

## **HISTORY OF THE OFFICE OF ATTORNEY GENERAL AND ITS FUNCTIONS IN SRI LANKA**

The office of "Attorney-General" was formally adopted in the year 1884 when Hon Francis Fleming became the 1st ever Attorney General under that appellation.

It was in 1884 that the designation Attorney-General was adopted. However the office of the Attorney-General could be traced back to the office of '**Advocate Fiscal**' which was in existence towards the latter stages of Dutch rule in the Island and which office continued even during the early years of British occupation until the year 1833 when the designation was changed to that of "**King's Advocate**"-vide **Land Reform Commission v. Grand Central Ltd (1981) 1 Sri. LR 250 at 258** (C.A. judgment of Court of Appeal is reported in. (1981) 2 Sri.LR 147 with the reference to the office at p. 153) . Also vide page 38 of the Supreme Court of Sri Lanka-the first 185 years by A.R.B.Amerasinghe.

Bonser C.J. in the year 1898, in the case of **Le Mesurier v Layard** 3 NLR 227 at p. 230 observed that:

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

During the reign of Queen Victoria and prior to the adoption of the designation "Attorney-General" in 1884, the office was called and known as Queen's Advocate. The office of Queen's Advocate prevailed between 1838 and-1883. It was only by the provisions of Ordinance 1 of 1883 that the designation Queen's Advocate changed to that of Attorney-General. The judgement of Cayley, CJ and Clarence J in the case of **Re Moragodaliyanage Peiris Perera** (1880) 3 S.C.C. 161 shows that the Queen's Advocate was the principal law Officer of the Government in all criminal matters as well.

By Ordinance No: I of 1883 the designations of the officers known as the Queen's Advocate and Deputy Queen's Advocate were altered to Attorney-General and Solicitor-General respectively and the deputies to the Queen's Advocate were named Crown Counsel. All rights, precedents, powers, and privileges, which at the passing of the Ordinance belonged to, were vested in or were exercised by the Queen's Advocate or the Deputy Queen's Advocate were re-vested in the Attorney-General and Solicitor-General respectively.

The change took effect from 1st January 1884. In introducing the Ordinance in the Legislative Council, the Queen's Advocate said that the Bill proposed that the Attorney-General and the Solicitor-General, besides having the powers exercised in England should have the same rights and privileges which the Law Officers of the Crown have hitherto possessed in the Colony."

The records indicate that from as far back as the year 1884 the Attorney-General was assisted in the discharge of his legal functions by the Solicitor-General and Crown Counsel. In due course an officer designated the Crown Conveyancer (later designated as Crown Proctor) was also appointed to the Attorney-General's Department to attend to conveyancing work and to assist in the conduct of civil litigation of the Government.

It has to be stated that the Queen's Advocate who had been re-designated the Attorney General was an official member of the Legislative Council and a member of the Executive Council until the establishment of the State Council under the Donoughmore Constitution in 1931. Under the Donoughmore Constitution the provision of legal advice to the Governor was the responsibility of the Legal Secretary and the Attorney-General's Department. The institution of Criminal prosecutions and Civil proceedings on behalf of the Crown was the duty of the Attorney-General's Department (Soulbury Report 1945 p.105)

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

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

As regards legal advice to Ministers under the new Constitution the Commissioners recommended that questions relating to the interpretation of existing law and departmental matters which may involve legal proceedings would continue to be referred to the Attorney-General. They also recommended that advice on matters of high constitutional policy on which the Cabinet as such may require advice could be given by the Attorney-General.

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

Sri Lanka attained independence on the 4th of February 1948. She became a Republic under the 1972 Constitution. The Governor-General was replaced by a President who was nominated by the Prime Minister and who was enjoined to act on the advice of the Prime Minister and other Ministers. Until 1972, the Attorney-General was appointed by the Governor-General and thereafter by the President. The Constitution of 1978

provided for an executive President to be elected by the People. Under the 1978 Constitution, the Attorney-General is appointed by the President

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and under the 18th Amendment to the 1978 Constitution, the President seeks observations of the Parliamentary Council in making the appointment.

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

Currently the 2<sup>nd</sup> Republican Constitution and several other statutes bestow on the Attorney General several onerous duties.

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

- i. Power to determine whether a trial in the High Court shall be by Jury or otherwise.
- ii. Power to grant sanction to institute certain prosecutions.
- iii. Power to tender pardon to accomplices.
- iv. Power to call for the original record even while the prosecution is pending.
- v. Power to quash a commitment made by a Magistrate and issue instructions to a Magistrate.
- vi. Power to direct a Magistrate to commit an accused who has been discharged.
- vii. Power in his discretion to enter "Nolle Prosequi".
- viii. Power to decide a Magistrate's Court having jurisdiction to try a case in case of doubt.

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

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

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

The Attorney General appears for the State, state officers and state entities before the Superior Courts at the hearing of appeals and applications for prerogative writs. Prerogative writs involve public rights and the Attorney General has a special duty to assist Court in such cases to reach the correct decision after balancing the rights of the State and public interest., The Attorney General is often invited to assist Court as amicus curiae in matters of constitutional and public importance.

As regards .Constitutional matters, under Article 77 of the Constitution it is the duty of the Attorney-General to examine Bills and to advise the President if any of the clauses therein that are inconsistent with the provisions of the Constitution and have to be enacted by a special majority prescribed in the Constitution. An officer acting on behalf of the Attorney-General attends Parliament when Bills are debated and become law. The officer so attending advises the Speaker on the constitutionality of any proposed provision.

As a matter of practice the Legal Draftsman forwards to the Attorney-General a copy of every draft Bill for the examination of the constitutional consistency of the Bills. This practice makes it possible to ensure in the early stages of drafting legislation that proposed laws do not contravene provisions contained in the Constitution especially those relating to fundamental rights.

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

i. When the Court exercises its jurisdiction in examining Bills for constitutionality.

When any question relating to the interpretation of the Constitution is under consideration by Court.

iii. When the Court hears any complaint or breach of fundamental or language rights guaranteed by the Constitution.

iv. When the Court exercises its consultative jurisdiction upon reference on a question of law or fact of public importance referred to the Court by the President,

v. When the Court exercises its jurisdiction in respect of breaches of Parliamentary . privileges.

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

As regards disciplinary proceedings against members of the Bar, the position is that the Supreme Court exercises the jurisdiction to inquire into the conduct of Attorneys at Law. When the allegation

against an Attorney at Law has been investigated, the relevant material is forwarded to the Attorney-General and the draft rule for approval. The Attorney-General may approve such rule with or without modifications. The officers of the Department appear and assist Court when the rule comes up for hearing. The overriding consideration in determining cases against an Attorney-at-Law is the interest of the litigant. It is the duty of the Attorney-General to ensure that the decision of the Court would uphold that interest.

In criminal trials the only interest of the Attorney General is that the verdict should be in accordance with law. In civil proceedings 'as well, the Attorney-General's function is to assist Court to reach the correct decision and not to endeavour to somehow obtain a judgment in favour of the State. When appropriate, it is his duty to promote conciliation of disputes between government departments and citizens if that would meet the ends of justice.

It cannot be gainsaid that the office of the Attorney General is at the intersection of the government and Parliament, of the Courts and Parliament, of the Executive arm of the government and the courts, and the State and the citizen. This position has continued in Sri Lanka under successive Constitutions.

It cannot also be gainsaid that the Attorney-General has been playing a unique role in the evolution of the legal profession in Sri Lanka. From the point of view of the unofficial Bar, he has been the head of the Bar both official and unofficial and has precedence over all President's Counsel including Queen's Counsel and ranks in precedence in the legal sphere next to the Chief Justice. He has played an important role in the history of the Bar. He has been right throughout from 1884 a member of the Bar Council and contributed in no small measure in developing the convention and the practices of the Bar. With the fusion of the profession by the Administration of Justice Law No 44 of 1973 and the formation of the Bar Association, the former position of the Attorney General was recognized and continued by making the Attorney General and the Solicitor General Ex Officio members of the Bar Council and the 1-974 Constitution of the Bar Association of Sri Lanka. From the point of view of the unofficial Bar, the role of the Attorney General as the head of the Bar is very important. The Attorney General addresses on behalf of the Bar in addition to the President of the Bar Association at all ceremonial sittings of the appellate Courts.

In this backdrop the office of the Attorney General occupies a pre-eminent position in the legal firmament and its evolution from Advocate Fiscal to its important roles today requires a special study to guide the present and future Law Officers of the State and to create public awareness to understand the roles of the Attorney General judicial or quasi-judicial in .the constitutional and statutory framework of our country.

