THE TWILIGHT OF JUDICIAL CONTROL OF EXECUTIVE ACTION IN SRI LANKA

This article describes a process of change which has taken place in Sri Lanka in recent times. Two statutes have restricted to a very significant extent the powers vested in the judiciary to control the exercise of executive power.

The need to provide avenues for judicial control of executive power and the relationship between the rule of law and executive power has been the subject of successive declarations by the International Commission of Jurists and section 1 of the article discusses such Declarations as a necessary prelude to the analysis of developments in this field in Sri Lanka. The significance and impact of the recent changes in Sri Lanka can be viewed by comparing the past with the present — and therefore section 2 traces very briefly the origin and growth of the law on the subject. Section 3 examines the provisions of amending legislation and their legal effect. Section 4 describes an assertion of judicial valour in interpreting the amending legislation narrowly and the swift manner in which the legislature retaliated. Section 5 attempts an evaluation of the remedies available in present day Sri Lanka. Section 6 examines through the perspectives of a government committed to social change, the rationale restricting the availability of judicial remedies against executive action. The restrictions imposed on the issue of the writ of habeas corpus is discussed in article 7.

1. *THE RULE OF LAW AND EXECUTIVE POWER*

The rule of law is an expression of wide import and has been the subject of discussion amongst judges, lawyers, jurists and others in various fields of human activity. Though some may think that the concept of the rule of law has outlived its usefulness (if ever it had any), the International Commission of Jurists[1] regards the rule of law as a living concept permeating several branches of the law and having practical importance in the life of every human being.

1 See Vol. 2 No. 1, Journal of the International Commission of Jurists, p. 3-42; *ibid.* p. 4-54; *The Rule of Law in a Free Society, A Report on the International Congress of Jurists, New Delhi, India* (1959); *Executive Action and the Rule of Law, A Report on the Proceedings of the International Congress of Jurists, Rio de Janeiro* (1962); *African Conference on the Rule of Law, A Report of the Proceedings of the Conference, Lagos, Nigeria* (1961); *The Dynamic Aspects of the Rule of Law in the Modern Age and Pacific Conference of Jurists, Bangkok, Thailand* (1965); *Rule of Law of Human Rights, Principles and Definitions as elaborated at the Congresses of Jurists* (1966).

The rule of law[2] is a changing concept and has meant different things at different times. It is not proposed to trace the development of this concept which has taken place largely as a consequence of the views put forward by constitutional lawyers and political scientists, but rather to explain it in very general terms. When one speaks of the rule of law one has in mind a contrast: the idea of the predominance of law in a society as opposed to the predominance of the will of any individual or oligarchy. In a constitutional democracy the idea of the rule of law carries with it the connotation of government by law and government according to law. All persons involved in the exercise of governmental power should act according to the law of the country and not according to their whims and fancies. The absence of discretionary and arbitrary power vested in individuals or bodies which is not subject to law is regarded as an essential ingredient of the rule of law. The rule of law has also been regarded as a norm or ideal which the laws of each state should seek to adhere to some principle against which legislation could be measured and evaluated.

Dicey said in words which have been often quoted "No man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land."[3] He added, the rule of law "means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government."[4] He also said "We mean... when we speak of the rule of law as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals."[5]

The rule of law also contains the idea of "... equality before the law, that is that among equals the law should be equal and should be equally administered, that like should be treated alike without distinction of race, religion, wealth, social status or political influence."[6]

The rule of law is a political concept which carries no legal validity. It has been subjected to many criticisms due to its vagueness and its usefulness has been doubted. It is an amorphous concept but it contains an important kernel of truth, namely that the governors of a country should be subject to law.

There are two further aspects of the rule of law. The rule of law if it is to serve any purpose must mean some thing more than

2 *A.V. Dicey, Introduction to the Study of the Law of the Constitution* (10th Edition) Part 2, especially chapter 4. The first edition was published in 1885. *W.I. Jennings, The Law and the Constitution* (5th Edition 1971) Appendix 2, criticises Dicey's views. See also E.C.S. Wade, Introduction (10th Edition) of Dicey, *op. cit*., pp. xcvi-cli; F.H. Lawson in (1959) vol. VII Political Studies 109, 207; S.A. de Smith, *Constitutional and Administrative Law* (1973) 525-27; L.J.M. Cooray, *Reflections on the Constitution and the Constituent Assembly* (1971) pp. 31-41.

3 A.V. Dicey, *op. cit.,* p. 188.

4 Dicey, *op. cit*., p. 202.

5 *Ibid.*

6 W.I. Jennings, *Law and the Constitution, op. cit*., pp. 42-64.

mere legality. The rule of law not merely requires that a government should act according to law but also that the body of law in existence in a country should be in accordance with certain minimum standards of equity, justice and good conscience.

The International Commission of Jurists in a series of Declarations[7] commencing from 1959 has added a new dimension to the rule of law. It was stressed by successive Congresses of the International Commission of Jurists which issued the Declarations that the rule of law could not be said to exist in a country unless the prevalent political, social, economic and cultural conditions upheld the dignity of man as an individual and also permitted him to fulfil his legitimate aspirations. It was pointed out that the idea of equality before the law is meaningless unless there is adequate legal representation so that the poorer sections of the community could be able to afford to engage in litigation. The constitution of a country may contain a bill of fundamental rights and the law and the constitution may confer political and civil liberties on individuals. But such liberties are only meaningful to and may be enjoyed by those who possess an education and an adequate standard of life.

It is proposed in this context to focus on those parts of the declarations of the International Congresses of Jurists which affect the role of the executive in the modern state.

Declarations of successive meetings of the International Congress of Jurists focus on two duties which the executive arm of government should be subject to. Firstly, the executive is bound to act in order to improve the political, economic, social and cultural life of the entire population of the country. Second, in its actions the executive must respect the rights of individuals and not trample on or deny individual rights. The rights of the individual against the executive could be safeguarded either by providing to a person aggrieved by executive action access to the courts or else to independent tribunals.[8] In relation to these two factors the Congresses were ambivalent (and it will be shown in the analysis to follow of the changes in Sri Lanka that to a certain extent this ambivalence is unavoidable). The Congresses did not appear to recognise the contradictions which arise from the two propositions they laid down. On the one hand in order to improve the social and economic standards of the people the executive must effect rapid changes in the fabric and structure of society and its economic organisations. On the other hand, this necessitates wide powers being conferred on and exercised by the executive and perhaps action in violation of individual rights. These tensions appear in section 6 of this article.

The developing countries which wish to develop economically, establish a just social system and at the same time observe the rule of law, face a problem which appears almost insurmountable.[9] The question has been posed, "How can the benefits of the rule of law be

7 See reference cited above in footnote 1.
8 See account of the Declaration of the International Congress of Jurists discussed below in this section.
9 See vol. 2 No. 1, Journal of the International Commission of Jurists, pp. 39-42, 51-54, 4-6.

achieved in new societies which have to build up institutions, adopt codes and establish within a very short time a legal system to meet the needs of the modern world while they are still struggling to establish a bare minimum of material and cultural existence."[10] Perhaps these tensions have been partly responsible for the eclipse of the rule of law in some Afro-Asian countries.

In a modern state, it is inevitable that wide powers be vested in the executive arm of government. The executive arm which is headed by the prime minister and the cabinet and which operates through state officers or public servants, in its actions will constantly affect the individual citizen. The question which arises is what are the remedies which an individual may have against the executive, particularly when the executive either negligently, irresponsibly or for improper and ulterior purposes abuses the powers which have been entrusted to it.

The Declaration of Delhi which was put forward after the Congress of the International Commission of Jurists in Delhi [11] laid down certain fundamental prerequisites for the operation of the rule of law.

Firstly, the acts of the executive which directly and injuriously affect the person or property rights of the individual should be subject to review by the courts.

Secondly, the judicial review of acts of the executive may be adequately secured by a specialised system of administrative courts or by the ordinary courts. Where specialised courts do not exist it is essential that the decisions of administrative tribunals and agencies if created to inquire into administrative disputes should be subject to ultimate review by the ordinary courts. Since this supervision cannot always amount to a full reexamination of the facts, it is essential that the procedure of such tribunals and agencies should ensure the fundamentals of a fair hearing to the person complaining against the acts of the executive. The complainant should have the following rights: to be heard, if possible in public, to have advance knowledge of the rules governing the hearing, to adequate representation, to know the opposing case and to receive a reasoned judgment. Save for sufficient reason to the contrary, adequate representation should include the right to legal counsel.

Thirdly, a citizen who suffers injury as a result of the illegal acts of the executive should have an adequate remedy either in the form of proceedings against the state or against the individual wrong doer, with the assurance of satisfaction of the judgement in the latter case, or both.

Fourthly, it will further the rule of law if the executive is required to formulate its reasons when reaching its decisions of a judicial or administrative character which affect the rights of individuals. At the request of a party concerned, such reasons should be communicated to him.

10 *Ibid.*

11 See *Rule of Law in a Free Society, op. cit.*, pp. 4-14; *Rule of Law and Human Rights, op. cit.*, pp. 9-13, 66.

The Congress at Delhi was followed by Congresses at Lagos in Nigeria in 1961 and Rio de Janeiro in Brazil in 1962. In the Nigerian capital the Congress[12] recognised that inquiry into the merits or to the propriety of an individual administrative act by the executive may in many cases not be appropriate for the ordinary courts. But it emphasised that there should be available to the person aggrieved a right of access to a hierarchy of administrative courts of independent jurisdiction, or where these do not exist, to an administrative tribunal subject to the overriding authority of the ordinary courts.

The Congress at Rio de Janeiro [12a] emphasised that in order to guarantee individual rights under the rule of law, there should be effective safeguards against the possible abuse by the executive. It is often necessary to adjust the rule of law to meet the needs of social and economic development. Governments must therefore seek to strike a balance between the freedom of the executive to act effectively under modern conditions on the one hand and the protection of individual and community rights on the other. The safeguards against abuse of power by the executive must therefore be provided by judicial and legislative control of the executive. Control must be effective, speedy, simple and inexpensive and its exercise demands full independence of the judiciary or the tribunal and professional freedom for lawyers.

2. *JUDICIAL REVIEW OF EXECUTIVE ACTION IN SRI LANKA*

2.1 *The basic principles governing judicial review of executive action*

It is now proposed to examine the rights of the citizen in Sri Lanka and the legal remedies available to him as against the state and state officers, including ministers, in respect of the abuse, exercise or wrongful exercise of power.

The individual according to the body of administrative law which prevailed in Sri Lanka from colonial times had three modes of obtaining relief against executive action improperly exercised. Firstly, he could go to the Supreme Court and invoke its supervisory jurisdiction by applying for a prerogative writ, such as *certiorari,* prohibition and *mandamus.* Secondly, he could go to the original courts (the District Court and Court of Requests prior to 1974 [13] and the District Court and the Magistrates Court after 1974 [14] and bring an ordinary action for a declaration and/or for a permanent injunction or specific performance. Thirdly, he could claim either from the Supreme Court or the District Court as circumstances warrant, an injunction staying the exercise of executive authority till a claim he had made in a substantive action is determined.

There are numerous instances in which this relief has been claimed and granted. They cannot be recapitulated in this context but it may

12 *African Conference on the Rule of Law, op. cit.*, pp. 11, 15-20; *Rule of Law and Human Rights, op. cit.*, pp. 13, 19-20, 67.

I2a *Executive Action and the Rule of Law, op. cit.*, pp. 23-34; *Rule of Law and Human Rights, op. cit.,* pp. 13-14, 20-22, 64-67.

13 Under the Courts Ordinance, No. 1 of 1889.

14 Under the Administration of Justice Law, No. 44 of 1973 which repealed the Courts Ordinance and took effect from January 1, 1974.

be stated that the subject in Sri Lanka has been more fortunate than his counterpart in England. The subject in Sri Lanka could sue the state in contract[15] as a right in a manner in no way different to that in which he could have sued any of his fellow citizens. Though he could not sue the Crown in damages for financial loss caused by an illegal act this disability was removed by the passing of the Crown (Liability in Delict) Act No. 22 of 1969. In England, from where a great part of the law of Sri Lanka was derived, the individual could not till recent times, sue the Crown in tort for damages; and the Crown could not be sued in contract except by way of petition of right[16] whereas in Sri Lanka, the citizen could sue in contract as of right.[17] In Sri Lanka, if a person was knocked down by a government vehicle, he could not sue the Crown for damages[18] until 1969. The Crown Liability in Delict Act conferred on him the right to sue the state for damages in consequence of a wrongful act by an employee of the state.

The citizen of Sri Lanka unlike in England also had the right to obtain an injunction against officers of the Crown. Reported cases going back to 1825 illustrate instances in which injunctions have been granted against public officials.[19] Public servants whose rights have been denied to them by the executive have successfully vindicated these rights by appealing to the courts of justice as their last resort.[20]

The system of administrative law contains defects, many of them inherited from England law. Legal proceedings are conducive to delay and are expensive. There is a range of unreviewable administrative action. There is no definite duty cast on an administrator to give reasons for administrative decisions. It is difficult at times to penetrate to the merits of an administrative decision because the administrator could hide the actual facts. If the administrator chooses not to give reasons for his decision, it is very difficult to prove that he had acted unlawfully. It is very hard in such a situation to impugn an act or decision for unreasonableness or even for an error of law. The procedure of the courts is not well adapted to finding out the facts of a case, particularly where relevant material is in departmental files. The judicial remedies in administrative law are over-complicated and hedged about by technical and restrictive rules, some of which are merely historical anomalies of English law which have become part of the law of Sri Lanka. There are various gaps in the law governing the civil liability of public authorities. A successful challenge to an invalid order or decision may prove a pyrrhic victory. The winner may find himself back in 'square one', with a heavy bill of costs and no statutory

15 See *Queen's Advocate* v. Siman *Appu* (1884) 9 A.C. 571; C.G. Weeramantry, *Law of Contracts* (1967) pp. 494-95.

16 See S.A. de Smith, *Constitutional and Administrative Law* (1973) pp. 608-23.

17 C.G. Weeramantry, *op. cit*., pp. 494-95.

18 *Colombo Electric Tramsways* v. *Attorney-General* (1913) N.L.R. 161.

19 Refer C.G. Weeramantry, *op. cit*., pp. 977-78; *Buddhaassa* v. *Nadaraja* (1955) 56 N.L.R. 537; *Mahamado* v. *Ibrahim* (1895) 2 N.L.R. 36; *Suntheralingam* v. *Attorney-General* (1972) 75 N.L.R. 318; *Arnolis Silva* v. *Thambiah* (1961) 63 N.L.R. 228.

20 See Weeramantry, *op. cit*., pp. 499-500.

entitlement to any form of compensation.[21] No system is perfect and despite the above defects, the citizen nonetheless did have remedies against abuse of administrative power.

Thus until the enactment of the Interpretation Ordinance (Amendment) Act, No. 18 of 1972 which "professed" to amend the Interpretation Ordinance, No. 21 of 1901 it could be said that the rule of law as defined above was accorded a fair measure of respect and the principles laid down by the International Commission of Jurists were to a significant extent complied with. It is said above that the amending Act "professed" to amend the Interpretation Ordinance because in effect the provisions of the latter were not amended, but three completely new sections which had no relation to the other sections of the Interpretation Ordinance were added to it. The three sections which were added to the Interpretation Ordinance were numbered as 22, 23 and 24 respectively. The primary function of an interpretation statute is to set out the guidelines to which a court should conform when it is called upon to interpret another law or statute. It does not ordinarily attempt to change the substantive law and the question must be posed whether any useful purpose can be served in attempting to restate the law which has already been stated clearly in judicial decisions. This is precisely what the Interpretation Ordinance (Amendment) Act has done. It has restricted the power granted by statute law and judicial decisions to the courts to review administrative action.

There was no special system of administrative courts in Sri Lanka. But there were many statutory tribunals which were set up and appeals were available from such tribunals to the Supreme Court. Further, by resorting to certain remedies which are discussed below, a citizen affected by executive action could go before the courts which could investigate and adjudicate upon the manner in which executive power had been exercised.

The Interpretation Ordinance (Amendment) Act however effected fundamental changes which had the effect of drastically restricting the remedies available to the individual citizen against administrative action. It is proposed to discuss the remedies which were available prior to 1972, the extent to which these remedies have been restricted, the reasons why it was considered necessary to do so and suggest alternative methods which may be adopted to safeguard the rights of the citizen.

2.2 *The judicial remedies against executive action available prior to 1972*

The main remedies[22] which a person aggrieved by administrative action possesses in the courts of law are firstly, the prerogative re-

21 S.A. de Smith, *op. cit*., pp. 624. For suggestions on novel lines regarding reforms, see Administration under Law (Justice 1971). For an example of a phyrric victory in the courts, see *Hall & Co.* v. *Shoreham-by-Sea U.D.C.* (1964) 1 W.L.R. 240 (plaintiff obtained declaration that conditions annexed to grant of planning permission were void; but the court refused to sever the conditions and the grant fell with them).

22 The administrative law of Sri Lanka is based on the English law. See L.J.M. Cooray in (1969) International and Comparative Law Quarterly pp. 757-69; J.A.L. Cooray, *Constitutional and Administrative Law* (1973) pp. 273-78; W.I. Jennings and H.W. Tambiah, *The Dominion of Ceylon* (1952) pp. 85-87.

medies of *quo warranto, mandamus, certiorari* and prohibition; secondly, the declaration; thirdly, the injunction. Fourthly, persons affected by administrative action may also make use of the private law actions for damages in tort or in contract or ask for specific performance of a contract. Further, an individual who is sued by the state may also, as a defence, argue that the state official is acting *ultra vires.*

A court has jurisdiction to consider whether an act committed in the exercise of a statutory power is *ultra vires,* and to ensure that the person acts within the limits of the statute which conferred the power. The consequence of an act being *ultra vires* is that a citizen may legitimately refuse to obey it.

2.3 *The grounds for issue of prerogative writs prior to 1972*

Section 12 of the Administration of Justice Law, No. 44 of 1973 confers on the Supreme Court the power to issue mandates in the nature of writs of *mandamus, quo warranto, certiorari procedendo* and prohibition. These words were also contained in section 42 Courts Ordinance, No. 1 of 1889 which also provided that the writs may be issued "according to law … against any District Judge, Commissioner of Assize or other person or tribunal." The phrase "according to law" has been interpreted to mean "according to English Law."[23] Thus is the issue of writs the courts have followed the principles of English Law. Though the Administration of Justice Law omitted the words "according to law", it is assumed that English law will continue to be resorted to. In the as yet unreported nine bench Land Acquisition injunction case[24] decided after the enactment of the Administration of Justice Law the court referred extensively to English law. Section 42 of the Courts Ordinance No. 1 of 1889 in turn re-enacted a provision originally contained in similar words in the Charter of Justice of 1833. The words "other person or tribunal" in section 42 have been very widely construed so as to include various categories of administrative officials. In *Abdul Thassin* v. *Edmund Rodrigo*[25] it was held that the writs specified in section 42 of the Courts Ordinance are unknown to Roman-Dutch and the law of Sri Lanka and should be issued according to English law. Rules of English law have therefore been followed by the courts in Sri Lanka on this subject.

Mandamus[26] is a writ available to command any person or body or court to carry out a public duty imposed on it by statute or common law. The public duty must be an imperative one. *Mandamus* does not lie to compel the performance of a discretionary power.

The writ of *quo warranto*[27] is issued by the Supreme Court to challenge the usurpation of a public office. Literally *quo warranto* means by "whose *authority"* and a person against whom the writ is issued is requested to show the legal basis of his right to the authority.

23 *Abdul Thassim* v. *Edmund Rodrigo* (1847) 48 N.L.R. 121.
24 Discussed below in section 4.
25 *Op. cit.*
26 See de Smith, *op. cit*., p. 390.
27 See de Smith, *op. cit*., p. 390.

Atkin L.J. in *Rex* v. *The Electricity Commissioners*[28] said, "The Court has jurisdiction to issue the writs of *certiorari* and prohibition[29] wherever any body of persons having legal authority to determine questions affecting the rights of the subject and having the duty to act judicially acts in excess of their legal authority". The writs of *certiorari* and prohibition are available where a person or body exercising statutory powers acts beyond his powers or when a person exercising statutory powers has failed to observe the rules of natural justice.

There are two aspects to natural justice;[30] where a person takes a decision *audi alteram partem* or where a person is a judge in his own cause. The *audi alteram partem* rule is contravened where a decision is taken which affects another person without giving the person so affected an opportunity to state his case and meet any reasons which the person taking the decision may have for so doing. The second aspect of the rule against natural justice is that no man may be a judge in his own cause. This is based on the principle that bias must not only be eliminated from influencing a decision but that even if no actual bias is present, there must not appear to be the possibility or a likelihood of bias. Therefore a person may not take a decision or adjudicate on an issue in which he has a substantial personal or proprietary interest.

The most frequent cause for judicial interference with the exercise of statutory powers is where the rules of natural justice have not been observed by a person exercising what is called "quasi-judicial" power in coming to a decision. The term "quasi-judicial" is difficult to define. A quasi-judicial decision is taken by an administrator and is one in which the decision has to be taken on a consideration of various factors which involve an application to the issue of a quasi judicial approach. The term "quasi-judicial" which means "as if judicial" emphasises the fact that if an administrator has to take a decision which in some though not in all respects partakes of a judicial decision, he would be regarded as acting in a quasi-judicial capacity.[31]

The grounds for the issue of the writs of *certiorari* and prohibition are the same and are contained in the Atkin test stated above. But *certiorari* lies as against a final decision. Prohibition on the other hand, may be brought at any time before the making of the final decision.

28 (1929) 1 K.B. 171 at p. 205.

29 The distinction between *certiorari* and prohibition is explained below in this section.

30 de Smith, *Constitutional and Administrative Law* (1973) pp. 575-87.

31 See S.A. de Smith *op. cit*., pp. 529-30. The need to show that a person is exercising a judicial or quasi-judicial function in England is not insisted upon to the same extent as it was during the last 50 years. Recent English decisions reflect the desire to follow nineteenth century cases in which the need to show a judicial or quasi-judicial duty was not important are being followed. In Sri Lanka, however, notwithstanding the efforts of the Privy Council, the Courts seem to insist on a judicial or quasi-judicial duty as a prerequisite for the operation of the rules of natural justice following a line of English decisions which have been departed from in England. For English Law, see Paul Jackson, Natural Justice, (1973) pp. 79-85 and for the position in Sri Lanka, see L.J.M. Cooray. "A Revival of Natural Justice in Ceylon" in (1969) International and Comparative Law Quarterly p. 757-69.

2.4 *The grounds for the issue of the declaration prior to 1972*

The declaration is a more flexible and adaptable instrument of judicial control of administrative action than the writs. It is free of the technicalities and fine distinctions which characterise and hamper the issue of the writs. The declaration[32] is granted under section 217(g) of the Civil Procedure Code. Under section 217 a court may by decree or order without offering any substantive remedy, declare a right or status. In the declaratory judgment the court merely declares the rights of the parties stating that a decision taken by a person or body is contrary to law.

A declaratory judgment however does not make provision for the person who obtains judgment to enforce the judgment and obtain his rights. A person who has obtained a declaratory judgment in his favour cannot rely upon the legal process to compel the defendant to pay damages, to compel the respondent to pursue a lawful course of action or refrain from an unlawful course of action referred to in the declaratory judgment. In circumstances in which no other legal remedy is available, the declaration is a convenient and flexible action and it is therefore an advantage for the petitioner to bring such an action. It is brought against the state and it is assumed that the state would not continue to act in violation of a judgment of a court. Gratiaen J. remarked in *Attorney-General* v. *Sabaratnam*[33] "Courts of justice have always assumed, so far without disillusionment, that the declaratory decree of the Crown will be respected."

2.5 *The grounds for the issue of the injunction prior to 1972*

The injunction like the declaration is a remedy which is part of the general law of Sri Lanka. It is available in litigation between individuals as well as in litigation between the state and the individual. On the other hand the prerogative writs are confined to the field of administrative law, to litigation between the individual and persons exercising statutory and legal powers.

An injunction[34] is an order of court addressed to a party to proceedings in court requiring him to refrain from doing (prohibitory injunction) or to do (mandatory injunction) a particular act. The court can grant an interim or an interlocutory injunction at any stage of an action to prevent a change in the *status quo* and which injunction is effective until the determination of the action or until the court cancels it or varies it. A perpetual injunction is granted at the conclusion of an action and the final determination of the rights of the parties. Sections 20 and 86 of the Courts Ordinance (now repealed) dealt with the power of courts to grant injunctions. Section 20 conferred power on the Supreme Court and section 86 conferred power on the District Court and the Court of Requests. Sections 21 and 42 of the Administration of Justice Law, No. 44 of 1973 confer power on the High Courts, District Courts and Magistrates' Courts to grant injunctions.

32 See A.I. Pulle in (1969) Colombo Law Review, pp. 113-22 for a review of the scope of the declaratory action in Sri Lanka. See also de Smith, *op. cit.*, pp. 604-6; I. Zamir, *The Declaratory Judgment* (1962).

33 *Attorney-General* v. *Sabaratnam* (1955) 57 N.L.R. 481, 485.

34 See J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka* (1973) pp. 366-71.

Section 21 gives a High Court power (prior to 1974 the Supreme Court had the power) to grant an injunction whenever irremediable mischief might ensue before a party could prevent it by bringing an action in an original court.[35]

Under section 42 a District Court or a Magistrate's Court (prior to 1973 a District Court or Court of Requests) may grant an injunction in any pending action, (a) where it appears that the plaintiff demands and is entitled to a judgment restraining the commission or continuity of an act or nuisance which would produce injury to the plaintiff, or (b) where it appears during the pendency of the action that the defendant is committing or threatening or procuring to be done an act or nuisance in violation of the plaintiff's rights regarding the subject matter of the action, or where it appears that the defendant is about to remove or dispose of his property with the intention of defrauding the plaintiff. Breach of an injunction or act in violation of an injunction amounts to contempt of court and is punishable by imprisonment.[36]

An action in tort for damages, an action for damages for breach of contract, an action for specific performance of a contract were remedies in the field of private law which could also in some circumstances be used against statutory officers.

2.6 *Statutory devices for excluding the jurisdiction of the courts.*

Parliament or the National State Assembly in conferring power on an executive authority by statute may seek to oust the jurisdiction of the courts to inquire into the manner of the exercise of executive authority. Various phrases have been adopted in different statutes. Certain statutes may provide that a decision made by a Minister under the provisions of the Act "shall be final and conclusive and shall not be questioned in a court of law".[37]

A statute may enact that an exercise of a delegated legislative power takes effect "as if enacted under this act". Here Parliament is attempting to give delegated legislation the same power and validity which a law passed by Parliament would possess. A statute may provide that a statement made by a Minister that the requirements of an Act have been complied with, shall be conclusive evidence that the requirements of the Act have been complied with.

35 *Suntheralingam* v. *The Attorney-General* (1972) 75 N.L.R. 318; *Gnanamuttu* v. *The Chairman, U.C. Banderaweela* (1942) 43 N.L.R. 366.

36 See 663 of the Civil Procedure Code, No. 2 of 1889.

37 S. 9 Sri Lanka Press Council Law, No. 5 of 1973; s. 2(1) (f) Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971; s. 3(3) Associated Newspapers of Ceylon Ltd., (Special Provisions) Law, No. 28 of 1973; s. 38(4) Ceiling on Housing Property Law, No. 1 of 1973; ss. 3(3), 4(2), 6(4), 19(3) Companies Special (Provisions) Law, No. 19 of 1974; s. 3(10), 4(10) Local Government Service Law, No. 16 of 1974; s. 20 National Water Supply and Drainage Board Law, No. 2 of 1974; part HE, s. 5 Tea Control (Amendment) Law, No. 39 of 1974; s. 10(5) State Agricultural Corporations Act, No. 11 of 1972; s. 6(6) Licensing of Shipping Agents Act, No. 10 of 1972; s. 9 Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961; s. 8 Criminal Law (Special Provisions) Act, No. 1 of 1962; s. 25 Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967; ss. 11(3), 12(6), 13(3) Citizenship Act, No. 18 of 1948.

Article 106(5) of the republican Constitution provides, "No institution administering justice shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question exercise of powers of the Cabinet regarding appointment, transfer, dismissal and disciplinary control of state officers". There are many provisions of the Constitution which in a similar way seek to exclude the jurisdiction of the courts.[38]

The effect of the use of such phraseology constitutes an attempt by the legislature to confer wide discretionary powers on the executive which could not be questioned in a court of law. The effect of such a provision *prima facie* is that even where the executive officer or agency was acting unlawfully the citizen who was adversely affected had no legal avenue to protest against such action. If he acted totally without jurisdiction (as distinct from mere unlawfulness) these words however did not protect him. Prior to the passing of Act, No. 18 1972, the courts adopted various devices for getting round the words used by Parliament and invalidating the exercise of statutory powers in such circumstances. Thus in *Sellamuttu* v. *Solomons*[39] Sri Skandarajah J. held: "The finality given by 28(5) of the Immigrants Act providing that any order made under this section is final and shall not be questioned in a Court of Law, does not apply to an order that is not in strict accordance with law." If a decision of a statutory authority was totally divorced from law, the courts would go behind the specific words used and hold that the exercise of power is invalid.

The courts have in the past gone behind the exclusionary formula where a person was acting totally without jurisdiction and was acting outside the power conferred on him.[40] But where he makes an error while acting within his powers the courts would then abide by the exclusionary formula.

3. *THE INTERPRETATION (ORDINANCE) AMENDMENT LEGISLATION AND ITS EFFECT ON THE ISSUE OF THE PREROGATIVE WRITS, THE DECLARATION AND THE INJUNCTION.*

3.1 *The effect of the amending legislation on the issue of the writs*

Section 2 of the Interpretation Ordinance (Amendment) Act, No. 18 of 1972 adds a new section, section 22 to the Interpretation Ordinance of 1901. Section 22 enacts:

> Where there appears in any enactment... the expression, "shall not be called in question in any court", or any other expression of similar import whether accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination or finding made or issued in the exercise of the powers conferred on such person, authority or tribunal.

38 See following articles in the Constitution of Sri Lanka which exclude the jurisdication of the courts: article 17; article 27(2); article 39(1); article 48(2) read with article 134(1); article 49(3); article 54(4); article 106(5) read with article 118(2); article 110(2).

39 (1964) 66 N.L.R. 367. See also *Herath* v. *Attorney-General* (1958) 60 N.L.R. 193; *Ladamuttu Pillai* v. *Attorney-General* (1957) 59 N.L.R. 313.

40 O. Hood Phillips, *Constitutional and Administrative Law* (1973) pp. 543-47.

The section goes on to provide that the preceding provisions of the section shall not apply to the issue of the writs of *quo warranto, mandamus, certiorari* and prohibition where an order, decision, determination, direction or finding has been made and (a) was *ex-facie* not within the powers conferred on such person, authority or tribunal; or (b) in doing so such person, authority or tribunal was bound to observe the rules of natural justice and has not done so; or (c) there has been compliance with a mandatory provision of any law which is a condition precedent to the making or issuing of such order, decision, determination, direction or finding.

The effect of this provision is that where a statute attempts to exclude the jurisdiction of the courts by use of specific words, the courts can interfere only in the situations referred to in (a), (b), (c).

Therefore when an attempt is made to exclude the jurisdiction of the court, the decision cannot be questioned on the ground that such decision is based on an error of law by the administrator or that he is acting beyond his legal powers unless the order, decision or determination on the face of it *(ex-facie)* shows that the person concerned is acting outside his powers. The unlawful nature of the act must appear on the face of the decision. Therefore if a decision is given without reasons, even if it is unlawful, the unlawfulness could not be proved and there would be little scope for contesting the decision. A statute may confer powers on an authority to take land for agricultural purposes and an order which vests a named land in the authority for stated agricultural purposes may be issued. Such an order could not be questioned on the grounds that the land is gravel, unsuitable for agriculture, is in the centre of an urban area and is not agricultural land, but is land on which there is a house. The order is *ex-facie* for the acquisition of agricultural land. Therefore in terms of the statute the order cannot be questioned, even if the state officer could be said to be acting *ultra vires* on the basis of incontrovertible facts which could be proved.

Since an administrator is not likely to give reasons or show on the face of an order all or any of the erroneous reasons for his decision or that he is acting beyond his powers, the effect of the above provision is that the power of the court of interfering on the grounds of *ultra vires* or that he is acting on the basis of an error of law is not in effect available as a ground of impugning his decision.

The effect of this amendment is that where the exclusionary words are used (and they are used in every law enacted today which confers powers on the executive),[41] the courts have no jurisdiction to control illegal exercises of power by statutory officials except on limited grounds stated in the proviso.

3.2 *The effect of the amending legislation on the issue of the declaration*

The addition of section 23 to the Interpretation Ordinance by the Amendment Act No. 18 of 1972 restricted the power of the courts to grant a declaration in respect of an order, decision, determination, direction or finding which any person, authority or tribunal is em-

41 See statutes quoted above in footnotes 37 and 38.

powered to make or issue under any written law. The effect of the section is to make the declaration not available in respect of the exercise of any statutory power. Section 24, however, contains a qualification to section 23 but it is not clear exactly what is meant by the words of section 24. Section 24 enacts that in certain circumstances the courts may not grant injunctions or make an order for specific performance, and then adds, "it is provided, however, that the preceding provisions of the sub-section shall not be deemed to affect the power of court to make in lieu of thereof an order declaring the rights of parties". In these limited circumstances it appears that the declaratory action is available.

3.3 *The effect of the amending legislation on the issue of injunctions and specific performance*

The Interpretation Ordinance (Amendment) Act added section 24 to the Interpretation Ordinance which provides that an injunction shall not be made against the Republic, a Minister, a Parliamentary Secretary, the Judicial Service Commission, the Public Service Commission, or any member or Officer of such Commission in respect of any act done or intended to be done by them besides any power or authority vested by law in any such person or authority. The proviso to the section enacts that a court shall have power to make in lieu of an injunction an order declaratory of rights of parties.

Section 24(2) provides that a court shall not in any civil proceeding grant any injunction or make any order against an officer of the Republic if the granting of the injunction or the making of the order would be to give relief against the Republic which would not have been obtained in the proceedings against the Republic.

Under the earlier law an injunction could be issued against an officer of the Republic.[42]

4. *AN ASSERTION OF JUDICIAL INDEPENDENCE AND LEGISLATIVE RETALIATION*

Section 24 of the Interpretation Ordinance (Amendment) Act came up for interpretation before a bench of the Supreme Court consisting of nine judges. The case has not at time of writing been reported in a law report.[43] Injunctions were issued in various District Courts[44] and a High Court[45] against the Minister of Agriculture who had acted under powers in the Land Acquisition Act to acquire land for public purposes. The injunctions prohibited him from proceeding with the acquisition. It was alleged on behalf of the petitioners who also asked for a declaration that the land had not been acquired for a public purpose but that it was acquired *mala fide* in order to victimise

42 *Buddhadasa* v. *Nadarajah* (1955) 56 N.L.R. 537.

43 The Ceylon Daily News, My 9-13 and 17-20, 1974 contain reports of the arguments put forward by counsel in Court. The Ceylon Daily News of September 4, 1974 carried a brief account of the judgment. The author has referred to the copy of the judgment issued by the Registrar of the Supreme Court at the request of one of the parties to the action which is the source of other quotations from judgment.

44 Under 42 of the Administration of Justice Law, No. 44 of 1973.

45 Under 662 and 664 of the Civil Procedure Code, No. 2 of 1889.

the political opponents of the government and was therefore unlawful and invalid. Section 24 of the Interpretation Ordinance (Amendment) Act which has been referred to above was relied on by the state to argue that an injunction could not be brought in any circumstances whatever against a Minister.

The court held by a majority of 5 to 4 in favour of the claim of the plaintiff. Perera J. held[46]

> On an analysis of section 24 it appears to me that the key words in the limitation clause are "in the exercise of any power or authority". For the preclusive clause to take effect the exercise of a power by the Minister must be real or genuine as opposed to a purported exercise of power.

Perera J. went on to hold that the exercise of power by the Minister must be a genuine and not a mere ostensible use of power. An ostensible exercise of power had overtones of *mala fides.* He also held that if the legislature intended to cover purported exercise of power in section 24 the legislature would have explicitly stated so, as it had done in section 22. Therefore, he concluded that section 24 did not clothe the executive with a garment of immunity from being restricted in appropriate cases (e.g. where power was being exercised *mala fide)* by injunction from interfering with the rights of individuals.

The dissenting judges who held that an injunction could not be issued against the Minister of Agriculture proceeded on the basis that the speeches of the Minister of Justice and other government members during the debate on the Interpretation Ordinance (Amendment) Bill had clearly shown that it was the intention of the legislature to bring section 24 in line with the powers of the English Courts under the Crown Proceedings Act of 1947 according to which an injunction was not available against the state. Quotations from Hansard of the speeches made during the debate on the Bill by the Minister of Justice and the Minister of Constitutional Affairs were cited. The majority view stated by Perera J. was that the judges were "unwilling to embark on a hazardous voyage of discovery on the tempestuous sea of the parliamentary speeches seeking to ascertain the intention of the legislature", and "Intention of the legislature is a slippery phrase which popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant."[47]

Sharvananda J. discussed some of the wider implications of the issues involved with reference to the rule of law. Sharvananda J. said:

> Rule of law is the very foundation of our constitution and the right of access to the Courts has always been jealously guarded. Rule of law depends on the provision of adequate safeguards against abuse of power by the executive. Our constitution promises to usher in a Welfare State for our country. In such a state, the legislature has necessarily to create innumerable administrative bodies and entrust them with multifarious functions. They will have power to interfere with every aspect of human activity. If their existence is necessary for the progress and development of the country the abuse of power by them, if unchecked, may defeat the legislative scheme and bring about an authoritarian or totalitarian state. The existence of power of judicial review and the exercise of the same effectively is a necessary safeguard against such abuse of power.

46 See Ceylon Daily News of September 4, 1974.
47 *Ibid.*

Sharvananda J. also quoted from a judgment of Dias S.P.J. who said[48]

> It is a characteristic feature of modern democratic government in the Commonwealth that unless a statute provides to the contrary officials or others are not exempted from the jurisdiction of the ordinary tribunals …. Behind Parliamentary responsibility lies legal liability and the acts of Ministers no less than the acts of subordinate officials are made subject to the Rule of Law.. . and the ordinary courts have themselves jurisdiction to determine what is the extent of his legal power and whether the orders under which he acted were legal and valid.

Sharvananda J. also said

> A blanket exclusion of injunction relief is hard to justify as Courts can be trusted to see that their jurisdiction to grant injunctions is not abused. A scheme of democratic government like ours no doubt at times feels the lack of power to act with complete all-embracing swiftly moving authority. No doubt a government with distributed authority subject to be challenged in a Court of Law, at least long enough to consider and adjudicate on the challenge, labours under restrictions from which other types of government are free. It has not been our tradition to envy such governments. The rule of law involves such restrictions. The price is not too high in view of the safeguards which these healthy restrictions afford. In any event, in the matters of delay complained of by the Solicitor-General the Government is not helpless. The delay can however be reduced or eliminated by the highest priority being given to the hearing and disposal of the Land Acquisition cases, as contemplated by section 2 of the Land Acquisition (Amendment) Act No. 20 of 1969. Counsel's argument that the overriding public interest should prevent the issue of injunction despite of alleged illegality of the acquisition also overlooks the fundamental rights of equality before the law and equal protection of the law which are enshrined in section 18 of our Constitution and was a fundamental principle of our Common Law. If section 24 intended favoured treatment to government agencies language more precise has to be employed to manifest such intention.

The approach of the minority judges must be viewed in the context of the following statement of Pathirana J.

> Under our Constitution, the ultimate control of legislative power is in a political body, the elected Legislature. The Judiciary performs an auxiliary function of interpreting statutes and reviewing administrative action. In this context, it is best always to leave policy to the elected organs of State and interpret such policy as far as the Judiciary is concerned intelligently, especially having in the background Article 18(2) of the Constitution.

The dissenting judges laid emphasis on the speeches in the National State Assembly and on the interpretation of the Sinhala translation of the Interpretation Ordinance (Amendment) Bill which it was argued conclusively showed that it was the intention of the legislature to make an injunction not available in any circumstances against a Minister of the State. The case was argued before the Supreme Court after article 9(1) of the republican Constitution had provided that with effect from 22 May 1972 all future legislation should be enacted in Sinhala. This factor it is submitted is no argument for referring to a Sinhala Bill of an act enacted before the Constitution was promulgated. The legislation passed prior to the proclamation of the Constitution must in terms of article 11 of the Constitution be translated into Sinhala and be laid before the National State Assembly and the Constitution provides that this would be the authoritative enactment. But it follows that until legislation is translated the English version is the authoritative version. There is no authority to say that a Sinhala copy of the Sinhala

[48] *In Re Agnes Nona* (1951) 53 N.L.R. 106 at p. 111.

Bill is authoritative. And it is not possible to find a scrap of legal authority to warrant reference to a bill and to decide a case according to the provisions of a bill. There was no justification to refer to the bill which by itself can carry no legal force. It is the enacted law which is effective and the law was enacted only in English. The Bill merely for the information of the legislature was circulated in Sinhala. The Bill of the Interpretation Ordinance (Amendment) Act No. 18 of 1972 which was relied on was not legislation which had been enacted in Sinhala nor was it legislation enacted in English prior to the Constitution and translated and laid before Parliament. Therefore the Act as enacted in the English language had to be interpreted.

Pathirana J. stated in conclusion:

> Before I conclude, I wish to make these observations: In the contemporary society in which we live there are social changes and upheavals which are taking place every moment to solve the problems of the people. It is necessary that in order to effect, consolidate and guarantee these changes that those who wield the executive power of the state must be armed with adequate and far-reaching powers unobstructed as far as possible and unless it is absolutely necessary by extraneous interference. These powers are given to public functionaries in trust by the legislature representing the power of the people. Implicit in repositing these extensive powers by the legislature is a duty expected from those who exercise these powers that they will do so with circumspection and above all with a sense of justice. There may be moments when they will derive infinite delectation in exercising these powers. But at the same time they must also remember in doing so that it is excellent to have a giant's strength but it is tyrannous to exercise it like a giant.[49]

The reaction of the state to the majority judgment was prompt. Immediately a law was rushed through the National State Assembly. The effect of the law was that the Courts would have in no circumstances whatsoever the power to issue an injunction against a Minister and further the law had the effect of rendering null and void the decisions delivered by the nine bench decision referred to above. The law not only legislated for the future but retrospectively rendered void solemn judgments of the Supreme Court which dealt with the property rights of the individual.

It is relevant when analysing the judgment and the reaction of the legislature to it, to take account of the fact that property is not regarded as a fundamental right in the republican Constitution.

If the amending Bill had gone before the Constitutional Court it may have been possible to argue that it was contrary to the Constitution, particularly since it was a law which operated retrospectively and had the effect of cancelling a decision of a court of law. Retrospective legislation is generally looked upon with disfavour,[50] and this has been recognised in *Liyanage* v. *The Queen.*[51] Further the circumstances of this case were peculiar. At any rate the public would have had the opportunity of following the argument of counsel on this point. But the Bill was rushed through and argument by counsel before the Constitutional Court was avoided. Article 55 of the Constitution was resorted to. Article 55 provides that an argument before

[49] See Ceylon Daily News of September 4, 1974.
[50] L.J.M. Cooray, *Reflections on the Constitution and the Constituent Assembly* (1971) pp. 38-40.
[51] (1965) 68 N.L.R. 265.

the Constitutional Court could be avoided by a reference to the Constitutional Court by the Speaker acting on a request of the Cabinet that it should report within 24 hours on the ground that a Bill was one of urgent national importance. Since in any event the Constitutional Court had to report within 14 days the need for such urgency did not appear on the facts of the particular situation to be manifest on the application of objective criteria. But the Cabinet is the sole judge of urgency. It is difficult to resist the conclusion that the reason for rushing this Bill through the National State Assembly was to avoid the matter being referred to the Constitutional Court and to deprive counsel of presenting before the public eye what may have been conclusive or at least very persuasive arguments against the Bill. It may then have made it difficult for the Constitutional Court if it was inclined to adopt a pro-government stance, to hold that the Bill was one which was in conformity with the Constitution.

5. *THE FUTURE AND ADEQUACY OF THE PREROGATIVE WRITS AS COMPARED TO THE DECLARATION AND THE INJUNCTION*

The writs of *quo warranto, mandamus, certiorari* and prohibition are remedies which were originally developed by the English courts and were introduced into the law of Sri Lanka in the nineteenth century. These remedies date back in England to medieval times. There are numerous technical and procedural difficulties which hamper the petitioner. The procedure which is followed in a writ application is the presenting of evidence by means of affidavits. Oral evidence is not recorded. This is a further disadvantage for the petitioner who cannot call witnesses and therefore often finds it difficult to prove the facts which he alleges in the petition. However, the writs have the advantage that an application is promptly taken up and generally disposed of in a short time, whereas actions brought in the District Courts generally tend to drag on for a long time. The trend in recent times in many common law countries and in Sri Lanka up to 1972 was to rely increasingly on the administrative remedies of the declaration and the injunction, as they have proved themselves to be more suitable remedies in the field of public law, than the old fashioned writs.

The action for declaration and the injunction are modern and by comparison with the writs, flexible remedies. "In administrative law the great advantage of the declaration is that it is an efficient remedy against *ultra vires* action by government authorities of all kinds including the Crown."[52]

"The use of the declaratory judgment as a means of defining rights and obligations of public authorities, including the Crown itself is one of the most remarkable developments of modern British administrative law. The importance of a declaratory judgment against the Crown is, of course, particularly great where many ordinary actions may not be brought against the Crown."[53] Lord Denning says "Just as the pick and shovel is no longer suitable for the mining of ceal so also the procedure of *mandamus, certiorari* and the other writs

[52] H.W.R. Wade, *Administrative Law* (1971) p. 119.
[53] H. Whitmore, *Principles of Australian Administrative Law* (1966) p. 230.

are not suitable for the winning of freedom in a new age. They must be replaced by new and up-to-date machinery by declarations and injunctions and claims for negligence."[54]

The Interpretation Ordinance (Amendment) statutes have had the effect of depriving the citizen of resort to the injunction and restricting the availability of the declaration in actions against the state. By contrast, section 22 which restricts the circumstances in which the writs are available have not had the same drastic effect because of the proviso to section 22. As a consequence the writs which are not very useful in modern times will have to be relied upon to a greater extent because the availability of the declaration and injunction which are more effective have been restricted.

6. *RATIONALE FOR RESTRICTING AVAILABILITY OF JUDICIAL REMEDIES AGAINST EXECUTIVE ACTION*

The prerogative writs, the declaration and the injunction have, prior to 1972, been used for a variety of purposes in the field of public law to protect the citizen against the acts of commission and omission of public servants. The manner in which their application has been restricted has been discussed above. The declaration and the injunction have many advantages over the writs, but involve delays and are certainly out of the reach of the poor man and the majority of the people of Sri Lanka. The argument put forward by the government to restrict resort to the judicial remedies is that they are made use of only by rich and powerful individuals, cause delay and frustrate action by a government which wishes to effect social change.[55] It is argued that land is sometimes urgently needed for village expansion, a school, hospital or a roadway and that when land is in the process of being acquired, if judicial remedies are available vexatious actions may be filed thus holding up development work. Land reform and other socialist policies could be brought to a complete standstill by actions instituted in the courts which drag on for years and years.[56]

Land Reform legislation introduced in many countries was frustrated and proved ineffective due to the fact that disputes which arose during the course of the takeover of lands were justiciable in the courts.[57] As a consequence in order to delay the process land owners both in order to safeguard their rights and in order to delay the entire process of land reform instituted actions. The institution of numerous vexatious actions in the courts have had the effect of bringing entire land reform programmes to a standstill. The officials involved in the takeover had to spend their time in courts and they could not carry out their duties. The land cannot be taken over and vested in the government and developed because pending the judicial decision on contentious issues all executive action must be stayed. Property actions may drag on for many years. In this way in many countries land reform programmes have been frustrated or slowed down due to cumbersome legal procedures and the long time taken to resolve disputes.

54 Lord Denning, *Freedom under the Law* (Hamlyn Lectures) (1949) p. 126.
55 National State Assembly Debates, April 20, 1972.
56 *Ibid.*
57 *Ibid.*

For the above reasons section 58 of the Land Reform Law, No. 1 of 1972, restricted the right of land owners to bring an action in court. As a consequence in Sri Lanka the entire process of taking over land from the owners and vesting it in the state was effected in a period of a little over two years. This contrasted sharply with the experience of some Indian states and many other countries. It is argued with a degree of justification that in Sri Lanka the main reason for the expeditious takeover of and vesting of private land in the state was the fact that the powers of the courts were restricted.

But it is dangerous from this one example to try to generalise that in all cases socialist policy and executive action will be frustrated unless administrator is given full powers to act. In the case of the Land Reform Law the officials who were involved in the administration of its were always careful to give a hearing to the land owners affected by the Law. Of course not everyone was satisfied but an attempt was made to hear the point of view of those affected by the Law. Further, since it was only land over fifty acres that was being acquired, all persons affected by the law were persons of a certain social and economic standing. As such they were able to exercise sufficient influence and pressure to be able at the very least to have an opportunity to present their point of view to the administrator.

In Sri Lanka as in many other countries public servants give a better hearing to those who have a certain standing in life whether social, economic or political, or who ask persons with such influence to intercede on behalf of them. Therefore the example of the Land Reform Law is no argument for denying access to courts in other situations, particularly when law affects ordinary citizens with less power and influence than those who were affected by the Land Reform Law.

In more ways than one the Land Reform Law is an exception, and a generalisation on the basis of the experience of this law cannot be made to justify in other and different situations the conferment of wide powers on statutory officials.

The argument that executive action will be stayed if the courts are allowed to interfere in disputes between the executive and the individual is not the only one which has been put forward for restricting access of the citizens to the courts. Where there is a dispute between the individual and the executive the ordinary courts are often not suited to the task or to put it differently the dispute may not be suitable for decision by a court. In making a decision it may be necessary to take account not only of legal rights and rules of law but also to consider the effect of social factors, public policy and the public interest.

There are other disputes which involve matters which require of an adjudicator technical know-how and experience. Here again the courts are regarded as unsuitable.[58]

[58] Committee on Ministers' Powers, Cmd. 4060 (1932) pp. 83-87.

The Land Acquisition Act, No. 9 of 1950, confers on a Minister the power to acquire land in the public interest. Samarawickrema J. in *Ratwatta* v. *The Minister of Lands*[59] said:

> I cannot resist the observation that it is remarkable how often over the years it has turned out by some extraordinary coincidence that the public interest appeared to require the acquisition of lands belonging to persons politically opposed to the party in power at the time. It is, therefore, necessary that the courts, while discouraging frivolous and groundless objections to acquisitions, should be vigilant if it is open to them to do so, to scrutinise acquisition proceedings where it is alleged that they are done *mala fide* and from an ulterior motive.

This is an assertion of judicial independence which had the effect of the executive withdrawing land acquisition proceedings that had been instituted against the relatives of the then Leader of the Opposition, the present Prime Minister. There is no scope for such a manifestation of independence after the second amendment to the Interpretation Ordinance.

The effect of the second amendment to the Interpretation Ordinance is that even where a land acquisition can be proved beyond doubt to be *mala fide* and inspired by a decision to victimise the political opponents of the governing party, there is now no ground on which such action can be questioned. The words of Pathirana J. quoted above[60] are based on certain realities but at the same time glosses over other realities. Land may be required genuinely for public purposes. Often the power of acquiring land and other wide discretionary powers vested in state officers are exercised as a means to victimise political opponents. Also they are being used increasingly to harass those who criticise the government. In the circumstances the exclusion of the jurisdiction of the court raises serious problems. The argument is that executive action cannot proceed if land acquisition is *bona fide.* The fear of vexatious actions is a real one. There is also the difficult problem which may arise when it could be said that land is needed for a public purpose and it is also manifest that there are *mala fides* and political overtones which moved the acquirers.

It cannot be denied that there are compelling reasons why disputes between administrators and the executive on the one hand and the individual on the other, should be removed from the courts. But to consider only those arguments is to look at only one side of the coin. There are other arguments of compelling force which merit consideration.

There are important issues which arise and which cannot be easily brushed aside. The fact that these remedies exist is to some extent a deterrent on unlawful, fraudulent, negligent, irresponsible, unfair, and *mala fide* acts by statutory officials. As long as there is the possibility that an official's act may be called in question in court (though it may not often happen) so long as the possibility exists, it can act as a deterrent against acts of the above mentioned type. Take the possibility away and open the door to many abuses of power.

It is true that when land is being acquired for a social purpose a government cannot tolerate delay. But lands have also been acquired

[59] (1969) 72 N.L.R. 60, 63.
[60] See section 4.

as a means of harassing and victimising an enemy by persons who have the power at various stages to influence an acquisition order. Such acts of victimisation can now continue apace. This is the dangerous road which has been opened.

The words "shall not be questioned in any court" are used in almost every statute passed today. This formula operates to protect all statutory officials whatever the nature of their work may be, not merely those engaged in land acquisition and land reform. The effect of shutting out the courts from adjudicating on issues and providing no other remedy to the ordinary person than an appeal to the Minister is that the administrator is supreme. In most cases the Minister if he has to hear an appeal will delegate his power to an administrator.

The administrator in whom vast powers are vested to take decisions could, on his own initiative or as happens more often under pressure from politically powerful persons, act fraudulently, negligently, irresponsibly, unfairly and *mala fide*. Remove the jurisdiction of the courts and this could be the inevitable result. The administrators are multiplying inevitably (though nonetheless alarmingly) and occupy an important place in modern society. Their acts affect human beings. But this factor can be forced into the background, where the administrator, seated at a desk, preoccupied with files, regulations, precedents and red tape, lays emphasis on rules, regulations and matters of policy which factors take precedence over viewing problems from the human standpoint and in the light of the practical and peculiar circumstances of the case.

The government has recognised that a movement towards a socialist society is to be made while retaining democratic principles and institutions. It has to be conceded that this is not possible without a curtailment of individual rights as they have been defined and developed by Western writers to suit the needs of a free enterprise capitalist oriented society. This does not mean however that individual liberties can be discarded in a socialist era. In the name of socialism such liberties must not be curtailed such that the power of the bureaucracy is increased without manifest public good accruing. Discretionary powers which erode liberty can be defended depending on the purpose and degree of public good sought to be achieved. But the purpose must be carefully scrutinised and the social good must be manifest before such power is entrusted to officials. And even after power is entrusted for desirable social ends, the people must be ever watchful that such power is not abused. The possibility of abuse is ever present.

The existence of wide discretionary power in the hands of officials can lead to socialism or it can lead to nepotism, stagnation, the retaining of feudalist ideas and institutions (which are still existent in Sri Lanka), concentration of power in the hands of few and ultimately fascism. Hitler started as a socialist — and ended as a fascist.

It is perhaps not practicable to try to persuade the government to go back on what it has done and make remedies available in the courts. The inherent dangers have been referred to. In this situation though the possibility of acceptance in the political context are slender, three proposals may be put forward: (i) the setting up of a system of

independent tribunals, (ii) in the absence of remedies to restore the *status quo ante,* the availability of an action for damages against the state to a person prejudiced by an abuse of executive power and (iii) the establishment of an ombudsman.

1. RESTRICTIONS ON THE ISSUE OF THE WRIT OF HABEAS CORPUS

When analysing the scope of the prerogative writs in Sri Lanka, no reference was made to the prerogative writ of *habeas corpus.* The writ of *habeas corpus* is issued calling upon a person who is detaining another to produce that person in court. When such person is produced the court would inquire into the legality of the detention, and if the detainer is not able in terms of the law to justify the detention, the court will order that the detainee be freed. The writ was formerly available under section 45 of the Courts Ordinance, No. 1 of 1889 and is now available under section 12 of the Administration of Justice Law, No. 44 of 1973. The writ of *habeas corpus* constitutes the classic guarantee of personal freedom.[61] It safeguards the right of personal liberty by providing a procedure by which an innocent person subject to imprisonment or other physical coercion, otherwise than in accordance with law, may obtain his freedom.

It is the classic safeguard against abuse of power and violence in respect of innocent persons. It is a safeguard not only against tyrannical use of power but what is much more likely negligent use of power. *Habeas Corpus* protects a basic human right. It is different in content from other writs and injunctions which are primarily concerned with protection of property rights. The writ of *habeas corpus* is concerned with the protection of the human person — his right to freedom which may be denied only where he has acted contrary to law.

According to section 5 of the Public Security Ordinance the head of state (the Governor-General prior to May 22, 1972 when the republican Constitution was promulgated and the President after that date) may upon the recommendation of the Prime Minister make emergency regulations which according to section 8 of the same Ordinance "shall not be called in question in any court". In pursuance of these powers, regulation 55 of the Emergency Regulations provides: "Section 45 of the Courts Ordinance shall not apply in regard to any person detained or held in custody under any emergency regulation". The intended effect of this regulation is to exclude the power of supervisory review of the courts to issue the writ of *habeas corpus.*

An important distinction must be noted. When the President makes regulations under section 5 he is acting under a power conferred by an Ordinance, which statute provides that the regulation is conclusive. But where a person exercises powers under a regulation made by the President under the Ordinance, it is a provision in another regulation (regulation 55) which seeks to protect him. The issue which arises is whether a regulation as distinct from a statute can oust the jurisdiction of the courts. It has been held that in regard to an invalid order, regulation 55 will not apply to oust the

61 S.A. de Smith, *Constitutional and Administrative Law* (1973) pp. 465-65.

jurisdiction of the court to pronounce on it. It also appears that where a person acting under a regulation is moved by *mala fides,* this will be an implied exception to the exclusionary nature of regulation 55, which on the face precludes a court from questioning the validity of an order made thereunder.

Three recent cases[62] of the Supreme Court construed regulations 18(1), 19(1) and 18(10) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. *6* of 1971 and section 8 of the Public Security Ordinance and also regulation 55. Regulation 8(1) enabled the Permanent Secretary to the Minister of Defence and External Affairs to make an order for the detention of a person if he is of opinion that such order is necessary with a view to preventing that person from acting in any manner prejudicial to the public safety and to the maintenance of public order.

Regulation 19(1) confers power on any police officer, any member of the Ceylon Army, Royal Ceylon Navy or Royal Ceylon Air Force, or the Commissioner of Prisons and certain other persons to search, detain for purposes of such search or arrest without warrant any person (a) who is committing an offence under any emergency regulation or (b) who has committed an offence under any emergency regulation or (c) whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any emergency regulation.

Regulation 18(10) sets out that an order for detention made by the Permanent Secretary under regulation 18(1) shall not be called in question in any court on any ground whatsoever.

In the case of *Hirdaramani* v. *Ratnavale*[63] Hirdaramani was detained by order made by the Permanent Secretary under Regulation 19(1). His detention was challenged by a writ of *habeas corpus* on the ground that the detention was not for the purpose authorised in the regulation but for an extraneous or ulterior purpose namely the facilitating of the investigation into certain contraventions of the Exchange Control Act and other laws and was therefore *mala fide.* A Divisional Bench of three judges of the Supreme Court held unanimously on a consideration of affidavit evidence that *mala fides* on the part of the Permanent Secretary had not been established as a question of fact. It was also held by Silva S.P.J. and Samarawickreme J. (Fernando C.J. dissenting) that regulation 55 was not applicable to a person unlawfully detained.

Silva S.P.J. cited by way of example a person who was sentenced to imprisonment for attempted murder of the Permanent Secretary and who in prison made known his intention to do what he had earlier failed to achieve when he got out of jail. Then if on his release the Permanent Secretary made an order for his detention under section 18(1) for his own personal safety it would be open to the court to question that order despite the prohibition contained in regulation 55. Samarawickrema J. cited another example. He said "For example,

62 *Hirdaramani* v. *Ratnavale* (1971) 75 N.L.R. 67; *Gunasekera* v. *de Fonseka* (1972) 75 N.L.R. 246; *Gunasekera* v. *Ratnavale* (1972) 76 N.L.R. 316.

63 *Op. cit.*

the order would not be in terms of the Regulation and would be a sham if the Permanent Secretary were to make it for a purely private purpose such as the detention of the rival to the woman he loved".[64]

H.N.G. Fernando C.J. thought that there were sufficient safeguards against abuse since the power was vested in a person specially selected by the Prime Minister and one in whom she would have had absolute confidence. He also considered it relevant that a person aggrieved could appeal to the Prime Minister. He therefore concluded that regulation 55 was intended to be absolute. The argument is dependent on the presumption that the Permanent Secretary would always act in good faith. But the question arises as to what the position would be if he did not act in good faith and whether the effect of the regulation was that even such an act was beyond the reach of the courts. Wade points out: "Every discretion is capable of unlawful abuse, and it is the Court which must decide where this point is reached. Only within its lawful boundaries is discretion free".[65]

The second case was *Gunasekera* v. *de Fonseka.*[66] Here another Divisional Bench of the Supreme Court held that the arrest of a detainee by a Police Officer on the orders of his superior was unlawful because the person making the arrest had no reasonable grounds for suspecting the detainee to be concerned in or to be committing or to have committed an offence. The Court held that a condition precedent for such arrest was that the officer who made the arrest should himself reasonably suspect that the person arrested had been concerned in some offence. Accordingly such arrest was held to be not in accordance with the regulation.

It must however be noted that all that is required is for the person making the arrest to state that he has reasonable grounds of suspicion. The mistake which the police officer made in the case was to admit that he had acted on the orders of a superior officer. If he had merely stated that he had reasonable grounds for suspicion, it appears that the court will act *prima facie* on that statement. On the very day of his release on the above order of the Supreme Court, the detainee was again arrested on an order made by the Permanent Secretary acting under section 18(1) while the detainee was in the Colombo Law Library having consultations with his lawyers.

This gave rise to the third case, *Gunasekera* v. *Ratnavale.*[67] Another Divisional Court held unanimously that the petitioner had not established *mala fides* on the part of the Permanent Secretary. They then went on to consider the exclusion clauses. Alles J. agreed with the dissenting view of H.N.C. Fernando C.J. while Wijetilleke J. agreed with the majority view in *Hirdaramani.* Although the head note says that Thamotheran J. was of the same view as Alles J. yet it is not clear whether this is correct. It is true that the learned judge said[68] "I have quoted these passages from the three Lords in the *East Elloe*[69]

[64] *Op. cit.,* p. 112.
[65] H.W.R. Wade, *Administrative Law* (1971) p. 78.
[66] *Op. cit.*
[67] *Op. cit.*
[68] *Gunasekera* v. *Ratnavale op. cit.,* p. 366.
[69] The reference is to *East Elloe* v. *Rural District Council* (1956) 1 A.E.R. 855.

case who held in the face of a section like section 8 of the Public Security Ordinance that it was not open to Court to inquire into an allegation of *mala fides* when the determination or order in question was *prima jade* valid. With all respect I agree with their reasoning". But he concludes his judgment saying,

> But it is clear that the jurisdiction of the Court is only taken away provided that the order on which the government is relying is an order 'made under the Ordinance'. It must be made by the detaining authority in the proper exercise of its power. It would not be an order made under the Ordinance if it was made merely in the wholesale exercise of its power or if the detaining authority exceeded the powers given to it under the Ordinance . . . . The Order must not be made for an ulterior purpose, a purpose which has no connection with the security of the state or the efficient prosecution of the War.[70]

It appears that the judge agreed with *dicta* in the *East Elloe* case, which he did not consider relevant in the situation he was considering. His views appear to be unambiguously stated in the paragraph quoted above.

The effect of the above provisions as interpreted by the Supreme Court is that subject to the above exceptions (which are rather narrow) where a person is detained under the emergency powers a writ of *habeas corpus* in not available. And in Sri Lanka today the people live under perpetual emergency rule.

It must be conceded that in a time of national crisis such as at the time of the insurrection of 1971 there was no alternative but to detain suspected persons under emergency powers and suspend the availability of *habeas corpus.* It was scarcely practical to expect the courts to hear applications from the 15,000 persons in custody. Criminal Justice Commissions[71] were set up to deal with this situation and the procedure gives scope to those detained which is not available in many countries, where detentions are made under emergency powers and persons are kept in prison for long periods. But dangers of conferring discretionary powers to detain human beings must not be lost sight of. Such powers could be negligently exercised or exercised *mala fides* and used for improper purposes.

Vanderbilt in his work on the Separation of Powers says,[72]

> The granting of extraordinary powers to the executive for the purpose of dealing with emergencies seriously affects the utility of the doctrine of the Separation of Powers unless the declaration of emergency is left to the legislative branch and unless the courts have the power — and exercise it — to enjoin the executive from acting in the absence of such a declaration and from taking action not reasonably necessary to cope with a declared emergency.

Vanderbilt[73] shows by reference to the German Constitution and the constitutions of some South American countries the danger of conferring wide legislative powers to the executive during times of emergency, where the courts do not have the power to determine whether in fact a state of emergency exists. The German Constitution

[70] *Op. cit.,* p. 368.
[71] Criminal Justice Commission Act, 8 of 1972.
[72] A.T. Vanderbilt, *The Doctrine of the Separation of Powers and its Present Day Significance* (1953) p. 28.
[73] *Op. cit.*. p. 34.

of 1918 vested wide emergency powers in the President. But where the government had declared a state of emergency and was exercising emergency powers the courts held that they had no jurisdiction to determine whether in fact a state of emergency according to objective standards. The legislature in Germany had the power to control the President and to pass a vote of non-confidence on the President. But despite these safeguards successive German Presidents, the last of whom was Adolf Hitler, exercising emergency powers and acting within the legal framework of a democratic constitution gradually limited and eventually destroyed democratic government.

The translation from democratic to totalitarian government can be made within the legal framework of a constitution, through the employment of delegated emergency powers by the executive and since the transition is both gradual and legal, public opinion is not alerted until it is too late.

> I am not suggesting that strict adherence to the doctrine of the Separation of Powers would have guaranteed to the individual liberty... but surely it must be conceded that the failure to have provided in the organic law against unwarranted interference with the fundamental rights of the individual and the stability of the normal processes of government indicates a fundamental lack of perception of the nature of the relationship that must exist between the citizen and the state if the rights of both the individual and society are to be assured. Is there any more depressing fact than this tragic lack of understanding in so many quarters, first of the relation between the Separation of Powers and the rule of law and, second, of the relation between the rule of law as a substitute for force and tyranny and individual freedom and the dignity of man?[74]

L.J.M. COORAY*

[74] *Op. cit.,* p. 35.

* LL.B.(Cey.), Ph.D.(Cantab.), Senior Lecturer in Law, MacQuarie University, N.S.W., Australia.