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Fax 69[illegible]618 Tel 686843/ 691228

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OBJECTIVES

The Law and Society Trust Fortnightly Review keeps the wider Law and Society community informed about the activities of the Trust, and about important events of legal interest and personalities associated with the Trust.

In November, the Bar Association of Sri Lanka held its National Law Conference. Several members of the judiciary and the bar presented papers and we publish in this issue two of these papers. November also saw the first visit by a team of Chinese scholars to our country. We publish a report on some of the discussions they held.

THE INPUT OF SCHOLARS

The Law Today : A Re-appraisal

IN THIS ISSUE

FUNDAMENTAL RIGHTS AND JUDICIAL APPROACHES

by

R.K.W. Goonesekere

A Bill of Rights in a Constitution is a solemn declaration of the State's commitment to the dignity and well-being of its citizens. When there is also a provision, as in our Constitution, enjoining all organs of government to respect, secure and advance constitutionally recognised fundamental rights, it is an endorsement of the importance attached to our Bill of Rights. The judicial branch of government is included in the reference to organs of government in Art.4(d). Referring to this provision Ranasinghe J. in Edirisuriya v Navaratnam 1385 (1) SLR 100, said "A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured by the Constitution to the citizens of the Republic as part of their intangible heritage". A good illustration of how Art.4(d) can be used by the Court is provided in Sirisena v Perera SC Appl. 14/90; SCM 26.8.91, where Fernando J. referring to ambiguities that can arise when interpreting a fundamental right that is subject to a restriction said, "any ambiguity must be resolved in favour of the liberty of the citizen, by preferring that interpretation which enhances the right rather than another that diminishes it, thereby complying with Art.4(d)...." A significant feature of our Constitution is that the apex Court has been given the sole and exclusive jurisdiction to hear questions relating to infringement of fundamental rights by 'executive or administrative actions', thus making the Court "the protector and guarantor of fundamental rights against infringement by State action of such rights" per Sharvananda J. in Velmurugu v A-G FRD (1) 180.

In other countries the Courts use the Bill of Rights mainly to test the legitimacy of laws enacted by legislative bodies. Such laws are struck down if they offend any of the enshrined rights or permit state officers in implementation of a law to violate a fundamental right. Such power is not given to our Supreme Court and past laws in particular are expressly protected against invalidation on the ground of inconsistency with Constitutional provisions. In the case of future laws, there is a mechanism of testing their constitutional validity, including conformity with the Bill of Rights, by the Supreme Court prior to enactment. The procedure does not ensure that all proposed legislation will go through this test, or even if they do come up before the Court that there would be the kind of examination that some legislative proposals deserve. The Court has been rightly conscious of its responsibility and created the healthy tradition of being willing to hear challenges to Bills even if this is not strictly in compliance with Constitutional provisions or the Rules of Court. Even without such challenge and with only the Attorney-General being heard in support of the Bill, the Supreme Court is known to take an independent scrutiny of the provisions of the Bill. The vigilance of the Court can however be frustrated because

notwithstanding the Court's determination that a particular clause is in violation of a fundamental right, Parliament can chose to ignore such finding and enact the law with the objectionable clause by 2/3 majority. The inability to challenge a law which has managed to pass the mesh of judicial scrutiny, and to prevent a law with an objectionable clause being enacted is a devaluation of the Bill of Rights.

Another matter the Court has to contend with is that, once a Bill leaves the Supreme Court with a determination, the Court loses control over subsequent proceedings in Parliament, especially amendments that may be introduced at the Committee stage. After the determination of the Court on the 13th Amendment to the Constitution Bill, one of the Petitioners made a further application to the Court complaining that steps taken in Parliament thereafter were not in due compliance with the determination (Appl. No. 49/87 Spl). The application was rejected with Chief Justice Sharvananda (with Atukorale and Tambiah JJ agreeing) holding that there had in fact been compliance, but also taking the view that since the 13th Amendment had already been passed by Parliament, " the validity of proceedings in Parliament cannot be called in question in a court on the ground of any alleged irregularity of procedure." In a separate judgement Ranasinghe J referring to the contention that an amendment which seeks to obviate an inconsistency with the Constitution as found by the Court's determination, should be referred again to the Court, thought that such reference back was both desirable and salutary, but in the absence of a clear mandatory requirement in the Constitution, the Court could not act on such complaint. Wanasundera J. in a dissent thought that important questions of constitutional law were raised meriting a full discussion before a Full Court. An opportunity for the Court to assert its authority in the interpretation of the Constitution with possible benefits spilling over to upholding fundamental rights, was lost.

It is not so much in the field of legislation but in the area of State action that the Supreme Court has had to come to grips with violations of State set fundamental rights in individual cases. Not many Judges appointed under the Second Republic could claim familiarity with this branch of the law. They had not been members of the Constitutional Court under the first Republic whose function was to examine Bills for inconsistencies with the 1972 Constitution. Lawyers, especially senior officers of the Attorney-General's Department, however had the advantage from 1973 of getting acquainted with the concepts relating to fundamental rights with American and Indian authorities expounding the scope of rights such as freedom of speech, equal protection under the law, freedom of religion, etc. When fundamental rights became justiciable under the 1978 Constitution, the legal community was in a position to rise to the occasion.

There have been assessments of the Court's performance in giving effect to fundamental rights previously. One study examined the number of applications filed and expressed disappointment that only very few had succeeded. In another study the decision of the majority in Perera v Jayawickreme (1985) 2 SLR 285 was critically discussed. My purpose is different. The first fundamental case was decided in April, 1979 and the trickle of cases before Court in the early years has now increased to several hundred every year. After 12 years we are in a position to take stock of the questions of a general nature that have arisen and now the Supreme Court has dealt with them.

should run. The strict view was also favoured in Ramanathan v Tennakoon SC Appl. 17/88; SCM 8.5.88, where the delay was due to negotiations for a settlement through the Commission for Monitoring of Human Rights.

The early cases slipped into the mistake that there was something similar to a statute of limitations operating against a complainant. Clearly this was in error because petitioners were in fact not sleeping over their rights but invariably doing something very sensible and appropriate in the meanwhile. Also it could not be said that the respondents were prejudiced by the delay. The time limits in Art.126 must be taken together and not in isolation and once it was permitted for the Court to exceed the two-month rule a relaxation of the one-month rule was called for. This was in fact done in an earlier case, Namasivayam v Gunawardene (1989) 1 SLR 394, where Sharvananda CJ. rightly observed that "Article 126(2) must be given a generous and purposive construction". There is no doubt that the Court is less inclined to take the strict view where unlawful arrest and detention or torture is concerned - see Wijewardene v Zain SC appl. 202/87; SCM 24.7.89; Saman v Leeladasa (1989) 1 SLR 1, and Somawathie v Weerasinghe (1990) 2 SLR 121. In principle the liberal construction should equally be extended to other fundamental rights and indeed one discerns this approach in recent cases.

As against favouring a literal compliance with Art.126(3) we may also refer to a Constitutional provision which is unequivocally mandatory, namely, Art.121(3) which requires a determination on a Bill to be communicated within three weeks. This did not prevent the Court from taking a further one week to communicate its determination on the Thirteenth Amendment to the Constitution Bill with consent of the parties. It must also be pointed out that by conferring sole and exclusive jurisdiction on the Supreme Court for infringement by State action, a complainant is denied recourse to any other court.

(b) Petitioner

Although there is provision for an Attorney to file a petition on behalf of a complainant who is not in a position to sign an affidavit uncertainty as to how such papers are to be filed has led to applications being filed by a close relative of the complainant. In Ansalin Fernando v Perera SC Appl. 18/87; SCM 21.5.90, the application was made by the mother of a detainee who was held virtually incommunicado. No objection was taken and after argument an order for compensation was made in favour of the petitioner. But in Somawathie v Weerasinghe (1990) 2 SLR 121, an objection was taken to an application made by the wife of a detainee and the Court had to rule on whether there was a proper application before Court. Amerasinghe J. while subscribing to the view that a Judge "must actively cooperate to give such fair, broad, large, liberal, purposive and progressive construction as will best ensure that the fundamental rights....are respected, secured and advanced", nevertheless felt constrained to use the techniques of strict interpretation and give Art. 126(2) "the ordinary, grammatical, natural and plain meaning of its language" and dismissed the application. Kulatunga J. in a dissenting judgment while accepting that the wording of Art.126(2) does not permit an extension yet thought that Art.4(d) permitted the Court to give a "purposive construction in circumstances of grave stress and incapacity when next of kin such as a parent or the spouse may be the only people able to apply to the Supreme Court in the absence of an Attorney-at-Law who is prepared to act as petitioner. If fundamental rights are to have any meaning, particularly to the weak and the helpless person whose freedom to have prompt recourse to this Court by himself or by an Attorney-at-Law is impeded due to circumstances beyond his control, it is the duty of this Court to construe Art. 126(2) purposively and not literally".

In this connection, it is relevant to refer to the large number of letters/petitions sent to the then Chief Justice in 1991 by persons kept by the authorities in the Boossa Detention Camp or by their relatives alleging violation of their fundamental rights. The Court decided to act on such representations in the same manner as if proceedings had been initiated in the normal way. With the assistance of the Bar Association some regularity was devised to enable the Court to deal with the applications. The Rules now provide for this informal invocation of the Court's jurisdiction – see Rule 44(7).

(c) Nature of Inquiry

There has been a distinct reluctance on the part of the Court to deviate from the practice of disposing of an application on the affidavits and documents before Court without extending the scope of the inquiry to hearing of oral testimony. Attempts to examine deponents where contradictory positions are taken by the parties have not met with success, generally to the detriment of the petitioner on whom the burden of proving the infringement lies. The most glaring instance is perhaps Elmore Perera v Jayawickreme. This has however not prevented the Court from putting questions to a respondent who may be in Court for the purpose of elucidation of facts.

Judges have also not hesitated to call respondent police officers to furnish material such as Information Book extracts or the IB itself or remand orders, and to direct medical officers to submit their reports or to examine a person in police custody. Such orders are frequently made to assist the Court when inquiring into allegations of unlawful arrest and detention or torture. Amerasinghe J. in Samanthilaka v Perera aptly referred to the Court as exercising "inquisitorial functions in clarifying disputed facts". See also Dheeraratne J. in Kodippilige Seetha v Saravanathan (1986) 2 SLR 228 who referred to a Magistrate holding an inquiry in a Habeas Corpus application as "no silent spectator" and as having the right "to ferret out the truth of any disputed matter".

Should this concern for the facts be limited to cases of allegations against the police? In principle the approach of the Court should be the same where other fundamental rights are involved and the assistance of the Court should be available to petitioners who are not in a position to come to Court with all the facts. Once a case is made out and leave to proceed granted the court should be ready to direct the respondents to place all relevant material before Court, and not take the position, as it unfortunately does sometimes, that the Court will not assist the petitioner to prove his case. It must be said that officers of the Attorney-General's Department act very fairly and in the highest traditions of the Bar in not starving a case of relevant documents which are solely in the possession of the respondents. In other cases the power of the Court to give direction (Art. 126(4(should be liberally used by the Court.

Liability for Infringement

Can the State be held liable for totally illegal or wrongful acts of its officers? In Mahenthiran v A-G FRD (1) 129 and Velmurugu v A-G FRD (1) 180, the Supreme Court assumed that executive or administrative action meant State action and where this was present State liability followed. The question in these cases, was whether the actions of some officers were of such a nature as to attract State liability. In his dissenting judgement in Velmurugu Sharvananda J said, obiter, that a claim for redress for violation of a fundamental right "is a claim

against the State for what has been done in the exercise of the executive power of the State. This is not vicarious liability; it is the liability of the State itself; it is not a liability in tort at all; it is a liability in the public law of the State".

In Ratnasara v Udugampola FRD (2)364, the Court without giving much thought to the matter made an award of compensation to be paid by a respondent police officer. Undoubtedly the Court has in mind a deterrent order for what it characterised as a serious violation of the fundamental right of a citizen. Thereafter in Goonewardene v Perera FRD (2)426, the Court found that a police officer had not been named a respondent but in an affidavit had accepted responsibility for an act which the court held was violative of the petitioner's fundamental right. In this situation an order was made against the State to pay compensation. Although in these cases the court was faced with a conceptual problem it was only in Saman v Leeladasa (1989) 1SLR 1 that the basis of liability is discussed. Amerasinghe J (Ranasinghe J agreeing) took the view that for a proved violation a sui generis State liability has been created by the Constitution. Disagreeing with this view Fernando J. held that the State's liability was based on the common law principles of delict which recognises a master's (State) liability for a wrong committed by a servant in the course of his employment. The difference in the two approaches was that the first led to an order for compensation against the State only and the second against a respondent and the State jointly and severally. In Samanthilaka v Perera (1990) 2 SLR 318, the petitioner was a female student who had been badly assaulted by police officers whom she identified. An objection was taken that the officers had not been made respondents. Dealing with this objection Amerasinghe J pointed out that the Court when exercising this jurisdiction is not adjudicating on conflicting interests of parties, but "is determining whether those rights of individuals which have been declared and guaranteed by the Constitution have been denied by a failure on the part of the State to discharge its complementary obligation ". The learned Judge continued that the Court assists "the Government to become aware of violations so that through appropriate measures it could restore and ensure the respect for fundamental rights which it expects of its servants, agents and institutions "and concluded by holding that wrongly adding a respondent or not adding a wrongdoer "are of no consequence with regard to the question of establishing executive or administrative action". While this case supports the State only approach, Rasol v Cader SC appl. 85/88; SCM 31.3.89 tilts in the other direction. This was not an application under Art. 11 or Art. 13 but under Art.12 and the petitioner had categorically stated that no relief was sought against the Attorney-General. Fernando J observed that if the correct position was that the State alone was liable, then only a bare declaration of infringement was possible, but he repeated the view earlier expressed by him that the State and the respondent are jointly and severally liable. "To hold that the State alone is liable would encourage rather than deter, the infringement of fundamental rights by public officers". The same judge in Karunaratne v Rupasinghe SC Appl. 71/90; SCM 17.6.91, said that making public officers pay for their wrong acts was necessary or they "may be tempted to accede to improper pressure from superiors or outsiders (or even deliberately flout instructions) in the belief that they would be immune from personal liability . . . The approach will not induce public officers to exercise, perform and discharge their powers, duties and functions with due care and attention for the fundamental rights of citizens".

It is this aspect of deterrence that Kulatunga J had in mind in Athula Dissanayake v Superintendent SC Appl. (Spl) 6/90; 28.3.91, when he pointed out that it was lapses on the part of officials which ended up in the State being answerable and having to pay compensation out of public funds. What happens today is that orders are

made against the Respondents and the State jointly and severally (Somasiri v Jayasena SC Appl. 147/88; SCM 1.3.91) against the State only (Dr. Fernando v Kapilaratne SC Appl. 1/91; SCM 10.12.91) or against the respondents and the State separately (Sirisena v Perera SC Appl. 14/90; SCM 26.8.91; Wijesiri v Fernando SC Appl. 20/90; SCM Appl. 28.7.92) depending on the circumstances. It is inappropriate to talk of State liability where the respondents are employees of Corporations, statutory bodies, local authorities and Provincial Councils.

While on the subject of compensatory awards for infringement of fundamental rights only Amerasinghe J has attempted to find a basis for such awards. This was done Saman v Leeladasa where the learned Judge said that compensation is awarded by way of an acknowledgement or regret and a solatium for the hurt caused by the violation .... and not as a punishment .... and that the amount "is the product of a inextricable considerations and, therefore, in expressing it, a separate assessment of the various elements,ought not to be made or disclosed". Indeed, we are often left to wonder why in one case so much was awarded and in another a different amount.

Enforcement of Orders

For many of us once a case is over, we put aside our briefs and show little interest in further proceedings. Our faith in the system is such that we assume that everything that should be done will be done properly, more so when a petitioner has succeeded in a fundamental rights case. There is in fact no procedure for enforcement of the Court's order made under Art. 126. What happens is that Counsel (whether Attorney-General or private counsel) will advise the respondents of the Court's decision and the need for compliance. In the case of compensatory awards and/or costs, I am informed that an application has to be made to the Registrar by the petitioner and thereafter the Attorney-General sees to it that a cheque is obtained (from the Ministry of Defence where its officers are involved?) and given to the petitioner in settlement. In the case of other orders, chiefly orders where Art. 12 has been held to be violated, and where some corrective administrative action needs to be taken, Counsel appearing for the respondents would generally ensure that this is done. But what if the petitioner finds that this is not happening? In Dayawathie v Fernando (1988) 2 SLR 314, the manner of implementing the Court's order led to a controversy which was brought to the Court's notice and finally resulted in the petitioner moving Court to deal with the respondents for contempt. After argument the Rule was discharged on the ground, inter alia, that the respondents had at all times sought the Solicitor-General's advice. In the course of his judgement Amerasinghe J. observed that contempt proceedings were not appropriate and the petitioner should go back to court and seek an injunction to enforce the order.

Abridgement of Fundamental Rights

This section deals with personal freedom only.

Writ of Habeas Corpus. The writ of Habeas Corpus was the great weapon forged by English Law to protect personal freedom from unlawful detention at the hands of the Executive, and it has come into our law. The issuance of the writ was originally entrusted to the Supreme Court but today it is the Court of Appeal that exercises this jurisdiction in accordance with the principles of the English Law and the provisions of Art. 141. Although used with effect for many years it is only recently that some procedural questions have received clarification. In Rasammah v Perera (1982) 1 SLR 30, the Supreme Court held that when a prima facie case

is made by the petitioner, it is not mandatory for the Court to require the respondent to produce the corpus before Court on the noticed returnable date. When on that date the respondent files a return that the corpus is not in his custody, the Court can nevertheless refer the matter to a Magistrate for inquiry. This was the decision in Juwanis v Latiff (1988) 2 SLR 185. If at the Magisterial inquiry the respondent persists in the denial but the magistrate is satisfied on all the evidence that the corpus had been taken into custody and reports so to the Court of Appeal, what course of action should the Court take? This is a question now before the Court.

In times of grave national crisis the government is obliged to take extraordinary method to strengthen the head of the Executive and to curtail the judiciary's supervisory role over executive actions. This has been done under the Public Security Ord. which provided for the Executive to make Emergency Regulations. Having regard to the wide powers given by the PSO, it was surprising to find that the fascicule of Emergency Regulations (Miscellaneous Provisions and Powers) made by the Executive in 1971 to deal with the insurgency that had broken out, led to the arrest and detention of large numbers of persons whether for being concerned in commission of Emergency offences, or as a precautionary measure. The suspension of the normal laws safeguarding the liberty of the subject was coupled with provisions such as PSO's 8 (ousting the jurisdiction of a court to question the validity of an ER or orders made thereunder), ER 55 (ousting the jurisdiction of the Supreme Court to grant the writ of habeas corpus) and ER 17(10) (ousting jurisdiction of a court to question an order for preventive detention) virtually left the Supreme Court powerless to deal with abuses and excesses by the Executive. The cases are too well known and need not be cited. The then Supreme Court was troubled but failed to act with sufficient authority.

The same fascicule of E. Regs. continued during emergencies even after the 1978 Constitution, with more drastic Regulations being added from time to time, but significantly, dropping the ouster of the writ of habeas corpus. The prohibition in PSO's. 8, which remains unimpaired, has not prevented habeas corpus applications being filed in the present crisis, and it can be said that the Court of Appeal's jurisdiction in this respect is now constitutionally guaranteed - see Siriyalatha v Basakaralingam HCA 7/88; CAM 7.7.88.

Fundamental Right to Personal Freedom

The Bill of Rights in our Constitution added another dimension to the protection of personal freedom in times of emergency. Although the PSO (including S. 8)has been made part of the Constitution, it is also enacted that E. Regs. cannot override, amend or suspend the provisions of the Constitution (Art. 155(2). the Supreme Court has held that the Fundamental Rights jurisdiction cannot be ousted by preclusive clauses and in a landmark decision ruled that an ER which curtailed freedom of speech (in violation of art. 14(1)(a) and also enabled the police to act arbitrarily and capriciously (in violation of Art. 12(1) was null and void - Joseph Perera v A-G SC 107 - 109/86; SCM 25.5.87. We also find ER 17(9) being struck down on the ground that it was 'unreasonable' (H.A.G. de Silva J) or 'unfair' (Kulatunga J) -see Wickramabandu v A-G SC Appl. 27/88; SCM 6.90.

Personal freedom is now guaranteed by Arts. 11 and 13(1)(2) C4), but Art 15(7) subjects Art. 13(1)(2) to restrictions in the interests of national security and public order prescribed by law or E. Regs. This has proved a dilemma to the Court when faced with challenges to arrest and detention under E. Regs. One cannot expect

to find a uniform approach to the problem. Soza J in Kumaratunga v Samarasinghe FRD(2) 347 said, "It is well recognised that individual freedom has in times of public danger to be restricted when the community itself is in jeopardy. When the foundations of organised government are threatened . . . (Emergency) Regulations overshadow the fundamental rights guaranteed by Arts. 13(1) and 13(2)". This may be the prevailing view but perhaps Rodrigo J went too far when he said "(Fundamental rights) take a back seat to the extent the Emergency Regulations take the front seat. There is no room for both in the front seat" - Visvalingam v Liyanage (1984) 1 SLR 305, 318. In Joseph Perera v A-G., Sharvananda CJ referring to freedom of speech said "Over-breadth in the area has a peculiar evil, the evil of creating a chilling effect which deters the exercise of the freedom "and Wanasundera J replied, "any restriction on the powers of the police in this area of action will also have a peculiar evil, the evil of creating a chilling effect which will inhibit law-enforcement officers from the due performance of their duties . . . "More recent cases indicate a turning towards the view expressed by Samarakoon CJ in Kumaratunga v Samarasinghe - "When provisions affecting the liberty of the subject are in question inroads into them must be strictly construed. What is lost in the roundabouts cannot always be made up on the swings".

In Wickramabandu v A-G, in answer to the Attorney-General's submission that Art. 15(7) permits any restrictions in the interests of national security, H A G de Silva J (Fernando J agreeing) said, "can we assume that the power conferred by the Constitution was intended to be used unreasonably, by imposing unreasonable restrictions on fundamental rights? The State may not have the burden of establishing the reasonableness of the restrictions placed by law or Emergency Regulations, but if this Court is satisfied that the restrictions are clearly unreasonable, they cannot be regarded as being within the intended scope of the power under Art. 15(7)". In Karunaratne v Rupasinghe SC Appl.71/90; SCM 17.6.91, Fernando J doubted that a ER which would authorised the arrest and detention of released suspect for the purpose of subjecting him to rehabilitation would be invalid.

In fundamental rights applications challenging orders made under E. Regs. the Court has not been deterred by the ouster clause in PSO's 8 or in ER 17(10) - see Wickramabandu. There are two kinds of orders effecting personal freedom that can be made under E. Reg.- (1) Order for arrest and detention made under ER 18 and ER 19, (2) Preventive Detention order under ER 17. I shall deal with them separately.
"

(1) Since ER 18 requires grounds for suspicion, from the beginning our Courts have held that the objectives test must apply to justify the arrest and detention. This position has not changed but insistence that for the validity of the arrest the sole issue for the Court is the knowledge and state of mind of the officer making the arrest (Gunasekera v de Fonseka 75 NLR 246) has been relaxed to the extent that lawful arrest can be made on the basis of statements made by a superior officer in a way which justified the arresting officer giving credit to such statements - Nanayakkara v Perera (1985) 2 SLR 375; Lundstron v Herath SC Appl. 27/87; SCM 29.489.

In an important judgement in Edirisuriya v Navaratnam, Wanasundera J held that Art. 13(1)(2) can be restricted by ER but since this had not been done, not only must a suspect be informed of the grounds of arrest but the constitutional requirement that a suspect must be brought before a judge must be complied with "in a reasonable way and within a reasonable time". As the learned Judge observed it was "a salutary provision to ensure the safety and protection of an arrested person. It is more than a mere formality or an empty ritual . . . "As he stated elsewhere in his judgement, "No constitutional requirement relating to fundamental rights can

generally be treated as a technicality". The lead given in this judgement was followed by five judges in Nanayakkara v Perera which held that detention under ER 18 is justified only if it is for further investigation and that it is unlawful and a violation of Art.13(4) to detain a suspect for an unspecified and unknown purpose or after investigation is concluded. i/e. ER 18 did not give the police a carte blanche to hold a person for 90 days. How did the authorities react? They resorted to the device of converting a detention under ER 18 without much ado into detention under ER 17, a practice which has yet to be condemned by the Court. An amendment to ER 19 in December 1989 dispensed with the requirement of producing a detainee before a Magistrate.

(2) A preventive detention order made under ER 17 results in total abridgement of a person's freedom for so long as the Secretary thinks it necessary. Several attempts were made to have preventive detention orders set aside in habeas corpus applications and fundamental rights applications. In the former, the argument was that the Secretary, Defence, had exercised his discretion improperly in authorising detention. In Siriyalatha v Baskaralingam the Court of Appeal following developments in English law after Liversidge v Anderson held that the Court was entitled to apply the objective test in determining whether the Secretary was justified in making the order. This approach has not been accepted by the Supreme Court.

In fundamental rights applications the challenge has been based on the argument that preventive detention is in violation of Art. 13(4) which cannot be made the subject of any restriction. The contention has been rejected on the ground that preventive detention is not 'punishment' within the meaning of Art. 13(4) – Kumaratunga v Samarasinghe; Yapa v Bandaranayake (1988) 1 SLR 33, and Wickramabandu. In the last case, it was also strenuously argued before a bench of five judges that ER 17 was unconstitutional, but this too did not succeed. Notwithstanding these decisions more scope has been given to judicial review of preventive detention orders. In Sasansiritissa Thero v de Silva (1989) 2 SLR 356, the Court held that the principles relating to preventive detention have been settled in Hirdramani v Ratnavale 75 NLR 67, and that it was only a question of the application of those principles in the new context of a Bill of Rights. Accordingly it would not be sufficient for the respondent to produce a detention order which was ex facie valid. The Court also took note of the fact it was not only Secretary, Ministry of Defence who was empowered to sign detention orders and that any excesses could be justiciable for violation of fundamental rights. The Court adopted the formula that detention for an unusually long period (particularly when an ER 19 order is followed by ER 17 order)in the absence of a proper explanation establishes a prima facie case of malice (in the broad sense) or, at any rate shows that the orders had been signed mechanically every month. In these circumstances it could be said that Art. 13(1) and (4) were violated. Following on this Kulatunga J held in Wickramabandu that the Secretary must disclose in the detention order the grounds with reference to specific acts alleged to have been done by the detainee. ". . . the Court will not, in the teeth of the constitutional right to personal liberty, presume the existence of grounds". In a separate judgement, HAG de Silva J (Fernando J agreeing) applied the test of unreasonableness in current administrative law and took the view that the discretion granted to the Secretary in subjective terms is not unfettered – it must be exercised reasonably and in good faith and upon proper grounds. Applying this test to preventive detention, a detention may be warranted initially, but if the material available (e.g. affidavits of respondents) did not justify the renewal of a DO, the Court can conclude that the Secretary did not form the opinion that the detention was necessary. As the judgement put it, "it is not merely excessive detention, but illegal detention".

The combination of the tests of unreasonableness and excessive detention laid down in Wickrambandu have been applied in subsequent cases. Dr. Fernando v Kapilaratne SC Appl. 1/91; SCM 10.12.91; Chandra Perera v Siriwardene SC Appl. 27/90; SCM 11.3.91; Somasiri v Jayasena SC 147/88 SCM 1.3.91; Ekanayake v Herath Banda SC Appl. 25/91;

Conclusion

The Supreme Court is the highest and final Superior Court of record; it has an original jurisdiction in matters of constitutional and public importance. It is therefore more than the apex Court in the hierarchy of courts. Its decisions are regarded as considered pronouncements on issues which are of great concern to many persons. The country looks to the Court to provide values for the society we live in distilled not merely from the law but from their collective wisdom. For the ordinary man the Supreme Court is as important as the Executive and the Legislature. Appointments to and retirements from the Court should not pass unnoticed. A place in the Court carries with it onerous responsibilities not the least being to give the people a sense of direction in the midst of conflicting opinions, free from political, religious or ethnic bias or any other kind of prejudice. It is therefore necessary that the decisions of the Court should be widely known, studied, discussed and critically examined. The people must know what the judges think and be free to agree or disagree. Members of the Court benefit from the stimulation of ongoing debate. Neither the dignity of the Court nor the reputation of judges is affected thereby.

Decisions of the Court in fundamental rights cases can be seen as contributing to respect for the foundation of a good society and the correction of pernicious trends. The work of the Court must not be considered of interest solely to the legal community but goes beyond that small world. There have been interesting developments in the law, but may I suggest, more judges should be involved in the hearing of cases and more opinions written in individual cases when the issues are particularly important. As I said we want to know what judges think.

It is unfortunate that we are in a situation that important decisions are not known to lawyers, and dare I say, even to judges. In fact they go unreported. There is one person, however who cannot profess ignorance and that is the Attorney-General. He is a necessary party in every case "to watch the interests of the State" (Mallikarachchi v A-G (1985) 1 SLR 74). The State referred to is not his client or other respondents but the People "who are sovereign, not those who sit in the seats of power". It is expected of him, because of his exalted position that he would follow up decisions to the fullest extent and see that they are acted upon immediately by all persons whose actions affect the rights of the subject. This aspect was adverted to by Atukorale J in his judgment in Chandradasa v Fernando SC Appl. 174/87; SCM 30.9.88, when he said " judging from the large number of successful applications filed in this Court under Art. 126 of the Constitution on the basis of unlawful arrests made by the police, the absolute necessity for adopting effective measures to ensure that every policeman acquire for himself an adequate knowledge and a correct perception of the legal powers of arrest without warrant cannot be overemphasised ". I am not sure this is being done and commend the same approach to all fundamental rights.

THE HIGH COURT OF THE PROVINCES: APPELLATE, REVISIONARY AND WRIT JURISDICTION

by

Justice Sarath N. Silva LL.M

Judge of the Court of Appeal

Introduction:

A historical perspective of the administration of justice in this country, reveals marked institutional changes specially in the post-1970 era. We have witnessed the emergence of new institutions and important structural changes in the institutions that were established before. The Supreme Court established by the Charter of Justice of 1833 and the other institutions such as the District Court and the Magistrate's Court have survived with changed and changing jurisdictions. The Court of Appeal established by Act No. 44 of 1971 after the abolition of appeals to the Privy Council, as the ultimate appellate court was short lived. The new institution bearing the same name established by the 1978 Constitution is a Superior Court but subordinate to the Supreme Court. The Family Court established under the Judicature Act with much enthusiasm in 1979, with Judges trained in Australia and the appointment of over 100 Family Counsellors, ceased to exist as a separate institution and is now merged with the District Court. The Court of Requests being the training ground of heavy weights at the civil bar, gave way to the Magistrate's Court (civil) and later the Primary Court. The Small Claims Court provided for in the amendment to the Civil Procedure Code effected by Act No.79 of 1988 was stillborn because the Minister who moved the amendment in Parliament did not bring the law into operation. In the area of alternative methods of dispute resolution, we are now having the second attempt at settlement of disputes outside the formal structure of courts, through Mediation Boards after repealing the Conciliation Boards Act No.10 of 1958 and having been without a substitute for nearly eight years. The Court of Appeal (Mediation in Appeal) Rules of 1990, made by the Supreme Court and espoused with fervour by a former Chief Justice has not been brought into operation by any of his successors. Be that as it may, in the post-1970 era, changes have been rapid and significant whilst being at the same time somewhat illusive, in relation to the institutions bearing the title "The High Court".

History:

The High Court was first established by the Administration of Justice Law No.44 of 1973 as the highest court of first instance exercising criminal jurisdiction in the respective Zones. It took over the original criminal jurisdiction of the District Court and the former Supreme Court.

Article 111 (1) of the Constitution of 1978 provided that the highest court of first instance exercising criminal jurisdiction shall be the High Court of the Republic of Sri Lanka. In terms of Article 169 (6) and (7) this court took over the jurisdiction of the High Court of the Zones established by the Administration of Justice Law.

Article 111 was amended by the 13th Amendment to the Constitution effected in May 1987 with the substitution of a new Sub-Article (1). The new Sub-Article changed the name of the Court from the High Court of the Republic of Sri Lanka to the High Court of Sri Lanka. However, Article 105 (1)(c) which describes the Court as the High Court of the Republic of Sri Lanka remains unamended. The amendment also removed the references to the court as a Court of First Instance exercising criminal jurisdiction. This amendment paved the way for the High Court to exercise appellate and revisionary jurisdiction. However, no appellate or revisionary jurisdiction was vested in the High Court until the 13th Amendment to the Constitution established a new institution by the description the High Court of the Province. The 13th Amendment did not repeal Article 111 and the relevant portions of Article 105 (1)(c) but introduced a new provision as Article 154 P which established the High Court of each Province. Thus we now have two institutions one known as the High Court of Sri Lanka and the other as the High Court of each Province. The High Court of Sri Lanka (Republic of Sri Lanka) appears to have only Admiralty jurisdiction in terms of Section 13(1) of the Judicature Act and jurisdiction in respect of limited categories of offences such as those committed in the territorial waters and air space of Sri Lanka and so on (Section 9(1)(b) to (f) of the Judicature Act). Judges are appointed to the High Court of Sri Lanka by the President in terms of Article 111 (2) and they are nominated as Judges of the High Court of each Province and are transferred by the Chief Justice, in terms of Article 154 P(2).

Jurisdiction:

Article 154 P(3)(a) vests in the High Court of each Province the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province. Article 154 P(3) (6) vests in that court an appellate and revisionary jurisdiction in respect of orders of Magistrate's Courts and Primary Courts within the Province. Article 154 P(4) vests the jurisdiction to issue Writs of Habeas Corpus and other Writs of Certiorari, Prohibition, Procedendo, Mandamus and Quo Warranto. Although this extensive jurisdiction was vested in the Court by the 13th Amendment no provision was made with regard to its exercise and the applicable procedure. The High Court of each Province thus functioned from 1988 until the enactment of the High Court of the Provinces (Special Provisions) Act No.19 of 1999, without statutory provisions in these respects. The Act by Section 13 validated the proceedings of the High Court of each Province had from 14-11-1987. This Act also provides for the manner of exercising jurisdiction and the applicable procedure. Section 2 provides that all written law as to the exercise of original criminal jurisdiction of the High Court of Sri Lanka and appeals to the Court of Appeal from such Court, will apply in relation to the High Court of each province. Section 5 similarly provides that all written law applicable to, appeals to the Court of Appeal from convictions, sentences and orders of Magistrate's Courts, Primary Courts, Labour Tribunals and orders under Section 5 and 9 of the Agrarian Services Act No.58 of 1979 and, for revision of any such orders will apply in relation to appeals and applications to the High Court. Section 7 provides for a similar application of the written law relevant to writ applications to the Court of Appeal, to those made to the High Court. Thus, the provisions of the Code of Criminal Procedure Act and of the Supreme Court Rules relevant to appeals and applications to the Court of Appeal will apply mutatis mutandis to the High Court of each province.

Appellate and Revisionary Jurisdiction in respect of the orders of the Magistrate's Court and the Primary Court:

As noted above this jurisdiction is vested in the High Court of the Province by Article 154 P(3)(b). The jurisdiction is limited to orders made by Magistrate's Courts and Primary Courts within the particular province.

The Court of Appeal continues to exercise a parallel jurisdiction in respect of all Magistrate's Courts and Primary Courts throughout the Island. As provided for in Section 5 of the Act No.19 of 1990 , the procedural law applicable both to the Court of Appeal and the High Court, is the same. The resulting position is that an accused or an aggrieved party has a right of appeal to either the Court of Appeal or the High Court of the respective Province. It appears that he may appeal to both Courts. Indeed, Section 12(a) of Act No.19 of 1990 contemplates a situation where appeals are filed to both Courts. In such a situation, if the High Court has not commenced hearing of the appeal, the Court of Appeal may either hear the appeal itself or direct the appeal to be heard by the High Court. Where an appeal is filed only to the Court of Appeal, the proviso to Section 12(a) empowers the Court of Appeal to transfer the hearing of the appeal to the High Court having jurisdiction, if it is considered expedient.

Where the appeal is heard by the High Court a person aggrieved by the decision of the High Court, has a right of appeal to the Court of Appeal in terms of Article 154 P(6). The written law applicable to such an appeal is contained in the Court of Appeal Procedure for Appeals from High Courts (established by Article 154 P of the Constitution) Rules of 1988, published in Government Gazette No. 549/6 dated 13-03-1989. It provides for a petition of appeal to be filed within 14 days from the judgment, in the particular High Court. A person aggrieved by the decision of the High Court may also appeal directly to the Supreme Court in terms of Section 9 of Act No.19 of 1990. Such an appeal may be filed only on a substantial question of law upon leave being granted by the High Court or upon special leave being granted by the Supreme Court in a matter that is fit for review by the Supreme Court. There appears to be no time limit or procedure applicable in respect of such direct appeal to the Supreme Court.

Revisionary Jurisdiction:

Article 154 P(3)(b) also vests a revisionary jurisdiction in the High Court in respect of orders of the Magistrate's Court and the Primary Court within each Province. The procedure applicable to such an application is the written law applicable in relation to revision applications to the Court of Appeal. Thus the provisions of Rules 46 to 61 (Part IV) of the Supreme Court Rules of 1978 published in Government Gazette No.9/10 dated 08-11-1978 and Court of Appeal (Appellate Procedure) Rules of 1990 published in Government Gazette No.645/4 dated 15-01-1991 will apply. These Rules provide inter alia that applications in revision be filed by way of petition supported with an affidavit and accompanied by originals of documents material to such application or duly certified copies thereof. If any interim relief is sought it is incumbent on the Petitioner to give notice of the filing of the application to the Respondent. If no notice is given the Court may grant interim relief on the ground of urgency but the period of such interim relief is limited to 14 days. Revisionary jurisdiction is of particular significance in relation to orders made by the Primary Court in terms of Part VII of the Primary Courts Procedure Act. Revision is not to be equated to appellate jurisdiction and it cannot be invoked as of right. In the first stage, the petitioner obtains leave and revisionary jurisdiction is exercised only in exceptional circumstances.

Jurisdiction in respect of Orders of Labour Tribunals:

Section 31 D(2) of the Industrial Disputes Act provided for an appeal from an order of a Labour Tribunal, to the Supreme Court, on a question of law. With the promulgation of the 1978 Constitution the reference to the

Supreme Court had to be read as being to the Court of Appeal and such appeal lay to the Court of Appeal. Section 3 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 vested in the High Court of each Province appellate and revisionary jurisdiction in respect of orders made by Labour Tribunals within that Province. It appears that the appellate jurisdiction thus vested by this section is a parallel jurisdiction to that exercised by the Court of Appeal. However, it is to be noted that the Court of Appeal did not exercise revisionary jurisdiction in respect of orders of Labour Tribunals. It has been so held in the cases Sri Lanka Broadcasting Corporation Vs de Silva (1981) 2 SLR p298 and Nadaraja Vs Thilaganathan (1986) 3 CALR p307. Therefore, the revisionary jurisdiction vested in the High Court of the Province in respect of orders of the Labour Tribunal within the Province should be considered a new jurisdiction vested in the High Court of the Province. In this state of law, the Industrial Disputes Act was amended by Act No.32 of 1990. The amendment repealed Section 31 D relating to appeals and substituted a new provision. The new section provides for an appeal to the High Court of each Province from an order of a Labour Tribunal within the Province. Such an appeal may be filed only by one of the following parties:

(1) The workman who is the applicant;
(2) The Trade Union who is the applicant, or
(3) The employer.

Where the appeal is by the employer, cash security has to be furnished as provided for in Section 31 D(4) of the Act. The security is to be computed as follows:

(1) Where the order of the Labour Tribunal directs the payment of money to the workman, an amount equal to that sum;

(2) Where the order directs reinstatement the equivalent of 12 months' of the terminal salary;

(3) Where the order directs payment of money as well as reinstatement the sum of money so ordered and the equivalent of 12 months' salary.

Section 31 D(6) provides that the petition of appeal should be filed within 30 days from the order together with the certificate issued under the hand of the President of the Labour Tribunal for the security that has been furnished.

Section 3 of Act No.19 of 1990 has not been repealed by the amendment to the Industrial Disputes Act. Therefore, provision for the High Court to exercise revisionary jurisdiction in respect of orders of a Labour Tribunal will remain. This inference is further supported by the fact that Section 31 D(4)(a) provides for the furnishing of security, computed as stated above in respect of revision applications to the High Court, as well.

Section 31 D D(1) of the Industrial Disputes Amendment act No.32 of 1990 provides for an appeal to the Supreme Court from the decision of the High Court made upon hearing an appeal or a revision application. Such an appeal may be filed with leave of the High Court itself or of the Supreme Court. Thus it is seen that the appellate jurisdiction of the Court of Appeal in respect of orders of a Labour Tribunal is now completely removed. It appears that the law has yet preserved the possibility of the Court of Appeal exercising writ jurisdiction in respect of an order of the Labour Tribunal. Section 31 D(4)(b) provides for security to be

furnished in the event of such an application being made and section 31 D D D(1) provides for a time limit within which such applications should be concluded.

Writ Jurisdiction:

Article 154 P(4) of the 13th Amendment vests the High Court of each Province the jurisdiction to issue Writs of Habeas Corpus, Certiorari, Prohibition, Procedendo, Mandamus and Quo Warranto. They are public law remedies and the jurisdiction of the Court of Appeal to issue the said writs vested by Article 140 and 141 has not been removed. The resulting position is that there is parallel jurisdiction in respect of these remedies. However, the jurisdiction of the High Court is limited in certain respects, unlike that of the Court of Appeal. As regards the Writ of Habeas Corpus, it can issue only in respect of persons illegally detained within the Province.

In respect of the other Writs of Certiorari, Prohibition and so on, the restrictions are contained in Article 154 P(4)(b). The restrictions are two-fold. Firstly, there is a subjectwise restriction and a writ may issue only in respect of any matter set out in the Provincial Councils List. That is List I in the 9th Schedule to the 13th Amendment. Secondly, there is a restriction in relation to the persons against whom the writ may issue. A person should be one who exercised within the Province any power under:

(1) any law, or
(2) any statute made by the Provincial Council of that Province.

Section 7 of Act No.19 of 1990 provides that the written law applicable to writ applications to the Court of Appeal will apply mutatis mutandis to applications made to the High Court of the Province. Therefore, the provisions of the following Rules made by the Supreme Court will apply in relation to these applications:

(1) Supreme Court Rules 1978 published in Government Gazette No. 9/10 dated 08-11-1978. Part IV of these Rules will apply;

(2) The Court of Appeal (Appellate Procedure) Rules 1990 published in Government Gazette No. 645/4 dated 15-01-1991.

These Rules govern matters such as the papers to be filed, the grant of interim relief, the opportunity to file objections and fixing cases for hearing. In terms of Article 154 P(6) and also Section 9(b) of Act No.19 of 1990, a person aggrieved by an order made by the High Court in the exercise of this jurisdiction may appeal to the Court of Appeal from that order. The procedure in respect of such an appeal is contained in the Court of Appeal (Procedure for Appeals from High Courts established by Article 154P of the Constitution) Rules 1988 published in Government Gazette No. 549/6 dated 13-03-1989. These Rules provide for two stages in filing appeals. Firstly, a notice of appeal to be filed within a period of 14 days from the order [Rule 11(3)]. Secondly, a petition of appeal to be filed within 60 days of the order [Rule 12(2)].

Appeals in respect of Orders made under the Agrarian Services Act:

The Agrarian Services Act No.58 of 1979 provided for appeals from orders made by Assistant Commissioners in respect of complaints of eviction [Section 5(6)] and disputes as to succession [Section 9(2)], to the Court of Appeal. Section 3 of Act No.19 of 1990 provided for a parallel appeal to the High Court of the Province where the order relates to any land situated within that Province. The Agrarian Services Amendment Act No.4 of 1991 repealed Section 5(6) and provided for an appeal from a decision of an Inquiring Officer on a complaint of eviction, to the Board of Review established in each Province. This amendment was certified on 23-02-1991 and as such from that day no appeal would lie from an order made on a complaint of eviction, either to the Court of Appeal or to the High Court of the Province. Therefore, this appellate jurisdiction vested in the High Court of each Province was operative only for the period 15-05-1990 being the date on which Act No.19 of 1990 came into force and 23-02-1991 being the date on which the amendment to the Agrarian Services Act came into force. However, it appears that the jurisdiction in respect of orders made in disputes as to succession under Section 9 remains in the Court of Appeal and the High Court.

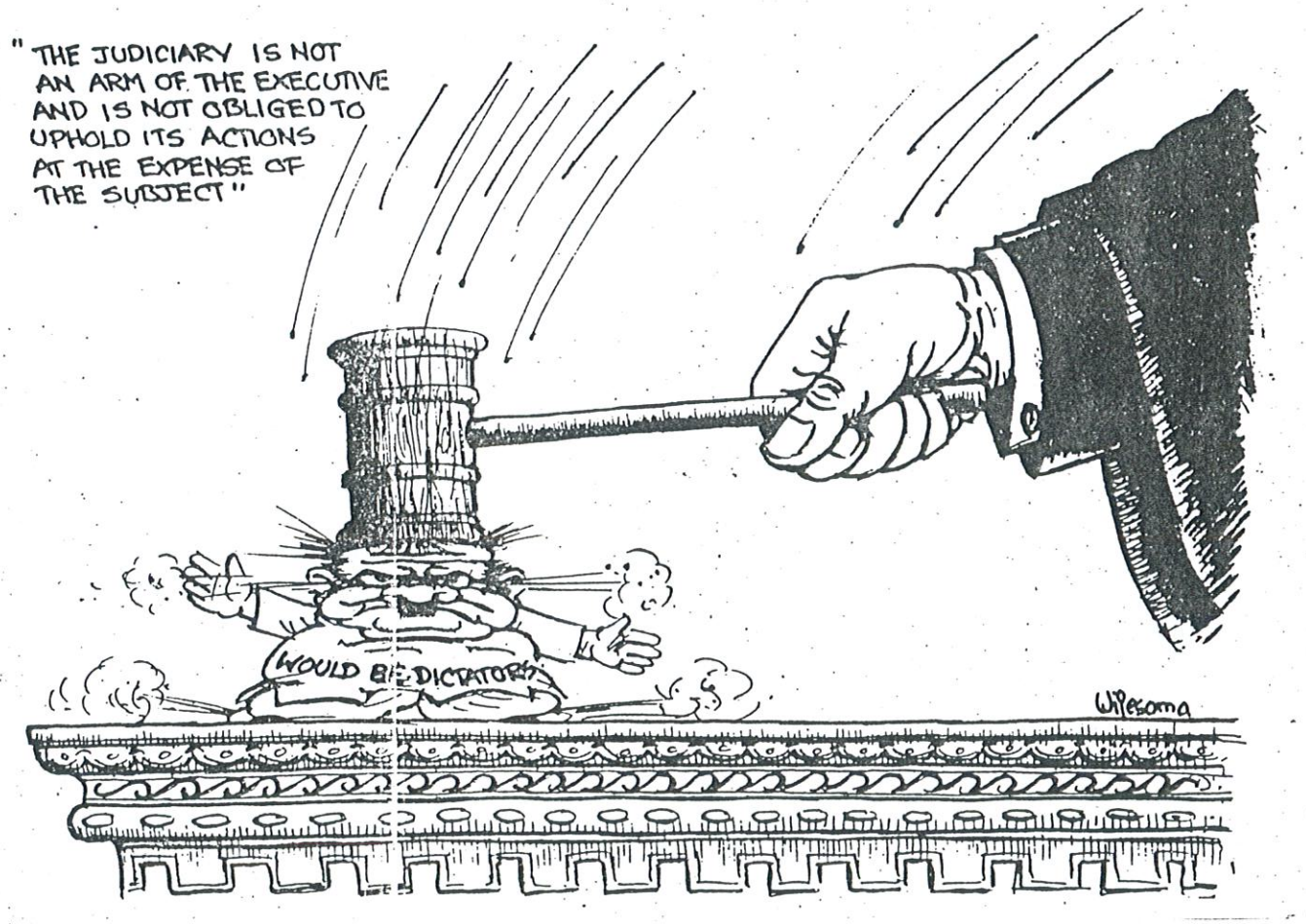
Workmen's Compensation:

Workmen's Compensation Ordinance was amended by Act No.15 of 1990 whereby the right of appeal from an order of the Commissioner is to the High Court of the Province and not the Court of Appeal (Vide amendments to Section 48, 49 and 50 of the Ordinance). Section 53A introduced by the Amendment provides for an appeal from the decision of the High Court, to the Supreme Court. Thus, the Court of Appeal has no appellate jurisdiction whatever in respect of orders made under the Workmen's Compensation Ordinance.

In the introduction to this paper I referred to certain legislative measures taken at structural reform in the system of administration of justice. I dealt with the post-1970 era primarily because that year could well be denoted the watershed in our history of administration of justice. Upto that year the system introduced by the Charter of Justice 1833 remained with changes of an evolutionary nature. As observed by de Sampayo AJ in an application for a Writ of Prohibition on a Court Martial heard by a Full Bench of the Supreme Court, 18 NLR p334 at p338, "the Charter is the foundation of our judicial system and parent of the Administration of Justice Ordinance 1868 and the Courts Ordinance 1889 which .... must be read in the light of that Charter". On the contrary, the post-1970 changes were of a radical and transformatory nature. In the post-1977 era there has been a roll back, to some extent, on this transformation with attempts at evolution in some respects and further transformation in other respects. The institutions by the names of "High Court of the Zones", "High Court of the Republic of Sri Lanka", "High Court of Sri Lanka" and "High Court of each Province", can be seen silhouetted where the waves of change left them.

With the devolution of Governmental power and the decentralization of the administrative structure, sought to be introduced by the 13th Amendment, it was imperative that appellate revisionary and writ jurisdiction be vested in provincial fora. The High Court being a familiar institution in the Indian States was the obvious mechanism for this devolution of the power of the Superior Court. Thus the provision dealing with the High Court of the Province was tucked away, as Article 154P of the 13th Amendment, more as a component of a package of devolution and not as reform of the system of justice. Its establishment was not discussed and considered by the Sri Lankan legal community. The extent to which the legal community was divorced from it is seen by the fact that the court functioned from 14 November 1987 upto 15 May 1990 (the enactment of Act

No.19 of 1990) without applicable procedural law. Even the indictments presented to the Court by the Hon'ble Attorney General had to be validated by Section 13 of Act No.19 of 1990, so much for our hallowed maxim "ignorantia juris non excusat". Now, the process of evolution is taking shape. High Courts are functioning in all Provinces except the North. They exercise a very useful appellate, revisionary and writ jurisdiction at provincial level. The purpose of this paper is to state the law relating to the jurisdiction and procedure of the court and no more.



VISIT OF THE CHINESE SCHOLARS

Symposium on China/Sri Lanka

Human Rights Theory and Practice

by

Rangita de Silva

The Law and Society Trust in the first week of November supported a major research project on human rights law as host to the Visiting Scholars of the Institute of Law of the Chinese Academy of Social Sciences. This research project, the first of its kind in China, was designed to increase Chinese understanding of the theory and practice of rights in different parts of the world and to enable the Institute to develop contacts with scholars, research centres, lawyers, judges, NGOs and intergovernmental agencies active in the rights field. The Institutes two earlier study visits to Europe and North America were the first specialized investigations on Human Rights ever undertaken by Chinese scholars. The Chinese study visit to South/South East Asia focused on India, Sri Lanka and Singapore.

The study Team numbered 5 members. The Team leader was the Institute's deputy director Professor Liu Hainian, who is one of China's leading legal Historians. The other members of the group were Prof. Li Buyun, a specialist in Jurisprudence and Constitutional Law who ranks among the boldest and most imaginative Chinese thinkers on Human Rights, Prof. Liu Nanlai the Head of the Institute's International Law section, Ms. Huang Lie, a comparativist and lecturer in law on the Developmental Rights, and Mr. Huang Qianghua who represented the Foreign Affairs of Law.

The Law and Society Trust received this delegation and assisted the team in obtaining an understanding of Human Rights theory and practice in Sri Lanka.

The Trust organized the Chinese delegation's meetings with some of the NGOS, such as MARGA, MDDR, LHRD, ICES, LST, Open University, Retired Judges Association, Civil Rights Movement, Human Rights Task Force, Nadesan Centre, Sarvodaya, Environmental Foundation. They also met Hon. A.C.S. Hameed, Minister of Justice and Higher Education, Justice Sharvananda – Governor Western Province, Hon. Tyronne Fernando – Minister of Legal and Prison Reform, Chief Justice and Judges of the Supreme Court, Mr. Rodney Vandergert State Secretary, Ministry of Foreign Affairs, Justice Palakidnar, Mr. Tilak Marapana, Prof. G.L. Pieris, Vice Chancellor University of Colombo, Mr. Bradman Weerakoon, Presidential Advisor, Presidential Secretariat, Director Human Rights Foreign Ministry.

The Study group was mainly concerned with some basic standpoints on major issues in the international human rights field. For example, issues such as the relation between international human rights protection and state

sovereignty and whether there exists a common standard in the international human rights field, the position on the right of development and of peoples to self determination and the role of the UN in protection of human rights. Further the Chinese scholars were interested in finding out the Sri Lankan viewpoints on basic theories of human rights. For instance, whether human rights have a general and specific character, the relation between individual and collective rights; and the relation between political, social and economic rights.

On the 9th of November The Law and Society Trust organized a Symposium on Human Rights Theory and Practice for a limited number of scholars. Dr. Deepika Udagama made a presentation on Human Rights Theory and Practice, A Sri Lankan Perspective. Justice K. Palakidnar on the history of Habeas Corpus and Izeth Hussain on some important concepts of Human Rights.

Dr. Udagama in her presentation pointed out that the notion of peremptory norms of international law (jus cogens) are norms accepted by the international community of states from which no derogation is permitted. The rules of customary international law that require the states to abstain from violations of human rights constitute jus cogens, and all agreements made in contravention of these rules are considered illegal. These norms have become concepts of international concern and form part of a global Bill of Rights. All rules of general international law which stand for humanitarian purposes constitute jus cogens. This notion of peremptory norms from which no derogation is possible means that countries can no longer easily claim that governmental human rights violations are merely an 'internal affair'. Human rights have become the responsibility of the world community and such concerns are now an active ingredient in interstate relations, transcending the bounds of national sovereignty.

Discussing the relationship between Civil and Political Rights on the one hand and the Social Cultural and Economic Rights on the other Dr. Udagama pointed out that the value of one cannot be underscored against the other. The Rights belonging to one category could not be vindicated while suppressing the rights of the other category. It would be pretentious to talk of social and economic rights without the freedom of expression to demand them. Thus both categories of Rights complement each other and despite the South's penchant towards economic, social and cultural rights, these rights cannot be asserted in vacuo. One category of rights cannot be sacrificed at the altar of the other. There is a close link between the two categories of human rights because all human rights are indivisible and interdependent and each category indispensable to the other. Though in the face of widespread poverty and underdevelopment economic and social rights may seem more important, it is indeed questionable whether human freedom and democracy can be promoted and protected without the realization of both categories of human rights.

As to the issue of the importance of foreign aid, Dr. Udagama commented that though aid given by some donor organizations is very welcome, the aid given by the IMF and the World Bank have so many strings attached to them that they cause greater harm than good, and sometimes result in the actual denial of human rights.

Justice Palakidnar traced the history of Habeas Corpus in Sri Lanka.

Article 141 grants power to the Appeal Court to issue mandates in the nature of Habeas Corpus whereby the body of any person illegally or improperly detained in public or private custody is to be brought up before such court or judge, and to discharge or remand any person so brought up or otherwise

deal with such person according to law. This high prerogative enables any person to petition the Court of Appeal accompanied by an affidavit setting out the facts relied upon to support the allegation that a person is detained unlawfully by the parties mentioned as having responsibility. The writ of habeas corpus has been historically resorted to as a remedial course of action in disputes between husband and wife with regard to the custody of children.

Mr. Izeth Hussain making a presentation on some concepts of the Human Rights discourse pointed out that human rights are usually conceived in abstract terms, while a more realistic approach would be to look at them in systemic terms. For this purpose Michel Foucault's notion of 'discourse' as the expression of power relations is useful. Of the several human rights discourses in the world the most important are the Western and the one associated with communism. These two discourses are however tied up with differing conceptualizations of society and political systems.

The Western discourse is the expression of bourgeois power and liberal democracy. This discourse regards the individual as sacrosanct, and society is conceptualized as conflictual and not consensual. It is probably because the individual is seen in opposition to the state that human rights keep proliferating in the West. The alternative model expresses communist power and an ideal of participatory democracy. It conceptualizes society as basically consensual. In this political system the individual is far from sacrosanct, and in terms of this conceptualization political rights, as distinct from economic and social rights, have to be limited.

The important question for the future remains whether liberal democracy has triumphed permanently, as Fukuyama's thesis holds. The assertion is questionable because its twin ideals of of liberty and equality are in contradiction with each other. It is not only communists who challenge notions of human rights tied up with the bourgeois social order and liberal democracy. For instance Michael Ignatieff argues that a theory of the human good cannot be premised on the absolute priority of liberty, and he asks whether liberty and the human need for community can ever be reconciled.

After the collapse of European communism the remaining Communist states have to modify their political systems.China since 1979 has started liberalizing its economy and introducing property rights to a limited extent. This could lead to a radical transformation of Chinese Communism.The important question for the future is whether China, starting with a conceptualization of society as consensual and the ideal of participatory democracy, can evolve a society allowing a wider range of human rights and a more wholesome model of society than the one offered by the West.

Professor Li Buyun then responded, as to the Chinese perspective on Human Rights theory. He agreed that even when a country has not expressly adhered to the covenants, as far as rights such as the right to life is concerned this is enforceable because by customary international law it is linked to the very conception of a human being. Even though one category of rights cannot gain precedence over another, in China one of the challenges is to prioritize social and economic rights and to emphasize social welfare which will bring about a socialist market economy. Professor Buyun also stressed that notions of human rights need to be separated from the conceptions of global power relations. Professor Li Buyun's remarks provided us with a rare glimpse into China's search for alternatives to the Western liberal theory of Human Rights. His insights have deep resonance to all developing
countries.

BOOK REVIEW

by

Angela Hussain

'To Do Something Beautiful'

by

Rohini Hensman

Published 1990 by Sheba Feminist Publications, London

Rohini Hensman, a citizen of Sri Lanka by descent, had her primary and secondary education in Colombo, and her higher education in the U.K. at the University of Oxford. She is married to an Indian citizen, and lives in Bombay, but visits her parents in Colombo regularly.

Rohini Hensman's 'To Do Something Beautiful' is a novel of social protest. Its scope is breathtakingly wide, bringing to mind George Eliot's panoramic view of social conditions in nineteenth-century England, in novels like Felix Holt. Rohini's novel is set in modern India, in its most cosmopolitan and industrialised city, Bombay. The city is so over-crowded with people of all creeds and communities, from every part of India, that over 60% of Bombay's population live on the streets or in shanty towns. Only the favoured minority can afford houses or apartments. In an intensified degree Bombay reflects the problems of every Asian city moving from traditional to modern ways of life.

Rohini plunges us into the life of this teeming city with all its vitality, joys and horrors. Her narrative moves between a cross-section of the workforce living in the shanties and some concerned citizens of the middle class, led by political activists, working to improve the lot of the poor. The central concern of the novel is the plight of the women, who are even more disadvantaged than the men. How she handles her material must be shown through a closer examination of the text.

Looking at the shanty dwellers first, we are shown how hard their conditions of life are. The pattern is the same as in Colombo, and wherever shanties exist. Each shanty town is dominated by a group of thugs, with a gangleader of whom all go in fear. All live in make-shift huts without the facilities of toilets, running water or electricity. All live with the threat that even these rudimentary shelters can be ruthlessly cleared away at any time, to make room for a more respectable housing scheme. The women are the worst off, qualifying for the poorest paid jobs, subject to male oppression at work and at home.

One woman's story will serve to illustrate the many Rohini brings to life. Lakshmi has been married off young. Her husband, Shetty, is a macho gangleader whose way of life involves terrorism and constant brutalities, and his young wife is not spared. She attempts to escape his ferocious ill-treatment by running back to her parents, but he comes after her and they tamely hand her back. She realises that "if her own parents could ignore her tears and desperation, and knowingly send her to certain torture and almost certain death", then she has no one to turn to. She waits for death as her only hope of deliverance. The years pass, but death does not come, although "thin as a skeleton... half her teeth knocked out, face marked with the scars of countless beatings... who would recognise the young girl of twelve years ago?"

However, of her many conceptions, two children are born living out of their mother's battered body. The sickly elder child is a boy, Chandran, who when he begins to understand his mother's plight becomes her champion. The terrible Shetty brings home a second wife, a spirited young woman called Vasanta. She soon challenges Shetty's power over her, and Lakshmi pays for his frustration. To save Chandran from the consequences of his feeble attempts to protect her, she flees with the children, and resorts to life on a series of railway platforms. After some weeks "she discovered capacities for tenderness and humour which she had completely forgotten she ever had... It was pleasant too to watch Chandran playing with his sister, to see him laugh like a child and drop the too-serious adult air he normally carried... If only they had a home, however small, and an income, however modest, she felt sure they could be a very happy little family".

This brief description of a part of Lakshmi's life must suffice to show Rohini's narrative skill, and the rest of Lakshmi's story can be left to the reader to find out.

Turning to the portrayal of the middle classes next, we are shown a group of social activists who make contact with the shanty dwellers. A University Lecturer, Ranjan, leads discussion groups among workmen on strategies to empower the poor. These involve forming trade unions and through them pressuring management into making concessions. There is a ring of authenticity about the failures of the activists with the small scale employer of the shanty dwellers, and their triumphs with the big established industrialist, which will not surprise those who know of the first-hand involvement of the author with such groups.

The most successful joint action in the novel arises from the sympathetic response of very poor women to the desperate needs of their neighbours, with the middle-class women as on-lookers, and advisors. Six militant workers in a small-time industry, Ardash Garments, are sacked, and their families left destitute. Mariam, a middle-class activist, the friend of both Ranjan and his wife Kavita, goes with Kavita to the shanty town to discuss ways of helping the destitute. Through discussions the women agree that if they cook mass meals using the facilities of each hut in turn, the small savings on fuel and cooking oil will permit thirty vegetarian meals to be prepared for the cost of twenty four prepared individually, and the destitute can be fed in this way till the jobless find employment. As the experiment proceeds the poor learn to share the work of child-minding with equally good results.

Thematically, one of the highlights of the novel is the discussion between Mariam and Kavita on the difficulties of mobilising women into resisting even the most intolerable male oppression. The 'women's-needs' theme ties naturally into the narrative at this point, because Mariam is depressed by the shanty women's lack of sympathy for the tragic fate of their neighbour Mangal. Mangal has come to the shanty town with Ramesh, a selfish man, but one who really cares for her as a person, unlike her brutal husband, to whom she was just a chattel, to be

used in any degrading way that benefitted him. Mangal goes mad and drowns herself after she is gang-raped. The neighbouring women do not respond to her screams for help because they are afraid of the rapists, a gang of shanty thugs. Later they defend their own cowardly inaction in terms which shock Mariam:

> "I don't think this would happen to any of us... she was that kind of woman.." Mariam says, "What do you mean, that kind of woman?.. its alright if some women get raped?"
>
> "If a woman leaves her husband and lives with another man, she's asking for trouble, isn't she?"

Discussing these responses later with Kavita, Mariam says,

> "what I find so horrifying is...that the majority of women identify themselves with the man, no matter how brutal or inhuman he is... we feminists are derided for wanting to be like men. And why? Because we identify with women!
> Apparently that is a most unfeminine thing to do, that's why nice women don't want to join us... If most women are so happy to be slaves...then what the hell are we doing, trying to set them free? I can't go on in this hopeless way, feeling all the time that all I do is completely useless..."

Kavita reflects, and answers,

> "women do learn...our task isn't quite impossible though it may look like that sometimes.. I suppose people who are powerless prefer to identify with people who have power... You don't want to identify with the woman who's been bashed up, or raped, or deserted even if - or perhaps precisely because she's so much like you. Its terrifying and humiliating to feel so helpless, so vulnerable".

This exchange makes us realise why feminist issues loom so large to social activists. Anyone who feels for the poor and downtrodden has to espouse the cause of the most helpless and vulnerable of them all, the women. Pity, not militancy, is what motivates them.

Novels dealing with the experiences of the poor usually have didactic aims - they aim at teaching rather than simply amusing us. There is nothing wrong with this, as long as the didactic content is successfully incorporated into the fictional work as a whole, and plot, character drawing and theme are not swamped by it. Assessing the book in these terms it is fair to say that 'To Do Something Beautiful' meets most of the accepted criteria of the novel form. The book holds our attention with its fascinating account of segments of society we interact so little with. The author has impressive talents as a storyteller, and the ability to bring together the strands of her story in a meaningful pattern. The characters are credibly brought to life, and the language has flavour. The only reservation that can be made is that there are some over-optimistic solutions to problems. For instance, an emotional response, the wave of sympathy for destitute neighbours described above, leads to co-operative efforts which benefit all. One cannot help wondering how long this co-operation would last in real life, under the strain of equally strong emotions of a conflicting nature, such as petty jealousies. Emotional sympathy needs to be backed up by carefully reasoned plans, such as religious or left-wing organisations can supply, if neighbourly co-operation is to last in daily life. Another instance is the story of Chandran's garden, flourishing in a waste lot, a symbol of hope under unpromising circumstances. In our experience in Sri Lanka, home vegetable gardens

have to be so rigorously protected from looters and vandals that they have become the hobby of those rich enough to have watch dogs and security guards. Are we to believe that this is purely a local problem, and can we accept the promise of Chandran's garden?

In spite of over-optimistic solutions of this kind - perhaps introduced to relieve the grimness of the general picture - this is a most impressive first novel. Apart from its being an absorbing and moving book, the relevance of 'To Do Something Beautiful' to the problems of modern Asia, including those of Sri Lanka, make it a must on everybody's reading list.

A Sinhala translation of 'To Do Something Beautiful' is being made, and should be published locally sometime in 1993.

WE WISH OUR READERS A PLEASANT AND PEACEFUL 1993

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