

Over the point

A RAJAWADI PUBLICATION



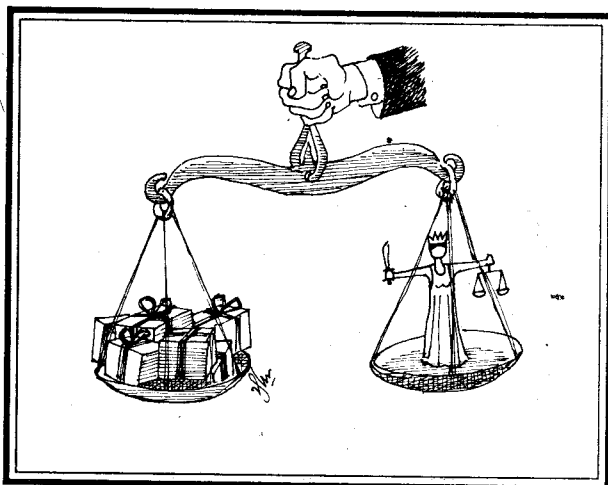
When sycophancy seasons justice ...

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Counterpoint

COVER STORY ☐ 4 BATTLE LINES ☐ 22



Counterpoint exposes the state of the art of the judiciary in the country, paying particular attention to the dangerous antics of the Kumaratunga administration, as well as to the internal politics within the service.

The story behind the Government offensives, Riviresa 1 & 2, and the cost of this unwinnable and tragic war are documented in this piece.



POLITICS ☐ 32 TAMIL VIEW ☐ 35



Our columnist provides a pithy account of the vicissitudes and *volte faces* of Lankan politics in the past few months.

Dr Hoole analyses the ways in which a crisis-ridden ruling elite have sacrificed their moral legitimacy to govern this country by the use of repressive measures of domination and control.



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The Tunnel at the End of the Light

THE country has just come out of the crippling Electricity Board strike, and before that the GMOA held everyone to ransom for a week. *Counterpoint* holds that legitimate trade union activity is a *sine qua non* of a vibrant democracy and must therefore be protected at whatever cost. Yet, the past month has seen trade unionism being given a bad name, with the relatively privileged GMOA flexing its collective muscle at the expense of the ordinary people of the land.

Trades union should be permitted to exercise the right to strike as a last resort, and this right cannot be denied even to doctors though it may cost innocent lives. It is crucial for a just democracy, however, that this right is exercised precisely as *a last resort* when all else has failed. Even with trade union action there is and must be *due process*, especially if the consequences are so dire. Just as in war there are rules and conventions that should be respected, so too with the legitimate agitation of a group of workers who have a grievance.

The GMOA won the day not on the merits of its case, but, rather, on the "terrorism" it exercised under the camouflage of trade union action. In fact, the very legitimacy of its

grievance was vitiated by the arbitrariness and intransigence of its behaviour. Even the rekindling of anti-Muslim communalism became grist to its mill in the single-mindedness of achieving its objective. What, really, did the GMOA set out to achieve? Surely not the mere reinstatement on the merit list of the poor "private medical college" graduate-(post)interns whom it had fought so hard against in the past? There was also always recourse to the legal system.

No, it is our view that the GMOA wanted to send out a clear and unequivocal message to the Government and the people, sooner rather than later, and on a relatively unimportant issue at that, so there would be no confusion in the future. The message is simply this: anyone who messes with the GMOA, whether it be an individual or the entire Cabinet, will be brought unceremoniously to its knees. What's more, having "won" its demands unconditionally, the GMOA has shown that it needs also to hound its perceived opponents to the ground.

Unfortunately, the GMOA's victory was a defeat for trade unionism on the one hand, and for democracy on the other. It was only a

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matter of time before other, less privileged but equally powerful, unions decided to get into the act. The Electricity Board Union's strike action was even less acceptable than the GMOA's before it. Hardly any warning was given before the entire country was plunged into darkness and, as a direct result, deprived of water on tap. No doubt, from the individual trade union's point of view such "wildcat" action can be hugely successful, but it irreparably sunders the shared responsibility that all trades union have towards the citizens of this country. Any union that wins its demands at the expense of the principles of equality, justice and fairplay upon which it is founded, cannot have won anything at all.

The end does not justify the means, nor does the ransom extorted under duress become anything but filthy lucre. The point is that the justice of the cause being fought for pales into insignificance in comparison with the terrorist-tactics employed to obtain redress. Hence, the GMOA may have had a legitimate grievance, once upon a time; the CEB Union may have had a set of reasonable demands, at a certain phase. Now, they have shown themselves to be no different from the crass politicians who subordinate everything to their narrow self-interest, and damn the consequences.

Counterpoint may not side with the unions this time on their tactics and timing, but this is by no means an endorsement of the Government's handling of the issue. No non-partisan person can have any doubt that Minister Ratwatte should resign forthwith as an acknowledgment of his mismanagement, incompetence and all-round perfidy. We are naturally suspicious of hyperboles that begin "Never in the history of human endeavour..." but in Sri Lanka today it is surely true that "so much damage has been done to so many by so few", and "the few" in this case are Mr. Ratwatte and his henchmen such as Leslie Herath.

Ratwatte and his men did virtually nothing

about the impending power shortage despite warnings from professionals and experts in the field. Emergency plans and alternative arrangements for the supply of power were not explored until it was too late. Even at the 99th hour the bungling of the Chairman and his top officials has achieved folk-legend status! Whether Ratwatte's war-mongering or Herath's imbecility is more to blame is a moot point. The fact of the matter is that this crisis could have been averted or at least minimised by careful planning. Moreover, once the Union went on strike, the use of force and physical coercion by the military to bring them back to work, reeks of the earlier dispensation which we had thought long past. Ratwatte, it would seem, sought to make up for his incompetence with a vengeance that was Premadasa-esque.

In a strange way, then, the striking union and the Minister share something in common: coming as they do from opposite ends of the spectrum, both groups appear to believe that "all is fair in love and war"!

Nor is the President absolved of blame if Anuruddha Ratwatte exacerbates the crisis of the war to reinforce his power-base, and if he minimizes the power-crisis to reinforce his war-base, because he does so with her complicity and tacit concurrence.

The President's allegations about a massive conspiracy, made at a press conference during the blackout and subsequently aired on national television, must be substantiated or withdrawn. She spoke about the UNP's alleged role in the strike and of criminal activity instigated to bring her government to disrepute. These are serious charges and require substantial proof. Presidential immunity cannot be the excuse for shooting off at the mouth.

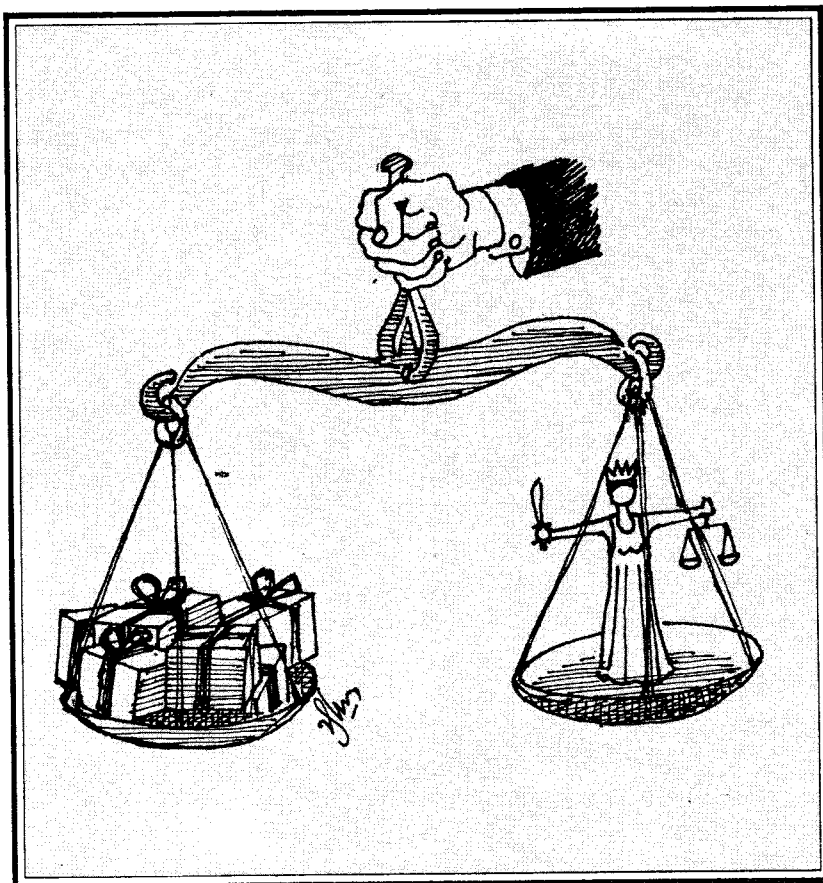
At any rate, the CEB strike, its repercussions and "resolution", raise a range of issues that impinge on the Government's entire economic policy, including its on-again/off-again privatization process which is riddled with problems. *Counterpoint* is committed to disturbing this hornets' nest in its next issue. ■

When sycophancy seasons justice ...

THE judicial system in Sri Lanka has come through a harrowing period. President J. R. Jayewardene who was the undisputed villain of the piece, manipulated the judiciary to accede to his every whim and fancy. When judges did not toe the line, "spontaneous" public opposition was orchestrated and, no doubt, paid for, in order to give them the most chilling of messages. That J. R. Jayewardene has survived in senile bliss the vagaries of successive regimes without the stark exposure of his ruthlessness and all-round perfidy, remains a sad indictment of the complicity of the different power-blocs that control the destiny of this country.

If Jayewardene's was a hard act to follow, the Late President Premadasa was in a league of his own! His innovativeness and indefatigability led to amazing new methods of stifling and stunting the judiciary. Though the main themes were the same -- Reward and Punish -- its variations were virtually infinite, but, of course, subtlety was not his strong point. Thus, it was that the Attorney General's Department became the plaything of Government, some judges and state counsel, appendages of political parties.

The People's Alliance rode in to power on the crest of a wave of public resentment and anger against these and other acts of corruption, nepotism and greed by the UNP in 17-years of misrule. Their election manifesto included the promise of sweeping changes in the Constitution in order to make it more democratic. The Presidential System was to be abolished as the first and most important step. Judicial review of legislation was to be introduced. Acts and Clauses that were



inimical to the protection of the fundamental rights of citizens were to be repealed. Offensive sections of the Public Security Ordinance, the Press Councils Act and the Parliamentary Privileges Act that impinged on media freedom were to be deleted. All these promises have yet to be realised. Some, it appears, have ceased even to be within the realm of the possible.

Interference within the Judicial Service

Though the Supreme Court Bench comprises 11 judges, only two are career judges who have risen from the ranks, so to speak. One of these is Justice Anandacoomaraswamy who has held judicial posts for over 35 years but is the most junior of the judges on the Supreme Court and who

will have only a few more months to serve. The other is Justice Wijetunge who was originally the President of a Village Council and became the Secretary of the Judicial Services Commission. From there it was one small step to the Appeals Court.

Most career judges begin at the primary courts or serve as Presidents of Rural Courts or as Magistrates. They spend a lifetime moving their families right round the country, only to retire virtually where they began. On today's Supreme Court Bench, nine judges have been taken either from the Attorney General's Department or the unofficial Bar. It is important that the Supreme Court has a fair blend of career judges, academics and attorneys, no the overloading that it now contains. The difficulty is that singling out persons from "outside" to serve on the Bench is

always fraught with danger. It has been said that either they were writing books appreciative of the family members of some Presidents or they were in the business of drafting the constitutions of political parties, and they have reaped the whirlwind. Instances where judges accepted promotions over their senior colleagues are legion.

The contrast between two brothers is a striking illustration of the "system" of promotions in the judiciary which defies any rational logic or precedent. Dr Asoka de Z Gunawardena who serves on the Court of Appeal and his brother Mr Upali de Z Gunawardena, six years his senior at the Bar, provide an interesting contrast. Justice Upali Gunawardena who joined the judiciary a quarter of a century ago is still a High Court Judge, while his brother Justice Asoka Gunawardena is soon to be the President of the Court of Appeal. If merit be the sole criterion, this is certainly wonderful, and a signal exception in the entire public service, but the basis of this assessment must surely be transparent.

The allegations of irregularities and favouritism by the Judicial Service Commission are extensive. Among these are claims that promotions are awarded to judges in an arbitrary and indiscriminate manner. *Counterpoint* has a list of over 30 such appointments which are allegedly irregular. In many cases, very junior magistrates have been appointed as District Judges, while more suitable senior judges await their turn and are informed that no vacancies exist. Occasions on which the two member quorum of the Commission has been violated have even been raised in Parliament. There is an instance where a judge was appointed as a magistrate as soon as she completed her training period which goes against due procedure. There are also some of the more

favoured judges who don't ever have to leave Colombo. For instance, one judge moved from the Juvenile Court to the Colombo Fort Magistrates Court to Campaha and back to Hulftsdorp. Another began at Hulftsdorp and worked her way from there to the Colombo Port, to Traffic Court and thence to Gangodawila.

There are over 10 vacancies in the District Judge Grade II cadre which cannot be filled as many of those serving in the District Courts as District Judges are relatively inexperienced and junior officers. There is no rationale or merit scheme by which these arbitrary promotions and preferential placements are justified or explained. In such a context, it is not unusual for a magistrate who has 8 or 9 years experience to wait in the wings while another occupies his/her rightful place. The other side of the same coin is that many District Judges are reduced to serving as Magistrates in the lower courts, no doubt for the same reason.

Many of these dubious practices and anomalies derive their legitimacy from the rules made by the Judicial Service Commission (JSC) under Article 112 subsection 8 of the Constitution and published in the *Gazette* on January 24, 1992. Many experts have pointed to the problems and contradictions contained in these rules, but the most troubling is Rule 9 which holds that any officer of the Sri Lanka Judicial Service other than a President of a Labour Tribunal can be transferred by the JSC to any court in the country be it District, Magistrate or Primary. Surely, this vests in the Judicial Service Commission an overwhelming centralisation of power to favour and discriminate, and against whose dictates there is no recourse of appeal or redress?

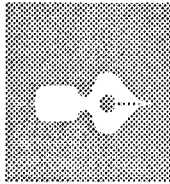
It is crucial that in a service such as the judiciary, impartiality, due procedure and transparency

must prevail. Otherwise, the very fabric of the legal system in this country will fray and tatter. The Minister of Justice, G. L. Pieris who had so much to say about transparency and propriety must realise that justice, like charity, begins at home! The solution is not, of course to dispense with the JSC, nor to have the Minister interfering, but to broaden the Judicial Service Commission, to create a consultative process and to foster transparency.

Many other issues remain, perhaps more mundane, but yet vital for a healthy service. The accounts of the Judges' Trust Fund, the (mis)allocation of official residences, the sale of land bought at concessionary prices from the state, the role of the Judges Institute, and so on. Unless and until the judicial service heals itself with a little help from the Government, those seeking justice in Sri Lanka may be forced to seek other venues than the courts, and this tragic path we have trodden too often in this country to remain apathetic while history repeats itself once more.

In this issue of *Counterpoint* we examine the state of the art of the judiciary in respect of some of the most recent developments that have taken place under the new dispensation of Chandrika Kumaratunga. Notable among these are the appointment of Sarath Silva as Attorney General, the proliferation of Presidential Commissions and their alleged antics, the Jeyaraj Fernandopulle affair and its ramifications of the independence of the judiciary, the alleged favouritism in judicial appointments, as well as a poignant account of the proliferation of defamation and criminal defamation suits by politicians and its impact on media freedom. In addition, our contributors examine the draft constitution as well as the Indian experience for dangers to be averted and lessons to be learnt. ■

The following judgement shows the Sri Lankan Judiciary in its strongest light. This pathbreaking and far-reaching ruling which held that a listener's fundamental rights were violated by the SLBC's sudden decision to close down the Non-Formal Education Service, is all the more significant as its architect, Justice Mark Fernando, may be one of those being marginalised by this administration.



Press Release by Free Media Movement

The Free Media Movement welcomes the decision of the Supreme Court of Sri Lanka announced today (May 30, 1996) to award compensation to a listener in acknowledgment of the fact that his fundamental rights had been violated by the Sri Lanka Broadcasting Corporation's stoppage of the Non-Formal Education Programme, popularly known as the "Nava Adhyapana Sevaya".

In this landmark judgement, Justice Mark Fernando writing on behalf of the three-member Bench, states, "it is well to remember that the media asserts, and does not hesitate to exercise the right to criticise public institutions and persons holding public office; while, of course, such criticism must be deplored when it is without justification, the right to make and publish legitimate criticism is too deeply ingrained to be denied." Not only was it clear to the Court that the "undue haste with which the 2nd Respondent [The Chairman, SLBC] acted suggested that the stoppage was not *bona fide*", Justice Fernando indicates that even greater injustice has been done to the persons who were working on these programmes.

in a hard-hitting indictment of the entire system at work at the SLBC, Justice Fernando writes, "I hold that the sudden and arbitrary stoppage of the NFEP [Non-Formal Education Programme] was not justified, and, if done without the consent of those responsible for its production, would have amounted to an infringement of their freedom of speech, besides being inconsistent with Government policy on Media Freedom."

The Free Media Movement wishes to draw the attention of the Minister and the Government to this ruling and its clear implications, which call for structural changes in the SLBC. The Court has not explicitly asked for the resumption of the NFEP only because of the delay in hearing this case which made such a direction "inappropriate", but the substance of the judgement supports the democratization process and participatory practices introduced and nourished by its then Director, Tilak Jayaratne. ■

The Fernandopulle Case and the independence of the judiciary

THE application to revise the Supreme Court decision in the Jeyaraj Fernandopulle Case has extremely dangerous implications for the independence of the judiciary. Why?

Article 126 of the Constitution gives the Supreme Court sole and exclusive jurisdiction in the area of fundamental rights. The court is also the final court of appeal in the country. It consists of between six and ten judges. The work of the court is divided. All the judges do not hear all the cases. In most instances a bench of the Supreme Court consists of 3 judges.

In certain special circumstances, the Chief Justice or two judges hearing the case, may feel that a larger bench should hear the case. A party to the proceedings may also apply for such a larger bench, and if the Chief Justice is satisfied that in his opinion the question involved is one of general and public importance, he may direct that a bench of five or more judges hear the case.

This is usually done before the case is heard or during the proceedings if an important or controversial issue were to arise. In any event, the convention has also developed that if a five judge bench is to be constituted the three judges hearing the case are consulted and appointed to the larger bench. This is to ensure that applicants and their lawyers do not engage in "bench fixing".

For example, in 1994, in *Hettiarachchi v Seneviratne*, leave to proceed with the application was initially refused. The petitioner sought to have the matter heard by a bench of five judges to enable further submissions to be made. The Chief Justice referred the case to the judges who had made the initial order. They granted the petitioner leave to proceed.

In 1995, in the case of *All Ceylon Commercial and Industrial Workers Union v The Petroleum Corporation* after the judgement was delivered, the petitioner sought to have the judgment revised. The



matter was considered by the same bench which had heard the case earlier and the application for revision was rejected.

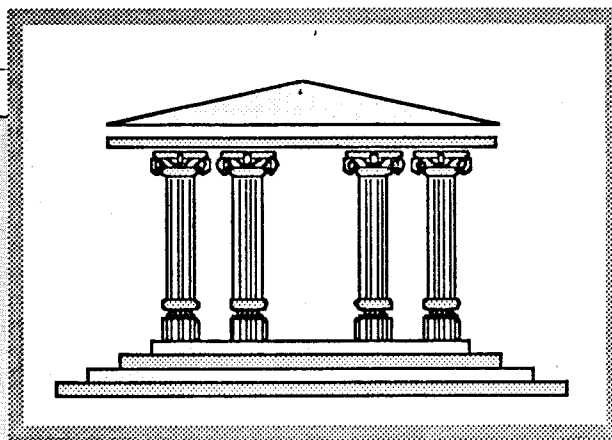
These practices are adopted *inter alia* to prevent independent judges from having their judgments reversed without their participation, by other judges on the court, who may be less impartial. Cases such as this will only consolidate perceptions of division on the Supreme Court between "pro-government" and "anti-government" judges, which, in turn, can only result in erosion of public confidence in the judiciary.

The application for revision in the Fernandopulle Case is disturbing for several reasons.

It seems as if the application was made when the Chief Justice was out of the country, and the matter speedily disposed of by the Acting Chief Justice, the controversial Tissa Dias Bandaranayake, during the Christmas holidays, before the Chief Justice returned. Why couldn't the matter have been left for consideration by the Chief Justice on his return?

The judges who decided the case, Justices A.S. Wijetunga, Mark Fernando and Priyantha Perera, who dissented, were neither consulted -- the matter was not referred to them for consideration -- nor were they appointed to the five judge bench which is due to hear the case in June. What necessitated this departure from established practice?

There is considerable pressure on the Bar Association to intervene in this matter, which is seen as an attempt by sections of the executive and the judiciary to intimidate independent judges. Junior members of the Bar Association are perturbed by the lack of strong leadership at the helm of the association. R.K.W. Goonesekere who appeared for Mr. Fernandopulle in the earlier case has declined to appear for him in the controversial revision application. The conduct of the bench and the bar and the Government will be closely watched as this controversial case commences in June. ■



A law unto themselves?

WHILE it is vital that the Constitution and laws of the country protect the independence of the judiciary, it is also important that judges do not think of themselves as *supermen*.

The judges' attitude to criticism of their judgments and performance is old fashioned and inconsistent with more liberal trends throughout the world. A Committee chaired by R.K.W. Goonesekere, appointed to recommend reform to the media laws of the country, has proposed the enactment of a Contempt of Court Act modelled on British and Indian legislation, in an attempt to liberalise and clarify the law on the subject. The controversial Supreme Court decision of Justices Mark Fernando and Dr. A.R.B. Amerasinghe in *In re Garumunige Tillekeratne* (the *Divaina Case*) which reflected a conservative attitude that has been abandoned in most modern democracies, made it clear to human rights activists and academics that the Sri Lankan judiciary left to itself would not follow a more liberal trend.

Last year, some judges who attended a conference on the Environment had walked out when a young State Counsel was about to address the gathering. The judges

considered it *infra dig* to listen to a lawyer who appeared before them in court. The logic of this argument is that a judge can never listen to a talk given by an Attorney at Law! Can judges only learn from other judges? This attitude is one of the reasons for the failure of the Judges Institute which has no links with the Faculty of Law or the Law College. In other countries, judges, lawyers and academics often meet together to discuss issues and new trends in the law. It is not surprising that given the attitude of judges in Sri Lanka, this hardly happens.

Retired judges have carried this insular and pompous attitude even further. They have decided that they should not serve on Commissions or Committees unless they preside over them. What is the reason for this attitude? Following this decision, former Supreme Court judge Justice M. Jameel resigned from the Official Languages Commission because Charles Abeysekere, and not he, was the Chairperson. Sixty years ago, Lord Atkin observed that

Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men (sic). ■

The draft constitution and the independence of the judiciary

Rohan Edrisinha

AS the Select Committee on Constitutional Reform flounders on, and public attention focuses on devolution, fundamental rights and the Executive Presidency, it is important not to forget other, less dramatic, but equally vital constitutional provisions. The protection of the independence of the judiciary, the institution which ultimately is the guardian of constitutionalism, must be a key objective of any good constitution. It is, therefore, disappointing that the Government's draft provisions released so far, fail to overcome the numerous defects in the present constitution, that have been highlighted by commentators and constitutional lawyers since 1978. Indeed, apart from a few improvements, it seems as if the Government has merely reproduced the present provisions on the independence of the judiciary.

There are three cardinal areas which need to be focused upon:

1. The appointment process.
2. Security of tenure.
3. Freedom from Executive interference and control.

The Appointment Process

The main shortcoming in the present Constitution is that judges of the Supreme Court and Court of Appeal are appointed at the sole and exclusive discretion of the President. There is no

ratification process like in the United States, nor is the appointment made on the recommendation of any institution or group of persons. The Draft Constitution provides for the Chief Justice to be appointed as at present, but requires the President to consult the Chief Justice with regard to the appointment of other judges of the Supreme Court and Court of Appeal.

It is surprising that the Draft Constitution does not provide for the appointment of all superior court judges to be made by the President on the advice of the Constitutional Council. The rationale for the Constitutional Council was that key public offices should be filled by a non-partisan or, at least, a bi-partisan body, consisting of persons holding important positions ex-officio. Judges of the superior courts should surely have been one of the obvious class of persons to be appointed on the recommendation of the Council. In Nepal, from where the idea of the Constitutional Council originated, judges are appointed by the Council.

The Draft Constitution's provisions in this respect are inadequate. Indeed, it could be argued that the proposals could be retrogressive in that the requirement that the Chief Justice be consulted, could serve as an incentive to appoint a "friendly" Chief Justice from either the Attorney General's Department or the unofficial Bar.

Another way of curtailing

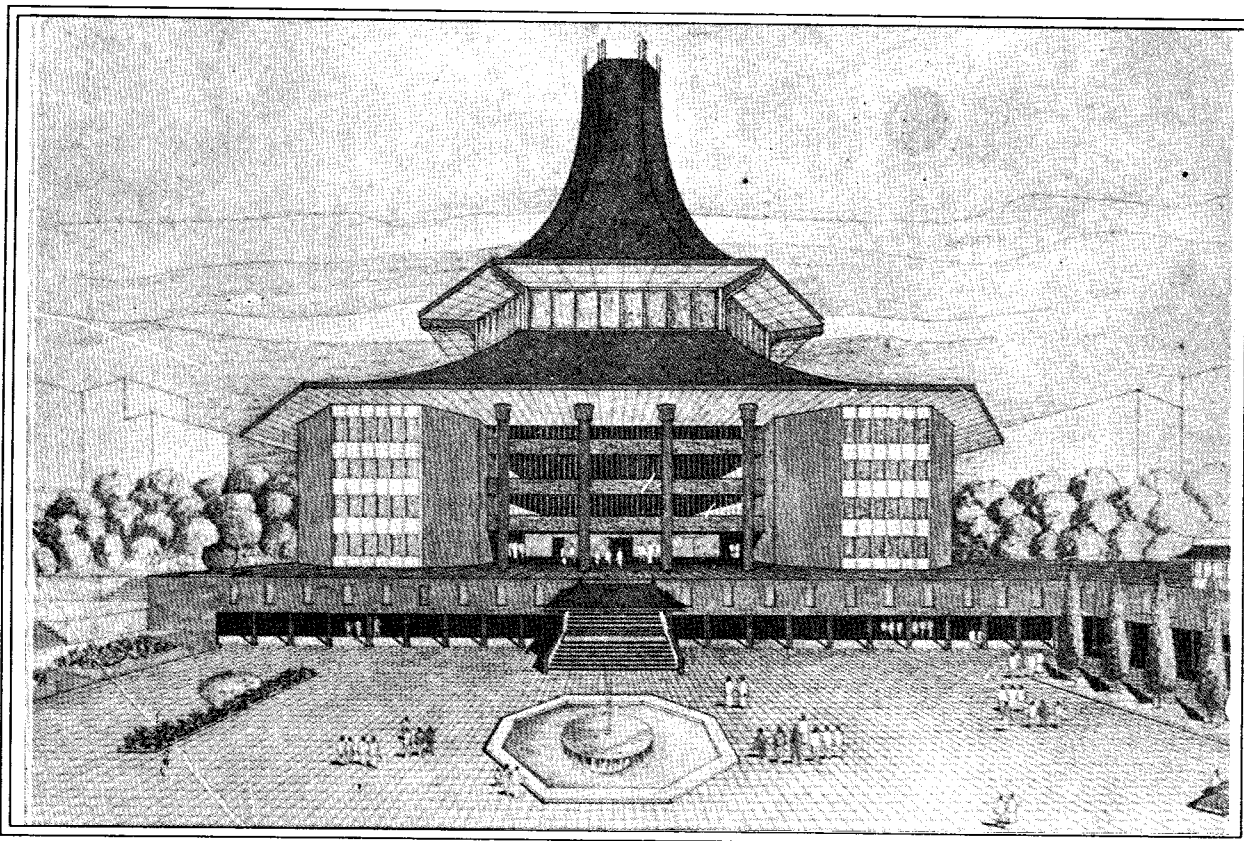
political interference at the appointment stage, is to specify basic qualifications for judges appointed to the superior courts. The present Constitution merely declares that

The Chief Justice, the President of the Court of Appeal and every other judge of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand. (Article 107 (1)).

The trend in a number of modern constitutions is to lay down basic qualifications. The Draft Final Constitution of South Africa, released in November 1995, provides for two options for the appointment of judges, both of which curtail the discretion vested in the President.

Option 1 focuses on constituting an independent and representative group to nominate the judges. It provides for the President to appoint judges on the advice of a Judicial Service Commission that consists of, *inter alia*, the Chief Justice, the President of the Constitutional Court, the Minister of Justice, two nominees of the advocates' profession, two nominees of the attorney's profession, a professor of law designated by the deans of law faculties, and four senators elected by a two-thirds majority of its membership.

Option 2 focuses on the qualifications of those selected. Judges of the Constitutional Court must be selected from among sitting judges, attorneys, advocates or lecturers in law with



at least 10 years experience, or persons "who by reason of training or experience" have expertise in the field of constitutional law. Judges of the Supreme Court should have ten years experience as either an attorney, advocate or lecturer in law at a university.

The Constitution of Nepal 1990, which was drafted with the assistance of several constitutional experts from across the world, including Dr. Neelan Tiruchelvam, in addition to providing that appointments should be made on the recommendation of the Constitutional Council, also specifies qualifications for judicial nominees. Article 87 (2) of the Nepali Constitution provides that "a person who has worked as a judge of the Supreme Court for at least five years is eligible for appointment as Chief Justice."

Article 87 (3) provides that *Any person who has worked as a judge of an appellate court or in any equivalent post of the judicial service for at least ten years; or has*

practised law for at least fifteen years as a law graduate, advocate or senior advocate; or who is a distinguished jurist who has worked for at least fifteen years in the judicial or legal field, is eligible for appointment as a judge of the Supreme Court.

Another way of curtailing the untrammelled discretion of the President with regard to the appointment of judges, is to provide for the ratification of such appointment by an independent institution like a Senate.

The draft Constitution's provisions with regard to the appointment of judges must be improved.

Security of Tenure

A surprising omission in the Government's draft proposals relates to the grounds for and the procedure by which judges may be removed from office. Since the J.R. Jayewardene Government harassed judges who withstood

executive pressure by hauling them before Select Committees of Parliament, and by allowing Members of Parliament to sit in judgment on the conduct of judges and even interpret the Constitution, one would have expected a new Constitution to prevent such a sorry spectacle from being repeated.

There is a powerful argument that a Select Committee of Parliament exercising what amounts to judicial power is unconstitutional. Though there is a certain amount of ambiguity in Article 4 (c), the interpretation which promotes the values of constitutionalism, is that the only exception to the principle that judicial power has to be exercised through courts and other institutions, is when Parliament may exercise judicial power directly with regard to its own powers and privileges. (Even this exception is controversial).

Justices Wimalaratne and Colin-Thome were subject to the indignity of having to persuade a

committee of Members of Parliament that they were not "anti-UNP." Later, Chief Justice Samarakoon's alleged misbehaviour was investigated by a Select Committee. The Chief Justice questioned the constitutionality of a Select Committee of Parliament inquiring into the conduct of a Supreme Court Judge. This highlighted the absurdity and dangers of such an exercise. The Select Committee rejected the argument based on the constitutionality of the Select Committee! The Members of Parliament adjudicated upon a difficult question of constitutional interpretation with regard to the meaning of Article 4. This was done notwithstanding Article 125 of the Constitution which declares that the Supreme Court shall have sole and exclusive jurisdiction with regard to constitutional interpretation.

It is totally unsatisfactory to have MPs usurping the role of the judiciary in the important area of constitutional interpretation and sitting in judgment on the conduct of judges. The draft Constitution, regrettably, will allow this to continue.

Freedom from Executive Interference and Control

Several provisions in the present Constitution which enable the Executive to interfere with or pressurise the judiciary are reproduced in the draft Constitution.

It has been pointed out by several commentators that having different ages of retirement for judges of the Supreme Court and Court of Appeal may compromise judicial independence. The draft Constitution reproduces the present provision which declares the age of retirement of judges of the Supreme Court to be sixty five years and judges of the Court of

Appeal to be sixty three. Since even the hint of executive intimidation must be ruled out, the argument that a Court of Appeal judge approaching retirement age, and who would naturally desire to crown his career with a seat on the apex court of the land, might be susceptible to executive pressure, warrants consideration.

The age of retirement of all judges of the appellate courts should be sixty five years.

Article 99 (1) and (2) of the draft Constitution, which reproduces Article 110 (1) and (2) of the present Constitution, can also serve to undermine the independence of the judiciary.

The paragraphs read as follows:

99 (1) *A judge of the Supreme Court or Court of Appeal may be required by the President of the Republic to perform or discharge any other appropriate duties or functions under any written law.*

(2) *No judge of the Supreme Court or Court of Appeal shall perform any other office (whether paid or not) or accept any place of profit or emolument, except as authorised by the Constitution or by written law or with the written consent of the President.*

These provisions may be subjected to abuse by the Executive and should therefore be amended.

The President's ability to require a judge to perform other functions can be used by a President to interfere with the judiciary in several ways:

- a) "friendly" judges can be appointed to various Commissions, thereby fostering the impression that there are pro-executive and anti-executive judges.
- b) "hostile" judges or judges who are perceived as independent by the Government, can be conveniently sidelined by appointing them to innocuous Commissions, thereby ensuring that they cannot sit on the court for a period of

time. To take an extreme example, if Justice X is "hostile", s/he can be appointed to a Commission to investigate sightings of UFOs in Moneragala and be asked to submit his/ her report in 3 months. This will effectively preclude him from hearing cases on the court for that period.

- c) The granting of the power to permit, or bar, a judge from performing any other function, to the President also opens up the possibility of the application of subtle pressure. If, as is rumoured to be the case at present, judges have to apply to the President for permission to leave the country, this too is inimical to a judiciary which is free from fear and favour.

Judges should not be liable to be called upon by the President to perform other functions. At the very least, the Chief Justice's concurrence should first be obtained. The Chief Justice should be entrusted with monitoring the acceptance of other offices and foreign travel, if such monitoring is considered necessary.

Another staggering omission, which must surely be an oversight, is the deletion of the present Article 106 which provides that the norm, subject to a few exceptions, is that all judicial proceedings are open to the public.

The provisions on the independence of the judiciary demonstrate the sad pattern that has unfortunately marked the PA Government's draft constitution in general. It contains marginal improvements in several areas, but no more. The promise of a radical departure, a totally new constitutional ethos compatible with the values of constitutionalism, a Third Republican Constitution which is a major improvement on the first two Republican Constitutions, looks set to be one of the major broken promises of the People's Alliance Government. ■

Omission of Commissions in law

THE Special Presidential Commission of Inquiry Act of 1978, a legacy from the Jayewardene Government, has aroused renewed concern. Not only are its provisions controversial, but the appointment of the Commissioners and the operation of the Act have been criticised as undermining the administration of justice, the independence of the judiciary and the Rule of Law.

It got off to a "flying start" when invoked to carry out proceedings against Sirimavo Bandaranaike, Felix Dias Bandaranaike, Nihal Jayawickrema and other key personalities of the United Front Government of 1970-77. The unfair measures adopted by Parliament to deprive these persons of their civic rights were eloquently recounted by Minister G.L. Peiris, in Parliament recently.

Quite besides, the merits of the Act itself, there is a powerful argument that the appointment of sitting judges as Commissioners, apart from having serious repercussions for the administration of justice also serves to undermine the independence of the judiciary and cause confusion in the mind of the average citizen for whom the legal system is intended to function. The confusion is further confounded when sitting judges are called upon to act as Commissioners into matters having a chiefly, if not solely, political flavour. Such proceedings will enmesh the judge in emotive political issues or create the impression that certain judges are the "political favourites" of the Government in power, a most unfortunate and unenviable position for a judge to be placed in. This is more so when the appointment is made at the sole discretion of the Executive and no specific procedure is spelt out for nominating or appointing a particular judge, whatever conventions are claimed to be followed.

Desmond Fernando, President's Counsel and former President of the Bar Association, in an address to the Inter-Parliamentary

Group reported in the *Sunday Times* of 18 February 1996, advocated both the repeal of the Special Presidential Commissions of Inquiry Act and a prohibition on sitting judges serving as Commissioners. His argument is that it tarnishes the reputation of those who accept appointment. He also states that in the first Commission appointed by the present Government, the Executive first made the appointment and thereafter the Chief Justice was a proforma consultant. The appointment was not after consultation with or on the recommendation of the Chief Justice. Mr. Fernando also alludes to the fact that after the Vijaya Kumaratunga Commission had commenced sittings, the President of Sri Lanka had publicly declared that she knew who had killed the late Mr. Vijaya Kumaratunga, thus highlighting the unhappy situation in which the Commissioners could find themselves.

While praising the fact that the Supreme Court has in recent years been strong in the area of fundamental rights litigation as in the Janagoshha and Wadduwa Cases, he decried sitting judges serving on Commissions stating that

the general point to be made is that it divides judges into two categories those who pick up crumbs from the executive and wag their tails are clearly the pet poodles of the Government. The others are watchdogs of the rule of law. The standing of the judiciary has been very seriously affected.

Nihal Jayawickrema, another "victim" of the Special Presidential Commissions of Inquiry Act, in an article published in the *Sunday Times* of 14 April 1996, calls for the repeal of the Act. He also refers to the Commissioners who carried out the inquiry against him as being handpicked by the Executive and granted special favours. Two of the three Commissioners were appointed to the new Supreme Court and found themselves way ahead in seniority and with extended terms of office. Some members of the Supreme Court sitting prior to its "reconstitution" lost their position without cause or compensation. The third Commissioner, a District Judge secured a "double promotion" to the Court of Appeal.

Recently ripples have been caused by the activities of some of the new Commissions. There is concern at the delay in the publication of the

report of the Vijaya Kumaratunga Commission.

The Commission of Inquiry into various malpractices, consisting of Justices Priyantha Perera, F.N.D. Jayasuriya and Hector Yapa has been accused of breaching parliamentary privilege by making certain pronouncements against parliamentarians. This arose as a result of a Commissioner stating that the Commission would not be intimidated by

juvenile chirpings emanating from Parliamentarians hiding behind the cloak of parliamentary privilege.

This led to several Members of Parliament raising the issue of a breach of Parliamentary privilege with the Speaker.

Controversy was also sparked off when it was reported that one of the Commissioners on the Kobbekaduwa Commission, Justice D.P.S. Gunasekera, a highly respected judge had resigned. A report in *The Leader* of 10 March 1996 stated that the Additional Solicitor General's passport had been impounded by the Commission. Justice Gunasekera who had still not resigned at the time was apparently unaware of such an order. *The Sunday Times* of 10 March 1996, in its lead story, reported a fiery exchange between Justice Gunasekera and the Chairman of the Commission, Supreme Court Judge Tissa Dias Bandaranayake. The one man show continued when Chairman Bandaranayake read out an order of the Commission explaining Justice Gunasekera's resignation, which had not been shown to the third Commissioner, High Court Judge Gamini Amaratunga. This prompted a walk out by Commissioner Amaratunga and his resignation from the Commission. There was great difficulty in finding a replacement.

The impounding of Upawansa Yapa's passport caused a stir in the Bar Association of Sri Lanka. Younger members of the Association were perturbed that the President, Mr. Daluwatte and his committee were not objecting more vigorously, and threatened to break away from the association. There was also mention of the matter being taken up with the Commonwealth Secretariat. Subsequently, High Court Judge Edussuriya was appointed to sit with Justice Bandaranayake on the Commission and the order impounding the passport of Upawansa Yapa revoked. There is speculation that the fact that lawyers and academics were to raise these issues both locally and internationally, scared the Government into relenting.

However, the damage has been done. To the

average layman, all these reports and expose's, at the very least, create discomfort. Are judges being unreasonably exposed to political controversies creating an impression of partisan thinking, and does the executive do justice to the system of justice by appointing sitting judges? Does not the role of a judge become quite confusing when Commission proceedings are conducted within court rooms or court complexes? What of a situation where judges on Commissions are provided additional vehicles and even back-up vehicles and security? Who pays the Commission and the Commissioners?

The present Government must be commended for permitting a degree of press freedom and public criticism, unlike in the past. Yet there is much that has to be done to ensure a fair administration of justice and the independence of the judiciary, especially by preventing political or other interference.

The Minister of Justice, Professor G.L. Peiris with his characteristic grandiloquence in public speeches regularly upheld the importance of the independence of the judiciary. His speech denouncing the deprivation of Mrs. Bandaranaike's civic rights was also hailed for its erudition. *The Daily News* reported recently that his address to the Commonwealth Law Ministers' Conference had received accolades from the participants and that he had been invited to prepare an international code of conduct for the judiciary. For the eloquence of speeches and professed intentions to be meaningful, practical and positive measures should be implemented first at home, in our little island. The logical consequence of Professor Peiris' eloquent speech on the deprivation of Mrs. Bandaranaike's civic rights must surely have been the repeal of the obnoxious legislation that enabled such action. The logical consequence of declaiming purple passages on the importance of the independence of the judiciary, must surely be to ensure that the judiciary is protected from interference from an executive in which one is the Minister of Justice.

Talk, even of the politically correct variety, is cheap. Minister Pieris' penchant for basking in the borrowed glory of fine speeches is well-known. What he needs to establish is that he has the courage of others' convictions! ■

The need to learn from the Indian experience

Kishali Adhikari

IN Hulftsdorp, a certain subtle tension underlies casual conversation. Much is said, much remains unsaid and ominous comparisons are made with a darker past.

Indeed, there is reason for such disquiet. Warning signals of tension between the Government and the judiciary has been present for some time. It was not so long ago that President Chandrika Kumaratunga somewhat rashly accused a particular Justice of the Supreme Court of giving discriminatory orders against her Government in the famous liquor licences cases. The allegation were factually incorrect as not one judge but the entirety of Supreme Court judges, excepting one who had been on leave at that time, had made the orders in question.

Hulftsdorp pondered over these remarks and braced itself for the storm that was to follow. It did not have to wait long. In the month of November 1995, a majority of the Supreme Court ruled that certain remarks made by the Deputy Minister of Plan Implementation and National Integration Jeyaraj Fernandopulle in Parliament could be used as evidence in a fundamental rights case against him. Justices AS Wijesingha and Mark Fernando gave the majority decision against Fernandopulle while Justice Priyantha Perera dissented on the basis that Fernandopulle's

comments were merely a "fighting reply" to jibes thrown at him by opposition members.

By that time, Justice Fernando had been subjected to unrestrained personal criticism by Deputy Minister Fernandopulle in Parliament. The Deputy Minister then filed an application seeking for a revision of his judgement by a fuller bench of the Supreme Court. Justice Tissa Bandaranayake who was acting Chief Justice at that time allowed the revision application without consulting members of the original bench who were also not invited to sit on the revision bench.

Acrimonious correspondence on these issues between Supreme Court Justices Mark Fernando and Tissa Bandaranayake has been an open secret in Hulftsdorp for some time. The letters revealed an animosity which titillated general curiosity but hardly served to inspire public confidence in the judiciary.

Further disputes in the higher courts were apparent when two commissioners of the Denzil Kobbekaduwa Commission resigned over personal disagreement with Justice Bandaranaike. The passport of a senior law officer of the land, Additional Solicitor General Upawansa Yapa was impounded by Justice Bandaranayake reportedly without the concurrence of the other two commissioners. It was explained that this was because the Commission wished to interview

Mr Yapa. Rumour mills began working overtime and even though Mr Yapa's passport was returned to him and he was appointed as Solicitor General, the damage had allegedly been done.

Judicial dissent of this nature does not spring forth unaided. Such bitter public carping over petty issues is not a normal part of the judicial process. For such a situation to occur in the functioning of our courts, executive interference in the judiciary is unavoidably pressured to a greater or lesser extent. This, Sri Lanka has seen in the past. Whenever a governments felt that the judiciary was asserting itself too strongly against the legislature or executive, it has acted swiftly and most often unscrupulously. Political manipulation of the judiciary has had a long history in Sri Lanka. Under the United Front Government in the seventies, relations between the court and Justice Minister Felix Dias Bandaranaike became strained when overtly political appointments were made to high judicial office. Parliament and the Constitutional Court clashed head on over the Press Council Bill when the legislature decreed that the court had no discretion to liberally interpret a specified time limit within which to determine the constitutionality of the Bill. The entire court resigned and the Government was compelled to appoint a fresh court.

Come 1978 and subjugation of the judiciary to the executive

reached a new low when the higher courts were "radically reconstituted" by the UNP government in defiance of normal constitutional traditions. Eight former Supreme Court judges were dropped from the new Court and three of their erstwhile colleagues demoted to the court of appeal. Subsequent developments were not for the better. The UNP Government delighted in showing open contempt for the Supreme Court by promoting police officers responsible for the violation of fundamental rights and paying their damages and costs. Procedural difficulties in judicial officers taking the oath of allegiance under the sixth amendment resulted in the police locking and barring the Supreme Court and the Court of Appeal and refusing entry to judges who reported for work. Houses of judges were stoned and vulgar abuse shouted at them by thugs.

"The judiciary would pose difficulties for the executive if they are wholly outside anyone's control", said former President JR Jayawardene, commenting on these incidents. Inevitably, political violence against the judiciary had an effect on the robustness of judicial decisions. Conscious of its constitutional responsibility to prevent abuse of power, the Supreme Court has however been even more conscious of the dangers of confronting a Government determined to get its own way. In many instances of blatant subversion of the democratic process, therefore, the Supreme Court has preferred to take refuge behind tortuous legal reasoning and ignore the real issues involved. Thus it was that

in 1982, when the UNP government made a rude break with time-honoured electoral traditions and substituted a referendum for a general election that was then due, the Supreme Court upheld the decision of the Government. In the subsequent

expelled unfairly, without any charges being served on them and without a hearing being given to them. The Supreme Court preferred to state that the Working Committee had no choice but to act with speed and take disciplinary action against the petitioners. The rules of natural justice were held not to be applicable in the instant case.

Apart from these three politically important decisions, the general manner in which the Supreme Court exercised its fundamental rights jurisprudence also revealed its innate reluctance to get embroiled in controversial political disputes. While the Court showed occasional bursts of sympathy in individual cases, on the whole its attitude was shaped by somewhat excessive caution and restraint.

The Nineties, however, saw a gradual change, with the judiciary taking a firmer stand on issues of democratic governance.

In 1993, the Provincial Governors Case decided that the appointment of a Chief Minister by a Governor was not a purely political matter and therefore immune from judicial review. The court claimed the power to decide whether the Governor's action was reasonable and stated that in the instant case, the appointments should be set aside and fresh appointments made. This case in particular, is interesting as the court could have taken the easy way out and pleaded political discretion as a reason for non-interference.

Similarly, in the Thilak Karunaratne Case, the Supreme



Tilak Karunaratne M.P.

Thirteenth Amendment Case, the Court was again politically correct in refusing to engage in a debate on the substantive merits and demerits of devolution while approving the amendments on the technical basis that they did not violate the unitary nature of the state. More recent times saw the Expulsion Case where the Court upheld the UNP decision to expel members involved in the abortive impeachment motion against the then President R Premadasa. The expelled UNP members including frontliners Lalith Athulathmudali and Gamini Dissanayake complained that they had been

Court declared that a member of a political party is not a mere cog in the party machine. The Court emphasized a fair balance between maintaining party discipline and the freedom of an individual party member to exercise his freedom of expression. This right should be allowed to him specially when it is used to call for democratic reform of his own party, the Supreme Court said, and ruled that the expulsion of SLFP MP Thilak Karunaratne from his party consequent to him giving a controversial press interview was not valid. It should be remembered, however, that this case involved a dispute within a Opposition party and not the Government unlike in the potentially explosive Expulsion Case.

In general, the Ninetiens saw the Supreme Court exercising a more activist fundamental rights jurisprudence. It showed itself more willing to hold the executive responsible for abuse of power. Several instances of judicial boldness in challenging the Government illustrates this point.

In Mohamed Faiz vs. The Attorney General, a Wild Life Dept. ranger obtained relief from the Supreme Court against two members of Parliament, a Provincial Council Member and three police officers. The Court pointed out that the assault, arrest and detention of the petitioner took place as a result of the police being pressurized by the politicians and held that they should all be held accountable. Even private citizens can be liable under the constitution if it is shown that they instigated officers of the State to violate the rights of citizens, the Court stated. In another landmark judgement, the *Jana Gosha* case saw the Supreme Court admonishing police officers for interfering in

non-violent criticism of the Government. Meanwhile, in cases of torture coming before the Court, the judicial attitude changed from neutrality to granting relief even in the absence of medical evidence. The State was held liable where a suspect was proved to have been assaulted while in police custody even if it could not clearly be established as to who had inflicted the injuries.

The PA government thus came into power at a time when the higher courts were struggling to free themselves from past legacies, and embark on vibrant judicial decision-making, much on the lines of the Indian Supreme Court. In that sense, it is unfortunate that conflict between the Government and the Judiciary should surface in such an obvious manner. It is also quite unnecessary. In the one and a half years of PA rule, strong judicial activism is arguably

of the Chief Ministers in dissolving Provincial Councils, stated the Court of Appeal.

Within days of dissolution, it had become apparent that this was a particularly ill-judged move by the Government. Some of the foremost lawyers and legal academics in the country had pointed out that the Constitution specified a clear procedure for dissolution of a council which had not been followed in the instant case.

In the face of such a clear consensus on the constitutional position, the judgement of the Court of Appeal cannot be described as startlingly activist to say the very least. Both this case and the Jeyaraj Fernandopulle revision application are due to come up before the Supreme Court in the middle of this year. Which way the Sri Lankan judiciary will turn, only time will tell. The

position in which Sri Lankan judges find themselves is in a stark contrast to their fellow judges in India.

Judicial history in India has had its dark moments. But executive manipulations of the Indian judiciary has in the main backfired on the Government. The Indian Supreme Court is a major force in the political process and the conflicts

that it has had with the Government over the past thirty years are legion.

The court possesses the power of overturning decisions of the Parliament and Cabinet which our court does not have. This power has been effectively used by the Indian Judges to curtail Governmental abuse of authority. In the *Folaknarh* case, the court ruled that Parliamentary power to amend the constitution was limited and in the later case of *Kesavananda Bharathi*, asserted that Parliament could not touch

Both this case and the Jeyaraj Fernandopulle revision application are due to come up before the Supreme Court in the middle of this year. Which way the Sri Lankan judiciary will turn, only time will tell.

apparent only in the Jeyaraj Fernandopulle case.

The liquor licences orders were negligible in terms of real political effect while the other decision worthy of note is the recently-decided Provincial Councils Dissolution Case. Here, the Court of Appeal ruled that the dissolution of the North Central and Sabaragamuwa Provincial Councils by their respective Governors acting on advice of the President was bad in law. The Constitution specifies that the Governors are bound by the advice

what was referred to as the "basic features" of the Constitution.

As pioneer of judicial activism, Justice PN Bhagwati observed this decision was obviously due to judicial fears that Prime Minister Indira Gandhi might use her monolithic majority in Parliament to tamper with the Constitution. Soon after this decision, three senior Supreme Court judges who constituted a part of the bench that heard the case were superseded and another judge appointed as Chief Justice.

Subsequently, in 1975, an obscure judge of the Allahabad High Court, Justice JMD Sinhar ruled that Mrs Indira Gandhi was guilty of corrupt election practices which disqualified her from holding public office for the next six years. The national uproar this decision generated led to the imposition of emergency rule by the Government thirteen days later. The Prime Minister appealed to the Supreme Court. On the very day that the appeal was to have been heard, Parliament passed legislation meant to put Mrs Gandhi's election beyond challenge. In an unprecedented show of judicial strength, the Supreme Court struck down a particular part of the legislation that directed the Supreme Court to allow Mrs Gandhi's appeal and to dismiss the cross-appeal of her rival.

During the emergency that followed, the Government embarked on a systematic process of stifling legitimate criticism of its rule. Strict censorship was imposed on the reporting of judicial and parliamentary proceedings. Preventive detention and the Maintenance of Internal Security Act (MISA) were calculated to terrorize the governmental opponents. But arbitrary detention and censorship was challenged by several High

Court judgements. Consequently, fifty six unpopular judges of the High Court were transferred without their consent. The

jurisprudence.

Innovative decision-making brought the Government to order in many areas of socio-economic reform. Public interest litigation made the Supreme Court in truth a forum to which the poor and the disadvantaged could come for relief. Judicial action was taken merely on the strength of a letter being addressed to court. Judges appointed a commission of inquiry to gather facts on matters that come up before them in a unique departure from tradition.

But executive manipulations of the Indian judiciary has in the main backfired on the Government. The Indian Supreme Court is a major force in the political process and the conflicts that it has had with the Government over the past thirty years are legion.

Supreme Court also came under threat with proposed constitutional amendments that suggested the creation of a judicial body superior to the Supreme Court.

The combined effect of these acts of political terror proves to be too much. The Supreme Court gave way before the Government in the Habeas Corpus Case. Here, the Supreme Court, including Justices Bhagwati and Channrachid ruled that no citizen has standing to challenge an order of detention on the ground that it is illegal or mala fide. Parliament then passed laws which specified that constitutional amendments were beyond judicial review. This indeed was India's darkest judicial hour.

Matters, however, changed after the Janata Party came to power in 1977. The pre-emergency position of the Supreme Court was restored and in the *Minerva Mills* case, the Supreme Court reasserted its authority by limiting Parliamentary power to amend fundamental constitutional features. Judicial activism received a temporary setback in the *Judges Case* when governmental policy of transferring rebellious judges was upheld by the Supreme Court but, in general, the Court fashioned for itself a new and revolutionary

The legitimacy of the Supreme Court among the Indian people grew in stature and has now reached its zenith with the Court decisively intervening in investigation into the "jain hawala" corruption scandal. In a controversial move, the Supreme Court ordered that the scandal which has implicated several major political and business figures should not be investigated under the authority of the then Prime Minister, Narasimha Rao.

The Central Bureau of Investigation (CBI) which had been dragging its feet on the inquiries for some time was taken to task by the court. The head of the CBI was ordered to report regularly to court on the progress of the investigations and was made personally accountable. Judicial attitudes in this issue has however come in for sustained criticism by some who feel that this time, the Supreme Court has gone too far.

Looking back at the past, the Indian Supreme Court can justifiably feel proud of itself in the manner in which it has responded to executive and legislative displays of political arrogance.

Perhaps Sri Lanka may be as fortunate at some point, even in the distant future. ■

Another case of all the President's men?

THE politicisation of the Attorney General's Department was one of the issues highlighted by the People's Alliance during the 1994 election campaign. Sunil de Silva's controversial advice to President Premadasa during the Impeachment crisis and Tilak Marapana's close links with President Wijetunga underscored the unfortunate trend, which commenced in the 1970s, of the Attorney General functioning as the chief legal advisor of the Government and not of the State. Worse still, individuals in power became personal patrons and the AG's department their lackeys. Infact, it is alleged that the AG's Dept. even helped pick candidates for the General Elections under Marapone's tenure, thereby functioning as an extension of the UNP.

The top echelons of the Department were viewed as so pro-UNP and responsible for justifying so many undemocratic acts of the Governments of 1977-1994, that the People's Alliance Government sought desperately for a "clean" person to accept the post of Attorney General. The Number 2 person in the Department, Shibly Aziz, apart from being considered part of the pro-UNP hierarchy in the Department, was tainted by his conduct as a virtual employee of

Airlanka and his role in the violation of the fundamental rights of a young executive which had earned him a stern rebuke from the Supreme Court. Douglas Premaratne was viewed as weak and ineffectual. Efforts were made to persuade Srinath Perera to accept the post, but to no avail, in an institution where the principle of seniority is firmly entrenched.

Sarath Silva, then a judge of the Court of Appeal, R.K.W. Goonesekere and Nihal Jayamanne were asked but they all refused. Finally, Shibly Aziz, after a long stint as Acting Attorney General, was confirmed in the post.

But as the People's Alliance grew accustomed to power and began to forget the principles it talked so much about when in opposition, the need for a person more personally loyal and beholden to the President at the helm of the Attorney General's Department was felt more acutely. No one doubted Shibly Aziz's qualifications and competence. In this context, he was perhaps too independent.

Yet he was sidelined as the debacle over the dissolution of the NCP and Sabaragamuwa Provinces revealed. A powerful Cabinet Minister then pressurised him to resign. The Government's treatment of Mr. Aziz was unfair. He should not have been appointed at all because of the Airlanka fiasco, but once he was he should not have been asked to resign as he had functioned effectively.



Former Attorney General Shibly Aziz

The Government's next step was also unprincipled and confusing. A sitting judge of the Supreme Court, who controversially, sits on a Commission to investigate the assassination of the President's husband, is appointed Attorney General. This is done at the same time as the Government proposes a salutary constitutional provision to bar ex-judges of the appellate courts from practising as Attorneys at Law.

Section 99(3) of the First Working Draft of the Constitution provides that
No person who had (sic) held office as a permanent judge of the Supreme Court or of the Court of Appeal may appear, plead, act or practise in any court, tribunal or institution as an attorney at law at any time.

The PA Government, therefore, by appointing Sarath Silva as Attorney General has violated its own new principle incorporated in Article 99(3). Hulftsdorp circles are bewildered by Sarath Silva's actions since the change of Government. He was one of the most respected judges on the Court of Appeal and his refusal of the post of Attorney General was seen as evincing a desire to climax his career as a possible Chief Justice. He had been appointed as President of the Court of Appeal despite the opposition of certain narrow minded, puritanical judges of the Supreme Court, who had tried to block his appointment due to various factors which had nothing whatsoever to do with his judicial competence.

His decision to accept appointment to the Commission investigating the assassination of Vijaya Kumaranatunga was the beginning of the decline. Justice Tissa Dias Bandaranayake was of the view that Justice Gunasekera should not sit on the Kobbekaduwa Commission as he had been a classmate of Denzil Kobbekaduwa for a period at school. If Justice Bandaranayake's dubious standard is accepted as correct, then Sarath Silva should never have sat on the Kumaranatunga Commission, as he and Vijaya Kumaranatunga grew up together in the same village in Katana.

There is speculation that the Chief Justice stakes too have a bearing on the appointment of the new

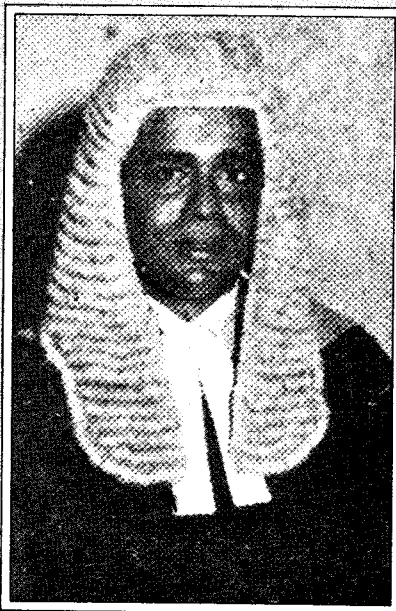
Attorney General. Though Chief Justice G.P.S. de Silva has several more years to serve, rumour was rife recently that he was offered a diplomatic appointment to induce an early retirement so that Bandaranayake J. could become Bandaranayake C.J. even for a few months. Thankfully, the Chief Justice withstood such pressure. When he reaches retirement age, however, the next in line in terms of seniority will be Justice Mark Fernando. Though his record on the bench clearly shows otherwise, powerful groups within the PA perceive him as pro-UNP. There is concern in legal circles that Sarath Silva will be elevated to the post of Chief Justice on G.P.S. de Silva's retirement, thereby pre-empting Mark Fernando.

Sarath Silva seems set to be made a pawn in a pathetic attempt to intimidate judges who have the integrity to withstand executive pressure. Are President

Kumaratunga and Minister Peiris trying to emulate the monkeying with the judiciary that President Jayewardene and his brother, H.W. Jayewardene engaged in in the late seventies?

The Constitutional Council was heralded by Minister Peiris as the mechanism by which the politicisation of important offices would be ended. The politicisation of the Attorney General's Department featured prominently in the election campaign. Surely the office of Attorney General is one that should be filled on the recommendation of the

Council. Why has this office been deleted from the list of offices to be appointed by the Council? If transparency is not to become blatant transgression of judicial norms, Minister Pieris must begin to put his money where his mouth is, and soon. Over to you Mr. Pieris? ■

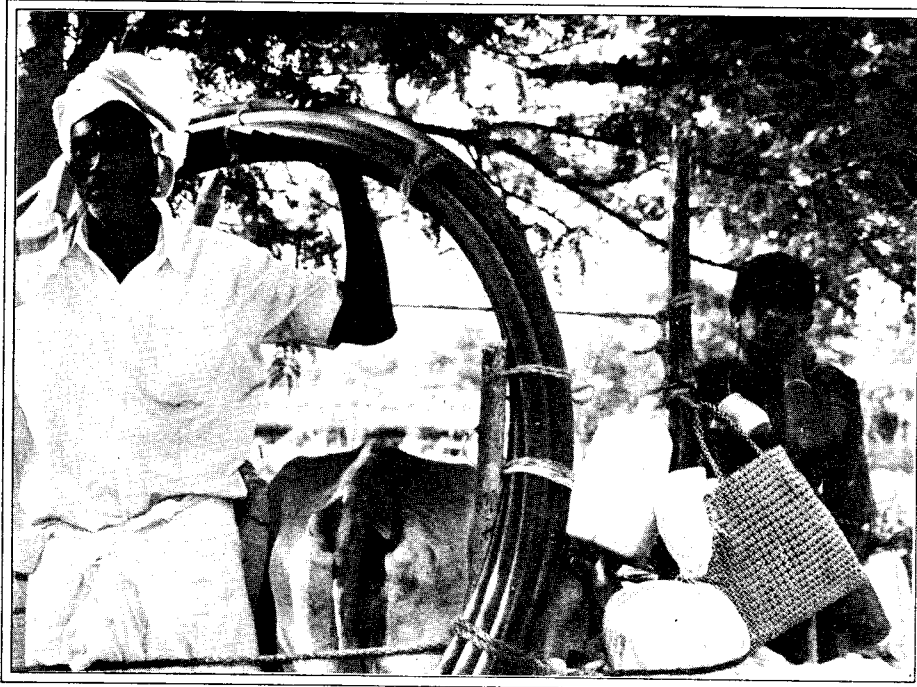


New Attorney General Sarath Silva

War-weary, yet afraid to hope . . .

Journalists were flown in to the Jaffna Peninsula for a day in mid-May where they were given a "guided tour" of the area. The return of civilians to their war-ravaged homes was hardly the triumph or renewal of faith in the military that it was touted to be. Just as the LTTE made much of the people leaving the peninsula in

December, as having "voted with their feet", the Government echoed the same refrain on their return in May. Neither of the protagonists in this bloody war appear to have any real respect or concern for the people, and are using them as pawns in their deadly power-play.





Morale boost at astronomical cost



Waruna Karunatilake

FOR the Tamils, the Jaffna peninsula is the citadel of Tamil civilisation and power. In recapturing the Peninsula for the first time in over six years, the Army has denied the Tiger rebels their prime psychological and strategic procession seriously denting Velupillai Prabhakaran's dreams of a separate Tamil nation.

It took two major operations to recapture the peninsula and cut it off from the northern mainland. The first, Riviresa One, launched in early October last year took 50 days to recapture the Valikamam area of the peninsula, including Jaffna town. The casualties on both sides were the biggest ever in a single military operation. The Army used the policy of maximum fire-power to overcome heavy Tiger resistance using six million rounds of small-arms fire and 87,000 rounds of artillery mortar and tank-gun shells.

The financial cost of that operation was staggering, but was

a major morale booster for the troops. The Government was lucky in more than one sense. With the massive power used, if the LTTE had not forced the civilians to flee ahead of the Army, large number of civilians could have been killed in the operation similar to the killings of Operation Pawan launched by the Indian troops in 1987. The heavy civilian casualties in Operation Pawan, estimated at around 6000, alienated the population in the peninsula, and the IPKF never recovered from that allowing the LTTE to be seen once again as the people's saviours. The other major stroke of luck was the failure of the North-East monsoon allowing the Army to use its armour all the way. If the monsoon rains had broken then the armour would have been useless, forcing the soldiers to fight without the help of the battle tanks and the armoured personnel carriers which played a major role in breaking through heavily fortified Tiger defences.

By the yardstick of Riviresa One, Riviresa Two launched on

April 19th, the first anniversary since the rebels broke off a 100-day ceasefire and peace talks with President

Chandrika Bandaranaike Kumaratunga's government, was a cakewalk for the military. What was controversial was the timing. With the Indian General Elections just two weeks away it would have been prudent to postpone the operation. The Foreign Ministry did bring up the issue but was overruled by General Ratwatte. It appears that prudent statecraft had to be overlooked in favour of astrological advice. However, at the end of the day the Government's luck held.

An estimated 20,000 troops moved into the rebel-held areas of the peninsula from four different directions. Two columns broke out from positions captured during Riviresa One and moved southwards towards Chavakachcheri, the main town in the Tennamarachchi division of the peninsula. Another column moved in a northern direction from the Elephant Pass Army

Camp which is situated at the neck of the peninsula, cutting off the main Jaffna -- Colombo road. The fourth column moved South-East from the sprawling Palali air and army base towards the Vadamarachchi region, aiming to capture Sea Tiger bases in the coastal towns of Valvettithurai and Point Pedro. But the main thrust was to capture Kilali, to cut off the Peninsula from the mainland.

It is from Kilali that both the rebels and the civilians have been crossing the Jaffna lagoon to and from the mainland since the Army established a camp in Pooneryn and cut off the Pooneryn causeway five years ago. A week after the offensive was launched Kilali was captured, effectively cutting off the LTTE's withdrawal line. The LTTE appears to have decided against putting up resistance as it did during Riviresa One in a bid save its cadres. Most of its military hardware was pulled out of the area before the operation was launched, but still the fall of the peninsula is a major military setback. The LTTE lost half a dozen training camps and a number of weapons factories as well as a major part of its transportation fleet. The Army also captured a major food storage facility. The Army suffered only six dead and 27 injured while claiming that it had killed 250 rebels. However, the LTTE admits to only nine deaths.

For the Government the real battle has just started -- winning over, or more to the point, not alienating the population. The Sri Lankan Army has come a long way since the war started 13 years ago. It is now a more disciplined, battle hardened force which does not go on the rampage at the slightest provocation. By all accounts the Army maintained its recently acquired reputation as a clean fighting force. The civilian casualties, as far as one can figure out, have been within a single digit. The only blemish was a single

report of rape near Chavakachcheri. Here again, the commanding officer not only immediately arrested the soldier but also paraded him publicly to reassure the civilians. However, the real test of the soldiers will be when the Tigers begin ambushing the Army within the peninsula. There is no way the Army can cut off the peninsula totally. The Tigers will infiltrate and re-introduce their pre-1985 tactics: landmine warfare and ambushes in crowded places to provoke the Army into harassing the civilian population. The Army would be smart not to station new or nearly-new soldiers in the peninsula, despite the constraints of manpower. One massacre of civilians would be enough to change the perception of the Tamil civilians, and the Government would take years to recover from such a setback.

The unimaginative thinking on the part of the military establishment is baffling. Soon after Riviresa Two, 72 Tamil youth suspected of being rebels were airlifted to Colombo for detention. This has created a backlash among the people, considering the notorious reputation the Boossa Detention Camp has among both the Tamils and Sinhalese. Why these youth could not be detained in the peninsula itself and their families allowed access defies logic. At least the Army realised their mistake quickly before more damage was done. Plans to shift more suspected youth to Colombo were cancelled, and they would be well advised to shift those in Colombo back to the peninsula immediately. It is this kind of decision-making without looking at the repercussions that will dent the credibility of both the Government and the Army.

The Army also seems to have come to the mistaken conclusion that the civilians are thrilled to see the Army. The truth cannot be any further than that. There is no doubt that the civilians are happy to

return to their homes but the fact is that, after 13 years of bloodshed, they are sick and tired of the uniformed kind. The best the Army can do in this situation is to give the people as little trouble as possible, and for the Government the best option is to move into the rehabilitation phase immediately despite the constraints. Until the Army opens a land route to the peninsula, which appears to be its next priority, major reconstruction work will be impossible. There is no way the necessary hardware can be moved to the peninsula by sea alone. The shortage of skilled labour and professionals will also hamper such work. The Government would be making a major mistake if it takes Sinhalese workers to fill the vacuum. The Tamils would fear any such move as another attempt by the Sinhala government to colonise their areas.

However, what is important is the perception that progress is being made in this sector. The Army's handling of Vavuniya after 1990 would be an excellent example of how to go about rehabilitating a war-torn area. The late General Kobbekaduwa and his "Hearts and Minds" expert Brigadier Devinda Kalupahana transformed the area from a ghost town to the thriving trading post it is now. The plus point of the Army initially handling redevelopment is that it does it much more efficiently than the red-tape bound bureaucracy. However, it is equally important that the administration is handed over gradually to the civilians as it was done in Vavuniya. It would be a disaster if the Army tries to reinvent the wheel in Jaffna where there is a strategy already successfully implemented. The key to this is to post the right officers in the peninsula as soon as the security situation allows it. The Government should realise that there are some army officers who are good at fighting but are not good at the second phase of such a war

-- which is the rehabilitation and hearts and minds phase. The proven incompetence of the current government would be the major drawback on this issue and it may take the Army many years before it can let go of the civilian administration.

For the LTTE the loss of the peninsula is perhaps the biggest setback since the IPKF drove them into the Mulaitivu jungles in the late 1980s. The rebels re-took control of the Jaffna Peninsula and most of the Northern province after the Indian Peace Keeping Force (IPKF) withdrew from the North and East of Sri Lanka in March 1990. The Government of President Ranasinghe Premadasa which was holding peace talks with the rebels at the time handed over control of the two areas to the rebels without a bullet being fired. In June 1990 the rebels withdrew from the talks and re-started the war. The Army had to painstakingly regain every inch of the North and East. The Army concentrated on taking control of the politically important Eastern region giving the rebels freedom to set up a virtual mini-state in the North with the Jaffna Peninsula being its crown jewel. The LTTE set up a parallel administrative service to that of the Government and an LTTE police force handled civil crimes while LTTE-appointed judges manned the courts. A widespread and highly efficient tax system was introduced earning the rebels millions of rupees a month to sustain their war machinery. No outsider could enter the North without a visa from the LTTE.

The Peninsula also contained a substantial part of its training facilities as well as manufacturing plants for war material such as mortars and anti-personnel mines. With free access to Jaffna hospital, it had good medical facilities for its cadres and diversion of food supplied by the Government to the civilians gave them more than

enough food for their cadres. Both free of charge.

The loss of the peninsula completes a "Annus Horribilis" for Prabhakaran.

He has not only lost his most precious possession but also a large number of battle-hardened cadres. The LTTE lost close to one thousand cadres in two abortive attacks last year. The Army claims it killed 2500 more during Riviresa One. The Navy with the help of the Indians blew up a ship off the Eastern coast carrying a large quantity of arms, ammunition and explosives for the rebels. To add to his troubles he lost the sympathy of the international community when the rebels broke off the peace talks and the ceasefire, and re-started the war on April 19th last year.

Then it looked as if Velupillai Prabhakaran's suicide fighters were going for the final push in their battle to set up an independent state in the North and East of the island. The unexpected breakdown of the peace process caught the military ill-prepared for war and the rebels scored a series of successes rattling both the military and the political establishment. Less than one hour after informing Sri Lankan President Chandrika Bandaranaike Kumaratunga that they were pulling out of the peace process the rebels sneaked into the Eastern Trincomalee naval harbour and blew up two naval vessels. Just three days later, the rebels stunned the country by shooting down two Air Force transport aircraft within 24 hours, using anti-aircraft missiles for the first time, killing close to a hundred soldiers in the process. In the first ten days of the war the LTTE had destroyed three naval craft and two aircraft.

However, Prabhakaran appears to have badly misread the reaction of President Kumaratunga and the single-minded commitment of General Ratwatte. The Government

reacted with the biggest arms buying spree in the history of the country. Hundreds of millions of dollars were spent on new attack aircraft, helicopter gunships and naval vessels. The Army was supplied with new artillery and thousands of new recruits as the intensity of the war increased dramatically. However, the biggest change was in tactics. For the last 12 years the Government has given priority to stabilizing the Eastern Trincomalee Batticaloa and Amparai districts, arguing that by depriving the rebels of the control of the Eastern Province, their claim for a separate state can be undermined. However, this tactic allowed the rebels a free hand in the Northern Province allowing the rebels the freedom to recruit and train cadres, unload shipments of weapons and collect millions of rupees through taxing goods and services. The new Deputy Minister of Defence Colonel Anuruddha Ratwatte argued successfully that the war must be taken to the North even at the cost of the destabilisation of the East. Moreover, he used persuasion and threats to push a reluctant army to carry out his plan. The rebels' only success for the year was a spate of spectacular attacks on the capital. The main Oil storage facilities just outside the city were set ablaze in a midnight commando style attack, and the Central Bank was destroyed with a massive 400-pound lorry bomb killing 89 people and injuring a mammoth one thousand others.

Both sides have had to pay a heavily for a year of intense fighting. The military says it has killed over 3500 rebels and injured thousands more. The military lost 2019 men, and over 5000 soldiers have been injured. 173 policemen were also killed in rebel attacks. Civilians of all communities continued pay a high price. At least 1013 Civilians are officially known to have been killed in rebel attacks and military strikes. ■

How the law is used to silence the truth

Victor Ivan

IMAGINE that you are the editor of a responsible newspaper. If you receive sufficient factual information about a great wrong committed by a powerful person what should you do as the responsible editor? If this question is directed at society at large there is no doubt that they will expect you to place all the facts before the public.

Yet, this is not such an easy matter. Even though it is the duty and responsibility of an editor to place such facts before the public, the legal situation that he has to deal with will undoubtedly strike fear in him. You will surely ask why one should be afraid of the law if one has sufficient evidence to prove that what has been written is the unvarnished truth.

I am not saying that our court system is biased. But neither can I say that it is always impartial. The verdict depends on the nature of the judge. It will certainly be in your favour if the judge is well versed in the law and abides by its rules. But if the judge is lured by the influence of a contending party, then you are sure to be in trouble. It is true that you can seek redress in the higher courts if justice is not meted out in the lower ones. But you have to have the wherewithal to do so.

Here's one of my encounters with a former Minister of Coconut

Industries.

Minister of Coconut Industries Indradasa Hettiarachchi was running a Housing Cooperative with the help of some of his political stooges. The Minister was the President of the Cooperative. He was in the business of purchasing land from the Land Rehabilitation Commission for an extremely low price with the help of J.R. Jayewardene, dividing it into smaller blocks, and selling the lots for a higher price. According to the concocted constitution, those who purchased land had to be members of the Housing Cooperative. According to the real Constitution, only those who did not possess land had the right to purchase it. While one

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person could possess only one block of land, the sale of the block was also prohibited.

But while the Minister's followers had purchased land in the name of all their family members, most of them had resold it for exorbitant profits.

It was required of all those who purchased land that they also paid,

aside from the money for the land, a certain amount to a development fund being run by the Minister. In the first phase of land sales, each purchaser had to contribute Rs 1000 to the Development Fund, in the second phase, the amount was Rs 5000. In the third phase, it was 25% of the value of the land, and in the fourth phase, it was 33% of the value of the land. The Minister's Development Fund had collected Rs 39 Lakhs in this manner.

Based on this information I had received, I published a lead story under the heading "Coconut Minister in Land Offence" dealing with the corruption in the Housing Cooperative under the Presidentship of the Minister.

The Minister then took action against the *Ravaya* not only on the basis of parliamentary privilege but went on to file a criminal defamation case against the paper.

I gave a statement on the matter to two officers from the Criminal Investigation Bureau who came to the *Ravaya* office. It was clear that they were more interested in collecting evidence against me than in finding out facts about the incident.

Even after the CID documents had been sent to the Attorney General, it was clear that there was no investigation as to whether the CID had conducted a fair inquiry into the matter. And, in the spirit of the Minister, the Attorney General also filed a case of criminal defamation against me

in the High Courts.

The *Ravaya* is not a rich newspaper, so we had to seek the support of a legal aid organization to appear on our behalf in the case. I discovered through this incident that though there were many legal aid organizations, what they were doing was not providing a competent lawyer who is able to conduct a case successfully, but one who was merely complying with certain principles dictated by another. The lawyer they provided us with was not incompetent, but he wasn't astute enough to grasp the complexities of the case.

The first witness to be called forward in the case that was heard before Shirani Thilakawardena of the High Court was the Minister himself. It was evident that my lawyer was not making optimum use of a host of evidence he possessed against the Minister. Realizing that I would be in trouble if the case went on this tack, I requested my lawyer to step down the very next day. As he was a senior lawyer, it was difficult to bring forward a new lawyer at this juncture, and I represented myself in court for a few days.

It was clear from the beginning that the judge was partial towards the Minister. Even though she had no wish to make me the guilty party, it was obvious that she didn't want to get the Minister into trouble.

She refused to admit that it was a crime to take money for a development fund from those who had purchased land from the Minister, and pointed out all the good services the Minister had rendered to the public through the fund.

Even if all the Minister had done was good deeds through the money he had collected from the Fund, it is contradictory to all Cooperative laws and all other laws of the country to charge

money for a fund external to the Housing Cooperative operations from those involved in purchasing Housing Cooperative land. Furthermore, the Minister had used the money from the fund to boost his political image. In that sense, it was used for personal gain, it was a corrupt act, and it was illegal. It was evident that the judge was trying her best to keep the case away from these central issues.

After a few days, I hired another lawyer, and considering the judge's partiality towards the Minister and her inability to mete out justice, I also requested that the case be heard from the beginning before another judge. My lawyer, after going through the case reports, also concluded that the judge had been partial.

We discussed the case with a prominent lawyer in the country. He told us that it was difficult to win a case in the High Courts on the basis that the judge had been partial, however true the case may be, and that one judge will never go against another judge. He said it was wiser to use some other

We discussed the case with a prominent lawyer in the country. He told us that it was difficult to win a case in the High Courts on the basis that the judge had been partial, however true the case may be, and that one judge will never go against another judge.

technical point for an appeal. Actually, my lawyer had by then found a point which could be used for an appeal. During the period in which I had no lawyer, the judge had procured from me an admission which could affect the whole case. Based on this, the appeal for a fresh hearing before another judge was rejected. We

were compelled to challenge the decision of the Court of Appeal and take the case up to the Supreme Courts. It was the conclusion of the Supreme Courts that the High Court inquiry had been unconstitutional. It was concluded that the judges had failed to mete out justice in the Court of Appeal, and that it was not done to inconvenience the accused for something he was not to blame. Hence, I was cleared of the charges of criminal defamation. So it is true that justice won after a long process. But what would the outcome of the case have been if I hadn't had the perseverance to go through this process?

While the case was in the Court of Appeal, the Commissioner for Cooperative Development was conducting a special inquiry into the Horana Housing Cooperative on the instructions of the Minister of Cooperatives. The outcome of the inquiry was that the Horana Housing Cooperative had not abided by Cooperative rules and regulations in the utilization of land and funds. The Commissioner concluded that

land had been sold under unconstitutional conditions and that the Development Fund that had been conducted outside the Housing Cooperative activity was illegal. I had said the same thing in my newspaper report a long time before this. But I had to face a case of criminal defamation for the sin of presenting facts to the public. And, until after a long legal rigmarole,

I never received fair treatment even from the courts.

This second experience I am going to relate is graver. It is also unpleasant. It happened during the time when President's Counsel Thilak Marapone was Attorney General.

Our attention had been directed towards the former

Railway General Manager W.A.K. Silva (now out of the country) by stories of illegal activity carried out by him at the Department of Railways. Even though W.A.K. Silva was a very corrupt official, he was very powerful and had close connections with former Presidents R. Premadasa and D.B. Wijetunge. There was no obstruction to his unscrupulous activity because he was a close associate of these government heads and also because bribes were seeing their way into the pockets of the Minister of Transport and high officials at the Ministry.

The Railway Department had a joint project with the Australian John Holland Company for producing concrete sleepers. A dispute arose between the company and the Railway GM on a statement made by him that John Holland owed him a 25% commission if payment for the concrete sleepers produced up to then was to be completed, and that a payment of Rs 30 per sleeper would be charged by him for each sleeper produced thereafter. We were able to get hold of a fax communicated to the local group of the John Holland company by a group affiliated to John Holland in Australia. The fax included startling information pertaining to the amount of money John Holland had been paying the Railway GM as commissions for dealings between the Railway Department and John Holland. With the information included in the fax, we published a detailed article in the *Ravaya* under the heading "Railway Boss asks for Women along with Commissions".

The GM Railway, upset by the disclosure, and to prevent the case being brought up in Parliament, filed a case of defamation against me at the Colombo District Courts with a request for compensation amounting to Rs 50 lakhs. When

an Opposition Minister raised the issue in Parliament, it was the Minister of Transport who pointed out to the Speaker that the case was already before the courts and that discussion of the issue must not be allowed.

Mr. Silva, not satisfied with a defamation case, also worked

He told me that no wrong had been done by him to the girl, that she had a bad character and that even a medical examination had failed to ascertain proof of rape.

towards a criminal defamation case. As customary, a CID officer procured a statement from me. Even though the Attorney General had received the CID report, he showed no enthusiasm to bring the case on.

After the appointment of Mr. Thilak Marapone as Attorney General, I had angered him through a certain incident.

We had published a special feature in *Ravaya* titled "The Law approves the Rape of Children by the Powerful" based on facts gathered by us of an incident where a case against a 65-year old Senior Police Superintendent who had raped a 11-year old servant girl had been called off by the intervention of the Attorney General in spite of the existence of abundant evidence against the guilty party. We had also requested our readers to write in to the Attorney General expressing their disapproval of this decision.

As soon as the paper was out, Mr. Thilak Marapone contacted me by 'phone. First, he reminded me of an old association between us when I had appeared before the courts as an accused in the 1971

insurrection. Thilak Marapone had then been in the Bar Association of Colin Thome who conducted the inquiry. Among others in that Bar Association were Ranjith Abeysooriya and the present Attorney General Sarath Silva. I told him that bygone incidents were of no importance in this matter, and that I hadn't written the story because of a personal grudge, but because of the injustice dealt against the 11-year old girl.

He told me that no wrong had been done by him to the girl, that she had a bad character and that even a medical examination had failed to ascertain proof of rape.

When I told him that I was not ready to believe that she was guilty, and that the said medical reports were in front of me at that moment, the noise on the other side subsided at once.

That *Ravaya* article succeeded in creating public outrage and persistent publication against the Attorney General. The Attorney General was also compelled to reconsider the case of the 11-year old girl.

Either because of the Attorney General's grudge against me regarding this matter, or the friendship between the GMR and the Attorney General, or because of the President's influence, the Attorney General brought a case of criminal defamation against me based on evidence that had so far been put aside.

But before filing the case, the Attorney General had to take off the records certain evidence that could work against him in the inquiry. By this time, an inquiry was being conducted into the assets of W.A.K. Silva before the Bribery Commissioner. If, at that juncture, the Attorney General had brought forward a case of criminal defamation against me to the effect that I had accused the GM

Railways of bribery, it could itself have proved that he was guilty.

Whatever the reason, the Attorney General needed to call off the inquiry now before the Bribery Commissioner. It is clear that President also D.B. Wijetunge wanted this.

So the President and the Attorney General spoke about the case against W.A.K. Silva with the Bribery Commissioner. She was also requested to inform in writing to W.A.K. Silva that there was no evidence for the case to be continued.

This coercion didn't please the Bribery Commissioner. She called for the papers on W.A.K. Silva's case and stated as follows on page 29: "*The President and the Attorney General have on several occasions inquired verbally about this case from me, and they have also asked me whether there was any possibility of closing the case, and have also requested me to inform the accused in writing that there was no evidence against him. Please present a certified copy of these documents to me as I have to investigate all the documents.*" -Nelum Gamage, 12.11.93.

It is because of this note that the Bribery Commissioner was sacked and posted as an Additional Secretary in the Ministry of Justice. She was removed from the post of Bribery Commissioner on the 21st or 22nd of December. It was on the 23rd of December that the case against me on the criminal defamation of W.A.K. Silva, of which the documents had been rotting in the AG's Department for so long, was approved for hearing.

Suranjith Hewamanne who appeared for me before the Maligakanda Magistrate on the 20th of May 1995 presented objections against the case on two counts.

He requested the courts to call

off the case on the grounds that according to articles 480 and 481 of the Penal Code that the Attorney General's approval was essential for filing a case, and that such an approval was not included in the legal documents, that a clear certificate was necessary for such

The Magistrate was not pleased with the conduct of the Attorney General on this matter. In his verdict, the Magistrate condemned the action of the Attorney General, and he had to later pay for his forthrightness.

a case in such a court, without which the court had no power to accept a case and issue subpoenas.

The prosecutors stated that written instructions had been received from the Attorney General, and that it had not reached the Arbitration Board because there was ample evidence against the accused.

As neither the Arbitration Board Act, nor the Attorney General's approval had been presented in court, the magistrate stipulated a date for their submission. He stated that initial evidence would be considered only on submission of the documents.

The next day, the cat was out of the bag. Aside from presenting the Attorney General's approval, the prosecutors also presented a statement by the Attorney General dated 27th May 1994 to the effect that indictments had been presented against the accused in the High Courts.

When the Attorney General has presented indictments to the High Courts, the Magistrate Courts are not authorized to carry out an inquiry on the same case.

By the rule of law, a Arbitration

Board Certificate is required before an inquiry can be made into such a complaint. The Attorney General was in trouble because he had violated this vital condition in bringing forward the case. So it was essential for him at this juncture to bring forward a trump card such as this to exploit his powers. Even though the prosecutors stated that the case had been presented to High Courts by then against the accused, we later discovered that such a case had not been filed by that date.

The Magistrate was not pleased with the conduct of the Attorney General on this matter. In his verdict, the Magistrate condemned the action of the Attorney General, and he had to later pay for his forthrightness.

The Magistrate on this occasion was Mr. E.A.P.R. Amarasekara, the then additional Magistrate of the Maligakanda Magistrate Courts. A lawyer in the Judicial Service later told me that Mr. Amarasekara had been transferred to Kabethigollewa after his verdict condemning the Attorney General. Mr. Amarasekara was not partial to me in the case. He was merely a law abiding magistrate. But the Attorney General exploited his powers because he was angered by this verdict, and Mr. Amarasekara was posted to remote Kabethigollewa. The lawyer who related this story to me said finally, "Don't write anything about the fact that Mr. Amarasekara was transferred to Kabethigollwewa. If you do so, it is you who will be affected, not him. If this incident gets publicized, any judge will be wary of giving a verdict in your favour, however much evidence there is".

It need not be said that Mr. Thilak Marapone's mode of action does not befit one in his position, or even that of an average lawyer.

I created a public awareness on the matter of the 11-year old girl who had been raped by the 65-year old retired police officer not because I had a personal grudge against Thilak Marapone but because I had to act as a responsible newspaper editor. But it may be that Mr. Thilak Marapone cultivated an animosity against me because of this. So it is clear that he brought the case of a well-known crook forward as a means of revenge against me. He knew well enough that he was assisting an officer who was known to be corrupt and had been charged with allegations of bribery. The basis of the charges against me was my newspaper report that W.A.K. Silva took bribes. Mr. Thilak Marapone also knew that an inquiry was being conducted against him by the Bribery Commissioner. But Mr. Thilak Marapone did all he could to close the case against the General Manager, Railways so he could

bring forward the case against me.

I wouldn't know what sort of punishment should be meted out to an Attorney General who seeks to protect such an individual at the expense of a newspaper editor who attempted to create public awareness on the issue.

I feel justice has to be meted out on this matter. There has to be somewhere one can go for redress in the face of injustice. I have inquired from many senior lawyers whether any legal action can be taken against Mr. Thilak Marapone on this issue. Their reply was that Mr. Thilak Marapone held a high post while he committed the crime, and that any legal action against him now would be legal action against his position, and not himself personally. But I am not ready to accept this. If I have been subject to injustice, there should be a form of relief for me. If necessary, this article can be considered a public complaint brought forward by me and

presented to the Chief Justice. Also, this article can be used by the Bar Association to take a decision on Thilak Marapone. I am going to observe keenly how legal organizations are going to act on this matter.

It is only government political heavyweights and state officials who are able to use the criminal defamation law as a weapon against journalists. Many powerful people outside these two arenas also use defamation law as a weapon against newspaper exposes against them.

Ravaya has only a short six-year history as a newspaper. During this short span a large number of persons have been stung by *Ravaya's* exposes, issuing 'demands for compensation' on the grounds of defamation. The complete list of suits and the amounts demanded are given below:

- | | |
|---|----------------|
| (1) Upali Sarath Amarasiri
M.P. (UNP), and son of Former Trade Minister & Chief Minister, Southern Provincial Council, M.S. Amarasiri | Rs. 50 lakhs |
| (2) W.A.K. Silva
Ex-General Manager Railways. Currently in hiding abroad to avoid corruption charges in local courts. | Rs. 250 lakhs |
| (3) Gamini Fonseka
Former M.P., Deputy Speaker (UNP). Presently, Governor for Northern & Eastern Provinces | Rs. 50 lakhs |
| (4) Tilak Karunaratne
M.P. (Former SLFP M.P.). Presently, M.P. (UNP) | Rs. 250 lakhs |
| (5) Ronnie de Mel
Former Finance Minister (UNP). Presently, M.P. (UNP) | Rs. 50 lakhs |
| (6) B. Sirisena Cooray
Former Housing Minister (UNP) & General Secretary, UNP | Rs. 1000 lakhs |
| (7) Dr. Rajitha Senaratna M.P. (UNP) | Rs. 50 lakhs |
| (8) B.C.S.N. de Silva
Former Chairman, National Film Corporation | Rs. 500 lakhs |
| (9) Dr. Oliver Fernando | Rs. 50 lakhs |
| (10) Dr. Reginald Perera | Rs. 50 lakhs |
| (11) Dr. Amal Harsha de Silva | Rs. 100 lakhs |
| (12) Somaratna Kariyawasam
Former Commissioner of Dept. of Buddha Sasana | Rs. 100 lakhs |
| (13) Y. Kasturiarachchi
New Proprietor, Ruhunu Cement Company | Rs. 250 lakhs |
| (14) H.M. Sirisena Herath D.I.G. of Police | Rs. 50 lakhs |
| (15) General Hamilton Wanasinghe
Former Commander of Army & Secretary to the Ministry of Defence | Rs. 500 lakhs |
| (16) Dr. Prathap Ramanujan | Rs. 50 lakhs |
| (17) P. Weerasekara Director General, Sri Lanka Customs | Rs. 500 lakhs |
| (18) Jagath Abesinghe Red Cross Movement | Rs. 50 lakhs |

(19) J.C. Alawathuwala M.P. (UNP)	Rs. 50 lakhs
(20) Miss S.P. Alawathuwala Daughter of Former Deputy Minister, Late Mr. S.W. Alawathuwala (UNP)	Rs. 10 lakhs
(20) Dr. S.M. Panagoda	Rs. 30 lakhs
(21) U.S. Alahakoon	Rs. 10 lakhs
(22) Douglas Peiris S.S.P. of Police	Rs. 100 lakhs
(23) Esther Wickramaratne	Rs. 10 lakhs
(24) Y. Kasturiarachchi New Proprietor, Ruhunu Cement Company	Rs. 2000 lakhs
(25) Dr. Nath Amarakoon	Rs. 100 lakhs
(26) Nalaka Athukorale Minister for Food, Co-operatives & Rehabilitation, Sabaragamuwa Province	Rs. 100 lakhs
(27) Dr. Seevali Ratwatte Chairman, Upali Newspapers Company Ltd.	Rs. 3000 lakhs
Total	Rs. 9910 lakhs

Even though a journalist's report may be both accurate and fair, the powerful person who has been so exposed is entitled to take the editor of the newspaper to court. By this means alone the politician or bureaucrat concerned can "show" the world that he has been wronged and that the claims against him are false. In addition, if the newspaper that the editor represents is not rich, then it cannot afford to retain high-powered lawyers and is, therefore, handicapped since its inexperienced legal team has to stand against the big guns of the opposition. This inequality certainly influences the outcome of the case. To make matters worse, such cases take so long to be resolved that the editor has to waste a great deal of his time in the courthouse. Therefore, even though an editor has before him sufficient authenticated data, in consideration of the fact that he runs the risk of facing a long and tortuous period of pressure, he may refrain from publishing the evidence he has against the powers-that-be.

There are also certain weaknesses and loopholes in the conventional legal system which the powerful are able to manipulate on these occasions. I

encountered such a case in point recently:

The *Ravaya* of December 05 1993 published an article with the headline "Minister and Wife Openly Embezzle Public Funds" about the violation of Provincial Council circulars and tender regulations by the Sabaragamuwa Provincial Council's Nalaka Athukorala, the Minister of Food, Cooperatives and Rehabilitation and his wife.

Ravaya had enough evidence to make a case against the Minister at the time of publication. Moreover, the attention of the Provincial Council, the Government and the Opposition had already been directed towards

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these charges.

Based on the information contained in *Ravaya*, opposition members in the Provincial Council brought forward a no-confidence

motion against the Minister signed by 14 MPs. Even though Nalaka Athukorala had promised Opposition Leader Ranil Wickremasinghe and the Chief Minister of the Provincial Council Jayathilake Podinilame to resign from the posts he held while the inquiry was being conducted by the Chief Minister, he failed to do so. The Chief Minister therefore took over his powers in December 1995.

After the publication of the news item, the Minister filed a defamation case for Rs 50 Lakhs against the *Ravaya* Editor and the Printer before the Colombo District Courts. The case was filed against us by the John Wilson Legal Company on December 15 1993.

If the accused fail to appear in court in a civil case, the court has the authority to hear the case ex parte, and to give a verdict based on that evidence. Furthermore, if the accused hears that there is an ex parte case being conducted in court against him, there is no means for him to intervene until the verdict has been delivered.

The accused should come to court only on a formal subpoena served by the fiscal. So all that a crooked person has to do is to prevent the fiscal serving the subpoena to the

accused and get him to make a statement in court that the accused was avoiding receiving the subpoena. It seems that this simple procedure has been conducted in the instance of Nalaka Athukorala's case against me.

The *Ravaya* office was then situated in Ratmalana. The duty of serving the subpoena therefore fell on the fiscal of the Mount Lavinia Courts, but for some mysterious reason, the serving of the subpoena for this special case was assigned to the fiscal of the Moratuwa Courts.

It is easy to find the office of a well-known newspaper. But the Moratuwa fiscal had informed the courts that the accused was not traceable according to the address given to him.

On 26 January 1995, a affidavit was presented on a motion brought forward by the prosecuting lawyers stating that a substitute subpoena be served as the accused was avoiding the subpoena. This substitute means pasting the subpoena on the door of the accused residence/office.

The Court allowed a substitute subpoena on February 3rd, 1995. The court has the authority to issue a substitute subpoena only in an instance where there is substantial evidence that the accused is trying to avoid receiving it. Only once is it stated in the "court service notes" that the fiscal went to the *Ravaya* office with the intention of serving the subpoena. The courts had not considered whether an Editor of a well-known newspaper would attempt to avoid a subpoena. Neither had the courts contemplated why the subpoena which should have been served by the Mt. Lavinia Courts was served by the Moratuwa Courts instead.

It is here that the second phase of this revolting incident begins.

Even though a person can

avoid being served a subpoena, a building cannot do so. If the subpoena had at least been pasted on the door, I would have known I had been summoned by courts. Even though the case was called on the 28th of April 1994, I had not been served with a substitute subpoena.

The case was recalled on the 26th of July 1995. Even by then, I

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By that time, it was a well-known fact that the Ratmalana office of *Ravaya* was to be shifted to Maharagama. The public was informed of this change of venue through a public notice on the 3rd of July 1995 stating that the *Ravaya* office will be shifted to Maharagama with effect from the 7th of August, 1995. The notice also carried a sketch with directions to the new office. It is impossible that the prosecutors in the case didn't know all this.

On the 9th of August, 1995, exactly two days after the *Ravaya* office had shifted, and when the case was to be called, the responsibility of serving subpoena, which had so far fallen on the Moratuwa fiscal, was assigned to the Mt. Lavinia fiscal.

Strangely, from then onwards, everything began happening quickly. The Mt. Lavinia fiscal pasted the subpoena on the old office of the *Ravaya* in Ratmalana on the 11th of October, 1995, and reported it. When the case was

called on the 17th of November, 1995, the Mt. Lavinia fiscal reported to court that the substitute subpoena had been served.

Then, the court, taking the case on an ex parte basis, ordered the accused to pay the sum of Rs 50 lakhs demanded by the prosecutor.

Those responsible for the law must be fair and act in a way that reflects this fairness. But all this shows only the reverse.

In most civilized countries, when a newspaper exposes corrupt practices, those accused resign from their posts and allow for a fair inquiry. If those accused do not resign, they are temporarily requested to leave their duties while the inquiry is conducted. Legal action is taken against newspapers only where defamation has occurred.

On the other hand, in most other countries, it is the bounden duty of heads of institutions to provide information requested by journalists. There is no such tradition in Sri Lanka. In other countries, the complainant is given the responsibility of proving that court reports are false. But in Sri Lanka, the journalists have the responsibility of verifying the reports. In other countries, the court has the ability to investigate the truth or falsehood of a newspaper report. But in Sri Lanka, the courts only have the right to conduct the inquiry, not the right to investigate the truth in a wider sense.

Prof. G.L. Peiris, who can be considered a legal scholar, promised journalists that a new court procedure would be created to circumvent the weaknesses in our current court system. Now, he is the Minister of Justice, but there are no signs of him keeping his promises. ■

Is this the governance we deserve?

Vyasa

BETWEEN Riviresa 1 and Riviresa 2, or alternatively, between the hoisting of the flag in Jaffna and the threat of total blackout, there was the Central Bank bomb, the Thawakkal disclosures, strikes involving the doctors and the plantation workers, the prospect of no-confidence motions against two Cabinet ministers engineered by two Cabinet ministers, the reimposition of islandwide emergency followed by the postponement of local government elections, censorship and the curious case of the Secretary to the Ministry of Information who cannot decide on his own date of birth!

The cost of living is soaring and in the North, the people are voting with their feet to return home as the Army seals off the peninsula. The commissions confirm the popular belief that, for a time, a crass and cruel Mafia constituted the power centre of the government of the day. As for the Select Committee, there have been reports that at times it has been

inquorate. Devolution is not going stale so much as simply not going anywhere.

Too much is happening to confirm that government and governance are moving further apart and that the problems of command, control and communication that seemed to beset this government at the outset, are no nearer a solution.

Disappointment and despair have infected the ranks of the PA and its supporters and the belief in the charisma of the President, always, ultimately winning the day when the chips are down, is also wearing thin.

Her lackadaisical style and undergraduate approach which mixes naivete with arrogance and even paranoia, has been

catalogued, criticised and derided on numerous occasions. Perhaps it is these very qualities that have ensured that no remedial action can or will be initiated.

The President appears to be as much a part of the problem as she has to be of the solution. We have come to the point at which the defence of the President, which concedes the inefficiency of her administration and attempts to mitigate it by reference to her sincerity and commitment, is becoming increasingly difficult. As a consequence, the characterization of the Government as having its heart in the right place and the rest of it at sixes and sevens, is, in the face of its demonstrable record and the



challenges ahead, a charitable one. On all fronts, this government has to get its act together. The opposition and the rest of us too, but more of that later.

Who runs this government so unsatisfactorily? Is it the President alone, with the Cabinet, with key Cabinet ministers and officials or with an unofficial kitchen Cabinet? Where is the real locus of authority and power?

Enough has been brought to light in the last months to indicate that some very odd anomalies abound in the process of decisionmaking. Either this lot are a lot less efficient in bad government than their predecessors or just as unconcerned and ill-equipped for good government as they were.

Take the case of Mr. Jeyaraj Fernandopulle which has been dealt with elsewhere in this issue. It said too much that is damning about this President's commitment to good governance. According to media reports, Mr. Fernandopulle threatened resignation yet again and complained of police harassment of his supporters. One of the conditions he apparently laid down for his continuation in office was the transfer of the police officer chiefly concerned. The President swiftly complied and the police officer, who by most accounts was doing his job and no more, was removed forthwith from Mr. Fernandopulle's stomping ground.

The Thawakkal fiasco, debated in the press and in parliament, left most questions about that shoddy episode unanswered. We were treated to explanations that ranged from the technical legal distinction between what is 'voidable' and what is 'void' to the pathetic admission of a bad filing system in the Cabinet office. It was this bad filing system that resulted in the highly respected and popular Foreign Minister Lakshman Kadirgamar, being misled into writing a letter which stands as

the reference point for the enduring perception that this government also condones sharp practice in the programme of privatization.

Thawakkal was a sordid affair. With its allegations of bribery, Cabinet papers that suddenly appeared to confirm Cabinet decisions that few seemed to remember, it tarnished the reputation of the President who is also the Minister of Finance, the Cabinet and even Mr. Kadirgamar, who took the high moral ground, all too briefly. Furthermore, if the allegations of impropriety are to be dismissed as insubstantial and the explanations for what happened accepted, Thawakkal still begs the question of the competence of the Government. After all, if all it was trying to do was to make good the bad its predecessor had done, how come it got ensnared in a scandal of its own making? Surely, transparency is not a trap?

The revelations that Edmond Jayasinghe, a former ambassador, Director-General for Economic Affairs in the Foreign Ministry, Censor, and until recently, Secretary to the Ministry of Media, Aviation and Tourism, a director of Air Lanka and Chairman of Lake House, has falsified his date of birth to the High Posts Committee of Parliament, in his application for a passport as well as in a visa application for Denmark, is a shocking illustration of the calibre of person that can rise in our public service under governments of both parties.

What is especially damning for this government are the reports that he has sponsorship and support from within the President's office and that it was employed to withdraw the Rupavahini news story of his sacking, over the head of the relevant minister, Dharmasiri Senanayake. It is believed in some quarters that this support is so powerful that it will guarantee him

a position in government.

Clearly, within the President's office there are those who are assured of acting with impunity in support of their friends and regardless of the adverse impact of their actions on the government's reputation. Is Mr. Sanath Gunatileke, the President's Media Advisor and the official in question, so abundantly competent that he can be forgiven yet again for embarrassing his President and her government in the area of his purported expertise?

Whether it be the President, officials closely associated with her or Cabinet ministers who were hailed as pillars of rectitude, competence and vision, reputations are being swiftly dented and undone in government.

Minister Peiris's reputation has suffered over the Hilton case, his battle with A.S. Jayawardene and his stewardship of the constitutional reform process; Kadirgamar over Thawakkal, Ashraff over the Galle Port and the Mulberry Group of the PA has decided to launch its own investigation into Nimal Siripala de Silva's ministry and allegations that he is in cahoots with Mr. Sirisena Cooray. Minister Wickremanayake is in bad odour over his role in influencing the election of the Basnayake Nilame of the Kataragama Devale and was for a moment the target of a CWC no-confidence motion over his handling of the plantation strike.

Minister Thondaman, always a political animal in a class of his own, in turn, was to be the target of a retaliatory no-confidence motion threatened by his Cabinet colleague Srimani Athulathmudali. Were these two motions to have been debated, it would have been a matter of record that the number of such motions brought by the Government against itself would have been equal to that which the opposition has thought fit to moot! It should

also be noted that whilst the CWC motion was an opposition motion, there is no evidence to indicate that Minister Thondaman actually discouraged it or canvassed against it.

It is common knowledge that Minister Athulathmudali is more than just piqued at the way she is treated by the President and that on devolution, she and her DUNLFers are passionately committed to the unitary state. Minister Rajapakse, on no lesser authority than that of the President's, should be best known as a 'reporter'. And as for the leftist members of the ruling coalition, they are not in agreement with the Government over the unitary state, privatization and the islandwide emergency.

Minister Ratwatte whose stock is high after Riviresa 1 and 2, is directly responsible for the management of the two crises facing the country -- the ethnic conflict and the acute power shortage. Both these issues are of fundamental importance to the future peace and prosperity of this country and in both cases, the light at the end of the tunnel cannot be detected easily or clearly.

It is difficult to ascertain what the minister intends to do to avert the threatened black-out and its repetition in the future, apart from praying for rain and playing with time. There was advance warning that we could come to such a ridiculous situation and nothing seems to have been done about it. Perhaps, the minister has been and is still over-burdened by his contribution to conflict resolution in the Northeast. Perhaps he should be relieved of one ministry on the grounds that however good the general, directing operations on two vital fronts is just too much to expect.

As for the ethnic conflict post-Riviresa 1 and 2, precisely because of the military success of those two offensives, the threat of going back to the future is a very real one

indeed.

There is every indication that military success has narrowed the space for a political solution along the lines of meaningful devolution and powersharing. The Select Committee seems to be in atrophy and one is hard pressed to identify sources of leverage that can be harnessed on behalf of devolution beyond the sincerity and commitment of the President and a handful at most, of her close lieutenants. And given promises and commitments in the past in the arena of constitutional reform, notably the abolition of the Executive Presidency, one hesitates to rely exclusively or even primarily, on the good faith of the chief executive.

On the crucial issue of an all-party consensus on devolution, given her intemperate remarks about the UNP and the Tamil parties, including a charge of dishonesty levelled against the latter, one cannot be blamed for thinking that at one stage, it was a wrecking job rather than consensus building that was the chief executive's chief preoccupation.

Assuming this to be too cynical a view and assuming that the President is keen to break the deadlock in the Select Committee and advance the cause of devolution, what options does she have?

An obvious method of breaking a stalemate in the legislature is to go to the people and obtain a verdict from them that parliament would find unwise to ignore. This entails an electoral contest in the form of a Presidential election, a General Election or a Consultative Referendum on devolution, the result of which would not be binding, as it would be outside the stipulated procedure for constitutional reform.

However, given the government's explanation for postponing the local

Government elections on the grounds of insufficient security personnel -- an explanation given, despite the fact that the Government knew a year ago that these elections had to be held in 1996 because it had postponed them in 1995 -- one wonders whether the availability of security personnel and the security situation, would allow for the conduct of any islandwide electoral contest in what remains of this year. Moreover, there is the danger that in all of these contests, the issue will not be devolution alone and whilst the Government will win, it will not, in all probability, win convincingly enough to claim a mandate to restructure the state.

What is clear is that there is a crisis of leadership and a desperate need for competence in government. That the UNP will inherit as the PA self -- destructs, will be no more than a testimony to the stranglehold of the two party system on our political psyche. There is little substantive evidence to show that the UNP is seriously transforming itself into an outfit the people will enthusiastically accept as being well prepared for efficient government and good governance. The UNP will have to clean itself up convincingly and openly admit past error and terror, before it can be embraced again as the party of government.

Many more messy months like these and the people will have to look elsewhere for salvation. There has got to be an alternative that is credibly democratic, non-violent and competent, with a radical agenda to reformulate the social contract in this country. The politicians are giving themselves a bad name and it is approaching the time when, we the people, will have to do more than watch, wait and see.

Is this the governance we deserve? ■

Law, Media and Ideology in the spirit of Degradation

Rajan Hoole

THE manner in which power is wielded in a society is the most revealing of its character. Two important reflections of it are the system of laws and their operation, and the functioning of the media. The two have a close relation to economic power, and more or less codify the dominant ideology of the ruling class along with whom and which interests they seek to protect. In and through legality the ruling interests seek to legitimise and fortify their position. When the ruling class is confident and its ideology unchallenged, its legal articulation is mature and refined. The opposite is nearly always true when the ruling class is in crisis.

Take the highly dubious Citizenship Acts of 1948/49 that made more than a tenth of the population of this country, who were of Indian origin, stateless and voteless vagrants, but who still continued to earn more than 70% of this country's foreign exchange. The departing British conveniently left behind a constitution that failed to define citizenship and the first Parliament of independent Ceylon defined it to suit the dominant interests. When challenged, the Lords of the Privy Council in London simply held that it was the proper function of the Parliament to define citizenship. It was all polished and decorous. That was the early 50s when the ruling classes in London and Colombo were confident. By the 80s the strains were clearly showing.

In pursuit of the interests of quick profits for its financial sector, British industry was brought low.

In an attempt to plug the holes, the British government launched on a policy of selling arms with no respect for publicly stated principles or the country's laws. While Saddam Hussein in 1988 ordered a genocidal poison gas attack on Iraqi Kurds, British Ministers Mellor and Newton were slinking in and out of Baghdad helping Saddam to build up his arsenal. Britain, with US and France, acting as chief protagonists in the war against Iraq in early 1991 was thus a cruel farce. The report of the inquiry into the arming of Iraq by Sir Richard Scott, while incriminating in its detail, also suggested that the Cabinet ministers acted "honestly and in good faith". Former Prime Minister Margaret Thatcher, the chief orchestrator in this shoddy affair, was barely touched by the inquiry. There were no resignations. The credibility of British justice was wearing thin. The draconian control imposed on the media during the Gulf War was a sign of the times.

The Privileged

It is invariably the case that concentration of economic power in a particular class is reflected in the country's laws and in the nature of the media. In Australia for example which once boasted of an egalitarian image, some alarming changes have taken place under, ironically, the two recent Labour governments of Hawke and Keating. Following on an economic policy of deregulation and dependence on unemployment (the so-called Nairu-Non accelerating inflation rate of unemployment),

the Labour years have seen the proportion of wealth controlled by the richer 1% double to 20%. The last vestiges of media diversity have been ended with 70% of the metropolitan press coming under the control of Rupert Murdoch. Abroad, the Australian government became deeply involved with Indonesia's Suharto regime that was implicated in a campaign of genocidal terror against the people of East Timor. Australian companies were potential beneficiaries of oil exploration deals signed. Not surprisingly, last year, Australian Foreign Minister Gareth Evans proposed a secrecy law that threatened journalists who exposed the villainy of the country's spy agencies with up to seven years in prison.

In Ceylon, on the other hand, the level of crudity rose much more sharply from the late 70s witnessing the fact that the ruling class and its ideology felt more threatened than their economic peers abroad.

Justice, Impunity and Culture

During the 80s, summary killings by the security forces and the practice of impunity became so much the norm that the law of the land assumed largely a vestigial role, primarily serving the function of upholding the canard that the security forces were striving to maintain law and order. The Prevention of Terrorism Act (PTA) and the new Emergency Regulations made confessions elicited under duress admissible in courts of law, and enabled the disposal of bodies without inquest. As we shall see, this led to the legal

process becoming tangled in contradictions and being subject to ridicule.

Underlying this is a society that tries to cling desperately to the cosy assumptions of chauvinist ideology. It has lost the ability for critical appraisal. Anyone who is seen as a threat to the status quo or the system could suffer systematic persecution, long periods of detention without justification and be slandered with impunity. There is, in the press, for instance, the regular presumption that any Tamil picked up is a suspected hard-core terrorist. The resulting alienation is not addressed.

Three women were arrested in connection with the JOC bomb explosion of June 1991 as suspected accomplices of the mastermind Varathan. Between police sources, the *Sunday Observer*, *Daily News* (30-6-1/7/91) and *Lankapuwath*, the following claims were made:

- 1) None of those detained had any academic qualifications;
- 2) Varathan had three mistresses in Colombo, all of them were hard-core LTTE cadres;
- 3) Two of them were married, and the third an attractive 20 year old girl" was unmarried.

It was a clear attempt to play on the prejudices of a credulous public, paint a picture of Varathan as a common criminal, and to divert attention from the glaring faults of a very corrupt state.

Varathan was in the business of transporting goods from Colombo to Jaffna at a time when, even as the press readily claimed, sections of huge bribes were paid to selections of the security establishment. Varathan was evidently very comfortable about his dealings in Colombo. From what I know of Varathan, he was a charismatic and disciplined person. The unmarried girl was his fiancée. All three girls were released by the end of 1993 either as innocent or by pleading guilty (by arrangement for early release) to the PTA offence of withholding information. In the meantime, the husband of one of the girls, a very innocent girl, had

committed suicide, unable to bear the obloquy heaped on his wife.

On the other hand, what was most objectionable about Varathan was just what the ideologically driven elite and the press (champions of Weli Oya) most admired. He had the ruthlessness to bring brainwashed young boys from Jaffna, condition and manage them, and then send them to their death as suicide bombers. Now and then the Colombo press have given publicity to former army officers who proposed forming counter-suicide squads using willing convicts serving prison sentences - the same category of persons first sent to drive Tamils out of Manal Aru and turn it into Weli Oya.

These are all part of the same picture of disintegration. Unlike, say, in Central America, where journalists and activists face regular persecution, attempts to question the drift here have been very feeble. What we have are mostly somnolent universities and metropolitan institutes turning out quantities of paper in law and in the humanities, hardly ever touching on the deepest realities of this country's tragedy.

The Ridiculous

There are many contradictions around for a country that is at war to stay united, which tend to the ridiculous. The elite culture is so debased that people are hardly conscious of this, and indeed accept it. What sort of a country is it where the mainline so-called independent press campaigns to oppose the rule of law and gives the impression of crowing in triumph when it succeeds? Is not the rule of law the cornerstone of a united nation?

Soon after the new government came to power in August 1994, its moves to set up commissions to inquire into gross violations by the security forces was ridiculed by leading sections of the press. It was accused in such terms as having a Dracula-like propensity to disinter old graves. For apparently not

disinterested reasons the campaign was joined by the UNP leader Ranil Wickremasinghe. In August last year several security operatives, including STF personnel, were detained over the corpses-in-lakes affair. The Island in a lead item suggested that the security of Colombo was being jeopardised.

In January this year President Kumaratunga ordered the Army Commander to place on compulsory leave a number of security personnel, including brigadiers, implicated with gross violations in commission hearings. Following a purposeful leak, there were again suggestions in the press that military operations against the LTTE in the North were imperilled. No credit is given to the political leadership of the new government that has been the crucial element in creating problems for the LTTE. The Army officers concerned have of course been around for a long time doing little better than creating a bloody mess. Shamindra Fernando in the Island's lead item of 16th April, could not suppress a note of triumph when two brigadiers implicated, instead of being sent on compulsory leave, were promoted to the rank of Major-General.

The following quote from the Island lead item of 19th February is a sad commentary of how the elite of an 'independent and sovereign nation' view their own people. "The forces launch artillery strikes in Valvettithurai every so often. The Forces are careful... as misguided shells can hit places occupied by foreigners" (i.e. ICRC and MSF in Pt. Pedro, six miles East. Civilians, including the large refugee population in the area, did not apparently matter).

The Batalanda Commission sittings recently brought out the absurdity of the legal process. A key event concerns the disappearance of police sub-inspector Rohitha Priyadharshana, who was allegedly murdered in February 1990 by his superior officers. The counsel for SSP Douglas Peiris attempted to

implicate Rohitha as a JVP sympathiser. In the cross-examining Rohitha's brother, Peiris' counsel revealed that according to a confession made by Piyadasa, an alleged JVP leader for Gampaha, Rohitha and another sub-inspector Ajith Jayasinghe (a key witness before the commission) had aided and abetted JVP violence. He further revealed that the alleged confession to the police, admissible as evidence under the PTA, was accepted as voluntarily made by the High Courts of Gampaha and Colombo.

In his re-examination of the brother, a counsel assisting the commission revealed that in both cases the suspect Piyadasa was not present in court, and that the conviction had been passed in absentia. Further, the prosecution witnesses in the Gampaha High Court were ASP Raja Dias and SSP Douglas Peiris, both implicated in harrowing deeds by the witness as appearing before the commission. It has been clear for more than a decade that repressive laws introduced to protect elite interests had led to the criminalisation of the police, with senior officers during the late 80s allegedly collecting huge payments from the police reward fund, based on claims to head counts of JVPers disposed of. What does one do with judgements of guilt based on confessions made to police officers later found to be criminals of the worst sort? What does one do with such confessions accepted by court as voluntary and later submitted as evidence against someone else? How is an ordinary member of the public to respect the law and the poor judges who operate this system?

The Crucial Challenge

A challenge before persons concerned with the future of this country is highlighted by the Batalanda Commission. It involves more than charges against a couple of privates, captains and brigadiers of humbler origins. A name that has come up before the commission a

number of times is that of Ranil Wickremasinghe, leader of the UNP, the country's alternative government. While he held office, according to witnesses, houses in the Fertiliser Corporation's Batalanda scheme had been allocated to selected police officers at his request, one of whom was Douglas Peiris. One of the houses was used as a torture camp; Mr. Wickremasinghe himself had an office in the scheme which he visited regularly, and police officers DIG Merrill Gunaratne and SSP Peiris who have been associated with the workings of the torture camp according to the testimony showed every sign of being close to Mr. Wickremasinghe. The hearings are still going on, and it is too early for conclusions. But there is a great deal of unease.

Unlike the reputations of the Ranasinghe Premadasas and the Sirisena Coorays which could be thrown to the wolves without too much discomfort, Mr. Wickremasinghe's discomfiture challenges the world of the elite who have been very comfortable with him. Hence, the deafening silence from the press and nearly all sections of Colombo society.

To begin, the UNP had two honourable options. They could have gone public with a forceful defence of their leader's integrity and refuted the very serious charges. This would also mean accusing a large number of witnesses from diverse walks of life of collective, malignant slander. Alternatively, they could have politely expressed confidence in their leader and asked him to stand down until his name is cleared. Their silence is typical of a party that is low on principles.

Not the least alarming is the silence of the Colombo-based institutes, scholarly establishments

and human rights groups. They remained silent when the press campaigned (successfully as it turned out) against the President's order to send army officers implicated in violations on compulsory leave. The accepted wisdom in all these matters seems to be, 'Do not touch them'. It is a sad commentary on the lack of convictions.

In an important sense, no long-serving member of the post-1977 UNP Cabinets is innocent of some of the most horrific crimes of this country's post-independence history. The July 1983 violence and in particular the massacre of Tamil prisoners at Welikada Prison strongly point to Cabinet complicity, not least because they were never investigated. The official who was in charge of the prison, and those whose actions then are said to have been fairly creditable, today heads the Human Rights Task Force. There is no doubt a good deal of testimony lying around Colombo with various organisations. Why has the matter not been investigated? It is far from enough to say 'We are truly ashamed of what happened during those times' and feel good about it. The poison is still very visible with us.

The only promising course open to us is greater radicalism and the application of constant pressure to ensure that the present commissions fulfil their allotted task. The burden should not be placed entirely on the judges. If others lack conviction, nothing would change. The Government too needs to be challenged to repeal the repressive legislation that paved the way for the tragedies these same commissions are looking into. If the Government does not, its sincerity and also the character of the Presidential Commissions will be placed in doubt. ■

Correction to the same writer's piece in the March issue: On curbing Police State Impulses.

A sentence in the last section where a misprint has given the opposite meaning should read:

"There could be no liberation for the Tamils in which thousands of LTTE cadre who are victims of circumstances, end up as ashes of military defeat"

Aussie cancellation of tour highlights ICC's impotence

'twixt slip & gully

THE Australians have finally decided that they are too busy to honour a two-test commitment to Sri Lanka in July and have announced their intention of participating only in the one-day Singer tournament to be held in September (after, of course another review of security!).

What is baffling is the news that there was no firm commitment for the two tests scheduled for July, and we are led to believe that the earlier commitment was just in the minds of the previous Cricket Board.

Ever since the refusal of the Australians to play in Colombo in the World Cup, citing security fears there was much speculation in the international media that the test tour in July was in jeopardy. This topic was discussed many times all over the world and no mention was made that the two tests were actually not even confirmed commitments as the ACB would like us to believe now.

The Australian *volte face* is typical of the



way some of the major cricketing nations have bullied their way around thanks to a very impotent International Cricket Council.

The ICC has a sacred duty to perform in administering the sport and popularising the game among its associate member countries and the rest of the world. The ICC sadly is toothless today and, happily enough for the sport, the minnows of yesteryear are now the game's leading exponents and they now must be heard as it is on their shoulders that the future of cricket rests.

The ICC must immediately ensure an **EQUITABLE** distribution of tests among all countries. Whilst the traditional "Ashes" series may have five or six tests, no test playing country should suffer the

ignominy of being granted anything less than a **THREE** test series.

All the test playing countries should be ranked every four years and an undisputed world champion will clearly emerge, as during this period all countries should have played each other **TWICE** in a minimum of **SIX** tests on a home and away basis.

This would mean each side would have to play an average of a dozen tests a year which is quite reasonable. All games will be supervised by the ICC who will calendarise the fixtures every four years. Any side failing to honour its commitments should be severely penalised.

Except for England, Australia and New Zealand most of the other test playing

countries can host games right throughout the year and so logistics should not be too much of a problem for the ICC.

Additionally, two sides can play an entire three-test series on "neutral" venues. This summer both India and Pakistan are due to play three tests each against England in England -- imagine the prospect of an India-Pakistan series in England! The two teams would probably draw more crowds than the Englishmen playing at home!

Equally fascinating would be West Indies playing South Africa in Colombo and Sri Lanka taking on Australia in Eden Gardens, Calcutta.

A similar programme should be conducted among the associate members of the ICC where the sides are ranked and then ensured an equal distribution of unofficial tests against each other.

This is how the ICC can improve its image and gain respect amongst the other members -- it must take over the running of the entire cricket programme. The time to start is **NOW!** ■

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