ORATION DELIVERED AT THE 3RD DEATH ANNIVERSARY OF LATE MR. C.R. DE SILVA, FORMER ATTORNEY GENERAL AND CHAIRMAN LLRC AT THE BMICH ON THE 07TH NOVEMBER 2016

THE ROLE OF THE ATTORNEY GENERAL OF SRI LANKA AND THE RULE OF LAW; WITH SPECIAL REFERENCE TO THE CRIMINAL JUSTICE SYSTEM

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Hon. Prime Minister, Mrs. Kamalini de Silva, members of the family of the late Mr. C.R. de Silva, the Hon. Chief Justice and the Hon. Judges of the Supreme Court, the Hon. President of the Court of Appeal and the Hon. Judges of the Court of Appeal, Hon. Members of the Judiciary, Hon. Attorney General, and members of the Official Bar, President, Bar Association of Sri Lanka and members of the Unofficial Bar, distinguished invitees, ladies and gentlemen.

At the very outset, I wish to express my profound gratitude to the organizers of the C.R. de Silva memorial oration, for honouring me with the invitation to deliver the first oration. Mr. de Silva was a person with whom I had been associated for over four decades. He was a young school boy at Royal College, Colombo when I first saw him in the year 1968. Ever since, myadmiration for him has grown as in the case of anyone who knew him closely.

In him, within a seemingly rough exterior, there was a passionate humane personality whose unselfish generosity was well known. He was a great leader, anyone would like to emulate. I always was of the view that he was a leader who was behind his men.

Even as a young school boy, I was not impressed with the phrase that one should lead from the front. I felt it was an obsolete phrase that would fit only those who soughtviolence as a mode of resolution of disputes. Mr. De Silva , I thought, was always behind his men, which I believeis a quality of a great leader.

I found support for my thinking from no less a person than President Nelson Mandela: President Mandela has said :

" A leader is like a shepherd. He always stays behind the flock, letting the most nimble go on ahead, whereupon the others follow, not realizing that all along they are being directed from behind."[1]

The late Mr. De Silva always stood behind his officers like a solid rock. I recall when I made the welcome address to him as the Head of the Criminal Division, on his appointment as the Attorney General, I told the officers that if they have done the correct thing they should not fear the consequences as they had a leader standing behind them in concrete solidarity. I assured them that Mr. De Silva would not abandon them any sooner than he abandoned himself. He never let us down on that optimistic expectation. "Fear not, go ahead, I shall be with you" was his message to all of us.

The organizers of this oration gave me the choice of the topic. According to Lord Thomas Bingham, who held the Posts of Master of the Rolls and Lord Chief Justice of England, that is the greatest challenge an unimaginative person would face when he is called upon to speak.[2] I faced that difficulty. However, ultimately I thought I would speak on the "*Role of the Attorney General of Sri Lanka and the Rule of Law; with special reference to the Criminal Justice System."* I thought of that topic for two reasons. Firstly, as Mr. C.R. de Silva was the 24th Attorney General of Sri Lanka himself, and during Mr. De Silva's tenure as Attorney General, he made all endeavours to uphold the Rule of Law; and, secondly, since it is a current topic.

What I intend to speak to you on, is the manner in which the Attorney General of Sri Lanka could contribute towards the upholding of the Rule of Law. This is to a very great degree, based on my experiences as an officer of the Department for over 35 years.

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[1] Long Walk to Freedom, Autobiography of Nelson Mandela, at page 26
[2] The Rule of Law, Tom Bingham, Penguin publications, Preface

I am fully aware that this audience is full of legal luminaries. I am equally aware that there would be a good proportion of persons without a legal background. I am therefore confronted with the task of making this presentation tolerable to both sections. I will try, to the best of my ability, to strike a reasonable balance on the contents.

The term "Rule of Law" is said to have been coined by Professor A.V. Dicey, in his book titled " *AnIntroduction to the Study of Constitutional Law",* published in 1885. He was serving as Professor of English Law at the University of Oxford at that time. However, some have expressed the view that there is reference to the concept in the teachings of Aristotle.

Professor Dicey, referring to the concept of the Rule of Law has said as follows in is his famous publication " An Introduction to the Study of Constitutional Law:

"We mean in the first place that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of law."

More importantly Professor Dicey further states:

" If anyone – you or I, is to be penalized, it must not be for breaking some rule dreamt up by an ingenious Minister or Official, in order to convict us. It must be for a proven breach of the established law of the land and not a tribunal of members picked to do the government's bidding, lacking the independence and impartiality which are expected of Judges."

It is an important aspect of the Rule of Law, that persons should be tried, convicted and punished by the normal courts and not by tribunals specially established for that task. That was one reason why the Commission to Investigate Allegations of Bribery or Corruption was conferred with only investigative

powers.[3] The Criminal Justice Commission[4] established to inquire into offences committed during the 1971 Insurrection and foreign exchange violations was conferred with punitive powers, and the activities of the Commission and regrettably the Commissioners came under heavy criticism on this basis.

The concept of Rule of Law has developed over the years. It has grown and taken its roots firmly in all States, though in different forms, shapes and degrees. Lord Denning of the United Kingdom referred to the concept of Rule of Law in his famous series of lectures called the Hamlyn Trust Lectures, which, he says, were delivered with the common man in mind.

According to Lord Denning, personal freedom which is an essential component of the Rule of Law, is the freedom of every law abiding citizen to think what he will, to say what he will and to go where he will on his lawful vocations without let or hindrance from any other person.[5] I quoted the above passage, in order to demonstrate that the Rule of Law is essentially a concept which protects the interests of the law abiding citizen.

When I was Attorney General, I had the honour of delivering, the K.C. Kamalasabeyson Memorial Oration, in memory of the 23rd Attorney General of Sri Lanka, an equally honourable gentleman. When I delivered that oration, I had to carefully weigh and consider each word I uttered as I was then the incumbent Attorney General. Today, as I stand here before you to make this presentation, I am a retired public servant, and I feel free to express my views without restraint.

In that presentation I said:

[3] Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994
[4] Criminal Justice Commission Act, No. 14 of 1972
[5] Freedom under the Law – Sir Alfred Denning, The Hamlyn Lectures – at page 5

" Indeed there would be no Rule of Law, if law abiding citizens live in constant fear of being preyed upon by the thief and the murderers with no protection of the law enforcement authorities. Stringent laws to deal with law breakers therefore, would itself, be a formidable safeguard against abuse. However, itwould be equally necessary that there be sufficient protection and effective remedies against the abuse or misuse of such authority by the Executive or Law Enforcement Officers."[6](This I believe is a statement of Lord Denning, the source, I was unable to quote)

I thought I would quote that passage, to show that the view I hold today, I held even when I was the Attorney General of Sri Lanka. I always thought that the Rule of Law essentially protected the rights of law abiding citizens, and whenever there was a danger of their rights being transgressed, the law should come hard on the transgressors, of course, within the limits of the law.

It is in that context that I would be dealing with the Role of the Attorney General of Sri Lanka (AG) in enforcing the Rule of Law.

The AG of Sri Lanka is the Chief Law Officer of the State and performs a function in respect of the implementation of the law, uncontrolled by any authority. The AG is the only authority, other than, of course the Commission to Investigate Allegations of Bribery or Corruption who can decide whether a person should be indicted for an offence or not. Neither His Excellency the President, nor any member of the Government or even the Supreme Court could lawfully direct the AG to file or to refrain from filing an indictment against any person. Whenever the Supreme Court finds that certain Police Officers have violated the fundamental right guaranteed by Article 11 of the Constitution, by torturing any person, the order is conveyed to the AG to consider indicting the suspect, if the AG is of the opinion that the material disclosed the commission of an offence in terms of the Convention against Torture and other Cruel, Inhumane or Degrading Punishment Act, No. 22 if 1994. There has never been a direction

[6] Selected Essays on Criminal Law of Sri Lanka – Palitha Fernando, at page 241

to AG to file indictment. It is the exclusive prerogative of the AG to decide on the material submitted to him by the investigators, whether a person should be indicted or not. It is said that the AG exercises a quasi judicial power in this respect.

There cannot be any supervision by any Executive Authority over the power of the AG to institute proceedings against a person before the High Courts. The decision to indict a person is taken by the AG on a careful and objective analysis of the facts and law, free of any prejudices or influences.

After the acquittal of Michael Le Vell, an actor in the popular TV series, *Coronation Street*, on a charge of child abuse, an allegation was made in the media that the prosecution of the suspect was a celebrity witch hunt. The Senior Legal Officer of the Crown Prosecution Service responded by saying that each case was assessed on its own individual merits, before the decision to indict is taken, and that, that decision never depended on the suspect's profile.[7]

This is exactly the basis upon which the AG of Sri Lanka decides on indicting persons. There has been only one instance where the decision of the AG to indict a person had been challenged by way of a Fundamental Rights application.[8] The Court did not find fault with the decision of the AG to indict the suspect on that occasion. The fact that a person is acquitted after trial does not in any way indicate that the decision of the AG to indict was wrong. The decision to indict is taken after a careful analysis of the material available on paper. The ultimate outcome of the trial depends on many other matters including the advocacy of defence Counsel and the independent decision of the presiding Judge or the Jury over which the AG has no control.

The AG enjoys the right to enter a *NolleProsequi* in respect of an offender, which was a right enjoyed even during the period of the British rule. This is a right that has come as a practice enjoyed by the AG

[7] London Metro Free News Paper of the 13th of September 2013
[8] *Victor Ivan* v.*The Attorney General*(1998) 1 SLR 340

and the AG alone. The only legal provision that statutorily recognizes this right is where it is provided in the Code of Criminal Procedure Act that the entering into a *NolleProsequi* is a right that the AG cannot delegate to any other officer of the Department.[9] Usually, in Sri Lanka, *NolleProsequi* entered by the AG is accepted without question. The *NolleProsequi*in Sri Lanka is entered by the AG on reasons of policy, though in his opinion, the material justifies a criminal prosecution.

The right of the AG to enter a *NolleProsequi* should not be confused with the power enjoyed by a prosecuting officer to withdraw an indictment or any charges therein. The prosecuting officer is entitled to seek the permission of court to withdraw an indictment at any stage of the proceedings, and such withdrawal is possible only if Court, for reasons recorded, permits the application of the prosecuting officer. [10]

Court can always refuse an application by a prosecuting officer to withdraw an indictment already filed in court. That is why I have constantly expressed the view that no allegation can be made against the AG for the withdrawal of any indictment before court. The prosecutor will have to convince court that his application is based on substantial ground. It is only then that the prosecuting officer would be entitled to withdraw the indictment. Sometimes it has been said that indictments against certain individuals were withdrawn by the AG due to political influence. However, those statements are made on the misconceived notion that the AG is entitled withdraw an indictment on his own. The only way the AG can discontinue a prosecution before the High Court, independent of the presiding Judge, is where he enters a *NolleProsequi*. In recent times, to the best of my knowledge, there have been no instances where a *NolleProsequi* was entered by the AG. All withdrawals of indictments filed before court were with the approval of the presiding Judge.

[9] Section 401 of the Code of Criminal Procedure Act, No. 15 of 1979
[10] Section 194 of the Code of Criminal Procedure Act, No. 15 of 1979

In the case of *Queen* v. *Karthenis de Silva*[11] decided under the Criminal Procedure Code, court referred to the discretion of court in permitting an application by Crown Counsel to withdraw a prosecution in the following terms:

" This provision calls for judicial discretion. The guiding principle being that court should be satisfied that this is not an attempt to interfere with the course of justice for an illegal or illegitimate purpose and Counsel for the Crown in exercising his executive function is not acting improperly."

This would demonstrate the extent of the power exercised by the AG of Sri Lanka In the criminal justice process to ensure the enforcement of the law, and to ensure that all abuses from whatever quarter are resisted to the maximum.

With the 19th Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, the AG is appointed by His Excellency the President, on the recommendations of the Constitutional Council. This is a move to ensure that the President has no exclusive authority in the appointment of the AG, who, as I stated, exercises a tremendous amount of authority in the enforcement of the law which sustains the Rule of Law.

In the famous case of*Land Reform Commission* v. *Grand Central Ltd*,[12] Chief Justice Neville Samarakoon, referred to the AG not only as the Chief Legal Officer of the State, but also as the Leader of the Bar. That is the traditional role of the AG of Sri Lanka. Chief Justice Samarakoon further stated:

" As Attorney General, he has a duty to Court, to the State and to the Subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth…."

[11]*The Queen* v. *Karthenis de Silva*, 70 NLR 66
[12]*Land Reform Commission* v. *Grand Central Ltd.*(1981) 1 SLR 250

Unlike in most other Commonwealth Jurisdictions, the AG of Sri Lanka does not exercise any supervisory control over Police investigations, which is considered to be the function of the Director of Public Prosecutions, an office that existed under the Administration of Justice Law, but was later abolished. However, in the interests of justice, AG, as the Chief Law Officer of the State, has intervened, and advised the Police in respect of ongoing investigations, either at the request of the of an aggrieved party or the Police or on his own initiative, where it is thought that the intervention of the AG was necessary in the interests of justice.

On numerous occasions, our courts have held that the Police should seek the advice of the AG in the case of complicated investigations before arresting or proceeding to institute action before the Criminal Courts.[13]

In the case of *Corea*v.*The Queen,* Justice Gratiaen stated as follows:

" In *Muththusamy v. Kannangara* (1951) 52 NLR 824, I pointed out that " the actions of police officers who seek to search private houses or to arrest private citizens without a warrant should be jealously scrutinized by their senior officers and that in cases of this nature, it seems preferable that the facts should in the first instance be reported to the Law Officer of the Crown so that, after an impartial examination of all the available material, the real transgressors, whoever they might be , could be brought to justice." I re-emphasize these observations in connection with the present case. Learned Crown Counsel who appeared before us in support of the convictions under appeal stated that the earliest communication received by his Department with regard to this case was dated the 15th of February 1952, i.e, two and a half years after the incident took place. And even that communication was a request by the 1st appellant's lawyers for an interview with a view to having the Magistrate's order of committal quashed by the Attorney General. "

[13] *Muttusamy* v. Kannangara, 52 NLR 324, *Corea*v. *The Queen,* 55 NLR 457, *Juan Appu*v. *Fernando,* 50 NLR 69, *Martin Appuhamy*v. *Sub Inspector Jaffna,* 64 NLR 42

When the late Mr. TyrrelGunatilake was the DIG in charge of the Criminal Investigations Department, he insisted that the investigators be in close contact with the officers of the Attorney General's Department in order to ensure an efficient investigation in the interests of justice. This practice is followed up to date by the Criminal Investigations Department. The Criminal Investigations Department, sometimes refers the file to the AG after recording the 1st complaint, seeking advice as to whether it discloses a matter that needs further investigation. When I was a junior officer of the Department, there was a circular directing us to advise on such files within two weeks of receipt. By this method, a great deal of cases which did not need any further action were closed with the 1st complaint. We decided that most such matters were civil transactions and that no criminal offence is disclosed. Though the power to supervise police investigations is not conferred on the AG like In the case of the Director of Public Prosecution, AG has over the years, based on judicial pronouncements and the provisions of the Code of Criminal Procedure Act, stepped in where intervention was necessary in the interests of justice.

Mr. Nicholas Cowdery, former Director of Public Prosecutions of New South Wales, Australia, in an article titled " Challenges to Prosecutorial Discretion" commenting on the coordination between investigators and the prosecutors states as follows:

"The relationship between the prosecutor and the investigator is important and must be nurtured professionally to enable the best to be obtained from both sides in a true spirit of cooperation in the pursuit of justice."[14]

The AG of Sri Lanka, over the years, has commendably performed this function, intervening wherever the intervention of the AG was required in the interests of justice. The Code of Criminal Procedure

[14] Commonwealth Law Bulletin, Vol. 39, March 2013

Actspecifically authorizes the AG to advise the Police on complicated investigations on the request of the Police or on his own initiative.[15]

Until the prosecution of Offences Act of 1985 was enacted, in England and Wales there was no Crown Prosecution Service. The decision to prosecute was in the hands of the police although most police authorities employed prosecuting solicitors for the purpose of conducting prosecutions. In Sri Lanka we have had a greater link with the Police and had played a prominent role in the institution of prosecutions. The Attorney General's Department established a Non Summary Unit in 1998, but it was abolished in 2009. My personal view is that, that unit should be re-established and the AG should take greater control over the prosecutions in the Magistrate's Courts.

In an article written by me as Head of the Criminal Division, on the title "Prosecutorial Discretion" I have included the following paragraph:

" The workload the officers of the AG's Department have to cope with, is far beyond their strength and hence it is not pragmatic to burden them with the supervision of police investigations in all cases. However, where the commission of a sensational crime that shocks public conscience is reported in the media, it has been the practice in the Department to open a file on the paper cutting and to monitor investigations in the interest of justice"[16]

When Her Excellency Ms. NavanethemPillay, United Nations High Commissioner for Human Rights visited Sri Lanka in 2014, she met me as the Attorney General of Sri Lanka, and I explained to her the role played by the Attorney General in respect of Police investigations into sensational crimes. A few days before her visit, or during her visit, there had been an attack on the residence of a journalist, which was given wide publicity in the media. While I was explaining to her the role of the AG to ensure fair

[15] Section 393 of the Code of Criminal ProcedureAct, No. 15 of 1979
[16] Selected Essays on Criminal Law of Sri Lanka, Palitha Fernando, at page 293

and just investigations she interrupted me and said, " Mr. Attorney General, I have read in the media about an attack on the residence of a journalist, what action do you hope to take about it ?" Without any response to that question, I turned to my officer in charge of administration and requested that the file I had opened the previous day, be sent to me immediately. It was brought to my chambers during the interview and I gave the whole file to her. It was a file opened on a paper cutting, with a minute from me to the Criminal Division, instructing that the file be opened immediately. The file contained a minute from me to a senior officer to take immediate action to get in touch with the police and to ensure impartial and expeditious investigations, and to keep me informed of the progress. Having read the file, her immediate and spontaneous response was, I must commend you for this. (His Excellency RavinathaAriyasinghe, Sri Lanka's Permanent Representative, Ms. BimbaTilakaratne, Acting Solicitor General, and I believe even the present AG were there on that occasion.)

The Department of the Attorney General has also a special unit called the MP Unit, which entertains petitions from the public seeking intervention of the AG where there is abuse in the process of law enforcement. In addition, an Attorney at Law, usually is entitled to make a representation to the AG on behalf of his or her clients, where the intervention of the AG is necessary, in the interests of justice. Such communications from Attorneys at Law, were entertained at any stage of the investigations. The communications were entertained from suspects as well as victims of crime. The purpose was to ensure that the enforcement of the law was not abused so as to defeat the interests of justice.

Recently, I happened to meet Mr. Sunil de Silva, President's Counsel, a former AG of Sri Lanka, who served as a Prosecutor in New South Wales, Australia. He observed that one of the greatest drawbacks of the Criminal Justice System in Sri Lanka is the delay associated with judicial intervention. The delay is within the system and it affects the Rule of Law to a great extent. A person aggrieved by an act, either by the law enforcement authorities or even the minor judiciary, cannot have it redressed without an

amount of delay which renders the remedy nugatory. It is a delay inbuilt within the system and I feel, the AG is the only authority who could expeditiously grant relief in such instances. The traditional link between the investigators and the officers of the AG's Department served to make the process efficient.

There was a bail application, where bail had been granted and the amount of certified bail ordered was Rs.50 Million. The suspect moved the revisionary jurisdiction of the Court of Appeal to have the amount of certified bail reduced. There is no doubt that the amount of bail is excessive and is contrary to the provisions of the Code of Criminal Procedure Act and the Bail Act.[17] Even threemonths after the filing of the bail application, it was still pending before the Court of Appeal and the suspect was languishing in remand simply because he could not furnish the certified bail ordered. Meanwhile the original court that ordered the certified bail, reduced the amount to an affordable degree after three months and the suspect was released on bail, while the application before the Court of Appeal was still pending. This I think, is a classic instance where the intervention of the AG could ensure the expeditious enforcement of the Rule of Law.

The enforcement of the law to its optimum efficiency, requires a coordinated effort by all those involved in the law enforcement process. The Judiciary, the Official Bar, the Unofficial Bar and the Police Department play important roles in this process. Out of all such agencies, the role of the AG and his Department is of utmost importance. I would, without the faintest hesitation state that the AG plays a pivotal role in the whole process. As I pointed out earlier, the delay involved in the judicial process is not due to the fault of any party. It is an inbuilt delay that nags the litigant. The AG is the only authority, who could legitimately intervene to ensure that justice is meted out where it is necessary.

During the period I served the Criminal Division of the Department, under the late Mr. Kamalasabeyson and Mr. C.R. de Silva, several important directions have been issued to the Police by the AG in the

[17] Please see section 404 of the Code of Criminal Procedure Act ,No. 15 of 1979, Section 11 of the Bail Act, No. 30 of 1997, and *Pathirana* v. *The State (*1985) 2 SLR 75

interests of justice and to ensure that grievances that deserved attention were expeditiously dealt with. I must mention with gratitude the assistance I received from Mr. N.K. Illangakoon former Inspector General of Police and Mr. Gamini Dissanayake, Attorney at Law and Senior Deputy Inspector General of Police, in sending out these instructions to all Police Stations. All such instructions were aimed at preventing the arrest of innocent persons, without the AG first having a look at the available material to ensure that the material warranted an arrest.

I shall give a summary of these instructions in an Annexure to this presentation for the information of those interested. The Legal Division of the Police Department took steps under Mr. Gamini Dissanayake, then Senior DIG (Legal) to convey such instructions by way of a circular from the Inspector General of Police. I have been informed that such instructions prevented the arrest of many persons who would have otherwise been arrested during the course of police investigations and remanded, without the material being considered by the AG in order to ascertain whether the material warranted an arrest.

Such instructions have always been given on representations made by an Attorney at Law on behalf of an aggrieved party, or taking into consideration the gravity of the matter and the possibility of innocent persons being arrested without a proper appreciation of the facts and law.

When Dr. Dennis Aloysius was the President of the Private Medical Officers Association, a representation was made to the AG that the Police be prevented from arresting a Medical Practitioner for a criminal offence where a patient under his care dies. It was requested that such arrests be made only after the AG looked at the relevant material. Based on this representation, instructions were sent to all police stations that where a patient dies while under treatment by a Medical Practitioner registered under the Medical Council that the suspect doctor should be arrested only after the material is submitted the AG to ascertain whether a case of criminal negligence is made out.

Whether on a given set of facts, a case of criminal negligence that amounts to a criminal offence is disclosed, is certainly not a matter an investigating Police Officer is competent to decide. It requires considerable experience and it is always necessary that a Legal Officer of the State objectively analysed the material in coming to that decision.

Recently when my good friend, Retired Senior DIG and Attorney at Law, Leo Perera passed away at the Police Hospital, I have been informed that the Medical Officers firmly requested the Police that no arrest should be made without the material first being submitted to the AG. I was personally informed by the Medical Officers that they were able to take that firm stand due to the instructions to the police by the AG that the material should be submitted to the AG before an arrest of a Medical Officer where a patient dies under the care of such Medical Officer. In the instructions sent to the Police, it is specifically stated that it did not apply to cases of suspected illegal abortion.

Where a patient dies while being treated by a Medical Practitioner, whether the evidence discloses a case of criminal negligence that warrants, an arrest is a complicated issue a police officer would not be competent to decide. If the suspect Medical Practitioner is arrested on the basis of the first complaint and he or she is remanded for the purpose of further investigations, that would cause irreparable damage to a person who may be totally innocent of any offence.

The Private Medical Officers Association made representations to the AG since a Medical Practitioner had once been arrested and that had caused much concern to the members of the Association. There is no doubt that the instructions of the AG is convincing proof of an instance where the intervention of the Chief Legal Officer of the State has strengthened the Rule of Law, leaving no room for abuse of the process.

Mr. U.R. de Silva, has included in his book titled " Criminal Defence" two letters addressed by me, as Head of the Criminal Division to him, the then Secretary of the Bar Association of Sri Lanka and to Mr.

W. Dayaratne, the then President of the Bar Association of Sri Lanka. They are two letters by which it was sought to educate the members of the Bar about AG's instructions to the Police as both members of the Official and Unofficial Bar are single minded in our quest for an efficient Criminal Justice System.

I quote below a paragraph from the letter addressed to the President of the Bar Association of Sri Lanka, Mr. W. Dayaratne, in order to demonstrate the purpose of the letter:

" I am writing to keep you informed of certain steps taken by me after assuming duties as the Head of the Criminal Division of the Attorney General's Department, and requesting you to communicate same to the members so that you too could associate yourselves in the efforts we are making to ensure the efficiency of the Criminal Justice System."

The Criminal Justice System in any country should be ruthlessly efficient in its pursuit of violators of the criminal law. Law abiding persons within the territory should be ensured of the protection of the law. No room should be left for offenders to believe that the law is incompetent to deal with them and that deficiencies of the law would provide them with ample opportunity to violate the law with impunity. The culture of impunity for whatever reason must be replaced with a culture of accountability. Those who are guilty of violating the law should be dealt with through a transparent, fair and expeditious process.

Equally important however, it would be, to ensure that abuse of the process for whatever reason, does not result in the incarceration of innocent persons with no expeditious remedy. If that is the case, it is tragedy to be mourned, and should be avoided utilizing all the strength at our command. That in my view, sums up the purpose and the strength of the Rule of Law. The role of the AG of Sri Lanka in achieving this objective cannot be underestimated under any circumstances. The AG is an impartial and independent officer who exercises an authority that permits him to grant expeditious and efficient relief that cannot be secured from any other authority.

Let me refer to two incidents that occurred during my tenure as AG that demonstrates the role AG can play in ensuring the protection of the Law to innocent persons. A Chief Legal Officer of a Bank, met me around 4.00 p.m with several of her legal officers in the company of Mr. YuwanjanWijayatilake,PC., the then Solicitor General. Her complaint was that a police station conducting investigations into an over payment is due to arrest two young clerks of the Bank without any evidence of been concerned in the commission of a criminal offence. I, immediately, through the Police Post, got in touch with the Senior DIG of the area and informed him of the situation and instructed that early the next day, the investigating officer with a Senior Police Officer should meet me with the notes of investigation, and that no arrest should be made until I decided on the material. Early next morning, with the notes of investigation, the investigating officers were present at the Department, and I opened a file and specially allocated it to a very senior officer of the Department, to go through the material and report to me that very day. Within one hour, the senior officer of the Department met me stating that there wasn't even an iota of evidence. I addressed a letter to the Senior DIG under my hand, informing of my decision having perused the material, and requesting the investigations be proceeded with, but no arrests should be made without the AG considering the material.

After retirement, I addressed a Seminar, and legal officers of the said Bank who were present there referred to this incident and said that no arrests were ever made thereafter. I should very strongly state that only the AG could have legitimately prevented that unwarranted arrest. There is no other authority, not even the judiciary that could have expeditiously granted the remedy which prevented the arrest of two young employees of the Bank, without an iota of evidence.

The second incident is where a young Magistrate, who was not a Sinhala Buddhist, called me one afternoon, and all that he told me was "I cannot sleep tonight." He then told me that a young Buddhist Priest was produced before him under the Antiquities Ordinance on a charge that he had committed

anoffence of tampering with an archeological site. He said from the moment he saw the Priest he felt he was a saint, I am sure what he meant was an Arahath. What the Priest had done was to clear a small area in the forest and put up a small hut where he meditated. The Magistrate said, I had no jurisdiction to grant bail and I am with a heavy heart. His request was to look at the material and decide whether an offence under the Antiquities Ordinance is disclosed. He said the Officer in Charge of the investigating Police Station has already been directed to meet me with the notes of investigation. The following morning a file was duly opened and allocated to a senior officer who reported back that there is no material to show that any damage was caused to an archeological site, or that there was evidence of the commission of an offence. The discharge paper went that very day under my name and a copy was faxed to the Magistrate. The Priest was duly discharged the very day.

Could the Judiciary, or any other authority have legitimately given such an expeditious remedy? How long would the Priest have had to languish in remand, if the AG refused to intervene?

I thought that I would refer to these two incidents, since this was a method adopted by the late Mr. C.R. de Silva when he was Head of the Criminal Division. Wherever there was a deserving case where the intervention of the AG was necessary, Mr. De Silva took bold steps to intervene.

While thanking you all for your presence on this occasion, let me conclude expressing my confidence that the role played by the Hon. Attorney General over the years would serve to strengthen the Rule of Law with greater intensity in the years to come.

ANNEXURE

SUMMARY OF THE INSTRUCTIONS SENT TO POLICE STATIONS THROUGH IG

1. **Where a person is suspected of having in his possession an offensive weapon, if there is no evidence of exclusive possession, or, if the investigators are suspicious of the circumstances, the notes of investigation should be submitted to the AG within 24 hours of the arrest for instructions. This applies to suspects having Narcotic Drugs in possession.**

Reasons for the above instructions

It was brought to the notice of the AG that offensive weapons were recovered on anonymous calls received by the police authorities and those weapons were found in places accessible to any person. However the chief inmate of the residence was arrested on such occasions and produced before the Magistrate. The Magistrate remanded the suspect as he had no jurisdiction to grant bail. Thereafter the productions were sent to the Government Analyst and the suspect languished in remand until the report of the Government Analyst was received. The notes of investigations were sent to the AG only after all investigations were concluded and the Report of the Government Analyst was available. There were reported instance of suspects languishing in remand for over two years, when finally AG decided to discharge them on the basis that there was no evidence of exclusive possession. The investigating officers were confident that it was an introduction. However, both the Magistrate and the Investigating officers were helpless. It was reported that suspected introductions almost ceased after the above step taken by the AG

2. **Where a patient dies while in the care of a Medical Practitioner registered with the Medical Council of Sri Lanka, no arrest should be made without submitting the material to the AG for advice. This does not apply to cases of abortion.**

Reasons for the above instructions

The Private Medical Officers Association made representations requesting that a Medical Practitioner should not be arrested merely because a patient dies under the care of a doctor, unless the AG looked at the material and decided there was evidence of a high degree of negligence that amounted to a criminal offence. There had been instances where Medical Practitioners were arrested under such circumstances and remanded due to adverse press coverage and the decision to arrest had been taken by the police.

Where a Medical Practitioner is arrested it causes irreparable professional damage to him. In most instances, such Medical Officers are innocent of any criminal offence and the material did not disclose a criminal offence warranting arrest. The Police are not prevented from investigating. However, no arrests

are to be made without the AG considering the material and approving the arrest and the institution of criminal proceedings

3. **Where an allegation is made against an Attorney at Law of forgery of a deed or any other irregularity in respect of his professional duties in respect of attesting a deed, the Attorney at Law should not be arrested without submitting the material to the AG for advice**

Reasons for the above instructions

There were cases where Attorneys at Law, were threatened to be arrested on the basis of allegations that they were guilty of forgery of deeds. However, when the material was considered by the AG it was found that the Attorney himself had been the victim of cheating committed by the parties. Under such circumstances, it had become almost impossible to continue attesting deeds. If an Attorney is arrested it causes irreparable professional damage to him. The reason for the above instructions was to prevent such arrests and to ensure that arrests were made only where the AG is satisfied that there is positive evidence. In such instances, the AG even permitted the Bar Association of Sri Lanka to make representations, if necessary

4. **Where a complaint of child abuse is made against a teacher of a school for a punishment inflicted on a student during school hours, the teacher should not be arrested without submitting the material to AG for advice. This would not apply where the allegation is one of sexual abuse or where the injury inflicted amounts to grievous hurt, and also where the child has been subject to an assault outside school**

Reasons for the above instructions

Quite often, complaints are made to the police of a child being punished at school. However minor the punishment is, the police immediately commence an investigation and sometimes the teacher was arrested and produced in court. This has quite often caused disruption to the school activities and in some instances the parents of other children had protested against the arrest on the basis that the teacher was a dedicated teacher. The above instructions were given to the police, not to condone suchpunishments, but to prevent a teacher being dragged to court as a common criminal, due to some minor punishment inflicted on a student. Prof. Harendra de Silva and the National Child Protection Authority were critical of this instruction. However Mr. Kamalasabeyson, the then AG was of the firm view that our instructions were in the interest of society.

5. **The husband of an under aged mother should not be arrested on a charge of rape, without submitting the material to AG for advice, if the couple is living together as husband and wife and there is no complaint of rape or abduction against the suspect.**

Reasons for the above instructions

The basis for this instruction was a complaint made to AG by Dr. Waidyaratne, who then served as Consultant Judicial Medical Officer, Anuradhapura. He informed us that a girl who was 15 years has been admitted to the Hospital for her confinement and her husband, that is the father of the baby was

near her bed side and that the police are about to arrest him for rape. He informed us that in the North Central Province, many young girls commence living as husband and wife with their lovers by the time they are 14 or 15 years. We were informed that this is quite common in that area and that if the husband of this lady is arrested by the Police, it would affect the mother and also the baby to be born. He said that what the Police are about to do was inhumane. Our intervention prevented the arrest, and the above instructions were sent to the Police. Thereafter no arrests were made in such cases without the material first being referred to the AG

6. **Government Health Authorities should not be arrested where they have provided contraceptive devices to young couples living as husband and wife. If an arrest is necessary, the material should be submitted to AG for advice before the arrest.**

<u>Reasons for the above instructions</u>

It was brought to our notice by the Health Authorities of the North Central Province, that a large number of young couples below the age of 16 were living as husband and wife with the blessings of their parents. This we were told was a very common occurrence in the remote areas. The health authorities were of the view that the girls were not physically fit to be mothers. Therefore they had launched a programme, where midwives, who are officials of the Health Department were asked to visit them and advise them of the health implications of being young mothers. The authorities had also taken steps to provide contraceptives to those couples in their own interest. AG was informed that the police were going to arrest the midwives for abetment of rape of young girls. They said that they would have to abandon this programme if that was the case and that it may cause a severe health problem in the area.