed., (Oxford: Clarendon Press, 1953), 346; See also generally, Wille's *Principles of South African Law*, 8th Ed., (Wetton: Juta & Co, 1991) 40, 642.

The *gestor* is entitled to recover even where he acts with the intention of benefiting himself.

The duty to mitigate damages requires that the –

> *plaintiff claiming damages must take all reasonable steps to minimize the loss consequent on the breach... ...the onus rests on the defendant to establish that reasonable steps were not taken to mitigate his loss.*[78]

> *The plaintiff is... ...not entitled to claim loss which he or she could reasonably have prevented, but the onus is on the defendant to show that the plaintiff's loss has been increased by his or her unreasonable omission to minimize the damage... ...the cost of the measures aimed at minimizing the damage can also be claimed from the defendant.*[79]

According to Bowstead and Reynolds on Agency, the English law concept of Agency of Necessity is not dissimilar to *negotiorum gestio* in the Roman law.[80]

In the light of these principles, what is the position of the affected persons? They are the victims of corruption, of breaches of duty by the State and its officials: should they not have a remedy?

Lee, under the heading 'Breach of a Statutory or Common Law Duty' states that,

> *in either case the person committing the* delict *is liable to an action at the suit of any one of the public who has sustained special damage in consequence.*[81]

The affected persons are entitled, in the first instance, to bring an action for damages, and perhaps for specific performance. However, even after making unsuccessful demands for fulfilment of the duties in question they are under a duty to mitigate the damage. They may therefore take steps to obtain the necessary funds, materials and labour and repair the damage complained of, and thereby avoid further loss, damage and prejudice. At this point the government is clearly unjustly enriched; the affected persons are, arguably, in the position of a *negotiorum gestor*; and insofar as the government's breach of duty is concerned, they have fulfilled their obligation to mitigate their damage. Are they not entitled thereafter to claim the damages suffered, including the cost of mitigating the damage, and costs? What is needed to develop a 'self-help' remedy is extensive research by academics, persuasive arguments by practitioners, and liberal interpretation by Judges. Courts may well be persuaded to award punitive damages and incurred costs.

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78 Wille's *Principles of South African Law*, 8th Ed., 526 (footnotes omitted).

79 Wille's *Principles of South African Law*, 8th Ed., 526 (footnotes omitted), citing also *Shrog* v. *Valentine*, 1949 (3) SA 1228.

80 F.M.B.Reynolds, *Bowstead and Reynolds on Agency*, 17th Ed., (London: Sweet & Maxwell, 2001) 129 (footnotes omitted).

81 R.W. Lee, *An Introduction to Roman-Dutch Law*, 5th Ed., 336.

14 Conclusion

The dragon of corruption may breathe fire, but it is by no means invincible. Dragon-fighters already have a range of reliable weapons with which they can successfully attack that dragon from all sides.

What else can be done?

Although it is not essential to await new weapons forged by legislation and/or executive action, such new weapons must not be scorned. However, those new weapons must be demanded as a matter of Constitutional right, and not of grace and favour.

On the basis that it is the inalienable Constitutional right of the People, the public must maintain critical review and scrutiny of legislative, executive and judicial performance as to the exercise of the powers delegated to them by the sovereign People to combat corruption, and in that task special responsibilities attach to civil society, to religious leaders, to professionals (especially legal), and to the general public.

The media must systematically expose and oppose corruption. They must help to create greater public awareness of the corruption which is now blatant and rampant, of the remedies available to deal with such corruption, and of the action being taken to stamp out corruption.

The public must also show their disapproval of those persons, however prominent or influential, who are tainted by corruption in any form. When elections are pending, for instance, voters must openly proclaim their unwillingness to vote for candidates tainted by corruption and for the parties nominating such candidates. Such persons must not be given places of honour at any function, political, religious, or social.

Special attention must be devoted to school children so that the new generation may have better values than their elders, and their idealism may yet overcome the cynicism of adults.

Let me conclude by observing that the battle to win our liberty from corruption must be waged and won in the hearts and minds of men and women. As a wise American judge observed:

> *What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon Constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes.*
>
> *Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law, no court can even do much to help it. While it lies there it needs no Constitution, no law, no court to save it.*[82]

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[82] Judge Learned Hand, http://www.criminaljustice.org/public.nsf/ENews/2002e67?opendocument.

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LANGUAGE RIGHTS IN SRI LANKA:
Enforcing Tamil as an Official Language
B. SKANTHAKUMAR (Ed.)

Since 1987, and through the enactment of the 13th Amendment to the Constitution, Tamil has joined Sinhala as an official language in Sri Lanka. This elevated status for the Tamil language endows Tamil speakers living in any part of the country with the right, *inter alia*, of communicating with any government office or officer in their own language and of receiving communications too in that language.

However, outside of the Northern and Eastern provinces (and imperfectly even there), Tamil speakers continue to be discriminated against in their access to, treatment within, and experience of public services such as government departments, police stations, courts, public transport and health service – through non-compliance of state agencies with the official languages law – thus denying them *de facto* equality.

This book is a compilation of papers from a Consultation on the enforcement of Tamil as an Official Language. It includes analysis of Tamil language needs and proficiency among public officers in Colombo, Nuwara Eliya, Puttalam, Trincomalee and Vavuniya; elaboration of recent measures by the Government of Sri Lanka to bilingualise the public service; the role of civil society organisations in enforcement of language rights; and rights-based critiques of the official languages policy as well as recommendations for its improvement and application.

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