LAND REFORM COMMISSION

v.

GRAND CENTRAL LTD.

COURT OF APPEAL.
RANASINGHE, J. AND VICTOR PERERA, J.
C.A. L/A APPLICATION 20/81 – D. C. COLOMBO 14125/L.
C. A. APPLICATION 211/81 – D. C. COLOMBO 14125/L.
MARCH 5, 9, 1981.

Attorney-General – Origins of office – Powers and functions of the holder of such office – Attorney-at-law – Right to appear in court – Whether Attorney-General entitled to appear in Court as an attorney-at-law in his private capacity – Preliminary objection taken to such appearance before the Court of Appeal – Powers of Court to regulate its proceedings – Judicature Act, No. 1 of 1978, sections 11, 15, 41, 47, 51 – Code of Criminal Procedure Act, No. 15 of 1979 – Civil Procedure Code, as amended by Laws Nos. 19 and 20 of 1977, Part IV and section 839 – Constitution of the Republic of Sri Lanka, 1978, Arts. 13 (3), 14 (1) (g), 54, 61, 77, 125, 134, 169 (12).

The two applications before the Court of Appeal were for leave to appeal against, and for revision of, an order made by the learned Additional District Judge of Colombo on 20.2.1981 refusing an application made by the Land Reform Commission, the defendant-petitioner, for the discharge and dissolution of an enjoining order. This order had been made upon the application of the plaintiff-respondent (a private company claiming to be owner of certain estates) against the defendant-petitioner and its servants and agents restraining them from interfering with the plaintiff-respondent's rights of management of the said estates. The Land Reform Commission was a statutory Corporation established by the Land Reform Law, No. 1 of 1972, which was a Law enacted *inter alia* to fix a ceiling on the extent of agricultural land that a person could own and to vest lands owned in excess of the ceiling in the Commission.

After these applications were taken up and the appearances for the respective parties were marked a preliminary objection was taken on behalf of the plaintiff-respondent that as senior counsel, who had marked his appearance for the defendant-petitioner in his private capacity as an attorney-at-law, was the holder of the office of Attorney-General under the present Constitution of Sri Lanka, he could not as long as he holds such office appear before the Courts of the Republic except in his capacity as Attorney-General. On a clarification being sought by senior counsel for the plaintiff-respondent, senior counsel for the defendant-petitioner had categorically stated that he and his two juniors, also officers of the Attorney-General's Department, were appearing in this case in their private capacities as attorneys-at-law, instructed by the Legal Officer of the Land Reform Commission. The Court of Appeal reserved judgment on the preliminary objection.

Held

(1) Having regard to the functions , powers and duties attached to the office of Attorney-General by tradition as well as by statutory provisions both in the past and at present, the holder of the said office under the present Constitution (1978), could appear before the Courts of the Republic only in his capacity as Attorney-General and accordingly could be heard by the Court of Appeal only in that capacity. The preliminary objection must be upheld.

(2) The Courts have an inherent power to regulate the proceedings before them, unless there is express statutory provision to the contrary, and accordingly have the discretion to decide who would be permitted to represent before the Court a party who has a right to be heard in such Court. In the present case as the holder of the office of Attorney-General was not appearing in that capacity, the Court could rule that he could not be heard as an attorney-at-law and for a party other than the State or any other person for whom he could appear in his official capacity as the Attorney-General.

Per Ranasinghe, J.

"A careful consideration of the provisions of the Constitution and also the other statute law referred to above shows that the Attorney-General is one of the very few, if not the only one of officers appointed under the Constitution who, in the exercise of the functions and duties attached to the office he holds, comes into direct contact with all three organs of Government—the Parliament, the President of the Republic and the Courts—through whom the sovereignty of the people, which is enshrined in and is recognized and guaranteed by the Constitution, is exercised. Whatever such an officer says and does should always be said and done in his official capacity and for and on behalf of the people of the Republic—not for and on behalf of any one person or a group of persons only. It seems to me that the very appearance of an officer of such high standing even in his personal capacity, for a private party would seem to be oppressive to the other party to a private suit. The appearance of such an officer even though it is in his private capacity is bound to carry with it, even though it may be quite unwittingly and imperceptibly the full weight of the authority of his official position and instil in the mind of the opposing party the thought that he has been placed at a disadvantage and that the other side has obtained an added advantage over him. Even though such an appearance may not in fact secure for the party for whom such officer appears any undue advantage, yet the thought or belief that would be entertained by the other party cannot be shrugged off as being altogether unreasonable and baseless."

Per Victor Perera, J.

"On an examination of these provisions it is clear that the Attorney-General holds a unique position endowed with wide powers, onerous duties and special rights in regard to matters involving the exercise of the Sovereignty of the People under the three limbs—

(1) Executive Power of the People;

(2) Legislative Power of the People; and

(3) Judicial Power of the People.

The significance of this fact is that, unlike in England where the Queen is the Sovereign, in the Republic of Sri Lanka, Sovereignty is in the People in terms of Article 3 of the Constitution and the Attorney-General represents and acts for the People of the Republic."

Cases referred to

(1) *Dahanayake v. D. G. Albert de Silva et. al., (1978-79) 1 Sri L. R. 41.*

(2) *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria, (1976) 1 W. L. R. 868; (1976) 3 All E.R. 437; (1977) Q.B. 529.*

(3) *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria, (1977) 1 All E. R. 881, (1977) 2 W.L.R. 356 (CA).*

(4) *Le Mesurier v. Layard, (1898) 3 N.L.R. 227*

(5) *Re Moragodalianage Peris Perera, (1880) 3 S.C.C. 161.*

(6) *Perera v. White, (1900) 4 N.L.R. 209.*

(7) *Vettivelu v. Wijeyeratne, (1956) 60 N.L.R. 442.*

(8) *O'Toole v. Scott, (1965) 2 All E.R. 240; (1965) A.C. 939; (1965) 2 W.L.R. 1160.*

(9) *Collier v. Hicks, (1831) 2 B. and Ad. 663.*

(10) *Simms v. Moore, (1970) 3 All E.R. 1; (1970) 2 W.L.R. 1099.*

(11) *Re S. (a barrister), (1969) 1 All E.R. 949: (1969) 2 W.L.R. 708.*

(12) *Attorney-General of Gambia v. N'Jie, (1961) 2 All E.R. 504; 60 C.L.W. 71; (1961) A.C. 617; (1961) 2 W.L.R. 845.*

(13) *Frazer v. Queen's Advocate, (1863-68) Ram. Reps. 316.*

(14) *D. M. Jayawardena v. Juanis Fernando, (1881) 4 S.C.C. 77.*

(15) *Attorney-General v. Don Sirisena, (1968) 70 N.L.R. 347.*

(16) *Attorney-General v. E. P. Samarakkody and Another, (1955) 57 N.L.R. 412.*

(17) *Attorney-General v. Saibo, (1912) 15 N.L.R. 204.*

(18) *Le Mesurier v. The Attorney-General, (1906) 10 N.L.R. 67.*

APPLICATIONS for leave to appeal from and to revise an order of the District Court, Colombo.

Shiva Pasupathi, with *K. M. M. B. Kulatunga* and *Suri Ratnapala,* for the defendant-petitioner.

H. W. Jayewardene, Q.C., with *C. Ranganathan, Q.C., H. L. de Silva, K. N. Choksy, Romesh de Silva* and *Lakshman Perera,* for the plaintiff-respondent.

Cur. adv. vult.

April 10, 1981.

RANASINGHE, J.

On 21.1.1981 the plaintiff-respondent instituted proceedings in the District Court of Colombo, in case No. 14125/L, against the defendant-petitioner praying for: an order directing the defendant-petitioner, its servants, agents and all those holding under it to hand over the management of the lands referred to in the first schedule to the plaint and which were said to belong to the plaintiff-respondent: an interim injunction preventing and restraining the defendant-petitioner, its servants, agents and those holding under it from interfering in any way with the plaintiff-respondent's right of management of the said estates until the hearing and the determination of this action.

Upon the application for the interim injunction being supported, the District Court made order, on 31.1.81, issuing notice of the said application upon the defendant-petitioner; and the learned Additional District Judge also proceeded to issue an enjoining order, preventing and restraining the defendant-petitioner and its agents and servants, as prayed for, to be in operation until the disposal of the application for the interim injunction.

Thereafter, on 6.2.81 the defendant-petitioner made an application praying, *inter alia*, for the discharge and dissolution of the said enjoining order. After inquiry, order was made by the learned Additional District Judge on 20.2.81 refusing the said application.

The defendant-petitioner, thereupon, filed on 23.2.81 two applications before this Court: Application No. 20/81 for leave to appeal to this Court against the said order, dated 20.2.81, in terms of the provisions of the Civil Procedure Code: and Application No. 211/81 to have the said order, dated 20.1.81, revised by this Court.

When these matters were taken up before this Court on 5.3.81, the appearances for the respective parties—the defendant-petitioner, and the plaintiff-respondent—were marked as set out above. Thereupon Mr. Jayewardene, Q.C. sought clarification as to whether Mr. Pasupathi, who is presently the holder of the office of Attorney-General, appears in this case in his official capacity or not. Mr. Pasupathi's clear and categorical reply was that he and his two juniors who are also both officers of the Attorney-General's Department, appear in this case, for the defendant-petitioner, in their private capacities, as ordinary attorneys-at-law. Mr. Pasupathi did also at the same time proceed to make a statement, which, however, is not relevant at this stage, but which would be referred to by me at a later stage of this order.

Upon Mr. Pasupathi so clarifying his position, Mr. Jayewardene, Q.C. informed this Court that he proposes to take the following preliminary objection, on behalf of the plaintiff-respondent: that, as Mr. Pasupathi holds office as Attorney-General under the present Constitution of the Republic of Sri Lanka he cannot, so long as he holds such office, appear before the Courts of the Republic except in his capacity as Attorney-General; and that, therefore, he cannot in this case appear in his private capacity as an attorney-at-law, for the defendant-petitioner. Mr. Jayewardene, Q.C. made it clear that this objection was only in respect of the appearance of Mr. Pasupathi in the capacity in which he seeks to appear and was not in this case directed against Mr. Pasupathi's juniors. The sum and substance of his submission is: that the office of Attorney-General is a very high and exalted office under the Constitution: the holder of such office has to perform both under the Constitution, and under certain other statutes functions

which are of a very responsible and solemn nature : that he is the chief adviser, on all legal matters to the Government : that by tradition too the office of Attorney-General carries with it certain function and privileges which are not accorded to any other member of the legal professsion—e.g. the Attorney-General is accepted as the head of the Bar— of both the official and unofficial—is accorded a special place of honour, both at ceremonial sittings of the Supreme Court and at meetings of the Bar Council: that the Attorney-General ought to appear before the courts only in his capacity as Attorney-General : that, having regard to the nature of the functions, powers and duties attached to the office of Attorney-General, both by law and by tradition, it would be improper for the holder of such office to appear before a court in his private capacity, as any other attorney-at-law : that a court has an inherent right to regulate its own business, and, in the exercise of such power, a court can and must refuse to hear such an officer, who should, in view, *inter alia,* of the constraints of the office, which he himself has voluntarily accepted, only appear in his official capacity, if and when he seeks to appear before the court in any other capacity.

Mr. Pasupathi, however, maintained that he is entitled to appear before this Court in his private capacity. He maintained that, so long as he is an attorney-at-law who has taken his oaths as an attorney-at-law under the Constitution, he is entitled, under the provisions of section 41, Judicature Act, No. 2 of 1978, to appear before any court of this Republic as an attorney-at-law, and, as such, he is entitled to the right of audience set out in the provisions of Article 169 (12) of the Constitution. The fact that he is also the Attorney-General does not detract from his right to appear and to be heard purely in his capacity as an attorney-at-law. He strenuously maintained that there is no legal impediment to his appearing also as an attorney-at-law and that, so long as there exists no such legal impediment, he could also appear, if he so desires, in his private capacity for a client before any court of this Republic. He maintained that the question of the propriety of his conduct in so appearing does not arise so long as, as already stated, there is no express legal prohibition against his appearance, in his private capacity. The question of propriety, he maintained is entirely a matter between himself and the proper professional disciplinary authority, and is not a matter for consideration by this Court.

Mr. Pasupathi laid great emphasis upon the argument that there is no legal impediment to his appearing in his private capacity and that so long as there is no such legal impediment this Court cannot and should not deny him a hearing.

I shall, before proceeding to consider the respective arguments put forward at the hearing, dispose of two matters which were referred to by Mr. Pasupathi in the course of his submissions and a reference to one of which has also been made thereafter in the written submissions made on behalf of the defendant-petitioner. Mr. Pasupathi, in the course of his submission, did state that he is appearing in this case for the defendant-petitioner upon a direction given to him by the Head of the State. The impression that I formed then was that this statement was made by Mr. Pasupathi in order to support the propriety of appearing the way he is appearing in this case. That a Head of a State—particularly an elected executive Head of State—would, in certain situations, consider it necessary to direct the chief legal adviser to the Government to go into court in order to protect the interests of the State is not anything unusual or unnatural under a Constitution such as the Constitution of 1978. If and when such a direction is given, it appears to me that it is for the Attorney General himself to decide how best he should set about it, having due regard both to the relevant express provisions of law and tradition. Be that as it may, any such direction is, in my opinion, not relevant for the purpose of considering the issue arising out of the preliminary objection taken in this case. Mr. Pasupathi did also at one stage during his oral submissions in reply to Mr. Jayewardene, Q.C. cite the judgment of His Lordship the Chief Justice in the case of *Dahanayake v. D. G. Albert de Silva et. al.* (1), and seek to argue that the party for whom he is seeking to appear is no ordinary party litigant but an agency of the State. Mr. Jayewardene, Q. C. did, in his reply, draw the attention of this court to the fact that the decision in the English case of *Trendtex Trading Corporation v. The Central Bank* (2), referred to by the Chief Justice in that case had, even by then, been set aside in appeal by the Court of Appeal (3) and that this fact does not seem to have been brought to the notice of the Chief Justice. Mr. Jayewardene, Q.C. further submitted that, although leave to appeal to the House of Lords had been granted by the Court of Appeal, the appeal does not seem to have been prosecuted and that there is nothing to show that the judgment of the Court of Appeal has been set aside. At the hearing of this application no further submissions were made

thereafter by Mr. Pasupathi in regard to this matter, although in the written submissions once again this position has been adverted to. I do not think it necesary for me to embark upon an examination of the question whether or not the defendant-petitioner is or is not an agency of the State, for the simple reason that, if it is, then there would be no question about the right of the Attorney-General to appear for the defendant-petitioner in his undoubted capacity as Attorney-General; yet, Mr. Pasupathi, the Attorney-General, does not so seek to appear but insists on appearing in his personal capacity. Hence I do not think that this matter should detain me any further.

The origin of the office of Attorney-General could be traced back to the office of "Advocate Fiscal" which was in existence under the Dutch towards the latter stages of their rule in this Island, and which office continued even during the early years of British occupation until the year 1834 when the name was changed to that of "King's Advocate". This designation was thereafter changed, in the year 1883, by the provisions of Ordinance 1 of 1883, to the present day appellation of "Attorney-General". Bonser, C. J. in the year 1898, in the case of *Le Mesurier v. Layard* (4), at p. 230 observed that:

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

Furthermore, the judgments of Cayley, C. J. and of Clarence, J. in the case of *Moragodaliyanage Peris Perera* (5), do show that the Queen's Advocate was the principal law officer of the Government in all criminal matters as well. The development of the office of Attorney-General in this Island thereafter under the British could be followed through the pages of the Reports of the Donoughmore Commission of 1928 and of the Soulbury Commission of 1945. At page 107 para 401 of the *Soulbury Commission Report* it is stated:

> "We have already recommended that the A.G. should be charged with the duties now carried out by the Legal Secretary under this heading. We envisage that, under the Constitution we recommended, Ministers will require legal assistance in (a) the day-to-day running of their departments, (b) the passage

of Bills through Parliament, especially at the Committee stage, (c) the interpretation of existing laws and the departmental matters which may involve legal proceedings, and (d) matters of high constitutional policy, on which the Cabinet as such may require advice".

The Ceylon (Constitution) Order-in-Council 1946 (Cap. 379) which came into operation thereafter in 1947 had certain specific provisions relating to the Attorney-General; e.g., the appointment of the Attorney-General by the Governor-General (Sec. 60) : that the Speaker should, before giving his certificate to certain specified Bills, consult the Attorney-General or the Solicitor-General. (Secs. 33 (2) and 34 (2)).

Then came the first Republican Constitution of 1972. This Constitution provided for the appointment of the Attorney-General by the President of the Republic (Article 108 (b)); and also contained certain specific provisions relating to the duties of the Attorney-General: duties pertaining to the examination of and the communication of his opinion to the Speaker in regard to certain Bills, which have been published and the amendments proposed to such Bills (Article 53): the right to be heard on all matters before the Constitutional Court (Article 63).

The present Constitution, which has been in operation from September, 1978, too contains provisions relating to the Attorney-General: the appointment by the President of the Republic (Article 54): the taking (or making) and subscribing of the oath (or affirmation) set out in the 4th Schedule before entering upon the duties of his office (Article 61): duties in regard to published bills (Article 77): the right to be heard in all proceedings in the Supreme Court in the exercise of the Supreme Court's jurisdiction in respect of constitutional matters, of Bills both ordinary and urgent, of the interpretation of the Constitution, of Fundamental Rights, of the expression of opinions at the request of the President of the Republic and of the Speaker, and of Election Petitions (Article 134).

The provisions of the Judicature Law, No. 2 of 1978, too confer upon the Attorney-General powers of a very responsible nature: the power to determine whether a trial in the High Court shall be by Jury (Sec. 11): the right to appeal to the Court of Appeal from sentences imposed by and also orders of acquittal made by the

High Court (Sec. 15) : by his fiat in writing to designate, in certain circumstances, the court or place at which any inquiry into or the trial of any criminal offence shall be held (Sec. 47) : the right to electing, in certain circumstances, the court, before which a prosecution for any crime or offence declared punishable by fine or imprisonment, may be initiated (Sec. 51).

The Attorney-General has also been vested with, under the provisions of the Code of Criminal Procedure Act, No. 15 of 1979, very wide and far-reaching powers and functions which call for the exercise of an independent and impartial determination: to decide, in case of doubt, the court in which an offence should be inquired into (Sec. 133): to grant the requisite sanction without which the courts will not take cognizance of certain offences (Sec. 135): the initiation of proceedings before a Magistrate's Court (Sec. 136 (1) (c)) : giving of directions to a Magistrate with regard to the initiation of a preliminary inquiry in respect of certain offences (Sec. 145 (1) (b), and the proviso to Sec. 142 (2)): to present indictments to the High Court (Sec. 160) : to determine, in certain circumstances, that trial of certain offences be on indictment before the High Court by a jury (Sec.161): sanctioning of the discharge of an accused person by a Magistrate (Sec. 190): the conduct of the prosecution in the Magistrate's Court (Sec. 191 (1)) , and even in regard to private plaints (Sec. 191(2)) : powers in regard to withdrawal of prosecutions initiated before the High Court (Sec. 194): the tender of pardon to accomplices (Sec. 256, 257): appeals from acquittals (Sec. 318) and from convictions (Sections 320 (2)): the appearance for the State in every appeal to the Court of Appeal where the State or a public officer is a party (Sec. 360) with regard to certain offences affecting the administration of justice (Sec. 389): the power to exhibit information, present indictments to institute, undertake and carry on criminal proceedings in certain specified cases (Sec. 393 (1)): the power to give advice, whether on application or ex mero moto, to State Departments, public officers, officers of the Police and officers in Corporations in criminal matters (Sec. 393 (2)): the power to summon any officer of State or of a Corporation or of the Police to attend his office with the necessary books and documents for certain specific purposes (Sec. 393 (3)): the right to have Superintendents and Assistant Superintendents of Police reporting to him the commission of certain specific offences and the supplying of all relevant information required by the Attorney-General (Sec. 393 (5) (b)):

the power to call for the original record and productions (Sec. 395): power to quash a commitment made by a Magistrate and issue instructions to a Magistrate (Sec. 396): power to order a Magistrate to take further evidence (Sec. 397): power to call for the proceedings in any criminal case from a Magistrate or a Judge of the High Court (Sec. 398): power to direct a Magistrate to commit an accused person who has been discharged (Sec. 399): power to exhibit information to the High Court to be tried by the High Court at Bar (Sec. 450): powers in regard to applications for bail—Chap. XXXV and the provisions of Acts Nos. 15 of 1978 and 54 of 1980.

The provisions of law relating to civil actions in which the Attorney-General figures are to be found in Part IV of the Civil Procedure Code, Chapter 101, as amended by Laws Nos. 19 and 20 of 1977: section 456 provides that all actions by or against the State should be by or against the Attorney-General: that all processes issuing against the State should be served upon the Attorney-General (Sec. 457): that the Attorney-General be allowed reasonable time to file answer (Sec. 458): no action to be filed against the Attorney-General, as representing the State, unless one month's notice of such action has been given to the Attorney-General (Sec. 461): the power to undertake the defence of an action against a Minister and other specified classes of persons (Sec. 463). Furthermore, the Attorney-General has been vested with powers and duties which have to be exercised for the protection of the interests of minors, who are considered wards of the District Court, in terms of the provisions of sections 589, 591, 592(2) of the Civil Procedure Code. So too in relation to persons of unsound mind—vide sections 556 (2), 572 (2), 575 (1).

Furthermore, the Attorney-General has to perform certain special functions when disciplinary action is set in motion against attorneys-at-law, in terms of the Rules which the Supreme Court has made in pursuance of the rule making power vested in the Supreme Court by the Provisions of Article 136 (1) (*g*) of the Constitution. In terms of the said Rules, once the Supreme Court issues a Rule upon an attorney-at-law calling upon him to show cause why he should not be suspended or removed from office, it is the Attorney-General (or the Solicitor-General, or any other officer of the Attorney-General's Department) who appears before the Supreme Court in support of such Rule and leads evidence against the attorney-at-law concerned. Then when an

attorney-at-law, who had been removed from office desires to apply to the Supreme Court for re-admission and re-enrolment, he has to make the Attorney-General a respondent to his application.

The Attorney-General of this Island has also, by tradition been accepted as the titular head of the Bar both of the official and of the unofficial: been given a special place of honour and of responsibility on behalf of the Bar at all ceremonial sittings of the Supreme Court: presided over meetings of the Bar Council.

The Attorney-General has, as already stated to, before he enters upon the duties of his office, take (or make) and subscribe the oath or affirmation, which is set out in the Fourth Schedule, whereby he has to "faithfully perform the duties and discharge the functions" of his office "in accordance with the Constitution.... and the law."

A consideration of the foregoing makes it quite evident that the Attorney-General appointed by the President of the Republic under the provisions of the Constitution is an officer who is not only the chief legal adviser to the State, both in matters civil and criminal, and the person by and against whom all claims of a civil nature by and against the State are instituted, but is also the person who is responsible for initiating, on behalf of the Republic, all proceedings to bring to book all offenders against the criminal law of the land: that the powers, functions and duties attached to the office of Attorney-General, both by statute and by tradition, are such that the person who holds the office of Attorney-General ought to appear before the courts only in his capacity as Attorney-General and Attorney-General alone. Very great emphasis was placed throughout his submissions by Mr. Pasupathi on the argument that so long as there is no legal impediment to his appearing in his private capacity he is entitled to apppear in such capacity, and that the Court must hear him in such capacity. True it is that there is no express legal provision anywhere which expressly prohibits the person, who holds office as Attorney-General, from appearing before the courts of this Island in his capacity as an ordinary attorney-at-law; yet, it appears to me that the express provisions of law referred to earlier and also tradition constitute constraints, which tend to operate against the holder of the office of Attorney-General from appearing before the courts in a capacity other than in his official capacity, and that the said constraints the Court itself, should take cognizance of.

It also seems to me that two simple illustrations would help show that this argument—based upon the lack of a legal impediment is far from convincing, and would not bear close scrutiny. Carried to its logical conclusion this argument could be made use of to justify an appearance, by the officer holding the post of Attorney-General, for the defence in a criminal case, say in a prosecution by the police in a Magistrate's Court, or even in a private plaint. There is no express provision which could be pointed to urge that he is expressly prohibited from doing so. Yet, having regard to all the powers and functions, vested by the provisions of the Criminal Procedure Code in the Attorney-General such a step on his part would seem to me to be even unthinkable. Take then a civil suit between two private party litigants. There lies the possibility, if not in every such suit, at least in a large number of such civil suits, of a question which would involve the interpretation of the Constitution arising in the course of it. What is to happen if and when a question relating to the interpretation of the Constitution arises in a case is set out in Article 125 of the Constitution. If the holder of the post of Attorney-General is already appearing in his private capacity for one of the parties to such a suit then the same person would not only receive, in his capacity as Attorney-General, a notice in terms of the provisions of Article 134 of the Constitution, from the Supreme Court but he could also, in such capacity, exercise his right to be heard in terms of the provisions of the self-same Article. Such a situation could certainly have not been contemplated by the framers of the Constitution. What would have been contemplated and intended was an independent and an uncommitted officer proferring to the Supreme Court assistance, untrammelled by any extraneous considerations; and, what is even more important, assistance which would not carry with it even the slightest hint of it being anything but strictly impartial.

During the course of his submissions, Mr. Pasupathi tendered to this Court a list of cases in which the Law Officers of the Crown had appeared for private parties in cases before the courts. This list certainly makes interesting reading and brings to light not only instances in which the two Law Officers had been pitted against each other and also occasions when the Solicitor-General of the day had led the Attorney-General of the day in a civil suit. It has to be noted that, whilst the earliest case in the list is a case in 1880 the latest is one in 1915. No case thereafter has been brought to our notice. Hence for well over half a century—during

the last 65 years at any rate—there has never been a single instance in the history of this Island where an Attorney-General of the day had left aside his official mantle and stepped down in his private capacity, into the arena of litigation—civil or otherwise—between ordinary private parties before the courts of this Island. It has also to be noted that the period covered by the said list is a period during the entirety of which this country was subject to colonial rule. Suffice it so say that, even before we gained independence and the Attorney-General came to be appointed by the President under the Republican Constitution the Attorney-Generals of this country had given up the said practice.

Considerable reliance was also placed by Mr. Pasupathi on the two cases of: *Perera v. White* (6), and *Vettivelu v. Wijeyeratne* (7). The judgments in both cases do contain opinions and observations which do support the view that there is nothing to prevent a professional officer of the Attorney-General's Department from appearing for private parties in private litigation. Nevertheless, it must be noted that whilst Bonser, C. J. in *Perera's case* did accept the position that " it is desirable" that at least one of the Law Officers of the Crown "should be free to take an unprejudiced view so as to be able to advise the Government", de Silva, J. in *Vettivelu's case* did accept the position that the reason why the Law Officers and Crown Counsel did not generally represent parties in private litigation was because of "the conditions of service binding on them", and also took cognizance of the practice that even where the Attorney-General did not take up the defence of a public officer who is sued in court, but yet instructs an officer of his Department to appear for such public officer, the officer of his (Attorney-General's) Department so appears only in his official capacity. Even in regard to these two cases what has to be noted is, that, whilst one (Vettivelu's case) did not deal with the position of the Attorney-General, they both belong to an era long prior to the Constitution of 1978.

A careful consideration of the provisions of the Constitution and also the other statute law referred to above shows that the Attorney-General is one of the very few, if not the only one of officers appointed under the Constitution who, in the exercise of the functions and duties attached to the office he holds, comes into direct contact with all three organs of government—the Parliament, the President of the Republic, and the Courts—through whom the sovereignty of the people, which is enshrined in and is

recognized and guaranteed by the Constitution, is exercised. Whatever such an officer says and does should always be said and done in his official capacity and for and on behalf of the people of the Republic—not for and on behalf of any one person or a group of persons only. It seems to me that the very appearance of an officer of such high standing even in his personal capacity, for a private party would seem to be oppressive to the other party to a private suit. The appearance of such an officer even though it be in his private capacity is bound to carry with it, even though it may be quite unwittingly and imperceptibly the full weight of the authority of his official position and instil in the mind of the opposing party the thought that he has been placed at a disadvantage and that the other side has obtained and added advantage over him. Even though such an appearance may not in fact secure for the party for whom such officer appears any undue advantage, yet the thought or belief that would be entertained by the other party cannot be shrugged off as being altogether unreasonable and baseless.

In England from the very earliest times the Judges have had the power to regulate the proceedings in their own Courts, and inherent in it was the discretion to decide whom they would permit to represent, before them, the party litigants. As time went on the judges delegated to the Inns of Court the function of selecting fit and proper persons whom the judges may permit to appear before them. Even so, the judges retained to themselves the supervisory powers in respect of them.

In the case of *O'Toole v. Scott* (8) their Lordships of the Privy Council had occasion to discuss the question whether a person had by law a right to act as an advocate before the justices of the peace; and Lord Pearson quoted, at page 242, the judgment of Lord Tenterden in the case of *Collier v. Hicks* (9), to the effect:

> "This was undoubtedly an open court and the public had a right to be present, as in other courts; but whether *any* person, and *who* shall be allowed to take part in the proceedings, must depend on the discretion of the magistrates; who, like other judges, must have the power to regulate the proceedings of their own Courts";

and, at p. 243, the judgment of Parke, J. also in the same case:

> "No person has the right to act as an advocate without the leave of the Court, which must of necessity have the power of

regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the superior Courts, by ancient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented; but justices of the peace who are not bound by such usage, may exercise their discretion whether they will allow any, and what persons, to act as advocates before them".

At page 243, Lord Pearson also sets down the other cases illustrating the general principle that, subject to usage or statutory provisions, Court or tribunals may exercise a discretion whether they will allow any, and what persons, to act as advocates before them. *O'Toole's case* (supra) was quoted with approval in the later case of *Simms v. Moore* (10).

In the case of *Re S. (a barrister)* (11) where Paull, J. went into the way a barrister became a person having a right of audience in the Superior Courts of England, and into the relationship between the Inns of Court and the judges, quotes at page 955, the words of Lord Denning in the case of *A.G. of the Gambia v. N'Jie* (12), at 508:

> "By the common law of England, the judges have the right to determine who shall be admitted to practise as barristers and solicitors; and, as incidental thereto, the judges have the right to suspend or prohibit from practice. In England, this power has for a very long time been delegated as far as barristers are concerned, to the Inns of Court; and, for much shorter time, so far as solicitors are concerned to the Law Society."

The principle which, in my opinion, could be culled from these judgments is that there is an ancient and an undoubted right in the courts of England to regulate the proceedings before them, and inherent in it is, unless there is statutory provision to the contrary, the discretion to decide whom the Courts would permit to represent before them a party who has a right to be heard by them. In this Island, where the system of Judicature and the relations between the Bench and the Bar are based upon principles similar to these obtaining in England, such an inherent power would rest in our Courts, in terms of the provisions of section 839 Civil Procedure Code, unless of course there is express statutory provision to the contrary. Such a principle cannot, in my opinion

be said to be out of "harmony with sound general legal principles," or be "inconsistent with the intentions of the Legislature."

In Sri Lanka the duty of putting forward persons as fit and proper persons whom the judges could permit in their respective courts to appear on behalf of party litigants, who come before them, has been vested by statute in the Council of Legal Education. Mr. Pasupathi also highlighted the provisions of Articles 13 (3), 169 (12) of the Constitution, and of section 41 of the Judicature Act, No. 2 of 1978, in support of his contention.

Article 13 (3) of the Constitution provides that a person "charged with an offence shall be entitled to be heard in person or by an attorney-at-law...." This guarantee of being heard in person or through an attorney-at-law is extended only to "a person charged with an offence."

What Article 169 (12) provides is that, after the appointed date referred to therein, "no attorney-at-law shall be entitled to represent any party to a proceeding or be given the right of audience in any Court, Tribunal or other Institution until or unless he has taken and subscribed the oath or made and subscribed the affirmation set out ...." This Article cannot be said to confer any substantive rights on the attorneys-at-law. It cannot be relied on to vest in the attorneys-at-law a right of audience. All that it states is that unless and until an attorney-at-law takes the prescribed oath, he will not be able to exercise either the right to represent another before a court of law or the right to be heard before a court of law. Neither of these rights is conferred by the provisions of this article on an attorney-at-law. It is not an empowering provision. All that it seeks to do is to place a bar to the exercise of certain rights, which it is assumed have been vested in an attorney-at-law by some other provision of law ordained by Parliament. One has to look to other statute law for the vesting, if any, of such rights in an attorney-at-law. Section 41 of the Judicature Act, No. 2 of 1978, is pointed out as such a provision of law.

Section 41 of the Judicature Act, No. 2 of 1978, provides:

"Every attorney-at-law shall be entitled to assist and advise clients and to appear, plead or act in every Court or other

institution established by law.... and every person who is a party to or has or claims to have the right to be heard in any proceeding in any such Court or other institution shall be entitled to be represented by an attorney-at-law."

An analysis of the provisions of this section shows that it deals with two matters: that every attorney-at-law "shall be entitled" to assist and advise *clients* and to appear, plead or act in every court: that every person who is a party or claims the right to be heard in a court shall be entitled to be represented by an attorney-at-law. An appearance of an attorney-at-law in court is on behalf of a "client". It is interesting to note that in England Barristers are divided into two categories: "Practising Barristers" and "Non-practising Barristers". The definition of a "Practising Barrister" as set out in the Regulations of the Bar Council—vide *Halsbury,* Vol. 3 (4th edition), page 594, para 1110, note II—is: ".... a barrister who is entitled to practise and who holds himself out as ready to do so not being otherwise employed in a whole time occupation, or a barrister whose whole regular occupation is that of editor or reporter of any series of law reports entirely written and edited by barristers for the use of legal profession". Our attention has not been drawn to any corresponding definition in Sri Lanka. Be that as it may the English definition contains an important characteristic of a practising lawyer, be he called a barrister or attorney-at-law. It is that his services as a professional is fully and entirely devoted to those who require his services as such. He is not one who is "otherwise employed" and is expected to devote his full time to the discharge of the functions and duties of such office, for which he is paid a salary, and is able to appear in court for another only when his services are not "otherwise" required. It appears to me that an attorney-at-law, who, of his own free will, accepts office as Attorney-General and takes and subscribes the oath or affirmation set out in the fourth Schedule can and must thereafter be taken to have opted to appear in court only on behalf of his one and only "client", the state (and or an agency of the state or any other person for whom he could appear in his official capacity as the Attorney-General).

The "right" conferred on an attorney-at-law by section 41 is not a right in the sense that it casts a corresponding duty on another and an infringement or a denial of which could be vindicated in a manner in which a "right" in that sense could ordinarily be vindicated. It appears to me to be more in the nature

of a privilege or a licence. The provisions of this section do not, in my opinion, come into conflict with the inherent right of the courts of this Island to regulate the proceedings in their courts as referred to earlier. Nor could they be said to be incompatible with such an inherent right.

In this view of the matter, I am of opinion that, having regard to the functions, powers and duties attached to the office of Attorney-General, both by statute and by tradition, the holder of the office of Attorney-General under the present Constitution should appear before the courts of this republic only in his capacity as Attorney-General, and that the holder of the said office should be heard by this court only in his capacity as the said Attorney-General.

For the reasons, I make order upholding the above-mentioned preliminary objection raised on behalf of the plaintiff-respondent.

VICTOR PERERA, J.

This is an application No. C.A. 211/81 by the Land Reform Commission as petitioner for the revision of an order made by the District Judge of Colombo and the application No. C.A. 20/81 is one for leave to appeal from the same order. This order is one made in a purely civil action between a private company, Grand Central Limited and the Land Reform Commission which is a statutory Corporation constituted under the Land Reform Law and a distinct legal entity. It would appear from the pleadings and documents filed in these applications that the subject matter in dispute was the management of some estates admittedly belonging to the plaintiff-respondent entrusted to the Land Reform Commission and the termination of the management. The dispute was thus one strictly between the company and the Land Reform Commission.

When the matter was taken up before us on the 5th March, 1981, Mr. S. Pasupathy, the Attorney-General, Mr. K. M. M. B. Kulatunga, Deputy Solicitor-General and Mr. S. Ratnapala, State Counsel, marked their appearances for the defendant-petitioner instructed by Mr. P. K. T. Perera, the Legal Officer of and an employee of the Land Reform Commission who had filed his proxy on behalf of the Commission.

Mr. H. W. Jayewardene, Q.C., Mr. C. Ranganathan, Q.C., Mr. H. L. de Silva, Mr. K. N. Choksy, Mr. Romesh de Silva, and Mr. Lakshman Perera marked their appearances for the respondent-company instructed by Messrs Julius & Creasy who had filed the proxy for the company.

At the very outset Mr. H. W. Jayewardene, Q.C., sought a clarification as to whether Mr. S. Pasupathy appeared for the defendant-petitioner as the Attorney-General or as a private attorney-at-law instructed by Mr. P. K. T. Perera, the Legal Officer and employee of the petitioner.

Mr. S. Pasupathy thereupon categorically stated that he was not appearing as the Attorney-General and that he was appearing in his private capacity as an attorney-at-law instructed by Mr. P. K. T. Perera for the Land Reform Commission. He asserted that he had complied with article 169 (12) of the Constitution which entitled him to the right of audience as an attorney-at-law having taken the prescribed oath. Mr. Jayewardene, Q.C., thereupon stated that he was taking a preliminary objection to Mr. Pasupathy appearing in his private capacity in a purely civil dispute between two parties.

It is to be noted that Mr. H. W. Jayewardene, Q.C., is the President Emeritus of the Bar Association of Sri Lanka, and that Mr. S. Pasupathy is the official leader of the Bar by virtue of his holding the office of the Attorney-General, who are deeply concerned with the interests and traditions of the legal profession.

Mr. H. W. Jayewardene, Q.C., stated that the point he was taking was a very important one which affected the entire legal profession, professional conduct, the appearances according to seniority, seniority depending on the date of call to the bar and the right of salaried employees under the State appearing in Court and principally the right of the holder of the very high office of Attorney-General appearing in his private capacity as a lawyer in a purely civil case between private parties. He contended that while Article 169 (12) of the Constitution (1978) entitled any attorney-at-law to represent any party to a proceedings or gave him a right of audience in any court, Tribunal or other institution, it was a franchise or privilege which a person could exercise so long as there was no legal prohibition, no constraints inherent in the nature of the office the person held or so long as there was no

conflict with the interests the person whose interests he has to look after by virtue of his office.

He contended that this court had a duty and right to adjudicate upon the question whether a person is entitled to the right of audience in a given case when such a right is questioned or where the absence of such a right is brought to the notice of court.

We therefore decided to hear submissions on this preliminary objection on behalf of both parties.

Mr. Jayewardene traced the history of the office of Attorney-General in this country from the earliest times in support of his contention that there are certain constraints attached to a holder of the office of Attorney-General which this Court should take note of and must uphold in the interests of the Administration of Justice.

After the Dutch Settlements in Ceylon were ceded to the British Crown, there was appointed a Governor to govern the country for the British Sovereignty. By Proclamation dated 23rd September, 1799, the Roman-Dutch Law was established as the common Law of the ceded territory and by Royal Command temporarily the Administration of Justice and Police were ordered to be exercised in conformity with the laws and institutions that subsisted under the United Provinces, namely, the Dutch Government, subject to deviations or alterations to be made from time to time. Under that system of the law the 'Fisc' meant Treasury, State or Crown and the *Advocate Fiscal* was the principal officer of the Government against whom any claim could be made as against the Government (vide *Le Mesurier v. Layard* (4).)The office of Advocate Fiscal continued for some time till about 1934, when the title of this officer was changed to King's Advocate, the change having been brought about by Royal Charter dated 18.2.1933.

As Bonser, C. J. pointed out in the above case :

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

In that case a 'dismissed officer of the Civil Service' sued the Attorney-General not in his personal capacity but as representing the Government of Ceylon. Lawrie, J. referring to the distinction drawn between the 'Crown' and the 'Government of Ceylon' agreed that there was such a distinction and held that the Attorney-General was the correct party defendant, if the party sued was the Government of Ceylon.

The importance of the office of King's Advocate or Queen's Advocate was still further accentuated by the provisions in the Law of Evidence Ordinance, No. 9 of 1852, in section 6:

> "(6) Nothing herein contained shall render the Queen's Advocate compellable to give evidence in any court in the Island instituted by or against that officer in his official capacity."

Ordinance No. 11 of 1868 was introduced to amend and consolidate the Law in the Colony relating to the administration of justice replacing the Royal Charter of 1833. Section 86 of that Ordinance provided for civil actions to be filed in the Court of Requests. Section 90 provided that if any person committed perjury in any civil case in the Court of Requests, the Commissioner was obliged to give information to the *Queen's Advocate* forthwith. This by implication meant that he should not otherwise appear in the Court of Requests. Section 111 dealt with the Queen's Advocate's powers of prosecution in regard to certain offences, his right to stop proceedings or to intervene in any prosecution and gave him the power to order the liberation of persons committed to jail. Section 117 dealt with his powers in civil cases and provided that the Queen's Advocate shall institute all civil suits on behalf of the Crown and gave him the right to appear in all civil suits instituted by any private party against the Queen's Advocate. Section 118 provided for the maintaining of a special roll in court referred to as the Queen's Advocate's Roll.

In the case of *Frazer v. Queen's Advocate* decided in July 1868 (13), at page 322 Creasy, C.J. and Stewart, J. held as follows:

> "We humbly consider that by these declaration of the Royal Will, Her Majesty's subjects in this Island who had or might have any money due to them from the local government for wages, for salary, for work, for materials, in short for anything

due on an obligation arising out of contract, were permitted to retain the old practice given by the Roman Dutch Law to sue the Advocate of the Fiscal, now styled the Queen's Advocate for recovery of their money."

In the case of *D. M. Jayawardena v. Juvanis Fernando, and the Queen's Advocate* decided on 7.6.1881 (14) an action upon a contract with a government officer acting on behalf of the government, was filed against the Queen's Advocate as representing the Crown. The Queen's Advocate demurred to this on two grounds, first that the Crown could not be impleaded by a subject and secondly that even if the Crown could be sued, *there was no enactment which made the Queen's Advocate the representative of the Crown.* It was held that the proper mode was to sue the Queen's Advocate, the representative of the Crown in suits against the Crown. Cayley, C. J., having referred to the series of cases when the Queen's Advocate had been sued as the representative of the Crown held:—

"The practice to adopt the procedure of suing the Crown in the person of the Queen's Advocate has never so far as we know been disputed in our courts. It would be needless to multiply citations of Ceylon cases on this point for the fact that such a practice (whether legally sustainable or not) has prevailed and been recognised by our courts during a long series of years is not open to controversy."

These cases clearly establish that the *Queen's Advocate was a representative of the Crown* and that his appearance in court as a party was nothing but as such representative, particularly in a civil action.

Mr. Jayewardene addressed us on the various changes in the Constitution that took place from time to time. He referred us to the Report of the Special Commission on the Constitution (1928) under the Chairmanship of Rt. Hon. The Earl of Donoughmore. At page 70 of this Report under the heading "The Attorney-General" the Commissioners have examined the position of the Attorney-General and made certain recommendations. Having earlier dealt with the Treasurer, the Report states as follows:

"In the same way the Attorney-General will be the Legal Adviser to the Government with the full status of Minister, and so able to participate in the deliberations of the Board

of Ministers and of the Council. He will be responsible for advising the Heads of Departments and the Executive Committee on such matters as may be referred to him, as for example the examination of contracts and the preparation of legal documents.

We would recommend that in order that the Attorney-General's duties may be satisfactorily fulfilled special attention would be paid to the staff of his department which has been criticised a 'second bottle neck' not less effective than that of the Secretariat in obstructing the free flow of public business."

The Soulbury Commission Report at page 107 had the following recommendation in regard to the Attorney-General – 401:

"We have already recommended above that the Attorney-General should be charged with the duties now carried out by the Legal Secretary under this heading. We envisage that, under the Constitution we recommended, Ministers will require legal assistance in (*a*) *the day-to-day running* of their departments, (*b*) the passage of Bills through Parliament, especially at the Committee stage, (*c*) the interpretation of existing law and in departmental matters which may involve legal proceedings, and (*d*) matters of high constitutional policy, on which the Cabinet as such may require advice."

The Ceylon (Constitution) Order in Council 1946 (Chapter 379, Revised Legislative Enactments) in Part III which came into operation on 5th July, 1947, provided in section 33 that before the Speaker certifies a Bill passed as a Money Bill he shall consult the Attorney-General or Solicitor-General and in section 34 (2) provided that before the Speaker certifies that any other Bill was passed he shall consult the Attorney General or the Solicitor-General. Section 60 provided that the appointments, transfers to the office of Attorney-General shall be made by the Governor-General.

In terms of the provisions of section 6 of the Ceylon (Constitution) Order in Council of 1946 which was the Constitution in force before Ceylon became a Republic on 22nd May, 1972, the Attorney-General was a Public Officer appointed by the Governor-General to the Public Service.

The proviso to this section provided the 'transfer' in regard to the Attorney-General by the Governor-General means a transfer

involving an increase in salary.

He was the chief prosecutor for the Crown at the time and all indictments in criminal cases against accused persons were under his name. As chief prosecutor he was the Director of all Crown prosecutions and in his discretion exercised the fiat of entering nolle prosequi. In non-summary proceedings before Magistrates, he gave instructions to Magistrates as regards the conduct of cases. Thereby he had quasi-judicial powers. In the case of *The Attorney-General v. Don Sirisena* (15) decided in 1968, H. N. G. Fernando, C. J. held:

> "Our Law has, since 1883 if not earlier, conferred on the Attorney-General in Ceylon powers directly to bring an alleged offender to trial before a Court, to direct a Magistrate who has discharged an alleged offender to commit him for trial and to direct a Magistrate to discharge any offender whom he has committed for trial. These powers of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of our system of Criminal Procedure, and it would be quite unrealistic to hold that there was any intention in our Constitution to render invalid and illegal the continued exercise of those powers."

The Supreme Court held that the exercise by the Attorney-General of powers under section 391 of the Criminal Procedure Code was not an interference with the powers of a court and therefore did not constitute an infringement of the principle of the Separation of Powers recognised in the Constitution of Ceylon. No appeal from an acquittal in a criminal case was possible without the sanction of the Attorney-General. *Even in the case of private prosecutions* the sanction of the Attorney-General was necessary before an appeal against an acquittal was filed.

In civil cases he become the defendant whenever the Government, Government Departments or Minister of State were sued as defendants. Under Parliament (Powers and Privileges) Act, No. 21 of 1953, it was the Attorney-General who initiates proceedings. (*The Attorney-General v. E. P. Samarakkody and W. Dahanayake* (16).

When the Republican Constitution of 1972 came into operation, there was hardly any difference in the actual position of the Attorney-General. He remained a State officer in terms of section

108 of the Constitution. He continued as the Chief Legal Adviser to the Government.

Under this Constitution however he had a Director of Public Prosecutions to carry out State prosecutions, but this officer functioned under him. The Attorney-General was given additional functions. He was required to examine every Bill introduced in Parliament for any contravention of the provisions of the Constitution. He was empowered to institute proceedings before the Constitutional Court and defend the point of view of the Government. He was entitled to express his opinion on Bills tabled in Parliament. This provision was a novel provision written into the Constitution and a heavy responsibility was cast on the single individual who was a State officer but not a politician, policy maker or draftsman. He had to act independently. This gave him a very important and responsible role in the legislative process.

The Constitution of the Republic of Sri Lanka (Ceylon) was adopted and enacted on the 22nd May, 1972. By Article 3, sovereignty was declared to be in the people. This sovereignty was to be exercised through the National State Assembly and the National State Assembly was the supreme instrument of State power. Article 53 provided for the duties of the Attrorney-General in regard to the examination of Bills passed and for the communication of his opinion to the Speaker. Article 63 (1) provided that the Attorney-General had the right to be heard on all matters before the Constitutional Court. The Attorney-General was appointed by the President. Even under that Constitution the Attorney-General held a very important place and was the principal Law officer of the Republic and adviser to the State.

The provisions of the present Constitution of the Democratic Socialist Republic of Sri Lanka (1978) *vis-a-vis* the Attorney-General have to be examined in order to determine the very important role the Attorney-General now plays in the exercise of the Executive, Legislative and Judicial powers that have to be exercised in relation to the sovereignty of the People after the displacement of the Crown.

Mr. H. W. Jayewardene stressed that the office of Attorney-General was a very exalted and high office and the holder of such office had corresponding obligations and duties to the Executive, to the Legislature and the Judiciary, that is, to the State. His

rights of audience in Court could not be considered merely from the point of view that he is an attorney-at-law. He drew our attention to the provisions of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978). He referred to Chapter IX which dealt with the Executive under the sub-head "Public Service".

Article 54 reads as follows:

> "The President shall appoint all public officers required by the Constitution or other written law to be appointed by the President, as well as the *Attorney-General* and the Heads of the Army, the Navy, the Air Force and the Police Force."

The officers so appointed become full-time members of the Public Service.

Thus the Attorney-General was an instrument by which the Executive Power was exercised by the President under the Constitution. He was the Head of a department, and was the principal Law Officer of the State.

Article 129 (1) of the Constitution provided for the President of the Republic when it appears to him that a question of law or fact has arisen or likely to arise of public importance, he could invoke the consultative jurisdiction of the Supreme Court. In terms of Article 134 the Attorney-General has a right to be heard in the Supreme Court in the exercise of its jurisdiction under Article 129 (1).

Chapter XI, Articles 70-81 which dealt with the Legislature under the heading "Procedure and Powers" refer to certain important duties and powers given to the Attorney-General. The legislative power of the People is exercised by Parliament and these provisions made him an instrument used in the exercise of this power. Article 77 makes it obligatory on the Attorney-General to examine every Bill for any contravention of the requirements of paragraphs 1 and 2 of Article 82 and for any provision which cannot be validly passed except by a special majority. The duties of the Attorney-General are clearly spelt out in Article 77 and he has a duty to communicate his opinion to the President and also to the Speaker. He has therefore of necessity to be available at all times to perform these duties.

Chapter XVI deals with Superior Court—Articles 118 to 147. Article 134 gives the Attorney-General the right to be heard in the Supreme Court in the exercise of its jurisdiction under Articles 120 to 126, 129 (1) and 131. The Judicial Power of the Executive is exercised by Parliament through the courts created and established or recognised by the Constitution or created or established by law. The Attorney-General thus became the instrument used in the exercise of this power.

On an examination of these provisions it is clear that the Attorney-General holds a unique position endowed with wide powers, onerous duties and special rights in regard to matters involving the exercise of the Sovereignty of the People under the three limbs—

(1) Executive Power of the People;

(2) Legislative Power of the People; and

(3) Judicial Power of the People.

The significance of this fact is that, unlike in England where the Queen is the Sovereign, in the Republic of Sri Lanka, Sovereignty is in the People in terms of Article 3 of the Constitution and the Attorney-General represents and acts for the People of the Republic.

The Attorney-General is the principal Law Officer of the State. He is assisted by the Solicitor-General who is subject to his authority. He is the Head of a Department staffed by attorneys-at-law and members of the Administrative Service in the full-time employment of the State. He is responsible for the legal advice given to the Government and, it is to his Department, that Government Departments turn for advice on matters of particular difficulty or of political or national importance. His Department is consulted by Statutory Bodies or Corporations like the Land Reform Commission itself, who act on that advice so received. These attorneys-at-law attached to his Department had been appointed as full time employees on a salary basis.

Apart from the duties and powers granted to him by the Constitution itself, the Attorney-General exercised the majority of his functions in a quasi-judicial manner and without regard to political consideration of any kind whatsoever. Under the Judicature Act, No. 2 of 1978, under section 11, the Attorney-

General could determine the High Court in which a trial could be held, section 15 gives the Attorney-General the right of appeal in criminal cases, section 47 gives him power to decide the court or place at which an inquiry or trial of any criminal offence shall be transferred, section 51 gives the Attorney-General powers to elect the court for the prosecution of a criminal case.

The Criminal Procedure Act, No. 15 of 1979, imposes specific duties and grants very wide powers to the Attorney-General. Under section 142, he could give directions to Magistrates. In non-summary inquiries under Chapter XV the *Attorney-General had been given the sole right of the presentation and service of indictments.* Section 191 (1) provides that the Attorney-General shall be entitled to appear and conduct the prosecution in a prosecution in the Magistrate's Court in summary cases. Under section 191 (2) the Attorney-General shall not appear in a case filed against a State employee without his consent. Section 193 provides that in any trial in the High Court, the prosecution shall be conducted by the Attorney-General or the Solicitor-General or by an appropriate appointee of the Attorney-General.

The Civil Procedure Code, No. 20 of 1977, Chapter IV, section 456 provides that all civil actions by or against the Crown (State) shall be instituted by or against (as the case may be) the Attorney-General. Section 456 (3) specially provides that the Attorney-General in this section *does not include the Solicitor-General or any Crown Counsel.* The fact that the Attorney-General represents the Crown or State is made clear by the provisions of section 461 where actions could be filed against a Minister, Parliamentary Secretary or Public Officer in respect of an act purported to be done by him in his official capacity. However, section 463 makes provision for the Attorney-General to make an application to Court to have his name substituted as a party to the action. It is significant that when the Attorney-General undertakes the defence of the action against a Minister, Parliamentary Secretary or Public Officer, he has to become a party to the action. By Act No. 48 of 1954 in section 463 the words 'government undertakes' were substituted to read 'Attorney-General undertakes'. Therefore he appears in court as the Attorney-General and not as a pleader on for or on behalf of the party concerned.

From an examination of all these provisions, I am of the view that the Attorney-General is the full-time Head of a Department of the Executive, that he has special duties and obligations towards the Legislature and specified duties and obligations to the Judiciary which latter duties bring him close to the Judicial Officers.

Mr. Pasupathy in reply to the preliminary objection so taken re-iterated his position that he was an attorney-at-law entitled to represent any party to a proceeding and had the right of audience in any Court, Tribunal or other institution so long as he complied with the provisions of Article 169 (12) and that he was appearing in his private capacity as an attorney-at-law with his other colleagues who too were appearing with him in their private capacities instructed by Mr. P. K. T. Perera, the Legal Officer and employee of the Land Reform Commission and that he represented his client the Land Reform Commission in that capacity. He relied on Article 14 (1) (g) of the Constitution which guaranteed to every citizen, inter alia,

> "the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise."

He contended that the exercise and operation of his fundamental right could only be subject to any restriction as may be prescribed by law in terms of Article 15(5). He sought to argue that the term 'law' referred to therein had to be defined in terms of Article 170 to mean –

> "Any act of Parliament and any law enacted by the legislature at any time prior to the commencement of the Constitution and includes an Order in Council".

He also argued that the term 'law' referred to in paragraph 15(7) includes regulations made under the law for the time being relating to public security. He thereafter referred to the Rules and Regulations made by the Supreme Court under Article 136 of the Constitution and published in Gazette No. 9410 of 8.11.78 and stressed that there was no restriction imposed on him by those rules or regulations. Mr. Pasupathy was heard to state at some stage that he was appearing on a direction of the Head of the State. But he did not seem to rely heavily on such direction.

If there was such a direction, he may have sought to intervene in these proceedings as Attorney General. Having chosen to appear as a private attorney-at-law, he would have realised that the direction he received did not justify his appearance in the way he did.

He submitted that he was at liberty to decide for himself whether he should appear as a private attorney-at-law for his client the Land Reform Commission and that decision so to appear was a matter for him alone and could not be questioned in this Court. He further submitted that this Court could not decide the propriety of his appearance in this capacity. If there was a breach of any rule of professional etiquette or any departure from any professional practice or discipline, that was a matter for inquiry by the Supreme Court. He contended that there was no known legal impediment for him to appear in his private capacity as any other attorney-at-law.

He relied heavily on the expression of opinion of Bonser, C.J. in the case of *Perera v. White* (6). This was decided in 1900 and was a case filed by Mr. White, the Acting Mayor of the Municipal Council for damages for an alleged libel by one Mr. Charles Perera, a member of the Municipal Council. The matter came up before the Supreme Court on an *ex parte motion* filed by Mr. White requesting the Supreme Court to apportion counsel to help him in his defence as several eminent counsel named in his affidavit had declined to appear for him. Bonser, C. J. characterised this application as a mere speculative or a sporting application and that the application was one without precedent in the Island. The opinion relied on is in these terms:

> "It is said that the Acting Attorney-General thought it advisable not to act for either party *in view of his being a Law Officer of the Crown.* I do not quite see how his being a Law Officer of the Crown is an impediment to his appearing in this case.
>
> *It may be that it is desirable that one of them should be free to take an unprejudiced view so as to be able to advise the government,* but there is another Law Officer of the Crown and it does not appear that any application was made to him or to any of the Crown Counsel".

The application was disallowed.

The case is no authority for the proposition that the Attorney-General could appear in a civil case between two private parties. Rather Bonser, C.J. had clearly adverted to the desirability that the Law Officer should be free and unprejudiced in order to be able to advise the Crown.

The other case relied on by Mr. Pasupathy was the case of *Vettivelu v. Wijeratne* (7). In that case the plaintiff had filed an action against the petitioner who was a Village Headman for recovery of damages in the District Court of Vavuniya Case No. 1281. In his answer the petitioner admitted that he demolished the house on the orders of the Government Agent as it was an unauthorised structure on Crown land. When the case came up for trial Crown Counsel moved to appear for the defendant instructed by Mr. Swaminather, Proctor, in terms of section 461 of the Civil Procedure Code. Counsel for the plaintiff objected. The objection taken was upheld in that the Attorney-General had not made an application to undertake the defence, Crown Counsel then moved to appear for the defendant in his personal capacity as an advocate of the Supreme Court. The District Judge disallowed that application as well. An application was made to the Supreme Court to revise *both orders* of the District Judge. K. D. de Silva, J. held that both orders were clearly irregular and illegal and that—

> *"an Advocate has the right of audience in any court in which he has the right to appear.* That right is in no way affected by reason of the fact that he happens to be an officer of the Attorney- General's Department.
>
> *It is true that Law Officers and Crown Counsel do not generally represent parties in private litigation. But that is not for the reason that they are unqualified to appear in those cases, but because of the conditions of service binding on them."*

The learned Judge held further as follows:

> "The fact that the Attorney-General had not made an application under section 463 of the Civil Procedure Code does not disentitle him from assigning Crown Counsel to appear for a defendant who is a Public Officer.

The learned Deputy Solicitor-General stated from the Bar that when public officers are sued in tort the Crown does not take up their defence, *but the Attorney-General instructs a Crown Counsel to appear for them."*

No objection could be taken to that practice".

Mr. H. W. Jayewardene, Q. C. in reply did not challenge the judgement of the Supreme Court in this case (7), but stated that case clearly indicated that Crown Counsel appearing under these circumstances in accordance with the long established practice was different from the Attorney-General personally appearing as a private attorney-at-law. K. D. de Silva, J. did accept the position that Law Officers and Crown Counsel do not generally represent parties in private litigation not for want of a right, *"but because of conditions of service binding on them."* The Attorney-General and the Solicitor-General were the only two Law Officers, that the learned Judge could have had in view and if their duties and conditions of service are such as to keep them away from private litigation it is not a deprivation of their right of audience in a court of law but a constraint attached to their office.

Mr. Pasupathy also relied on section 41 (1) of the Judicature Act, No. 2 of 1978, in regard to right of representation on the basis that he was an attorney-at-law.

"41 (1) Every attorney-at-law shall be entitled *to assist* and *advise clients* and to appear, plead or act in every court or other institution established by law for the administration of justice and any person who is a party to or has or claim to have a right to be heard in any such court or other institution shall be entitled to be represented by an attorney-at-law."

This provision no doubt covers all attorneys-at-law, but the question does arise whether the Attorney-General as Law Officer could have only the State as his client. In that event, he is entitled to assist and advise the State as his client and appear, plead and act for the State only as Attorney-General and not as a private attorney-at-law.

Mr. Pasupathy referred us to the case reported of *The Attorney-General v. Saibo* (17). This was a case in which costs were decreed payable to the Crown. The Crown Proctor submitted a Bill of Costs which contains items for costs payable to Crown

Counsel for advising the appeal, retainer brief fee and fees for appearance. The Registrar rejected these items as not incurred by Crown Counsel. The Attorney-General appealed to the Supreme Court. The Supreme Court held when the Crown comes into court as a successful litigant and asks taxation of its Bill of Costs it must be taken to have submitted to the rules of practice prescribed for the exercise of that branch of the jurisdiction of the Courts to which it appeals. In that case there is a reference to an earlier case decided in 1906, *Le Mesurier v. The Attorney-General* (18) that where the Attorney-General employs Crown Counsel to appear on behalf of the Crown and disburses nothing and incurs no debt by way of fees, he is not entitled to charge the opposite party such fees as he might reasonably have had to pay for the services of a private advocate, had he chosen to engage one. In that case there is a reference to the practice that when Crown Counsel appear for the Crown and costs are awarded and recovered, they are paid to the particular Crown Counsel for his services thus rendered, but if costs are not awarded or recovered, Crown Counsel gets nothing for his services beyond his regular official salary. This is what Lascelles, C. J. stated in the case of *Attorney-General v. Saibo (supra)*:

> "Before the decision in *Le Mesurier v. The Attorney-General (supra)* it appears to have been the invariably practice to allow on taxation fees of the Attorney-General, Solicitor General and Crown Counsel, but the practice never received judicial sanction.
>
> These officers up to the date when their salaries were adjusted on a sterling scale were allowed to retain their fees when recovered.
>
> From that date officers of the Attorney-General's Department who were in receipt of a sterling salary were prohibited by the General Orders of Government from retaining any fees paid in respect of their services and their fees if allowed were payable to the Public Treasury."

In this case, however, the Supreme Court adopted the passage of Wendt, J.:

> "An alteration in the destination of these fees, when recovered, might perhaps have obviated the objection to their allowance. I do not see that any exception could be taken to

the practice of the Crown paying yearly salaries to counsel for doing its work in court; and it would be reasonable enough *that the Crown, when successful should recoup itself by recovering from its opponent a fair fee for the work done. But in such a case the fee must go to the Crown,* and not directly into the pocket of the advocate engaged in the case."

These cases do not support the contention of Mr. Pasupathy in any way as they dealt with the appearance of his officers in their official capacity.

At the argument Mr. Pasupathy submitted a list of cases reported in Supreme Court Circulars 1881-1883 and 1889-1891, from the New Law Reports up to 1915 where there have been appearances of the Queen's Advocate, Attorney-General and Solicitor-General in civil cases. But all these cases belong to an era prior to the imposition of special duties and rights to the Attorney-General and the Solicitor-General.

Having argued that he was entitled to appear for a private person as an attorney-at-law, he next took up the alternative position that the Land Reform Commission, though a statutory body, was an agency of the State and that therefore he could have the same relationship of lawyer and client with such an agency as the interests of the State were involved.

He cited the Supreme Court judgment dated 10th September, 1979, in Election Petition Appeal No. 1 of 1979, the Galle Election Petition case (2). In that case the Supreme Court after considering the constitution, activities and functions of the Petroleum Corporation which carried on monopolistic commercial transactions for the State held that it was an agent of the State.

The Land Reform Commission is, however, a statutory corporation created by the Land Reform Law, but was not similar to the Petroleum Corporation in any way and was not an agency of the State. It had it own legal department with Attorneys-at-law as its full-time employees as its advisers. This contention would however, have been plausible if he appeared as Attorney-General.

The courts in this country have consistently followed the practice of the English Bar. The two main divisions of the

profession are the Judges (the Bench) and the lawyers. Therefore any matter that is raised in regard to the legal profession, is a matter that effects both divisions. The primary function of the profession is to apply and utilise the law in specific cases, in short, to individualise the law. This function is manifest in the work of the lawyers and the Judge in the court room. Ordinarily the lawyer is retained by one side only (for a client) and necessarily is partisan. The adversary system of the administration of the law under which lawyers zealously represent sides involves the use of such partisan representatives to bring out the truth and to achieve equal justice under the law. A lawyer has thus several loyalties, a loyalty to his client, to the administration of justice, to the community of his associates in practice and to himself whether to his reasonable economic interests or to his ethical standards as a man and as a member of the profession governed by its own rules. In this context I do not think the Attorney-General could step down into the arena of private or partisan representation in a civil case, leaving his duties, loyalties and obligations to the Republic aside even for a while, when his office as Attorney-General demands the devotion of his entire time to the interests of the People.

Mr. H. W. Jayewardene, Q.C. contended that the appearance of the Attorney-General would offend against the glorious rule that justice must not only be done but must also appear to be done. He argued that considerations of public policy should prevent the Attorney-General representing private persons. The Attorney-General by virtue of the office he holds is the representative not of an ordinary party to a controversy but of the Sovereign and now of the Sovereignty of the People enshrined in the Constitution, a Sovereignty, whose obligation to govern impartially, is as compelling as its obligation to govern at all. The Attorney-General's only client is this Sovereignty, the Republic. The Constitution of the Republic has vested in him very important and exclusive rights and duties to act as such representative. Various statutes have imposed duties in regard to the prosecution for offences, the right of representation in Courts on behalf of the State and quasi-judicial functions in relation to High Courts and Magistrates Courts. Thus as far as the Attorney-General is concerned he has been given an exclusive privilege to practise as an attorney-at-law within certain circumscribed limits and within these limits his fundamental rights are unaffected.

The two principal law officers of the State have been and still are the Attorney-General and the Solicitor-General but under the present Constitution unlike in the 1946 Constitution, the Attorney-General has alone been given certain specific powers and duties. No doubt the Attorney-General, the Solicitor-General and the other law officers are the legal representatives and advisers of the State. As in England here too the Attorney-General is primarily an officer of the State and is in that sense an officer of the Public.

Mr. H. W. Jayewardene, Q.C., cited *Halsbury's Laws of England,* 4th Edn., Vol. 8, p. 1274, where it is stated that neither the Attorney-General nor the Solicitor-General may engage in private practice.

In reply to that Mr. Pasupathy in a written submission referred us to Vol. 3, *Halsbury's Laws of England,* 4th Edn., paragraph 1125, note 3, where it is stated that the Attorney-General and the Solicitor-General in England may not undertake any business on behalf of a private client. (Treasury Minute dated 5th July, 1895). The fact that this prohibition is based on a Treasury Minute as far back as 1895 would indicate that the State wanted their services for itself while being in the employment of the State. However, paragraph 1126 deals with other offices the holding of *which is deemed to be inconsistent with practice as a barrister* and at page 594 according to note 11, a "practising barrister" means a barrister *who is entitled to practice and who holds, himself out as ready to do so* not being otherwise employed in a *whole time occupation."*

The various judgments of the Supreme Court also referred to envisage the limitations in regard to the Law Officers by virtue of the conditions of service binding on them.

I have given my anxious consideration to the question raised by Mr. Jayewardene, Q.C., that it is within the competence and jurisdiction of this Court to decide whether any person could be permitted to appear and Mr. Pasupathy's contention that this Court had no such jurisdiction. It cannot be disputed that if an attorney-at-law is not properly attired according to the rules framed by the Supreme Court, this Court could refuse to see or hear him. If it is brought to the notice of the court that the attorney-at-law who has noted his appearance, if proved to be

one struck off the roll, this court could refuse to hear him. Thus the court has an inherent jurisdiction to see that procedings before it are regularly conducted.

The objection here is not one of enrolment or removal of an attorney-at-law which is within the exclusive jurisdiction of the Supreme Court as laid down in section 42 of the Judicature Act, No. 2 of 1979. The objection that has been raised relates to the marking of an appearance as a private attorney-at-law in this particular case by the holder of the office of Attorney-General.

Mr. H. W. Jayewardene, Q.C., referred us to the case of *O'Toole v. Scott* (8) 242 and 243. Lord Pearson referred to several cases and held that the general principle was that, subject to usage or statutory provisions, Courts or Tribunals may exercise a discretion whether they will allow any, and what persons, to act as advocates before them.

I have examined the office of Attorney-General, his powers and duties in detail and come to the conclusion that he is an attorney-at-law employed in the Public Service as a full-time employee of the Republic. I have come to the further conclusion that the exercise of his fundamental right to practise as any private attorney-at-law has been voluntarily surrendered by him by his acceptance of the office of the Attorney-General under the Republic which office by its very nature prevents him from undertaking any business on behalf of private clients. This office is one that could be deemed to be inconsistent with the practice of an attorney-at-law for clients generally. An attorney-at-law could elect to practise his profession, he could be a member of the profession and elect to serve as a Judge or as an officer of the Public Service. But if he elects to practise his profession he must make it his primary occupation and must refrain from engaging in any other full-time occupation. It is for that reason that in England a distinction was made between barristers who are entitled to practise and practising barristers. A practising attorney-at-law, like his counterpart in England, the 'practising barrister' could only mean an attorney-at-law who is not only entitled to practise but also one who holds himself out as ready to do so, not being otherwise employed in a whole time occupation. According to note 11 at page 1110, 3 *Halsbury's Laws of England,* 4th Edn. even a barrister employed in the regular occupation as an editor or reporter of a series of Law Reports for the use of the legal profession was categorised as a non-practising barrister.

Examined from that point of view, the provisions of section 41(1) of the Judicature Act which provides *that any attorney-at-law shall be entitled to assist and advise clients and to appear, plead in every court or other institutions* established by law for the administration of the law contemplate an attorney-at-law—

(*a*) who is entitled to practise; *and*

(*b*) who holds or could hold himself out as ready to do so not being otherwise employed in a whole-time occupation.

If it is brought to the notice of the Court that a particular attorney-at-law is one who cannot be termed a practising attorney-at-law, then the Court could in the exercise of its inherent powers, rule that such an attorney-at-law could not be heard in the capacity he chooses, outside the scope and ambit of his whole time occupation, though he may be otherwise qualified as an attorney-at-law. In this case Mr. Pasupathy cannot complain that he is being denied the exercise of his fundamental rights under Article 14(1)(*g*) as he was not appearing as Attorney-General. If he had appeared as Attorney-General he could have been permitted to appear as such on that basis, as there he was entitled to engage in his lawful occupation as the Attorney-General of the Republic.

It was contended by Mr. Pasupathy that there was no legal impediment or prohibition to his appearing in Court in his capacity as an ordinary attorney-at-law. It is to be noted that there is no legal prohibition in law cited to us prohibiting him appearing in that capacity for a complainant or accused in cases before the courts exercising criminal jurisdiction. But there is an implied prohibition, by reason of the administrative functions imposed on him by the law, where his certificate or fiat is necessary before proceedings in some prosecutions or where the prosecution has to be instituted with his consent or by him as Attorney-General. He could give directions in regard to the Court in which a case is to be tried. These are constraints arising from the very nature of his functions and duties in regard to proceedings in the criminal courts. Similarly in proceedings before civil courts, where the State or its members or officials are sued or where the State sues, he appears as a party. Under Article 125 of the Constitution (1978) dealing with any question relating to interpretation of the Constitution—

> "whenever any such question arises in the course of *any proceedings in any court or tribunal or other institution empowered by law* to administer justice or to exercise judicial or quasi-judicial functions, such question shall forthwith be referred to the Supreme Court for determination."

In such an event it is the Attorney-General who shall be noticed under Article 134 and shall have the right to be heard in such proceedings. Therefore if the holder of office of Attorney-General lays aside his mantle of office, whenever he decides to do so, and advises private clients and descends into the arena of partisan litigation in the criminal or civil courts, his appearances as a private attorney-at-law are not consistent with or are incompatible with the duties imposed on him by the Constitution.

The Attorney-General, as the Law Officer of the Republic representing the People, is in a very special position and is not like any other attorney-at-law. In the eyes of the lay public, which knows little of the prerogative rights of the Sovereignty vested in the People, when the holder of the office of Attorney-General appears in a different capacity, serious doubts could arise instantly whether or not there is a fair hearing. The right of a fair hearing is at the root of the sound and equitable administration of the Law.

The same constraints that apply to those who are holders of judicial office or who hold full-time public office have been traditionally accepted as equally effective as prohibitions by law. Such attorneys-at-law cannot claim rights under section 41(1) of the Judicature Act, as by virtue of their conditions of service they cannot possibly be available to assist and advise clients generally or even to appear for them. The Attorney-General has been employed only to advise and appear for the Republic. It will indeed be a sad day in the annals of the administration of jutice in this country, if the holder of the office of Attorney-General spends his time assisting and advising private individuals or bodies and not being available to the People in the discharge of his duties to the Executive, the Legislature and the Judiciary.

Having examined all these circumstances, I have come to the inevitable conclusion that Mr. Pasupathy is not entitled to appear in this Court as a private attorney-at-law in these essentially civil

proceedings while still being the holder of the office of the Attorney-General of the Republic.

I therefore uphold the preliminary objection.

Preliminary objection upheld.