

ATTORNEY-GENERAL AS ADVISOR TO THE GOVERNMENT AND AS GUARDIAN OF PUBLIC INTERESTS

The Attorney-General of Sri Lanka is appointed by the President. He is the Chief Legal Advisor to the Government and ranks in precedence in the legal sphere next to the Chief Judge of the highest Appellate Court. He may communicate direct with the President, Ministers and Heads of Departments. He is the Head of the Bar and has precedence over all President's Counsel. As will be discussed later in this paper, he is also in the position of a guardian of Public interest.

It was in the year 1884 that the designation Attorney-General was adopted. However, the office of the Attorney-General could be traced back to the office of 'Advocate Fiscal' which was in existence towards the latter stages of Dutch rule in the Island and which office continued even during the early years of British occupation until the year 1834 when the designation was changed to that of "King's Advocate". **Land Reform Commission V. Grand Central Ltd., SLLR 1981 CA pg.147 at pg.153.**

Bonsor, C.J. in the year 1898, in the case of *Le Mesurier V. Leyard* 3 NLR 227 at pg.230 observed that:

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

During the reign of Queen Victoria and prior to the adoption of the designation Attorney-General the office was called and known as Queen's Advocate. The judgement of Cayley, C.J. and Clarence, J. in the case of *Moragodaliyanage Peiris Perera* (1880) 3 SCC 161 shows that he was also the principal law Officer of the Government in all criminal matters as well.

By Ordinance No.1 of 1883 the designation of the officers known as the Queen's Advocate were altered to Attorney-General and Solicitor-General respectively and the deputies to the Queen's Advocate were named Crown Counsel. All rights, precedence, powers, privileges, which at the passing of the Ordinance belonged to, were vested in or were exercised by the Queen's Advocate or the Deputy Queen's Advocate were re-vested in the Attorney-General and Solicitor-General respectively. The change took effect from 1st January 1884. In introducing the Ordinance in the Legislative Council, the Queen's Advocate said that the Bill proposed that 'the Attorney-General and the Solicitor-General, besides having the powers exercised in England should have the same rights and privileges which the Law Officers of the Crown have hitherto possessed in the Colony.'

The earliest constitutional reform under British rule in Sri Lanka was effected in the year 1833 when by Royal Instructions dated 20.03.1833 there were established a Legislative Council consisting of official and unofficial members and an Executive Council consisting of certain high officials. The Governor was directed to make Ordinances with the advice of the Legislative Council and to consult the Executive Council in the execution of his powers and authorities.

The King's Advocate was a member of the Executive Council.

The other members were the Senior Officers in command of the British land forces in the Island, the Colonial

Secretary, the Colonial Treasurer and the Government Agent for the Central Province.

By Royal Instructions dated 16th June 1877 the Queen's Advocate was in addition to his membership of the Executive Council made an official member of the Legislative Council.

There followed successive Constitutional reforms. The Queen's Advocate who had now been re-designated the Attorney-General was included as an official member of the Legislative Council and as a member of the Executive Council in successive Governments until the establishment of the State Council under the Donoughmore Constitution in 1931.

The State Council was composed of:

- (a) A Chief Secretary, a Legal Secretary and a Financial Secretary appointed by the Governor with the approval of the Secretary of State and styled Officers of State; provided that until the Governor shall appoint a person to be Legal Secretary the Attorney-General was charged with the function of that office.
- (b) Fifty elected members; and
- (c) Not more than eight nominated members.

The Donoughmore Constitution also provides for a Board of Ministers composed of the Officers of State and seven Ministers. The Legal Secretary was assigned, *inter alia* the following subjects and the functions:

- (a) The Administration of Justice.
- (b) Drafting the Legislation.
- (c) Legal Advice to Government: and
- (d) Criminal Prosecution and Civil Proceedings on behalf of the Crown.

Our records show that from as far back as the year 1884 the Attorney-General was assisted in the discharge of his legal

functions by the Solicitor-General and Crown Counsel. In due course an officer designated the Crown Conveyancer (Later designated as Crown Proctor) was also appointed to the Attorney-General's Department to attend to conveyancing work and to assist in the conduct of civil litigation of the Government.

Under the Donoughmore Constitution the provisions of legal advice to the Governor was the responsibility of the Legal Secretary and the Attorney-General's Department. The institution of criminal prosecutions and civil proceedings on behalf of the Crown was the duty of the Attorney-General's Department (Soulbury Report 1945 pg.105).

The Soulbury Commission recommended that the functions of the Legal Secretary certifying Bills prior to submission to the Governor for assent should be transferred to the Attorney-General (Soulbury Report pg.92).

The Commission recommended the appointment of a Minister of Justice to deal with the subject then allocated to the Legal Secretary. They also recommended that under the new Constitution, for some time at least, the Attorney-General and the Solicitor-General should not lose their status as public servants and become Ministers and that the provision of legal advice to the Governor General should in future be a duty of the Attorney-General (Soulbury Report pg.105).

At page 106 of this report the Commissioners states:

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

of any judicial or quasi-judicial function, or the institution or supervision of prosecutions."

As regards legal advice to Ministers under the new Constitution the Commissioners recommended that the questions relating to the interpretation of existing law and departmental matters which may involve legal proceedings would continue to be referred to the Attorney-General or the Solicitor-General. They also recommended that advice on matters of high Constitutional policy, on which the cabinet as such may require advice could be given by the Attorney-General, provided that the recommendation as to his non-political status was accepted (Soulbury Report pg.107).

As regards advice to the Governor-General in the exercise of the Royal Prerogative of Pardon, the Commissioners suggested that this should be the responsibility of the Minister of Justice. The Commissioners added that "in view of the ease with which the duty of advising Governor-General in these matters might be turned to political ends, we would express the hope that the Minister would hesitate to tender to the Governor-General advice contrary to the recommendation he had received from the Attorney-General, the Permanent Secretary and other non-political advisers." (Soulbury Report pg.108).

The Ceylon (Constitution) Order in Council 1946 (Cap.379) gave effect to the above recommendations except that in regard to Bills it provided that the Speaker shall consult the Attorney-General or the Solicitor-General before giving his certificate to any Bill. It was only after such certificate that the Bill could be presented to the Governor-General for assent.

Sri Lanka attained independence on the 4th February 1948. She became a republic under the 1972 Constitution. The Governor-General was replaced by a President who was nominated by the Prime Minister and who was enjoined to act on the advice of the Prime Minister and other Ministers.

Until 1972, the Attorney-General was appointed by the Governor-General and thereafter by the President.

The Constitution of 1978 provided for an Executive President to be elected by the People. Under that Constitution also the Attorney-General is appointed by the President.

It is observed that none of the Constitutions adopted since 1946 altered the non-political status of the Attorney-General and the Solicitor-General. The Attorney-General continued to be the Chief Law Officer of the State. His independence and status remained unaffected. However, his functions were increased under the 1972 Constitution. The Constitution of 1978 vested in him many more functions.

Edwards in his book 'The Law Officers of the Crown' discussing the status of the Law Officers in England states:

"The Attorney-General and Solicitor-General were never Cabinet Ministers in the whole course of English Constitutional Government. That these members have been made members of the Executive Councils of Colonies has only arisen from this, that Constitutional Government has not existed, and the Law Officers so situated had only the right to offer advice, without any power to compel that advice being adopted." (Edwards pg.167).

Edwards' account of how the Attorney-General became a member of the Cabinet is as follows:

"Indeed, the circumstances surrounding the appointment of Sir Rufus Isaacs, later to become Lord Reading, as the first Attorney General to be given a seat in the Cabinet suggests that this departure from established precedent was in no way a deliberate break with tradition. What happened was this. In June, 1912 the Woolsack became vacant through the resignation of Lord Lochbroom, and Mr. Asquith, then Prime Minister, appointed Lord Haldane, the Secretary of State for War,

as the new Lord Chancellor. Viscount Simon, who was Solicitor-General at the time, has told in his memoirs how aggrieved Isaacs felt that the Prime Minister had not offered the Woolsack to him."

Viscount Simon filled in further pertinent information explaining the subsequent action of the Prime Minister when he wrote:

"Isaacs considered that this omission might be regarded as a reflection on his origins, for though not a follower of the Hebrew religion he never failed in loyalty to his race. For a day or two he even hinted privately at resignation and before the new nomination was made public, I took upon myself to write a memorandum for Asquith setting out the reasoning which seems to establish that a Jew can lawfully be appointed to be Lord Chancellor..... The Prime Minister sent for me and said with some vigour that he agreed that Reading was qualified but that he had long ago decide that if opportunity offered he would appoint Haldane....."

The assuage the Attorney-General's disappointment, on the suggestion of the Government Chief Whip, Sir Rufus Isaacs was made a member of the Cabinet while retaining his existing office (Edwards pg.169-170).

The dual status of the English Attorney-General was criticised on the ground that the independence of the Attorney-General as Chief Legal Advisor of the Cabinet and the Government departments was jeopardised by his membership of the Cabinet. As such, it became necessary, in the course of the debates that followed, to clarify and restate the Constitutional position of the Attorney-General.

Thus in 1948 when it was urged that the Attorney-General should not appear before the Lynskey Tribunal appointed to inquire into allegations of corruption against

certain members of the Attlee Government Sir Hartley Showcross the Attorney-General thought otherwise. As he subsequently wrote:

"It was the duty (however personally unpleasant) of His Majesty's Attorney-General to represent the public interest with complete objectivity and detachment and that to refuse to discharge that duty in a particular case in which the public interest might be suspected to conflict with the interest of certain of his friends or his political colleagues would be tantamount to saying that the office itself was inadequate to represent and protect the public interest against who so ever might challenge it."

Sir Hartley Showcross emphasised that it was the Attorney-General's duty "to be wholly detached, wholly independent and to accept the implications of an obligation to protect what he conceived to be the public interest whatever the political result may be." (Edwards pg. 297-298).

Speaking in the House of Commons in 1951 Sir Hartley Showcross maintained that when a prosecution may concern a question of public policy or national or international importance the Attorney-General has to make up his mind not as a party politician, but must in a quasi-judicial way consider the effect of prosecution upon the administration of law and Government in the abstract. He said:

"The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political consideration which in the broad sense that I have indicated affect Government in the abstract; it is the Attorney-General, applying his

judicial mind who has to be the sole judge of those considerations". (Edwards pg.223).

In Sri Lanka the Attorney-General has under successive Constitutions after independence, retained his non-political status and did not become a member of the Cabinet. Hence, the independence of his office never became the subject of debate or controversy.

Supreme Court in the exercise of its jurisdiction in the following cases: However, during the Colonial period, the status and the power of the Attorney-General and the need for the holder of that office to maintain the independence had been the subject of much comment. In regard to Government measures proposed to the Legislative Council, those duties rested on the Attorney-General.

In regard to judicial appointments, the practice was that in the case of all Courts other than the Supreme Court the Attorney-General was asked to select an individual for appointment to any post which was not held by a civil servant. This practice was criticised as being in conflict with his position as a litigant and on the ground that it tends to diminish the independence of the judiciary. [The Ceylon Law Records 1930 Vol.XI (New Series) Part(8)LXXV.]. The following extracts from contemporary Law Journals make interesting reading:

(a) As regards his authority:

"He has more authority than the Attorney-General of England or the Local Advocate of Scotland. He is responsible for all legislation. He is the final authority on all legal matters. He controls and directs the magistracy. District Judges stand in awe of him and have to provide him with returns and answers

queries." (The Ceylon Law Recorder 1919 Vol.1 Part III XII).

(b) As regards his position as the Head of the Bar:

"It is most unfortunate that by the withdrawal from private practice he is practically out of touch with the profession he leads and with the actual working and administration of our laws and procedure. He becomes an absolute stranger to the country and knows nothing of the people and their wants. If he is carried away by first impressions he generally goes wrong. If he gets under the thumb of the Colonial Office, then good-bye to his usefulness. If he is a wise man he will only keep his eyes and ears open and form no conclusions for some time a least."

(c) On the principle that the Attorney-General must maintain independence in the discharge of his judicial functions:

"How this principle was violated in Ceylon was shown in one remarkable instance. A younger planter, Tewsen by name was most brutally murdered somewhere in the Kelani valley. A man was charged and the evidence against him was valueless and the Attorney-General thought he ought not to be put on his trial and actually ordered his discharge. The planting community clamoured for his committal for trial to the Supreme Court. They knew very little of the facts. They only saw a young man of their body cruelly done to death. A suspected person was put on his trial not because there was any evidence against him but for political reasons. The man lay in jail for over eight months and was tried in the Supreme Court and of course acquitted. Government there upon asked the Council for a vote of Rs.1000/- to be paid to him as compensation. This was opposed by the planting

member, and not to do the Governor of the day an injustice, we court his words "From a political point of view, with which I am chiefly concerned, I think it was most desirable that the case should have been tried and ventilated and that the innocence of this man should be established. His innocence has been impugned and this was the only opportunity he had of clearing his character. The man had been deprived of his livelihood and been put into great expense."

"From a political point of view" a man against whom there was no evidence was put on his trial. What if a perverse jury convicted him? The Attorney-General who was over-ruled became on the first vacancy Chief Justice. Nobody asked, by who the man had been very badly treated.

We are not blaming individuals. We are objecting to a system which makes such things possible and which encourages such action and proceedings." (The Ceylon Law Recorder 1919 Vol.1 Part V LXXVII).

It is in this background that the rights and duties of the Attorney-General as advisor to the Government and guardian of public interests during the post-independence period have to be considered.

As regards criminal matters, the Attorney-General advises Government departments, in particular the Police Department. Indictments against accused persons who are charged with serious offences are forwarded in the name of the Attorney-General. A State Counsel prosecutes in such cases. The Attorney-General himself leads the prosecution in major trials of public importance.

Some of his powers under the Code of Criminal Procedure Act No.15 of 1979 are as follows:

- i. Power to determine whether a trial in the High Court shall be by jury or otherwise.
- ii. Power to grant sanction to institute certain prosecutions.

- iii. Power to tender pardon to accomplices.
- iv. Power to call for the original record even while the prosecution is pending.
- v. Power to quash a commitment made by a magistrate and issue instructions to a Magistrate.
- vi. Power to direct a Magistrate to commit an accused who has been discharged.
- vii. Power in his discretion to enter 'Nolle Prosequi'.
- viii. Power to decide the Magistrate's Court having jurisdiction to try a case in case of doubt.

The Attorney-General also makes his recommendation as to whether or not the sentence of death passed on an accused may be carried out.

As regards civil matters, the Attorney-General advises Ministers and Government Departments. The Solicitor-General is charged with the general supervision of the work of officers in the Civil Branch and acts in close consultation with the Attorney-General in the more important matters.

All actions by or against the State are filed by or against the Attorney-General. Sec.461 of the Civil procedure Code requires that before any action is filed against the Attorney-General, a Minister, Secretary or a public officer a month's notice of action should be given. The object of such notice is to afford the Attorney-General an opportunity of considering whether the claim is justified, if so, the claimant may be granted relief without the necessity of his having to resort to litigation.

By convention, any citizen is free to complain to the Attorney-General of injustices by administrative officials or neglect of public duties. The Attorney-General is competent to call for reports in such cases and to arrange for redress administratively in appropriate cases so that aggrieved persons will be saved the trouble of litigation which can be both expensive and protracted.

As regards Constitutional matters, under Article 77 of

the Constitution it is the duty of the Attorney-General to examine Bills and to advise the President if any of the clauses are inconsistent with the provisions of the Constitution and have to be passed by a special majority prescribed by the Constitution. An officer acting on behalf of the Attorney-General attends Parliament when Bills are debated and passed into law. The officer so attending advises the Speaker on the constitutionality of any proposed provision.

As a matter of practice the Legal Draftsman forwards to the Attorney-General a copy of every draft Bill. The Ministry concerned takes steps to have the Bill gazetted only after the Attorney-General certifies that its provisions are not inconsistent with the Constitution. This practice has made it possible to ensure in the early stages of drafting legislation that proposed laws do not contravene the provisions contained in the Constitution especially those relating to fundamental rights.

Article 134 of the Constitution provides that the Attorney-General shall be noticed and have the right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction in the following cases:

- i. When the Court exercises its jurisdiction in examining Bills for constitutionality.
- ii. When any question relating to the interpretation of the Constitution is under consideration by the Court.
- iii. When the Court hears any complaint of breach of fundamental or language rights guaranteed by the Constitution.
- iv. When the Court exercises its consultative jurisdiction upon reference of a question of law or fact of public importance referred to the Court by the President.
- v. When the Court exercises its jurisdiction in respect of breaches of Parliamentary privileges.

In all those proceedings public interests are involved and the right of the Attorney-General to be heard therein enables him to assist the Court to reach a decision which would advance such interests.

Under Article 105(3) of the Constitution the Supreme Court and the Court of Appeal have the power to punish persons for contempt of Court including contempt of inferior Courts of original jurisdiction. In exercising this jurisdiction, the Court issues a rule on the accused setting out the allegation against him and directs him to show cause why he should not be punished. It is the practice of the Court to forward a draft rule to the Attorney-General for approval before proceedings are commenced. The Attorney-General or an officer or his Department appears as *amicus curiae* when the rule comes up for hearing.

As regards disciplinary proceedings against members of the Bar, the position is that the Supreme Court exercises the jurisdiction to inquire into the conduct of Attorneys-at-Law. When the allegation against an Attorney-at-Law has been investigated, the relevant material is forwarded to the Attorney-General by the Registrar of the Supreme Court with a draft rule for approval. The Attorney-General may approve such rule with or without modifications. The Attorney-General's Department appears in Court and assists the Court when the rule comes up for hearing. The over-riding consideration in determining cases against the Attorney-General is the interest of the litigant. It is the duty of the Attorney-General to ensure that the decision of the Court would uphold that interest.

The Attorney-General appears for the State and the State Officers before the Superior Courts at the hearing of appeals and applications for the issue of writs. The writ jurisdiction is designed to ensure judicial control of administrative action. Writ applications involve public rights and the Attorney-General has a special duty to assist the Court in such cases to reach the correct decision after

balancing the rights of the State and the public interest.

The most important powers of the Attorney-General are judicial or quasi-judicial. In the exercise of these powers he must act objectively and impartially between the State and the subject. In criminal trials his only interest is that the verdict should be in accordance with Law. His officers have been advised to express no views on the punishment to be imposed on an accused who has been found guilty unless the Court invites assistance on that question. The following extracts from an article entitled "The Legal profession and the Law" published at page 106 of the Journal of the International Commission of Jurists Vol.1, No.(Autumn 1957) is of relevance to this subject:-

"A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation Crown Counsel is a representative of the State; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind or try to shut out any legal evidence that would be important to the interest of the person accused. It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which comprise his case, and to make these perfectly intelligible and to see that the jury are instructed with regard to the law and are able to apply the law to the facts.

The business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury.

It would be improper for counsel for the prosecution to attempt by advocacy to influence the court towards a more severe sentence, or after a plea in mitigation by defending counsel who asks that the prisoner be bound over to keep the peace, to tell the judge he oppose the suggestion. It is, however, a common and proper practice, especially in the case of an unrepresented offender, for prosecuting counsel to draw the attention of the court to any mitigating

circumstances as to which he is instructed."

In civil proceedings also Attorney-General's function is to assist the Court to reach the correct decision and not to endeavour to somehow obtain a judgement in favour of the State. When appropriate, it is his duty to promote conciliation of disputes between Government departments and citizens if that would meet the ends of justice.

In advising the Government, he has to form his opinion after considering the legal principles as well as the practical effect of his advice. This does not mean that his advice should not mean besides being correct be somehow favourable to the Government. Thus where any question in respect of which his advice is sought has arisen out of political, controversy or has political overtones, his opinion should be objective and fair to the parties affected. No doubt that he must have due regard to the desire of any Government to realise its legitimate aspirations and the political problems Ministers have to contend with. However, it is his duty to advise the Government to act within the law in implementing its policies.

No Government will lightly disregard the opinion of the Attorney-General and advise itself wrongfully. If it did so, that would lead to wrong decisions which would in turn discredit it in the public eye. It may thus be true to say that in a particular situation the stability of the Government may itself depend on the correctness of the opinion tendered by the Attorney-General. As such he will not rest his advice on mere expediency.

It follows from the above discussion that the person holding the office of Attorney-General must be a person of the highest integrity and independence. He must possess experience, common sense, tact and the capacity to handle delicate or tense situations in an unruffled manner. It is also his duty to guide his officers to act in accordance with the principles and traditions built up over the years. The officers who tender advice on his behalf should be conscious of such principles and traditions.