“Freedom of expression and maintaining the authority and independence of the courts, ie Article 22 (2) (d)”.

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A paper delivered by Justice Anthony Fernando during the Symposium held on the theme “The Freedom of Expression”, at the Palais des Justice on the 17th of June 2024 on the occasion of the Day of the Constitution.

Article 22 of the Constitution which guarantees the right to Freedom of expression states at sub article 1 of article 22, that every person has a right to freedom of expression and for that purpose this right includes the freedom to hold opinions and to seek, receive and impart ideas and information without interference. This right belongs to every person and are derived from his inherent dignity, rationality and worth as a human being and inalienable and is the cornerstone of the foundation for freedom, justice, welfare, fraternity, peace and unity. What I wish to emphasize at the very outset is that all rights of a person which constitute the foundation of justice imply the duty of everyone to ensure that such rights are protected and preserved. **Mahatma Gandhi** has said: **“***I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done*.**”** It is for this reason that article 40 of the Constitution which sets out the Fundamental Duties, states that

it shall be the duty of every citizen to uphold and defend the Constitution and the law, to further the national interest and generally to strive towards the fulfilment of the aspirations contained in the Preamble of the Constitution. In the Preamble to the Constitution we have solemnly declared to uphold the rule of law based on the recognition of the fundamental human rights and freedoms enshrined in the Constitution.

What does article 22 mean in a Court of law to a lawyer arguing his case or a litigant whose case is being heard? It simply means the right to freely express themselves pertaining to the case without interference, provided they abide by the procedure laid down by law, the Rules of the Court, maintain relevancy without unnecessary repetition and also maintain decorum before the court. If a lawyer or litigant who respects these factors is prevented from putting forward his arguments freely, there is a breach of the right to Freedom of Expression. Further in such a situation the 'Right to a Fair Hearing' which is enshrined and entrenched in articles 19(1) and 19(7) of the Fundamental Rights Charter in our Constitution would also be rendered meaningless. It is also the duty of the Court to seek and receive the views and thus give an opportunity to the lawyer or his litigant to express themselves about an important legal or factual issue, which the Court has found on its own, although not argued before the Court by either party, before making a determination based solely on that issue. This is what is meant by "seek, receive and impart ideas". This does

not however mean that a Court needs to make out a case for a litigant or seek the views of the parties to the case on all issues on which its decision is based, unless it is of such a fundamental issue that is relevant to the determination of the case and goes to the very root of the case and becomes the basis on which the final decision of the court is made.

The right to freedom of expression is not an absolute or an unlimited right. That right is subject to the restriction under article 22(2)(d) for maintaining the authority and independence of the courts. The Constitution provides at article 119(2) that the Judiciary shall be independent. Any expression that could jeopardize the authority and independence of the courts would certainly not come within the right to freedom of expression that is guaranteed in article 22 of the Constitution. It must be remembered that it is also the duty of the Executive, the Legislature, every lawyer, litigant or person to uphold and defend the Constitution and thus to ensure that the independence of the Judiciary and respect for the Court is maintained at all times.

It must also be remembered that the independence of the Judiciary is also subject to the Constitution and the other laws of Seychelles. Article 119(2) while protecting and preserving the independence of the Judiciary also restricts it by subjecting it to the Constitution and the other laws of Seychelles.

The restrictions to the right to freedom of expression, however, need to be prescribed by a law and necessary in a democratic society. Thus the restrictions need to be prescribed by the Constitution, statutory laws and any unwritten rule of law and such restrictions should necessarily be in order to develop a democratic system in which there is tolerance, and proper regard for the fundamental human rights and freedoms and the rule of law. In all litigation whether they be civil, constitutional, administrative or criminal; the procedures, respectively laid down by the Civil Procedure Code, Constitutional Court Rules, Supervisory Jurisdiction Rules and the Criminal Procedure Code, must necessarily be followed in the filing of the cases and in the conduct of litigation before the courts. No one has the right to freedom of expression in violation of these procedures. The Rules of the Court of Appeal made by the President of the Court of Appeal and the Rules of the Supreme Court made by the Chief Justice under article 136 of the Constitution and rules made by the Chief Justice under other statutory instruments thus prescribe certain restrictions to the right of Freedom of Expression. Rules provide a time table for litigation and prescribe the manner that litigation should be conducted.

Article 119(3) of the Constitution provides that "Subject to this Constitution, Justices of Appeal, Judges and Masters of the Supreme Court shall not be liable to any proceedings or suit for anything done or omitted to be done by them in the performance of their functions." This is an interesting provision as this right

of Justices of Appeal, Judges and Masters of the Supreme Court not to be sued in the performance of their functions, is not an unqualified right, and will apply, only, if there has been no violation of the right to a fair hearing, the right of a person to be treated with dignity or the right to equal treatment of the parties before the Court at a hearing. This is what is meant by the words "Subject to this Constitution" which necessarily involves having regard to the fundamental rights guaranteed to any person before the courts. Generally, however, violation of any of these rights by Judges may not invoke personal liability against them, but will be the subject of an appeal against the decision of the Court, or may give rise to a constitutional case.

One of the important matters I wish to highlight at this symposium is in relation to the law of Contempt of Court and Trial by Media, for there needs to be a balancing exercise between the public interest in the Freedom of Speech and the public interest in the administration of justice and maintaining the independence of the Judiciary. Faith in the administration of justice is one of the pillars on which democratic institutions function and sustain.

In the Seychelles it is the common law of England as at 1976 that is applicable in contempt cases, subject to the Constitution and the Criminal Procedure Code or the Civil Procedure Code. At common law, contempt of court is an act or omission calculated to interfere with and prejudice the due administration of justice if there is a real risk as opposed to a remote possibility that prejudice will result. It has been

held that punishment for criminal contempt is in violation of the constitutional guarantee of free speech and press, in the absence of showing that the utterances created a clear and imminent danger to the due administration of justice according to the facts and circumstances of the case. The law of contempt of court does not exist for the glorification of the bench but solely for the protection of the public. **Lord Denning in the case of R V Commissioner of Police, ex p. Blackburn** in 1968 stated that **"***We will not use contempt to suppress those who speak against us. We do not fear criticism, nor do we resent it, for there is something far more important at stake and that is free speech. It is the right of every man to make fair comments, even outspoken comments on matters of public interest*.**"** In a Special **Reference from Bahamas the Privy Council** held that where a Judge had been criticized strongly and brought into public ridicule as a result of him entering into a newspaper controversy, it was not contempt but may amount to an action for libel. In the **US case of Craig V Harney** it was said: "*The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of Justice. The danger must not be remote or even probable, it must immediately imperil*.**"**

In 2004 an interesting case came up before the Supreme Court of Seychelles in relation to Freedom of Publication. This case arose as a result of the publication in a

newspaper of an internal memo, from three Judges of the Supreme Court to the then Chief Justice which was not under confidential cover, complaining against the conduct of the Registrar of the Supreme Court in relation to his administrative functions and his attitude towards the Judges which they claimed was unbecoming of the Registrar. There was no allegation that the Registrar was in any way interfering with their judicial functions. This letter leaked to a newspaper. They wanted to publish the letter because this newspaper had always been critical of the appointment of the Registrar in regard to his suitability and thereafter about his conduct, in several issues of the newspaper, without any matters being raised. They wanted therefore to publish the letter to confirm their allegations about the Registrar. The Acting Chief Justice at that time on its own motion made a gagging order preventing the Editor from publishing the letter on the basis that it will be prejudicial to the best interest and proper functioning of the Seychelles Judiciary. The proper functioning of the Judiciary concerns the public, just as much as it concerns the Judiciary. In fact it is a public right to ensure that the Judiciary functions properly. It is the Attorney General as representative of the public, who in fact should have made an application for the gagging order and not the Court on its own motion. The Supreme Court has no jurisdiction on its own motion to prevent the commission of alleged acts of illegality. The only exception to this being where contempt is committed in the precincts of the Court. At that time I was the Attorney General and

I refused to make an application for a gagging order as the publication of the letter in my view would not have affected the proper functioning of the Court or undermined the Judiciary in any way. Undoubtedly the gagging order was improperly made. The letter was published despite the gagging order on the basis that the gagging order was a restriction on the right to freedom of expression and publication. The question however that is for determination is can an improper order in the circumstances of that case could have been disobeyed or defied without being in contempt of Court. There are two schools of thought in this regard, namely that it amounts to contempt and the other that such an order can be disobeyed with impunity, based on the **Privy Council judgments in McPherson V McPherson and Scott V Scott**. After the publication of the letter the Supreme Court issued a Rule Nisi for Contempt of Court calling upon the Editor of the newspaper, as to why he should not be dealt with, for contempt. Here again the Court acted on its own motion without leaving the matter to the Attorney General to make a motion for committal.

It is important to note the difference between civil and criminal contempt. A civil contempt consists in disobedience to an order of the court where principally the parties to the case are affected. Criminal contempt are those that are calculated to bring the administration of justice as a whole into disrepute, such as, contempt in the face of the court, acts calculated to prejudice the fair trial of a pending cause,

publications scandalizing the court, etc (etcetera). It is therefore clear if at all, this amounted to a criminal contempt, and it was the Attorney General as the guardian of the public interest in the due administration of justice who should have initiated any action. I was the Attorney General at that time as stated earlier and was of the view that the facts in this case did not amount to a criminal contempt. Unfortunately the trial against the alleged contemnor, namely the Editor of the newspaper proceeded and he was convicted, despite many procedural irregularities in the manner the trial was conducted.

The Freedom of Expression clause in the Constitution would be rendered meaningless if the press is to be muzzled by improper gagging orders in publishing matters of public interest and those who defy such orders are to be dealt with for contempt.

The right of free speech is an important right of the citizen, in the exercise of which he is entitled to bring to the notice of the public the infirmities from which any institution suffers, including institutions which administer justice. Indeed the right to offer healthy and constructive criticism which is fair in spirit must be left unimpaired in the interests of public institutions themselves. Critics should be instruments of reform, not those actuated by malice but those inspired by the spirit of public good. Courts do not want to assume that they are above criticism and that their functioning needs no improvement. As observed by **Lord Atkin**, **"***Justice is*

*not a cloistered virtue and she must be allowed to suffer the criticism and respectful, though outspoken, comments of ordinary men.***"** But it should be made clear that the freedom of expression is not to be confused with a license to make unfounded allegations against the Judiciary, for that would bring the matter nearer to the law of contempt. Improper or intemperate criticism of Judges stemming from dissatisfaction with their decisions constitute a serious inroad into the independence of the Judiciary. Judgments can be criticized but motives to the Judges need not be attributed. Any person is entitled to express his honest opinion about the correctness of a judgment, order or sentence objectively, with detachment and in a dignified and moderate language pointing out the error or defect or illegality in the judgment, order or sentence.

It is to be noted that prejudgment of a dispute, which is being heard before the court, by the media, namely 'trial by newspaper' may amount to contempt taking into consideration the circumstances of the case. However it is to be noted as had been stated by the **European Court of Human Rights "***That there is a general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press or amongst the public at large, for the public has a right to receive that information. But the mass media must not overstep the bounds imposed in the interest of the*

proper administration of justice.**"** It is essential that every decision by courts must be made in accordance with the law and not under pressure of any group, or under threat of criticism by irresponsible journalists or ill-intentioned politicians. If a judge is to be in fear of personal criticism by pressure groups or the media while deciding a case that would certainly undermine the independence of the Judiciary.

There is another aspect to the freedom of expression that is rarely spoken about, namely the freedom of expression of members of the Judiciary in respect to their legitimate rights and privileges. It is sometimes considered undignified and improper to air their dissatisfaction against the Executive or the Legislature in this regard. It is to be noted that the Seychelles Judiciary is not financially autonomous and therefore has to depend on the Executive and the Legislature to ensure that their rights and privileges are granted. The members of the Judiciary should be free to carry out their functions without fear, favour or dissatisfaction. Judges should in the exercise of their functions be immune from outside control and influence. Such immunity is established by constitutional and legal provisions as those relating to their salaries and other privileges, the security of their tenure and the manner of their removal. Apart from the legal provisions judicial independence requires arrangements to secure the administrative and economic independence of Judges. The members of the Judiciary too have a right to hold opinions and to seek, receive and impart ideas and information without interference and expect that their voices

are heard and acted upon by the Executive and the Legislature in relation to their rights and privileges. It is the constitutional duty of the Executive and the Legislature to uphold and defend article 119(2) of the Constitution which states that the Judiciary shall be independent.

Thank you.