IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. Spl(LA) No. 182/99

C.A.Appeal No.208/95
H.C.Colombo 6825/94

Nallaratnam Singarasa
Presently serving a term of imprisonment
Kalutara

Petitioner

Vs

The Hon. Attorney General
Attorney General's Department
Colombo 12

Respondent

BEFORE : Sarath N Silva, Chief Justice
Nihal Jayasinghe Judge of the Supreme Court
N.K.Udalagama Judge of the Supreme Court
N.E.Dissanayake Judge of the Supreme Court
Gamini Amaratuga Judge of the Supreme Court

COUNSEL R.K.W.Goonesekera with Savithri Goonesekera, Suriya Wickremasinghe, V.S. Ganeshalingam, and Saliya Edirisinghe instd by E. Mariampillai, for the Petitioner.

Yasantha Kodagoda, D.S.G with Harshika de Silva S.C. for the Attorney General

ARGUED ON: 5.12.2005

WRITTEN SUBMISSIONS : Petitioner – 25.1.2006
Respondents – 24.2.2006

DECIDED ON : 15.09.2006

Sarath N Silva, C.J.,

The Petitioner was indicted for trial before the High Court on five charges that he, between 1.5.90 and 31.12.1991 at Jaffna, Kankasanthurai and Elephant Pass together with Asokan, Palraj, Sornam, Pottu Amman, Dinesh, Susikumar and others unknown to the prosecution, conspired to overthrow the lawfully elected Government by means other than lawful and in order to accomplish the said conspiracy attacked the Army camps in Jaffna Fort, Palaly and in Kankesanthurai.

The charges were under the Emergency Regulations and the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, as amended.

After trial the High Court convicted the Petitioner on all five charges and sentenced him to terms of 10 years R.I., on each to run consecutively. The Petitioner appealed from the said conviction and sentence to the Court of Appeal. The appeal was argued on 23.6.1999 and 6.7.1999, and written submissions were tendered. Upon a consideration of the matters raised in the appeal the Court of Appeal dismissed the Petitioner's appeal on 6.7.1999, subject to a reduction of sentence on each charge to 7 years R.I to run consecutively. The Petitioner sought Special Leave to Appeal from the judgment of the Court of Appeal and a Bench of this Court comprising of Mark Fernando,J , Wadugodapitiya, J., and Wijetunga J., having considered the submissions of counsel refused special leave to appeal on 28.1.2000.

The Petitioner has filed this application on 16.8.2005 for revision and/or review of the judgment of this Court delivered on 28.1.2000, and to set aside the conviction and sentence imposed by the High Court and affirmed by the Court of Appeal respectively. The application is made on the basis of and pursuant to the findings of the Human Rights Committee at Geneva established under the International Covenant on Civil and Political Rights, in Communication No. 1033 of 2000 made under Optional Protocol to the Covenant.

It is appropriate at this stage to refer to the International Covenant on Civil and Political Rights (the Covenant) adopted by the General Assembly of the United Nations on 16.12.1966, to which Sri Lanka acceded on 11.6.1980. The Covenant contains certain rights as laid down in the Universal Declaration of Human Rights on which the fundamental rights contained in Articles 10 to 14 of the Constitution are based. Article 2 of the Covenant states as follows :

> *1. "Each party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;*
>
> *2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."*

Thus it is seen that the Covenant is based on the premise of legislative or other measures being taken by each State Party "*in accordance with its constitutional processes ..... to give effect to the rights recognized in the..... Covenant*". In Sri Lanka fundamental rights have been guaranteed in the Constitution of 1972 and in the present Constitution and enforced by this Court, even prior to ratification of the Covenant in 1980. The Government has not considered it necessary to make any amendment to the provisions in the Constitution as to fundamental rights and the measures for their enforcement as contained in the Constitution, presumably on the basis that these provisions are an adequate compliance with the requirements Article 2 of the Covenant referred to above.

The general premise of the Covenant as noted above is that individuals within the territory of a State Party would derive the benefit and the guarantee of rights as contained therein through the medium of the legal and constitutional processes that are adopted within such State Party. This premise of the Covenant is in keeping with the framework of our Constitution to which reference would be made presently, which is based on the perspective of municipal law and international law being two distinct systems or the *dualist* theory as generally described. The classic distinction of the two theories characterized as *monist* and *dualist* is that in terms of the *monist* theory international law and municipal law constitute a single legal system. Therefore the generally recognized rules of international law constitute an integral part of the municipal law and produce direct legal effect without any further law being enacted within a country. According to the *dualist* theory international law and municipal law are two separate and independent legal systems, one national and the other international. The latter, being international law regulates relations between States based on customary law and treaty law. Whereas the former, national law, attributes rights and duties to individuals and legal persons deriving its force from the national Constitution. .

The constitutional premise of the United Kingdom (U.K) adheres to the *dualist* theory. This was brought into sharp focus when UK together with Demark and Ireland signed the Treaty of Accession to be a party of the European Community in 1972. Since membership of the Community presupposes a *monist* approach, which entails direct and immediate internal effect of "Community treaties" without the necessity of their transformation into municipal law, the U.K. Parliament enacted the European Communities Act in 1972.

Section 2 of the Act which in effect converts UK to a *monist* system in the area of European Community Law reads as follows :

> "*All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the*

*United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies."*

The Preliminary Note in Halsbury's Statutes exemplifies the distinction between a *dualist* and *monist* constitutional premise in relation to the contents of sections 1 and 2 of the European Communities Act 1972 as follows :

*"Sections 1,2 determine the position of Community treaties in the British legal system. It was necessary to do so because, following the "dualist theory", international treaties to which the United Kingdom is a party bind merely the Crown qua state but have to be implemented by statute in order to have internal effect. The membership of the community presupposes a "monist" approach which entails direct and immediate internal effect of treaties without the necessity of their transformation into municipal law. By virtue of S.2(1) the pre-accession Community treaties, became part of the United Kingdom Law. Post-accession treaties, on the other hand, become as they stand effective by virtue of Orders in Council when approved by resolution of each House of Parliament( S.1(3))".*
(Halsbury's Statutes – Fourth Ed.Vol. 17 p 32).

Thus 'community rights' become effective in the U.K through the medium of the 1972 Act and other municipal legislation but the continued adherence to the *dualist* theory in the U.K is clearly seen in the following dictum of Lord Denning :

*"Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act – with the intention of repudiating the Treaty or any provision in it – or intentionally of acting inconsistently with it – and says so in express terms – then I should have thought that it would be the duty of our courts to follow the statute....." (Macarthys vs Smith) (1979) 3 All ER 325 at 328.*

In this background I would refer to the relevant provisions of our Constitution. Articles 3 and 4 of the Constitution are as follows :

3. *"In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes, the powers of government, fundamental rights and the franchise".*

4. *"The sovereignty of the People shall be exercised and enjoyed in the following manner :*

*(a) the legislative power of the People shall be exercised; by Parliament, consisting of elected representatives of the People and by the People at a Referendum;*

*(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;*

*(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;*

*(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and*

*(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors:*

Article 5 lays down that the territory of the Republic of Sri Lanka shall consist of twenty-five administrative district set out in the first schedule and its territorial waters.

It is seen from these Articles forming its effective framework that our Constitution is cast in a classic Republican mould where Sovereignty within and in respect of the territory constituting one country, is reposed in the People. Sovereignty includes legislative, executive and judicial power, exercised by the respective organs of government for and in trust for the People. There is a functional separation in the exercise of power derived from the Sovereignty of the People by the three organs of government, the executive, legislative and the judiciary. The organs of government do not have a plenary power that transcends the Constitution and the exercise of power is circumscribed by the Constitution and written law that derive its authority therefrom. This is a departure from the monarchical form of government such as the UK based on plenary power and omnipotence.

For instance, the dicta of Megarry V-C that –

> ".....it is a fundamental principle of the English Constitution that Parliament is supreme. As a matter of law the courts of England recognize Parliament as being omnipotent in all save the power to destroy its own omnipotence." (Manuel vs A.G (1982 3 AER 786 at 795),

would not apply to the Parliament of Sri Lanka which exercises legislative power derived from the People whose sovereignty is inalienable as laid down in Article 4(a) referred above.

The same applies to the exercise of executive power. There could be no plenary executive power that pertain to the Crown as in the U.K and the executive power of the President is derived from the People as laid down in Article 4(b). Hence the statement in Halsbury's Statute cited to above that –

> ".....*international treaties to which the United Kingdom is a party bind merely the Crown qua state but have to be implemented by statute in order to have internal effect;*"

has to be modified in its application to Sri Lanka to interpose the essential element of constitutionality and should read as follows ;

*"international treaties entered into by the President and the Government of Sri Lanka as permitted by and consistent with the Constitution and written law would bind the Republic qua state but have to be implemented by statute enacted under the Constitution to have internal effect".*

This limitation on the power of the executive to bind the Republic qua state is contained in Article 33 which lays down the powers and functions of the President. The relevant provision being Article 33(f) reads as follows :

*"to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorized to do."*

Thus, the President, as Head of State is empowered to represent Sri Lanka and under Customary International Law enter into a treaty or accede to a Covenant, the contents of which is not inconsistent with the Constitution or written law. The limitation interposes the principle of legality being the primary meaning of the Rule of Law, "that everything must be done according to law. (Administrative Law by Wade and Forsyth– 9th Ed. Page 20).

In this background, I would examine the submissions that have been made. Counsel for the Petitioner contended that Sri Lanka acceded to Covenant (as referred to above) on 11.6.1980 and to its Optional Protocol on 3.10.1997. The Petitioner produced the Declaration made by Sri Lanka upon accession to the Optional Protocol which would be reproduced later. The Petitioner contends that pursuant to this Declaration he addressed a communication to the Human Rights Committee at Geneva alleging that the conviction and sentence entered and imposed by the High Court, affirmed by the Court of Appeal and the dismissal of his appeal by this Court is a violation of his rights set forth in the Covenant. That, the Committee came to a finding forwarded to the Government, that the conviction and sentence imposed "disclose violations of Article 14 paragraphs 1, 2, 3 and paragraph 14(g) read together with Article 2 paragraphs 3 and 7 of the Covenant. The Committee came to a further finding that Sri Lanka as a "State party is under an

obligation to provide the Petitioner with an effective and appropriate remedy, including release or retrial and compensation."

I pause at this point to note only two matters that require attention. They are :

i) the alternative remedies specified by the Committee cannot be comprehended in the context of our court procedure. A release and compensation (to be sought in a separate civil action) predicate a baseless mala fide prosecution whereas a retrial is ordered when there is sufficient evidence but the conviction is flawed by a serious procedural illegality. The High Court convicted the Petitioner on the basis of his confession after a full *voir dire* inquiry as to its voluntariness. If the confession is adequate to base a conviction, a retrial (as contemplated by the Committee) would be a superfluous re-enactment of the same process.

ii) The Petitioner has been convicted with having conspired with others to overthrow the lawfully elected Government of Sri Lanka and for that purpose attacked several, Army camps. The offences are directly linked to the Sovereignty of the People of Sri Lanka and the Committee at Geneva, not linked with the Sovereignty of the People has purported to set aside the orders made at all three levels of Courts that exercise the judicial power of the People of Sri Lanka.

The objection of the Deputy Solicitor General to the application is based on the matter stated at (ii) above. He submitted that judicial power forms part of the Sovereignty of the People and could be exercised in terms of Article 4(c) of the Constitution, cited above, only by Courts, Tribunals or institutions established or recognized by the Constitution or by law. This basic premise is elaborated in Article 105(1) which reads as follows :

*"Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be –*

*a) the Supreme Court of the Republic of Sri Lanka;*

b) *the Court of Appeal of the Republic of Sri Lanka;*

c) *the High Court of the Republic of Sri Lanka and such other Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish*

The resulting position is that the Petitioner cannot seek to "vindicate and enforce' his rights through the Human Rights Committee at Geneva, which is not reposed with judicial power under our Constitution. A fortiori, it is submitted that this Court being "the highest and final Superior Court of record in the Republic" in terms of Article 118 of the Constitution cannot set aside or vary its order as pleaded by the Petitioner on the basis of the findings of the Human Rights Committee in Geneva which is not reposed with any judicial power under or in terms of the Constitution.

On the other hand Counsel for the Petitioner contended that Sri Lanka acceded to the Optional Protocol in 1997 and made the Declaration cited above and the Petitioner invoked the jurisdiction of the Committee at Geneva in the exercise of the rights granted by the Declaration. Therefore he has a legitimate expectation that the findings of the Committee will be enforced by Court. In the alternative it was submitted that this Court should recognize the findings and direct the release of the Petitioner from custody.
The respective arguments of Counsel run virtually on parallel tracks, one based on legitimate expectation and the other on unconstitutionality. They converge at the basic issues as to the legal effect of the accession to the Covenant in 1980, the accession to the Optional Protocol and the Declaration made in 1997. These issues have to be necessarily considered in the framework of our Constitution which adheres to the *dualist* theory as revealed in the preceding analysis, the sovereignty of the People of Sri Lanka and the limitation of the power of the President as contained in Article 4(1) read with Article 33(f) in the discharge of functions for the Republic under customary international law.

The President is not the repository of plenary executive power as in the case of the Crown in the U.K. As it is specifically laid down in the basic Article 3 cited above the plenary power in all spheres including the powers of Government constitutes the

inalienable Sovereignty of the People. The President exercises the executive power of the People and is empowered to act for the Republic under Customary International Law and enter into treaties and accede to international covenants. However, in the light of the specific limitation in Article 33(f) cited above such acts cannot be inconsistent with the provisions of the Constitution or written law. This limitation is imposed since the President is not the repository of the legislative power of the People which power in terms of Article 4(a) exercised by Parliament and by the People at a Referendum. Therefore when the President in terms of customary international law acts for the Republic and enters into a treaty or accedes to a covenant the content of which is not inconsistent with the Constitution or the written law, the act of the President will bind the Republic qua State. But, such a treaty or a covenant has to be implemented by the exercise of legislative power by Parliament and where found to be necessary by the People at a Referendum to have internal effect and attribute rights and duties to individuals. This is in keeping with the *dualist* theory which underpins our Constitution as reasoned out in the preceding analysis.

On the other hand, where the President enters into a treaty or accedes to a Covenant the content of which is "inconsistent with the provisions of the Constitution or written law" it would be a transgression of the limitation in Article 33(f) cited above and ultra vires. Such act of the President would not bind the Republic qua state. This conclusion is drawn not merely in reference to the *dualist* theory referred to above but in reference to the exercise of governmental power and the limitations thereto in the context of Sovereignty as laid down in Articles 3, 4 and of 33(f) of the Constitution.

In this background I would now revert to the accession to the Covenant 1980 and the Optional Protocol in 1997.

As noted in the preceding analysis, the Covenant is based on the premise of legislative or other measures being taken by each State Party "accordance with its constitutional processes..... to give effect to the rights recognized in the .....Covenant" (Article 2). Hence the act of the then President in 1980 in acceding to

the Covenant is not per se inconsistent with the provisions of the Constitution or written law of Sri Lanka. The accession to the Covenant binds the Republic qua state. But, no legislative or other measures were taken to give effect to the rights recognized in the Convention as envisaged in Article 2. Hence the Covenant does not have internal effect and the rights under the Covenant are not rights under the law of Sri Lanka.

It appears from the material pleaded by the Petitioner that in 1997 the then President as Head of State and of Government acceded to the Optional Protocol and made a Declaration as follows :

> *"The Government of the Democratic Socialist Republic of Sri Lanka pursuant to Article (1) of the Optional Protocol recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."*

There are three basic components of legal significance in this Declaration relevant to the matters at issue -viz:

i) A conferment of the rights set forth in Covenant on an individual subject to jurisdiction of the Republic;

ii) A conferment of a right on an individual within the jurisdiction of the Republic to address a communication to the Human Rights Committee in respect of any violation of a right in the Covenant that results from acts, omissions, developments or events in Sri Lanka;

iii) A recognition of the power of the Human Rights Committee to receive and consider such a communication of alleged violations of rights under the Covenant.

Components 1 and 2 amount to a conferment of Public Law rights. It is therefore a purported exercise of legislative power which comes within the realm of Parliament and the People at a Referendum as laid in Article 4(c) of the Constitution cited above. Article 76(1) of the Constitution reads as follows :

> *"(1) Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power;*
>
> *(2) It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make, in any law relating to public security, provision empowering the President to make emergency regulations in accordance wish such law."*

Therefore the only instance in which the Parliament could even by law empower the President to exercise legislative power is restricted to the making of regulations under the law relating to Public Security. It has not submitted the President had any authority from Parliament, post or prior to make the declaration cited above. Therefore, components 1 and 2 of the Declaration are inconsistent with the provisions of Article 3 read with Article 4(c) read with Article 75 (which lays down the law making power) of the Constitution.

Component 3 is a purported conferment of a judicial power on the Human Rights Committee at Geneva "to vindicate a Public Law right of an individual within the Republic in respect of acts that take place within the Republic is inconsistent with the provisions of Article 3 read with 4(c) and 105(1) of the Constitution.

Therefore the accession to the Optional Protocol in 1997 by the then President and Declaration made under Article 1, is inconsistent with the provisions of the Constitution specified above and is in excess of the power of the President as contained

in Article 33(f) of the Constitution. The accession and declaration does not bind the Republic qua state and has no legal effect within the Republic.

I wish to add that the purported accession to the Optional Protocol in 1997 is inconsistent with Article 2 of the Covenant which requires a State Party to "take the necessary steps in accordance with its constitutional processes ..... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the .....Covenant." I cited the European Communities Act 1972 of the U.K as an instance in point where steps were taken to give effect to a treaty obligation before the treaty came into force. No such steps were taken to give statutory effect to the rights in the Covenant. Without taking such measures, in 1997 the Optional Protocol was acceded to purporting to give a remedy through the Human Rights Committee in respect of the violation of rights that have not been enacted to the law of Sri Lanka. The maxim *ubi Jus ibi Remedium* postulates a right being given in respect of which there is a remedy. No remedy is conceivable in law without a right.

In these circumstances the Petitioner cannot plead a legitimate expectation to have the findings of the Human Rights Committee enforced or given effect to by an order of this Court.

It is seen that the Government of Sri Lanka has in its response to the Human Rights Committee (produced by the Petitioner with his papers) set out the correct legal position in this respect, which reads as follows :

> *"The Constitution of Sri Lanka and the prevailing legal regime do not provide for release or retrial of a convicted person after his conviction is affirmed by the highest appellate Court, the Supreme Court of Sri Lanka. Therefore, the State does not have the legal authority to execute the decision of the Human Rights Committee to release the convict or grant a re-trial. The Government of Sri Lanka cannot be expected to act in any manner which is contrary to the Constitution of Sri Lanka."*

If the provisions of the Constitution were adhered to the then President as Head of Government could not have acceded to the Optional Protocol in 1997 and made the Declaration referred to above. The upshot of the resultant incongruity is a plea of helplessness on the part of the Government revealed in the response to the Human Rights Committee cited above, which does not reflect well on the Republic of Sri Lanka.

For the reasons stated above I hold that the Petitioner's application is misconceived and without any legal base.

The application is accordingly dismissed.