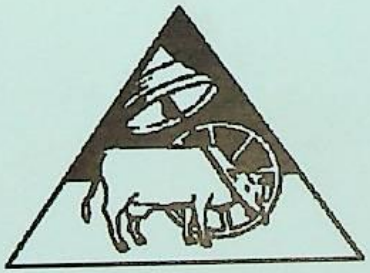
LST REVIEW

Volume 25, Issue 329 & 330, March & April 2015

Tribute to RKW Goonesekere



Law & Society Trust

Contents

Editor's Note

The LST review in this edition pays tribute to the life and work of the late RKW Goonesekere, his contribution to legal scholarship, legal education, public life and the development of the law in Sri Lanka. The first section of the review collates tributes to Mr. Goonesekere following his demise in 2014, which highlights his contribution as an outstanding member of the legal profession and citizen of integrity and vision. The essence of the tributes is captured by the words of Dr Rajini Obeysekere, a family member, at his funeral on 19 November 2014: "...RKW Goonesekere, was a man of ...unflinching commitment to the values of integrity and human rights. For Raja, these were not just theoretical concepts. They were a lived reality, values forged on his vast experience..."

Mr. Goonesekere was the first graduate in law from the University of Ceylon, and later the Chancellor of the University of Peradeniya and the Principal of the Sri Lanka Law College. He acquired the stature of *magister magistrorum* – "teacher of teachers", having taught and influenced the life of leading legal academics, and practitioners of the Sri Lankan Bar. He himself was a distinguished member of the Bar, and his contribution and influence is seen in landma case law, and writings on a wide range of subjects extending to administrative law, constitutio law, human rights, and land law. Section three of the review reflects the versatility of this writi and section two highlights some of his contribution to legal precedent.

Apart from his contribution to the substance of the law, he set a standard for the legal profession by his demeanor and conduct. In the words of late Dr. A.R.B Amarasinghe, in his tribute to RKW Goonesekere on completing 50 years at the Bar, he had "a keen faculty of perception and a delicate sense of what was right, fitting and proper at the time... (he) did not make the mistake of thinking that he was to go into the profession to win for his clients by whatever means he could. He resolved to win by justice."

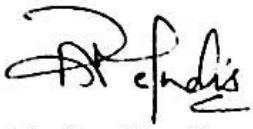
The objectivity and impartiality with which Mr. Goonesekere approached legal advocacy and analysis is evident in his association with various Commissions, both within Sri Lanka and internationally. He received the following commendation, when he was a member of the United Nations' Sub-Commission on the Promotion and Protection of Human Rights, called upon to work on the sensitive subject of Caste and 'preventing discrimination based on work and descent': "Mr. Goonesekere should be commended for the fairness and balance with which he has approached his subject... (his) study was a pioneering effort focusing on a complex social issue; (that) such populations defined by caste or occupation existed not only in Asia but on other continents."

The selection of Mr. Goonesekere's writings published in the Review deal with many current issues of law and justice, such as corruption, electoral reforms, capital punishment, monolingual

education, the concept of judicial restraint, and the impact of the 18th Amendment to the Constitution of Sri Lanka.

Among his other less known writings, Mr. Goonesekere explored historical themes and analyses outside the limits of his profession, but interestingly, linked to it; His piece, 'The Gift of the Kingdom" traces the legal instruments used by King Dharmapala to transfer our Island to the King of Portugal.

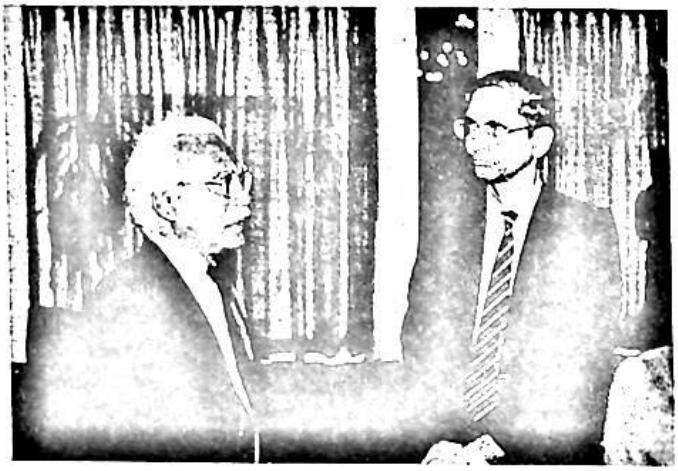
RKW Goonesekere's life reflects a vision that is inspiring, and a standard we must strive to emulate.



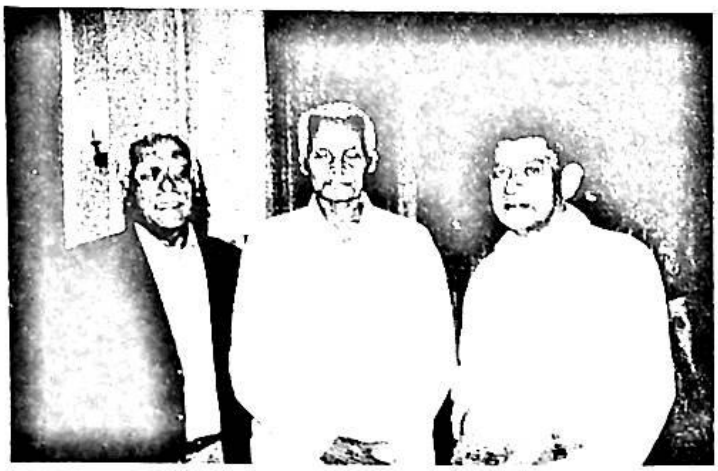
Rasika Mendis
Editor

"My Lords, I stand before you, conscious that what is at stake is the independence of judiciary, not the independence of the judiciary as a chapter in a book on Constitutional law, not independence of the judiciary as the theme of a seminar, not independence of the judiciary as the subject of an erudite professional speech from a public platform, but as a practical reality. I stand for an independent judiciary, and the general body of legal practitioners is interested in an independent judiciary, for one of the objectives of the Bar Association is the promotion and protection of human rights and liberties."

- Hand written note by Mr. RKW Goonesekere, for an opening address in a case before the Supreme Court; quoted by Prof Savitri Goonesekere in her speech as guest of honour at Convocation of Geoffrey Alagarathnam , 41st Convocation of the Bar Association of Sri Lanka, March 28, 2015



Mr Goonesekere with Justice Mark Fernando



Mr RKW Goonesekere with Justice Wanasundera and Justice ARB Amerasinghe

My Lords.

As I stand before you I am conscious that I am supporting an unprecedented application but I am also conscious that what is at stake is the independence of the judiciary, not independence of the judiciary as a Chapter in a book on Constitutional Law, not independence of the judiciary as the theme of a Seminar, not independence of the judiciary as the subject of an erudite speech from a public platform, but as a practical reality. I stand for an independent judiciary

"A Life to be Celebrated", Dr G. Usvatte-aratchi, Chairman, Law & Society Trust

Mr. R.K.W.Goonesekere was a legend in his own lifetime. He was a brilliant scholar who taught at Peradeniya under redoubtable Professor S. Nadarajah, was the Principal of the Ceylon Law College in its most celebrated years, and later was one of the most respected counsel to appear in the higher courts of our country. He had been awarded a degree of Doctor of Laws (*honoris causa*) by the University of Colombo, and carried the ultimate academic honour of being appointed the Chancellor of the University of Peradeniya where, as a part of the erstwhile University of Ceylon, he had himself obtained his first degree with honours. His were the rarest of rare achievements. His brilliance in the superior courts of Sri Lanka is something I must leave to his colleagues there to celebrate, as I belonged in a different circle altogether. I will record only his championing of human rights. I did not expect that the disparate circles we belonged to would intersect, or even go tangential to each other.

That changed one morning in 2007 when he telephoned me and surprised me, asking whether I would join the Board of Directors of the Law & Society Trust (LST) of which h was Chairman. He had joined LST in 2002, and later had been invited in 2007 to Chairmanship. I had heard of Mr. Goonesekere and even seen him when he was a sm young lecturer at Peradeniya, and I a student in a different Faculty of Study. I had learnt concerns under that theme Law and Society from the Journal of Law and Society, published from the University of Chicago and which I had used in my own research. However, of LST itself, I knew next to nothing, and that next was that Dr. Neelan Tiruchelvam had set it up. Dr. Tiruchelvam had himself been a man of enormous stature, who fell to a most foul blow delivered by the LTTE. The combination was staggering and I asked for time to recover my wits and let him know my mind. I learnt that the most celebrated lawyers Mr. Kanagag Iswaran and Mr. Walter Ladduwahetty and younger stars Dr. Deepika Udagama and Dr. Shivaji Felix were members of the Board. I had little doubt that they were there mostly because of their deep commitment to the mission of LST and in some measure out of their respect for Mr. Goonesekere. Later he invited Mr. Geoffrey Alagaratnam, now President of the Bar Association of Sri Lanka, to join the Board. They were a galaxy of brilliant lawyers and I knew straight away that I did not belong there and informed Mr. Goonesekere so. He was ready with a plea. The organization was Law and Society Trust, and the Board missed Society in the form of professionals in the field of Social Sciences. Apart from an economist, he was looking out for a historian and a sociologist. I agreed to join the Board and eventually Dr. Harini Amarasuiya (Sociologist) and Professor Indrasiri Siriweera (Historian) joined the Board. In 2013 there were both lawyers and social scientists on the

Board of LST. His vision had been realised. It would be wise to continue to remember those two wings of LST, as this society, as it develops, flies into complex and at times stormy weather, raised by depressions in either or more disastrously in both together.

Mr. Goonesekere left the day to day work and fund raising work of LST to its staff led by an Executive Director who sat in the meetings of the Board. He was the means of communication between the staff and the Board. Periodic financial reports and the report of the auditors helped the Board to keep informed of developments and take whatever decisions called for. The research and the actual writing of papers was entirely the responsibility of the staff and consultants and Mr. Goonesekere made sure that there was no interference from the Board in the staff expressing their own points of view as individuals. However, he was very watchful that staff did not in public present a point of view of LST, which privilege was left to the Board and its Chairman.

When matters of discipline arose that required the Board to intervene, rarely as they did in small organization, Mr. Goonesekere insisted that the other party be heard loud and ear. This was sometimes awkward among a small staff that interacted with each other equently, yet the hallowed principle was scrupulously observed, on his insistence that we o so.

At his home he was the most genial friend. His collection of books was something he most valued. He valued greatly the collection of all statutes passed by legislatures in Sri Lanka and any library connected with the practice and teaching of law might be well advised to seek possession of them eventually. He enjoyed listening to quiet music. He loved conversation and we loved to listen to the mellow flow of anecdote or more commonly argument that he held forth with. His wife, a celebrated law professor herself, was frequently a partner in these conversations.

Mr. Goonesekere's was a life to celebrate. How best can his life be celebrated? Recall that he was a teacher of law, both at University and the Law College. Besides, he was mentor to many fine lawyers who now shine so bright in the firmament of the practice of law. As was emphasised at the recent (28 March) installation of Mr. Geoffrey Alagaratnam as the President of the Bar Association of Sri Lanka (BASL), we need to expand the study of the law to go beyond the confines within which it has been taught in our universities. A rich literature has grown on law and society and as an economist I recall the works of John Rawls, Amartya Sen, Judge Posner in the Federal Courts of US (and as I recall the University of Chicago, later) and, of course, the marvellous Journal of Law and Society. It is well within the ingenuity and the resources of the legal fraternity here and the informed

public who wish to celebrate the life of Mr. Goonesekere to establish a professorship at one of our universities to teach and research interactions between law and society. Founding a chair at one of our universities will need some Rs.25 million, which at 10 percent returns should yield Rs.2.5 million a year, sufficient to pay a full professor each year. We can be creative and seek partnership with government and other like- minded parties. If 1,000 lawyers donate Rs. 10,000 a year for two and a half years, you will have that sum in thirty months. Such action on the part of the community of lawyers will itself demonstrate that the law and lawyers are far more than the common caricature made of them by the uninformed. I earnestly urge the Bar Association of Sri Lanka and its present young Executive Committee to take up that challenge.

G. Usvatte-aratchi

Tribute by Mala Liyanage, Executive Director, Law and Society Trust

I am privileged to write this tribute for him, I am honoured to have known him and am extremely fortunate to have worked with him. If I had told Mr. Goonesekere that I was writing a tribute for him, our conversation would have gone like this.

He*: Tribute? What tribute? You know what I think of tributes after the person has gone?*

Me: *Yes I do know, but this one is for a special issue of the LST Review, knowing your views...we will take great care about what is published. A special issue was done for Neelan as well.*

He: *Still, I don't see the point.*

Me*: I know. I asked your wife to curate it- it will have your writing and tributes by others.*

He*: My writing? I never wrote much. I edited myself out. Nothing felt good enough for publication, writing takes a lot out of me, it is a difficult process.*

Me: *I understand. This is why we asked Professor Goonesekere for her ideas and suggestions.*

He: Hmm. well if Savi agreed, then..., anyway what can a man do after he's gone?

Smile emerging from beneath the moustache, eyes twinkling, self depreciating humour takes over.

Mr. Goonesekere was chairman of LST from February 2007 to July 2014 and resigned middle of last year. He had wanted to resign for several years feeling "not up to it" for at least one year before that; it tired him out, he said, it was "too much for an old man" he would say. He was persuaded to continue because the Board valued the leadership he gave the institution in difficult times. He was a great listener; He listened carefully, with his full attention. Then, gazing ahead as he did so, he would reflect on what had been said, his response would come slowly as he considered every side and alternative explanations, often he would present the "other side" and frame it carefully. I don't know anyone who could do this as well as he could. He would hold these conflicting opposites and juggle with them until clarity emerged. Experiencing the cognitive dissonance seemed natural to him, if he

was uncomfortable with it, I never knew. What was very clear was that he would approach any question from the standpoint of a person's right. The right to hold and express a point of view; the right to be heard, were never questioned. He could dwell with any number of different views never condemned anyone for their values or views. He would look for mitigating factors, most view points were worth examining—in detail. No judgment was possible until every angle had been thoroughly examined. Once to my amazement, he came into LST sat down and said he had been reading *Mein Kampf*. "*You are reading Mein Kampf?*". "Yes, "he said, "Hitler knew how to argue his case" I remember being upset at the time.

He didn't like working in groups because he thought it lead to group-thinking which undermined and subjugated individual thinking for the benefit of the collective. He felt constrained in groups and so avoided joining them, he said. He didn't like LST to issue statements because it seemed that a group had agreed on every point in the statement- this was a point of conflict and then we stopped issuing them altogether. Statements were pointless, they changed nothing and made no impact, he thought other organisations engaged in it to gain visibility with donors. He saw a letter I had written to the Preside after the Aluthgama riots and said "Why are you writing these letters to the Presiden "You should be writing to the IGP. Is it the President's job to maintain law and order? It the job of the IGP!"

He was an expert on land laws. His books on land laws were reviewed by "an expert" before they were published. The highest single donation from an individual to the Law and Society Trust was made by Mr. Goonesekere through his books, *FR Casebook 1, FR Casebook 11* and *Select Laws on State Lands* which have been printed multiple times. All the costs associated with the research and production were borne by Mr. Goonesekere himself. From the first prints in 2003, and subsequent re-prints, the Trust made Rs 455,450.00 after deducting printing costs. He was not a wealthy man at all.

He would come into the office occasionally, never stand on ceremony and always speak with new staff many of whom held him in awe. One day he would discuss the new DVDs he had bought; on another, a stack of books he had purchased or one he was reading, sometimes a news item in the papers (running this country is not easy at all!) Just before he retired he came in saying he had celebrated his birthday (lowering his voice "I am eighty six") He enjoyed the time spent with his children and grand children on a trip to Batticaloa; he took delight in their company (you are happy when you see others happy!) He disdained computers, did not care for email (people should talk to each other)

Mr Goonesekere was wise. His slow, measured responses allowed for this inherent wisdom to emerge; he had the ability to enjoy a good story; he was kind and funny; he had great charm. If he was around I would have shared a draft with him, he would have read through it without comment and said Hm..and smiled. I think he would have approved.

Mala Liyanage

Mala Liyanage

TRIBUTES

This section captures personal tributes to the life of RKW Goonesekere and the different capacities in which he contributed to the legal profession, legal education, public life and the development of the law in Sri Lanka. The tributes are from a variety of sources, including prominent legal experts, colleagues in the legal profession, litigants, and past students. They are broadly divided into statements that pay tribute to Mr. Goonesekere as a teacher and educationist, and a human rights lawyer and advocate.

"Magister Magistrorum" – Teacher of Teachers

Prof M. Sornarajah, CJ Koh Professor at the Faculty of Law of the National Univer Singapore.

> "Truly, a great and gifted teacher of teachers has passed away. I was fortunate to b student in the 60s at Peradeniya. Mr Goonesekere was a great jurist who had an eas grasp of complicated issues of the law. He explained these issues with a rare clarity to his students. We, his students stood in reverential awe of the extent of his knowledge. Yet, he carried his knowledge and wisdom with such humility. His knowledge of the Roman Dutch Law and criminal law was astounding. The manner in which he taught provided the model for the many students who themselves became teachers later. He was certainly my model and throughout my own life as a teacher of law I have aspired to be as good and kind a teacher to my students as he was to me. All of us, his students, loved and respected him as a splendid teacher. More than as a formidable teacher and scholar, Mr. Goonesekere will be admired for his work as a human rights lawyer at a time when the country was going through great turmoil. He stood firm in the face of chicanery that had begun to despoil the political life of the country. He fought hard against the abuse of corrupt, official power. His example will inspire many to come in the future stand firm against the total collapse of the once great system of law and justice that existed in the country. His memory will ensure that others will come to restore the old days of the rule of law that existed in Sri Lanka. On a personal note, I was among Mrs Goonesekere's first batch of students. In a moment of her great sadness, it may bring some comfort to know that a distant student shares her grief."

"*A Tribute to a Great Teacher and Scholar par excellence – Deshamanya R.K.W. Goonesekere*", Extract from a Tribute by Dr. Dayanath Jayasuriya, President's Counsel, Sunday Island, December 14, 2014

RKW had a remarkable knack of being able to demystify complex private intentional law principles and judicial decisions and explain them in the most simplified form.

Thousands of those who had the good fortune to know Deshamanya RKW Goonesekere as a teacher or practitioner or researcher will miss him as a great lecturer; a helpful friend and a scholar par excellence.

"*Rajah Goonesekere: A Life Well Lived*", Sriyan de Silva, Attorney-at-Law November 22, 2014

Deshamanya Rajendra KW Goonesekere receiving the Degree of Doctor of Laws (Honoris Causa). University of Colombo

I was privileged to have had Mr Goonesekere as a lecturer in Law at the University of Peradeniya in the late 1950s and early 1960s, and to have also interacted with him socially in later years. As a lecturer, he was very much a role model for me. While there was a degree of rote learning and we were expected to sometimes absorb and reproduce what we were taught, Rajah's approach was to compel us to think for ourselves.

He had the ability to explain complex legal concepts in relatively simple terms. I learned through this example (as well as from my father) that Law is not just a 'trade or profession, but a discipline which, if taught and learnt properly, could develop one's mind, enabling an individual to think conceptually.

Rajah was a role model in other respects as well. He was a gentleman; he would never compromise his integrity and possessed a fiercely independent mind. His system of values, was based on conviction about 'right' and 'wrong' and not on expediency or personal gain. He was victimized by politically motivated individuals when he served as the Principal of Law College precisely because of his deeply ingrained values and because he displayed the courage of his convictions without fear.

University of Colombo

"*To Sir with Love*", Deshamanya R.K.W. Goonesekere, by Dr Rohan Samarajiva, Founding Chair of LIRNEasia.

Extract from a tribute following Mr. RKW Goonesekere's resignation as Principal of the Sri Lanka Law College in 1974, published in 1978

"It is perhaps unusual that students of an educational institution should publish a tribute to a Principal they never were under, whom in fact they have not even seen. But Mr R.K.W. Goonesekere, the Principal of Sri Lanka Law College from 1963 to 1974, is the kind of person to whom such unusual compliments are paid. Though Mr. R.K.W. Goonesekere resigned from the Law College 4 years ago his presence is still felt and his memory treasured.

Mr. Raja Goonesekere was at the helm of Law College for only eleven years – a short time in an institution with a history of one hundred and four years. But in that short time he changed Law College, perhaps more than any other person before or after him. His nam synonymous with change, with innovation and with daring.

Two major policy decisions affected Law College during Mr Goonesekere's tenure. Oı the fusion of the profession, and the other was the change in the language of the law. It his credit that he responded in a most undogmatic way to these changes and implemente them in a creative manner.

He studied the implications of the language switchover – perhaps the only person to do so at that time – and formulated proposals that would give effect to the change to swabasha, while not isolating the study of the law from the main currents of legal thinking. Reference is made to his study of the issue – which deserves publication – and the bilingual scheme that was implemented as a result, in Dr Mark Cooray's article in this Review.

His contributions to the student life of Law College deserve special mention. He was a generous administrator who recognized the truth that the student is the most important element in an educational institution. One did not have to wring out welfare facilities from him; he himself suggested and provided them. The mural that he commissioned for the Law College canteen stands as testimony to his enlightened ideas. The somber, pathetic figures in the mural that became clearer and more alive as we grow mature in the ways of Hulftdorp, remind us of the man, his courage and his vision.

The poor state of the law and the profession is evidence we did not do enough. But Raja Goonesekere was one who tried.

"R.K.W. Goonesekere: Was he the last of the Mohicans?" **Hemantha Warnakulasuriya, President's Counsel**

I first met R.K.W. Goonesekere after having passed the intermediate examination at Law College.

"There came a young man with a goatee into Law College. As there was no age barrier to enter Law College, in our batch there were fathers and grandfathers. We were not overawed by the majestic walk and the resemblance to a young revolutionary, but we were determined to rag him and fine him. When he climbed the few steps into the premises, I said, "Hey Man, you have entered the forbidden gates of hell, unless you pay us a fine of Rs 20/= you will not be allowed to take one step forward," this man smiled and was about to take Rs 20 from his purse, when my friend Hemal Perera came running from nowhere and called me to aside and whispered into my ear, "Are you mad? This is the new Principal of Law College and today he has come to assume duties. I asked, "How do you know?" "He is a cousin of mine"

I went and told him. "Yes, the committee has decided to let you come through the gates of hell, but if you do not happen to be the new Principal, when you come back you will have to pay the fine. "He said, "No. Who said I am the new Principal? That must not prevent you from doing your job. Here is the Rs 20." Most students continued with the great tradition of Law College – the Cut Table. Even lawyers joined this unholy union and gambled till the wee hours of morning. One day, at about 4 o'clock in the evening, we were all engrossed in cutting and chopping the card pack, when we had a visitor who was none other than R.K.W. Goonesekere, who came along with the watcher, Ariyaratne. Then he saw us and summoned Ranjith Devapura, me and a few others, to his office. We all went to his office thinking that all our dreams and our parents' hopes of making professionals learned in the law were doomed.

When we walked into the room with trepidation, Ranjith Devapura, almost shivering, R.K.W. looked at us and said: "Mr Devapura, this game is being played at the most exclusive clubs in Colombo. Therefore, I have no objection if you indulge in this noble game in any club but, not at Law College. I knew this tradition has been there from the very inception of Law College. But, today I have received an appeal from our watcher Ariyaratne's wife, saying that his entire salary is gambled away at the Cut Table and he

comes back to their quarters without a cent. So, I have to protect him and his family and cannot permit you to play cards inside this building."

Then he asked Ranjith Devapura, "what is the reason for you to engage in playing this card game?" Ranjith said, "We have a lot of free time in-between lectures. Sometimes the first lecture is at 11 o'clock in the morning and the 2nd lecture is at 2 o'clock in the afternoon. So between 11 and 2, we have nothing to do. We have no recreation facilities. Then, he asked, "so what do you suggest?" Then Ranjith Devapura said that the monies earned by the Law College are being invested in goldmines in South Africa. "Why doesn't the Council decide to buy the students a billiards table so that we could engage in playing billiards during our free time," he asked. "Yes, that's a good idea. Why don't you go round Colombo and spot a billiards table which is for sale and I will ensure that it is bought," RKW said.

I believe the service RKW Goonesekere rendered to the legal profession cannot be writte in a few words. But the demise of this great person is the demise of the great learnin erudite scholarship, honour, dignity, ethics and principles he stood for that are invaluable.

Arun Tampoe, Attorney-at-Law, November 20, 2014

I admired him as a man and as a teacher and accessible to all his students whenever they sought his advice. I have many happy memories of him. All of us who came into contact with him will miss him as he was *sui generis*!! We shall never see the likes of him again.

"The People's Lawyer" – Human Rights Lawyer and Advocate

Tribute by late Dr A.R.B Amerasinghe taken from the felicitation volume – "*Human Rights: Theory to Practice*", to mark the completion of 50 years at the Bar by R. K. W. Goonesekere

He was a guru to hundreds of persons. Some of them are here this evening. The night will not last me to recount the names of the students and pupils who at academic institutions and in his chambers had the benefit of his able guidance; but a few categories may be recalled merely to illustrate the breadth of his influence. Raja was *magister magistrorum* – a teacher of teachers. Among his pupils have been numerous Deans, Professors and Lecturers in Universities all over the world. Some of his students went on to be Judges of the Supreme Court and Court of Appeal, Vice Chancellors, Ambassadors, Cabinet Ministers and Members of Parliament, Secretaries-General of Parliament, and experts in international organizations. There were others of course. For example, an Attorney-General, a Solicitor-General, a Registrar-General, a Chairman of the Law Commission, a

Chairman of the Public Service Commission, and a Member of the Constitutional Council. Many leading figures at the Bar came under his tutelage at one time or another. But Raja himself did not take 'silk'. Although he had made a name for himself and was eminently well qualified to be a President's Counsel. No doubt in most instances the dignity of silk is deserved by those upon whom it is conferred. But exceptionally the title has served to distinguish the mediocre and embarrass the superior. Raja had neither the need to be distinguished nor the inclination to be embarrassed.

In court, he did not have the commanding, physically charismatic, personality of some lawyers, but Raja was a man of noble presence and of true dignity. His experience of men and affairs was considerable and he had a deep and wide knowledge of the law. But Raja was essentially engaged in the civil rather than in the criminal courts. As far as the former was concerned, all was grist that came to his mill, and in my view, it is less than accurate to describe him as a lawyer who worked exclusively in one field or another. But, of course, perspectives are important. Raja's return to active practice at the Bar, more or less coincided with an era when oppression and injustice reached disturbing new heights and questions relating to judicial review of administrative actions became increasingly important, and when for the first time fundamental rights became constitutionally justiciable. There were some notable exceptions, but in general, although lawyers (including judges) at that time had some knowledge of what were then usually described as the 'prerogative writs', they had less than sufficient understanding of what came to be known as Administrative Law. In fact, about half a century ago in the legal systems of the Commonwealth, there was no such recognized body of law. Compare the present with the previous edition of Halsbury. Lawyers had, perhaps, even less appreciation of the underlying concepts relating to fundamental rights. More than sound knowledge of the bare bones of laws set out in the Constitution had become necessary to deal with the questions that were coming up in the Superior Courts. Moreover, an entirely new branch of law relating to the environment had emerged. In the early days, heavy reliance was placed on the decisions of the Supreme Court of India. In fact, a former, distinguished Justice of the Indian Supreme Court, Justice Krishna Iyer , once ventured to suggest to me that all that Sri Lankans had to do was to follow India. Many were the matters relating to Administrative Law, Fundamental Rights and the Environment that came to be entrusted to Raja and he turned them to account. Naturally, grievances would always arise but Raja's sincere and public spirited concern for freedom and justice made him a champion of the rights of ordinary men and women whose complaints, he insisted, should be freely heard, deeply considered and speedily redressed. But personal passion never blinded him in another's cause. The court room is not a place for sentimentality; but Raja knew, and took full advantage of the fact, that it is a place of compassion. There is a popular misconception

that a lawyer is economical with the truth. But as far as Raja was concerned, that was never the case. Like Otaye of ancient Persia, he was from his earliest youth consecrated to the truth and no one was able by any means to wring one drop of falsehood from his tongue. The sentiment of individual independence was very strong with him and, as an ardent supporter of the right to freedom of thought and expression; he tolerated and even encouraged people, including his students and juniors, to be of their own opinions. His law was reason and he depended on the law as on the best of friends, mistaken though in the opinion of others, including his friends, he might have been: He had a broad, equitable commonsense and never did anything mean or little in his disputes and he was scrupulously honest in his beliefs. As a man of principle he did not set his sails to every passing breeze and demanded that, whether in or out of court, no lie should remain uncontradicted and that no pretension be left unexamined. Judges sometimes disagreed with him. But they always trusted him. In arriving at the truth, they depended on his well thought out arguments, which were always well presented not only logically, with clarity and lucidity, with suavity of manner, clear-headedly in simple and succinct and forcible terms, but also with candour, consideration, indulgence, scrupulous fairness and tact.

According to Chief Justice Lord Alverstone, when Sir John Karslake was asked what were the three things necessary for success at the Bar, he said the first was tact, the second tac and the third tact. Raja had a keen faculty of perception and a delicate sense of what wa right, fitting and proper at the time, thereby avoiding giving offence and instead winning goodwill. Raja did not make the mistake of thinking that he was to go into the profession to win for his clients by whatever means he could. He resolved to win by justice. Time and time again Raja discouraged frivolous litigation and discountenanced sharp practices. In that regards he reminds me of Abraham Lincoln, who followed a similar philosophy. Raja fought with the sword of a warrior, and never with the dagger of an assassin. As well as truth and fairness, Raja had from his earliest years, set much mindfulness on courtesy. His disciplined intellect preserved him from the blundering discourtesy of less educated minds who like blunt weapons, tear and hack instead of cutting clean, who mistake the point in argument, who waste their strength on trifles, misconceive their adversary, and leave the question more involved than they find it. He had an orderly mind. He was self-possessed. He marshaled his facts well and was able to state them with precision without prolixity. He never wasted the time of court. He chose his words with care and spoke fluently. His advocacy was smooth and elegant. His qualities endeared him not only to judges but also to his opponents at the Bar whose esteem he enjoyed.

"*RKW Goonesekere*", tribute by Maureen Seneviratne, President's Counsel, Sunday Island, January 25, 2015

On November 16, 2014 when R.K.W. Goonesekere died, the country lost a formidable legal mind and a great human being.

R.K.W. Goonesekere was an inspiring teacher who was tireless in helping others in all walks of life, a respected colleague, and for many, a lifelong friend and mentor. He had tremendous passion for work, from which he derived a visible pleasure and satisfaction and he conveyed his enthusiasm to all those who were fortunate to have had him as a teacher.

He was also a remarkable human being whose core characteristics were his humility and courtesy. His modesty in speech was only exceeded by his humility in action. This is something that most people who came into his radiant circle understood and grew to appreciate. He always stood up for the idea that government meant the rule of law and not man.

As a lawyer, he was painstaking and conscientious, always conscious of the dignity, honesty and high standards expected of a lawyer. He strongly believed that the surest foundation of civilization is a firm, impartial and speedy administration of justice, and that ideal can be achieved only when you have judges who are strong, courageous and impartial in the discharge of their duties, and a Bar that is equally strong and courageous to support them in that task, and to offer resistance if at any time, they were being coerced to deviate from that strict and correct path. He also made a selfless contribution to public causes, and was active and effective in several organizations, particularly in the field of Human Rights.

He never failed to support a good cause and he was quick to come to the defence of victims of wrong, outrageous and criminal character assassinations. I recall with gratitude how he volunteered his services to me when a group of people, who wielded much political power at the time, made defamatory allegations of dishonesty against my brother, now deceased, who was a lawyer. They accused my brother of attesting a forged Power of Attorney, a document that was signed by the late Upali Wijewardene. If the document had been dismissed as a forgery, Mr Wijewardene's two sisters would have been deprived of inheriting their brother's estates.

The allegations were acted upon by the then Attorney General, who indicted by brother. Shortly after the indictment was served on him, my brother passed away.

R.K.W. Goonesekere, who ably and with great dignity and refinement watched the interests of my brother in Court, met all the allegations made on behalf of the Attorney General, whose counsel, shouted so loudly when making his submissions that his voice was heard outside the court house. It was fortunate that the presiding judges acted like Caesar's wife, and closed the case in my brother's favour.

The allegations made against my late brother were given wide publicity by a particular local press. However, they failed to publish the Judgment of the Supreme Court which completely exonerated my brother of the charges made against him. But, for R.K.W. Goonesekere's invaluable contribution, my brother's name would have remained tarnished even after death.

R.K.W. Goonesekere's career was also one of conscientious devotion to duty and a meticulous sense of honour and an almost hyper sensitive observance of the unwritten laws of our professional code. He was a great and good man, loved by his friends and held in great respect by all who knew him.

His death is an incalculable loss to the legal profession, the community and his family. Saddened as we are over his passing away, we console ourselves with the thought of how fortunate we are to have counted as a friend such a fine and honest man.

***"A tribute to Raja Goonesekere"*, by Dr Ranjini Obeysekere, a family member, at his funeral on November 19, 2014,**

We are here today to pay our last respects to R.K.W. Goonesekere a man of great generosity of spirit, of sharp intellectual and legal insight, and above all, an unflinching commitment to the values of integrity, justice and human rights.

For Raja these were not just theoretical concepts. They were a lived reality, values forged on the anvil of his vast experience, his wide reading, and his love of literature, poetry and music.

I would like to share with you some of the tributes that are coming from around the world from eminent lawyers and jurists.

"A great and gifted teacher of teachers, who carried his astounding knowledge and wisdom with great humility... I hope that his example will inspire new generations to stand firm against the collapse of a once great system of law and justice that existed in this country."

"A distinguished and brilliant advocate of human rights."

"He was an advocate who did not fight cases but causes and usually of the downtrodden."

I on my part hope that his legacy and the values he stood for will inspire and guide us at this critical point in our country's history.

Mithran Tiruchelvam, in a personal letter to the family, November 2014:

"...It is with great sadness that I write to you after the loss of uncle Raja. It is hard to describe what a profound influence and example he was to all of us in the Tiruchelvam family and also to speak of the institutions my parents established; LST and TA. His wisdom, wit and zest for life represented all that was best in Sri Lanka for me. And the world is so much smaller without him..."

Thank you Note from a Client he represented *pro bono* in his lifetime, May 1991

"Sir, when I think of your magnanimity towards a completely unknown and helpless person as me purely for the sake of "Justice... I am humbled beyond words to express my feelings of gratitude to you... As a token Sir, I beg you to please accept this simple gift with my humble thanks. May Our Lord bless you and your loved ones always."

From one of the many professionals who were his clients and whom he represented pro bono in celebrated cases

"He was a lawyer of great eminence ... he toiled for me – free of charge – on many occasions in different courts. We are deeply grateful to him for this great deed"

"50 years at the Bar" felicitation dinner

With late K.C. Kamalasabayson, Attorney-General and Justice ARB Amerasinghe (left) and with J.C. Weliamuna, Senior Attorney-at-Law, and previously a junior in Mr. RKW Goonesekere's law chambers (right)

Litigation and Advocacy

Waiting in the corridor of the Supreme Court before the judgment are counselor for the petitioner, Mrs. Sirima Bandaranaike - Messrs R.K.W Goonesekere and Nihal Jayamanne, Attorney-at Law, P.C. (Picture by S. Chitrananda)

The following includes a few of the landmark court cases in which Mr. Goonesekere appeared and made representations. A majority of them, as included below, captures Mr. Goonesekere's excellent contribution to the development of fundamental rights jurisprudence in Sri Lanka:

***Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others*, the "Eppawela Case", (2000) 3 SLR 243**

RKW Goonesekere with Ruana Rajepakse and Anusha Dharmasiri in this landmark public interest litigation case, appeared for the petitioners.

The present case revolves around the collaboration of Government of Sri Lanka with Freeport McMoran Resource Partners of USA, a multi-national company specialising in phosphate mining, with a particularly bad record in environmental pollution. The government entered into agreement with the said company to extract and exploit the rock phosphate deposits in Eppawala.

The Petitioners were residents of Eppawala engaged in cultivation and on their own lands, one of whom was the Viharadhipati of a temple. He complained of an infringement of their fundamental

rights under the Constitution[1] by reason of the proposed agreement. The Petitioners' counsel RKW Goonesekere with Ruana Rajepakse and Anusha Dharmasiri relied on the analysis of several professional experts and reports of the National Academy of Science and the National Science Foundation, who were of the opinion that the proposed agreement will not only be an environmental disaster but an economic disaster.

The Court held among other things that the individual petitioners have standing to pursue their rights in terms of Articles 17 and 126(1) of the Constitution; that they are not disqualified on the alleged ground that it is "public interest litigation". The Court is concerned with the rights of individual petitioners even though their rights are linked to the collective rights of the citizenry of Sri Lanka, rights they share with the people of Sri Lanka.

Court has jurisdiction in terms of Article 126(1) of the Constitution to hear and determine the alleged infringement of fundamental rights notwithstanding the claim that the Government and not the Court is the 'trustee' of natural resources in Sri Lanka. There was an imminent infringement of the petitioners' rights guaranteed by Articles 12(1) 14(1)(g) and 14(1)(h) of the Constitution as there was no proper compliance with environmental/statutory laws and the project would adversely affect the petitioners well-being, and would pose a threat to their lands and homes.

Per Amerasinghe, J.

"Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environment protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration). In my view the proposed agreement must be considered in the light of the foregoing principles."

"David Koten, the founder President of the People – Centred Development Forum, once observed: 'The capitalist economy.... Has a potentially fatal ignorance of two subjects. One is the nature of money. The other is the nature of life. This ignorance leads us to trade away life for money, which is a bad bargain indeed.... Money is a number. Real wealth is food, fertile land, buildings or other things that sustain us...'"

[1] Articles 12(1) All persons are equal before the law and are entitled to the equal protection of the law; 14(1) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise (g) and 14(1) (h) the freedom of movement and of choosing his residence within Sri Lanka

Channa Pieris v. AG 1994 1SLR 1, popularly known as the 'Ratawesi Peramuna case'

In this case Mr RKW Goonesekere with Methsiri Coorey for the Petitioner in SC Application Nos. 146/92, 149/92 and 154/92 represented petitioners Channa Pieris, Athureliya Rathana and Patali Champika Ranawake respectively of the Ratawesi Peramuna Movement. Ten separate applications were filed by 16 members of the said movement.

The Ratawesi Peramuna was an anti-government organisation. However, in the view of the law, mere vehement, caustic and unpleasantly sharp attacks on the government, the President, Ministers, elected representatives or public officers, are not *per se* unlawful. It was the contention of the petitioners that the movement was to be the base for a broad political agitational front not affiliated to or controlled by any political party. Its purpose was to promote policies that would not be subject to change despite changes in Government, and to prevent the youth from being pushed to violent politics. A meeting was held at a temple to consider some of the problems facing the movement. The police acting on an anonymous telephone call that a 'meeting of the JVP was being held', forcibly arrested the members of the movement, on grounds that they have of speeches alling to topple the Government, an offence under ER (Emergency Regulation) 23(a). All persons ere arrested and detained at the police station.

The petitioners claimed that their fundamental rights under Article 13(1) of the Constitution were violated. Article 13(1) states that "no person shall be arrested except according to the procedure established by the law. Any persons shall be informed of the arrest"

Among other things the Court held that it is incumbent on the person making the arrest to precisely indicate the procedure under which the arrests were made. Therefore the arrests of the petitioners are violative of Article 13(1) of the Constitution.

Per Amerasinghe, J: (a) "The right not to be deprived of personal liberty except according to a procedure established by law is enshrined in Article 13(1) of the Constitution. Article 13(1) prohibits not only the taking into custody but also the keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law."

b) "Severe criticism of the Government is legitimate and necessary to safeguard democracy. "Legitimate agitation cannot be assimilated with incitement to overthrow the government by unlawful means. What the third respondent is supposed to have heard, even according to the fabricated notes he has preferred, was a criticism of the system of Government, the need to safeguard democracy and the proposals for reform."

The obvious purpose of Regulation 23(a) is to protect the existing government not from change by peaceable, orderly, constitutional and therefore by lawful means, but from change by violence, revolution and terrorism, by means of criminal force or show of criminal force. The fundamental right of each and every one of the petitioners to be free of arrest except according to procedure established by law guaranteed under Article 13(1) of the Constitution has been violated.

The person being arrested must be informed of the reason for his arrest. The obligation of the person making the arrest is to give the reason at the moment of the arrest, or where it is in the circumstances not practicable, at the first reasonable opportunity.

***Amaratunga v. Sirimal* 1993 1SLR 264, popularly known as the "Janagosha Case"**

An SLFP Pradeshiya Sabha member from Horana had his drum seized by the Police and broken into pieces while he himself suffered some injuries as a result of the assault. He filed a fundamental rights case against the policeman involved, alleging infringement of his right to freedom of speech and expression guaranteed by Article 14(1)(a) of the Constitution.

Senior Counsel RKW Goonesekere appeared for the petitioner together with L.C.M. Swarnadhipathi and J.C. Weliamuna

Counsel for the Petitioner, RKW Goonesekere submitted that the petitioner's protest was disrupted simply because it was against the Government, and that 'criticism, in any form', is well within the scope of Article 14 (1) (a) .

Upholding the Petitioner's claim Justice Fernando was of the view that the fundamental right of the petitioner under Article 14(1) (a) had been violated. His Lordship observed that the right to support or to criticise Governments and political parties, policies and programmes, is fundamental to the democratic way of life, and that freedom of speech and expression is one "which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions."

***Abeysundera v. Abeysundera* (1998) 1 Sri LR 185**

Mr R.K.W. Goonesekere appeared as *Amicus Curiae* at the invitation of the Supreme Court. The Supreme Court expressed its deep appreciation to Mr Goonesekere for the assistance given by him as *amicus.*

The Supreme Court in this case dealt with the question whether a man who had entered into a monogamous marriage prior to embracing Islam would be guilty of bigamy if he thereafter contracts a marriage under Muslim law with a person professing Islam, during the subsistence of the first marriage.

The accused-respondent and his wife, the appellant, were both Roman Catholic and were married under the Marriage Registration Ordinance. During the subsistence of the first marriage, the accused registered a marriage with one Miss Edirisinghe under the Muslim Marriage and Divorce Act. The accused was convicted of the offence of bigamy. His defence was that prior to his second marriage, both he and Miss Edirisinghe had embraced Islam, and hence the second marriage was valid.

It was held as follows:

'1) Section 18 of the Marriage Registration Ordinance prohibits polygamy and sections 18, 19(1), and 35(1) and 35(2) read together show beyond doubt that the Ordinance contemplates only a monogamous marriage, and the respondent could not, by a unilateral conversion to Islam, cast aside his antecedent statutory liabilities and obligations incurred by reason of the prior marriage. The rights of the respondent are qualified and restricted by legal rights of his wife whom he married in terms of the Marriage Registration Ordinance.

(2) The second purported marriage of the respondent during the subsistence of the prior marriage contracted under the Marriage Registration Ordinance is void, notwithstanding the respondent's conversion to Islam.

It was noted in the judgment; the submission of Mr Gooneskere, that prohibition against polygamy (except in the cases of Muslims) under our statute law rests on grounds of public policy, and is well founded. As stressed by Mr Goonesekere, the integrity of the institution of marriage is the most important consideration.

Fernando v. Sri Lanka Broadcasting Corporation **'SLBC Case' 1996 1SLR 157**

The petitioner complained against the infringement of the fundamental right to freedom of speech. RKW Goonesekere appeared for the petitioner, together with J.C. Weliamuna

The case of *Wimal Fernando v. SLBC* (1996) 1 Sri L.R.157 involved a Non-Formal Educational Programme (NFEP) broadcast by the SLBC which included listener participation. It covered a variety of topics including human rights, current affairs and legal issues. It was introduced in 1994 in the context of the new Government's 'Media Policy' which recognised the media's right to expose

corruption and misuse of power. However on February 6, 1995 the programme which was being transmitted live was suddenly stopped after two Government Ministers had been criticized for failing to resolve a strike at a major factory. The participatory programme of the SLBC was brought to a halt thereafter.

Mr RKW Goonesekere contended that the NFEP had been stopped arbitrarily and without reason; and thereby the Petitioner's fundamental right of freedom of speech had been infringed. His principal submission may be summarised as follows: freedom of speech is the right of one person to convey views, ideas and information to others. Communication is the essence of that right; such communication necessarily postulates a recipient, because without a recipient the right is futile. And therefore, freedom of speech implies and includes the right of the recipient to receive the views, ideas or information sought to be conveyed. He argued that the petitioner as a regular listener to the NFEP, and as a result, the abrupt ending of the NFEP violated his freedom.

Justice Fernando held that:

"Article 14(1) (a) of the Constitution is not to be interpreted narrowly. Not only does it include every form of expression, but its protection may be invoked in combination with other express guarantees (such as the right to equality); and it extends to, and includes, implied guarantees necessary to make the express guarantees meaningful. Thus it may include the right to obtain and record information, may be by means of oral interviews, publications, tape recordings, photographs and the like, and, arguably, it may even extend to a privilege not to be compelled to disclose sources of information, if that privilege is necessary to make the right to information "fully meaningful".

Supreme Court (FR) Application No. 367/2000, the "Editors' Guild Case", Island June 15, 2000

A fundamental rights application was made by the Editors' Guild, against the censorship of military news. The following is taken from a review of the case in The Island, June 15, 2000.

The Competent Authority had subjected some newspapers to arbitrary and unequal treatment, in deleting sections of certain newspaper articles. Mr. R.K.W. Goonesekere contended that the deletions were discriminatory:

"Mr Goonesekere supported the Fundamental Rights violation plea filed by the Editors' Guild, against the censorship imposed on military related news, by the Competent Authority, operating under the censorship amended and imposed in November last year under Emergency Regulation No 14. The petition had alleged that, Regulation No 14 of the Emergency Regulation Act No 1 of

2000 is a violation of Article 12(1) of the Constitution of Sri Lanka, and consequently *ultra vires* the regulation making power of the President under section (5) of the Public Security Ordinance".

The petitioners were Sinha Ratnatunga, Editor Sunday Times, President of the Editors' Guild and nine other editors who were Gamini Weerakoon, (The Island), Manik de Silva (Sunday Island), Upali Tennakoon (Divaina), Siri Ranasinghe (Lankadeepa), Lalith Alahakoon (Daily Mirror), Lasantha Wickrematunga (Sunday Leader), Bandula Padmakumara (Lakbima), Sivanesanchelvam (Thinakaran), and Victor Ivan (Ravaya) all members of the Editors' Guild of Sri Lanka and in effect representing the entire print media in the country.

This petition, together with other petitions that followed against the arbitrary action of the Competent Authority were significant in that, Sri Lankan journalists felt sufficiently agitated to come before court, challenging specific censorship of their writings.

***Gamini Athukorale v. Attorney General,* ' SLBC Authority Bill Case' SC Determination 1/97 – 15/97**

In April 1997 the government very suddenly tabled in Parliament a Bill to establish a new broadcasting authority, which would exercise considerable governmental control over broadcasting media. Media and human rights groups had lobbied for a new broadcasting authority to be created, but one that would protect media rights and freedoms and that would be independent of government.

The Free Media Movement (FMM) led other human rights groups in a strong protest campaign against this draconian Bill. Notwithstanding the apparently secretive procedure used by the Government to table the Bill and, the short time within which they could act to challenge it, the FMM, the Editors' Guild, other media professional organisations and several private radio and television companies responded rapidly and filed a total of 15 petitions in the Supreme Court challenging the constitutionality of the Bill. They objected to excessive political interference in the proposed Authority, the severe controls which would be imposed on the freedom of operation of the industry and an unfair institutional bias in favour of the cinema industry as against the electronic media.

The Bill provided, among other things, for the proposed Authority to be directly appointed by the Minister responsible for the media and also empowered the Minister to issue guidelines for operation by licensees. The Authority would thus not have been independent of the government. The Bill contained no safeguards to ensure that non-partisan and competent people would be appointed to the Authority. Further, it gave the Minister power to dictate policy, and programme content in a manner that would have rendered the electronic media industry completely vulnerable to the whims and fancies of politicians and any partisan interests they might represent.

Such interference in the operations of media ventures would not have been conducive to the healthy growth of the industry and could have narrowed the parameters of expression through the radio and television media.

The Supreme Court ruling against the entire Bill is considered a landmark in the history of the modern mass media industry in Sri Lanka and provides a further affirmation by the country's judiciary of its independent stance on fundamental rights.

The judgment by Chief Justice G.P.S. de Silva, and Justices A.R.B. Amerasinghe and P. Ramanathan, was also important for its observations on the role of the mass media in society and the nature of the regulatory role the State may play in relation to the media.

The Supreme Court observed in relation to the need for regulation that:

a) Having regard to the limited availability of frequencies, and taking account of the fact that only a limited number of persons can be permitted to use frequencies, it is essential that there should be a grip on the dynamic aspects of the broadcasting to prevent monopolistic domination of the field either by the Government or by a few, if the competing interests of the various sections of the public are to be adequately served. If the fundamental rights of freedom of thought and expression are to be fostered, there must be an adequate coverage of public issues and ample play for the free and fair competition of opposing views.

It further noted that:

b) While we do not accept the view that licensing must be confined to regulating the technic aspects of broadcasting, and do concede that, in the matter of licensing the State is permitted a margin of appreciation, we are of the view that the principle of pluralism, of which the State is the ultimate guarantor... must be safeguarded in order to ensure that freedom of thought and expression may not only survive but thrive and flourish vigorously.

With regard to the role of the mass media in Sri Lankan society, the Court observed:

(c) Without free political discussion, no public education, so essential for the proper functioning of the process of popular government is possible.

(d) It is of paramount importance that programmes should be balanced so that viewers may freely form their opinions.

(e) .... Although the electronic media has a critically important role to play in the formation of political opinion, its role in satisfying other public needs, including intellectual, spiritual and emotional needs, ought not to be ignored or underrated.

Rajaratne v. Air Lanka Ltd. And Others (1984)2 SLR 128

The following case is an application against the infringement of fundamental rights embodied in Articles 12 (1) (Right to Equality), 17 and 126 of the Constitution of Sri Lanka.

The petitioner complained of unjust discrimination by Air Lanka (Pvt) Ltd (hereinafter referred to as 'Air Lanka'), on the basis that although he was more qualified for the post applied for, namely the position of 'cadet flight engineer', another person had been recruited to this position. It was further argued on behalf of the petitioner that different standards/criteria had been adopted by Air Lanka in respect of himself and the other persons, with respect the appointment for this position.

Counsel for Petitioner, RKW Goonesekere invited the Court to adopt the 'test of government agency' propounded by decisions of the Indian Supreme Court, which gives a much broader interpretation of "administrative or executive action", as stipulated by Articles 126 of the Sri Lankan Constitution.[2]

t was held that, although the petitioner was better qualified and more eligible for appointment as a Flight Engineer, the appointment of another amounted to discrimination. It was contended that a certain 'written test' that the petitioner was requested to take, was intended to belittle the petitioner's qualifications, whereas the written test set for the other, was one tailor-made to suit his special aptitudes. This amounted to 'differential treatment and a denial of equality of opportunity'.

With respect to whether the actions of 'Air Lanka' amounted to executive and administrative action, required by Article 126 it was argued, that Air Lanka was brought into existence for carrying out a function of great public importance, once carried out by the government through a statutory corporation, it is financed entirely by the government and managed and controlled by government through its own nominee Directors, and hence is an agency or instrumentality of the Government. In reality, 'Air Lanka' is a company formed by the government, owned by the government and controlled by the government. The juristic veil of corporate personality donned by

[2] A petition for the violation of Fundamental Rights may only be brought against entities who exercise 'executive and administrative' action. A petition cannot be filed against any private individual or corporate authority who is not vested with executive or administrative powers. Hence, a violation of fundamental rights may be determined only where it is caused by executive or administrative action.

the company for certain purposes cannot, for the purposes of the application and enforcement of fundamental rights enshrined in the Constitution, be permitted to conceal the reality behind its control, which is by the government. The brooding presence of the government behind the operations of the company is quite manifest. The cumulative effect of these factors and features is to render "Air Lanka" an agent or organ of the government. Its action can therefore be properly designated as executive administrative action within the meaning of Articles 17 and 126 of the Constitution.

The Petitioner established that he is entitled to relief under Article 126 (4).

Extracts from Publications and Articles

The following are articles, and extracts from articles and publications, by Mr. RKW Goonesekere

***"Arm of the Law"*, LST Occasional Paper Series, July 2009**

When I was a first year student at the University of Ceylon, constitutional law was a subject in our course. The class was taken by Sir Ivor Jennings, the renowned constitutional expert who was then the Vice –Chancellor. He was also advisor to the government of D.S. Senanayake in drafting the Independence Constitution of Ceylon, a task that required much skill. The Soulbury Commission had come and gone leaving a constitution less than what a country, fired by the success of nationalism in India, wanted. There was much discussion in all parts of the country and we, young students, had great expectations from the course.

My remembrance of the year, however, was of learning the fundamentals of the British Constitution, sovereignty of Parliament, doctrine of separation of powers, independence of the judiciary, Dominion Status and the Statue of Westminster, and rudiments of administrative law.

Of the constitutional history of Ceylon there was hardly anything except for an analysis of the Soulbury Constitution, especially in relation to the protection of minority interests.

Writing today, what strikes me most was the small part given in the course to the substance of judicial control of administrative acts. The importance of the writ of *habeas corpus* in guaranteeing cherished concepts of freedom for British people, received its due share with English law examples. But there was no reference to our leading case in In re *Mark Bracegirdle* [3] and the curbing of executive power by a colonial judiciary not bent on cringing before a powerful executive authority. In this case, the Governor was acting under the power vested in him by the Order in Council, 1896, to order a person to quit the Colony. The question was whether this was an absolute power given to the Governor not conditioned by time, occasion or circumstance, in which case the deportation order was valid. The Supreme Court had previously interpreted the Order in Council as giving a power to deport only when the national security was in danger as by war or extreme civil disorder. Such was the case In re *W.A. de Silva*[4] when the application for the writ of *habeas corpus* to secure the release of a person detained under martial law failed.

The *Bracegirdle* case was different because deportation was sought simply because he was labour agitator and an irritant to the British planters, and the Order was held to be invalid. Th. landmark decision, owed much to the brilliance of Ceylonese lawyers, who were listened to attentively by the Bench, which was a feature of the times. The case is recommended to all law students to show that advocates and their juniors studied hard to assist the Bench and were given ample time to develop their arguments. Nothing is more pleasing to an advocate than that he is given a patient hearing. Bracegirdle is an example of good law reporting and the fair and meticulous writing of judgments.

Our law reports show that *habeas corpus* was regularly used in hope of freeing persons in detention camps under the Immigration and Emigration Act, No 20 of 1948.

They did not succeed and the judgment in *Sudali Andy Asary v. Vanden Driesen* [5] shows more than due deference being shown by the Supreme Court to Ministerial acts. Lord Atkin's famous dissent in *Liversidge v. Anderson*[6] was however noted.

The other prerogative writs, which also gave powers to the judiciary, were not frequently used except to settle disputed local government elections. From the beginning, great caution was

[3] (1937) 39NLR 193
[4] (1952) 54NLR 66
[5] (1952) 54NLR 66
[6] (1948) AER 373

expressed by judges in invalidating official acts. In *In re W. A. de Silva* (*supra*) the Court emphasized that its duty was to inquire into questions of fact but not into the exercise of military law powers. When a similar question arose after independence in regard to the exercise of executive powers under emergency regulations, which section 58 of the Public Security Ordinance directed could not be questioned in any court, the Supreme Court after some initial vacillation held that the purported ouster of the Court's jurisdiction could not stand up to the provisions of the 1978 Constitution.[7]

But changes were taking place in England after World War II and they did not go unnoticed in our Law Library. The writs, especially *Certiorari* and *Mandamus*, were given a new vitality by English judges. Executive decisions came increasingly under judicial scrutiny, and executive authorities were on the defensive. Here the process was made easier by local administrators taking over governance and local judges replacing English judges. When I came to practice, the *Anisminic case*[8] and *Wednesbury* rules[9] were being talked about in Hulftsdorp and civil and criminal law rules were already being dwarfed by public law. But judges were cautious of their new power which if not used with restraint could lead to a "New Despotism" as feared by Robson.[10] They were at pains to say that their duty was to see if there had been a competent exercise of lawful authority and no more. As stated by the Supreme Court in 1956, "There is no authority in law for the substitution of the decision or discretion of the Court, in place of the decision or discretion of the Minister."[11] There was also insistence on strict satisfaction of the accepted conditions for the exercise of their jurisdiction. These are to be found in any book on administrative law and there has been no disagreement amongst judges and lawyers in regard to these conditions.

Further developments in administrative law with the recognition of grounds beyond illegality and abuse of discretion gave greater opportunities for judges to come into conflict with government. It is in this connection that the judicial role came correctly to be seen as upholding the Rule of Law. When all this was happening there was no feeling or belief by judges that they now had an unrestricted power. H.W.R Wade said in 1982 that, "the court will treat an administrative act or order as invalid only if the right remedy is sought by the right person in the right proceedings."[12]

The vigour shown by judges in review of administrative acts many years later led a frustrated government to amend the Interpretation Ordinance in order to place limits on the exercise of judicial power. This failed due to the remarkable judgment of a bench of nine judges, with eight

[7] See, *Joseph Perera v. Attorney General* (1992) 1SLR 199
[8] *Anisminic v. Foreign Compensation Commission* (1969) 2 AC 147.
[9] *Associated Provincial Picture House Ltd. v. Wednesbury Corporation* (1948) 1KB
[10] See, W.A. Robson, *Justice and Administrative Law* (London, 1928)
[11] *John Nadar v. Vanden Driesen* (1956) 58NLR 85.
[12] (1974) 80 NLR 1

judges writing separate judgments in *Sirisena v. Kobbekaduwa*[13] and led to a second amendment, but the limitations failed to survive the 1978 Constitution.

The Soulbury Constitution set up a Parliament consisting, at first of House of Representatives and Senate, and after 1971, a House of Representatives only. It gave Parliament the widest powers to pass laws except for the restrictive provision in section 29(2). It also provided for the procedure for law-making. Sir Ivor Jennings, one of the architects of the Constitution said that, "The legislative power of Parliament is not that of a sovereign legislature"[14] The Soulbury Constitution did not expressly give the power of judicial review to the courts but by implication recognized this in section 29(2), which declared void any law discriminatory of a community or religious group. When the occasion arose, the Supreme Court interpreting the Constitution took the view that Parliament cannot pass a law containing provisions that are inconsistent with provisions of the Constitution, except by a two-thirds majority together with a Speaker's certificate confirming this.[15]

The Supreme Court was the only superior court exercising appellate and writ jurisdiction. Cases would come before the Courts by way of appeals from lower courts and tribunals, or by applications for writ of *Certiorari* to quash the order of a statutory tribunal, and in both cases calling for interpretation of the Constitution. The Court's approach was cautious. In *P.S. Bus Company v. CTB*[16] the legality of the law under which the order was made was fully argued but the Court, rather than striking down the law, refused the petitioner's application on the grounds that *Certiorari* is a discretionary remedy.

When the question whether it was constitutional for Parliament to create tribunals with quasi judicial powers arose, the Supreme Court without coming into conflict with Parliament, adopted a via media. The Court's opinion expressed in *Jailabdeen v. Danina Umma*[17] was that Parliament had the right to establish new tribunals with special powers but the rights and authority of persons appointed must conform to section 55(i.e., appointments must be by the Judicial Service Commission) or their orders would be invalid and quashed in appeal. [18]

Queen v. Liyanage[19] was different. On a preliminary objection to a Trial-at-Bar by three Judges appointed under section 9 of the Criminal Law (Special Provisions) Act of 1962, giving the Minister

[13] (1974) 80 NLR 1
[14] Sir Ivor Jennings, The Constitution of Ceylon, 1953, p. 23
[15] *Bribery Commissioner v. Ranasinghe* (1964) 66 NLR 73
[16] (1958) 61 NLR 491
[17] (1962) 64 NLR 419
[18] See also, *Senadhira v. Bribery Commissioner* (1961) 63 NLR 313, *Piyadasa v. Bribery Commissioner* (1962) 64 NLR 385, and *Ranasinghe v. Bribery Commissioner* (1962) 64 NLR 449
[19] (1962) 64 NLR 313

of Justice the power to nominate Judges, the Court held that section 9 was *ultra vires* the Constitution. *Mudanayake v. Sivagnanasundaram*[20] was an early case testing the Supreme Court. The Parliamentary election law was amended in 1949, or soon after the Constitution came into operation, to the disadvantage of voters of Indian and Pakistani origin. A judicial officer tasked with the administrative function of preparing Electoral Registers declared the amending law invalid. The government moved the Supreme Court to have this order quashed by writ of *Certiorari* and succeeded. The Court said it was not discriminatory legislation and did not offend section 29(2).

Equally interesting is *Attorney General v. Kodeeswaran.*[21] A Tamil public servant was denied his normal increment on account of not possessing a language qualification imposed by Treasury Circular consequent to the passing of the Official Language Act No 33 of 1956. He sought a declaration from the District Court that he was entitled to his increment on the ground that the Act was unconstitutional and invalid. The District Court held that the Act was in violation of section 29(2) and gave judgment for him. The government appealed to the Supreme Court. Argument on the preliminary question of constitutionality of the Official Language Act was avoided by the Court agreeing to decide the case on the question whether a public servant had in law the right to sue the Crown for wages, and the appeal was allowed on the ground that he did not. As a result, the Supreme Court left open the Constitutional issue. In the Privy Council, the Law Lords found themselves unable to pronounce on the validity of the Official Language Act because they did not have the benefit of the Supreme Court's views.[22] The Act survived because it was not challenged again. The last two cases exhibit judicial timidity rather than judicial restraint.

After a strong socialist government took office with a mixture of Marxist leaders, it was decided to replace the Westminster Constitution given by the Order in Council with an autochthonous Republican Constitution. The Republican Constitution of Sri Lanka, 1972, retained features of the Independence Constitution with significant differences, one of which was to take away the power of the courts to pronounce on the legality of any law passed by the new legislature, which was declared in the Constitution to be "the supreme instrument of State power."[23] To satisfy public opinion, a Constitutional Court was created and given the task of examining proposed laws before they passed through Parliament in order to see that they did not contain provisions inconsistent with the Constitution. The Court's powers were limited and did not extend to preventing the National State Assembly (NSA) from enacting a law even inconsistent with the Constitution because the NSA retained the power to pass the Bill into law by a special majority. Otherwise, the

[20] (1967) 70 NLR 121
[21] (1967) 70 NLR 121
[22] (1969) 72 NLR 337
[23] Constitution of Sri Lanka (S 5)

Court's opinion was binding on all institutions administering justice and could not be in any manner called into question.

If the shortness of time given to the Court to express its opinion and the handpicking of members of the Court was in the expectation that there would be a rubber stamping of Bills submitted to the Court, this did not happen. When the six volumes of the Decisions of the Constitutional Court are looked at,[24] they will show that the Court consisting of judges and former judges took this new function seriously and acted with commendable independence and integrity. There was no question too that lawyers appeared before the Court in the same spirit and gave the Court all assistance.

Perhaps judges and lawyers enjoyed the role of being adjuncts to the lawmaking. The denial of the right to challenge a law at a later and more appropriate stage before a judicial forum had its critics. Strangely, however, the fact that persons trained only in law and whose experience was court work may now be going into questions of policy, an area traditionally left to lawmakers, did not appear to be a matter for concern.

It may be for these reasons that the Second Republican Constitution adopted the same policy of not allowing duly passed laws to be struck down by courts. Again we find provision for pre-enactment scrutiny now given to the Supreme Court but with more safeguards for the supremacy of Parliament in making laws. There have been a larger number of petitions of challenge made to the Supreme Court in the last thirty years, showing that the opportunity to take part in lawmaking was seized by ordinary people, more particularly by organizations and unions.

Looking at the Decisions of the Constitutional Court and the Determinations of the Supreme Court,[25] it cannot be taken for granted that this novel procedure has had a satisfactory effect. For the National State Assembly there may have been good reasons at the time for enacting a law with provisions inconsistent with the Constitution which could be explained in Parliament and passed, whatever the Constitutional Court may have had to say in its Decisions. But under the present Constitution the entrenching of several Articles and decisions of the early Supreme Court that Article 4 attracted Article 3 had unexpected results of many Bills having to be ruled as not only having to be passed by a two-thirds majority but also submitted to a Referendum or drastically amended. In a Parliament elected under the proportional representation system even a simple majority is often unattainable, as we have seen, much less a two-thirds majority. This places the fate of a proposed law in the hands of three judges.

[24] Published by the Registry of the Constitutional Court of Sri Lanka, 1973.
[25] Published by the Secretariat of Parliament.

What has happened is that serious debates that should take place in Parliament by people's representatives, and are intrinsic to parliamentary democracy, are stalled. The focus now becomes proceedings in Court. The 13th Amendment to the Constitution was hotly "debated" in the Supreme Court but not sufficiently, for lack of time. Subsequent speeches in Parliament, so necessary for a Bill of this nature, were also lacking. The incorporation of associations by Private Member's Bills, for which a special procedure is laid down in the Standing Orders of Parliament for hearing of public opinion, was routinely used to incorporate religious associations. However, when three religious bodies sought incorporation, Supreme Court Determinations prevented this on grounds which it is difficult to imagine would have been urged in Parliament.[26] Submissions made in the Supreme Court for and against the Anti-Conversion Bill show how easy it is for policy and constitutional provisions to get blurred.

In my view, the advantage of prior judicial scrutiny over the slight risk of later invalidation of a law by judges has not been demonstrated. There is also subordination of lawmaking to another branch of government that is not accountable to the people.

Representative government has always meant having clean elections to choose representatives. Rules are laid down in the governing election laws for ensuring free and fair elections and serious consequences for non-observance by political parties and candidates. The election petition for unseating a candidate declared elected had the most salutary effect. The threat of losing one's seat for corrupt practice during the election was a serious deterrent to candidates and their supporters from resorting to thuggery etc. and the function of deciding on the petition was assigned to an election Judge. There was little difficulty in presenting evidence when the electorates were small and the duty of the Judge was to apply the law. There was no need for local or international observers.

All this changed when, under the proportional representation system, the electorates became the District with a large number of candidates from many political parties contesting. Election laws and election offences remained to ensure clean elections and election petitions could still be filed but the procedure for prosecuting the petition was now difficult. Election petitions virtually disappeared with unfortunate consequences for the country.

If the important role assigned to judges was seldom exercised, a new role was given to them by a constitution fashioned for election of political parties and less of candidates who had the confidence of voters. Party constitution and party discipline mattered more to elected candidates than

[26] Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill, SC Determination No. 2 of 2001; New Wine Harvest Ministries (Incorporation) Bill, SC Determination No 2 of 2003; Provincial of the Teaching Sisters of the Holy Cross of the Third order of Saint Francis in Menzingan of Sri Lanka (Incorporation) Bill, SC Determination No. 19 of 2003.

satisfying the wishes of the electorate. The threat of election petitions and a by-election was replaced by threat of expulsion by the party which meant loss of parliamentary seat. This was to prevent changing sides after election, a freedom earlier enjoyed by parliamentarians (MPs). The only way for the expelled member to retain his seat was to petition the Supreme Court that the expulsion did not follow the party's constitution. Now the Supreme Court was required to go into the party constitution and the petitioner's acts and explanation and in effect decide on the MP's fate. If the expulsion is upheld another member is sent by the party without a by-election. If the Court decides in favour of the petitioner, he will remain an MP and officially a party member.

In a coalition government, because one party does not have an absolute majority, the crossing over of members from other parties to the government in large numbers will give a much needed majority to the government. In this situation, the decisions of the Supreme Court to uphold the expulsion as valid could lead to the downfall of the government. The fate of the government could lie in the hands of the judges.

There is a theory that when a Constitution clearly commits an issue to a coordinate political department such as the executive or the legislature, any challenge to the decision of that body is a 'political question' and non-justiciable by the courts. The doctrine of separation of powers requires that there be no lack of respect to a coordinate branch of government and that no embarrassment is caused by different pronouncements by various departments on a single question. The smooth working of government requires this. The doctrine of 'political question' is clearly intended as a limitation of judicial power. The law involved in *Queen v. Liyanage*[27] referred to earlier can be explained as the legislature showing a lack of respect for the judicial branch. On the other hand, the suitability of members of the legislature is not in our law committed to the legislature but to the judiciary. But what of appointments within the legislature.

The question has not arisen with regard to the appointment of the Prime Minister or other Members of Parliament. Not so in the case of the Provincial Councils. Following Provincial Council elections, the appointment of two Chief Ministers to two Provincial Councils by the respective Governors was challenged by writs of *Certiorari* and *Mandamus*, applying the test of Wednesbury unreasonableness. It was countered by the argument that the power given to the Governor was a matter for his subjective assessment and not a subject to review by the Court. In the Supreme Court, Counsel submitted that it was a 'political question' and relied on the reasons propounded in the American case of *Baker v. Carr*[28]. The Court rejected this submission holding that a Provincial Governor cannot be regarded as a branch of government coordinate to either of the Superior Courts and that no judicial deference or self-restraint is owed to subordinate executive or

[27] *Supra*, n. 16
[28] (1962) 369 US 186

legislative bodies such as the Governor of the Provincial Council. It is interesting, however, that the judgment said that the Court's position would be different in the case of President and Parliament. It cannot therefore be said that the 'political question' doctrine question was dismissed from our law.[29]

Entering into treaties when assigned solely to the executive branch, as in our Constitution, is generally non-justiciable because it is outside the area of judicial competence. The recent judgment of the Supreme Court in the *Singarasa case*[30] striking down the executive accession to the Optional Protocol to the ICCPR is contrary to the argument that there is such a thing as a 'political question' or non-justiciability of an issue or the ordinary respect due by the Courts for the political domain.

In the last section of this paper, I will say something of the new role given to judges under the 1978 Constitution. In this connection some preliminary remarks have already been made above. Having enumerated fundamental rights and made them enforceable, the Constitution also gave the Supreme Court jurisdiction for the protection of fundamental rights in Article 118 and by Article 126, which recognized the Supreme Court as having sole and exclusive jurisdiction to hear and determine any petition relating to the infringement of any fundamental right by State action. The Constitution required the petition to be presented within one month of the infringement, a condition insisted upon by the Court unless the petitioner is able to show good reasons why it should be relaxed. The Rules of the Supreme Court required that the petition should set out the facts and circumstances relating to the right, by whom and how it was infringed and the relief prayed for. In short, the petitioner should know all or most of the facts relating to the infringement of his or her fundamental right before coming to Court.

When the petitioner succeeds in the application, the Court has the power "to grant such relief or make such directions as it may deem just and equitable in the circumstances".[31] Judges have not considered this power as giving them an absolute or unfettered discretion.

Usually it is an order for costs and compensation to the petitioner by the State and /or the respondents and such other orders as are necessary to give the relief or redress to the petitioner. The basis for the sum of money awarded as compensation is not given in the judgments.

It is abundantly clear from Articles 17 and 126 that it is the person who is entitled to the fundamental rights who can be the petitioner, by him or himself or by an Attorney-at-Law on

[29] See, *Premachandra v. Jayawickrema* (1994) 2 SLR 90
[30] *Singarasa v. Attorney General* No 2 SC Spl(LA) No 182/1999 (2006)
[31] Constitution Article 126

his/her behalf, and no one else. The question whether a third party can bring the action was considered by a Bench of five judges in *Somawathie v. Weerasinghe*.[32] The majority decision was that not even the wife of the torture victim had standing under Article 126. Putting the Article under close scrutiny, Amerasinghe J. held the words to be clear and unambiguous. He added:

> Separation of powers requires me as a Judge not to presume, that I know how best to complete the legislative scheme. In such a situation, any attempts on my part to fill the supposed gaps would lead me to cross the boundary between construction or interpretation and alteration or legislation.

In taking this view he took into consideration that otherwise even a concerned citizen could claim standing. In *Faiz v. Attorney General*[33], agreeing with Amerasinghe J., Mark Fernando J. said:

> Article 126 does not enable the Court to reach all those responsible, at least by means of just and equitable orders and directions. That jurisdiction cannot be expanded by twisting, stretching or perverting the Court through a populist process of activist usurpation of the legislative function thus creating a judicial despotism under which the Courts assume sovereignty over the Constitution...For the Rule of Law binds the Judiciary as well as other organs of government.

Again the same Judge in *Sriyani Silva v. Iddamalgoda*[34] drew attention to the fact that, Article 126(2) gives only the person who alleges that a fundamental right "relating to such person" (emphasis in judgment) has been infringed, has the right to apply to Court. It is a very limited exception that has been recognized as to who else can bring a fundamental rights case justified by the special facts of each case. It was also applied in *Rani Fernando v. Seeduwa Police*.[35] Article 126 is a constitutional provision and an interpretation must be appropriate to the words.

There is a consistent line of decisions as to who is entitled to be the petitioner in an application under Article 126 and good reason has been given. It is nonsense to say they represent a conservative view relying on the Indian cases which have developed a broad approach to standing in public law and accepted public interest litigation. In the Constitution of India, the Supreme Court is given a concurrent right with the High Court for the enforcement of fundamental rights and the power to issue directions or orders of writs. There is a fusion of the writ and fundamental

[32] (1990) 2 SLR 121
[33] (1995) 1 SLR 372
[34] (2003) 1 SLR 14
[35] (2005) 1 SLR 40

rights jurisdiction. India does not have a provision corresponding to Article 126 which calls for its own interpretation and application. Our writ law is unwritten and can and has been developed in a liberal manner. The "new doctrine" of the scope of recent fundamental rights litigation has not seen this distinction.

Let us see where the "new doctrine' has led us by looking at some decided cases.

1. In the P-Toms case (2005)[36] application under Article 126 in overturning a political decision of the government. Their contention that they were acting in the public interest was accepted by the Supreme Court.

2. In the Date of the Presidential Election case (2005), [37] there was no finding by the Court that the Commissioner had infringed the right of the petitioners and no order was made against him. The Court however said that the petition had been filed in the public interest and claiming to act under Article 125 directed the Commissioner to fix the date of the election according to the findings in the judgment. According to Presidential election law, it was the Commissioners who had the right to decide the date.

3. In the North and East Merger case (2006),[38] the petitioners had standing and their delay in coming to Court within one month was excused. Three Executive Presidents had postponed the taking of the poll in the Eastern Province for 17 years and this would have been due to their political perception of the situation in the country, but this did not prevent the Court from declaring the postponement invalid.

4. In the President's Entitlements after Retirement case (2007),[39] two petitioners who filed a petition for infringement of their fundamental rights under Article 12(1) made no attempt to show how their rights were infringed. But they claimed they were representing the rights of the people of the country. When objections were taken to their right to come to Court under Article 126, the Court concluded that ordinarily a fundamental rights petition is filed when the wrongful executive act affects a person. But the Court proceeded to say that it does not prevent any person in the public interest from seeking a declaration from the Court of infringement of their fundamental right to equality before the law by a decision of

[36] *Weerawansa v. Attorney General*, SC(FR) 228-230/2005, SC Minutes 15.07.2005 (unreported); P-TOMS stands for the Post-Tsunami Operational Management Structure set up in June 2005 as a joint mechanism for reconstruction of the Tsunami affected areas of Sri Lanka.

[37] *Omalpe Sobitha Thero v. Commissioner of Elections*, SC (FR) 278/2005, SC Minutes 26.08.2005 (unreported)

[38] *Wijesekere v. Attorney General*, SC(FR) 243-245/2006, SC Minutes 16.10.2006 (unreported); relates to the constitutionality of the merger of the Northern and Eastern Provinces of Sri Lanka in 1987.

[39] *Senarath v. Chandrika Kumaratunga* SC(FR) 503/2005, SC Minutes 03.05.2007 (unreported)

the President and the Cabinet. The Court held their rights had been infringed and besides making the orders awarded Rs. 100,000 as costs to each petitioner to be made by the respondent.

5. In the School Admissions case (2007),[40] an ordinary school admission petition was settled to the satisfaction of all parties. Normally this would have been the end of the case. But it did not stop there because the Court decided to look at the Rules of the Ministry of Education as set out in the Circular to see if they satisfied the equal protection laws of the Constitution. The Circular had been affirmed by the Cabinet as being the national policy for admissions. The examination by the Court led to Court faulting some of the criteria on the ground that proper guidelines for formulating a policy had not been followed, and that the school had deviated from the Circular issued by the Ministry of Education. The judgment went on to order a new policy to be formulated which would not be in breach of the right to equality before the law and equal protection of the law. This was done by a draft Circular submitted by the Ministry to the Court after the judgment. On a yet later date, associations of past pupils made representations as to proper guidelines in a draft prepared by them. Finally, the Supreme Court approved the amended draft submitted b the Presidential Secretariat and later ordered admissions for the next year to be complete by 29 February.

6. In the SLMSL case (2008), [41] the petitioner as a former politician and social worker said that he filed the application in the national and public interest to enforce the fundamental right to equality before the law which had been denied by unjust, wrongful, unlawful, unreasonable, arbitrary, capricious and *mala fide* action. Respondents objected that the petitioner was out of time and that he had no right to represent the citizens of the country. These were overruled by the Supreme Court. First, because the petitioner had to obtain material documents from sources not accessible to him. Second, because the executive as guardian of the State resources in the people's interest gave him a 'positive component' in the right to equality. The Court declared that all agreements which formed the basis of the transfer of State land invalid and directed the Secretary of the Treasury, who had been made a respondent, to pay Rs 500,000/- to the State, and two public companies and two officers holding managerial positions to pay Rs 250,000/- costs to petitioner as just and equitable relief. After judgment was delivered, the Secretary to the Treasury was summoned to appear before the Court and asked to resign from all public officers held by him. This was not a relief asked for by the petitioner in his petition on which leave to

[40] *Ranjith Haputhanthrige v. Principal, Sujatha Vidyalaya, Matara*, SC (FR) 10-13/2007, SC Minutes 29.03.2007 (unreported); other similar petitions were consolidated and the order made.

[41] *Nanayakkara v. Choksy et al*, SC(FR) 209/2007, SC Minutes 21.07.2008 (unreported); SLMSL stands for Sri Lanka Marine Services Ltd.

proceed was granted. Nor was it an order made in the judgment except that the judgment ended by saying that, "All parties to the proceedings will take the necessary action on the basis of the findings stated above."

7. In the Water's Edge case (2008),[42] the petitioners alleged that they brought the action because the national interest and national economy and rights of citizens of the country had suffered by abuse of the executive power vested in the President. Objections were taken that they had no standing and were out of time. The first was rejected on the ground that the petitioners in public interest litigation have a Constitutional right given by Articles 17 and 126 to forward their claim. The second was also rejected because no date had been indicated as to when the one month period should be reckoned. The judgment itself gives the date of acquisition as 1984 and the other material dates as 1998 and 2003. The judgment allowing the petitioner's application declared their rights under Article 12(1) to have been infringed. The Court further held that, several transactions which had Cabinet approval, had no force or avail in law because they were ratifications of actions in violation of the Public Trust Doctrine. The former President as Head of Cabinet was ordered to pay Rs 3 million to the State. A respondent who had no executive status but had profited from the transaction was found "guilty" of impropriety or connivance with the executive in the wrongful acts and as a "punishment" was ordered to pay Rs. 2 million to the state, raising the question whether the original fundamental rights jurisdiction given to the Supreme Court has acquired an additional criminal law element. Costs in Rs 500,000 were ordered to be paid to each petitioner by eight respondents in equal proportion.

   By reading newspapers I gather that there are other fundamental rights cases leading the Supreme Court to making orders:

8. For the removal of permanent checkpoints, illegal "No Parking" signs that lead to prohibition of parking in certain roads, minimizing inconvenience caused to the public by stoppage of traffic to permit VIP movement.

9. For Secretary to Treasury to consider the possibility of allowing Rs 10 billion to implement a strategic plan for a traffic system for the Greater Colombo area.

10. Restraining a baby elephant from being sent to Armenia as a gift.

11. Restraining a scheme of the Kandy Municipal Council for easing traffic congestion in Kandy.

[42] *Mendis v. Chandrika Kumaratunga*, SC(FR) 352/2007, SC Minutes 08.15.2008 (unreported).

12. Prohibiting shops from charging customers for paper bags.

These cases show the very wide powers assumed by the Supreme Court in its fundamental rights jurisdiction. All declarations, orders and directions made by the Court are not reviewable by any authority and some, if not all, are backed by the Court's contempt powers which also are not subject to review. These cases show the far reaching consequences of the decisions and how they came to be made deserves examination.

Acceptance of a petition under Article 126(2) from virtually any person claiming to act in the public interest or on behalf of citizens of the country, and the wide interpretation of equality before the law and equal protection of the law in Article 12(1), together with the wide powers assumed under Article 126(4), are cornerstones of the "new doctrine". The authorities given for the new doctrine are, Dicey's Rule of Law, Wade on Administrative law, India's public interest litigation, the Public Trust Doctrine, and our own cases such as *Premachandra v. Jayawickrema,*[43] *Bandara v. Premachandra*[44], *Bulankalama v. Secretary of Industries,*[45] *Faiz v. Attorney General,*[46] and all these require a separate article for analysis.

Suffice for the moment to quote India's former Chief Justice Bhagwati who said:

> When a person, class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting *bona fide* can move the Court for relief under Article 32 and *Certiorari* also under Article 226, so that the fundamental rights become meaningful not only to the rich and the well-to-do who have the means to approach the Court but also for the large masses of people who are living a life of want and destitution and who are by reason of a lack of awareness, assertiveness and resources unable to seek judicial redress.[47]

In *Indian Constitutional law* the author M.P. Jain[48]states:

> Public interest litigation should not however be used by a petitioner to grind a personal axe. He should not be inspired by malice or desire to malign others or actuated by selfish or

[43] (1994) 2 SLR 90
[44] (1994) 1 SLR 301
[45] (2000) 3 SLR 243
[46] *Supra*, note 30
[47] *Bandua Mukti Morcha v. Union of India* AIR 1984 SC 802
[48] M.P. Jain, Indian Constitutional Law, 1998.

personal motives or by political or oblique considerations. He should be acting bona fide and with the view to vindicate the cause of justice. The Supreme Court has cautioned that public interest litigation is a weapon which has to be used with great care and circumspection and that the judiciary has to be careful to see that under the guise of redressing a public grievance it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature.

This statement is all the more applicable to the Constitution where decisions are final and not subject to review.

Soli Sorabjee, former Attorney General of India, while supporting public interest litigation uttered the following caution:

> It must never be forgotten that in a democracy people have every right to scrutinize and appraise not merely what the judiciary actually delivers but the integrity of the judicial process. The judiciary must constantly guard against the danger of judicial populism. It should not by hyper exercise of judicial power usurp decision making power from the legislature, the Cabinet or civil service, in respect of matters of policy. That would be impermissible judicialisation of politics, an encroachment on other wings of the State. Such an action on the part of the judiciary would render judicial review a process that substitutes the policy judgment of unelected representatives of the socio-economic and political elite for Parliament and legislatures.[49]

Article 126 applies when executive or administrative actions (State action in the wide meaning given to it by case law) cause an infringement of a person's fundamental right. After this is proved, the Supreme Court is given the power to give equitable and just relief to the **person** who suffers the wrong. The State is not intended to benefit from a fundamental right action.

Finally, I wish to address in this last section to the reference made in some judgments to the widely accepted principle that 'no one is above the law.' That being the case, can judges be above the law? Actions by judges may not be subject to complaints of infringement to fundamental rights, as held by our case law. But the Judiciary as an organ of the government is bound by Article 4 to respect and secure fundamental rights. Reports of recent proceedings in the Supreme Court require that judges' attention be drawn to two Articles in particular.

[49] "Judicial Review in Public Law" in BASL Silver Jubilee Journal, 1999, p. 89; same paper presented at the National Law Conference of the Bar Association of Sri Lanka, November 1999.

Article 11 states that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. In *Sudath Silva v. Kodituwakku*[50] the Supreme Court said:

> Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs.

This is part of the sovereignty of the people. The respondent in a fundamental rights case cannot be in a worse position than a criminal. Article 11 has an expanded meaning and includes causing mental pain and suffering, humiliating treatment and affront to dignity. Persons in Court – whether as parties to a litigation, witnesses and persons on notice, or lawyers – must not be made to experience such treatment by off the record utterances from the Bench. A person's right to engage in a lawful occupation is guaranteed by Article 14(1)(g). If he is employed, he is governed by the terms of the employment. Can a respondent in a fundamental rights case be deprived of this guarantee by order of Court that he should cease his employment? The question *is Quis custodiet ipsos custodes*[51]

[50] (1987) 2SLR 110

[51] Latin phrase meaning "Who will guard the guardians."

"*Political Parties and Governance*", extract from the SWRD Bandaranaike Memorial Lecture

As I see it, these incremental changes in the election law had its effect on the governance of the country. With the rise of political parties and the campaigns carried out by them, the voter came to accept that for him the choice was between parties, and if individuals mattered it was those who held leadership positions in the party structure. Persons with political ambitions gravitated to political parties and there was the birth of political careers. The two party system envisaged by the Donoughmore Commissioners however was not achieved and perhaps it was a good thing.

Recent history has raised many questions on the power of political parties. The new constitution embodied a political philosophy that has a profound impact on the government. The system gives pride of place to the party and rubs out the individual who wants to serve his people. What is more, even a semblance of the link with the electorate is not there. The system of proportional representation of parties in Parliament could not accommodate the people's choice of representatives. We tend to forget the new election law that was enacted in 1981 because it never applied to any election after 1977. It made the selection of candidate and the election of members solely a matter for the parties. **The vote given to the people was to vote for a party. He/she had not choice as to the candidate he was voting for because the party had already decided for him who was the better or more suitable representative in the nomination paper. Those who thought of this idea or thought this was democracy should feel ashamed of themselves.**

My lack of enthusiasm for what the constitution and the election law ordains might be criticised for over-dramatizing the negative features of the dominance of the political parties in government in Sri Lanka and that I have not taken into account the contribution of political parties. This has to be corrected. Political parties have succeeded through organizations at local authority level, electorate level, district and provincial levels, and national level in bringing issues facing the country to the attention of the people and enlisting their support for particular programmes. These are significant developments in democratic governance and a continuation of a like process began before independence by the left wing parties in particular.

What I find distressing is that today the entire governmental apparatus appears to have been handed over to political parties and there is a distancing of the people from those who exercise governmental power. It is the party that has the last word in selection of representatives of the people and it is the party that comes first in the allegiance. The

amorphous entity, the party that has such powers to command may not always act in a transparent fashion and is not accountable to the people. It is a lacuna which the media and organs and civil society try to fill. It is not the best solution because what all this means is that the party has a few persons to please but for the elector the important time is the period immediately before nomination and the polls date.

Politicians do not find the time to look back too often and someone has to do this for them and hope that it will be some little use. We have passed from the stage of putting a vote into a colored box to making a cross against a symbol and a number. Meeting the people was considered important to candidates because they wanted to appear as their representative but this has gone. The sudden ban on candidates canvassing for votes had a rationale when the election law and elector only vote for a party, but when that was changed no one thought if this prohibition should remain. So we have a situation when we are denied the opportunity of meeting those who seek our vote. The election law sets the stage for political parties and their leaders.

"Truth of Executions", the Island newspaper, September 11, 2009

For many who recall the horrific details of a particular murder the response to an impending execution would be 'He deserves it' and 'Justice is being done', and they would proceed with their normal lives not caring what the truth of a hanging is. Come the day fixed for the execution, even if they read about it in the newspapers, they would not spare a thought for the condemned man. It is called an execution, a nice, clean word, or carrying out the death penalty. Amnesty International says it is a violation of the right to life, and the ultimate cruel, inhuman and degrading punishment, words which in the interpretation of Article 11 of our Constitution can range from extreme torture to walking a manacled suspect along a crowded street to the Magistrate's Court. It is in fact a killing which is as horrific as the original killing, and it is a deliberate, planned killing by the State using all its power against a human being who is probably half dead already after years in a condemned cell. Or it could be a human being who is a changed man because he used his time in incarceration to reflect and repent.

The average reader of the newspapers would not have seen an execution or even wanted to see one, much less to participate in the execution. More than forty years ago there appeared in the "Sunday Observer Magazine" a series of articles on the experiences of a prisons officer written after retirement. Not all of them were on the executions he had witnessed. I have taken an account of one hanging, one which was not botched because the rope was too long or too short, or because of a lapse on the part of even a seasoned hangman in checking

the slack of the rope at the correct time, resulting in the head being torn from the body or life struggling to leave the body, after the drop. Cruel and inhuman punishment inflicted on a human being? It is much more than that. It is a negation by an act of State of the dignity that is the right of a human being at the moment of death.

"So Hendrick placidly spent the last days of his life in the death cells of Welikada Prison chewing betel, having an occasional chat with his jailors (including me) and reading. He had no visitors at all. He showed no very great concern when I told him that his appeal, had failed, that the Governor-General had confirmed the sentence of the death passed on him. And so it was that I peeped into Hendrick's cell about one in the morning. What, I thought, would a man who was to die in a few hours be doing? Perhaps he would be sitting in a corner of his cell deep in contemplation of the events of his life which was drawing to a close?

"I was in for a rude shock. Hendrick was fast asleep - not the tortured sleep of the worried or the sick, not the torpid sleep of the drunkard, but placid, unworried, restful, as if he was as innocent as a babe and had years of happy life ahead of him.

"On the bunk by the slumbering figure lay a book he had been reading the last two days or so. Then there was a chew of betel and a few letters lay scattered in an unruly heap in a corner of the cell. From whom I wondered did these come?

"I couldn't sleep the rest of the night, which was just as well, because I had to be on duty at 5.30 a.m. All that morning I was in a daze.

"The executioners trooped in, fixed the gallows, donned their white suits and stood at attention by the gallows entrance.

"Next came two bhikkus. I had to lead them to the cell where they spoke to Hendrick and prepared him for what was to come. Then trooped in the Fiscal, the medical officer and the superintendent of the prison.

Five minutes to go

"I walked up to the cell and requested the bhikkus to leave. They did so with reluctance. Hendrick Appuhamy, the condemned murderer didn't turn a hair. He was cross-legged on the floor of the cell, his long hair falling over his shoulder, a look of deep calm on his face.

"Many were the occasions later on where I was to see men become a hopeless blubbering mass of fear at this dreadful moment, many were they who would have to be carried to the gallows in a semi- coma. But not Hendrick. When the guard opened the padlock to open the cell, Hendrick pushed at the doors and welcomed the executioners. He smiled at them, a cynical smile, as they strapped his hands to leather fastened to his body. And then, as he commenced his short walk to meet death, he crouched down and saluted me.

"A few more steps and Hendrick stood at the threshold of Eternity. With that same sad, cynical smile he bowed and saluted the Fiscal, superintendent, doctor, etc, turned about and walked to his death. It was the crash of the gallows trap door that awakened me from the daze in which I had been from the previous night.

"Notwithstanding the ghastly feeling of revulsion I had and the feeling of mammon in the pit of my stomach, -my curiosity led me on to descend into the crypt below to see the prisoner. There he hung, and jerking spasmodically. A quiver ran through -my spine as I saw him there, dangling by his neck. A few minutes and all was over."

Hendrick had maintained that he had been convicted on the false testimony of a singl witness. But that is not the point. The death penalty by hanging has been under attack i this country for many years because it was considered barbaric. This was long before 'cruel, inhuman and degrading punishment' gained currency. It led to fewer hangings but not to abolition of capital punishment. Finally, enlightened public opinion saw to it that no executions were carried out even when the death penalty was imposed. I believe that during this period of suspension, no Head of State relished the idea of being the final arbiter of life or death for a condemned man. The same public opinion, not international prescriptions, which can take credit for putting a stop to executions, should not be stampeded by gut reaction to brutal killings which are taking place, to taking a wrong course of action today.

Preface from the Monograph; *Bribery: A Study in Law Making and of the Criminal Process*, Wesley Press Colombo, 1976

"But who so gives the greatest Bribe she shall overcome. For it is a common saying in this Land, That he that has Money to see the Judge, needs not fear nor care whether his cause be right or not." So wrote Robert Knox, that disturbing chronicler of seventeenth century Sri Lanka.[1] Sir John D'Oyly in his *Sketch of the Constitution of the Kandyan Kingdom* has

[1] An Historical Relation of Ceylon, 99 (Tissara Press, 1966)

given a more detailed account of the administration of justice in the Kandyan Kingdom in the early part of the nineteenth century, which places the prevalence of bribery in slightly different perspective.[2] Justice by the Kandyan Kings was administered by an hierarchy of chiefs who were not specially rewarded for this service, nor was the litigant called upon to contribute to the royal coffers for the privilege of having a procedure for the adjudication of disputes. But it was the custom of the people for anyone appearing before a chief for whatever reason, and this included a complainant, to bring with him presents of rice, sweets, fruits, etc. This was as "a Token of Respect and not a Bribe", an important distinction in a county which believed in courtesy and deference to rank. The "bribe", as seen by western eyes, consisted of the *bulat surulla* (bundle of betel leaves in which a silver coin was placed) which was often given to the chief who was hearing the dispute, frequently by both parties according to their means, and ostensibly to secure a speedy hearing. The chiefs generally expected a bulat surulla since their offices did not carry a stipend, and tenure was not guaranteed to them. Although the King expressly forbade the chiefs to receive bribes, his commands were unavailing since "the Presents are conveyed in private... and it is certain that the practice prevailed to such an extent as to corrupt the system.

Not all the chiefs were corrupt for there were also those "respected no less for their Ability in the Investigation of suits, than their Integrity in the Decision of them." Rich litigants would bide their time till a corrupt chief succeeded an honest one, to have the case reopened with a handsome *bulat surulla*

Bribes were also taken by the chiefs in the discharge of their administrative functions, and this was again part of the system of governing by appointments to offices which carried no direct remuneration. But it is interesting to find that chiefs were expected to keep to certain limits, so that when a certain chief died leaving a large estate acquired during office, the King seized it for his use.[3] This could be the historical precedent for making it an offence to amass assets by bribery, as under the Bribery Act.

The foregoing account lends support to the popular view of a tradition of bribe-taking and giving among Asian peoples.[4] The West can no longer, however, afford to be smug and righteous on this account – the disclosures of big payoffs by multinational corporations to secure orders has seen to that; the magnitude of the bribes and the people concerned are sufficient to make bribe-taking by Asian officials appear as kindergarten games.

[2] Second edition, 1975, pp.31 ff.
[3] Ralph Pieris, Sinhalese Social Organisation, 118 (1956)
[4] Cf. "Time" Magazine of 23 February, 1976: "bribes are a centuries-old lubricant for government action that is as widespread in Asia as the cultivation of rice."

Many western countries have only recently focused on the need to examine the corruption in their political and administrative systems. This country, by contrast, has been concerned, if not alarmed, by the evidence of bribery and corruption and has been taking active steps over a period of years to do something about it. This book examines the bribery laws of the British who established an entirely new system of government by educated, paid officials who enjoyed security of service, backed by a code of behavior which saw no distinctions in the categories of government servants. Later with the entrustment of a different kind of power to a new class of persons, elected or nominated to represent the people in the Legislature or local bodies, there was a shift of the incidence of corrupt practices from the official to non-officials, i.e., members of the public temporarily occupying positions of authority. The old laws were inadequate to deal with them and new measures had to be taken. Some of this has already been forgotten although so sensational, dramatic and at times even poignant, only a few years ago. Meanwhile the pressure was kept by the public and the press for a clean-up, culminating in the Bribery Act.

As a weapon, the Bribery Act has tremendous potential and it is part of this study to examine the provisions closely in the light of judicial decisions. The Act has for some years now been used with unusual vigour and the anti-bribery drive has caught the public imagination. The spotlight once more has turned on the official, in the larger sense. No member of Parliament or, after 1972, of the National State Assembly has been charged under the Act. The reason for this could be that no allegations of bribery have been made, or that the Bribery Commissioner has not received the necessary permission from the Speaker to investigate allegations made to him against members.

Several questions arise. How effective is the Bribery Act to deal with all forms of corruption that have appeared in society? Are there new forms of corrupt practice which ought to be condemned? Are there possibilities of the machinery being abused?

These and perhaps other questions are matters outside the scope of this book but, hopefully, the reader will find material in these pages which will help him if he is so inclined to proceed further.

"Constitution and the People", Desmond Fernando Oration, July 01, 2011

The move to abolish the constitutionally placed limit of two terms only for a President was sprung on the people in mid-2010 when the incumbent President had not completed the first term in office and the next Presidential Election would be in 2014 or 2015. The thinking public cannot be blamed for seeing something sinister in this move – the slide to totalitarianism and the erosion of fundamental freedoms. This is something frightening to ordinary people who are deemed by the Constitution to be sovereign, and have the right to know and understand and sometimes be consulted, when important changes in the basic law are contemplated. The people can no longer rely on their representatives in the legislature when they can see for themselves their pathetic performance in Parliament when the Bill was presented.

The Bill titled 18th Amendment to the Constitution was challenged in the Supreme Court by five petitioners and the objections heard by a Bench of five Judges. It was hoped that the amendment would be found to be inconsistent with the Constitution and therefore referred to the people at a Referendum. This was not to be the case. The Court's Determination was that nothing more was required for the repeal of Article 31(2) on the two term limit of the President, than the special majority in Parliament prescribed by the Constitution that is a two-thirds majority which was of course a foregone conclusion

The Court's approach was to look at Article 83 on Bills requiring a Referendum, and having found that Article 31(2) on the two term limit was not an entrenched provision the Court examined the application of Article 3 on the Sovereignty of the People and Article 4 on the manner in which this Sovereignty shall be exercised. The Court was concerned only with whether the franchise of the People, an aspect of Sovereignty of the People as enunciated in Article 4(e) would be restricted by the repeal of Article 31 (2). The Court said, no, and added that the repeal would "enhance the franchise of the People...since the voters would be given a wide choice of candidates including a President who had been elected twice by them." It is submitted, with greatest respect, that this is not just a case affecting the franchise of the people which is enunciated in Article 4(e) but an amendment inconsistent with the Sovereignty of the People, which is at the core of the Constitution and stated in Article 3. Article 3 states very clearly that "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." It is a right of the People when a Bill is introduced in Parliament to examine the Bill as a whole or in parts to see how it affects them. Article 121 gives a citizen the right to petition the Supreme Court and state his concerns. Article 4 (a) states that the lawmaking powers "of the People" are given to

Parliament and to the People at a Referendum. The two-term limit imposed on a President was wisely and necessarily put in the Constitution and to repeal it can be justified only if the People agree.

It is understanding the Constitution that must be the starting point when a major change is proposed by the government. The 1978 Constitution is a departure from the previous Constitutions, but not a departure from the principles of democracy or the rights of the People. Article 31(2) comes in the Chapter dealing with the President and it is here that the Executive is given wider powers than before. How did the framers of the Constitution see these powers? It is here that I turn to what Professor A.J. Wilson had to say in 1978 when the Constitution was adopted. Professor Wilson was then Professor in the Department of Political Science, New Brunswick, after being for many years Professor of Political Science of Peradeniya University. In an article to the "Sunday Observer" of 18th September, he acknowledges his part in drafting the new Constitution when he says "...We have retained and modernized the parliamentary legacies inherited through the years." He justifies giving the President elected by an absolute majority and emerging as a national figure "a maximum of authority to handle the problems of a society in disequilibrium." He denies that the Constitution has potentialities for dictatorship as predicted by major opposition figures, stating that "The Constitution of the Second Republic is the least prone to dictatorship of all systems."

One of the reasons he gives is that there can be no extension of the President's term of office of six years without a Referendum, because Article 62 (2) is a protected Article. Having said that he didn't have to say that the fixed two terms for a President could not be amended by a simple two-thirds majority. This was unthinkable when the scheme of a Constitution that was democratic and socialist and the Sovereignty of the people, not any individual holding a key executive, legislative or judicial office took centre place.

The six year term for a President is unusually long and it meant that a person would be Head of State, Head of the Executive and Government and Commander-in-Chief of the Armed Forces for 12 uninterrupted years. During this period, he is given the power to make many important appointments from Ministers, Heads of Armed Forces, Judges, Ambassadors and other diplomatic agents etc. When all these powers were given to a President who was outside Parliament, there were strong personalities in Parliament, the likes of Ranasinghe Premadasa, Lalith Athulathmudali, Gamini Dissanayake, Cyril Mathew, Thondaman etc. If it had been put to them, "Let's have a President for unlimited terms" because he needs more time, how would they have reacted? My guess is that they would have been horrified and said "If you cannot do your job in 12 years, please step aside

and let someone else do it." Even when President Jayewardene tampered with the first term of the President by the Third Amendment, these persons saw to it that the maximum 12- year period was not exceeded.

It was no different in the government of President Kumaratunga which had its share of powerful figures including the present President. What is different in President Rajapaksa's government that the idea of a President with unlimited terms should be warmly embraced and quickly turned into law? Obviously it has something to do with the quality of the people in Parliament. If the seniors in government and the seniors in the ruling party cannot take a principled stand then the People's only hope is the Supreme Court.

The Constitution is capable of being amended by a two-thirds majority in Parliament, but some Articles are protected from easy amendment. They are found in Article 83. A Bill to amend or which is found to be inconsistent with these protected Articles must also be approved by the People at a Referendum. Article 3 is a protected provision which proclaims the Sovereignty of the People but not Article 4 which sets out the agencies and instruments for the exercise of the People's Sovereignty.

The Supreme Court has in a series of decisions taken the view that Article 4 cannot be left out of consideration when a Bill is challenged, especially a Bill to amend the Constitution. This has been done by linking Articles 3 and 4 because they are complementary and must be read together. It has enabled the Court to play a creative role in safeguarding the rights of the People by holding that a Bill can only become law after a Referendum. The Court has in many Determinations on Bills found inconsistencies with aspects of Article 4 such as the judicial power of the people or violations of fundamental rights, or the franchise. This has wrongly led to the impression that Article 4 is more important than Article 3 when in fact there can be a violation of Article 3, or the Sovereignty of the People without invoking Article 4. How the Court worked this out can be seen by looking at some of the decisions of the Court.

In The First Third Amendments (SD 5 of 1980) or the Bill to seat two members for the Kalawana electorate the Court's opinion was that the Bill required a Referendum because it was found to be inconsistent with the provisions of Article 3. In the second Third Amendment (SD 2 of 1982) or the Bill to enable a sitting President to reduce his first term of office after four years provided he would contest the next election was challenged on the ground of violating Article 3 but was allowed to pass without a Referendum because the

Court was of the view that in those circumstances of a reduction of the term, the President's term of office was not involved in the concept of franchise. The Court said –

"in our view by restricting the irreducible period of the President's office from six to four years, the President would be enabled to discover the will of the people and the People will be given an opportunity to express their approval or disapproval of his stewardship on his programme of action prior to the expiration of the full period of six years."

(A similar reasoning is found in the present Eighteenth Amendment Determination) It is respectfully submitted that if the franchise issue had not been dragged in, violation of Article 3 would have been manifest.

By the Fourth Amendment (SD 3 of 1982), the government sought to extend the term of the first Parliament. The grounds of challenge are not stated in the short Determination but would have been violation of Article 3 and the franchise. The Court was divided 4-3 with the majority holding that a Referendum was not required. The Fifth Amendment (SD 1 of 1983) was challenged as being inconsistent with Article 3 and violating the principle of equality and alienation of the franchise. The Court did not think there was a violation of equality or an alienation of the franchise but did not consider whether Article 3 was infringed.

My last case is the 19th Amendment (SD 7-40/1987) and the determination of a Bench of seven judges led by Chief Justice Sarath Silva. The Bill did not affect the judicial structure or violate fundamental rights or the franchise. The Bill was brought by the UNP government in power to restrict the President's power to dissolve parliament. The Determination was perhaps the best analysis of Articles 3 and 4. It did not stop with linking these Articles but went further and incorporated a key phrase from Article 3 to the reading of Article 4(a) (b) and (c). By so doing other provisions of the Constitution became entrenched.

Because the People's Sovereignty in Article 3 was given a practical dimension by Article 4, it was possible for the Court to say that:

> "Executive power should not be identified with the President and personalized and should be identified as the power of the People. Similarly Legislative power should not be identified with the Prime Minister or any party or group in Parliament and thereby be given a partisan form or character. It should be seen at all times as the Power of the People."

It followed that to permit the transfer of power given by the Constitution to one organ of government would be an alienation of the sovereignty of the People, inconsistent with Article 3.

If this line of reasoning was followed in the Determination of the Eighteenth Amendment, it is respectfully submitted that the Court would have held that the proposed repeal of the two term limit for the President should be put to the People at a Referendum. Unfortunately, it does not appear that the Nineteenth Amendment Determination was brought to the notice of the Court.

It will be seen from these cases that the task of Constitutional interpretation given to Judges is not an easy one, and that there could even be strong divisions of opinion. The separate five Determinations in the Thirteenth Amendment Case is the best example. It also shows how rigorously Judges at that time applied themselves to the task in the interests of the People.

One last word if you will permit me on the Eighteenth Amendment. The Amendment deals mainly with necessary Amendments to the Seventeenth Amendment (which introduced the Constitutional Council to the Constitution) and changes to the President's term. Why the government lumped these together in one Bill is not clear because they are not connected. It is more strange that the Cabinet consisting of stalwarts of many parties should certify the Bill as "urgent in the national interest." They were certainly not acting in the interests of the People. What the Cabinet did was to give no time to the People and their lawyers to study the implications of the repeal of Article 31(2) and prepare their submissions to the Court. It was also totally unfair by the Judges of the Court to be given little time to express an opinion. The Supreme Court of India in *Gupta v. Union of India* observed –

> "If there is one principle which runs through the entire fabric of the Constitution, it is the Principle of the Rule of Law and under the Constitution it is the Judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective.

The Cabinet gave our Supreme Court just twenty-four hours to discharge the duty of scrutinizing the Bill to see if there were inconsistencies with the protected provisions of the Constitution. By so doing the Cabinet showed no respect to the People or the Judiciary.

"*State, Education and the Law*", 12th JE Jayasuirya Memorial Lecture, February 14, 2002

The State has come to the rescue by providing subsidized hostel accommodation and financial grants for living expenses by way of Mahapola scholarships. Not even in Communist China is education free.

My reading in preparation of this paper made me realize that my own life was a witness to the changes in educational policies. When I started schooling in Ratnapura, in a High School the Education Ordinance of 1920 was law. When I entered Royal it was the Education Ordinance of 1939 and before I left free education had come. In school I studied Sir Walter Scott's "Lay of the last Minstrel" and came home and read Richmal Compton's William Books with Willy Bunter's antics thrown in. There was no difficulty in entering the new University, as a collegiate education was adequate for many to do well in life without a degree. I had four years of free University education in English and had many options after graduation. Later as a young lecturer at Peradeniya the decision to ditch English as a medium of instruction was taken and opinion was strongly divided on the wisdom of this move. At the same time frantic efforts were made to acquire some proficiency in Sinhala and Tamil by lecturers. I was principal of Law College when the first steps were taken to make Sinhala and Tamil the language of the courts, much to the consternation of senior lawyers. I could see the logic of the change and formulated a policy for legal education, which took a very practical view of the language needs of young lawyers of the future. In the Law Faculty the changeover had to be immediate, leading to a stunning increase in the numbers wanting to read law. Today I can see many totally Sinhala educated lawyers after a few years of practice conduct cases fluently in Sinhala and when necessary in English.

When my kind of education ended, the new kind of education had begun, and I saw it in the lives of my children – the struggle to get into schools, the struggle to get into University and the struggle to cope with limited reading material. For the middle classes the going was very tough. I see the success of the new educational policy in the best of it products, most of whom come from less privileged homes. They are not inferior to those of an earlier generation, and they have been helped by knowledge of English acquired even at a late stage of their education. English as a concomitant tool to higher education is what is needed to consolidate equal opportunity achieved in the past fifty years.

My education however good it may have been had its fault in driving me away from my own language and culture, but insularism in education is not the correction. In an age of rapid advances in knowledge, science and technology a good education can be made better

if the window to the outside is kept clear of the cobwebs of a past era. This is a message to students because educationists have known it for a long time.

The Singarasa case: A brief comment, Sunday Times newspaper, 22nd October 2006

The recent judgment of the Supreme Court seeking to invalidate Sri Lanka's accession to the Optional Protocol to the ICCPR has led to questions as to how this judgment came to be given. Yes, there was a case, and as Senior Counsel, I would like to explain the circumstances in which it came before the Supreme Court.

An application was made to the Supreme Court in 2005 for the exercise of the Court's inherent power of revision of a conviction and sentence in 1995. This was after the views of the United Nations Human Rights Committee had been conveyed to the State, that Singarasa should be released or retried as his right to a fair trial had been breached. Singarasa had petitioned the UN Human Rights Committee by virtue of the right given to him by an international agreement or treaty entered into by the Sri Lankan State, namely the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

The Supreme Court constituted a Divisional Bench of five judges to hear the application, and it became known as the 'Singarasa Case'.

The legality or constitutionality of Sri Lanka's accession to the Optional Protocol to the ICCPR did not arise in this case, was not raised by Court and was never argued. Indeed the time given to make oral submissions was limited and an application on behalf of the petitioner for a further date of hearing was ignored. The Supreme Court could have in passing in the judgment raised the question of the treaty ratification process and left it to be decided in a suitable case, after hearing the Attorney-General on behalf of the executive Head of State and the Minister of Foreign Affairs, who takes the initiative and is responsible for registering the instrument of ratification or accession in the UN.

Singarasa's application to Court was not an application to enforce or implement the views expressed by the Human Rights Committee (HRC) of the UN on an individual's communication in terms of the Protocol. It is a matter of common knowledge that the views of the HRC are not decisions binding on national courts. All that Singarasa did was to ask for a revision or review of the decisions of the Supreme Court and other courts given earlier. This is possible in our law. The views expressed by the HRC were relied on solely to seek to persuade the Court to take a fresh look at the facts and the law in Singarasa's case.

The Supreme Court was invited to reconsider the conviction and sentence of 50 years imprisonment (reduced in appeal to 35 years) in the light of the HRC's views as to the requirements of a fair trial, which is a right guaranteed in our Constitution. Unfortunately the Supreme Court has seen it only as an attempt to substitute for the decisions of our courts the views of the HRC and, without looking at the facts or the law on confessions to the police, pronounced on the constitutionality of the State's accession to the Optional Protocol in 1997. This also explains why the Court said the application was misconceived and without any legal base.

There could be no misunderstanding in the minds of Judges that the petitioner's substantive case was that there had been a grave miscarriage of justice in his conviction, and a number of reasons were given in the petition which were totally independent of the views of the HRC. There is no reference in the judgment to these other arguments and they have not been considered. As stated above, time was not given for full argument even though judgment was delivered after many months.

In its views communicated to the State the HRC of the UN had recommended that the Prevention of Terrorism Act (PTA) provision, which cast on the accused the burden of proving that a confession made to the police was not voluntary, should be amended. Singarasa had been convicted, after the confession was held admissible, for not leading any evidence to show that the alleged attacks on Army camps (which formed the basis of the charges) had not taken place or that he was not involved in them. It was a golden opportunity for the Supreme Court to have emerged as the true guarantor of the rights and freedoms of people by including in a judgment - even a judgment refusing the application - a recommendation to this effect.

Singarasa was a Tamil youth of 19 or 20 who had no schooling and spoke only Tamil. His conviction was solely on the basis of a confession which was denied by him at his trial. The evidence was that he made the confession in Tamil to a police officer who understood Tamil but could not write Tamil; his confession was translated into Sinhala and written down by the same police officer. At the end of Singarasa's statement the police officer read out to Singarasa in Tamil what he had written in Sinhala before taking his thumb impression on the record. This was all done in the presence of a senior police officer to whom a confession under the emergency regulations or the PTA had to be made. This officer understood only a little Tamil and the translation into Sinhala was also for his benefit. The Supreme Court could also have commented on the undesirability of a procedure that permitted a police officer to record a statement confessing to committing serious crimes, in Sinhala, when it was made in Tamil. Had the Supreme Court done only this we would have been

disappointed but satisfied that the cry for justice by Singarasa, sentenced to prison for 35 years, had been heard. It is responses like this that have made the Supreme Court of India the highly respected body it is.

Nowhere in our Constitution is it said that the Supreme Court is Supreme; it is but another court exercising the judicial power of the People who are Sovereign. It is the People's right to say that the Supreme Court's pronouncement taking away a valuable right conferred on the People was *per incuriam* and in excess of the Court's jurisdiction. A treaty solemnly entered into by the State in the exercise of the executive power and in terms of international law as reflected in the Vienna Convention on Treaties is not, it is submitted with respect, subject to judicial review. There is a procedure in the Protocol for a State Party to denounce the Protocol, but until this is done, the Protocol is in force in the country. It must not be forgotten that Sri Lanka's accession to the Optional Protocol of the International Covenant on Civil and Political Rights was one of the major accomplishments of the late Lakshman Kadirgamar during his distinguished career as Foreign Minister. Both Bench and Bar, at the unveiling of his portrait at the Law Library, paid tribute to Kadirgamar's eminence as a lawyer and to his outstanding contribution to the country as Foreign Minister.

Highlights of contribution to Public Life

Served as Lecturer, Senior Lecturer in Law, University of Ceylon, Peradeniya, 1952 -1966

Principal of the Sri Lanka Law College (1966 -1974)

Served as Chancellor of the Peradeniya University from 2002 -2007

Taught law as Reader (Associate Professor of Law) at Ahmadu Bello University, Nigeria. 1976- 1982

Mr. Goonesekere was chairman of the Committee to Advise on the Reform of Laws Affecting Media Freedom and Freedom of Expression in 1996, which recommended numerous reforms including the right to information. This report is popularly known as the 'R.K.W. Goonesekere Committee Report' which is the fundamental document we have today on legal reforms to ensure media freedom in Sri Lanka

Member of the Human Rights Commission of Sri Lanka

Member of the Asia Pacific Forum, National Human Rights Institutions

Expert member of the UN Sub Commission on Promotion & Protection of Human Rights, 1998 – 2001 · Mr. Goonesekere presented a report on discrimination on Caste to UN Human Rights Council while he was acting as a member from Sri Lanka on the UN Subcommission on Promotion and Protection of Human Rights

He also served in this capacity as a member of the UN Sub Commissions Working Committee on Discrimination

Member of on the Asia –Pacific Advisory Council of Jurists of Asia Pacific Forum

He was a founder member and chairman of the Civil Rights Movement of Sri Lanka

He was also a member of the Law Commission and Legal Aid Commission of Sri Lanka

He served as a member of the Committee of Experts appointed by President Rajapaksa to assist the All Party Conference (APC) and contributed to the 'Majority Report' of the Committee

He was invited by the IIGEP (International Independent Group of Eminent Persons) to assist the Udalagama Commission of Inquiry and the IIGEP

He served in several private sector agencies; among them, as Director, Delmege & Company

Member Telecommunication Regulatory Commission of Sri Lanka

Member Panel of Arbitrators, Sri Lanka

RKW Goonesekere and Suriya Wickremasinghe, Senior Attorney at-Law founding members and office bearers of the Civil Rights Movement (CRM)

Mr RKW Goonesekere: Music, Poetry and Family

RKW with his youngest grandchild, Colombo

Subscriptions

The annual subscription rates of the LST Review are as follows:

Local: Rs. 2,000.00 (inclusive of postage)

Overseas:
PDF version of LST Review: US$ 20 (all countries)

Print version of LST Review:

South Asia/Middle East	US$ 62
S.E. Asia	US$ 67
Europe/Africa	US$ 78
America/Canada and Pacific Countries	US$ 110

Individual copies at Rs 220/- may be obtained from LST, 3 Kynsey Terrace, Colombo 8, and BASL Bookshop 153, Mihindu Mawatha, Colombo 12.

For further details, please contact:

Law & Society Trust
3 Kynsey Terrace, Colombo 8, Sri Lanka
(+94)-11 2691228 / 2684845 / 2686843
lawandsocietytrustorg@gmail.com