The book cover features a complex, layered background. At the top, there's a dark, textured area. Below it, a light-colored, abstract pattern resembling a grid or a mesh is visible. The main title is presented in three stacked rectangular boxes: a blue box at the top, an orange box in the middle, and another blue box at the bottom. The text is in a white, serif font. The overall design is modern and academic.

*Salient Aspects of
Public Interest Litigation
Jurisprudence
in Sri Lanka*

Edited by
Bhavani Fonseka &
Luwie Ganeshathasan

Centre for Policy Alternatives

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& Luwie Ganeshathasan



The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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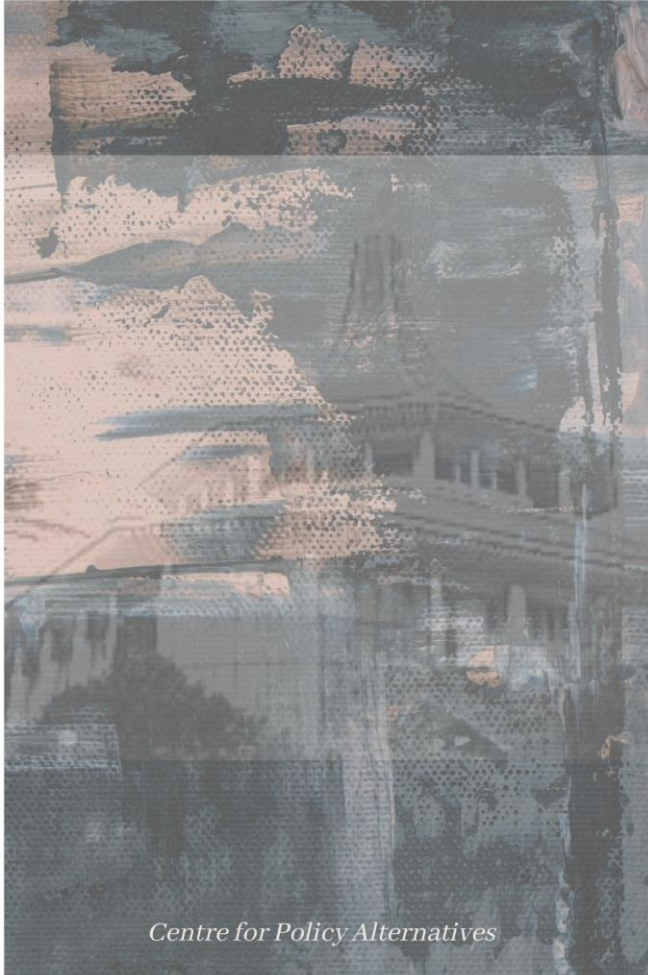


Image: The Supreme Court Complex of Sri Lanka

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PREFACE

Public Interest Litigation and Jurisprudence
in Sri Lanka

Dr. Paikiasothy Saravanamuttu

At its inception in 1996, Public Interest Litigation (PIL) was identified as a key activity of the CPA, founded on the belief that civil society's contribution to public policy-making should be strengthened. PIL in this respect links the three arms of government – the executive which implements the laws, the parliament which passes them and the judiciary which interprets their consistency with the constitution – through the action of concerned citizens who petition the Court. Unfortunately, though, Sri Lanka does not have a judicial review but rather has only a limited pre-enactment review of legislation. Citizens have the opportunity to petition the Court only **before** the Bill is debated in Parliament, amendments are passed at the committee stage and the Bill is eventually passed. Judicial review of legislation is therefore a key feature of constitutional reform.

The rationale underlying CPA's extensive programme of PIL is the highlighting of the substantive issues on which the Court is petitioned and moreover, the primacy of the rule of law. CPA believes that irrespective of the judgement or direction of the Court, the filing of the case itself raises the salience of the issue of the rule of law on the public policy agenda and serves as a catalyst for greater attention to it and debate on the consequences of its violation. In this regard, whereas CPA has not always been successful in the cases it has taken to court, CPA feels that the purpose of the litigation should therefore be assessed according to the publicity and debate cases give rise to and the public policy reform they result in from the perspective of the rule of law and human rights. PIL is consequently a key instrument in

the armoury of checks and balances to be resorted to by citizens to protect and enhance their rights in a functioning constitutional democracy. The case taken by CPA in 2007 on the bussing of Tamil citizens residing in lodges in Colombo to the northeast is a clear example of swift and decisive action in filing a petition to the Supreme Court resulting in the Court upholding and protecting the rights of citizens.

The range of issues on which CPA has gone to Court has either reversed or restricted the extent of the democratic backsliding that has been the hallmark of political developments in the last four decades. The expectation of the public that CPA would indeed go to Court and our ability to do so reinforces the organization's faith in its mandate and at least, the status of Sri Lanka as a flawed yet functioning formal democracy. PIL needs to be sustained and subscribed to by many other actors if our democracy is in turn to be sustained, strengthened and made infinitely more robust.

The essays in this publication cover a wide range of areas from IDP and land rights to the franchise, freedom of religion, language rights, national security, gender and public finance. It is hoped that this publication will clarify and confirm the importance of PIL in our democracy and encourage citizens to pursue this option for the protection and enhancement of their rights.

INTRODUCTION

Public Interest Litigation in Sri Lanka

Bhavani Fonseka & Luwie Ganeshathan

Recent years have witnessed a surge in cases filed by aggrieved parties petitioning courts in the pursuit of accountability and remedies. Among these applications is an increasing body of cases filed in the public interest challenging proposed constitutional amendments, legal and policy measures, and arbitrary and unjust practices. Such cases are broadly defined as “Public Interest Litigation” in Sri Lanka with the concept gaining traction in popular discourse over the past twenty years.

The increasing demand for the intervention of the court in a range of matters can be attributed to greater activism by the citizen and awareness of their rights linked to the responsibility of the government towards the citizen. It is also the knowledge that the judiciary is distinct from the executive and legislature in terms of its very specific role of reviewing and implementing the law and being the defender of constitutional values, without the responsibility of governing.¹ The increasing number of public interest litigation cases in recent years further illustrates the rising demand of the court to be a check on executive overreach and to be an independent arbiter of administrative action. Thus, there are multiple and emerging demands on the judiciary as noted by Radhika Coomaraswamy: “They have a duty not only to examine challenged action but also to install mechanisms for continual review of government

¹ U Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980).

effectiveness in implementing provisions of the constitution”².

The expanding number of public interest litigation cases is also a testament to its impact. The mounting number of executive actions and inaction that contributed to the violation of a fundamental right has witnessed an increasing number of aggrieved parties petitioning the court to obtain accountability and redress, resulting in greater scrutiny and attention by the court of administrative action and the awarding of remedies in recognition of the wrongs committed. Public interest litigation has also been used to highlight arbitrary and unjust proposals and to establish a record of discriminatory practices, with litigation highlighting trends and issues that otherwise may have been ignored or side-lined. Such attention generated by public interest litigation has also energized public activism and movements for democratic reforms. Furthermore, it has catalysed and informed legal and policy reforms and generated a discourse with the aim of strengthening the rule of law.

All this has contributed to many who now rely on public interest litigation and look to the court with increasingly high expectations. This though comes with particular setbacks including the dangers and difficulties inherent in the power of judges to review proposed legislation and practices amidst

² R Coomaraswamy, *Towards an Engaged Judiciary* . in N Tiruchelvam and R Coomaraswamy (eds), *The Role of the Judiciary in Plural Societies* (ICES 1987) 8.

an entrenched and polarized political context. Against such a backdrop, there is also a realisation of the limitations of the judiciary and its authority and the limitations of public interest litigation in Sri Lanka.

Centre for Policy Alternatives and Public Interest Litigation

The Centre for Policy Alternatives (CPA) has initiated public interest litigation for over 25 years and has contributed to the rich body of jurisprudence which broadly falls under the rubric of public interest litigation. Several of CPA's cases are widely cited in court proceedings, academia, and policy documents and have contributed to the legal and policy reforms in Sri Lanka. The present publication is an initial attempt to capture the range of issues CPA has litigated or supported litigation in the furtherance of strengthening the rule of law and constitutional democracy in Sri Lanka.

Despite Sri Lanka's growing list of public interest litigation cases, limited work has been done to examine public interest litigation and its impact in a comprehensive manner. The present publication attempts to make a modest contribution to the existing literature on the subject and captures some of the key areas wherein public interest litigation has contributed to and expanded debates and influenced policy reform. The impact of public interest litigation is rarely linear and is often obfuscated by other political processes.

On most occasions public interest litigation has only served to prevent backsliding on democratic reform, making it even harder to fully appreciate its contribution to broader political discourse.

This publication is intended as means to engage with the growing interest in public interest litigation in Sri Lanka and to reflect on what has been achieved over the past two and a half decades. It intends to draw on the lessons of the past and frame these lessons in a manner that is relevant to the future of public interest litigation in Sri Lanka and of potential setbacks.

It must also be noted that this publication is not an exhaustive study of public interest litigation initiated over the decades but is a compilation that was envisaged as a resource and a starting point for academics, law students, and practitioners interested in public interest litigation jurisprudence. Furthermore, the chapters and themes covered by this book are closely linked to public interest cases filed and supported by CPA during a period of over 25 years, with the editors noting that there are many other areas that fall within public interest litigation in Sri Lanka not covered in the present publication. It is hoped that the chapters in this publication can generate further discussion and debate around the importance of public interest litigation and its impact, providing a resource that can hopefully inform and enrich ideas, policy reform, and activism.

The Focus of the Publication

The publication brings together chapters written by lawyers who have been involved with CPA's public interest litigation cases as well as legal academics and human rights practitioners with expertise in the particular subject matter. The chapters examine public interest litigation from the vantage point of a wide variety of issues ranging from land rights, the right to vote, devolution of power, public finance and language rights, and cross-cutting themes such as national security, judicial attitudes/approaches, and gender. The following is a brief summary of the eleven chapters³.

In *Broadening the Scope of Locus Standi in Public Interest Litigation* Shermila Antony provides an insight into creative adjudication or judicial activism adopted to explicate the classifications of standing by asking the question '*who should complain*' interchangeably with the question '*in whose interests*'. This chapter starts with a brief explanation of the gradual judicial and constitutional extension of categories of persons in the evolution of public interest litigation. In part II, the chapter discusses key substantive and procedural underpinnings of *locus standi* on the judicial conception of balancing its role, functions, and powers, and its limitations in promoting rights and access to justice for the most vulnerable and disadvantaged.

³ The chapters were written, edited and updated between December 2020 and October 2022.

Dr. Gehan Gunatilleke's chapter *Public Interest Litigation and the Judicial Duty to Give Reasons* examines whether judges have a special duty to provide reasons for their decisions in public interest litigation cases. This chapter first examines the general duty of judges to give reasons for their decisions. Thereafter it explores the value and rationale of public interest litigation and asks whether judges have an enhanced, or 'special', duty to give reasons for their decisions in public interest litigation cases. The final section examines recent certain landmark public interest litigation cases and offers several observations on judicial practice in this domain.

The chapter, *Judicial Review and Laws of Exception in Sri Lanka: A story of exclusion and impotency* by Ermiza Tegal & Shalomi Daniel traces the constitutional handicaps placed on the Supreme Court and Court of Appeal, which limit their ability to act as an effective check on other arms of government and to protect fundamental rights enshrined in the 1978 constitution whilst negotiating the widely couched powers of the executive in the Prevention of Terrorism Act and the Public Security Ordinance. The chapter deals with a particularly difficult area of the law and draws upon a multitude of judgments by the Superior Courts, exercising different jurisdictions and in different contexts. The authors conclude that these limitations and the further burdens of national security concerns during times of emergency have resulted in the limited development of fundamental rights jurisprudence in this area.

Building on the theme of National Security and fundamental rights, the next chapter, *Rights over Land vs National Security: Examining the Impact of Public Interest Litigation* Bhavani Fonseka & Nivedha Jeyaseelan, examines the deficiencies in the legal framework for State acquisition of private land, highlights instances where acquisitions have taken place in violation of the laws in place, or where the ultimate purpose of the acquisition has been at variance with its stated objects. Thereafter, this chapter analyses how public interest litigation has supplied these deficiencies. The chapter traces the transformation of the conventional understanding of ‘national security’ in the post-war context to include an economic dimension and highlights the impacts of these trends on governance, reconciliation, and democracy in Sri Lanka.

In *Public Interest Litigation and the Devolution of Political Power in Sri Lanka*, Dr. Kalana Senaratne examines the influence of public interest litigation on the discourse on political power-sharing in Sri Lanka. This is done through the examination of selected public interest litigation cases filed by individuals and interest groups. The broad subject matter of this chapter is not a novel one, however, revisiting the topic is extremely useful, especially in light of the proposed constitutional reform.

Suren Fernando in *Protecting Public Finance Through Public Interest Litigation* provides an exhaustive exposition of the Supreme Court’s jurisprudence relating to public

finance with special emphasis on the determinations of the Supreme Court in respect of Bills [Special Determinations]. The chapter provides an overview of the manner in which the Supreme Court of Sri Lanka has dealt with matters relating to public finance and attempts to draw overarching principles for decoding and unravelling a complicated body of jurisprudence. The chapter discusses some implications of the Executive's fiscal decisions on the People's Sovereignty. The chapter also discusses what 'control' Parliament actually exercises with regard to public finance and juxtaposes this with the control that Parliament should exercise in this regard, in terms of its constitutional responsibility in relation to public finance.

Binendri Perera provides a comprehensive analysis of the jurisprudence being developed by the Sri Lankan Supreme Court on language rights in her chapter *Litigating Language Rights in Public Interest: Significance and Potential*. After a careful explanation of the scope of language rights provided in the Constitution of Sri Lanka [1978] she sets out a thoughtful analysis of the significance and potential of litigating language rights in the public interest. She concludes by assessing the impact of the language used by the Supreme Court conduct its proceedings on the public interest litigation process and resulting jurisprudence.

In Public Interest Litigation for the Realization of Gender Rights in Sri Lanka: Lessons from the South Asian Region, Khyati Wikramanayake & Inshira Faliq examine the

application of public interest litigation in achieving gender justice in the South Asian region. Drawing upon case law from Sri Lanka, India, Nepal, and Bangladesh the authors argue that public interest litigation has great potential for advancing gender equality. The chapter provides an overview of the legal provisions and jurisprudence relating to gender within the legal framework of Sri Lanka. Thereafter, looking at comparative jurisdictions the authors explore the ways in which public interest litigation can be used as a tool for advancing gender justice in Sri Lanka. The authors provide an important caution as to the limits of public interest litigation, arguing that holistic change cannot be achieved through judicial intervention alone and will require a cultural change stemming from legal and structural reform, a change in political culture and awareness starting from the grassroots of Sri Lankan society.

In Public Interest Litigation and the Freedom of Religion and Belief Dr.Asanga Welikala & Charya Samarakoon provide a historical overview of the Buddhism chapter in Sri Lanka's republican constitutions. They argue that the Buddhism chapter was never intended to be a precise and univocal provision, but rather, it was designed purposefully as a vague and multivocal clause in order to avoid and/or bridge the demands of multiple groups. Thereafter they provide a brief analysis of the Buddhism chapter's use in litigation focusing on selected cases and discussing options for reform that would ensure more meaningful enjoyment of the fundamental rights guaranteed by the constitution.

Pasan Jayasinghe examines the right to vote within contemporary Sri Lankan public interest litigation jurisprudence in *The Right to Vote: Judicial Interpretation and Evolution*. The chapter argues that in the context of a legal framework that implicitly provides for the right to vote, public interest litigation-initiated jurisprudence has provided a meaningful avenue of securing and enhancing the right in Sri Lanka. However, he cautions that the value of such efforts are constrained in particular ways by the narrow parameters of the legal framework itself, as becomes evident when considering the particular applications of the right to vote. The chapter concludes by imagining the right to vote and how it may be interpreted and advanced under different legal and conceptual frameworks.

The 'Pass System'; The military detention of Internally Displaced Persons (IDPs) and restrictions on their freedom of movement by Renuka Senanayake is a deep dive into the public interest litigation cases which dismantled the pass system in 2002 and enabled free movement for the residents of Vavuniya and Mannar and freeing over 10,971 families who were detained in government-run camps, where they were held against their will for over 7 years, from 1995 to 2002. The chapter provides an overview of the context of the military-imposed pass system and the events that led to the restrictions on the Petitioners' movement. It then discusses the legal arguments advanced by the two petitions brought before the Supreme Court. Finally, the chapter details the outcome of this litigation and provides a brief discussion of the contribution it made to the understanding of the

constitutional right of the freedom of movement and limitations on that right in the interest of public security. This chapter is unique in that it is also a tribute to an individual Petitioner's bravery, the chapter provides keen insights into Arumugam Vadivelu (Peter) – a brave individual who challenged arbitrary and unjust practices by the military at great risk to himself and his family. His tenacious and brave action not only highlighted a clear fundamental rights violation but set in motion events that provided remedies impacting thousands of individuals.

Acknowledgements

There are many who were involved in the production of this publication, without whose support this endeavour would not be a reality.

The inspiration for this book stems from the substantial corpus of Public Interest Litigation (PIL) cases undertaken by CPA since 1996. Whilst the book is not an attempt to chronicle these cases, it drew inspiration from the underlying themes of this body of PIL cases. As such we note the role played by Dr. Paikiasothy Saravanamuttu, Executive Director of CPA and Mr. Rohan Edrisinha, founder Director at CPA for commencing the PIL work at CPA. A special note must be made to the leadership given by Dr. Saravanamuttu who has unreservedly supported CPA's PIL efforts for over 25 years including during difficult political and economic circumstances. This leadership in litigating a range of issues from proposed constitutional amendments to arbitrary practices has made CPA and his name synonymous with PIL in Sri Lanka.

The tireless work by many Attorneys-at-Law who supported CPA's PIL cases as Counsel and Instructing Attorneys must be acknowledged. We are humbled by the contributions of dozens of lawyers and others who supported the idea of PIL during challenging times and who helped build up a body of PIL jurisprudence. Their support has often been at great personal cost, in terms of the time they have dedicated to these cases, the loss of more lucrative cases and on occasion

threats to their security from the most powerful officers within government and outside.

A special mention must also be made of the many who supported these cases as Petitioners and in other ways. The nature of the cases meant that some faced significant challenges, including threats to their own personal safety and livelihood. Despite threats and challenges, we are indebted to all who took a principled stand in challenging what is unjust and arbitrary.

Thank you to all the authors who contributed to this publication amidst these challenging circumstances. Their thoughtful and diligent contributions have raised critical issues relating to PIL jurisprudence in Sri Lanka and provided a resource to carry forward fruitful discussions on these issues.

Charya Samarakoon provided invaluable support in many different areas of this publication. From research to referencing, coordination to curating material, we owe her a special mention for her diligent and unwavering support to us during this process. Appreciation is also due to Senal Senevirathne for proofreading the chapters and his assistance in copy editing and to Rakitha Abhayaratne for formatting the publication and for his extensive support in conceptualising and designing the cover page. Many different colleagues at CPA supported in different ways to bring this volume to print. Our gratitude goes to Harshini Amarasinghe, Bhagya Samarakoon, Kushmila Ranasinghe,

Nivedha Jeyaseelan and Khyati Wikramanayake for their support.

The publication itself was conceptualised and produced during a time of great political, economic and social unrest in Sri Lanka- from Covid-19 lockdowns and an unprecedented economic and political crisis that resulted in prolonged daily power cuts and large-scale citizen protests. These and other circumstances make it all the more remarkable that this body of work has come to fruition during this time. For this, we owe a debt of gratitude to all who contributed and supported this publication.

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Outstanding Student. She also obtained an Upper Second Class at the Attorneys-at-Law Final Examination, securing 13th rank at the December/January 2017/18 Examination. She carried out her Apprenticeship at the Attorney General's Department and took Oaths in 2019. She has close to two years of experience in commercial/civil litigation and has researched at the Right to Information Commission, and the Centre for Policy Alternatives. She has authored and/or edited publications on the Right to Information, freedom of expression, Constitutional Law, and laws relating to Microcredit in Sri Lanka. During her undergraduate years, Nivedha has worked as a rapporteur and assistant researcher under senior researchers contributing to several publications and studies and has completed internships at reputed organisations, like the Lakshman Kadirgamar Institute. She also served as the Editor – in – Chief of the Colombo Law Journal, the flagship student journal of the Faculty of Law, in the year 2017.

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Broadening the Scope of Locus Standi in Public Interest Litigation

Shermila Antony

Introduction

Representative standing in the public interest has taken a major turn since the birth of constitutionally protected Public Interest Litigation (PIL). Since its beginnings in the United States, PIL has acquired unprecedented legitimacy and binding power, and is acknowledged as a powerful weapon to counter “[S]tate repression, governmental lawlessness, administrative deviance, and exploitation of disadvantaged groups”.¹ For instance, PIL in India has stretched the parameters of substantive and procedural legality to “forge new tools, devise new methods and adopt new strategies for the purpose of making fundamental rights meaningful to the masses of people”.² Perhaps one of the most distinguishing characteristics of PIL is the liberalisation of locus standi or standing, which determines the competence of the complainant to assert the matter of his or her complaint before the court.³ Standing performs an important and practical function, and time and time again has been used by the courts as an effective rule to keep out meddling busybodies. The courts dread that to allow unobstructed

¹ PN Bhagwati, 'Judicial Activism and Public Interest Litigation' [1985] 23(1) Columbia Journal of Transnational Law 561.

² *Bandhua Mukti Morcha v Union of India and Others* (1997) 10 SCC 549.

³ Barry Hough, 'A Re-Examination of the Case for a Locus Standi Rule in Public Law' [1997] 28 Cambrian Law Review 83.

access to public interest litigants, would be to risk opening the “virtual floodgates to a multiplicity of proceedings”, burdening scarce judicial resources, and diverting its attention from far more important matters.⁴ The courts are also burdened by their role within the doctrine of separation of power and the quandary as to where judicial adjudication of public policy should rest within the tripartite system of government. Therefore, observance of locus standi rule has consequently become a critical hurdle to overcome, for those litigants who pick the courts to advocate rights in the public interest.

Since 1996, the Centre for Policy Alternatives (CPA) a non-partisan civil society organisation has been a forerunner in initiating PIL to promote the rule of law, democratic governance and human rights in Sri Lanka. The string of fundamental rights petitions filed in the Supreme Court covers an extensive range of rights abuses protecting the fundamental right to movement, equality and non-discrimination,⁵ free speech and expression,⁶ free and fair elections,⁷ liberty and due process,⁸ freedom from torture and inhuman and degrading treatment⁹ and religious

⁴ Dianne L Haskett, ‘Locus Standi and the Public Interest’ [1981] 4 Canada-United States Law Journal 39.

⁵ *Dr. Paikiasothy Saravanamuttu, Thusitha Aluthpatabendige v Peter Perera, Dayananda Dissanayake* S.C. (FR) 432/2005.

⁶ *Neloufer de Mel and One Other v Attorney General* S.C. (SD) 5/99 – 12/99.

⁷ *Rohan Edrisinghe and Three others v Dayananda Dissanayake and Five others* S.C. (FR) 265/99.

⁸ *Kandaswamy Rasalingam v Inspector General of Police* S.C. (FR) 217/2007.

⁹ *The Centre for Policy Alternatives v Minister of Defence* S.C. (FR) 424/07.

freedom. The CPA has also challenged the constitutionality of Bills under Articles 120 and 121 of the Constitution,¹⁰ including the recent challenge to the constitutionality of the Twentieth Amendment in 2020¹¹ and the constitutionality of the regulations made under the Prevention of Terrorism Act (PTA) in 2022.¹² CPA has continuously supported its claim to stand in the public interest on the ground that it aims to strengthen and safeguard democracy, pluralism, the rule of law, human rights and social justice.

Part I of the chapter briefly examines the gradual judicial and constitutional extension of categories of persons in the evolution of the public interest suit as a medium for social justice. Without claiming to be exhaustive, the chapter provides an insight into creative adjudication or judicial activism adopted to explicate the classifications of standing by asking the question ‘who should complain’ interchangeably with the question ‘in whose interests’. For this purpose, the chapter will survey the developments in standing in PIL in comparative jurisdictions, particularly the United Kingdom, India, South Africa and Sri Lanka,

¹⁰ Article 120 grants the Supreme Court the sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the constitution. The Constitution of The Democratic Socialist Republic of Sri Lanka 1978.

¹¹ *The Centre for Policy Alternatives v Attorney General* S.C. (SD) 3/2020. ; *In Re the Twentieth Amendment to the Constitution* S.C. (SD) 01/2020.

¹² The Centre for Policy Alternatives filed a Petition challenging the Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulation No. 01 of 2021, published in Extraordinary Gazette No. 2218/68 stating that such regulation violates constitutionally guaranteed Fundamental Rights.

exploiting in particular, the vast jurisprudence of fundamental rights, to enhance access to courts and widen the scope of juridical review of Executive and Administrative action. In conclusion, Part II of the chapter will discuss key substantive and procedural underpinnings of locus standi on the judicial conception of balancing its role, functions and powers, and its limitations in promoting rights and access to justice for the most vulnerable and disadvantaged.

Part I

Categories of Locus Standi in PIL

Traditionally considered during the preliminary stage of judicial review, common law rules of standing originally developed within a private law paradigm attempted to establish a nexus between the litigant and the complaint or grievance. Only a ‘person aggrieved’ would be allowed to invoke the jurisdiction of the court in the absence of non-compliance by any government authority and a person is not aggrieved, unless he or she has personally suffered some injury to tort or property. The rationale is to draw out the judiciary from policymaking outside its traditional function within the tripartite system of government and to exclude any individual from enforcing the law unless a right or

interest of their own is at stake, leaving public accountability to forces of government.¹³

The question arises then, whether any person aggrieved, although not directly affected may have an equal right to access courts or whether the judicial review should be confined to the interest protected.¹⁴ Early on the courts realised the conceptual challenges to the adoption of a private litigation approach, to standing in public law.¹⁵

In the United Kingdom (UK), prior to statutory amendments to locus standi, English law was cluttered with contradictory cases that decided on the application of rules of standing based largely on the remedy sought than the grievance suffered.¹⁶ The law was amended statutorily to allow English judges the discretion to decide on who has a right to sue. Section 31(3) of the Supreme Court Act 1981 provides that “No application for judicial review shall be made... unless... the applicant has a *sufficient interest* (emphasis added) in the matter to which the application relates.” In 1994 the Law Commission suggested a two-track approach to further liberalise standing, first concerning cases where

¹³ Clive Plasket, *Representative Standing in South Africa* (Class Actions National Report, 2007).

¹⁴ Shivaji Felix, 'Judicial Review in Administrative Law: A comparative study of Rights Consciousness with special reference to Sri Lanka' (Ph.D thesis, University College London 2000) 69.

¹⁵ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 (2) SA 621 (CC). Plasket n(13).

¹⁶ M Gomez, *Emerging Trends in Public Law* (Vijitha Yapa Bookshop 1998) 48.

the complainant is personally aggrieved and second concerning cases of public interest.

After the amendments and more specifically due to the recognition of representative standing in the public interest, a flood of cases showed the court's willingness to discard the inclination to approach standing from a restrictive point of view and allow in pressure groups or public-spirited individuals to come forward where they can show 'substantial default or abuse' by public authority, which if left unchecked defeats the purpose of public law that seeks to prevent it.¹⁷ The presumption was that 'citizens simply qua citizens have a sufficient interest in government legality [and] all else is seen as a qualification of [it]'.¹⁸ Therefore, to avoid cases that merit review withdrawn on strictly procedural grounds, the courts noted that standing should be seen in the legal and factual context of the whole case.¹⁹

In India, placed between a rock and a hard place, an awakening in PIL through judicial activism is attributed to the conditions that followed the Emergency Period in the mid-seventies and the urgency in which the courts felt it had to redeem itself in the eyes of the Indian public.²⁰ Unlike in other countries, PIL or Social Action Litigation as it is

¹⁷ HWR Wade and C Forsyth, *Administrative Law* (Oxford University Press 2014) 712. (as cited in Felix (n14) 92).

¹⁸ Paul Craig, *EU Administrative Law* (3 edn, Oxford University Press 2018). (as cited in Gomez (n16) 67).

¹⁹ *R v Secretary of State for Foreign Affairs, Ex Parte The World Development Movement Limited* [1995] All ER 611 (*Pergau Dam Case*)

²⁰ Zachary Holladay, 'Public Interest Litigation in India as a Paradigm for Developing Nations' [2012] 19(2) *Indiana Journal of Global Legal Studies* 559.

sometimes referred to was entirely a product driven by the Indian Judiciary.

The British rule bequeathed to India a colonial legal heritage. The Anglo-Saxon model of adjudication insisted upon the observance of procedural technicalities such as locus standi and adherence to the adversarial system of litigation. The result was that the courts were accessible only to the rich and influential people. The marginalised and disadvantaged groups continued to be exploited and denied basic human rights.²¹

Early judicial tendencies to ‘shed the shackles of the private right perspective’ was visible in the Fertilizer Corporation Case, where Justice Krishna Iyer disagreeing with the then Chief Justice on the claim of standing said that ‘in simple terms, locus standi must be liberalised to meet the challenges of the times.’²² In fact, that is exactly what transpired thereafter.

Glaringly aware of the limitations of government and legislative inertia and the unique social and economic conditions that deprived many Indians of constitutional protections, the Supreme Court took radical steps to increase access to justice by relaxing rules regarding locus standi. The court held that ‘where a wrong against community interest is done, **‘no locus standi’** will not always be a plea

²¹ Parmanand Singh, ‘Protection of Human Rights Through Public Interest Litigation in India’ [2000] 42 Journal of the Indian Law Institute 2.

²² PP Craig and SL Deshpande, ‘Rights, Autonomy and the Process: Public Interest Litigation in India’ [1989] 9 Oxford Journal of Legal Studies 3.

to non-suit [of] an interested public body chasing the wrongdoer in court...'.²³ The list of interested persons or bodies became non-exhaustive. It was stretched to include individuals acting on behalf of others to class actions to civil society organisations to journalists to academics to *any member of the public acting bona fide*, to move the Court for relief under Article 32 of the Indian Constitution when a person or a determinate class of persons to whom a legal wrong or injury is caused is unable to approach the Court for judicial redress, on account of “poverty or helplessness or disability or socially or economically disadvantaged position.”²⁴

As the categories of people eligible to move the court exploded, so did the reasons for moving the court. “Originally aimed at combatting inhumane prison conditions and the horrors of bonded labour, public interest actions have now established the right to a speedy trial, the right to legal aid, the right to a livelihood, a right against pollution, a right to be protected from industrial hazards and the right to privacy and human dignity.”²⁵

Unlike in India, where social and economic rights are non-justiciable rights under the Constitution, the new constitutional order established Post-Apartheid in South Africa specifically enshrined a Bill of Rights that,

²³ *Maharaj Singh v Uttar Pradesh*, AIR 1976 SC 2602,2609.

²⁴ PP Craig and SL Deshpande (n22) 3.

²⁵ Jamie Cassels, ‘Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?’ [1989] 37 *The American Journal of Comparative Law* 3.

recognised not only first generational rights, but also second and third generational rights. The Interim constitution and the final constitution that followed in 1996 further grounded fundamental rights by broadening rules of standing.

Before the introduction of the Interim Constitution, South Africa too was labouring under the burden of British colonial rule. As a result, the South African Supreme Court used its power of review sparingly and conservatively. Standing was restrictively interpreted and “personal, sufficient and direct” loss or damage to the aggrieved was insisted.²⁶

Section 38 of the 1996 Constitution provided for a broad range of persons that may invoke the jurisdiction of the Constitutional court for violations or threatened infringement of fundamental rights enshrined in chapter 2 of the Constitution. The recognition of new and improved rights with the recognition of new categories of litigants was consistent with the new judicial order that was expected in South Africa. It has been commented that “with a few strokes of a pen, the makers of the...Constitution emulated the principle which was evolved over many years by the Indian Supreme Court.”²⁷

Section 38 specifies the persons who may approach a court. They are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the

²⁶ Plasket (n13).

²⁷ *ibid.*

interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

In the first instance, the constitution not only established the common law rule of standing of a person who has direct and substantial interest but deliberately established the view that people acting in their own interest may also act in the interest of others.²⁸ In the second instance, representative standing institutionalised by the constitution produced a mixed outcome due to its affinity to Sections 38 (C) and (D). The better view was presented in the case of *Ngxuza*, where four applicants were awarded standing on behalf of thousands based on similar reasoning resorted to by the Indian courts as other “applicants are unable to individually pursue their claims because they are poor, do not have access to lawyers and ... have difficulty in obtaining legal aid.”²⁹ The third instance, renewed class action which was made redundant by Roman-Dutch Law in South Africa.

²⁸In line with this approach, Heher J., in *National Coalition for Gay and Lesbian Equality and others v Minister of Justice and Others* ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) accepted that the applicant organisation had a sufficient interest itself to challenge the constitutionality of rules of common law and statutory provisions which criminalised various forms of consensual sexual conduct between adult men. Two of the organisation’s objectives were to ‘promote equality before the law for all persons, irrespective of their sexual orientation’ and to ‘challenge by means of litigation ... all forms of discrimination on the basis of sexual orientation.’

²⁹ *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* (2001) 4 SA 1184 (SCA).

The fourth and relevant category of standing for the purpose of this chapter, ‘people acting in the interest of the public’ allows litigation based on the merit of the issue at hand, which a genuine applicant claims are in the real³⁰ public interest.³¹ This category of public interest standing is extremely broad in that it does not require proof of an infringement or threatened infringement of a fundamental right.³²

The genesis of the transformative trajectory of locus standi in PIL in the UK, India and South Africa as a result of constitutional or statutory reform or judicial ingenuity has a significant impact on the Sri Lankan approach to standing.

Unlike the Indian and South African Constitutions, post-enactment judicial review that was available under the Soulbury Constitution was deliberately withheld from the autochthonous constitutions adopted post-independence Sri Lanka. The Second Republican Constitution, which

³⁰ Prut’s case, when reduced to its basics, is authority for the proposition that if an issue of constitutionality is one of public interest, a representative litigant may vindicate the public interest as long as the issue is a real, and not merely an academic one; *Port Elizabeth Municipality v Prut NO and Another* 1996 (4) SA 318.

³¹ Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be considered in the light of the facts and circumstances of each case; *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 (2) SA 621 (CC).

³² *Plasket* (n13).

established an Executive Presidency moving away from a system based on parliamentary sovereignty in 1978, introduced fundamental rights under Chapter III of the Constitution. The 1978 Constitution also introduced a mechanism under Articles 17 and 126 to enforce fundamental rights and language rights stipulated in Chapter II and III respectively. In enacting Articles 17 and 126, the framers of the Constitution set up a special machinery for providing a “quick and efficacious remedy” for the enforcement of fundamental rights, which itself is considered a fundamental right. Article 126 sets out how the jurisdiction of the Supreme Court may be invoked and exercised when a person aggrieved or his or her attorney at law files a petition in the Supreme Court for a violation or imminent violation of a fundamental right.³³

Early on, commenting on the stance taken by the Privy Council in *Durayappa v Fernando*,³⁴ Craig stated that the Privy Council purposefully adopted a strict test with regard to legal standing. The courts continued to follow a stringent approach to standing following the reasoning in early English law cases.³⁵ Towards the early 1980s, the courts took a turn and started to freely use established principles of administrative law to interpret fundamental rights and *vice*

³³Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (2nd edn, Stamford Lake Publication 2013) 725-729.

³⁴ 69 NLR 265; [1967] 3 WLR 289. Felix (n14) 79.

³⁵ *Premadasa v Wijewardena and Others* [1991] 1 Sri LR 333 followed sufficient interest test.

versa.³⁶ For instance, in cases where public authorities have acted with unreasonableness or with improper purposes or where rules of natural justice have not been observed or where decisions have been taken contrary to the legitimate expectations of the complainant, the courts established a violation of equal protection before the law under Article 12.³⁷ Similarly, courts have insisted on the reasonable use of discretion or right to provide reasons as a necessary corollary of the equal protection clause. The rich interchange of jurisprudential borrowing and cross-fertilization boosted the development of relaxed rules of standing where a person shows a ‘genuine interest’ or comes before the court as a ‘public-spirited person’ to seek that the law is obeyed in the interests of all.

As in India where a mere scribble on a piece of paper prompted the court to assume jurisdiction of the court with regard to the torture of prison inmates,³⁸ a letter sent to the Chief Justice signed by thousands of persons detained in Boosa Detention Camp in the latter part of the 1980s demanded a drastic change in the rules of standing and court proceedings.³⁹ Eventually, the Supreme Court Rules were

³⁶ Under the current constitutional and legal framework judicial review of administrative action can take place either by way of a writ application in the Court of Appeal or in the Regional High Courts. Further judicial review of administrative action can also take place by means of a fundamental rights application.

³⁷Article 126 (3) of the Constitution; See discussion in *Shanthi Chandrasekeram v D. B. Wijethunga* [1992] 2 Sri LR 293.

³⁸Holladay (n20).

³⁹Gomez (n16).

amended to ease the burden of standing to allow any person, whether such person is a complainant or not, to access the courts where the aggrieved does not have the means to pursue or have suffered or may suffer substantial prejudice by reason of such infringement or imminent infringement.⁴⁰

In the four decades of constitutionally protected fundamental rights, the courts have flaunted the rules of standing to allow third parties whether they are a parent,⁴¹ spouse,⁴² readers or contributors of a newspaper,⁴³ a listener of a radio broadcast,⁴⁴ Member of Parliament⁴⁵ or professionals⁴⁶ right of access to court in cases where free speech and access to information, illegal detention or torture and inhuman and degrading treatment, equality and non-discrimination is championed.

Another area where there has been a reformation in locus standi is where the public interest defended is for the protection and preservation of the environment. The right of standing by public interest organisations to conserve the environment was explicitly recognised in the celebrated judgement popularly known as the *Eppawela Case*,⁴⁷ and

⁴⁰ *ibid* 32.

⁴¹ *Ansalin Fernando v Sarath Perera* [1992] 1 Sri LR 411.

⁴² *Somawathie v Weersasinghe* [1990] 2 Sri LR 121.

⁴³ *Visualingam v Liyanage* [1983] 2 Sri LR 311.

⁴⁴ *Fernando v The Sri Lanka Broadcasting Corporation* [1996] 1 Sri LR 157.

⁴⁵ *Wijesiri v Siriwardena* [1982] 1 Sri LR 171.

⁴⁶ *Kithsiri Gunaratne v Kotakadeniya, Commissioner of Motor Traffic* [1990] 2 Sri LR 14.

⁴⁷ *Bulankulame v The Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 245.

extended in several other high-profile cases such as the *Galle Face Green Case*,⁴⁸ where the right to information on environmental matters was explicitly recognised, and the *Wilpattu Forest Case*⁴⁹, where the court not only recognised the illegality of governmental action but issued a mandamus to carry out a tree-planting programme at the expense of the respondent under the ‘polluter pays principle’. In furthering environmental justice and carving out a right to access clean water in the *Chunnakam Power Plant Case*, the courts stripped of its traditional propriety, left an indelible mark infusing fundamental rights with the state’s obligations under Directive Principles of State Policy (DPSP).⁵⁰ The court held that “Directive Principles of State Policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to”.⁵¹

Moreover, not confining the liberal space for public interest standing to civil and political rights, social and economic rights and environmental rights, in landmark decisions such as the *Lanka Marine Services Case*, *Waters Edge Case* and

⁴⁸ *Watte Gedera Wijebanda v Conservator General of Forests* [2009] 1 Sri LR 337. (cited in N Wijesekera, ‘Providing Adequate Environmental Protection under the Constitution of Sri Lanka: An Agenda for Reform’, [2021] 1(2) Kotalawela Defence University Law Journal 104.)

⁴⁹ *Centre for Environmental Justice v Anura Satharasinghe and others* W.P. 291 of 2015, Sri Lanka Court of Appeal (16 November 16, 2020) (*Wilpattu Forest Case*)
⁵⁰ S.C. (FR) 141/2015.

⁵¹ N Wijesekera, ‘Providing Adequate Environmental Protection under the Constitution of Sri Lanka: An Agenda for Reform’, [2021] 1(2) Kotalawela Defence University Law Journal 104.)

the Sri Lanka Insurance Company Case,⁵² the courts resorted to the public trust doctrine to hold unlawful action by government authorities to task not only because there is a duty to uphold in the ‘name of good governance but also for sustainable economic development ... of all its people especially the economically challenged, the disadvantaged and the marginalised’.⁵³

Part II

Locus Standi and Substantive and Procedural developments

It is quite evident from the above examination that, PIL has forced courts to query the merits of strict adherence to locus standi in the face of illegal governmental action or unconstitutional governmental behaviour or where deeply rooted social and economic disparities and disadvantages are apparent. Judges in India and South Africa have constantly resorted to the purposive reading of the constitution in its entirety to rationalise the debunking of even loose threads of procedural limitations to avert fundamental rights to remain but a ‘teasing illusion’⁵⁴ for the poor and disadvantaged. The courts have severely altered the rules of the game to allow

⁵²*Vasudeva Nanayakkara v K.N Choksy and Others (John Keells Case)* [2008] 1 Sri LR 134; *Sugathapala Mendis And Another v Chandrika Kumaratunga And Others (Waters Edge Case)* [2008] 2 Sri LR 339.

⁵³ R Goonetilleke, ‘Public interest litigation: a species of direct democracy and good governance’ [2014] 4 Sri Lanka Journal of Development Administration 83.

⁵⁴ *Bandua Mukti Morcha v Union of India and Others* (1984) AIR 802.

third parties who are genuinely interested where fundamental human rights are at stake, stating that it may sometimes be “necessary to open the floodgates in order to irrigate the arid ground below them”.⁵⁵

To further the argument that rules of standing cannot be considered as a serious obstacle for PIL, the courts in engaging in adjudication consider standing as a parallel examination of the merits albeit the approach of the American Court which persistently refers to standing as a "threshold determinant".⁵⁶ This reasoning blurs the query as to who would be considered as an eligible complainant with the opinion of the court whether such interest complained is deserving of protection within the bounds of judicial propriety.

In India and less vigorously in Sri Lanka, the courts have intentionally promoted not only first generational rights but also second and third generational rights through a creative reading of fundamental rights with DPSP. In both legal systems, DPSP espouses standards and guidelines for Executive and Administrative policymaking, which are non-justiciable in a court of law. The courts have read in the social and economic aspirations of the DPSP as a necessary corollary of fundamental rights through Article 21 thereby

⁵⁵ *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others* [1996] 3 All SA 462.

⁵⁶ Haskett (n4) 39.

giving them substantive and procedural content.⁵⁷ The Indian courts, in particular, have continuously resorted to translating the ideals of socialism rhetoric to give meaning to negative rights, even suggesting that positivism is “deliberately constructed to insulate judges against vulnerabilities to public criticism, and preserve their image of neutrality”.⁵⁸ Deference to theory and ideology are dismissed in the face of substantive disparities in the social and economic distribution of resources.

The convergence of enforceable rights with unenforceable welfare obligations has a bearing on the model of standing required under a constitutional democracy. The accusation that such an infusion dilutes the sanctum of individual rights within the framework of a liberal democracy paving the way to judicial socialism is argued by some scholars as exaggerated.⁵⁹ Reality suggests that PIL has minimal power to redistribute public resources or influence public spending on social welfare or force the legislature to pass laws or even comply with judicial decisions. Conversely, it empowers vulnerable communities and “breathe new life to fundamental rights” through the importation of the values under DPSP and enforce constitutional guarantees through existing legislation and existing responsibilities of public

⁵⁷ Thus Article 21 of the Indian Constitution, which enshrines the right to personal life and liberty is read expansively as a protection of human dignity. This reading is imbued with more force by breathing life into the concept of dignity using the Directive Principles of State Policy as the foundation for the minimum social and economic requirements which render dignity possible.

⁵⁸ Bhagwati (n1) 561.

⁵⁹ Cassels (n25) 3.

agencies.⁶⁰ Such a model of standing is not only suitable for a country such as Sri Lanka but is also encouraged, especially in light of the limited application of constitutionally permissible judicial review of legislation.

Locus Standi and the Role of the Judiciary

The nexus between judicial review and standing has constitutional significance. Rules of standing decide issues that are allowed for judicial review and issues that are set aside due to the lack of a competent complainant. This argument appears *prima facie* to be at odds with the constitutional requirement of legality, as public law is essentially concerned with imposing legal controls of governmental powers.⁶¹ Therefore, the issue arises whether unlawful public acts should go unheeded unless “invited to [be] intervene[d] by an individual having a cognizable interest in the matter”.⁶²

Standing raises important questions regarding judicial control of public authorities and determines the role of the judiciary within a legal system and its willingness to approach “at least in public law...than anywhere else the

⁶⁰ *ibid*

⁶¹ Standards of review of Administrative and Executive power has also undergone substantive changes from the traditional doctrine of *ultra vires* to general principles of administrative law such as natural justice, legitimate expectation, unreasonableness and proportionality to human rights standards; Felix (n14).

⁶² Hough (n3).

prevailing system of values upon which the law is based”.⁶³ Some scholars argue that rules of standing in public law as an “unnecessary layer of exclusionary principles”, that in effect leads to arbitrary public law adjudication due to dependence on “the fortuity of having the right individual willing to take up the proceedings” to adjudicate on important matters in the public interest.⁶⁴ On the other hand, it has attracted many other scholars to question the judicial arm of government as the appropriate forum for policy adjudication.

Despite arguments in favour of its practical significance to rule out busybodies and intermeddlers, wasting scarce judicial resources and inundating the courts with frivolous or vexatious litigation,⁶⁵ standing goes beyond the realm of neutral procedural formality, which can be manipulated by courts to avoid cases that raise political questions or “issues with social, political and economic overtones”. This argument may be justified on the ground of separation of power where courts adjudicate disputes between individuals and leave matters of administration to the public authorities. Notably, however, scholars advocate that “the position that review by an unelected judiciary as an alternative centre of power and supervision over an elected parliament” transcends judicial propriety not only exaggerates the

⁶³ Plasket (n13).

⁶⁴ Hough (n3).

⁶⁵ Both the Indian and South African courts have dismissed this argument as frivolous and such litigant as a ‘more often a spectral figure than a reality’; *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others* [1996] 3 All SA 462.

“significance and efficacy of parliamentary accountability over potential abuse of Executive and Administrative power but also underestimated the transformation of liberal democratic principles fixated on individual rights”.⁶⁶

It is contended that the first argument is flawed. It assumes that law and policy are mutually exclusive and courts, when adjudicating questions of law, substitute judicial policy without transgressing their functions.⁶⁷ In fact, in PIL, courts have gone so far as to blatantly and boldly replace not only judicial policy but perceptions of individual judges. They are not alone when they propose that the ‘issue is not *whether*, but *what type* of, political values should enter into adjudication’.⁶⁸ Therefore, adjudication on legality does not necessarily become non-justiciable just because the decision may have political consequences or vice versa.⁶⁹

The justification for the second challenge is also threatened as it places undue and misplaced responsibility on financially, politically and legally constrained public authorities to oversee public interests as opposed to building an argument for *actio popularis*.⁷⁰

⁶⁶ Plasket (n13).

⁶⁷ *ibid*

⁶⁸ Cassels (n25) 512.

⁶⁹ *ibid*

⁷⁰ Whilst parliamentary accountability, contingent upon regular elections, strong oppositions, autonomy of individual MPs, independent media and a vibrant civil society unquestionably contributes to public accountability, the role of the judiciary to review public power not only as a fetter for excesses of that power but also as a champion of human rights is widely accepted today; Gomez (n16).

However, limitations of judicial capacity, lack of power to provide effective responses to government corruption and wrongdoing, question the legitimacy of the courts as the chosen guardian for the vindication of rights. Whilst these limitations are true, it also mitigates or discharges serious arguments against exercising judicial restraint in the face of public interest controversies.

Locus Standi and Right of Access to Courts

Rules of standing also raise crucial questions regarding the right of access to courts. From a form of direct democracy to the current species of liberal democracy, increasingly people feel removed and excluded from the decision-making process. Fewer concerns are raised by the political process. Hence, the judiciary becomes an alternative forum to exercise their direct right to participation in matters that not only affects the individual but the public at large. Public interest litigation has become a vehicle for such litigants and courts have relaxed rules of procedure by jettisoning strict requirements of formal petitions, replacing adversarial settings and even appointing commissions of inquiry to investigate and gather evidence to reduce the burden of the complainant. In India, courts have gone beyond the traditional equitable remedies and tested remedial strategies that require continuous court supervision. This has incrementally contributed to increased access to court, although blurring the delineation of the court's function as adjudicator *vis a vis* administrator.

The decision to allow a person to maintain a suit before the court has far-reaching consequences explicitly with the right to invoke the jurisdiction of the court and implicitly with the right to an effective remedy. Access to courts developed by the common law and statutory law is now enshrined in numerous international human rights instruments, regional conventions and incorporated and recognised in domestic constitutions in many liberal democracies in the world, including Sri Lanka.

For instance, Article 32 of the Indian Constitution specifically deals with the ‘Right to Constitutional Remedies’ and affirms the right to *move the Supreme Court by appropriate proceedings for the enforcement of [fundamental] rights*⁷¹ conferred in Part III of the Constitution. Direct access to courts itself is an incentive to move the court in cases of rights abuses and liberal interpretation of ‘who can move’ the court has only ‘further sought to rebalance the scales of justice.’ In Sri Lanka, administrative excesses may be reviewed through a writ application or fundamental rights application. Although the Indian Constitution provides a loose and allusive mechanism by leaving it to the judiciary to define what is meant by ‘move the Supreme Court by appropriate proceedings’, the courts by the extension of Supreme Court Rules have shown

⁷¹ ‘Public interest litigation in India is channelled through two avenues. If the complaint is of a ‘legal wrong’ the appropriate forum is the High Court of the state under Article 226 of the Constitution. If a ‘fundamental right’ is alleged to have been violated the remedy may be sought from the High Court or directly from the Supreme Court under Article 32. Cassels (n25) 495.

promise to discard procedural propriety in the face of serious violations of fundamental rights.

Conclusion

Today, standing in the public interest by a genuine party is no longer a matter for serious contention by the courts. However, some conflicting judicial approaches to standing in PIL in Sri Lanka leaves us to believe that we are not at the end of the road but navigating critical bends and turns.⁷²

It is apparent that standing has undergone a radical transformation in many jurisdictions to allow at a minimum, a person aggrieved or a person acting on behalf of the complainant and at a maximum any bona fide person acting in the public's interest. The courts either empowered by constitutional safeguards or liberal interpretation coupled with judicial activism and realities of social and economic inequalities have leaned towards a compassionate approach to *locus standi*, sometimes may be at the expense of creating a set of 'disjointed rules dealing with a common subject'.⁷³

⁷² The Supreme Court refused to grant leave to proceed for several fundamental rights petitions challenging the date of the General Election announced by the National Election Commission (June 20) and the gazette issued by the President dissolving Parliament among other petitions.

News First, 'SC refuses to grant leave to proceed for all FR petitions' *News First* (Colombo, 2 June 2020) <<https://www.newsfirst.lk/2020/06/02/sc-refuse-to-grant-leave-to-proceed-for-all-fr-petitions/>> accessed 31 December 2021.

⁷³ Haskett (n4) 39.

Liberalisation of the rules of standing has also emanated at the expense of dispensing with traditional demarcations of allocation of power within the government. The courts have come under heavy criticism for usurping the functions of the Executive or Legislature by allowing public interest litigation to question matters of public policy that are best dealt with outside the courtroom. Further, courts have been accused of judicial overreach and lack of real impact in addition to accusations of politicisation of the judicial function and inordinate delays in concluding PIL cases.⁷⁴

The lack of clear standards or the existence of a ‘hodgepodge’⁷⁵ of rules of standing has threatened the continued vigour and temerity of judges to uphold the original commitment to social activism. For instance, the Indian courts that ferociously instigated and promoted PIL to rid the post-independence constitution of being a “sentinel of the interests of the propertied class than a protector of the right of the poor and underprivileged” have been accused of straying from its original purpose to advocate in favour of economic reform and development over the rights of vulnerable groups or the environment.⁷⁶ Scholars have hence argued that the judiciary has emerged as an institution of

⁷⁴ *P N Kumar and Another v Municipality Corp. of Delhi* 1987 SCC (4) 609, 610; The Court observed that, ‘even if no new case is filed in this court hereafter, with the present strength of judges it may take more than 15 years to dispose of all the pending cases.’

⁷⁵ Louis L. Jaffe, ‘Standing to Secure Judicial Review: Private Actions’ [1961] 75 *Harvard Law Review* 255.

⁷⁶ Singh (n21) 172.

governance through PIL and should be subjected to rules to avoid an individualised approach to standing based on the whims and fancies of a particular judge.⁷⁷ On the other hand, the PIL movement also raises vital questions about the capacity of civil society to access information and legal aid and the democratic space available to avail human rights by an independent and impartial judiciary. The tool of the third party standing in the interest of the public whilst empowering social action groups, should also ensure that ‘the subaltern’⁷⁸ is not further victimised by creating an additional layer of dependency, allowing for elitist organisations to dictate priorities and policies.

Nevertheless, the admission of limitations of PIL cannot undoubtedly dismiss the contribution it has made to create a rights conscious society especially rights of minorities or rights that are not popular enough for Executive or Legislative action. It has also sparked social consciousness amongst civil society groups to vindicate legitimate interests of the people through a viable forum. PIL has also allowed space for ‘judicial dynamism to fashion a culture sensitive to human values and human dignity’ by generating space to

⁷⁷ *ibid*

⁷⁸ See, Ranajit Guha and Gayatri Chakravorty Spivak, *Selected Subaltern Studies* (Oxford University Press 1988) (as cited in Shermila Antony, ‘Women and Abortion in Sri Lanka: A Perennial Dilemma’ (LLM Thesis, Harvard Law School 2004).

directly participate in the political process through unconventional means.⁷⁹

Thus, the new constitutional reform process in Sri Lanka provides a window of opportunity to entrench and uphold a new constitutional order for the promotion of rule of law and democratic governance that makes fundamental rights meaningful to the masses of the people through litigation in the public interest.

⁷⁹ David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' [1992] 55(1) *The Modern Law Review* 44.

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Public Interest Litigation and the Judicial Duty to Give Reasons

*Gehan Gunatilleke*¹

Public interest litigation (PIL) forms a crucial element of Sri Lanka's constitutional jurisprudence. It has remained a vehicle for canvassing vital constitutional issues and has provided a platform for the courts to pronounce on matters of great importance to the public. With such importance comes a genuine public desire to receive and understand the reasons for a particular judicial outcome in a PIL case.

This chapter inquires whether judges have a special duty to provide reasons for their decisions in PIL cases. It is presented in three sections. The first examines the general duty of judges to give reasons for their decisions. The second section explores the value and rationale of PIL, and asks whether judges have an enhanced, or 'special' duty to give reasons for their decisions in PIL cases. The final section examines recent jurisprudence in Sri Lanka in the domain of Fundamental Rights. I do not attempt to survey the entire gamut of PIL cases in Sri Lanka. Instead, by examining certain landmark PIL cases, I offer some observations on judicial practice in this domain and argue that a limited judicial duty to give reasons ought to be recognised when

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the issue at stake is of public importance. I suggest that such a judicial duty extends to giving clear reasons for refusing ‘leave to proceed’ in Fundamental Rights cases involving issues of public interest.

The Judicial Duty to Give Reasons

Surveying commonwealth jurisprudence

A general duty to give reasons is recognised in numerous jurisdictions including Sri Lanka. The duty is often said to flow from the principle of natural justice. The Supreme Court, most famously in *Karunadasa v Unique Gemstones Ltd., and Others*,² upheld this duty in the context of administrative decisions. Justice Fernando observed:

To say that Natural Justice entitles a party to a hearing does not mean merely that his evidence and submissions must be heard and recorded; it necessarily means that he is entitled to a reasoned consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision ‘may be condemned as arbitrary and unreasonable.’³

² *Karunadasa v Unique Gem Stones Ltd., and Others* [1997] 1 Sri LR 256.

³ *ibid* 263.

I shall return to Fernando J's erudite observations later when I attempt to extrapolate the underlying principle that they advance. But in the meantime, it should be noted that these observations were made in relation to administrative decisions, and not judicial ones.

Historically, judges have not assumed a duty to give reasons. H. L. Ho notes that the expression '*judices lion tenentur exprimere causnin sententine suae*', i. e., the maxim 'judges are not bound to explain their decision' has been in use since the seventeenth century.⁴ Yet, a general common law judicial duty to give reasons has emerged since the mid-1990s in some commonwealth jurisdictions. In *Coleman v Dunlop Ltd*, Henry LJ observed that, although for a long time, the common law did not impose such a duty, common law must be understood as a living thing. He contended that it had now evolved to a point where 'the judge, on the trial of the action, must give sufficient reasons to make clear his findings of primary fact...'⁵ Henry LJ then reaffirmed this position by suggesting that judges do have a general duty to give reasons for their decisions in *Flannery v Halifax Estate Agencies Ltd*.⁶

The rationale for this duty may vary across Commonwealth jurisdictions. In England, it appears that the duty is part of

⁴ H L Ho, 'The judicial duty to give reasons' [2006] 20(1) Legal Studies 42-65.

⁵ *Coleman v Dunlop Ltd*, 26 November 1997, unreported, discussed in Ho (n4) 43.

⁶ *Flannery v Halifax Estate Agencies Ltd* (1999) 149 NLJ 284.

the ‘function of due process, and therefore of justice’.⁷ It offers the parties a sense of why they have won or lost. In Australia, it appears to be connected to the general duty to ‘act judicially’.⁸ As pointed out by Meagher JA in *Beale v Government Insurance Office of New South Wales* ‘the requirement to provide reasons can operate prophylactically on the judicial mind, guarding against the birth of an unconsidered or impulsive decision’.⁹ In this context, some scholars examining Australian jurisprudence have argued that there is ‘an absolute constitutional duty to provide reasons for judicial decisions’.¹⁰ They rely on clear authority such as *Soulezis v Dudley (Holdings) Pty Ltd*,¹¹ where McHugh JA presented three sound reasons for recognising a judicial duty to give reasons. First, being privy to judicial reasons ‘enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge’s decision’. Second, reasons promote judicial accountability and, therefore, enhances the credibility of courts. Some scholars have accordingly argued that the judicial duty to give reasons promotes the value of ‘open justice’, and has been embraced by courts in Australia on that basis.¹² Third, reasons ‘allow people to ascertain the

⁷ *ibid.*

⁸ *Pettitt v Dunkley* [1971] 1 NSWLR 376.

⁹ *Beale v Government Insurance Office of NSW* (1997, unreported, Court of Appeal of New South Wales), discussed in Ho (n4).

¹⁰ L Beck, ‘The constitutional duty to give reasons for judicial decisions’ [2017] 40(3) *University of New South Wales Law Journal* 923.

¹¹ *Soulezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279.

¹² J Bosland and J Gill, ‘The principle of open justice and the judicial duty to give public reasons’ [2014] 38(2) *Melbourne University Law Review* 482.

basis upon which like cases will probably be decided in the future'.¹³ It is suggested that higher courts have a duty to provide reasons owing to the requirement that their orders and judgments offer 'precedential value'. These courts have a more general duty to contribute towards the development of law. Such development would be virtually impossible if courts got into the habit of refraining from giving reasons for their decisions.¹⁴

While there may be a sound basis for a general judicial duty to give reasons, we must be cognisant of the costs (including time, attention, and resources) of imposing such a duty. Judges in Canada and New Zealand have remained reticent about recognising a general duty to give reasons precisely due to the costs that may be incurred. For example, Laskin CJC observed in the Canadian Supreme Court case of *MacDonald v R* that 'the volume of criminal work makes an indiscriminate requirement of reasons impractical'.¹⁵ It is also suggested that when judicial discretion is being exercised—for instance, when leave to appeal is being considered, no reasons need be furnished for a judicial decision. Of course, as pointed out by Ho, the 'reverse could be argued: it is where the judge has a discretion that the need for accountability is at its strongest'.¹⁶ In fact, some courts have taken this view. Luke Beck concludes that the New

¹³ *Soulemezis v Dudley (Holdings) Pty Ltd* at 279.

¹⁴ Ho (n4) 63.

¹⁵ *MacDonald v R* (1976) 29 CCC (2d) 257, 262-263.

¹⁶ Ho (n4) 54.

South Wales Court of Appeal always complies with the constitutional duty to provide reasons even in respect of leave to appeal applications.¹⁷

Nevertheless, it appears that placing a particularly onerous duty on judges to give reasons for their decisions may be costly in terms of the scarce time and resources at the disposal of the judiciary. Therefore, cost remains a relevant factor when imposing a general duty on judges to give reasons. It could be argued that dispensing with the duty to give reasons may be necessary when the functioning and efficiency of a court would be impeded by a strict imposition of such a duty.

The general duty to give reasons—if such a duty exists in the case of judges—would then be subject to some caveats. One way of resolving the challenge of cost would be to say the general duty is subject to the condition that discharging the duty would not result in an impediment to the proper functioning and efficiency of the court. Therefore, cost becomes an exceptional factor to consider when applying the norm that judges ought to give reasons for their decisions. Jurisdictions such as England and Australia appear to adopt this approach.¹⁸ Another way of dealing with the challenge is to presume that the general duty would be too onerous, and to only require judges to give reasons for their decisions in exceptional circumstances. Canada and New Zealand

¹⁷ Beck (n10) 951.

¹⁸ Ho (n4) 43. See *Waterson v Batten* (13 May 1988, unreported).

appear to veer towards this approach.¹⁹ These jurisdictions are not completely averse to the idea that judges ought to give reasons. They are instead reticent about imposing such a duty in general. It would then appear that ‘importance’ is a threshold that the case or the issue at hand must meet in order for the judge to be required to give reasons for their decision. Only in cases of some *importance* would the duty arise.

Reconciling the variations evident in Commonwealth jurisdictions is beyond the ambit of this chapter. However, one sound principle does appear to be shared among the jurisdictions and would possibly apply to Sri Lanka: judges ought to give reasons for their decisions if the matter at stake is of particular importance. The prevailing principle is best articulated by Justice Michael Kirby when he observes that judges are not relieved of ‘providing, however briefly, reasons for important evidentiary rulings’.²⁰ In this context, it can be safely assumed that, if the importance of the issue at hand outweighs the cost that may be incurred by the court (in terms of time, attention, and resources), judges indeed have a duty to give reasons for a decision.

¹⁹ *ibid.* See *R v Awutere* [1982] 1 NZLR 644; *MacDonald v R* (1976) 29 CCC (2d) 257.

²⁰ M Kirby ‘Reasons for Judgment: Always Permissible, Usually Desirable and Often Obligatory’ [1994] 12 *Australian Bar Review* 121, 128.

Three principles

It is unclear as to what Sri Lanka's approach might be with respect to a judicial duty to give reasons. It would, however, be sensible to derive three simple principles from the foregoing discussion.

First, judges should recognise a general duty to give reasons when issuing judgments on the merits of a case. Such a duty can certainly be reasonably expected of judges. The fundamental idea underpinning Fernando J's opinion in *Karunadasa v Unique Gemstones Ltd.*, i. e., that principles of natural justice require that a person is entitled to a 'reasoned consideration' of the case which they present, can be applied to the Judiciary's own duty to give reasons. The interests of justice, transparency, and precedent are served by the recognition of this duty.

Second, judges should not be expected to provide extensive reasons when exercising discretionary jurisdiction, and where the cost of such a burden outweighs any benefit accruing to the litigant if reasons are given. This principle would be of particular relevance to appellate court jurisdictions where no right of appeal is provided by law. For example, in cases where special leave to appeal is being sought from the Supreme Court against a judgement of an appeal court—and where the *right* of appeal has already been exhausted—the Supreme Court has discretion on whether or not to grant such leave. The sheer volume of such

cases²¹ and the scarcity of the Court's time and resources might warrant relieving the Court of a general duty to give reasons when it dismisses applications for special leave to appeal.

It is perhaps less clear as to whether the Court can be relieved of such a general duty when it dismisses Fundamental Rights applications at the 'leave to proceed' stage. Rule 45 (1) of the Supreme Court Rules of 1990 (as amended) provides that a bench comprising no less than two judges of the Supreme Court should hear the petitioner and make order granting or refusing leave to proceed. Again, the number of cases is voluminous, and it may be onerous for the Court to provide extensive reasons in every single case in which it sees no basis to grant leave to proceed. Similarly, the Court of Appeal might be relieved of such a general duty where it is required to determine whether or not notice ought to be issued in Writ applications. It could be argued that a general duty to provide reasons may place an untenable burden on the court.

Third, judges should be expected to grant reasons if the case at hand, or the point on which a decision is made, is particularly important, and of precedential value. Admittedly a bright line cannot be drawn on what is important and what is not, for all cases are of importance as far as the litigant is concerned. Yet there appears to be an

²¹ An analysis of Supreme Court lists from 2017-2021 reveals that, on average, around 400 fundamental rights cases are filed each year.

exceptional principle that higher courts should uphold even when exercising discretionary jurisdiction. It may be an exceptional principle that applies even when decisions are made at the stage of granting or refusing ‘leave to proceed’ or issuing ‘notice’ in Fundamental Rights and Writ applications respectively. I next turn to the question of whether PIL cases meet this threshold of importance.

Public Interest Litigation

PIL involves litigation by persons on behalf of the general public. The term gained prominence in India following several landmark cases in which the Supreme Court of India recognised a petitioner’s standing to litigate in the public interest. For example, Justice Bhagwati in the case of *S P Gupta v Union of India*²² recognised that any member of the public or social action group acting in good faith can invoke the Writ jurisdiction of the High Courts or the Supreme Court seeking redress against the violation of rights of persons, who due to some material disadvantage cannot approach the court.

The Sri Lankan Supreme Court in the *Eppawela Case*²³ famously recognised the standing of the petitioners to litigate on matters that happen to be of interest to the public in general. The case concerned the environmental and

²² *S P Gupta v Union of India* AIR 1982 SC 149.

²³ *Bulankulame v Secretary Ministry of Industrial Development* [2000] 3 Sri LR 243.

economic impact of an agreement with the foreign mining company to mine phosphate. The respondents took up the objection that PIL cases are not permissible under the Sri Lankan Constitution, and that the petition should be dismissed on that basis. However, the Court held that ‘[o]n the question of standing,...the petitioners, as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court, [and] are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka’.²⁴ It added:

In the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners’ fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lankans, becomes relevant.²⁵

Since this case, numerous cases have been filed in the public interest, and the Courts have recognised both the standing

²⁴ *ibid* 258.

²⁵ *ibid*.

and the overall importance of PIL cases.²⁶ Importantly, in the landmark *Water's Edge Case*,²⁷ the Court connected PIL to the public trust doctrine. It suggested that the Judiciary, in the Exercise of its constitutional jurisdiction, has a particular duty to ensure that the public expectation that the State maintains high standards of efficiency and service is realised.²⁸ It has been rightly observed that these judicial sentiments indicate that PIL 'may be used as a tool to advance the interests of the economically underprivileged and the marginalised sections of society as has been the case in India'.²⁹

We may recall that, even if there is justifiable reticence about imposing a general and possibly burdensome duty on courts to give reasons for their decisions, courts can be expected to give reasons for their decisions in cases of public importance. In this context, it could be argued that PIL cases attract such a judicial duty. While 'public interest' may not be a separate cause of action, and PIL may not be a separate category of litigation in any formal sense, PIL cases certainly qualify as being of 'public importance'. First, the fact that many stakeholders, or the 'public at large' have a stake in the outcome of the case elevates its importance. In

²⁶ See for example, *Environmental Foundation Ltd. v Urban Development Authority* S.C. (FR) 47/2004; *Vasudeva Nanayakkara v K.N.Choksy and others* [2008] B.L.R. 23; *Mendis and others v Kumaratunge and others* [2008] B.L.R. 1.

²⁷ *Mendis and others v Kumaratunge and others* [2008] B.L.R. 1 at 7.

²⁸ *ibid.*

²⁹ R Goonetilleke, 'Public interest litigation: a species of direct democracy and good governance' [2014] 4 Sri Lanka Journal of Development Administration 83, 91.

this context, a duty to give reasons may be justified, as such reasons enable the public to better understand how the court has grappled with their interests. Members of the public have a legitimate interest in knowing the reasons for a decision when it impacts their interests. Second, it is plausible to think that the outcomes of such cases have precedential value. Reasons for a decision will also guide future courts on how to deal with similar issues of such public importance. Therefore, giving reasons for a decision promotes greater legal certainty, as it enables the public to ascertain the basis upon which similar cases will be decided in the future.³⁰

Presumably, the duty to give reasons would apply to any case if it were in fact relevant to the public interest. The public interest value of a case may be evident from the nature of the case, i. e., where the issue itself affects a substantial section of the population, and from the actual claims of the petitioners, i. e. where the petitioners claim in good faith that they are canvassing the issue in the public interest.

The question of whether or not a case falls within the ambit of ‘public importance’ will have to be determined by the court hearing the case. Although the threshold in this regard can be somewhat fuzzy, the jurisprudence discussed above suggests that it is not uncommon for courts to be called upon to determine the public interest value of a particular issue. There are also examples of statutory criteria involving the ‘public interest’, which courts are called upon to interpret

³⁰ This idea was enunciated in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279.

and apply in concrete cases. For example, the notion of ‘public interest’ is embedded in many right to information laws, including Sri Lanka’s own.³¹ Courts are required to determine which disclosures would have a public interest value and which would not. Therefore, the idea of ‘public importance’ can be a usable threshold in classifying a case, and courts may very well be accustomed to determining whether a case meets this threshold.

A Duty to Give Reasons in the Public Interest

There is little evidence to suggest that Sri Lanka’s Supreme Court recognises even a limited duty to give reasons for its decisions concerning PIL cases. I focus on a specific class of cases in this regard: PIL cases in which the Court decided not to grant the petitioners leave to proceed in their Fundamental Rights applications. The broader gamut of cases where the Court has had to pronounce on the merits of the case may not provide much insight into whether or not the Court recognises a duty to give reasons. The general practice of the Court has always been to set out its reasoning in a judgment on the merits of a case. It is at the stage of leave to proceed, and particularly when the Court decides to refuse leave to proceed that we might gain a better insight as to whether the Court assumes a specific duty to give reasons in PIL cases.

³¹ Right to Information Act, No. 12 of 2016 s 5(4).

In *Centre for Policy Alternatives v Secretary, Ministry of Defence and Others*,³² the petitioners challenged five new Regulations issued under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA) on 29 August 2011. The petitioners complained that the new regulations were *ultra vires* the PTA, and violated several of the people's Fundamental Rights guaranteed under articles 10, 11, 12 (1), 13 (1), 13 (2), 13 (5), 14 (1) (a), and 14 (1) (g) of the Constitution. The petitioners claimed that their Fundamental Rights application was being filed in their own interest and 'in the national and public interest'.³³

The context of the case clearly reflects its public interest dimension. The state of emergency in Sri Lanka had just been discontinued by then President Mahinda Rajapaksa. In place of the emergency regulations promulgated under the Public Security Ordinance, No. 25 of 1947, the government sought to issue these new regulations under the PTA. The petitioners alleged that a state of emergency in the country was *de facto* being continued through these regulations in violation of the Fundamental Rights of the people. It may be true that a clear line cannot be drawn in terms of which cases can be described as falling within the class of 'PIL'. Yet a case challenging new counterterrorism regulations would surely fall within this class. In fact, another petition was filed

³² *Centre for Policy Alternatives v Secretary, Ministry of Defence and Others*, S.C. (FR) 453/2011.

³³ *ibid* paragraph 4 of the Petition.

by the General Secretary of the political party, Illankai Tamil Arasu Kachchi challenging these new regulations.³⁴

After hearing counsel for the petitioners, the Supreme Court, presided over by Justice Shirani Bandaranayake, refused to grant leave to proceed. The merits of this decision is not relevant to the present chapter. When it occurred to counsel for the petitioners that the Court was about to refuse leave to proceed, he inquired from the Court as to whether it would be inclined to state any reasons for its decision in light of the public interest dimension of the case. In response, Bandaranayake J observed that the convention of the Court was not to state reasons when refusing leave to proceed in Fundamental Rights applications.

Bandaranayake J's observation appears to be generally aligned with the subsequent practice of the Supreme Court. For example, eight Fundamental Rights applications were filed challenging the President's decision to dissolve parliament in March 2020, and to call for an early election.³⁵ Once again, the public interest dimension of the case was scarcely in doubt. In fact, a bench of five judges including the Chief Justice was appointed precisely due to the fact that the matter was of public importance. After hearing the petitioners, respondents, and several intervenient petitioners over eleven days of oral submissions, the Court refused

³⁴ *Mavai Senathirajah v Secretary, Ministry of Defence and Others* S.C. (FR) 449/2011.

³⁵ *Centre for Policy Alternatives v Attorney General*, SC (F.R.) 86/2020.

leave to proceed. Incidentally, the Attorney General raised preliminary objections as to the maintainability of the petitions, and the majority of the Court overruled those objections. Yet, the Court neither provided reasons for overruling the objections nor for ultimately refusing leave to proceed.

More recently, the Court declined to give reasons for refusing leave to proceed in several Fundamental Rights applications complaining about the Government's policy of compulsorily cremating those suspected to have died of COVID-19. On 11 April 2020, the Minister of Health and Indigenous Medical Services issued Regulation 61A under the Quarantine and Prevention of Diseases Ordinance, No. 3 of 1897, and declared that 'the corpse of a person who has died or is suspected to have died, of Coronavirus Disease 2019 (COVID-19) shall be cremated'.³⁶ The new regulation had a direct bearing on the religious rites of Muslims, as the cremation of deceased persons is understood by many Muslims as contrary to Islamic teaching.³⁷ Accordingly, as many as eleven Fundamental Rights applications were filed in the public interest.

Following a lengthy hearing in which counsel both for and against Regulation 61A were heard, the Supreme Court refused leave to proceed in December 2020. Once again, no

³⁶ Gazette Extraordinary No. 2170/8, 11 April 2020.

³⁷ S Dawood and others, 'Memorandum on the Disposal of Bodies of Covid-19 Victims' [2020] Social Science Research Network.

reasons were offered for the decision.³⁸ Interestingly, one of the judges of the Supreme Court dissented, thereby suggesting that the Court was not unanimous in its decision to refuse leave to proceed. However, it is not known which judge dissented or why they differed from the majority, as no order containing reasons was issued by the Court.

Several questions arise with respect to these cases. First, the question arises as to whether the Court would have undertaken a particularly costly and onerous task had it opted to give reasons for refusing to grant leave to proceed. This question is perhaps difficult to answer given the fact that it would be the Court that ultimately understands its own workload.

Second, the question must be asked as to whether these cases were sufficiently important to warrant a duty being imposed on the Court to give reasons despite the potential cost involved. Undoubtedly, these cases concerned the interests of a large number of citizens in the country, many of whom belong to marginalised segments of society. The PTA regulations case, for instance, concerned scores of persons at risk of being detained under or otherwise impacted by the new regulations. The early dissolution of parliament and the announcement of a general election, particularly during a deadly pandemic, impacted the entire voting population in

³⁸ Centre for Policy Alternatives, 'Statement on Forced Cremations' (*Centre for Policy Alternatives*, 4 December 2020) <<https://www.cpalanka.org/statement-on-forced-cremations/>> accessed 31 December 2021.

the country. The forced cremation case concerned many citizens from the Muslim and Christian faiths, and who stood to be directly affected in terms of the practice of their religion. Therefore, even if it is difficult to draw a bright line between cases of public importance and cases that are not, these cases were undoubtedly within the class of PIL.

On the one hand, the ‘leave to proceed’ stage of a Fundamental Rights application might be considered a stage at which the judiciary exercises a certain level of discretion. It may consider the merits of a case only where it believes that there is at least a *prima facie* violation or imminent violation of a Fundamental Right. On the other, the ability to seek redress from the Supreme Court for an infringement of Fundamental Rights is in itself a *right* recognised under article 17 of the Constitution. Therefore, the discretionary nature of the ‘leave to proceed’ stage (if it may be considered discretionary at all) is certainly not analogous to special leave to appeal cases. In Fundamental Rights cases, the Supreme Court is undoubtedly exercising jurisdiction where the litigant has a constitutional right to canvass court.

The principle discussed in the previous section appears to be of some relevance to PIL cases. If the matter at hand is of sufficient importance—that is to say, if the underlying interests are sufficiently important—a duty can be imposed on the judge to give reasons for their decision. PIL cases would naturally satisfy this threshold and warrant such a duty to give reasons regardless of the fact that the Court was

deciding on whether a *prima facie* case had been established by the petitioners. Moreover, in cases where the Court is not unanimous in its decision to refuse leave to proceed, an added justification might be presented for the Court to set out its reasons and for the dissenting judge to do the same.

Third, the question must be asked whether the Court would have broken from its own convention had it given reasons for its decision to refuse leave to proceed in these cases. It is certainly true that the convention of the Court is for no reasons to be given when refusing leave to proceed. Yet there are instances in which the Court has in fact given reasons as to why it refused leave to proceed. Crucially, the Court has deviated from the norm when the matter at hand is particularly important. For example, in *Centre for Policy Alternatives and Another v Kabir Hashim and Others*, the Supreme Court offered limited reasons for refusing leave to proceed in a Fundamental Rights application that challenged the appointment of Sarath Fonseka to Parliament on the National List.³⁹ The United National Party (UNP) had sought to fill the vacancy created by the demise of the original Member of Parliament appointed under the National List. The petitioners argued that article 99A of the Constitution sets out the procedure through which National List seats would be filled after a general election. One of the requirements in this regard was that, prior to the election, the political party concerned submits (to the Election

³⁹ *Centre for Policy Alternatives and Another v Kabir Hashim and Others*, SC (F.R.) 54/2016.

Commission) a list of candidates who would be appointed to Parliament on the National List. The basis of the petitioners' challenge was that Fonseka was not named on the original UNP list and could not be appointed later on the occurrence of a subsequent vacancy. The issue at hand was clearly of public interest, and the Court thought it fit to include in its order a brief account of its reasons for refusing leave. It found that section 64(5) of the Parliamentary Elections Act, No. 1 of 1981 provided for a 'elaborate procedure with regard to the filling of vacancies in Parliament' and that it could not rely on article 99A, which only deals with the filling of vacancies soon after a general election.⁴⁰ In 2022, the Supreme Court heard a similar case where Dhammika Perera's appointment to Parliament on the National List was challenged.⁴¹ On that occasion, the Court simply referred to its previous decision in Fonseka's case and stated that it was refusing leave to proceed for the reasons set out in the previous case.

Another landmark case in which the Supreme Court decided to give reasons for refusing leave to proceed relates to Justice Shirani Bandaranayake's appointment to the Supreme Court in 1996.⁴² Several Fundamental Rights applications were filed challenging the appointment. After

⁴⁰ *ibid* 3.

⁴¹ *Centre for Policy Alternatives (Guarantee) Ltd., and Dr. Paikiasothy Saravanamuttu v Sagara Kariyawasam, General Secretary, Sri Lanka Podujana Peramuna*, SC (F.R.) 203/2022.

⁴² *Edward Francis William Silva, President's Counsel and Three Others v Shirani Bandaranayake and Three Others* [1997] 1 Sri LR 92.

hearing all the petitioners, the Court decided to refuse leave to proceed. However, Fernando J and Perera J penned fairly lengthy orders setting out the reasons for the Court's decision. The Court explained why it found that the petitioners had not established a *prima facie* case that their Fundamental Rights under articles 12 (1), 14 (1) (a) and 14 (1) (g) of the Constitution had been violated by the appointment of the 1st respondent. The Court did not explain exactly why it thought it necessary to set out its reasons for refusing leave to proceed in this case. However, it did allude to its thinking when it acknowledged that a bench of seven judges had been appointed because the petitions 'involved questions of general and *public importance*' (emphasis added).⁴³ It would appear that in the Court's mind, the case raised questions of public interest, and had a public interest dimension. Therefore, even if it was going to refuse leave to proceed, it thought it appropriate to set out the reasons for refusing leave to proceed. Not one but two opinions were penned in this respect, thereby establishing a strong exception to the general practice of not giving reasons for refusing leave to proceed.

What we learn from the Bandaranayake Appointment Case is that the Court has on occasion recognised the need to furnish reasons for its decision—even at the leave to proceed stage—when the issue at stake is of some public importance. The break from the norm is wholly insufficient to firmly establish a precedent for the judicial duty to give reasons.

⁴³ *ibid* 92.

Yet it offers a crucial counterpoint to the notion that judges need not give reasons for their decisions in PIL cases. It seems that the Court itself has, through its own actions, recognised that it ought to give reasons when dealing with questions of public importance. If indeed this ideal is reflected in judicial practice more regularly, it is entirely possible that a limited judicial duty to give reasons in PIL cases would eventually be recognised. Such a duty would serve to enhance public confidence in judicial reasoning even when unfavourable decisions are made, and it would serve as important guidance for future cases.

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Judicial Review and Laws of Exception in Sri Lanka: A story of exclusion and impotency

Ermiza Tegal and Shalomi Daniel

Introduction

Sri Lanka's post-independence years were largely under declared states of emergency. Consecutive communal riots, insurrections and a three decade long civil war has seen this country in a permanent state of crisis.¹ Heightened national security has been part and parcel of the form of governance experienced by people of this country.

Sri Lanka has enacted several laws with the objective of national security.² The longest running, a piece of colonial

¹ Refer R Coomaraswamy and C de los Reyes, 'Rule by Emergency: Sri Lanka's Post- colonial Constitutional Experience' [2004] 2(2) International Journal of Constitutional Law 272.; A Welikala, *State of permanent crisis: Constitutional government, fundamental rights and states of emergency in Sri Lanka* (Centre for Policy Alternatives 2008) ; D Udagama, *An Eager Embrace: Emergency Rule and Authoritarianism in Republican Sri Lanka*. in A Welikala (ed), *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (Centre for Policy Alternatives 2015).

² Public Security Ordinance No.25 of 1947; Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979; Offences Against Aircraft Act No. 24 Of 1982; SAARC Regional Convention On Suppression Of Terrorism Act No. 70 Of 1988; Prevention And Punishment Of Crimes Against Internationally Protected Persons No. 15 Of 1991; Suppression Of Unlawful Acts Of Violence At Airports Serving International Civil Aviation No. 31 Of 1996; Suppression Of Terrorist Bombings Act, No. 11 Of 1999; Prevention Of Hostage Taking No. 41 Of 2000; Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation No. 42 Of 2000; Convention On The Suppression Of Terrorist Financing Act No. 25 Of 2005; Financial Transactions Reporting Act No. 6 Of 2006; Prevention Of Money Laundering No. 5 Of 2006; International Covenant on Civil and Political Rights Act No. 56 of 2007; Chemical Weapons Convention No.58 Of 2007

legislation, is the Public Security Ordinance 1947 (PSO) under which during declared states of emergency, emergency regulations (ERs) were promulgated by the President. The other is the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA). Both these laws, endowed with very broad powers, particularly of arrest and detention, are the subject of this paper.

This study of judicial responses to these security laws is undertaken with an understanding of the constitutional design of the judiciary in the background. By design, Sri Lanka's Judiciary is a weak check on the Executive. The head of Judiciary, the Chief Justice, is by design directly appointed by the President. From 1978 to 2015, the Judiciary lacked jurisdiction to hold the all-powerful Executive President, in which office the subject of national security is vested, accountable. Fundamental Rights challenges are further restricted in a practical sense by the imposition of a strict time bar of 30 days and the Supreme Court having sole jurisdiction to hear such application being geographically based in Colombo. The Sri Lankan judiciary also cannot scrutinise enacted law for consistency with the Constitution. The only power of judicial review over legislation is pre-enactment.³

³ This too has been curtailed by arbitrary overuse of provisions allowing the passing of 'urgent bills' giving the Supreme Court a mere three days to review urgent bills for consistency with the constitution.

It is within these limitations that the Sri Lankan Judiciary has developed a light body of jurisprudence in relation to these laws of exception, the PSO and the PTA.

This paper takes a look at how the superior courts, the Supreme Court and Court of Appeal, have protected Fundamental Rights in negotiating the widely couched powers of the Executive in the PTA and ERs.

States of emergency and the Prevention of Terrorism Act

The power to declare a state of emergency and promulgate emergency regulations is vested in the President by the PSO.⁴

A state of emergency was first declared in Sri Lanka on 1st June 1958.⁵ The second declaration of emergency was in the early 1970s, in response to the armed insurrection at the time. A little more than a decade later, in 1983, Sri Lanka's longest period of emergency rule commenced. This was in response to the Liberation Tigers of Tamil Eelam (LTTE) beginning a struggle for a Tamil homeland in the North and the second JVP led insurrection in the South. Except for brief intervals, a state of emergency was in place from 1983 till

⁴ Section 2 states that the purpose of such a declaration is that it is "*in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community,...*"

⁵ KKS Perera, '1958 under fire' *Daily News* (Colombo, 24 January 2018) <<http://www.dailynews.lk/2018/01/24/features/140799/1958-under-fire>> accessed 31 December 2021.

2011 mainly in response to the war. It was lifted two years after the end of the war in May 2009. There have since been two very recent instances of states of emergency. One was in April 2019, following the Easter Sunday attacks⁶ and the second on 30th August 2021 in a purported attempt to address food shortages and ensure supply of essential food items.⁷ The Centre for Policy Alternatives (CPA) challenged the state of emergency declared in April 2019.⁸ However, as the state of emergency lapsed on 22nd August 2019, having been in place for four months, no determination was made by the court. Similarly, the state of emergency declared on 30th August 2021 lapsed without extension at the end of one month.

The sweeping powers under ERs have historically been used to “requisition property and personal services; to control meetings, processions, publications, and firearms; to supervise, arrest, and detain individuals; and to influence investigations and trials.”⁹

The PTA was introduced as an urgent bill with the Supreme Court being given a mere 24 hours to determine the

⁶ Gazette Extraordinary No. 2120/3 (22 April 2019) <http://documents.gov.lk/files/egz/2019/4/2120-03_E.pdf> accessed 31 December 2021.

⁷ Gazette Extraordinary No. 2244/16 (9 September 2021) <http://documents.gov.lk/files/egz/2021/9/2244-16_E.pdf> accessed 31 December 2021.

⁸ *Centre for Policy Alternatives v Attorney General* S.C. (FR) 199/2019 <<https://www.cpalanka.org/centre-for-policy-alternatives-v-attorney-general-sc-fr-199-2019/>> accessed 31 December 2021.

⁹ See (n4)

constitutionality of the proposed law.¹⁰ The bill was debated and passed in Parliament within a single day.¹¹ Accordingly, the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 was enacted as a temporary measure to address purported threats to a unified Sri Lanka. Thereafter, in 1982, the PTA was amended to become a permanent law.

The PTA introduced several deviations from procedures in the criminal law relating to arrest, detention, admissibility of evidence, etc.¹² The departure from such existing standards and safeguards were sought to be justified on the grounds that the PTA was necessary to respond to terrorist activities that were a threat to national security and to the life and safety of citizens.

¹⁰ K Pinto-Jayawardena, G Gunetilleke and P Abeywickreme, *Authority without accountability: the crisis of impunity in Sri Lanka* (International Commission of Jurists 2012).

¹¹ N Manoharan, *Counterterrorism legislation in Sri Lanka: Evaluating Efficacy* (East-West Centre 2006).

¹² For instance, the PTA removes the safeguard stipulated in the ordinary criminal procedure that a person arrested ought to be produced before a Magistrate within 24 hours and permits a person to be kept in the custody of the police for up to 72 hours or where a detention order is issued for a person to be kept in administrative, as opposed to judicial, custody without being produced before a Magistrate for a maximum period of 18 months (Section 9(1)). Moreover, whilst ordinary criminal procedure does not allow confessions made to police officers to be admitted as evidence under the Evidence Ordinance, confessions made by persons arrested under the PTA to a police officer above the rank of Assistant Superintendent of Police (ASP) are admissible (Section 16).

Limited Parliamentary oversight over these national security laws

For declarations of states of emergency and consequent emergency regulations, the PSO by Sections 2 (3) and 2 (4) requires that the proclamation be communicated to Parliament forthwith and that unless Parliament approves the proclamation of emergency it will lapse after 14 days. Article 155 (6) of the Constitution also stipulates that the extension of a state of emergency beyond a period of 14 days requires the approval of Parliament and that the state of emergency may be extended beyond the initial one month, only with the approval of Parliament. For each subsequent month that the state of emergency is extended, Parliamentary approval is required. Further, Section 5 (3) of the PSO empowers Parliament to amend or revoke emergency regulations.

In practice, this Parliamentary check has often proved ineffective. Parliaments have not exercised the power to abstain from approving the extension mainly because majorities in Parliament are the ruling party of the day, which is often also the political party of the President.

Even these limited checks do not apply to the PTA or the regulations under the PTA. The PTA is not subject to recurring Parliamentary scrutiny or approval, and regulations under the PTA can be promulgated by the President, without Parliamentary approval. However, regulations under the PTA may be challenged in Court.

A Tussle Over Exercising Judicial Review

Judicial review of the application of national security laws ensures that fundamental and universally accepted human rights are protected. It acts as a check on the exercise of power by the Executive.¹³ The PSO contains clauses ousting judicial review over declarations of a state of emergency.¹⁴ The PTA contains clauses removing review over detention orders and restriction orders.¹⁵ These ouster clauses operate as a direction by Parliament on the Judiciary. As such full judicial oversight and requirement to give notice of derogations from full protection of rights due to emergency situations, required by international standards is not found in the country's domestic law.¹⁶

¹³ International Commission of Jurists, 'Sri Lanka: Briefing Papers; Emergency laws and international standards' (*International Commission of Jurists, 2009*) <<https://www.icj.org/wp-content/uploads/2012/05/SriLanka-emergencylaws-advocacy-2009.pdf>> accessed on 31 Decemeber 2021.

¹⁴ Section 3 of the PSO provides that "Where the provisions of Part II of this Ordinance are or have been in operation during any period by virtue of a Proclamation under section 2, the fact of the existence or imminence, during that period, of a state of public emergency shall not be called in question in any court." Section 8 provides "*No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.*" Section 21(3) provides: "*An Order made under section 12 [calling out the armed forces] section 16 [curfew], or section 17 [essential services] or the circumstances necessitating the making of such Order, shall not be called into question in any court.*"

¹⁵ The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 s 10 and 11(5).

¹⁶ K Pinto-Jayawardena and others (n10) 30; Article 4 of the ICCPR read with General Comment No. 29, reiterates that "In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."

The jurisprudence of the superior courts wavers on whether it rejects ouster clauses particularly when invited to review infringements of Fundamental Rights. In 1987, in the case of *Joseph Perera Alias Bruten Perera v The Attorney General*¹⁷ the Court held that an individual's Fundamental Rights took precedence over Section 8 of the PSO, which ousted the jurisdiction of courts to review detention orders. This approach is tempered by the decision in *Wickremabandu v Herath and Others*,¹⁸ the court stated "...we are of the view that Section 8 of the Public Security Ordinance and Regulation 17 (10), which provides that such an order shall not be called in question in any court on any ground, do not affect our jurisdiction" before relying on the concept of reasonableness to review the restriction itself.

Similarly, when adjudicating a case under the PTA, the Court in *Dissanayaka v Superintendent Mahara Prison and others*,¹⁹ emphasised the importance of judicial oversight, for arrests and detentions made, especially against the context of the PTA providing for arrests without warrant.²⁰

¹⁷ [1992] 1 Sri L.R. 199

¹⁸ [1990] 2 Sri LR 348.

¹⁹ [1991] 2 Sri LR 247

²⁰ The Court held "The Court will not surrender its judgement to the executive for if it did so, the fundamental right to freedom from arbitrary arrest secured by Article 13(1) of the Constitution will be defeated. The executive must place sufficient material before the Court to enable the Court to make a decision, such as the notes of investigation, including the statements of witnesses, observations etc. without relying on bare statements in affidavits."

However, attempts at challenging the legitimacy of ERs issued under the PSO have proved unsuccessful. In successive cases, the Court consistently deferred to the Executive and upheld the validity of ERs. In 1966, in the case of *S. Weerasinghe v G. V. P Samarasinghe and Others*,²¹ the Supreme Court held that regulations issued under the PSO were *intra vires*. In 1971, despite the obvious challenges faced by a person when undertaking to prove *mala fides* on the part of the Executive, the Court held in the case of *Hirdaramani v Ratnavale*,²² that a detention order issued by the defence secretary in good faith, cannot be questioned. A similar stance was adopted by the Court even ten years later in 1982, in the case of *Yasapala v Wickremasinghe*,²³ where the President's discretion to proclaim national emergency was not permitted to be challenged, in the absence of *mala fides*.

These decisions echo the impunity from criminal action afforded to public officials for acts done in good faith, as per Sections 9 and 23 of the PSO. However, it is important to note that such immunity is contrary to international standards, such as provided in General Comment 20 of the UN Human Rights Committee, read with Article 7 of the ICCPR.²⁴

²¹ [1966] NLR 361

²² 75 NLR 67

²³ [1982] F.R.D. (1) 143

²⁴ K Pinto-Jayawardena and others (n10) 30.

In 1999, in a landmark decision in the case of *Karunathilaka and Another v Dayananda Dissanayake, Commissioner of Elections and Others Case No. 1*,²⁵ the Court invalidated ERs. The ERs sought to circumvent the bar against postponing Provincial Council elections, as the terms of office for five Provincial Councils were to lapse. A state of emergency was declared in an effort to suspend the holding of elections. However, the court held that the regulation lacked the character of an ER and hence was not authorised in law. The Court went on to state the regulation was further invalid, as there was no reasonable nexus between the purpose of the regulation and the national emergency in the absence of a threat to national security in the areas the regulations covered. Thus, the Judiciary in this instance was an effective check on the Executive, in the face of attempts to exploit Executive powers and curtail the democratic exercise of regular elections.

In the 2005 case of *Ragulan v Attorney General*²⁶ the Supreme Court delved into the purpose of the PTA and considered how the provisions of the PTA ought to be interpreted against this purpose. Court stated that the PTA was enacted “to establish and maintain the rule of law and dispel the threat of anarchy” and hence should be accorded the “widest possible meaning.” The accused in this case was charged with being a member of the LTTE organisation and undergoing weapons training, an offence punishable under

²⁵ [1999] 1 Sri LR 157.

²⁶ [2006] 3 Sri LR 253

section 2 (2) (II) read with 2 (1) (h) of the PTA.²⁷ The conviction was based on a confession. The Court determined that weapons training would fall under the scope of Section 2(1) (h), even though the provision related to causing violence or religious or racial disharmony or feelings of ill will between different groups by use of words or signs.²⁸

However, the judiciary failed to exercise similar scrutiny in 2011, when the CPA and the Tamil National Alliance sought to challenge the validity of the 2011 PTA regulations relating to detainees, purported ‘surrendees’ and local authorities. The regulations were designed to carry forward the legal framework of suspended rights under the ERs by enacting the same framework under the PTA. The Supreme Court did not grant leave to proceed and did not provide any reasons for its decision.²⁹

Tracing the jurisprudence of court on the question of exercising jurisdiction or not, one can see that it has been a back and forth exercise, with the *Ragulan* decision being the largest concession made. This wavering stance may be also

²⁷ Section 2(1)(h) imposes criminal liability upon any person who: “...by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups...”

²⁸ The Court stated that the *eiusdem generis* rule does not apply in this case as weapons training is undertaken to cause acts of violence against the state. Therefore, the words “or otherwise” was construed as providing a broader offence and would constitute any act done either to “cause or intended to cause the commission of acts of violence . . .”

²⁹ K Pinto-Jayawardena and others (n10).

attributed to thinking of judges occupying the bench at various times. The inconsistency itself demonstrates the opportunity for a wide range of interpretations and highlights the tensions felt by the judiciary when faced with interpreting national security laws.

A jurisprudence of limited procedural safeguards relating to arrests

All persons in Sri Lanka are guaranteed by the Constitution freedom from arbitrary arrest.³⁰ The constitution also sets out the limits³¹ and circumstances under which this Fundamental Right may be restricted. This section traces the jurisprudence of the Supreme Court on arbitrary arrest under ERs and the PTA. It finds that the Court has, in moving back and forth on the scope of review over the Executive, developed a line of authority that introduces certain safeguards by insisting on basic preconditions for arrests of persons.

The Supreme Court reviewed the power of arrest of persons without a warrant under the ERs, in 1972 in the *habeas*

³⁰ Article 13(1) of the Sri Lankan constitution states “No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.”

³¹ Article 15(7) provides “...subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph “law” includes regulations made under the law for the time being relating to public security.”

corpus case of ***Gunesefera v De Fonseka***.³² The Court held that an arrest can only be effected if the arresting officer had reasonable grounds to suspect an offence was committed. Further, the Court held that an arrest will be deemed unlawful, if such arresting officer was personally unaware of, or not in possession of information regarding the alleged commission of offence.

However, subsequent decisions of the Court scaled down on some of the safeguards put in place with regards to such arrests.

In 1972, in the case of ***Gunesefera v Ratnavale***³³ the Supreme Court demonstrated a reluctance to adjudicate on arrests made under emergency regulations, thus depriving arrests of judicial oversight. The Court was content to allow the Executive to exercise absolute discretion in effecting arrests under ERs. In this case, the Court stated that any order under Regulation 18 (1) of the ERs of 1971 should not be called into question in any Court on any ground whatsoever. Further, the Court held that unless there was proof of any ulterior motive or collateral purpose influencing the detention orders of the Permanent Secretary, all such detention orders will be considered *ex facie* valid and executed in good faith.

In 1986, the Court of Appeal in ***Susila de Silva v Weerasinghe***,³⁴ in a complete reversal of the Supreme

³² 75 NLR 246

³³ 76 NLR 316

³⁴ [1987] 1 Sri LR 88

Court's decision in *Gunasekera v De Fonseka*³⁵ held that an arresting officer was not required to have first-hand knowledge regarding the commission of an offence. The Court accepted reliance on statements made by others as adequate grounds for undertaking an arrest. Further, in determining if the detention orders were valid, the Court did not entertain any doubt as to the bona fides of the arrest, as the petitioner's affidavit did not allege that the arrest was maliciously motivated.

In the early 1990s, however, the Court revived scrutiny over the arbitrariness of arrests under ERs. For instance, in the cases of *Wickremabandu v Herath*³⁶ and *Seetha Weerakoon v Mahendra O.I.C. Police Station, Galagedera and Others*³⁷ Court held that not only should reasonable grounds be present for arrest, but that such material to objectively assess such reasonable grounds should also be produced to the Court. In contrast to its stance in preceding years, the Supreme Court appeared willing to exercise some judicial oversight over Executive actions.

The Court regressed just a year later however, in the case of *Chandra Kalyanie Perera v Captain Siriwardena and Others*.³⁸ The Court refused to analyse material placed before it regarding reasons for arrest and stated that Court could only decide on whether there was sufficient material

³⁵ 75 NLR 246

³⁶ [1990] 2 Sri LR 348

³⁷ [1991] 2 Sri LR 172.

³⁸ [1992] 1 Sri LR 251.

to substantiate the arrest, thus ceding more control to the Executive once more.

However, several decisions a few years later saw the superior courts move away from its position in *Chandra Kalyanie*. These decisions also underscored the importance of informing the arrestee of the reasons for her arrest.

In *Channa Peiris and others v Attorney General and others*,³⁹ the Court echoed some of its previously progressive decisions and emphasised that the officer making the arrest, needs to have reasonable grounds for suspecting the persons to be concerned to be committing or to have committed the offence. Such reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both. The Court reiterated that a person being arrested must be informed of the reason for his arrest at the moment of the arrest, or at the first reasonable opportunity.

Similarly, *Vinayagamoorthy, Attorney-At-Law (On Behalf of Wimalenthiran) v the Army Commander and Others*⁴⁰ a few years later, reiterated the importance of providing reasons for arrest, as essential to enable the arrestee to defend herself or take steps towards her release. Moreover, Court held that what should be considered is whether "...at the time of the arrest the person was committing an offence,

³⁹ [1994] 1 Sri LR 1

⁴⁰ [1997] 1 Sri LR 113

or that there were reasonable grounds for suspecting that the person arrested was concerned in or had committed an offence.” Arrest on a vague suspicion, hoping that some evidence would eventually turn up was held to be arbitrary arrest.

In the case of *Sirisena Cooray*⁴¹ Court elaborated on what constitutes a reasonable decision. Court held that a decision backed by good reasons, evaluation of the facts, and excluding irrelevant considerations, caprice or absurdity, would amount to a reasonable decision to arrest. The Court further underscored that the Defence Secretary should arrive at a decision based on independent and impartial information.

In *Padmanathan v Sub Inspector Paranagama*⁴² the failure on the part of the Respondents to inform the individual arrested, of the reasons of his arrest and the failure to demonstrate that there was a reasonable suspicion on the grounds on which the arrest was effected, resulted in the Court holding that such arrest was “arbitrary, capricious and unlawful” and hence a violation of Article 13 (1) of the Constitution.

The Court reiterated the importance of providing reasons for detention, in matters brought before it under the PTA as well. Thus, in *Weerawansa v AG (2000)*⁴³ Court emphasised that not informing the Petitioner of the reason for the

⁴¹ [1997] 3 Sri LR at 286–87

⁴² [1999] 2 Sri LR 225

⁴³ [1990] 2 Sri LR 348.

deprivation of his personal liberty amounted to arbitrary arrest. Further, the Court held that the failure to notify the Human Rights Commission regarding the transfer of the petitioner's detention to customs violated Article 13 (1).

It is observed that the superior courts, whilst maintaining that the Executive is vested with absolute discretion, have overtime laid down some procedural safeguards surrounding arrests made especially under ERs. Courts have determined that the failure to provide reasons for arrests, carrying out arrests on the mere hint of suspicion without reasonable and material grounds, and failure to apprise court that material exists for forming a reasonable suspicion of a connection to an offence for arrest, amounts to arbitrary arrest.

A jurisprudence of safeguards relating to detention

The Sri Lankan constitution sets out the freedom from arbitrary and illegal detention as a Fundamental Right.⁴⁴ This is also recognised in international legal instruments.⁴⁵

⁴⁴ Article 13(2) of the Constitution provides that *"Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or of liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."*

⁴⁵ Article 9(1) of the International Convention on Civil and Political Rights states that: *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."* Article 9(4) further states that *"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."*

This section explores how superior courts in Sri Lanka have interpreted the freedom from arbitrary detention in light of Sri Lanka's national security laws.

In early decisions, the Supreme Court adopted a conservative approach on review of detention orders. In 1971, in the case of *Hirdaramani v Ratnavale*,⁴⁶ the Supreme Court held that a detention order issued by the Permanent Secretary at that time in 'good faith' under the then Regulation 18 (1) was not justiciable.

In later decisions the Court required well substantiated and objective reasons for detention of persons under ERs. For instance, in 1985, the Court emphasised the importance of furnishing the reasons for detention and providing the opportunity to object to such detention such as in *Nanayakkara v Perera*.⁴⁷

In 1993, in *Chandrasiri v Gen. Cyril Ranatunga and Others*,⁴⁸ the Court held that the failure to submit to Court, notes of investigation, intelligence reports etc., on the basis of which the detention order was purportedly made, and the lack of a justifiable reason for not tendering such proof, failed to demonstrate to Court that the detention order was required to prevent the petitioner from acting in a manner prejudicial to national security. The Court further held that obtaining a preventive detention order on the grounds that

⁴⁶ 75 NLR 67

⁴⁷ [1985] 2 Sri LR 375

⁴⁸ [1993] 1 Sri LR 104

investigations were not complete, was not a valid ground and hence the detention was considered invalid.

Channa Peiris and other v Attorney General and others,⁴⁹ demonstrated the Court's attempts to balance judicial oversight over executive actions. While Court held that preventive detention could not be effected to complete investigations, Court also opined that the failure to provide the petitioners with copies of the detention orders does not infringe any constitutional right.

In 1997, in *Sunil Kumar Rodrigo (on behalf of B. Sirisena Cooray) v Chandananda de Silva and Others*⁵⁰ the Supreme Court was called to make a decision on a detention order under Regulation 17 at that time.⁵¹ The Court set out certain limitations on the Executive with regards to detention orders. Court held that actual, available material should be considered, that the decision to detain should be arrived at independently by the Defence Secretary and not merely based on recommendations made by others. Further, detention orders must give specific reasons as to how the detainee poses a threat to national security and hence justifies detention.

⁴⁹ [1994] 1 Sri LR 1

⁵⁰ [1997] 3 Sri LR 265

⁵¹ Regulation 17 provided that the Defence Secretary may make a detention order upon being satisfied that "*the detention is necessary to prevent an individual from undertaking acts posing a threat to national security, endangering provisions of essential services, or committing, aiding, or abetting the commission of specified offenses.*"

Similarly, in *Gamini Perera, Attorney-At-Law (On Behalf of Saman Srimal Bandara) v W. B. Rajaguru Inspector General of Police and Others*⁵² the Supreme Court held that a detention order was invalid as it did not contain important details such as the period of detention.

However, in May 2000, the wording of the regulation was amended⁵³ to state that instead of having to produce evidentiary material to justify detention, it would suffice if the Defence Secretary was of the opinion that the detention was necessary, thus further consolidating the powers of the executive.

In *Padmanathan v Sub Inspector Paranagama*⁵⁴ Court held that the Petitioner's Fundamental Right under Article 13 (2) was violated as the Respondents failed to produce the detainee before the nearest Magistrate for three days. The Respondents' argument that the arrest was under Section 6 (1) of the PTA and hence that the person arrested can be detained for up to 72 hours prior to being produced, was not accepted by Court on the basis that the arrest was not duly effected under Section 6 (1), and hence cannot be afforded the 72 hours window.

In 2000, in *Weerawansa v Attorney General*⁵⁵ detention under the PTA was considered unlawful, as no material was

⁵² [1997] 3 Sri LR 141

⁵³ Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2000 as promulgated in Gazette 1130/8 of 3 May 2000.

⁵⁴ [1999] 2 Sri LR 225

⁵⁵ [1990] 2 Sri LR 348.

placed justifying reasonable suspicion of unlawful activity and the order was made on the ground that the petitioner was concerned in the illegal importation of explosives in respect of which there was no material at all. The Court further held that "Not only must the Minister of Defence subjectively have the required belief or suspicion, but there must also be objectively, 'reason' for such belief."

Court made reference to Sri Lanka's international obligations in emphasising that the detainee should be brought before a Magistrate following arrest.⁵⁶

The Court also elaborated on the importance of producing the Petitioner before a judicial officer on the grounds that such judicial officer would be able to record the detainee's complaints, his own observations including any ill - treatment, the failure to provide medical treatment, the violation of the conditions of detention prescribed, the infringement of the detainee's other legal rights, etc.⁵⁷

Thus, over time a body of case law has developed, introducing a framework of safeguards on the executive

⁵⁶ Court stated that "such production is also required by Article 9 of the International Covenant on Civil and Political Rights (ICCPR) (as well as the First Optional Protocol) to which Sri Lanka is a party and which should be respected in terms of Article 27(15) of the Constitution."

⁵⁷ The Court further emphasised that "the suspect must be taken to where the nearest competent judge is, or that judge must go to where the suspect is, and the suspect must have an opportunity to communicate with the judge. If those conditions are not satisfied, the judge would have no jurisdiction in respect of that suspect, to make a remand order."

when issuing detention orders. Court has required that decisions with regards to detention be made based on a careful consideration of facts, that reasons for detention be informed to the detainee post haste, and that the detainee be produced before a Magistrate within the stipulated time frame.

Glimmers of protection of freedom of expression

The Executive has often attempted to stifle or stifled freedom of expression under the name of national security. Superior courts have in early cases been unwilling to exercise review over such infringements in contexts of national emergency. Jurisprudence has since moved in the direction of some review.

In ***Visuvalingam v Liyanage***⁵⁸ regarding the shutdown of a newspaper under ERs, the Court held that restricting the freedom of expression during national emergency was the state's prerogative against which judicial review should not be applied.

Overtime, the judiciary has taken a more progressive approach. A decade after *Visuvalingam*, the Court in a landmark judgment in ***Joseph Perera v the Attorney General and others***⁵⁹ upheld the guarantee of freedom of expression. Members of the Young Socialists of the

⁵⁸ [1983] 2 Sri LR 311

⁵⁹ [1992] 1 Sri LR 199

Revolutionary Communist League were detained for issuing a leaflet criticising the government at that time. The Court held that fundamental rights, including freedom of speech and expression, can be restricted only if an intimate and rational connection to the state of emergency can be demonstrated. Chief Justice Sharvananda emphasised that the freedom of expression, even during a state of emergency, comprises discussion of governmental affairs, untrammelled media publication, and censuring government actions. Restriction can be imposed only if there was a clear tendency to undermine state security or public order, or to incite commission of an offense.

Two years later in *Channa Peiris and others v Attorney General and others*,⁶⁰ Court recognised the right to criticise the government. The Court held that the mere fact that there was a "call to 'topple' the President or the Government *per se* could not be taken to mean that violence will be employed. The arrest of the petitioners and the restriction of their freedom of expression, were considered an infringement of their fundamental rights.

In *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and others*,⁶¹ the Court reverted to its position in *Visuvalingam* echoing much of the reasoning in that case. On the one hand, the Court recognised the importance of the freedom of expression and even the right to information.

⁶⁰ [1994] 1 Sri LR 1

⁶¹ [2000] 1 Sri LR 314

In *Leader Publications (Pvt.) Ltd. v Ariya Rubasinghe, Director of Information and Competent Authority and Others*⁶² Court adopted a narrow technical approach to prevent ERs from restricting the freedom of expression and free media. Without scrutinising the constitutionality of restricting free media and freedom of expression, and the basis of such restriction, the Court merely considered whether the correct procedures had been followed. Accordingly, the Court held that as the ‘Competent Authority’ had not been specifically named in this instance, the orders of the Respondent purporting to be that of the competent authority, were not valid.

The above are robust decisions within the confines of the law. In the cases of *Joseph Perera* and *Channa Peiris*, dissent was recognised as legitimate expressions regardless of emergency, and in *Sunila Abeysekara*’s case the right to information recognised as part and parcel of expression. The hesitancy in commenting on Executive acts and their consequences is visible in the cases of *Sunila Abeysekara* and *Leader Publications* in which the focus was procedural propriety. It is an approach of bold moments while colouring within the lines.

It is interesting to note that in recent years, governments have deployed multiple measures to curb expression including the arbitrary use of Section 3 of the International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007 enacted to penalise hate speech and the incitement

⁶² [2000] 1 Sri LR 265

of violence, discrimination or hostility.⁶³ In this context of normalising exceptions to freedom of expression and increased Executive transgressions of this right, whether the superior courts will respond with full and unflinching exercise of its power of review, is to be seen.

Weak judicial review over procedural lapses

Superior courts have from time to time failed to address procedural impropriety or lapses when the circumstances involve national security laws. Lapses have been dismissed as mistakes and these courts have drawn over such lapses the veil of legal protection afforded to good faith measures.

For instance, in ***Wickremabandu v Herath and others***,⁶⁴ in the police's alleged involvement in an incident that took place after the arrest, the court chose to consider this as a mistake that was not fatal for the case. Further, although subsequent detention orders were not justified, and though this detention was considered unlawful by the court, in ordering compensation, the Court did not make an order for compensation against the Respondent personally, as the Court considered that the Respondent acted in good faith.

⁶³ A Wipulasena, 'Abuse of ICCPR has 'chilling effect' on fundamental freedoms' *Sunday Observer* (Colombo, 16 June 2019) <<http://www.sundayobserver.lk/2019/06/19/news-features/abuse-iccpr-act-has-%E2%80%98chilling-effect%E2%80%99-fundamental-freedoms>> accessed 31 December 2021.

⁶⁴ S.C. (Appeal) 27/1988.

In *Vinayagamoorthy, Attorney-At-Law (On Behalf of Wimalenthiran) v the Army Commander and Others*⁶⁵

Court also dealt with the issue of disappearances, stating that “In order to prevent or minimise disappearances or abuses” procedural requirements in the regulations should be adhered to strictly, in order to uphold personal security and liberty of all persons. The importance of custody being under a civil authority such as the police, instead of the military was underscored in this case. The Court also stated that it is best secured when custody is under judicial authority in an approved prison where chances of abuse are deemed to be less, as prison authorities do not have a vested interest in securing a conviction.

However, Court held that Regulation 17 (9) which enables the Secretary to deprive a detainee of the right to make representations to the President and the Advisory Committee, was unreasonable in the circumstances and *ultra vires*. The Court made recommendations on representations and emphasised that such recommendations were not being made of its own volition, but solely on the invitation of the Attorney General. Overall, the Court showed great reluctance to recommend strong procedural safeguards.⁶⁶

⁶⁵ [1997] 1 Sri LR 113.

⁶⁶ The recommendations made by the Court comprised some degree of judicial supervision for instance, as to the place and conditions of detention seem desirable, some provision designed to ensure the independence and objectivity of the members of the Advisory Committee seems desirable, prompt notification of the reasons for detention, subject to the interests of national security, and

In 2010, the Supreme Court adjudicated upon an instance where the relevant authorities had recommended the forfeiture of property on the grounds that such property was being used for “committing an offence and for illegal activities.”⁶⁷ Such forfeiture was carried out under Regulation 7 (1) of the Emergency (Proscription of the Liberation Tigers of Tamil Eelam) (sic) Regulations 2009. However, it transpired in Court that such recommendation for forfeiture was based on unsubstantiated allegations, and that a proper inquiry into such allegations had not been held prior to forfeiting such property, in accordance with the procedure established under the said Regulations. Therefore, the Court held that the 1st to 3rd and 7th Respondents “acted in total disregard of the essential requirements of justice” in recommending the forfeiture of the property in question. However, the Court took the position that there did not appear to be any malicious intent and hence no order was made for the Respondents to personally pay compensation. Instead, the State was directed to pay Rupees five hundred thousand (Rs.500, 000/=) as compensation to the Petitioner.

Torture and Forced Confession

This section traces the extent to which the Fundamental Right to be free from torture has been interpreted in situations of national security. The laws of evidence under Sri Lankan general law, allow confessions to be admitted as

some limitation of the overall period of detention, under successive Detention Orders, together with an element of judicial control.

⁶⁷ S.C. (FR) 15/2010.

evidence only in very limited circumstances. Section 24 (1) of the Evidence Ordinance No. 14 of 1895 provides that confessions made under inducement, threat or promise cannot be admitted. Further, subsequent provisions of the Evidence Ordinance state that confessions made to a Police officer, or while in the custody of a Police officer, cannot be admitted as evidence.

However, Sections 16 and 17 of the PTA provide that confessions made to a Police officer above the rank of Assistant Superintendent of Police (ASP) can be admitted as evidence. This provision has been abused time and again, with confessions being elicited from detainees under the PTA by means of threats, inducement and torture.⁶⁸ These sections of the PTA remove the safeguards provided under the ordinary criminal law against self-incrimination and the use of unlawful means to extort confessions. Further, the burden of proving that such confessions were elicited by means of torture, is on the accused, further shifting the scales in favour of State officials, the perpetrators of this violence.

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, reiterated in 2017 that the PTA “Through exceptional provisions that admit the use of uncorroborated

⁶⁸ Amnesty international, 'Countering terrorism at the expense of human rights ' (*Amnesty International*, January 2019) <<https://www.amnesty.org/download/Documents/ASA3797702019ENGLISH.PDF>> accessed 31 December 2021.

confessions made to Police officers as the sole basis for convictions, it has fostered the endemic and systematic use of torture.’⁶⁹

The Sri Lankan judiciary has repeatedly taken into consideration evidence obtained by way of confessions, in convicting individuals of offences under the PTA. The judiciary has often shown reluctance to consider the reasonability of admitted evidence that under general criminal law is considered inadmissible.⁷⁰ Only in certain instances where the accused has been able to demonstrate the use of torture to elicit the confession, or where the content of the confession is evidently not in line with other factual circumstances, has the Court been willing to disregard the confession. In several instances, confession has been relied on, even in the absence of corroborating evidence.⁷¹

In 2000 in *Nagamani Theivendiran v Attorney General*⁷² the only evidence against the accused was his confession. However, later on the accused denied having made the

⁶⁹ United Nations ‘Human rights and counter-terrorism: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka: Preliminary findings of the visit to Sri Lanka’ (*United Nations*, July 2017) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21883&LangID=E>> accessed 31 December 2021.

⁷⁰ K Pinto-Jayawardena and others (n10) 36.

⁷¹ Human Rights Watch, ‘Locked up without evidence: Abuses under Sri Lanka’s Prevention of Terrorism Act’ (*Human Rights Watch*, January 2018) <<https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act>> accessed 31 December 2021.

⁷² S.C. (Appeal) 65/2000.

confession. The High Court admitted the confession on the grounds that the accused failed to discharge the burden that it was obtained by inducement, threat or promise. The Court of Appeal affirmed the conviction and stated that “there is a presumption that a person would not make an admission against his interest unless it was true”. The Supreme Court held that “the confession itself dealt with the activities in the LTTE group three years previously in the year 1992. The confession is vague, indefinite and devoid of material particulars, and in the absence of any other evidence it cannot be relied upon, even if true as being sufficient and trustworthy to form the basis of a conviction on the charges against him”. The Court thereafter decided to set aside the conviction on a technicality, namely, that the trial judge failed to consider whether there was an attack during the period covered by the charge.

However, five years later, the Court in *Raghulan v Attorney General*⁷³ did not hesitate to accept the accused’s purported confession as evidence against the accused himself. Though the accused had given evidence under oath and denied the confession, and though no other evidence had been led to prove the truth of the matters referred to in the confession, the fact that the accused was arrested on information received from two others who were also arrested by the Police on suspicion of terrorist involvements, was considered sufficient grounds to conclude that the confession was definite.

⁷³ [2006] 3 Sri LR 253

On one hand, the Supreme Court took cognizance of the fact that in order to be satisfied beyond reasonable doubt the crime referred to in the confession has to be verified, and that such verification was not undertaken in this case. The Court decided to admit the confession as evidence.⁷⁴

Similarly in 2006, in *Nallaratanam Singarasa v Attorney General*⁷⁵ the accused was convicted by the High Court,⁷⁶ and the conviction upheld by both the Court of Appeal and the Supreme Court on the sole basis of a confession that had been elicited by torture. The confession which was written in Sinhala, could not be understood by the accused. No interpretation was provided, and the accused was not afforded legal representation during the initial stages. However, the High Court, and subsequently, the Court of Appeal and the Supreme Court, failed to consider the torture, and the lack of assistance of an external and independent interpreter at the time the confession was said to be recorded, and the failure to provide access to legal representation or legal aid, in convicting the accused based on his confession.

⁷⁴ In justifying its decision, the Supreme Court stated that *"No court can expect the authorities to verify this kind of facts either. The dates, names and places are not known to the authorities. There is no way of verifying the mentioned names. Even if such names were checked, the evidence adduced would be hearsay and not admissible. Therefore in this kind of situation the court has to arrive at a decision by looking at the confession alone. It is true that the accused denied the whole confession in evidence. Could the confession become vague as a result of this? The trial court held that the confession was voluntary. The learned counsel did not challenge that decision. Evidence adduced is sufficient and that the accused has been rightly convicted."*

⁷⁵ S.C. (SpL(LA)) 182/199

⁷⁶ 6825/94

In 2008, journalist Tissanayagam, was arrested and charged under Section 2 (2) (ii) and 2 (1) (h) of the PTA read with section 113 (a) and section 102 of the Penal Code and Regulations No. 7 of 2006 published on 6th December 2006 in Gazette Extraordinary No. 1474/3.

A confession purportedly given by the accused was tendered by the state. The accused stated that he was induced to make the statement, that the statement was in fact dictated to him by the police officer and that the ASP was not present when the accused's statement was taken. The accused further denied that it was his signature which was found on the statement. Independent observers from the International Commission of Jurists (ICJ) observed that "There does not seem to be any expert evidence about the signature which appears on the Statement."⁷⁷ The ASP and the purported typist of the statement gave evidence at the *voir dire inquiry* that the confession was made voluntarily by the accused. No further witnesses were called. The Judge presiding over the *voir dire inquiry* concluded that the confession was voluntary. While written reasons were tendered for reaching this conclusion, ICJ observers note that "A written judgment was delivered by the Court at a later date, but for reasons unknown was not made available to Defence Counsel until

⁷⁷ International Commission of Jurists 'Trial Observation Report Regarding Proceeding Before The High Court Of Colombo, Sri Lanka Brought Against Mr J.S. Tissainayagam' (*International Commission of Jurists*, September 2009) <<https://www.icj.org/wp-content/uploads/2012/05/SriLanka-journalist-report-2009.pdf>> accessed 31 December 2021.

after the expiration of the fourteen (14) day period in which an appeal of the Interlocutory Judgment might be lodged.”

The High Court went on to find Tissanayagam guilty under the said provisions of the PTA and ERs and was sentenced to 20 years rigorous imprisonment.⁷⁸ He was thereafter granted a presidential pardon in 2010.

Thus, Sri Lankan courts have been inclined to accept confessions made by the accused as admissible evidence and has failed to pay adequate attention to potential violation of the freedom from torture, as in the case of *Nallarattnam Singara v Attorney General* discussed above.

The impact of the jurisprudence of the superior courts on Executive practices

One strains to see the impact, if any, of the limited strides the superior courts have taken to review Executive acts in terms of national security laws. This paper, therefore, next draws attention to a spate of recent events, and complaints by persons arrested, detained and charged under national security legislation. The examination is whether the complaints reflect that the Executive has taken note or addressed the issues that the superior courts have found to have resulted in violations of rights. What is the impact, if any, of the pronouncements of superior courts on protecting

⁷⁸ 4425/2008

Fundamental Rights in a context of national security concerns.

(a) National security measures post the Easter bombings

On 21st April 2019, on Easter morning, there were six bombings at three churches and three hotels in Colombo, Negombo and Batticaloa. The attacks claimed over 250 lives and left more than 500 injured. Responsibility for the attacks was pinned to the National Thowheed Jamath (NTJ), a local militant group claiming to have links to Islamic State (ISIS).⁷⁹

A spate of arrests was carried out in the immediate aftermath and in the months following the bombings. Reports of arrests alleged involvement in the bombings or referred to extremism. Many of these arrests were purportedly under the PTA or the ERs.⁸⁰ The latter came into play, with the President declaring a state of emergency the day after the

⁷⁹ V Singh and W Thomas, 'Sri Lanka Easter blast mastermind linked to three Islamic State cases in India: NIA' *The Hindu*, (New Delhi, 14 June 2019) <<https://www.thehindu.com/news/national/sri-lanka-easter-blast-mastermind-linked-to-three-islamic-state-cases-in-india-nia/article27901803.ece>> accessed 31 December 2021. ; B Perrigo, 'ISIS claims responsibility for Sri Lanka terrorist attack' *Time (California)*, 23 April 2019) <<https://time.com/5576053/isis-sri-lanka-easter-attack-responsibility/>> accessed 31 December 2021.

⁸⁰ Amnesty International 'Old ghosts in new garb: Sri Lanka's return to fear' (*Amnesty International*, February 2021) <<https://www.amnesty.org/download/Documents/ASA3736592021ENGLISH.PDF>> accessed 31 December 2021.

Easter attacks, which was thereafter renewed for four months, lapsing finally on 22nd August 2021.⁸¹ Following the Easter attacks, arrests were increasingly also made under Section 3 (1) of the ICCPR Act.

Reports of arrests alarmingly referred to no clear reasons being afforded for the arrest, or vague reasons such as possessing a Quran or Arabic literature, selling saffron coloured cloth or allegedly possessing large amounts of money (which later proved to be false), being cited.⁸² Two emblematic cases of arrest and detention are described below to review the impact of the jurisprudence of the superior courts as discussed above.

On 14th April 2020, Hejaaz Hizbullah, a human rights lawyer was arrested.⁸³ The arrest was purportedly under a detention order which refers to a connection with the bombings in April 2019 and also makes vague reference to

⁸¹ Gazette Extraordinary No. 2120/5 issued on 22 April 2019 <http://documents.gov.lk/files/egz/2019/4/2120-05_E.pdf> accessed 31 December 2021. ; Gazette Extraordinary No. 2121/1 issued on 29 April 2019 <http://documents.gov.lk/files/egz/2019/4/2121-01_E.pdf> accessed 31 December 2021. ; Gazette Extraordinary No. 2123/4 issued on 13 May 2019 <http://documents.gov.lk/files/egz/2019/5/2123-04_E.pdf> accessed 31 December 2021.

⁸²Human Rights Watch, 'Sri Lanka: Muslims Face Threats, Attacks' (*Human Rights Watch*, July 2019) <<https://reliefweb.int/report/sri-lanka/sri-lanka-muslims-face-threats-attacks>> accessed 31 December 2021.

⁸³ Sri Lanka Brief, 'Six UN Special Rapporteurs write to Sri Lanka Govt on "arbitrary and unlawful" arrest of Hejaaz Hizbullah' (*Sri Lanka Brief*, August 2020) <<https://srilankabrief.org/six-un-special-rapporteurs-write-to-sri-lanka-govt-on-arbitrary-and-unlawful-arrest-of-hejaaz-hizbullah/>> accessed 31 December 2021.

‘activities detrimental to religious harmony among communities’. A *habeas corpus* application was filed on his behalf three days after his arrest and a fundamental rights application was filed twenty one days after his arrest. Neither court exercised review over the arrest and detention for ten months. This is also despite the Fundamental Rights jurisdiction attracting a sense of urgency by providing that litigants present applications within one month of the violation or knowledge of the imminent violation and applications be disposed of by court within two months of granting leave to proceed.⁸⁴ It was ten months before he was produced before a judicial officer.⁸⁵ On 12th March 2021, eleven months after his arrest, charges were framed and forwarded to the High Court of Puttalam by the Attorney General.⁸⁶ The charges were reported to be conspiracy under the PTA over alleged extremist speeches made to students at the Al Suhariya Madrassa in August 2018 and the offence of inciting religious and racial hatred under the ICCPR Act.⁸⁷ Both charges on the face of it did not refer to direct

⁸⁴The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 126(5).

⁸⁵ The Morning, ‘Produce Hizbullah in Court: AG to IGP’ (*The Morning*, 18 February 2021) <<https://www.themorning.lk/produce-hizbullah-in-court-ag-to-igp/>> accessed 31 December 2021.

⁸⁶ Colombo Gazette, ‘AG files indictment against Hejaaz’ (*Colombo Gazette*, 12 March 2021) <<https://colombogazette.com/2021/03/12/ag-files-indictments-against-hejaaz/>> accessed 31 December 2021.

⁸⁷ *ibid* ; Colombo Page, ‘Attorney General files charges against lawyer Hejaaz Hizbullah’ (*Colombo Page*, 13 March 2021) <http://www.colombopage.com/archive_21A/Mar13_1615620456CH.php> accessed 31 December 2021.

involvement in the bombings of April 2019 as initially suggested.

Another well publicised arrest and detention is the case of Ahnaf Jazeem. On 16th May 2020, Jazeem, a poet and teacher, was arrested under the PTA on the purported grounds that his anthology of poetry and his teaching promoted extremism.⁸⁸ The authorities further claim that Jazeem's anthology has been found at a school in Puttalam affiliated to an organisation linked to Hejaaz Hizbullah. Jazeem was also one of the teachers who conducted classes for children in the village, within the premises of the said school.⁸⁹

Jazeem's brother has stated that Jazeem was first taken to Vavuniya for questioning, brought back to his residence to collect some clothes and seize all his books, and thereafter arrested.⁹⁰ However, no evidence has been presented to date to substantiate these allegations. Jazeem's lawyers have stated that both Jazeem and his father have been coerced to make incriminating statements, in a language that is not their first language.⁹¹ In response to the arrest it was reported that

⁸⁸ *ibid*

⁸⁹ R L Jayakody, 'Complaint lodged with HRCSL over poet Ahnaf Jazeem detained under PTA' (*Colombo Telegraph*, 31 December 2020) <<https://www.colombotelegraph.com/index.php/complaint-lodged-with-hrcsl-over-poet-ahnaf-jazeem-detained-under-pta/>> accessed 31 December 2021.

⁹⁰ *ibid*

⁹¹ R Fernando, 'Ahnaf Jazeem: the silenced poet' (*Sri Lanka Brief*, 14 May 2021) <<https://srilankabrief.org/ahnaf-jazeem-the-silenced-poet-ruki-fernando/>> accessed 31 December 2021.

the anthology condemned religious extremism and instead addressed topics such as patience, war and peace.⁹² In further response, the Executive has secured a review of the poetry by a team of child psychiatrists who have claimed that the contents of the anthology are harmful to children.⁹³

It is reported that Jazeem was also denied access to his family and legal counsel for several months after his arrest.⁹⁴ It was after nearly ten months of his arrest that Jazeem was allowed to meet his lawyers for a few minutes.⁹⁵ Yet again the family alleged that CID officers listened to, and recorded, the privileged lawyer-client communication.⁹⁶ In April 2021, a Fundamental Rights application was filed with regards to Jazeem's arrest and detention. The petition stated that Jazeem was held in unsanitary and difficult conditions, such as being handcuffed while sleeping, and that Jazeem

⁹² M Sirinivasan, 'Year-long detention of lawyer, poet sparks concern in Sri Lanka' (*The Hindu*, 6 May 2021) <<https://www.thehindu.com/news/international/year-long-detention-of-lawyer-poet-sparks-concern-in-sri-lanka/article34501745.ece>> accessed 31 December 2021.

⁹³ Daily Financial Times, 'Poetic injustice: another poet languishes in prison under PTA' (*Daily Financial Times*, 14 December 2020) <<https://www.ft.lk/news/Poetic-injustice-Another-writer-languishes-in-prison-under-PTA/56-710172>> accessed 31 December 2021.

⁹⁴ Human Rights Watch, 'Sri Lanka: Joint Statement Calls for Immediate Release of Poet Detained for a Year Without Charge' (*Human Rights Watch*, May 2021) <<https://www.hrw.org/news/2021/05/17/sri-lanka-joint-statement-calls-immediate-release-poet-detained-year-without-charge>> accessed 31 December 2021.; P Waravita, 'Arrested poet Ahnaf Jazeem mistreated by TID: Lawyers' (*The Morning*, May 2021) <<https://www.themorning.lk/arrested-poet-ahnaf-jazeem-mistreated-by-tid-lawyers/>> accessed 31 December 2021.

⁹⁵ R Fernando (n91).

⁹⁶ *ibid*

has been bitten by a rat, developed skin rashes and suffered psychological breakdowns.⁹⁷ The Supreme Court in August 2021 ordered that Jazeem’s lawyers be allowed access to Jazeem.⁹⁸ In December 2021, Jazeem was enlarged on bail.⁹⁹

The conditions of detention of the two detainees described above have also been exacerbated by the COVID-19 pandemic, with Hizbullah said to have contracted COVID-19 while in custody.¹⁰⁰

Despite judicial precedent¹⁰¹ requiring reasons for arrest and detention be provided there does not appear to be any measures in administrative procedure or law that have been set in place to arrest the repeat of this Fundamental Rights violation. The violations complained of in both cases above on the face of it, appear to disregard the Fundamental Rights

⁹⁷ *ibid*

⁹⁸ Daily Mirror, ‘SC allows lawyers to access remanded Poet Ahnaf Jazeem’ (*Daily Mirror*, 4th August 2021)

<https://www.dailymirror.lk/breaking_news/SC-allows-lawyers-to-access-remanded-Poet-Ahnaf-Jazeem/108-217531> accessed 31 December 2021.

⁹⁹ The Morning, ‘Detained poet Ahnaf Jazeem held under PTA released on bail’ (*The Morning*, 15 December 2021) <<https://www.themorning.lk/detained-poet-ahnaf-jazeem-held-under-pta-released-on-bail/>> accessed 31 December 2021.

¹⁰⁰ Daily Mirror, ‘Hejaaz Hizbullah contract COVID-19: CID informs Court’ (*Daily Mirror*, 7 January 2021) <https://www.dailymirror.lk/breaking_news/Hejaaz-Hizbullah-contracts-Covid-19:-CID-informs-court/108-203321> accessed 31 December 2021.

¹⁰¹ *Channa Peiris and others v Attorney General and others* [1994] 1 Sri LR 1; *Vinayagamoorthy, Attorney-At-Law (On Behalf Of Wimalenthiran) v the Army Commander And Others* [1997] 1 Sri LR 113; *Padmanathan v Sub Inspector Paranagama* [1999] 2 Sri LR 225; *Weerawansa v Attorney General* [2000] 1 Sri LR 387.

jurisprudence of requiring reasonable cause for arrest,¹⁰² reasons for arrest to be clearly communicated to the accused,¹⁰³ and that ERs and national security, not be used as a weapon to stifle free expression.¹⁰⁴ The complaints of coerced confessions also appear to continue regardless of the judicial pronouncements in the cases of *Theivendiran*, *Singarasa* and *Tissanayagam*. This raises three important questions, what is the impact of the judgments of the superior courts on rights violations in Sri Lanka? Is there a real or meaningful remedy available in making an appropriate application before these superior courts? In any event, is it practical to expect all similarly affected litigants to access superior courts?

(b) Executive creates regulations to enable arbitrary detention

Having demonstrated the failure of the executive to respond to even the limited judicial precedent on safeguards when acting in terms of national security laws, it is also alarming to note that the Executive from time to time also attempts to accumulate powers to restrict civil liberties by powers of enacting subsidiary law. This is reflected in the regulations

¹⁰² *Padmanathan v Sub Inspector Paranagama* [1999] 2 Sri LR 225; *Weerawansa v Attorney General* [2000] 1 Sri LR 387.

¹⁰³ *Channa Peiris and others v Attorney General and others* [1994] 1 Sri LR 1; *Vinayamoorthy, Attorney-At-Law (On Behalf Of Wimalenthiran) v the Army Commander And Others* [1997] 1 Sri LR 113.

¹⁰⁴ *Joseph Perera v the Attorney General and others* [1992] 1 Sri LR 199; *Channa Peiris and others v Attorney General and others* [1994] 1 Sri LR 1.

that are made under the provisions of the PTA. The most recent example is described below.

On 12th March 2021, by way of Extraordinary Gazette bearing number 2218/68, the President promulgated the *Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 01 of 2021*, which was published by way of gazette notification.¹⁰⁵

These regulations are being challenged before the Supreme Court of Sri Lanka at the time of writing this paper. In issuing interim orders staying the operation of these regulations the Supreme Court has exercised its supervisory role to inquire as to whether the regulations are compliant with the Constitution.¹⁰⁶ Court has been petitioned for the reasons that regulations are a flagrant violation of the requirement that persons be detained only if there is reasonable material available to demonstrate the probability

¹⁰⁵ The purpose of the Regulations are: “...to ensure, that any person who surrenders or is taken into custody on suspicion of being a person who by words either spoken or intended to be read or by signs or by visible representations or otherwise, causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups after the coming into operation of these regulations is dealt with in accordance with the provisions of the Act, and that persons who have surrendered or have been taken into custody in terms of any emergency regulation which was in force at any time prior to coming into operation of these regulations, continue in terms of these regulations, to enjoy the same care and protection which they were previously enjoying.”

¹⁰⁶ Aazam Ameen, ‘SC issues interim order suspending application of de-radicalization regulations’ (*The Morning*, 5 August 2021) <<https://www.themorning.lk/sc-issues-interim-order-suspending-application-of-de-radicalization-regulations/>> accessed 31 December 2021.

of committing an offence,¹⁰⁷ the requirement for judicial oversight of arrests and detention,¹⁰⁸ and non-involvement of the military in such arrests and detentions.¹⁰⁹

Therefore, the recent deployment of security laws post the Easter bombings and the use of PTA regulations to further the powers of the Executive, as described above, are signs of the Executive paying no attention to the pronouncements made and the jurisprudence built by the superior courts.

Conclusion

This paper traced the constitutional handicaps of the Judiciary that prevent it from exercising an effective check on other arms of government. These limitations are further exacerbated during times of emergency and in the face of concern for national security, as power is ceded in law and practice to the Executive. It is not surprising that the experience of three decades of war has cemented a heightened perception of threat to persons and property associated with national security. There have been no strides in the development of Fundamental Rights jurisprudence as a result of this. Moreover, tensions and constraints on the

¹⁰⁷ *Wickremabandu v Herath; Seetha Weerakoon v Mahendra O.I.C. Police Station, Galagedera and Others; Padmanathan v Sub-Inspector Paranagama, OIC, National Intelligence Bureau, Vavuniya And Others* [1999] 2 Sri LR 225.

¹⁰⁸ *Dissanayaka v Superintendent Mahara Prison and others.*

¹⁰⁹ *Vinayagamoorthy, Attorney-At-Law (On Behalf Of Wimalenthiran) v the Army Commander And Others.*

superior courts are likely to be felt multiple times over by the lower Judiciary.

Of the limited developments in the jurisprudence of Fundamental Rights versus national security that this paper recounts above, it is also alarming that the judicial precedent does not translate to administrative or legislative development. In fact, as demonstrated above, Executive measures have instead either continued to repeat violations of Fundamental Rights or moved to circumvent the safeguards.

Whether the continued flagrant violations by the Executive will prompt judicial activism is to be seen. The role of lawyers in telling the story of the impact of the continued failure to secure safeguards and the continued dismissal of rights protections by the Executive will also play a part in this. The role of the legislature in strengthening the powers of the Judiciary for the benefit of securing the rights of the people of Sri Lanka must also come under scrutiny. The way forward in securing a strong citizen centred jurisprudence that upholds without fear the values of the Constitution involves many actors and an unwavering focus on the need for change, including institutional reform.

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Rights over Land vs. National Security: Examining the Impact of Public Interest Litigation

Bhavani Fonseka and Nivedha Jeyaseelan

1. Introduction

Recent years witnessed a spate of initiatives that has impacted a citizen's right to own, use and access land. The near three decade-long ethnic conflict and post war context have resulted in national security, together with the creation of High Security Zones (HSZ), being used to impinge upon land rights of private citizens. In more recent times, development related initiatives have also impacted the land rights of private citizens. In both these respects – national security and development – cases litigated in the public interest have contributed to the recognition of specific rights of landowners and the introduction of necessary safeguards.

Whilst the Constitution of Sri Lanka does not provide for a specific Fundamental Right to land, case law demonstrates how litigants have used the right to equality under Article 12 (1) to litigate under the Fundamental Rights jurisdiction of the Supreme Court. Further, several cases have also been filed in the Court of Appeal challenging administrative action relating to land, in terms of the Court's Writ jurisdiction. This chapter explores several cases filed in the public interest using the Fundamental Rights and Writ jurisdictions. These cases pertain to private land and attempts made to prevent individuals from using and

accessing their own lands on the basis of national security. As the chapter discusses, the position of the Courts has evolved with time, moving away from not reviewing decisions made on the basis of public purpose, to articulating and expanding the Public Trust Doctrine in Sri Lanka. Such a line of reasoning has pushed back on the notion that decisions made by the Minister or a statutory body are beyond review to one where such entities must act in the interests of the public, follow established procedures, and be held accountable for their actions.

This chapter examines the deficiencies in the legal framework for State acquisition of private land, highlights instances where acquisitions have taken place in violation of the laws in place, or where the ultimate purpose of the acquisition has been at variance with its stated objects. This chapter mainly looks at how public interest litigation has supplied these deficiencies, and upheld the rights of landowners, *inter alia*, through the invocation of the Public Trust Doctrine.

Whilst the chapter explores several key strands pertaining to land and national security, the authors recognise that this is not the only modus through which the tenure security of landowners has been upended. As seen with multiple developments – related projects, land has been acquired for non-security related reasons, *albeit* with similar concerns as to the public purpose of such acquisitions. This chapter also contains a brief examination of the development-related dimension to land acquisitions. The chapter further

demonstrates how the conventional understanding of ‘national security’ has transformed in the post war context to include an economic dimension. These trends have wide ranging implications including an impact on governance, reconciliation and democracy in Sri Lanka

2. Legal Framework Governing the Acquisition of Private Land

This section briefly sets out the relevant legal framework to acquire private land and the jurisprudence that has provided for safeguards. As noted below, the chapter discusses the acquisition of private land by the state and is not a comment on taking over of state land, which is governed through a separate legal and administrative framework.

2.1. The Land Acquisition Act

The Land Acquisition Act No. 9 of 1950 (hereinafter, sometimes “LAA”) is the primary legislation by which privately owned land is acquired by the State. The legislation sets out procedural requirements which ought to be fulfilled in order for the State to acquire private land. Besides the stipulation of a “public purpose” in order to acquire land, the LAA contains no substantive yardstick to assess what constitutes public purpose. Due to its failure to formulate a substantive yardstick to assess public purpose, the legislation also does not address instances where an acquisition would fall outside of the ambit of the Act, and what measures can be taken by persons who are aggrieved

by such acquisitions, purportedly for public purpose. Therefore, the understanding of what constitutes a lawful public purpose for the acquisition of land has been developed through judicial pronouncements, some of which have been made in public interest litigation.

While substantive criteria to assess what constitutes public purpose to acquire land have not been defined in the LAA, the procedural requirements contained in the LAA have not been followed in all land acquisitions. Hence, the Judiciary has been approached in the public interest on two occasions, *viz*:

1. Where a land acquisition made under the LAA does not seem to demonstrate any discernible public purpose.
2. Where the procedural requirements contained within the LAA have not been adhered to.

The procedural requirements stipulated in the LAA are as follows. Section 2 of the LAA states that where a land is decided to be acquired for a public purpose by the Minister, that a notice must be first issued. The language, manner and place of the display of the notice has also been specified, together with the steps that may be taken to ascertain the suitability of the land for acquisition by an officer authorised by the acquiring officer.¹ Further, Section 38A provides for

¹ Land Acquisition Act No. 9 of 1950 s 2.

2. (1) Where the Minister decides that land in any area is needed for any public purpose, he may direct the acquiring officer of the district in which that area lies to cause a notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area.

(2) The notice referred to in subsection (1) shall be in the Sinhala, Tamil and English languages and shall state that land in the area specified in the notice is required for a public purpose and that all or any of the acts authorised by subsection (3) may be done on any land in that area in order to investigate the suitability of that land for that public purpose.

(3) After a notice under subsection (2) is exhibited for the first time in any area, any officer authorised by the acquiring officer who has caused the exhibition of that notice, or any officer acting under the written direction of the officer authorised as aforesaid, may enter any land in that area, together with such persons, implements, materials, vehicles and animals as may be necessary, and-

(a) survey and take levels of that land,

(b) dig or bore into the subsoil of that land,

(c) set out the boundaries of that land and the intended line of any work proposed to be done on that land,

(d) mark such levels, boundaries and line by placing marks and cutting trenches,

(e) where otherwise the survey of that land cannot be completed and such levels taken and such boundaries and line marked, cut down and clear away any part of any standing crop, fence or jungle on that land, and

(f) do all other acts necessary to ascertain whether that land is suitable for the public purpose for which land in that area is required: Provided that no officer, in the exercise of the powers conferred on him by the preceding provisions of this subsection, shall enter any occupied building or any enclosed court or garden attached thereto unless he has given the occupier of that building at least seven days' written notice of his intention to do so.

lands to be acquired urgently, and sets out the procedure to be followed in such instances.²

The requirement of a “public purpose” being the only substantive stipulation in the LAA, there is a steady line of precedent to the effect that such public purpose for which the land is acquired must be clearly stated in the Section 2 notice.³ Nevertheless, it is important to note that, it has also

² Land Acquisition Act No. 9 of 1950 s 38A.

38A (1) Where any land is being acquired for the purposes of a local authority and the preliminary valuation of that land made by the Chief Valuer of the Government does not exceed the specified sum, the immediate possession of such land on the ground of urgency, within the meaning of the proviso to section 38, shall be deemed to have become necessary, and accordingly the Minister may make an Order of possession under section 38 of this Act.

(2) In subsection (1) "specified sum means- (a) in the case of an acquisition for the purpose of a Village Councillor a Town Council, twenty-five thousand rupees; (b) in the case of an acquisition for the purpose of an Urban Council, seventy-five thousand rupees; (c) in the case of an acquisition for the purpose of a Municipal Council, one hundred thousand rupees.

(3) The provisions of subsection (1) shall not be construed to limit in any way the powers of the Minister to make any Order of possession of any land on the ground of any urgency under section 38 of this Act which he may lawfully make under that section, whether such land is being acquired for the purposes of a local authority or not.

(4) In this section "local authority" means a Municipal Council, Urban Council, Town Councillor Village Council.

³ *Manel Fernando v D. M. Jayaratne* [2000] 1 Sri LR 112 at 126.

“Public purpose cannot be an undisclosed one...From a practical point of view, if an officer acting under Section 2(3) (f) does not know the public purpose, he cannot fulfil his duty of ascertaining whether any particular

been held that the exceptions to the requirement to spell out the public purpose can, “perhaps be implied in regard to purposes involving national security and the like”.⁴

In a more recent judgement, the Court of Appeal held that “when it comes to National Security, Section 2 Notice may not even state the public purpose.”⁵ In a two – part acquisition for the establishment of (i) a Brigade Headquarters and (ii) a Training School under such Brigade Headquarters of Sri Lanka Army, the Section 2 notice issued with regard to the latter was challenged by way of a *Certiorari*. The Section 2 notice was upheld by the Court and the matter is presently on appeal before the Supreme Court.

3. Land Rights and National Security

This section briefly examines the scope of Fundamental Rights in Sri Lanka and the use of the term ‘national security’ in relation to land takeovers.

land is suitable for that purpose... In my view, the scheme of the Act requires a disclosure of the public purpose.”

Horana Plantations v Minister of Agriculture [2012] 1 Sri LR 327 at 327.

“When lands are acquired for public purposes it is important to spell out the true purpose for which such acquisition is being made... In this case, the public purpose has not been clearly manifested in the notice issued under Section 2 of the Land Acquisition Act.”

⁴ *Manel Fernando v D. M. Jayaratne* [2000] 1 Sri LR 112 at 126 (Fernando J).

⁵ *Thambirajah v Waragoda C.A.* (Writ) 376/2014.

3.1. Overview of Fundamental Rights and National Security

The Fundamental Rights recognised in the Constitution are subject to, *inter alia*, “such restrictions as may be prescribed by law in the interests of national security”, and where, such “law” is interpreted to “include regulations made under the law for the time being relating to public security.”⁶ As indicated in the introduction, the right to land and tenure security is not a Fundamental Right enshrined in the Constitution of Sri Lanka.

Sri Lanka has been under Emergency Rule throughout the ethnic conflict and, in limited respects, during the post war years as well. A State of Emergency was first declared in 1983 and ended in 2011, with successive governments extending each term of the State of Emergency during the 28 years of the conflict.⁷ Emergency Regulations, promulgated by the Executive under the Public Security Ordinance, override existing legislation, bypass legislative processes, and enable infractions into Fundamental Rights in the interests of national security in terms of the Constitution. Emergency Regulations have been used to requisition

⁶ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 15 (7).

⁷ Centre for Policy Alternatives, 'CPA Statement On The Termination Of The State Of Emergency' (*Centre for Policy Alternatives*), 27 August 2011) <<https://www.cpalanka.org/cpa-statement-on-the-termination-of-the-state-of-emergency/>> accessed 31 December 2021.

property during the conflict.⁸ The power to declare Emergency Rule has been considered to exacerbate the constitutional pre-eminence of the Executive President. It has been held by the Supreme Court⁹ that this power to declare Emergency is not untrammelled, and is subject to Parliamentary review in terms of Article 155 of the Constitution¹⁰, as well as under Section 5 (3) of the Public Security Ordinance.¹¹ Writers have opined that, however, Parliament has never struck down an Emergency Regulation of the President, and that it has served as a rubber stamp to the President's powers in this regard.¹²

There have been different judicial approaches to the subject of national security *vis-à-vis* the adjudication of Fundamental Rights. In *Joseph Perera v Attorney General*,¹³ Justice Sharvananda interpreting national security in Article

⁸ R Coomaraswamy and C de los Reyes, 'Rule by Emergency: Sri Lanka's Post-colonial Constitutional Experience' [2004] 2(2) International Journal of Constitutional Law 272.

⁹ *Joseph Perera v Attorney General* [1992] 1 Sri LR 199 (Sharvananda J).

¹⁰ See esp. The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 155 (8).

"If Parliament does not approve any Proclamation bringing such provisions as are referred to in paragraph (3) of this Article into operation, such Proclamation shall, immediately upon such disapproval, cease to be valid and of any force in law but without prejudice to anything lawfully done thereunder."

¹¹ Public Security Ordinance No. 25 of 1947 s 5 (3)

"Any emergency regulation may be added to, or altered or revoked by resolution of Parliament or by regulation made under the preceding provisions of this section."

¹² Coomaraswamy (n 8).

¹³ [1992] 1 Sri LR 199

15 (7), held that the connection between a restrictions sought to be imposed and national security must be proximate and direct, and struck down the Emergency Regulation impugned in the case. In the case of *Karunathilake v Dayananda Dissanayake, Commissioner of Elections*,¹⁴ the Supreme Court held that the Emergency Rule decreed by the President, which had the effect of suspending five Provincial Council elections, was invalid, and that there was no nexus between the declaration of Emergency Rule and the suspension of elections, in the absence of an apprehensible threat to national security. In cases like *Visuvalingam v Liyanage*,¹⁵ the Court upheld Emergency measures, and held that the restrictions imposed on Fundamental Rights were within the Executive's prerogatives to act in the interests of national security.

Although the right to land and tenure security is not a Fundamental Right, writers have postulated that arbitrary take-overs of land can be challenged under Article 12, for violating the concept of Rule of Law and the right to equality.¹⁶ However, it has also been pointed out that Article 12 can be considered to have been violated only if it can be established that another landowner similarly situated would have been treated differently.¹⁷ Arbitrary state policies relating to land, it has been suggested, can be challenged

¹⁴ [1999] 1 Sri LR 157

¹⁵ [1983] 2 Sri LR 311

¹⁶ J Guneratne and others, *Not this Good Earth; The Right to Land, Displaced Persons and the Law in Sri Lanka* (Law and Society Trust, 2013).

¹⁷ *ibid.*

through the Writ jurisdiction of the Court of Appeal in Article 140 of the Constitution, where state or administrative action can be impugned on the basis of illegality, irrationality, disproportionality or procedural impropriety.¹⁸ The 2011 Land Circular, discussed later in this chapter, was challenged in this manner in the first instance.¹⁹

A protracted three decade long conflict has required the stringent imposition of restrictions in the interests of national security, including in the forms of military take-over and occupation of private lands, and the establishment of what is termed ‘High Security Zones’ (“HSZ”). These measures, in effect, have dispossessed people of land or affected their rights and interests in their lands. While a number of procedural and substantive irregularities are evident in the take-over and occupation of private lands by state actors in the interests of national security, it is equally significant to note instances where national security is a pretext to legitimise continued occupation or take-over of private land by state actors. Furthermore, resettlement of displaced persons is an issue that has given rise to a gamut of legal and administrative issues of its own. National security has also weighed in heavily on the issue of resettlement.

¹⁸ *ibid.*

¹⁹ *M.A. Sumanthiran v R. P. R. Rajapakse C.A. (Writ) 620/2011.*

3.2. Legal Framework to Take-over Lands for National Security

Where lands have been taken over for national security, this has often been for the establishment of HSZ. The procedure to be followed for the acquisition of private land is prescribed in Section 2 of the Land Acquisition Act (discussed briefly previously), but the declaration of lands as HSZ have often taken place in the form of Emergency Regulations issued by the Executive through Gazette notification. This segment briefly examines some instances of public interest litigation where attempts to take over private lands were challenged.

Approximately 25.8 square kilometres of land in Jaffna was sought to be taken over in 2013 for the establishment of a “Defence Battalion Headquarters [Jaffna] – regularising handover of area on which HSZ [Palaly and Kankesanthurai] is established”. The purported Section 2 notice was challenged in *Arunasalam Kunabalasingham and 1473 others v A. Sivaswamy and 2 others*,²⁰ through a Writ Petition. The 1474 Petitioners claimed that the Section 2 notice issued under the LAA was flawed on several procedural and substantive grounds. The Petitioners aver that no lawfully constituted HSZ can be in existence after 2011, hence the takeover of the land for the “regularising handover of area on which High Security Zone [Palaly and Kankesanthurai] is established” was unlawful, and that due

²⁰ C.A. (Writ) 125/2013.

procedures had not been adhered to in terms of Sections 2 and 4 of the LAA. It has been pointed out that most of the HSZ established in Jaffna differ characteristically to HSZ in Kandy or Colombo, due to not being declared as HSZ through Gazette notification.²¹

The nature of the military take – over in Ashraf Nagar, Ampara district, is different to the above instances, due to the complete absence of a legal process. In what may be rightly identified as a ‘land grab’, the military forced the villagers of Ashraf Nagar out of their lands in November 2011 and commenced encroachment upon their land for the purpose of, *inter alia*, commercial establishments.²² Two residents of the *Kasangkeni* village in Ashraf Nagar filed a Fundamental Rights petition before the Supreme Court challenging the land occupation. An Interim Order preventing any further development was issued by the Supreme Court.²³

The residents of Panama, too, faced eviction from their traditional farming village in 2010 by the security forces. A

²¹ B Fonseka and M Raheem, *A Brief Profile of the Trincomalee High Security Zone and other Land Issues in Trincomalee District* (Centre for Policy Alternatives, 2008).

²² Human Rights Watch, 'Sri Lanka: Government Slow to Return Land' (*Human Rights Watch*, 9 October 2018) <<https://www.hrw.org/news/2018/10/09/sri-lanka-government-slow-return-land>> accessed 31 December 2021.

²³ Women's Action Network, 'Ashraf Nagar: The Courageous Struggle of Peasants against the Forcible Land Acquisition in Ampara District' (*Groundviews*, 19 January 2013) <<https://groundviews.org/2013/01/19/ashraf-nagar-the-courageous-struggle-of-peasants-against-the-forcible-land-acquisition-in-ampara-district/>> accessed 31 December 2021.

Fundamental Rights application was filed before the Supreme Court by the villagers, who averred that their farming lands and housing were destroyed through burning and bulldozing.²⁴ Further, the villagers had approached various local government and national authorities, to no avail, prior to the filing of the Court action. In 2015, a Cabinet decision ordered the release of some of the lands seized and granted the payment of compensation to lands upon which constructions had already been erected. However, as at 2021, the decision had not been implemented.²⁵ According to reports, the land grab has been to develop the village for tourism.²⁶

In addition to Statute Law and Gazettes, administrative processes, like Circulars, have been used to acquire land or impose measures which effectively dispossess people of their lands. The Land Circular 2011/04 was specifically impugned for circumventing constitutional and legal safeguards in this manner.²⁷ Land Circular No. 2011/04 was

²⁴ S.C. (FR) 66/2013.

²⁵ The People's Alliance For Right To Land, 'Five years following Cabinet Decision to return – Panama people still not home PARL Statement in Solidarity with Panama land struggle' (*The People's Alliance for Right to Land*, 11 February 2020)

<<https://www.parlsl.com/storage/app/uploads/public/60f/fea/180/60fea180b4af593677014.pdf>> accessed 31 December 2021.

²⁶ M. Borham, 'Stolen Paradise' *Sunday Observer* (Colombo, 10 October 2018) <<https://www.sundayobserver.lk/2018/04/22/news-feature/stolen-paradise>> accessed 31 December 2021.

²⁷ Centre for Policy Alternatives, 'A Short Guide to 'Regulating the Activities Regarding Management of Lands in the Northern and Eastern Provinces' Circular: Issues & Implications' (*Centre for Policy Alternatives*, 21 September 2011) <<https://www.cpalanka.org/a-short-guide-to-%e2%80%98regulating->

challenged by way of a Writ Application as well as a Fundamental Rights Petition in the Supreme Court. The impugned circular, *inter alia*, suspended the release of lands except on the grounds of national security or special development projects. It was challenged for violating various Constitutional and statutory safeguards, in substance and procedurally,²⁸ as well as for the violation of Articles 12 and 14 of the Constitution.²⁹ The Circular sought to establish a mechanism for dispute resolution for land disputes arising out of the Northern and Eastern Provinces. The Circular pertained to disputes regarding the management of state lands and where ownership is claimed by people who have been resettled in areas where the conflict took place. As per the Circular, the inquiring committees are to settle disputes arising from ownership claims made over state lands. This procedure was challenged for the subversion of a judicial process.

The petition averred that the judicial sovereignty of the people and the right of access to the judiciary cannot be impeded even through statutory schemes. However, this Circular, which was not even a statutory scheme, was being used to deprive people of their right to land, in the first instance, and thereafter, their right to access the judiciary in the event of a travesty. One of the main arguments raised in

the-activities-regarding-management-of-lands-in-the-northern-and-eastern-provinces%e2%80%99-circular-issues-implications/> accessed 31 December 2021.

²⁸ C. A. (Writ) 620/2011.

²⁹ S. C. (FR) 494/2011.

the case was that the Land Circular was issued *ultra vires* to the powers vested with the Land Commissioner. Although the Circular was replaced with Land Circular 2013/01³⁰ with new administrative provisions, the issue relating to legislating on land *via* Circulars is to be noted.

4. The Use of High Security Zones to Acquire Land, Development Projects, and Issues Around Resettlement

4.1. High Security Zones

The continuation of HSZ in post war Sri Lanka, and in the absence of a legal basis for the establishment of HSZ, has led to the continued militarisation of these regions.³¹ Further, what is notable is that the procedures set out for state acquisition of private land in, chiefly, the LAA, and the stipulation of a “public purpose” therein, has enabled the take-over of private land as well as prevented the return of displaced persons. As noted in this chapter, national security has been used to justify the taking over of large swathes of

³⁰ Centre for Policy Alternatives, 'Commentary on Accelerated Programme on Solving Post Conflict State Lands Issues in the Northern and Eastern Provinces' (*Centre for Policy Alternatives*, 12 March 2013)

<<https://www.cpalanka.org/commentary-on-accelerated-programme-on-solving-post-conflict-state-lands-issues-in-the-northern-and-eastern-provinces/>> accessed 31 December 2021.

³¹ B Fonseka and U Dissanayake, *Sri Lanka's Vistas of Prosperity and Splendour: A Critique of Promises Made and Present Trends* (Centre for Policy Alternatives, 2021) ; B Fonseka and D Jegatheeswaran, *Politics, Policies and Practices with Land Acquisitions and Related Issues in the North and East of Sri Lanka* (Centre for Policy Alternatives, 2013).

private lands (and in some instances state lands used by individuals) with discrepancies in the adherence to procedural safeguards. Moreover, a few cases filed in the superior courts challenging attempts to acquire or take over lands under the guise of national security included instances where such lands were ultimately used for, *inter alia*, economic purposes and tourism development. Thus, the use of ‘national security’ to appropriate lands has evolved from military installations to purposes involving an economic dimension.

As discussed below, in some instances, such as the case in Sampur, the authorities used multiple strategies to prevent the legal owners from returning to their lands which were successfully challenged in the Supreme Court, with cases taking years to be resolved. Whilst cases discussed in this chapter is not an exhaustive list on the matter, it is indicative of the varied methods used by authorities to take over land, questions on the legality of such methods and the activism shown by affected parties and public interest litigators to contest such measures.

The first case examined is in relation to the land in Sampur, Trincomalee district, where authorities used various methods to appropriate private lands. The first attempt was the creation of a HSZ in 2007. When East Muttur and Sampur were declared a HSZ through Emergency Regulations issued by the President in Gazette Extraordinary No. 1499/25 of 30th May, 2007, two Fundamental Rights Petitions were filed in the Supreme Court challenging the

Gazette on the basis of violating the Petitioners' Fundamental Rights under Articles 12 and 14. The Gazette in effect prevented the residents returning to the areas they were displaced from, in around 2006. While one of these Petitions were filed by the Centre for Policy Alternatives (CPA) and its Executive Director,³² the second was filed by four internally displaced persons (IDPs) of Sampur who were directly affected by the issuance of the Gazette.³³ It was the contention of the Petitioners that the declaration of these areas as High Security Zones have prevented the Petitioners and their families, together with several others, from returning to lands which they have inherited, now cleared after the demolition of structures and plantation, and this in turn has violated their Fundamental Rights.³⁴ In the Petitions filed by the IDPs, the Petitioners averred their inability to provide deed documentation, due to their displacement in April 2006.³⁵

Leave to proceed was refused in both Petitions by the Supreme Court. Further, in SC (FR) 218/2007, the Regulation was upheld on the premise that it ensured adequate security to the Trincomalee Harbour, and that "it is not intended to deprive any person of his place of residence". In both cases, the Respondents undertook to resettle the

³² *Centre for Policy Alternatives v H.E. Mahinda Rajapakse* S.C. (FR) 218/2007.

³³ *Natsingam Suntharalingam v H.E. Mahinda Rajapakse* S.C. (FR) 219/2007.

³⁴ See paragraphs 14 to 25 of the Petition in *Natsingam Suntharalingam v H.E. Mahinda Rajapakse* S.C. (FR) 219/2007.

³⁵ See paragraphs 2 to 5 of the Petition in *Natsingam Suntharalingam v H.E. Mahinda Rajapakse* S.C. (FR) 219/2007.

IDPs. Despite this undertaking, the resettlement faced numerous setbacks with IDPs spending nearly a decade in makeshift camps and uncertainty looming as to whether they would be able to return home or be provided alternate housing.

4.2. Internal Displacement and State Policies

Persons internally displaced due to the conflict have also been prevented, in effect, from returning to their homes due to State take – over of private lands, which were not necessarily premised in national security. In *R. Nadarasa v Minister of Economic Development*,³⁶ the Petitioners challenged the issuance of an Extraordinary Gazette³⁷ declaring their lands in Sampur as belonging to a “Special Zone for Heavy Industries”. The Petition filed by the Petitioners averred that there is no legal basis to dispossess them, as the acquisition process was not commenced within the provisions of the LAA. The Petitioners claimed that preventing them from returning to their properties through the establishment of a Special Zone for Heavy Industries, despite being able to return after the war, was an infringement of their Fundamental Rights. Subsequent to the challenge, President Maithripala Sirisena in May 2015, by

³⁶ S.C. (F.R.) 309/2012.

³⁷ Gazette Extraordinary No. 1758/26 of 17.05.2012; Accessible at <http://documents.gov.lk/files/egz/2012/5/1758-26_E.pdf> accessed 31 December 2021.

Gazette Notification 1913/19 (of 07.05.2015) revoked Extraordinary Gazette 1758/26 in its entirety.³⁸

Sri Lanka has faced decades of displacement due to the war, national disasters and development projects that have prevented people from residing in their lands. The creation of HSZs resulted in thousands being displaced with some being displaced for decades as seen with the HSZ in Jaffna. The wide-ranging implications of displacement include litigation around the take-overs of land, and advocacy focusing on improved frameworks and systems for resettlement and durable solutions. Despite the number of years where Sri Lanka has faced displacement and resettlement, the response in terms of the legal and policy frameworks and implementation has been piecemeal and unsatisfactory.

The National Involuntary Resettlement Policy (“NIRP”) is among the few stated government policies on the subject of resettlement. The NIRP contains several principles including the minimisation of the effects of resettlement, prompt compensation to displaced persons, and the consultation of displaced persons regarding their resettlement.³⁹ In a study of state and non-state actor compliance with the NIRP, it was noted that although the

³⁸ Gazette Notification 1913/19 of 07.05.2015; Accessible at <http://documents.gov.lk/files/egz/2015/5/1913-19_E.pdf> accessed 31 December 2021.

³⁹ G Gunetilleke and V Nathaniel, *National Involuntary Resettlement Policy: Dispelling misconceptions and Assessing Compliance* (Verite Research, 2014).

policy has been observed in some resettlement projects, the same cannot be said of all instances of mass civilian resettlement.⁴⁰

4.3. The Impact of Development Projects

National security, however, has not been the only grounds on which lands have been taken over by the state and state actors. Tourism, too, has been cited as a ground for the taking over of privately owned lands in the recent past. It has been pointed out that land takeovers for tourism and ‘mega-development projects’ have taken place through a highly centralised process, without prior consultation with the affected residents.⁴¹ These projects have been impugned for the detriment caused to the environment and eco-system.⁴² However, these projects also have an adverse impact on the landowners and their livelihoods, especially where these acquisitions have taken place without due process of the law, in the absence of an overarching ‘public purpose’, or in some instances, through forced evictions. While this essay has impugned the legality of some of these take-overs carried out in terms of the Land Acquisition Act, it is concerning that yet other take overs have taken place in the absence of any legal process, through forced evictions.

⁴⁰ Gunetilleke (n 39).

⁴¹ People’s Alliance for Right to Land, *People’s Land Commission Report-Our Land, Our Life* (PARL, 2019-2020).

⁴² *ibid.*

5. Public Trust Doctrine in Recent Sri Lankan Jurisprudence

The Public Trust Doctrine is now firmly established in the Sri Lankan jurisprudence, with clear duties and responsibilities placed on statutory bodies. This segment explores some of the more recently decided cases and assesses the emerging trends in utilising the Public Trust Doctrine to emphasise the obligations of public authorities. Although the scope of this paper is to examine public interest litigation *vis-à-vis* land acquisitions on the grounds of national security, this segment has been retained in view of the seminal role of Public Trust Doctrine in the adjudication of land disputes in Sri Lanka, as well as, a lacunae in the discussion of recent jurisprudence.

Justice Mark Fernando discussed this in *De Silva v Atukorale*⁴³ where he spoke of the power conferred by the LAA for “the public good, not for his personal benefit; it was held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.” This was further expanded in *Mundy and Others v Central Environmental Authority and Others*⁴⁴ where Justice Mark Fernando spoke of public authorities being vested with powers that are not absolute or unfettered but held in the interest of the public.

⁴³ *De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*, S.C. (Appeal) 76/1992.

⁴⁴ *Mundy v Central Environmental Authority and others* S.C. (Appeal) 58/2003.

Subsequently, when the Mahaweli Authority of Sri Lanka alienated and granted permission to effect constructions on a land proximate to the Victoria Reservoir, a public interest litigation was filed before the Supreme Court. In *Environmental Foundation Limited v Mahaweli Authority of Sri Lanka*,⁴⁵ the Petitioners contended that State Land had been alienated and permission to effect constructions had been granted contrary to statutory provisions, as well as in a manner that was *ad hoc* and arbitrary. The land so alienated for the purpose of construction was one of geographic and ecological significance and had been granted statutory protection.⁴⁶

The Petitioners pleaded in their Petition that the land has been alienated in breach of several statutory provisions, directives and guidelines, which prevented constructions in the said protected area. The Petitioners also contended that the structures so effected on these areas have led to soil erosion and given rise to the possibility of landslides and earth slips. Court held that the Mahaweli Authority has acted in breach of Article 12, that no further allocation of state land can be made in violation of statutory provisions and that the

⁴⁵ S.C. (FR) 459/2008 (Decided on 17.06.2010)

⁴⁶ The portion of the land which the Mahaweli Authority had alienated for the purposes of construction of private buildings, falls within all:

(a) the Special Area declared in terms of Section 3(1) of the Mahaweli Authority Act No. 23 of 1979

(b) the 100 metre reservation area from the full supply level of the Victoria Reservoir which falls within the Accelerated Mahaweli Program

(c) and the Victoria- Randenigala – Rantambe Sanctuary created under Section 22 of the Fauna and Flora Protection Ordinance

stipulated guidelines be followed when granting such approval. Court held further that the powers conferred on the Mahaweli Authority must be exercised only in furtherance of the statutory objects of the Mahaweli Authority.⁴⁷ According to the Court, the Public Trust Doctrine must guide state functionaries in the exercise of their powers.

The Supreme Court cited with approval a *dicta* of the Supreme Court of California, in the case of *National Audubon Society v Superior Court of Alpine Country*,⁴⁸

*“Thus, the Public Trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, Marshlands and tidelands, **surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust**”.* (Emphasis added)

The *ratio* of the Court in this case extended the idea of Public Trust to state that public functionaries should act in the public interest not only when exercising their powers, but also when alienating their powers, as in the instant case. This understanding of public trust is important because this casts not merely a positive duty on state functionaries, but a

⁴⁷ The statutory objects of the Mahaweli Authority *vis-à-vis* Special Areas declared under the Act are contained in Section 12 of the Mahaweli Authority Act.

⁴⁸ 33 Cal.3d 419

negative duty to not exercise (or abdicate) their statutory powers in a manner that is inimical to the public trust placed in their office.

This judgement, together with the dicta of the California Supreme Court, has been cited with approval in subsequent Sri Lankan cases. In one such case, the Court considered the failure of state functionaries to duly exercise their powers as a breach of public trust. In *Kariyawasam v Central Environmental Authority and others*,⁴⁹ Petitioners claimed that the operation of the Chunnakam thermal power plant by a company has polluted the ground water in Chunnakam, making it putrefied and incapable of consumption. The Central Environmental Authority and the Board of Investment had the statutory powers to call for and consider the Initial Environmental Examination Report (IEER) or the Environmental Impact Assessment Report (EIAR) prior to granting approval for the implementation of a prescribed project, in terms of the National Environment Act (and Regulations⁵⁰). The Supreme Court held that the Central Environmental Authority and the Board of Investment had failed not merely in their statutory / regulatory duties, but had acted in breach of the public trust reposed in these authorities. Court held that this amounted to a statutory violation, a breach of public trust, as well as a violation of the Fundamental Rights of the residents of Chunnakam in

⁴⁹ S.C (FR) 141/2015 (Decided on 04.04.2019)

⁵⁰ National Environmental (Procedure for Approval of Projects) Regulations No. 1 of 1993

terms of Article 12 (1) of the Constitution. Pronouncing the judgement of the Court, Justice Prasanna Jayawardena held that,

*“The BOI and the CEA’s duty to ensure that the provisions of Part IV C of the Act and the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 [including obtaining and considering an IEER or EIAR] were strictly complied with prior to the 8th respondent (the company) implementing its project to add power generation capacity, were statutory and regulatory duties and powers conferred on the BOI and the CEA in the public trust. A **failure to duly perform those duties and duly exercise those powers amounts to a breach of the public trust reposed in the CEA and the BOI.**”* (Emphasis added)

In yet another case, the Court examined an instance where the failure to exercise one’s public functions could result in a breach of the public trust. In the case of *Leelawathie v Minister of Lands and Others*,⁵¹ the Petitioners invoked the jurisdiction of the Court of Appeal, in a matter where land had been acquired by the State under the Land Acquisition Act, 36 years ago, under the “urgency” provisions in the Act. However, the land so acquired by the State had not been utilised as at the time of filing the action, 36 years later, and the Petitioners applied for the Respondents to make a

⁵¹ C.A. (Writ) 306/2014 (Decided on 20.02.2020)

‘divesting Order’ in terms of Section 39 of the LAA.⁵² The Court was unequivocal in its view that once a land has been acquired in view of an urgent public purpose, it must be utilised within a reasonable period of time for the said public purpose. Failure to do so would result in a breach of public trust. Court held that,

⁵² A divesting Order is one whereby a vesting Order issued to acquire land is revoked. Section 39A of the Land Acquisition Act sets out the procedure for this,

39A. (1) Notwithstanding that by virtue of an Order under section 38 (hereafter in this section referred to as a “vesting Order”) any land has vested absolutely in the State and actual possession of such land has been taken for or on behalf of the State under the provisions of paragraph (a) of section 40, the Minister may, subject to subsection (2), by subsequent Order published in the Gazette (hereafter in this section referred to as a “divesting Order”) divest the State of the land so vested by the aforesaid vesting Order.

(2) The Minister shall prior to making a divesting Order under subsection (1) satisfy himself that

(a) no compensation has been paid under this Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;

(b) the said land has not been used for a public purpose after possession of such land has been taken by the State under the provisions of paragraph (a) of section 40;

(c) no improvements to the said land have been effected after the Order for possession under paragraph (a) of section 40 had been made; and

(d) the person or persons interested in the said land have consented in writing to take possession of such land immediately after the divesting Order is published in the Gazette.

*“When the Minister acquires private lands under proviso (a) of section 38 of the Land Acquisition Act on the basis of urgent public purpose, he shall have a clear plan to implement at the time of taking that decision. **He cannot acquire lands in a great hurry and then take his own time to think of plans after acquisition. That is a betrayal of the public trust doctrine.**”*⁵³ [Emphasis added]

⁵³ The Court cited with approval a passage from an earlier Judgement on the Public Trust reposed in public authorities, also concerning divesting of lands acquired (*De Silva v Atukorale* [1993] 1 Sri LR 283)

“The Public Trust Doctrine is based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain or favour, but always to be used to optimise the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution, the Sovereignty reposes. Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review.”

The judgement in *De Silva v Atukorale* also sets out extensive criteria / considerations for state authorities when issuing divesting Orders. Court held, *inter alia*, that,

“The purpose of the Land Acquisition Act was to enable the State to take private land, in the exercise of its right of eminent domain, to be used for a public purpose, for the common good; not to enable the State or State functionaries to take over private land for personal benefit or private revenge. Where the element of public benefit faded away at some stage of the acquisition proceedings, the policy of the Act was that

Court directed that the lands so acquired by the State be divested of by the Minister of Lands.⁵⁴

In the case of *Centre for Environmental Justice v Conservator General, Department of Forest Conservation and others*,⁵⁵ the Court of Appeal made reference to the Public Trust Doctrine when granting relief to the Petitioners, and in interpreting its jurisdiction in terms of Article 140. The Petitioners came before Court in the public interest contending that the resettlement of around 1500 internally displaced families in the Northern Sanctuary of the Wilpattu National Park has been made contrary to law. The area cleared and used for said resettlement has been declared as ‘reserved forests’ in terms of the Forest Conservation Ordinance. While the Court acknowledged that there was a need to resettle IDPs, the Court held that the Rule of Law must override any competing interests, as the areas cleared of forest for the construction of houses and roads were those declared as ‘reserved forests’ in terms of the Forest Conservation Ordinance.

In this case, Court made reference to the Public Trust Doctrine in its interpretation of Article 140, stating that the Court had jurisdiction to “make Orders in the nature of a Writ of Certiorari”,

the proceedings should terminate and the title of the former owner restored.”

⁵⁴ At page 30 in C.A. (Writ) 306/2014 (Decided on 20.02.2020)

⁵⁵ C.A. (Writ) 291/2015 (Decided on 16.11.2020)

“Taken in the context of our Constitutional principles and provisions, these ‘orders’ constitute one of the principal safeguards against excess and abuse of executive power; mandating the judiciary to defend the sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive... Further this Court itself has long recognized and applied the ‘public trust’ doctrine.”

The Court did not order the removal of the housing project or resettlement, but ordered that the Conservator General of Forest take action against the removal of forest cover to effect resettlement, organise a reforestation program, and reinstate the forest lands to the forest reserve in terms of the Forest Ordinance.

Delivering the judgement of the Court, Justice Janak de Silva further adduced the ‘Polluter Pays’ principle in the Rio De Janeiro Declaration,⁵⁶ to hold the Minister of Industry

⁵⁶ The Rio de Janeiro Declaration on Environment and Development (1992)
Principle 16

“National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”

Sri Lankan Courts have upheld the “Polluter Pays” principle previously in cases like, *Bulankulama and Others v Secretary, Ministry of Industrial Development and Others* [2000] 2 Sri LR 243; *Wijebanda v Conservator General of Forests* [2009] 1 Sri LR 337; *Kariyawasam v Central Environment Authority and Others S.C. (FR)* 141/2015. This judgement was appealed from by the 7th Respondent before the Supreme Court around February, 2021.

and Commerce to bear the full cost of the tree-planting program ordered by Court, as he had been instrumental in effecting the forest clearance and resettlement.

“Article 28 (f) of the Constitution dictates that it is a fundamental duty of every person in Sri Lanka to protect nature and conserve its riches. This includes public officials and representatives of the people like the 7th Respondent (the Minister of Industry and Commerce).

In view of this constitutional duty, it would be a travesty of justice to require the State and consequentially the taxpayer to bear the costs of this programme when the 7th Respondent was instrumental in getting the reserved forest released for the resettlement of the IDPs.

Although it is true that no relief has been sought by the Petitioner against the 7th Respondent, this in my view does not prevent the Court from applying the polluter pays principle against the 7th Respondent and granting ancillary or consequential relief against him.”

6. Conclusion

The core issue with dispossession of private land through State acquisitions is the deprivation of the landowners' tenure security. Since many of these lands so acquired are also farming lands, this has a direct and adverse impact on their livelihoods. This essay has attempted to point out defective provisions in the relevant laws, acquisitions that have taken place in violation of such law, and appropriation of lands that have taken place through force or violence. To this extent, the different premises on which the state makes claims to private land have been assessed.

Tenure security has been characterised as a right into which inroads can be made only as defined in law and through procedure established by law, and that in the event of such deprivation that the landowners are compensated adequately. These issues are exacerbated through the lack of title documentation, since most lands subject to acquisitions, as discussed above, are from former conflict-ridden areas or farming lands owned traditionally for decades. Public Interest Litigation has played a significant role in reining State actors in, when these acquisitions have taken place on whim and caprice, and in flagrant violation of the law. To this end, this essay has shown the development of the law relating to land acquisitions through Public Interest Litigation, and the establishment of principles by the Judiciary for the protection of those deprived of tenure security.

The State has time and again appropriated lands belonging to and used by individuals on various grounds. These acquisitions have often been premised on national security or development, and at times, have taken place *sans* a legal process, for instance, through forced evictions and what can be termed ‘land grabs’. These trends have resulted in many individuals being displaced and dispossessed, with limited to no redress available. This has in turn witnessed a spate of cases being filed challenging such attempts to acquire private land and the taking over of state land. The Courts have put in place safeguards as to the specific purposes for appropriating land and dispelling the notion of the absolute right of the State over land. Further, courts have also gone on to recognise the duties of public officials to act in the public interest and expanded the Public Trust Doctrine. This coupled with checks on how security laws can be used to infringe on Fundamental Rights have provided a rich jurisprudence of the limits in the use of laws, gazettes and administrative circulars that can impede rights over land.

This chapter captures some of the key developments around land rights and jurisprudence. Despite measures by successive governments to take over land for national security and development purposes, the courts have stood firm for the need for transparency and accountability, ensuring that due process safeguards are in place. Thus, the jurisprudence now provides important safeguards and has also resulted in the review and reform of frameworks that recognise the rights over land and tenure security.

Despite these welcome developments, the continued appropriation of private land by the State is troubling. As noted in the chapter, there is increasing acceptance of the term ‘national security’ to appropriate land and enable continued militarisation in post war Sri Lanka. Worrying trends also demonstrate how national security has evolved to include economic and tourism purposes. Public interest litigation, as hitherto, can be a paramount safeguard and effective check against such trends of arbitrary and unjust take-overs of private land by the State.

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Public Interest Litigation and the Devolution of Political Power in Sri Lanka

Kalana Senaratne

1 Introduction

It has been over three decades since a constitutional framework devolving political power was adopted in Sri Lanka. This framework is the 13th Amendment to the Constitution.¹ Adopted in 1987, it established a system of Provincial Councils. The 13th Amendment was a consequence of India-Sri Lanka Accord signed in 1987. The Accord envisaged, *inter alia*, the establishment of a political structure which devolved power especially to the Northern and Eastern Provinces in Sri Lanka.²

The past years have given rise to a considerable body of case law relating to the 13th Amendment. The cases on the 13th Amendment have been filed by individuals and groups, largely in the public interest. The intention of the parties has often been to ensure that the State respects the provisions of the 13th Amendment and that the principle of power-sharing is upheld, albeit within the framework of a unitary State.

¹ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Chap. XVII A.

² See Indo-Sri Lanka Accord (1987). in R Edrisinha and others, *Power-Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (Centre for Policy Alternatives 2008) 356-359.

This chapter examines how public interest litigation has influenced the cause of political power-sharing in Sri Lanka. This is done through the examination of selected cases filed by individuals and interest groups in the public interest. The broad subject matter of this chapter is not a novel one. However, revisiting the topic may be useful in times such as the present, when much is being said against the need for devolution in Sri Lanka, especially by the President and other elected representatives of the people.³

2 Public Interest Litigation and Devolution

Public interest litigation⁴ has played an important role in the protection of the rights and liberties of people. Also known as social action litigation, this is a phenomenon whereby individuals and groups petition the courts seeking the protection of rights of communities, in the public interest. Such litigation has been a very popular phenomenon in countries like India. The Indian Supreme Court has

³ See, for example, Hindustan Times, 'The 13th amendment for Tamil devolution can't be implemented as it is: Sri Lankan President' (*Hindustan Times*, 8 March 2020) <<https://www.hindustantimes.com/videos/india-news/sri-lanka-prez-interviewvideo/video-iZcVdkgQDzmLS9hSNenqxN.html>> accessed 28 March 2021. ; S Indrajith, 'PC Minister Weerasekera opposes full implementation of 13 A' (*The Island*, 9 October 2020) <<https://island.lk/pc-minister-weerasekera-opposes-full-implementation-of-13-a/>> accessed 28 March 2021. The ideological arguments against devolution and the 13th Amendment, as raised by numerous ideologues representing what are considered to be Sinhala-Buddhist majority interests, has a long history and is too well known to be discussed here.

⁴ See generally, M Gomez, *In the Public Interest: Essays on Public Interest Litigation and Participatory Justice* (University of Colombo 1993).

developed a rich body of jurisprudence on public interest litigation.⁵

Litigation initiated in the public interest can be helpful, not only in the protection of individual and group rights. It can also be helpful in promoting the cause of political power sharing and devolution⁶ guaranteed by the constitution. This is especially because devolution is always a matter that affects a wider community of people living in a particular territorial formation, such as a region or a province within a State. This is the case in Sri Lanka, wherein the concept of devolution is based on the territorial principle: i. e., devolution is granted to territorial units, namely the provinces. This invokes the need for individuals and groups to be vigilant about the policies of the State and the attempts made by the Executive and Legislative branches to promote and introduce laws which affect the principle of devolution and the autonomy of the Provincial Councils.

⁵ See, for an early study, P N Bhagwati, *Social Action Litigation: The Indian Experience*. in N Thiruchelvam and R Coomaraswamy (eds), *The Role of the Judiciary in Plural Societies* (Frances Publishers 1987) 20-31.

⁶ In this chapter, 'devolution' is a broad reference to the sharing of power (of an executive, legislative and judicial nature) between the centre and regional/provincial units. Such sharing of power often happens on a territorial basis; i.e. through the establishment of legislative bodies in regions/provinces, with constitutional and/or legal recognition afforded to them. In the Sri Lankan context, 'devolution' would therefore be a reference to the sharing of power, especially between the Parliament and the Provincial Councils, as facilitated through the 13th Amendment. Devolutionary mechanisms can even be considered to be a particular manifestation of federalism, even though it should be noted that concepts like 'devolution' and 'federalism' do not have precise definitions. See, generally, F Palermo and K Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Bloomsbury Academic 2019) 34-66.

Public vigilance on devolution is required especially in a country like Sri Lanka, where the State is not necessarily devolution friendly. As mentioned above, the dominant discourse in Sri Lanka is against devolution and the 13th Amendment. Additionally, where the principle of devolution is seen to be acceptable, the reasoning behind such acceptance has turned out to be somewhat concerning too. The classic example is the manner in which the Supreme Court, in 1987, accepted the constitutionality of the 13th Amendment Bill (and the Provincial Councils Bill).⁷ In a neatly divided judgement, the Court held that the Bills did not violate the Constitution and that, therefore, only a two-thirds majority in Parliament was required to pass them. But the reasoning behind the majority was a curious one. It was largely based on the sense that the 13th Amendment was well within the concept of the Executive Presidency, the unitary framework of the State and the concept of Parliamentary sovereignty. In other words, the majority was more comfortable in seeing the 13th Amendment as creating a political structure which was subordinate to the Central Government, and not one which enhanced the democratic freedoms of the people (and especially the minority peoples in the periphery).

The majority made a great effort to show how the provisions of the 13th Amendment Bill did not clash especially with the Executive powers of the President. As they stated: “The

⁷ See *In Re the Thirteenth Amendment to the Constitution and Provincial Councils Bill*. in L Marasinghe and J Wickramaratne (eds), *Judicial Pronouncements on the 13th Amendment* (Stamford Lake 2010) 1-128.

general effect of the new arrangement will be to place under provincial democratic supervision a wide range of services run in the respective provinces for the said provinces, without affecting the sovereign powers of Parliament and the Central Executive.”⁸ Interestingly, this was not how the minority on the bench thought about the impact of the 13th Amendment Bill. Those on the minority, especially Justice Wanasundara, thought the 13th Amendment Bill enhanced the autonomy of the people, especially the Tamil people, not just in a significant way but also in ways that were detrimental to the majority community.⁹ This was seen to be a threat to Sri Lanka’s sovereignty, necessitating a referendum on the 13th Amendment Bill.

Therefore, the majority of the Supreme Court accepted the 13th Amendment Bill, but not entirely for the best of reasons. In short, the spirit of the Court’s determination in 1987 could have been more promising; it could, and should, have been one which emphasised the role and rationale behind devolution and its ability to guarantee the autonomy of peoples in the provinces, including the Tamil people. In light of this backdrop, it can be argued that litigation in the public interest is essential to protect and promote political power-sharing in Sri Lanka.

⁸ *ibid* 22.

⁹ *ibid* 84.

3 Devolution: Some Selected Cases

Over the past decades, many cases have been heard on numerous questions pertaining to the constitutional framework promoting devolution. Therefore, a considerable body of judicial decisions and jurisprudence has developed concerning devolution.¹⁰ There are many works which analyse the workings of the 13th Amendment and decided cases.¹¹

In broad terms, the Supreme Court's engagement with the 13th Amendment has not been a disappointment. The Court has, in general terms, interpreted the provisions of the Constitution in ways that have promoted devolution. Many cases can be cited in this regard. The Court's decisions in cases such as the *Agrarian Services (Amendment) Bill of 1990* case,¹² the *Re Transport Board Statute of the North-Eastern Provincial Council* case,¹³ the *Water Services Bill* case,¹⁴ the *Land Ownership Bill* case¹⁵, and the *Local Authorities (Special Provisions) Bill* case,¹⁶ are some cases

¹⁰ See generally: Marasinghe and Wickramaratne (eds.) (n 7). ; J Wickramaratne (ed.), *Judicial Pronouncements on the 13th Amendment: 2019 Supplement* (Stamford Lake 2019).

¹¹ From an otherwise long list, a few examples are: L Marasinghe and J Wickramaratne (eds.), *13th Amendment: Essays on Practice* (Stamford Lake 2013); R Amerasinghe and others (eds.), *Thirty Years of Devolution: An Evaluation of the Workings of Provincial Councils in Sri Lanka* (Institute for Constitutional Studies 2019).

¹² S.C. (SD) 9/1990; see Marasinghe and Wickramaratne (eds.) (n 7)142-147.

¹³ S.C. (Spl) 7/1989 ; ibid 148-172.

¹⁴ S.C. (SD) 24 and 25/ 2003; ibid 47-454.

¹⁵ S.C. (SD) 26-36/2003; ibid 455-479.

¹⁶ S.C. (SD) 6 and 7/2008; ibid 516-521.

in which the Court has prevented the Central Governments' attempts to bypass the Provincial Councils when making laws. It has even been argued that while the Sri Lankan Judiciary has been consistent in its interpretation of the constitutional provisions concerning devolution, it is the lack of political will which has contributed to the inadequate implementation of the 13th Amendment.¹⁷

This chapter, therefore, will not engage in an examination of the many cases already examined. Rather, this section will examine a few cases which were filed by individual petitioners and institutions such as the Centre for Policy Alternatives (CPA), especially during the post-2010 era. The determinations will point to how, and in what ways, some of the crucial interventions made in the public interest have advanced the cause of devolution in Sri Lanka, and what kinds of lessons we can learn from the determinations of the Supreme Court.

3.1 Divineguma Bill I¹⁸

An important landmark in the jurisprudence relating to devolution should be the *Divineguma* cases, which were heard in 2012. The first Divineguma case concerned the Bill

¹⁷ U Egalahewa, *Judicial Approach to Devolution of Power: Interpretation of the Thirteenth Amendment to the Constitution*. in L Marasinghe and J Wickramaratne (eds), *13th Amendment: Essays on Practice* (Stamford Lake 2013) 163.

¹⁸ *Divineguma Bill I, 2012* S.C. (SD) 01-03/2012 reproduced in Wickramaratne (ed.) (n 10) 12-37.

titled ‘Divineguma’, which was placed on the Order Paper of Parliament on 10.08.2012. The Bill sought to establish: a Department which was to be known as the Department of Divineguma Development; Divineguma Community Based Organisations at the rural level; and Divineguma Community Based Banks and Banking Societies. Many petitioners challenged the constitutionality of the Bill, invoking the jurisdiction of the Supreme Court as per Article 121 (1) of the Constitution.

One of the main arguments raised by the petitioners was that the Bill, in several of its clauses, sought to legislate on subjects contained in the Provincial Council List (List I) of the Ninth Schedule to the Constitution. In a detailed table presented to Court, the petitioners listed the numerous clauses in the Bill which related to subjects covered in List I. In such a situation, it is imperative that the President refers the Bill to the Provincial Councils before placing it on the Order Paper of Parliament. This is in terms of Article 154G (3) of the Constitution.¹⁹ The petitioners argued, therefore, that the Divineguma Bill had been placed on the Order Paper in violation of the mandatory requirement set out in Article 154G (3) of the Constitution.

The Supreme Court held with the petitioners. It accepted the argument that numerous clauses in the Bill did concern subjects covered in List I and that, therefore, the Bill cannot

¹⁹ Article 153(G)(3) of the Constitution states, *inter alia*, that no Bill regarding a matter set out in the Provincial Council List shall become law unless it is referred by the President to every Provincial Council.

become law unless it has been referred by the President to every Provincial Council, as required under Article 154G (3) of the Constitution. This was not a radical finding. The Court was simply asserting the procedure that needed to be followed, as per the Constitution. However, the importance of the Court's determination lies in what the Court said about the 13th Amendment in particular and the Constitution in general.

The Court argued that Article 154G (3) of the Constitution was mandatory because it would otherwise negate the purpose of the 13th Amendment. The Court noted:

“Considering the purpose on which the 13th Amendment was introduced, and the establishment of the Provincial Councils, this procedure laid down in Article 154G (3) has to be regarded as mandatory since otherwise the object of the said Article would be defeated.”²⁰

Consulting the Provincial Councils was mandatory for the further reason that such authority had been attributed to the Provincial Councils under the Constitution.²¹ The Court proceeded to state:

“It is not disputed that the Provincial Councils came into being as a result of the introduction of the Thirteenth Amendment to the Constitution in 1987. The object was to achieve a more democratic

²⁰ *Divineguma Bill I* (n 18) 30.

²¹ *ibid* 31.

constitutional regime on the basis of the power which was hitherto vested with the Central Government, being devolved to the Provincial Centres. By this process, in terms of Article 154 G, certain restrictions have been placed with regard to enacting laws by the Centre over the subjects which are specifically devolved to the Provincial Councils. When there are such restrictions, those cannot be overcome by a mere reference to national policy. Such actions would only negate the whole purpose of the introduction of Provincial Councils [in] order to devolve power.”²²

Thus, the Court commented on a democratic constitutional regime, which the Court does not (unfortunately) do very often in its determinations. In particular, the Court’s reasoning suggests that the 13th Amendment needs to be seen as a democratic addition to the Constitution; even a democratic reformation of the 1978 Constitution. The implication could be that the 1978 Constitution, in its original form, needed democratic reformation.

The Court also stated in the process that it is “to be borne in mind that the Constitution is the basic and fundamental law of the land, which reigns supreme and all other documents are subject to provisions contained in the Constitution.”²³ This, of course, is not entirely accurate, given Article 16 of the Constitution, which states that all existing laws, even if

²² *ibid* 36.

²³ *ibid* 35.

they are inconsistent with Fundamental Rights, shall remain valid. However, the approach of the Court towards the question of devolution and power-sharing in this case was a commendable one. And it is largely due to the efforts of the petitioners, who instituted action in the public interest, that the Court was persuaded to comment approvingly on devolution.

3.2 Divineguma Bill II²⁴

The second *Divineguma* case is also of importance. The question in this case was about the reference of the Divineguma Bill to the Provincial Councils. More specifically, as per Article 154G (3), any Bill on a matter concerning the Provincial Council List should be referred by the President to every Provincial Council for the expression of its views. However, at the moment this referral took place, the Northern Provincial Council was the only Council that had not been constituted; therefore, the government had sought to obtain the views of the Governor. Was this adequate? In other words, the main legal question was whether reference to “every Provincial Council” in Article 154G (3) included non-constituted Provincial Councils as well. The Court framed the question as follows:

“The question at issue is at a time where one Provincial Council has been established, but not

²⁴ *Divineguma Bill II, 2012* in Wickramaratne (ed), (n 10) 38-73.

constituted, whether the phrase ‘every Provincial Council’ would include the said non-constituted Provincial Council, along with all the Provincial Councils which are established and constituted.”²⁵

The Supreme Court, in a somewhat detailed decision (albeit being repetitive, in numerous places in its reasoning), provided an affirmative answer to the above question. In broad terms, the Court adopted an object-oriented approach to Constitutional interpretation. It stated:

“Constitutional provisions are required to be understood and interpreted with an object oriented approach. The words used [have] to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. The successful working of the Constitution depends upon the democratic spirit underlying it being respected in letter and in spirit.”²⁶

Furthermore, the Court, quoting Indian jurisprudence, stated that the simple method of interpretation was to give effect to the sensible meaning of a particular phrase. A commonsensical approach was to be adopted.²⁷

In stating so, the Court undertook an examination of the scope and purpose of Article 154G (3) and the object that provision sought to accomplish. One of its purposes was to

²⁵ *ibid* 57.

²⁶ *ibid* 53.

²⁷ *ibid* 57.

ensure that it was mandatory to refer a Bill (concerning List I) to every Provincial Council and not to any other person.²⁸ In the process, the Court also made a distinction between the nature of a Governor of a Provincial Council *and* a Provincial Council. The Governor was appointed by the President and held office during the pleasure of the President. However, in contrast to this, the Provincial Council consists of elected members, in terms of Article 154A (2). The Court held that a Governor cannot be considered to be a part of the membership of the Provincial Council.²⁹ Therefore, obtaining the views of the Governor was not the same as obtaining the views of the Provincial Council.³⁰

Importantly, the Court referred to Article 12 of the Constitution, and considered its gravamen to be equality of treatment. Such equal treatment was denied in a situation where the President obtained the views of eight Provincial Councils on one hand, and the Governor of the Northern Provincial Council on the other. This would result in discrimination, amounting also to a denial of equality among all citizens in the country who have a right to elect their representatives to the respective Provincial Councils.³¹ It is also,

²⁸ *ibid* 61

²⁹ *ibid* 56.

³⁰ *ibid* 61.

³¹ *ibid*.

“the duty [o]f the Court to interpret Article 154G (3) which [does] not deny to the people or a section thereof, the full benefit to foster, develop and enrich democratic institutions. No Court should construe any provision of the Constitution so as to defeat its obvious ends. A harmonious and workable interpretation is always preferred in order to achieve the objects and to obviate a conflicting situation.”³²

In this way, the Court came out in favour of respecting the provisions of the 13th Amendment in a way that promoted a certain degree of autonomy guaranteed to a Provincial Council under the Constitution. The Court placed importance on the way in which the Constitution ought to be interpreted, A strictly positivist approach would have resulted in the Court adopting a different decision that hampered the autonomy, especially of the Northern Provincial Council (and thereby the Councils in general). This, the Court avoided, by emphasising the importance of an object oriented approach to interpretation. Public interest litigation, in a sense, made this possible.

3.3 The 21st Amendment Bill, 2013³³

The story about public interest litigation concerning devolution is not always a happy one. In 2013, a Bill entitled

³² *ibid* 62-63.

³³ See the *Twenty First Amendment to the Constitution Bill* in Wickramaratne (ed) (n 10) 74-84.

‘Twenty First Amendment to the Constitution’ was presented to Parliament. It was a Private Member’s Bill. It aimed to remove certain provisions in the 13th Amendment.

The sole petitioner in this case was the CPA. It approached the Supreme Court, seeking a determination to the effect that the Bill had not been validly placed on the Order Paper of Parliament, and that it can only be done after the Bill is referred by the President to every Provincial Council – as required under Article 154G (2) of the Constitution. It was the petitioner’s argument that the Bill was not a valid Bill, as the mandatory requirements set forth in Article 154G (2) had not been followed. Therefore, the Supreme Court was not able to consider whether a referendum was required, since there was no valid Bill before Parliament.³⁴

The petitioner appeared to have a strong case; since the Supreme Court had, on a number of previous occasions, confirmed the mandatory character of Articles 154G (2) and (3) of the Constitution. If the reasoning in such cases was followed, the decision would have favoured the petitioner.

The Court, however, adopted a different line of reasoning. It sought to distinguish the earlier cases, stating that they were different as they dealt with ordinary Bills of Parliament; they were not Bills which sought to amend the Constitution.³⁵ Having done so, the Court placed great emphasis on Article 120 of the Constitution, according to which the Supreme

³⁴ *ibid* 76-77.

³⁵ *ibid* 78 and 84.

Court has the sole and exclusive jurisdiction to determine the constitutionality of any Bill. But the Court stressed that proviso (a) to Article 120 was of particular significance to deciding the case. It was so also because the present case dealt with a Private Member's Bill.

What proviso (a) states is that where a Bill seeks to amend a constitutional provision or repeal and replace the Constitution, "the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a referendum..." The Court observed that it was unable to examine or pronounce on the validity of the Bill and the mandatory process laid down in Article 154G (2) – as the petitioner has requested – due to proviso (a) of Article 120. In other words, Article 120 (a) of the Constitution had precluded the Court from commenting on the main issues raised by the petitioner. The Court, in other words, lacked the requisite jurisdiction. The Court was not in a position to assume jurisdiction; and had to respect the limitations placed upon it by the Constitution.³⁶ The Court believed that this position was strengthened, *inter alia*, by Article 124 of the Constitution;³⁷ and because the placement of a Bill on the Order Paper of Parliament is part of Parliamentary proceedings, it was a matter on which the Court could not comment.³⁸ To return to the point about the previous determinations of the Court; they were to be distinguished,

³⁶ *ibid* 81.

³⁷ *ibid* 83-84.

³⁸ *ibid* 81.

since in those cases, the Court did not grapple with Articles 120 (a) and 124.³⁹

The Court adopted a very rigid and problematic understanding of Article 120 of the Constitution. The impact of this approach was to limit the Court's own jurisdiction and ability to comment on what it considered to be the legislative process of passing legislation. It was a decision given by what appeared to be an ultraconservative Bench, which did not promote the principle of devolution.

3.4 The 20th Amendment Bill, 2017⁴⁰

The case concerning the constitutionality of the 20th Amendment Bill, presented in 2017, is another important case which deals with issues of devolution and the Provincial Councils system. This too was a matter that a number of petitioners challenged in the Supreme Court. In short, the Bill sought to amend a number of Constitutional provisions (Articles 154D and 154E); and thereby introduce the requirement of holding all elections to the Provincial Councils on the same date.⁴¹ The majority of the Court held that several clauses in the Bill were inconsistent with Articles 3, 4, 12 (1) and 14 (1) of the Constitution. Therefore, as per Article 83 of the Constitution, the Bill had to be passed

³⁹ *ibid* 84.

⁴⁰ See the *Twentieth Amendment to the Constitution Bill, 2017*, in Wickramaratne (ed) (n 10) 115-156.

⁴¹ *ibid* 120.

by a two thirds majority in Parliament and approved by the people at a referendum.⁴²

There was a preliminary objection raised by the petitioners to the effect that the Bill was not a valid Bill, since the mandatory provisions in Article 154G (2) had not been complied with.⁴³ Interestingly, this was an argument that was raised in the 21st Amendment Bill case in 2013 (discussed above). In that occasion, the Court declined to address that question – quoting Article 120 (a) and 124 of the Constitution. However, the Court in this case (which now had a different Chief Justice) took up the matter for examination.

In this regard, the Court took note of the Attorney General's argument that the Bill had been referred to all the Provincial Councils by the President.⁴⁴ In response, the petitioners argued that there was no proof of such a referral and that it was even imperative that the views of the Provincial Councils were conveyed to the President before the Bill was placed on the Order Paper.⁴⁵ The Attorney General's contention was that there was no such requirement to await the views of the Provincial Councils. Mere reference of the Bill to the Provincial Councils was sufficient.⁴⁶ Here, the Court accepted the Attorney General's argument. The Court stated that the expressions of the views of the Provincial

⁴² *ibid* 135-136.

⁴³ *ibid* 122.

⁴⁴ *ibid* 122.

⁴⁵ *ibid* 123.

⁴⁶ *ibid* 123.

Councils was required only before the voting took place to pass the Bill in Parliament. The expression of views was not required before the Bill was placed on the Order Paper. The only imperative was to refer the Bill to the Provincial Councils before it is placed on the Order Paper; the failure of which makes the Bill invalid.

The impact of the Court's engagement with this issue appears to disregard, somewhat implicitly, the very rigid approach taken by the Supreme Court in 2013 (discussed above). The Court does not consider the reasoning of the 2013-determination. It is unclear how this issue will be addressed in the future. A more conservative Bench could be prompted to follow the Court's reasoning in 2013. However, for the moment, what can be said is that the approach adopted by the Court in 2017 is a more acceptable one.

What was particularly problematic about this Bill concerned the impact it had on the term of the Provincial Councils. The petitioners argued that the Bill, if passed, will result in the term of certain Provincial Councils being extended beyond the stipulated five years; while the term of certain other Provincial Councils would be reduced to less than five years.⁴⁷ This would, therefore, violate the Constitutional provisions concerning the sovereignty of the people and also affect the rights of people, especially the right to equality and the freedom of speech.⁴⁸

⁴⁷ *ibid* 131.

⁴⁸ *ibid* 131-133.

The Court accepted this argument. It noted that while it may be desirable to hold the Provincial Council election on a single day, that was not essential. The Constitution did not provide for this requirement, providing instead for the possibility of establishing them on different dates.⁴⁹ The Court stated, in particular, that unlike Parliamentary or Presidential elections, there was no compelling reason to hold the elections to all the nine Provincial Councils on the same date, because:

“Election of a Provincial Council is restricted to the Province and does not affect the other provinces. Although it may be desirable, the Bill does not provide the valid reasons for the proposed amendment.”⁵⁰

Therefore, it can be argued that the Court reached a decision which promoted the spirit of devolution and also the particularity of a Provincial Council. Different elections sought to address somewhat different political concerns. While all are, in broad terms, national elections, their impact and relevance to the people would differ. This difference had to be taken note of in the present case, especially because holding Provincial Council elections on a single day would have had a negative impact on the rights of people.

⁴⁹ *ibid* 129.

⁵⁰ *ibid* 130.

4 Conclusion

The cases examined above reveal that much of the litigation on devolution centres on some key legal questions. The predominant question has been whether the President has consulted the Provincial Councils before a Bill, which affects the subjects covered under the Provincial Council List, has been placed on the Order Paper of Parliament. On the one hand, this is a very basic, even mundane question; a question about following a mandatory procedure laid out in the Constitution. On the other hand, having to petition Court concerning this question, on a constant and repetitive basis, shows that governments tend to bypass constitutional requirements when making law. More critically, these attempts show the reluctance of successive governments to respect the spirit of devolution.

What then is the correct law? It is the argument of this chapter that the acceptable view, on the legal issues discussed, is reflected in the *Divineguma* cases. The approach of the Supreme Court in those cases promotes the correct procedural position of the law. It is also an approach which welcomes the broader aims and purposes of devolution. The decision of the Court in 2013 (on the 21st Amendment Bill), it is argued, is extremely problematic and runs against the spirit of devolution that ought to govern cases concerning the 13th Amendment. Thanks to the Court's decision in 2017 on the 20th Amendment Bill, it can be said with some certainty that the Court has been unwilling to

follow or give credence to the rigid and conservative approach adopted by the Court in 2013.

Examining the above cases and the broader jurisprudence concerning the 13th Amendment, it can be argued that public interest litigation in this area has helped in giving some meaning to the devolutionary provisions in the Constitution. In petitioning the Supreme Court, individuals and organisations such as the CPA have been able to get the Court to elaborate on some of the constitutional provisions concerning devolution. In the process, the Judiciary has, on a few occasions, proceeded to comment on why devolution is necessary, and on why respecting the Constitution is important.

However, it is felt that the Court could have done more to enhance the quality of its jurisprudence on devolution and the 13th Amendment. A greater boldness could have been shown by the Court especially in terms of explaining, for example, as to why devolution is necessary for the enhancement of the democratic freedoms of the people, including minority communities. The Court's engagement with some of the basic principles and ideals underlying the need for devolution in a pluralist country have been minimal and unfortunately inadequate. It is almost as if the Court finds it difficult to pronounce on how devolution would assist the minority communities, especially the Tamil people, through political power-sharing as promoted in the

Constitution.⁵¹ Given the studies which have critiqued the Court's jurisprudence concerning the protection of fundamental rights and how it has addressed minority rights concerns,⁵² the Court's reluctance to engage with the 'Tamil question' might not be surprising. However, it is hoped that the Court would, in the future, be more forthright in asserting the importance of devolution to minority peoples in particular and the country in general. That would result in creating an important body of judicial opinion which could act as a check on any potential attempts to take away, totally or in part, the devolutionary provisions in the Constitution. It is not clear whether the Sri Lankan Supreme Court would take up that challenge in the future. Yet, it is public interest litigation that can have some critical impact on persuading the Court to do so.

⁵¹ This may be partly because the cases brought before the Court have often concerned the broader Provincial Council system which is applicable in all provinces of the country. Therefore, the Court might not feel the need to comment specifically on how devolution affects the minority peoples. However, the Court, when it got the opportunity to comment on the minority question (in 1987), did not do so, as argued at the beginning of the chapter.

⁵² There are a number of studies, but a most forceful critique is J de Almeida-Guneratne and others, *The Judicial Mind in Sri Lanka: Responding to the Protection of Minority Rights* (Law & Society Trust 2014).

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PROTECTING PUBLIC FINANCE THROUGH PUBLIC INTEREST LITIGATION

Suren Fernando

“It was a central factor in the historical development of parliamentary influence and power that the Sovereign was obliged to obtain the consent of Parliament (and particularly the House of Commons as representatives of the people) to the levying of taxes to meet the expenditure of the State.”¹

Introduction²

The Constitution of Sri Lanka recognises the pre-existing fact that *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.*³ The Constitution also provides that “**Parliament shall have full control over public finance.** No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law.”⁴ The objective of such parliamentary control over public finance, simply put, is to ensure that the People’s monies are collected and utilised

¹ TE May and others, *Erskine May’s treatise on the law, privileges, proceedings and usage of Parliament* (25 edn, LexisNexis 2019) 849.

² This chapter was finalised in July 2021 and is current up to that date.

³ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 3.

⁴ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 148.

subject to the consent of the People, which consent must be expressed through their representatives.

The principle contained in Article 148 of the Constitution traces its roots to constitutional developments in the United Kingdom (and later the United States) from as far back as the thirteenth century. The principle of no taxation without the consent of the citizen was established in the Magna Carta of 1215,⁵ and reiterated in the Petition of Right 1627⁶ which *inter alia* provided that “your Subjects have inherited this Freedom That they should not be compelled to contribute to any Taxe Tallage Ayde or other like Charge not set by common consent in Parliament.”

Subsequently, in 1765, the Stamp Act Congress convened in New York adopted a thirteen point resolution, one of which was that “it is inseparably essential to the freedom of the people, and the undoubted right of Englishmen, that no taxes should be imposed on them but with their own consent, given personally or by their representatives.”

If the position in a monarchy is that the *Sovereign [is] obliged to obtain the consent of Parliament*⁷ with regard to fiscal decision making, it must necessarily be all the more so in a Republic.

⁵ The Magna Carta *inter alia* provided that “No 'scutage' or 'aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable 'aid' may be levied. 'Aids' from the city of London are to be treated similarly.” Magna Carta (1297) 1297 CHAPTER 9 25 Edw 1 cc 1 9 29.

⁶ The Petition of Right (1627) 1627 CHAPTER 1 3 Cha 1.

⁷ T E May (n1) 849.

This chapter considers, with particular reference to *Appropriation Bills*, and public debt creation, the manner in which the Supreme Court of Sri Lanka has dealt with matters relating to public finance; some implications of the Executive's fiscal decisions on the People's Sovereignty; what 'control' Parliament exercises with regard to public finance; and the control that Parliament should exercise in this regard. Given word constraints, this chapter will not deal in depth with other public interest litigation relating to the protection of public finance.

Public Finance as a component of the Sovereignty of the People

Although public finance is not specifically mentioned in Article 3 of the Constitution as a component of the People's sovereignty, it has been judicially recognised that Parliament's *full control over public finance* is a component of the legislative power of Parliament encapsulated in Article 4 (a) of the Constitution.⁸ Similarly, it has been judicially recognised that "control of public finance through the elected representatives is an attribute of the sovereignty of the people as set out in Article 3 of the Constitution."⁹ In a series of judgements recognising the 'public trust

⁸ *In Re the Appropriation Bill S.C. (SD) 3 and 4/ 2008.*

The reasoning in the *Determination related to the Development Councils Bill S.C. (SD) 4/1980* suggests that a violation of Article 148, could also amount additionally to an abdication of legislative power, and thus infringe Article 76(1) and in turn Article 3 of the Constitution.

⁹ *In Re the Divineguma Bill S.C. (SD) 4 - 14/2012.*

doctrine’, the Supreme Court has also recognised the principle that the “organs of State are guardians to whom the people have committed the care and preservation of the resources of the people.”¹⁰

In *Azath Sally v Colombo Municipal Council* the Supreme Court noted that “The concept of public trust had been followed in several judgments of this Court and now it is an accepted doctrine that the resources of the country belong to the people; Sri Lanka’s sovereignty is in the people in terms of Article 3 of the Constitution and is inalienable and includes the powers of Government, Fundamental Rights and the franchise; and the people have committed the care and preservation of their resources to the organs of the State, which are their guardians or trustees.”¹¹ The People’s resources would necessarily include, though obviously not be limited to, financial resources, i. e. public finance.

What is ‘full control’ of public finance?

As noted above, the Constitution mandates that Parliament shall have ‘full control’¹² over public finance. The Constitution thus seeks to ensure that fiscal activity of the Executive is subject to the control of the legislature which,

¹⁰ *Bulankulama and others v Secretary, Ministry of Industrial Development and others* (Eppawela Case) [2000] 3 Sri LR 243, 253; see also *Sugathapala Mendis and Another v Chandrika Kumaratunga and others* [2008] 2 Sri LR 339, and *Azath Sally v Colombo Municipal Council* [2009] 1 Sri LR 365.

¹¹ [2009] 1 Sri LR 365, 398.

¹² The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 148

as an institution, by and large, is representative of the People as a whole. The question then arises as to what is meant by ‘full control’? Is it a mere Parliamentary post-mortem on Executive decision making, or does it involve active participation or approval prior to the implementation of Executive policies?

In Re the Appropriation Bill (SC SD 3 & 4 of 2008)¹³ it was held that:

“According to that Determination¹⁴ in terms of Article 4 (a) of the Constitution, Parliament is the sole custodian of legislative power of the People and will exercise that power in trust for the People in whom sovereignty is reposed. Legislative power includes the ‘full control over public finance’ as stated in Article 148 cited above, which in our opinion is also a vital component of the balance of power firmly established by the Constitution in relation to the respective organs of Government.

...One important check on the exercise of Executive power is that finance required for such exercise remains within the full control of Parliament – the Legislature. There are three vital components of such control in terms of the Constitution viz:

¹³ *In Re the Appropriation Bill* S.C. (SD) 3 and 4/2008.

¹⁴ Referring to *In Re: the 19th Amendment to the Constitution* S.C. (SD) 11 – 40 / 2002.

- (i) **Control of the source of finances**, i. e. imposition of taxes, levies, rates and the like, and the **creation of any debt of the Republic**;
- (ii) **Control by way of allocation of public finances** to the respective departments and agencies of Government and setting of limits of such expenditure;
- (iii) **Control by way of continuous audit and check** as to due diligence in performance in relation to (i) and (ii).¹⁵

...an Act lacking in such transparency or being an **alienation** of control by Parliament would be inconsistent with Article 148 of the Constitution.”¹⁶

Thus, any legislation affecting Public Finance must ensure that Parliament continues to exercise all of the following:

- (i) **Control of the SOURCE of finances**, including with regard to **creation of any debt of the Republic**;
- (ii) **Control by way of ALLOCATION of public finances** to the respective departments and

¹⁵ *In Re the Appropriation Bill* S.C. (SD) 3 and 4/2008.

¹⁶ *ibid.*

agencies of Government and setting of limits of such expenditure;

- (iii) Additionally, **control by way of continuous AUDIT and CHECK.**

Previously, *In Re the Determination related to the Appropriation Bill 1986*¹⁷ dealing with the question whether the Minister's power to alter the limits relating to certain heads of expenditure would be inconsistent with the Constitution, the Court recognised that "the issue in this matter is more the question of the extent of Parliamentary control over national Finance than one of delegation of legislative power simpliciter. Incidentally, **it would be anomalous for Parliament which has to exercise financial control over expenditure by the Executive to delegate that power to the very authority which it has to supervise without devising suitable checks to control the use of that power.** In our view **some amount of direct and actual control, however nominal, has to be retained by Parliament** in this matter. The effect of our determination is to restore to Parliament the right to exercise a power which rightly belongs to it."¹⁸

Parliament, which is exercising delegated power with regard to fiscal matters, should not be permitted to sub delegate, alienate or abdicate this power.

¹⁷ *In Re the Appropriation Bill* (1986) Decisions of the Supreme Court on Parliamentary Bills, Vol II, page 29.

¹⁸ *ibid* 35.

*In Re The Nineteenth Amendment to the Constitution*¹⁹ the Supreme Court observed that “shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an ‘alienation’ of sovereignty which is inconsistent with Article 3 read with Article 4 of the Constitution.”

*In Re the Colombo Port City Economic Commission Bill*²⁰ the Supreme Court was called upon to determine whether the Estate Manager could levy taxes. The Court observed that the Bill sought to make provision for the Estate Manager to collect taxes²¹ although the enumeration of general powers of the Commission in the Bill²² did not confer any power on the Commission to impose taxes. The Supreme Court accordingly determined the clauses which sought to confer power on the Estate Manager to collect taxes were inconsistent with Article 148 of the Constitution.²³

¹⁹ S.C. (SD) 11,13,15-21,25-35, 37-40/2002.

²⁰ S.C. (SD) 4, 5, and 7 – 23/2021

²¹ Colombo Port City Economic Commission Bill Clauses 60(c) and 60(f).

²² Colombo Port City Economic Commission Bill Clause 6.

²³ *In Re the Colombo Port City Economic Commission Bill* S.C. (SD) 4, 5, & 7 – 23/2021 at 44.

The Supreme Court thus recognised the principle that no taxes could be levied except with the prior approval of Parliament and did not permit a mechanism in which the Executive could levy unspecified taxes sans parliamentary approval.

In Re the Colombo Port City Economic Commission Bill the Supreme Court also dealt with the issue of the possible grant of tax exemptions by the Executive. The Court determined that:

“The Bill as it stands now does not provide for any guidelines in the granting of exemptions or incentives. Neither the individual exemptions nor incentives go before Parliament for approval. Clauses 52 (5) and 71 (2) (p) as it stands now presupposes that there are guidelines in the Bill for the grant of such exemptions or incentives when there is none. Accordingly, Clause 52 (3) read with Clauses 52 (5) and 71 (2) (p) of the Bill are inconsistent with Articles 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution.”²⁴

The Court went on to determine that:

“Thus, the Court determines that the requirements in Article 148 of the Constitution are satisfied when fiscal exemptions are granted in accordance with regulations made specifying the conditions under

²⁴ *ibid* 39.

which exemptions can be granted and the approval of Parliament is obtained for such regulations.”²⁵

Therefore, the Supreme Court has recognised that Parliament’s full control over public finance which includes the imposition of taxes, also extends to the grant of tax exemptions. The grant of tax exemptions cannot be by the Executive acting alone but must be conditional on Parliamentary approval for the criteria or conditions based on which exemptions are granted.

The cumulative effect of the above determinations thus appears to be to ensure Parliamentary control over the source and allocation of funds, and to ensure continuous audit and checks by Parliament with regard to funds so sourced from, and allocated to, specific sources. Additionally, Parliament cannot abdicate these responsibilities, by purporting to delegate any of the powers in their entirety to the very Executive that it is called to supervise.

*In Re the Appropriation Bill (SC SD 15/2012)*²⁶ dealing with the concept of full control of public finance as a check on Executive power the Supreme Court stated that:

“Another perhaps less explicit but dominant control is enshrined in Article 148 of the Constitution, **which mandates that all ‘Public Finance’, including the control of the ‘spring’ or source of the finance whether it be through taxes etc., and**

²⁵ *ibid.*

²⁶ *In Re the Appropriation Bill S.C. (SD) 15/2012.*

the control of the allocation of public finance pass through and only through the “eye” of Parliament, which is expected and invested with powers to act in good faith and to act in accord with the public trust doctrine by monitoring through its directions and maintaining checks and balances through its audits and verifications, to assure the people that there is the highest degree of fiscal accountability on the executive. In practice, fiscal accountability can only be assured by a process where Parliamentary control is exercised in full in a transparent manner where matters are placed in the public domain, enhancing the credibility of the process through patent disclosures and public debate on implications.”²⁷

The Supreme Court, dealing in particular with the question of the raising of loans, opined that:

“... Only if such adequate information is provided prior to obtaining these loans, would there be a comprehensive opportunity to Parliament to scrutinise and exercise full control over public finance. This anomaly could be rectified if the impugned clause is amended to read, that prior to the obtaining of the loan, the terms of such loan must be approved by Parliament. If not, **this Court is of the**

²⁷ ibid 109-110.

view that clause 2 (1) (b) would be unconstitutional as under its scheme, Parliament would fail to exercise the due and full financial control envisioned under Article 148.²⁸

Dealing with the delegation or abdication of Parliamentary control, the Supreme Court in *Re the Appropriation Bill (SC SD 15/2012)* opined that:

“To permit the clause to be enacted as it is, would obstruct the exercise of full Parliamentary fiscal control at the macro level, as mandated by Article 148, and would clearly result in ‘delegation’ and / or abdication of Parliamentary control, relegating to the Minister of Finance the ability to override the dictates of Parliament without its approval. It places an unfettered power in the hands of the Minister of Finance which does not accord with the spirit and letter of the Constitution which assures full control of public finance with Parliament. The scope and ambit of this clause contrasts strongly with clauses 8 and 9 of the Bill, which mandates that Parliamentary prior approval was needed even for a relatively lesser and smaller category...”²⁹

²⁸ *ibid* 109, 111.

²⁹ *ibid* 109, 113.

The Court thus concluded that:

“...Additionally, this provision permits the Minister of Finance to have unfettered power to vary details in the Appropriation Act and its Schedules, which tantamount to amending the Appropriation Act by an Executive decision, sans any Parliamentary control, and the abrogation of powers over public finance in contravention of Article 148 of the Constitution. This could be cured if amended to read that it could only be done with Parliamentary approval.”³⁰

Consequently, *In Re the Appropriation Bill (SC SD 15/2012)* the Supreme Court determined that clauses which permitted the Executive to raise loans subject to a ceiling of Rs. 1,295 billion (without oversight as to the terms of the loans), and those which permitted the Minister to utilise sums allocated (by Parliament) to a particular head of expenditure, for any other authorised expenditure, sans Parliamentary control, would violate Article 148 of the Constitution. Regrettably, the government enacted the clauses so held to be unconstitutional, by resorting to its two-thirds majority in Parliament.

However, in the following year, *In Re the Appropriation Bill*³¹ the Supreme Court, dealing with the identical two clauses, differed from the views of the Supreme Court *In Re the Appropriation Bill (SC SD 15/2012)* and held that the impugned clauses were not unconstitutional. While doing

³⁰ *ibid* 109, 114.

³¹ *In Re the Appropriation Bill S.C. (SD) 19/2013* at 101.

so, the Supreme Court did cite with approval³² the *dicta* cited above *In Re the Appropriation Bill* (SC SD 3 & 4 of 2008)³³, and the basis of its finding that the impugned clauses were not unconstitutional was that, in the view of the Court, there were sufficient law and mechanisms in place to ensure that the criteria specified *In Re the Appropriation Bill* (SC SD 3 & 4 of 2008) were present. Further, the Supreme Court, *inter alia*, determined that “domestic and international loans are raised by virtue of the relevant laws that authorise such debt to be created”³⁴ which agencies were created with regard to raising and managing debt.³⁵ The Court thus noted that:

“...one would find that the Legislature has enacted several means and agencies to perform the task of monitoring the raising of loans and this only goes to prove that the Appropriation Act is not the only means to control public finance and the pervasive provisions that have been recited above demonstrate the zealous concern that the Legislature has displayed towards giving true

³² *ibid* 101, 109.

³³ *In Re the Appropriation Bill* S.C. (SD) 3 & 4/2008 at 45.

³⁴ *In Re the Appropriation Bill* S.C. (SD) 19/2013 at 109. The Court at pages 109-110 drew attention in the case of local debt, to the Local Treasury Bills Ordinance, Registered Stocks and Securities Ordinance, Treasury Certificate and Deposit Act, Tax Reserve Certificates Act, and the Monetary Law Act, as well as section 20 of the Fiscal Management (Responsibility) Act, with regard to advances from the Central Bank. In the case of foreign debt the Court noted that the Foreign Loans Act, the Loans (Special Provisions) Act, and the Monetary Law Act would apply.

³⁵ Citing as examples, the Central Bank of Sri Lanka, the Public Debt Department, the Economic Research Department, and the Domestic Debt Management Committee.

meaning to the constitutional imperative stipulated in Article 148 of the Constitution that Parliament shall have full over public finance. Parliament exercises this control through several of its agencies, because it cannot engage in the continuous micromanagement of public finance. If the whole members of Parliament were to gather every time a loan is about to be raised simply for the purpose of approving the terms and conditions of a particular loan, it would frustrate the democratic governance of the country for which principal task the people of the nation bestowed them with all the important palladium of legislative power, privileges and immunities.”³⁶

The Court also opined that in the case of foreign loans, additional control mechanisms had been established, by ensuring that budget estimates give details of the domestic/foreign funding required for each object under a programme, and whether funding has already been committed, while statements under the Fiscal Management (Responsibility) Act would provide detailed facts and figures with regard to government borrowings, disbursements, and loans under negotiation.³⁷ The Court thus determined that:

“Thus this Court observes that whilst the legislature in sub-clause 2 (1) (b) would authorise the raising

³⁶ *In Re the Appropriation Bill* S.C. (SD) 19/2013 at 101, 110.

³⁷ *ibid.*

of loans on behalf of the Government sum total of which would not exceed rupees one thousand one hundred billion - the ceiling specified in that Clause, the host of legislation that Parliament has enacted raises the threshold of checks and balances that seek to obviate arbitrariness or circumvention of the full control vested in it by Article 148 of the Constitution.”³⁸

It is, however, respectfully submitted that the *slew of legislation* referred to by the Supreme Court did not ensure Parliamentary control prior to the obtaining of the loans/decision making. Such legislation only provided the framework within which branches of the Executive should act in obtaining such loans, and a mechanism for post-fact Parliamentary supervision, or auditing. The resultant Appropriation Act to an extent thus abdicated or alienated Parliamentary control over public finance to the Executive, contrary to the observation of the Supreme Court *In Re The Nineteenth Amendment to the Constitution*³⁹ that “...any power that is attributed by the Constitution to one organ of Government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an ‘alienation’ of sovereignty which is inconsistent with Article 3 read with Article 4 of the Constitution.”

³⁸ *ibid* 111.

³⁹ *In Re The Nineteenth Amendment to the Constitution* S.C. (SD) 11,13,15-21,25-35, 37-40/2002 at 319 - 320.

The Sri Lankan experience also suggests that even the limited fiscal discipline sought to be imposed, for example through the Fiscal Management (Responsibility) Act⁴⁰ ('FMRA') have been observed in the breach, and that in most cases, rather than seek to work towards achieving the statutory goals, governments have preferred to shift the goalposts to a future date.

Section 3 (a) of the FMRA provides that:

“The objectives underlying responsible fiscal management which need to be adhered to, by the Government in outlining the fiscal strategy of the government are as follows:

- (a) reduction of government debt to prudent levels, by ensuring that the budget deficit at the end of the year 2006, shall not exceed five per centum of the estimated gross domestic product and to ensure that such levels be maintained thereafter;”

However, the reports of the Central Bank of Sri Lanka demonstrate that in every year from 2006 onwards, the budget deficit has exceeded five percent of the estimated gross domestic production.⁴¹

⁴⁰ Act No. 3 of 2003 (as amended).

⁴¹ For an analysis of the statistics, see Verité research , 'Non-Compliance with the Fiscal Management Responsibility Act Has Been a Demonstration of Irresponsibility' (*Public Finance*, 29 June 2021) <<https://publicfinance.lk/en/topics/Non-Compliance-with-the-Fiscal->

Section 3 (f) of the FMRA originally provided that:

“The objectives underlying responsible fiscal management which need to be adhered to, by the Government in outlining the fiscal strategy of the government are as follows:

“(f) ensuring that at the end of the financial year commencing on January 1, 2006, the total liabilities of the Government (including external debt at the current exchange rates) do not exceed eighty-five per centum of the estimated gross domestic product for that financial year ; and that at the end of the financial year commencing on January 1, 2013, the total liabilities of the Government (including external debt at the current exchange rates) do not exceed sixty per centum of the estimated gross domestic products for that financial year”.

However, in the years 2006, 2007 and 2009, the liabilities as aforesaid exceeded (albeit marginally) the eighty five percent ceiling. It had also become obvious by 2013 that the liabilities could not be reduced to 60% of the gross domestic

Management-Responsibility-Act-Has-Been-a-Demonstration-of-Irresponsibility-1624966502> accessed 31 December 2021. It should also be noted that in several years, most notably 2013, 2016, 2017 and 2018 the budget deficit exceeded GDP by not more than 0.5% above the prescribed 5% ceiling.

product,⁴² and thus section 3 (f) of the FMRA was amended in 2013,⁴³ to provide:

“at the end of the financial year commencing on January 1, 2013, the total liabilities of the Government (including external debt at the current exchange rates) do not exceed eighty per centum of the estimated gross domestic product for that financial year; and that at the end of the financial year commencing on January 1, 2020, the total liabilities of the Government (including external debt at the current exchange rates) do not exceed sixty per centum of the estimated gross domestic products for that financial year;”

It thereafter became apparent that the 2020 target was also not achieved, and the period was then further extended until 2030 by a further amendment to the FMRA.⁴⁴

The statutory limits of Government guarantee as a percentage of Gross Domestic Production has also been revised from the original 4.5%, to 7% in 2013,⁴⁵ to 10% in 2016,⁴⁶ to 15% in 2021.⁴⁷

⁴² For an analysis of the statistics, see Verité Research (n40).

⁴³ By Act No. 15 of 2013

⁴⁴ Act No. 12 of 2021

⁴⁵ By Act No. 15 of 2013

⁴⁶ By Act No. 13 of 2016

⁴⁷ By Act No. 12 of 2021

An analysis of Sri Lanka's debt and debt repayments also demonstrates that in 2014, while the national debt increased by approximately five hundred and ninety seven billion rupees, approximately four hundred and thirty six billion rupees (73%) was towards servicing the interest on the existing debt. Similarly in 2016, 2017 and 2019 the sums required to service interest on debt, as a percentage of the increase in national debt, amounted to approximately 69%, 81%, and 90% respectively. This was despite the primary deficits in these years being 0.3%, 0% and 1% respectively.⁴⁸

According to the Appropriation Act⁴⁹ for the service of the financial year 2021, under Head 249 - Department of Treasury Operations (relating to payments to be made in respect of the Foreign Loans Act and Local Treasury Bills Ordinance) a total sum of rupees two thousand one hundred and ninety two billion five hundred and fifty seven million (Rs.2, 192,557,000,000) is authorised. Out of the said sum, nine hundred and forty billion two hundred and sixty million (Rs.940, 260,000,000), or approximately forty three percent (43%) of the head, is in respect of the payment of interest on loans.

Examined from a different perspective, the total of such payments, i.e. capital repayment and interest (though capital repayments are not classified as 'expenditure') is equivalent

⁴⁸ The writer acknowledges the assistance provided by Verite Research in providing the relevant data.

⁴⁹ Act No.7 of 2020

to approximately seventy eight percent (78%) of the budgeted total expenditure of rupees two thousand eight hundred eighteen billion three hundred ninety million (Rs.2, 818,390,000,000) for the year. The interest component alone amounts to approximately thirty three percent (33%) of the budgeted annual expenditure. Therefore, it is manifest that, even with prudent fiscal management, a government would be saddled with the debt burden, and debt financing responsibilities and liabilities created by itself, as well as by previous governments. Where loans have been obtained at high interest rates, the obligation to service such debts would arise in subsequent years.

It is also manifest that Parliament merely authorising a debt limit in respect of a particular financial year does not in any way constitute full control over the debt component of public finance. While such authorisation may amount to full control over the capital component of the debt, it does not amount to control over the interest aspect of any debt obtained in terms of the authorisation.

As borne out by the statistics quoted above, the interest liability which has arisen as a result of Executive borrowing, (on terms which would not have received prior Parliamentary approval), must be serviced in a subsequent financial year. In effect, a future Parliament is then compelled to approve further borrowing in order to repay interest at rates which were never authorised by Parliament.

Considering the enormous sums paid by way of interest on loans, it is essential that Parliament must exercise its full

control over public finance, by legislating that the terms of loans (including foreign loans, and interest rates) at least in respect of loans above a specified threshold, must be subject to prior Parliamentary approval.

It is also of interest to note that a Report published by the Inter Parliamentary Union (IPU) titled “Parliamentary Oversight of International Loan Agreements & Related Processes: A Global Survey”, observes that “more than half of the 99 countries (59 percent) for which data are available from any of the three sources – Parliaments, the World Bank, and the IMF – have laws that require parliaments to ratify loan agreements before they become effective. In the remaining 41 percent of countries, Parliament does not have a clear legal mandate to ratify loans.”⁵⁰

The Report goes on to observe that:

“Among the countries requiring parliamentary ratification, 83 percent do not allow for any exceptions to the law, meaning that – in principle at least - it is not easy for the Executive to override Parliament’s ratification authority. In some cases where exceptions to the law are allowed they appear to be intended to minimise the institutional burden, with loans below a certain amount not requiring parliamentary ratification.

⁵⁰ Inter-parliamentary Union, 'Parliamentary Oversight of International Loan Agreements & Related Processes' (*Inter-Parliamentary Union*, 2013) <<https://www.ipu.org/resources/publications/reports/2016-07/parliamentary-oversight-international-loan-agreements-related-processes>> accessed 31 December 2021.

The majority of the surveyed countries (61 percent) have the same legislative process in place for the ratification of loans as for projects financed by grants. In 74 percent of the surveyed countries the law requires parliaments to ratify each loan one-by-one rather than grouping them as part of government programmes. Even where the legislation allows for loans to be ratified as a package, the general practice in many countries is to ratify loans separately or to examine loans individually before they are bundled.”⁵¹

Therefore, given especially the large quantum of loans (especially foreign loans) being raised to fund government expenditure (including high spending on infrastructure development funded by foreign loans), and given the long term implications for succeeding generations of citizens,⁵² it is imperative that the loans (or at least those over a prescribed or ascertainable limit) be obtained in a transparent manner, and that the prior authorisation of Parliament should be obtained in respect of the terms (including interest rates and repayment periods) of such loans. Such approval could, of course, be obtained by periodic approval of general terms, or by the approval of specific terms in the event that there is a need to obtain such loans on less favourable terms.

⁵¹ *ibid* 7.

⁵² The Supreme Court in *In Re the Appropriation Bill* SC SD 15/2012 at 111 specifically referred to the intergenerational impact of such loans, in coming to the conclusion that prior Parliamentary approval should be obtained.

Semi-Presidentialism and Parliamentary Control of Public Finance

Under the 1978 Constitution in its original form, Executive power was to be exercised by a directly elected President and by the Prime Minister and Cabinet of Ministers (appointed from among Members of Parliament).⁵³

The Sri Lankan model was thus a semi-presidential system, and not a pure *presidential system* where Executive power would be exercised by an Executive headed by a directly elected President, and where the Executive is separate, and not drawn from, the legislature. The President was, *inter alia*, empowered to determine the number of Ministers of the Cabinet of Ministers, and to appoint such Ministers,⁵⁴ assign subjects and functions to himself, and to determine the Ministries to be in his charge,⁵⁵ and to appoint non-cabinet Ministers⁵⁶ and Deputy Ministers.⁵⁷

The Nineteenth Amendment, *inter alia*, introduced the requirement that the appointment of Ministers of the Cabinet of Ministers,⁵⁸ Non-Cabinet Ministers⁵⁹ and Deputy

⁵³ Article 4(b) of the 1978 Constitution provided that '*the executive power of the People... shall be exercised by the President of the Republic elected by the People*', while Article 42(1) provided that '*there shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic.*'

⁵⁴ Article 44(1) of the original 1978 Constitution.

⁵⁵ Article 44 (2) of the original 1978 Constitution

⁵⁶ Article 45 (1) of the original 1978 Constitution

⁵⁷ Article 46 (1) of the original 1978 Constitution

⁵⁸ Article 43 (2) of the Constitution (as it was under the 19th Amendment framework)

⁵⁹ Article 44 (1) of the Constitution (as it was under the 19th Amendment framework)

Ministers⁶⁰ by the President, be on the advice of the Prime Minister. Similarly, their removal by the President would also be subject to the advice of the Prime Minister.⁶¹

Thus, the Nineteenth Amendment could be said to swing the balance from a Presidential-Parliamentary system to a Premier-Presidential system, which would also have enhanced the ability of Parliament to act as a check on the Executive.

With the enactment of the Twentieth Amendment to the Constitution, Sri Lanka reverted to a situation in which the original mechanism relating to the appointment of the Prime Minister and Ministers were reintroduced, thus granting the President significant control over Parliament, including the carrot of Ministerial appointments,⁶² and the stick of their withdrawal,⁶³ coupled with the power of dissolution any time after two and a half years after the first meeting of such Parliament.⁶⁴ In the context where the President exercises such control over Parliament, it is all the more important that full effect is given to Parliamentary controls over the Executive.

⁶⁰ Article 45 (1) of the Constitution (as it was under the 19th Amendment framework)

⁶¹ Article 46 (3) (a) of the Constitution (as it was under the 19th Amendment framework)

⁶² The Constitution of the Democratic Socialist Republic of Sri Lanka Art. 43(4), 45(1), 46(1).

⁶³ The Constitution of the Democratic Socialist Republic of Sri Lanka Art. 47(2).

⁶⁴ The Constitution of the Democratic Socialist Republic of Sri Lanka Art. 70(1)(a).

Attempts by Parliament (or the Government representatives therein) to abdicate (or ‘delegate’) Parliament’s power in favour of Cabinet/Executive would result in a position where the Opposition would not even be able to question such Executive actions in Parliament. The Opposition’s ability to at least question such decisions in Parliament before the fact, and not merely post fact, must be retained and strengthened, notwithstanding the almost inevitable conclusion that if the majority of members of Parliament belong to the same political party as the President, they are likely to grant Parliamentary approval for the envisaged financial decisions. Amidst such a scenario, it is critical to at the minimum have limited oversight and control in the case of loans which create a debt burden on succeeding generations of citizens. In the case of foreign loans, there is also the added risk of depreciation of the Rupee, which in turn increases the future debt burden in Rupee terms.

The importance of rigorous Parliamentary debate on such fiscal decisions; the necessity to compel the government to address such issues in Parliament; the public awareness and debate created through such Parliamentary deliberations; and the potential impact of public opinion on government decision making should not be underestimated.

Judicial oversight over executive decisions relating to Public Finance

While the main focus of this chapter has been with regard to Parliamentary control over public finance, it would be

incomplete without some reference to the possibility of judicial review of public finance related executive action, through the fundamental jurisdiction of the Supreme Court and the Writ jurisdiction of the Court of Appeal.

In *Senarath and others v Chandrika Bandaranayake Kumaratunga and others*⁶⁵, the Supreme Court was called upon to adjudicate on the legality of the grant of certain privileges, ostensibly in terms of the Presidents Entitlements Act,⁶⁶ to a former President of the Republic.

The Petitioners challenged the grant, alleging, *inter alia*, that the relevant President (prior to her ceasing to hold office) had participated (as head of the Cabinet) in the decision to grant herself benefits postretirement, and that the benefits so granted were unlawful, and thus violated their right to equal protection of the law in terms of Article 12 (1) of the Constitution.

The Supreme Court, with regard to the manifest conflict of interest which had arisen, held that:

“...the provisions have been advisedly worded in this manner to avoid a situation as has happened in relation to the 1st respondent of the President himself or herself partaking in decisions as to the entitlements to be given after ceasing to hold office.

⁶⁵ *Senarath and others v Chandrika Bandaranayake Kumaratunga and others* [2007] 1 Sri LR 59.

⁶⁶ Act No. 4 of 1986.

In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a matter where he has a personal interest. ‘*Nemo debet sus judex*’ is a principle of natural justice which has now permeated the area of corporate governance as well. This salient aspect of good governance has been thrown to the winds by the 1st respondent in initiating several Cabinet Memoranda during her tenure of office and securing for herself purported entitlements that would if at all ensure only after she lays down the reigns of office and acquire the eligible status of a former President.”⁶⁷

The Supreme Court having also dealt with the excessive (and thus unlawful) nature of the privileges so granted, proceeded to declare that the grant of the ‘entitlements’ in question were of no force or effect in law.⁶⁸ Though not directly linked to Article 148 of the Constitution, the case is a clear example of how the Fundamental Rights jurisdiction of the Supreme Court was invoked in order to prevent the wrongful use of public resources.

Similarly, in *Smithkline Beecham Biologicals S.A. and another v State Pharmaceutical Corporation of Sri Lanka and others*,⁶⁹ the Supreme Court, considering a Fundamental Rights application filed by an unsuccessful tenderer, rejected

⁶⁷ Senarath and others v Chandrika Bandaranayake Kumaratunga and others [2007] 1 Sri LR 59 at 71.

⁶⁸ *ibid* 76.

⁶⁹ [1997] 3 Sri LR 20.

the proposition that the Fundamental Rights jurisdiction should not be exercised in situations in which contractual rights were also involved. The Supreme Court held that:

“In my view, where there is a breach of contract and a breach of Article 12 (1) brought about by the same set of facts and circumstances, it cannot be correctly said one of the remedies only can be availed of, the other being thereby extinguished; nor can it be correctly said that the aggrieved party must be confined to his remedy under the law of contract, unless there is a violation of statutory obligations.”⁷⁰

The Supreme Court, in the circumstances of the case, found that the applicable guidelines had been violated in the awarding of the Tender to the Respondent, and held such decision to be of no force of avail in law.⁷¹

While the *Smithkline case* dealt with an application of an aggrieved tenderer, it would be possible for citizens to similarly invoke the fundamental rights jurisdiction of the Supreme Court in situations of violation of tender procedures, inasmuch as such violations result in a violation of the public trust doctrine, the rule of law, and could result in wastage of public resources.

Dealing with the Writ jurisdiction of the Court of Appeal, the Supreme Court in *Heather Therese Mundy and others v Central Environmental Authority and others*⁷² recognised

⁷⁰ *ibid* 29.

⁷¹ *ibid* 55 – 56.

⁷² S.C. (Appeal) 58-60/2003.

that the Writ jurisdiction in Sri Lanka was a constitutional right, which could be invoked, *inter alia*, in situations of abuse of executive power. The Court held that:

“The jurisdiction conferred by Article 140, however, is not confined to ‘prerogative’ writs, or ‘extraordinary remedies’, but extends – ‘subject to the provisions of the Constitution’ - to ‘orders in the nature of’ writs of *Certiorari*, etc. Taken in the context of our Constitutional principles and provisions, these ‘orders’ constitute one of the principal safeguards against excess and abuse of Executive power: mandating the Judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents. Further, this Court itself has long recognised and applied the ‘public trust’ doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes (see *de Silva v Atukorale*, [1993] 1 Sri LR 283, 296-297; *Jayawardene v Wijayatilake*, [2001] 1 Sri LR 132, 149, 159; *Bandara v Premachandra*, [1994] 1 Sri LR 301, 312); and that doctrine extends to national and natural resources (such as the airwaves, *Fernando v SLBC*, [1996] 1 Sri LR 157, 172, and mineral deposits, *Bulankulame v Secretary*

Ministry of Industrial Development, [2000] 3 Sri LR 243, 256-257). Besides, Executive power is also necessarily subject to the Fundamental Rights in general, and to Article 12 (1) in particular which guarantees equality before the law and the equal protection of the law. For the purposes of the appeals now under consideration, the ‘protection of the law’ would include the right to notice and to be heard. Administrative acts and decisions contrary to the ‘public trust’ doctrine and/or violative of Fundamental Rights would be in excess or abuse of power, and therefore void or voidable. The link between the writ jurisdiction and Fundamental Rights is also apparent from Article 126 (3) - see *Perera v Edirisinghe*, [1995] 1 SriLR 148, 156 - which contemplates that evidence of an infringement of Fundamental Rights may properly arise in the course of hearing a writ application, whereupon such application must be referred to this Court which may grant such relief or make such directions as it may deem just and equitable. Thus, although this Court would still be exercising the writ jurisdiction, its powers of review and relief would not be confined to the old ‘prerogative’ writs. These Constitutional principles and provisions have shrunk the area of administrative discretion and immunity and have correspondingly expanded the nature and scope of the public duties amenable to Mandamus and the categories of wrongful acts and decisions

subject to *Certiorari* and Prohibition, as well as the scope of judicial review and relief.”⁷³

Conclusion

Public finance is undisputedly an important aspect of the Sovereignty of the People. While the Constitution envisaged that Parliament should act as a check on the Executive in its dealings with public finance, the question arises as to how well this control has been exercised outside the limited post-mortem Parliamentary controls. The very nature of Sri Lanka’s semi-presidential system (especially as prevails under the post-Twentieth Amendment constitutional framework), encourages a *de facto* abdication of Parliamentary controls, at least in situations where the President and Parliamentary majority are from the same political party. The position has been aggravated by certain provisions of fiscal statutes, such as the Appropriation Acts, which could be viewed as attempts to abdicate or alienate Parliamentary control over public finance. Especially in Sri Lanka’s semi-presidential system, it is all the more important that Parliamentary controls are exercised to the fullest, in order that opposition questioning of Executive decisions is not limited to post-fact questions.

⁷³ *ibid* 13 – 14.

In pure policy related matters, the citizen is compelled to rely on representative democracy, i. e. duly elected Members of Parliament, to ensure that Parliament acts as an effective check on the Executive. However, in situations where the Executive acts outside the framework of the law in public finance related decisions, the citizenry is not without recourse, and can invoke the Writ jurisdiction of the Court of Appeal, or Fundamental Rights jurisdiction of the Supreme Court, as appropriate.⁷⁴

⁷⁴ In situations in which the President's actions are directly challenged, the citizens could still invoke the fundamental rights jurisdiction of the Supreme Court, while naming the Attorney General as a Respondent (as provided for by the 19th Amendment, and continued post 20th Amendment), in terms of the provisions of Article 35.

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Litigating Language Rights in Public Interest: Significance and Potential

Binendri Perera

1. Introduction

The courts play a significant role in elaborating the constitutionally enshrined language rights and ensuring that they are effectively implemented by the Executive and Administrative authorities in practice. Arguing in defence of the role of public interest litigation in bringing about social change, Denvir states that discounting courts as ‘fundamentally elitist and non-democratic’ and overly relying on the ‘allegedly democratic legislature’ is not realistic.¹ This is especially the case in Sri Lanka due to the long period that takes to enact legislation,² and because the legislative capacity to engage in executive oversight in the developmental stages of a Bill is limited.³ This chapter assesses the significance and potential in litigating language rights, focusing on the jurisprudence on language rights that is being developed by the Sri Lankan Supreme Court.

¹ J Denvir, 'Towards a Political Theory of Public Interest Litigation' [1976] 54(6) North Carolina Law Review.

² For example, the Disability Rights Bill has been in the process of drafting since 2004 as stated in P Mendis and B Perera, Disability Policy Brief for Law Makers, Administrators and other Decision Makers (International Centre for Ethnic Studies 2019) 22-23.

³ P Jayasinghe and others, *Parliament: Law, History and Practice* (Centre for Policy Alternatives 2019) 3, 67.

Section II of this chapter will lay out the scope of language rights provided in the Constitution of Sri Lanka 1978 and the constitutional procedure for their enforcement, which facilitates upholding these rights in the public interest. Section III, IV, and V explore the significance and potential of litigating language rights in the public interest given their capacity to enable a range of human rights, their overarching impact upon individuals and groups, and their specific role in empowering the linguistic minorities. Section VI assesses the impact of the language of the Supreme Court on the public interest litigation process and jurisprudence.

2. Language rights: substantive law and mechanism for enforcement

Chapter IV of the Constitution provides for the language rights of the people. This Chapter is the result of a long struggle by the Tamil speaking communities of Sri Lanka for an inclusive language policy. The Official Language Act No. 33 of 1956 recognised Sinhala as the sole official language of Sri Lanka. As Edrisinha notes, while there was a backlash against this Act by way of communal riots it came before the courts only much later.⁴ When a Tamil civil servant who was deprived of his salary increment because he could not pass the Sinhala language proficiency test challenged this Act, the District Court of Colombo struck it down. According to

⁴ R Edrisinha, *Sri Lanka: Constitutions Without Constitutionalism: A Tale of Three And Half Constitutions*. in R Edrisinha and A Welikala (eds), *Essays on Federalism in Sri Lanka* (Centre for Policy Alternatives 2008) 17.

the Supreme Court, District Judge held the Act void on the basis that it violated Article 29 (2) of the Soulbury Constitution which prohibited discrimination on the basis of religion and community.⁵ However, the Supreme Court in *Attorney General v Kodeeswaran* takes an approach of caution. Edrisinha calls this ‘a classic example of restraint and timidity’ on the part of the Sri Lankan Supreme Court.⁶ The Court cites Cooley on Constitutional limitations and the more conservative jurisprudence from the United States Supreme Court to support their position.⁷

The Court notes that the Supreme Court of the United States and India have been reluctant to exercise judicial review of legislation.⁸ While the Supreme Court of United States has indeed exercised ‘passive virtues’ sidestepping the making of a decision on political issues to protect their institutional integrity,⁹ this is also the court that set the precedent for judicial review of constitutionality of legislation in *Marbury v Madison*.¹⁰ A line of judicial decisions emanating from the United States has struck down legislation as violating the Constitution.¹¹ There is a similar jurisprudence in India,

⁵ 70 NLR 121, 138.

⁶ Edrisinha (n 4) 17.

⁷ *ibid.*

⁸ *ibid.*

⁹ AM Bickel, ‘The Supreme Court, 1960 Term - Foreword: Passive Virtues’ [1961] 75(1) *Harvard Law Review* 40.

¹⁰ (1803) 5 U.S. 137, 1 Cranch 137.

¹¹ Constitution Annotated, ‘Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court’ (2021) <<https://constitution.congress.gov/resources/unconstitutional-laws/>> accessed 8 December 2021.

evidenced through cases such as *Navtej Singh Johar v Union of India*, which held section 377 of the Penal Code of India unconstitutional.¹² The Supreme Court of India has not only struck down legislation, but also constitutional amendments, whole or in part, as unconstitutional.¹³ Therefore, the Sri Lankan Supreme Court's reliance on comparative jurisdictions does not emanate from a holistic assessment of the jurisprudence of these courts.

In *Attorney General v Kodeeswaran*, the Supreme Court sidesteps the decision assessing the validity of the Official Language Act, denying Kodeeswaran's capacity to sue on the basis that a civil servant cannot sue the crown.¹⁴ On the appeal to the Privy Council in *Kodeeswaran v Attorney General*, the Council holds that such a right is available to Sri Lankan civil servants, and returns the case to Sri Lankan Supreme Court to consider the constitutional issue.¹⁵ However, before the litigation could draw to an end, the first Republican Constitution of 1972 was enacted, constitutionally entrenching Sinhala as the sole official language and barring the judiciary in engaging in post enactment judicial review of legislation.

¹² AIR 2018 SC 4321.

¹³ 'Constitutional Amendments Struck Down by Supreme Court: 7 Partially and 1 wholly so far' (24.07.2021) < <https://www.livelaw.in/know-the-law/constitutional-amendments-struck-down-by-supreme-court-178063?infinitescroll=1> > accessed 8 December 2021.

¹⁴ See Edrisinha (n 4) 139.

¹⁵ [1970] AC 1111.

The first Republican Constitution's entrenchment of Sinhala as the sole official language continued in the second Republican Constitution of 1978. The current inclusive provisions on language in this constitution were only incorporated through the Thirteenth and Sixteenth Amendments to the Constitution.

Article 18 and 19 of the Constitution recognises Sinhala and Tamil as the official languages and the national languages of the state. Article 18 (2) also recognises English as the link language. Article 20 – 24 provides for the language rights of the people concerning the key areas of political participation, education, administration, legislation, and courts.

Article 20 states that any Member of Parliament, Provincial Councils, or Local Authorities are entitled to participate in the political process in a National Language of their choice. Article 21 provides that people are entitled to primary and secondary education in a National Language of their choice. This provision does not apply to tertiary education.¹⁶ Article 22 (1) provides that 'Sinhala and Tamil shall be the languages of administration throughout Sri Lanka.' Tamil is to be used as the primary language of administration in Northern and Eastern Provinces. Nevertheless, any person is entitled to transact with the administrative bodies and

¹⁶ However, according to Article 21 (2) even the higher educational institutions must offer their courses in both the National Languages where they offer such a course only in one National Language and no comparable course is available in the other National Language for persons who have been educated in that language before university level.

inspect the public documents in an Official Language of their choice or English.¹⁷

Article 23 requires all legal enactments at the central, provincial, and local authority levels to be available in both the official languages with a translation in English. According to Article 24, the language of the courts is based on the language of administration of the area. Therefore, the courts are to function in Tamil in Northern and Eastern Provinces and Sinhala in all other Provinces.¹⁸ However, any party or applicant is entitled to appear before the courts in Sinhala or Tamil and any stakeholder in court is entitled to receive translation and interpretation to facilitate their effective participation in the court process. The Minister of Justice has the power to set out the use of English in courts according to Article 24 (4).

¹⁷ Article 22 (5) further states that a person is entitled to face the entrance examinations to the 'Public Service, Judicial Service, Provincial Public Service, Local Government Service or any public institution' in Sinhala, Tamil, or a language of choice. But the scheme of recruitment may require for such persons to attain proficiency in Tamil or Sinhala within a reasonable time after admission to service based on reasonable necessity.

¹⁸ This supersedes Section 2 of the Language of the Courts Act No 3 of 1961, which empowers 'the Minister of Justice to determine the courts in which Sinhala shall be used for purposes of pleadings and record' and Section 2 of the Language of the Courts (Special Provisions) Law No 14 of 1973, which provides that 'The Minister may, with the concurrence of the Cabinet of Ministers, determine that the language of any institution exercising original jurisdiction in the Northern and Eastern Provinces and also of any court, tribunal or other institution established under the Industrial Disputes Act, and of any Conciliation Board established under the Conciliation Boards Act, No. 10 of 1958, in the Northern and Eastern Provinces shall be Tamil.;

Article 25 states that the State should ‘provide adequate facilities’ to ensure the effective implementation of this chapter. According to Article 25A, language rights prevail over any other inconsistent law, which ensures the supremacy of the Constitution in relation to this chapter. Article 126 empowers the Supreme Court to exercise jurisdiction over matters that infringe or imminently infringe language rights by Executive or Administrative action, alongside Fundamental Rights, subject to the procedural constraints laid out in that section. This provision of a common procedure to enforce Fundamental Rights and language rights reiterates the integrated nature of the two sets of rights and emphasises the role and responsibility of the Supreme Court in upholding rights. This is in light with the Canadian Supreme Court’s insistence in *R v Beaulac* that “language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided.” Based on this statement the court emphasises the “duty of the State to take positive steps to implement language guarantees.”

3. Significance of language rights litigation in enabling the gamut of human rights

Litigating language rights in the public interest is significant due to the role that language rights play in enabling the gamut of human rights. Article 1 paragraph 5 of the Vienna Declaration 1993 highlights the indivisible, interdependent,

and interrelated nature of human rights.¹⁹ These characteristics of human rights are demonstrated clearly through language rights.²⁰ The Sri Lankan Constitution 1978, in Articles 3 and 4, recognises that Fundamental Rights are a means through which directly exercises their sovereignty. Article 4 (d) specifically states that the state must respect, secure, and advance Fundamental Rights and that restrictions are allowed only to the extent permitted by the Constitution. This section provides an analysis of how language rights are integral to Fundamental Rights because they enable civil and political rights, economic social, and cultural rights as well as third generation rights such as environmental rights and the right to development.

Canadian jurisprudence on language rights eloquently presents how language rights enable civil and political rights. For instance, *Ford v Quebec (Attorney General)*, recognises the right of individuals to “the freedom to express oneself in the language of one's choice.”²¹ Similarly, the South African Constitutional Court in *S v Pienaar*,²² holds that the right to a fair trial includes the right to be heard in

¹⁹ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993 <<https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>> accessed 24 February 2021.

²⁰ V Pupavac, *Language Rights: From Free Speech to Linguistic Governance* (Palgrave Macmillan 2012) 21.

²¹ [1988] 2 SCR 712 < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/384/index.do>> accessed 1 December 2021.

²² (2000) (2) SASV 143 (NKA).

one's language and be represented by a legal representative whom one can communicate with.²³

Chapter III of the Constitution of Sri Lanka mainly upholds the civil and political rights of people. Language rights facilitate the exercise of these rights enshrined in Chapter III. For example, *Singarasa v AG*,²⁴ in which the petitioner has also sought a remedy before the Human Rights Committee,²⁵ is a classic example of this. In this case, the petitioner was forced to sign a confession that the police wrote down in Sinhala when he could not read the language. This violation of the language rights of the petitioner violated his right to liberty, procedural rights on freedom from self-incrimination, and right to a fair trial.

Another example is *Mariyathas Basilraj v Gotabaya Rajapaksha*,²⁶ dealing with an instance in which around 100 petitioners were assaulted and arrested by the Sri Lanka Army and Police seeking redress for the violations of their

²³ Constitutional Court of South Africa, 'South African Criminal Law Reports 2000' <<https://collections.concourt.org.za/handle/20.500.12144/15387>> accessed 1 December 2021.

²⁴ *Singarasa (Nallarathnam) v Attorney General*, Application for judicial review, S.C. (Spl (LA)) 182/1999, ILDC 518 (LK 2006), 15th September 2006.

²⁵ *Singarasa* 1033/2001 CCPR (21 Jul 2004). See also, *Roy Manojkumar Samathanam* 2412/2014 CCPR (28 Oct 2016).

²⁶ S.C. (FR) 387/2011 – and other Navaanthurai Fundamental Rights Applications – S.C. (FR) 387, 388, 389, 394, 391,396,395,407,408, 399, 397, 398, 402, 405, 406, 400, 401, 384, 385, 392, 393, 414/2011 <<https://www.cpalanka.org/mariyathas-basilraj-vs-gotabaya-rajapaksha-sc-fr-3872011-and-other-navaanthurai-fundamental-rights-applications-sc-fr-387-388-389-394-391396395407408-399-397-398-402-405-406-400/>> accessed 5 March 2021.

Fundamental Rights.²⁷ They pleaded that their language rights under Article 22 (1) and (2) were violated due to the language of administration were violated alongside Article 11 on freedom of torture, Article 12 (1) on equality before the law, and Article 13 (1) on freedom from arbitrary arrest and right to receive reasons for arrest.

The language rights also enable economic, social, and cultural rights as well as third generation rights such as the right to development. For instance, McLeod argues how the communication rights, such as freedom of expression and language rights facilitate 'the right to work, education, marry and found a family, own property, self-determination, freedom of religion and social security.'²⁸ However, Chapter III of the Constitution of Sri Lanka on Fundamental Rights only expressly enshrines a selected number of civil and political rights. Meanwhile, certain elements of economic, social, and cultural rights are stated in Chapter VI on Directive Principles of State Policy, which are not justiciable.²⁹ In this context, language rights recognised in Chapter IV of the Constitution play a special role in providing the Supreme Court with the capacity to uphold aspects of economic, social, and cultural rights through

²⁷ *ibid.*

²⁸ S McLeod, 'Communication rights: Fundamental human rights for all' [2018] 20(1) *International Journal of Speech-Language Pathology* <<https://doi.org/10.1080/17549507.2018.1428687>> accessed 24 February 2021.

²⁹ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 29.

language rights.³⁰ Several cases that have been litigated in recent years exemplify this. Therefore, engaging in public interest litigation is especially important in the Sri Lankan context.

There are several cases in which upholding the language rights of the petitioners enabled the socio-economic rights of petitioners as well as other beneficiaries. For example, *Jovita Arulanantham v the University of Colombo*,³¹ wherein the petitioners challenged the Institute of Human Resources Advancement (IHRA) of the University of Colombo for violating language rights. The petitioner argued that the courses conducted by the IHRA, specifically the Diploma in Counselling Psychology to which she applied, were only carried out in Sinhala. This violates Article 21 (2) of the Constitution, which provides that a person educated in one of the national languages before the University level should have access to courses in that language at any “department or faculty of any University, directly or indirectly financed by the state,” when no similar course is offered in this national language at that university or another similar university.

The petitioner in *Arulanantham* argued that this is a violation of her language rights, simultaneously highlighting ‘the discriminatory impact on prospective students who received

³⁰ This is similar to how the Sri Lankan Supreme Court has upheld economic, social and cultural rights in cases in violation of Article 12 – Right to Equality. For example, *Kavirathne v Commissioner General of Examinations* S.C. (FR) 29/2012.

³¹ S.C. (FR) 40/2012.

their secondary education in the Tamil language.’³² Based on this petitioner argued that her right to equality and right to non-discrimination is violated by the respondents.³³ The petitioner also refers to the impact of such discrimination as a ‘failure to provide equal educational opportunity to Tamil speaking students,’ emphasising the importance of education important for ‘personal development’ and to enhance career prospects.³⁴ This is similar to how General Comment 13 on the Right to Education in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) assesses the importance of education as a human right.³⁵ Therefore, this case is an instance in which the upholding of language rights promotes the right to equality and enables the right to education. Enabling the right to education further enables the right to development, which has both an individual and a communal aspect.³⁶

Guruge v National Medicines Regulatory Authority challenged the failure of the National Medicines Regulatory Authority and the Consumer Affairs Authority to ensure the publication of information displayed on ‘medicines, medical

³² *ibid.*

³³ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 12 (1) and (2).

³⁴ *Arulanantham* (n 31).

³⁵ Economic and Social Council, General Comment No. 13 (Twenty-first session, 1999) The Right to Education (Article 13 of the Covenant) E/C.12/1999/10 8 December 1999 1-2.

³⁶ Declaration on the Right to Development, Adopted by General Assembly resolution 41/128 of 4 December 1986, Article 2 (2) <<https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx>> accessed 24 February 2021.

devices, and borderline products’ in Sinhala and Tamil.³⁷ This case highlights how the availability of information on pharmaceutical products only in the link language ‘effectively impugns the use of such medicines and has the potential to cause serious risk, harm, and injury to most individuals who are not conversant with the same.’³⁸ This case was filed in the public interest for violating the language rights of people as well as Fundamental Rights to equality and non-discrimination. In effect, this case also upholds people's right to information, despite Article 14A of the Constitution on right to information being limited to upholding the information held by various public authorities.³⁹ This case also promotes the right to health since information accessibility is a component of accessibility of ‘health facilities, goods and services’ according to General Comment 14 on Right to Health in the ICESCR.⁴⁰

However, this is one of the cases that went for a settlement without the court issuing a judgement. The Consumer Affairs Authority and the National Medicines Regulatory Authority issued Gazettes requiring the manufacturing companies to provide the basic information in Sinhala and Tamil to which the manufacturers responded with their

³⁷ S.C. (FR) 102/2016.

³⁸ *ibid* 7.

³⁹ As was recognized in *Environmental Foundation v UDA* 2009 1 Sri LR 123.

⁴⁰ General Comment No. 14 (2000), ‘The Right to the Highest Attainable Standard of Health’ (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (11 August 2000) 4.

difficulties.⁴¹ The Authorities allowed them time to adopt a trilingual policy in light of these concerns. While the public interest litigation was the catalyst that led to these actions, the prioritising of practicality has led to the Court's jurisprudence being silent on such a critical issue. As a result, a crucial aspect of the Supreme Court's contribution in upholding the constitutionally guaranteed Fundamental Rights is glossed over, thereby rendering these settlements to become siloed instances of actions relating to language inclusivity. Since Sri Lanka follows the doctrine of stare decisis, the absence of a judgement denies the case to set a precedent for the future and develop the Sri Lankan jurisprudence on language rights.

4. Individual and communal impact of litigating on language rights

Public interest litigation is well suited for language rights cases because of its dual character of being both an individual right and a group right. McDougal, Lasswell, and Chen describe language as a 'rudiment of consciousness and close to the core of personality' and argue that deprivations in language rights 'deeply affect' both individual and

⁴¹ Centre for Policy Alternatives, 'Statement on the Implementation of the Official Language Policy by the Consumer Affairs Authority and the National Medicines Regulatory Authority' (*Centre for Policy Alternatives*, 22 June 2020) <<https://www.cpalanka.org/statement-on-the-implementation-of-the-official-language-policy-by-the-consumer-affairs-authority-and-the-national-medicines-regulatory-authority/>> accessed 8 December 2021.

communal identities.⁴² *Re Manitoba Language Rights* case decided by the Canadian Supreme Court also recognises the individual impact of language referring to the ‘the essential role that language plays in human existence, development and dignity.’⁴³ It is through language that we are able to form concepts; to structure and order the world around us.’ Focusing on the communal aspect, the court states that, “language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.” Therefore, litigation on language rights often has an overarching impact.

This is especially important in the Sri Lankan context, where Article 126 (2) of the Constitution states that petitioners whose rights are violated or his Attorney-at-Law must petition the Supreme Court for infringement of their rights. However, *Bulankulama v Secretary, Ministry of Industrial Development*, recognises the locus standi of the petitioner to invoke the jurisdiction of the court in the public interest. The court justifies its expansive approach by stating that it is “concerned with the rights of individual petitioners even though their rights are linked to the collective rights of the citizenry of Sri Lanka, rights they share with the people of Sri Lanka.”⁴⁴ Therefore, because of the individual and

⁴² M S McDougal and others, Freedom from Discrimination in Choice of Language and International Human Rights. in McDougal and others (eds), *Human Rights and World Public Order* (Oxford University Press 2019).

⁴³ [1985] 1 SCR 721 < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/60/index.do> > accessed 1 December 2021.

⁴⁴ [2000] 3 Sri LR 244.

societal impact of the language rights petitioners have been able to file cases alleging individual infringements while also seeking remedies in the broader public interest.

For example, *Guruge v Commissioner General of Registration of Persons Department* is a case litigated in public interest demanding the National Identity Cards be issued in Sinhala and Tamil.⁴⁵ Petitioner refers to the significance of the National Identity Card as the 'most reliable document that ensures identification of persons' for multiple 'administrative processes,' such as obtaining a passport, driver's license, voting at elections, opening a bank account, performing transactions at a bank, at security points and entering a government institution.⁴⁶ The overarching purpose of the National Identity Card, therefore, is to identify its bearer to others and facilitate his public life. Therefore, the significance of the National Identity Card as a document has both an individual aspect and a broader communal aspect. Petitioner cites that the Registration of Persons Department recognises the role that this document plays "to create national security and a peaceful atmosphere."⁴⁷

However, the information therein is available only in Sinhala impeded the petitioner from being identified in districts where Tamil is the official language. Thereby, the petitioner argued that it was a violation of his language rights

⁴⁵ S.C. (FR) 93/2013.

⁴⁶ *ibid* 3- 4.

⁴⁷ *ibid* 3.

as stated in Articles 18, 19, 22, and 25 of the Constitution as well as his Fundamental Right to equality, guaranteed under Article 12 (1) of the Constitution.⁴⁸ The petitioner further claimed that the imposition of ‘disabilities and restrictions’ concerning access to many places especially in North and East of Sri Lanka is a violation of Article 12 (3) and the freedom of movement guaranteed by Article 14 (1) (h) of the Constitution of Sri Lanka.⁴⁹ Violation of this intersecting gamut of language rights and Fundamental Rights has an individual and a group impact. Therefore, the petitioner argues that this impediment violates the rights of the Sinhala people and Tamil people to be identified in any part of the country, to move freely within the country, and to be treated equally.⁵⁰

The court upheld this petition and from 1st January 2014, the National Identity Cards are issued to the public in both the national languages.⁵¹ This is ‘an interim measure until the E National Cards are issued which would be biometric’ in all three languages.⁵² The result of this case has an impact on the primary document of identification used by all the citizens of Sri Lanka. This is a classic example of the individual dignity and communal linguistic identity being upheld through public interest litigation and the overarching impact of public interest litigation on language rights.

⁴⁸ *ibid* 6-7.

⁴⁹ *ibid* 7.

⁵⁰ *ibid* 6.

⁵¹ S.C. (FR) 93/2013 at 3.

⁵² *Guruge* (n 45) 6.

Guruge v National Medicines Regulatory Authority,⁵³ wherein the petitioners called for the publication of information in pharmaceutical products in Sinhala and Tamil is a similar case that upholds individual and broader public interest. Publication of the information only in English affected the rights of both the Sinhala and Tamil speaking communities and hence has an overarching impact on the people of Sri Lanka.

Another example is *Guruge v Official Languages Commission*,⁵⁴ where the petitioners challenged the non-availability of legislation, including key legislation such as the Penal Code, Civil Procedure Code, Evidence Ordinance, Motor Traffic Act, and Industrial Disputes Act, in Sinhala and Tamil.⁵⁵ Even where translations of certain enactments are available in Sinhala and/or Tamil, these are not official due to the failure to publish them in the Gazette.⁵⁶ This is despite both the Republican Constitutions of 1972 and 1978 having a requirement to this effect.⁵⁷ This case argued that the non-availability of legislation in all three languages is a violation of the language rights stipulated in Articles 18, 23, and 25 and the Fundamental Right to equality enshrined in the Constitution.

⁵³ *Guruge* (n 37).

⁵⁴ S.C. (FR) 364/2014.

⁵⁵ *ibid* 5.

⁵⁶ *ibid* 5-6.

⁵⁷ The Constitution of Sri Lanka (Ceylon) 1972 Art. 10 (1) and (2) and The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 23 (4).

The case also highlights the overarching impact of upholding language rights on all citizens of Sri Lanka. This is especially the case because our legal system operates on the basis that ignorance of the law is not an excuse, elucidated by the Latin maxim *Ignorantia Juris non excusat*.⁵⁸ Such an assumption that the people would have a basic understanding of the law and lawful conduct while the legislation is inaccessible in the official languages of the state is extremely problematic. Nevertheless, as a result of this litigation, the Ministry of Justice gave a written undertaking on 24th July 2015, that the legislation will be made available in all three languages thereafter.⁵⁹

Public interest litigation is an important tool among the multiple actions required to achieve effective implementation of language rights. This is especially useful because language rights impact people's daily lives in underrated but practically significant ways.

An example of this is, *Guruge v Superintendent Currency of the Central Bank*,⁶⁰ This case challenged the Central Bank of Sri Lanka on certain essential phrases in currency notes not being printed in all three languages as a violation of Fundamental Rights. The petitioners initially filed a complaint to the Official Language Commission on 16th December 2011 that the monolingualism of the currency

⁵⁸ R L Narasimham, 'ignorantia Juris Non Excusat: Ignorance of Law is no Excuse' [1971] 13(1) Journal of the Indian Law Institute 70-78.

⁵⁹ Based on the information provided by the Outreach Unit of the Centre for Policy Alternatives.

⁶⁰ S.C. (FR) 417/2013.

notes detrimentally affects the freedom to engage in transactions.⁶¹ In 2012, the petitioners also filed a complaint with the Human Rights Commission of Sri Lanka.⁶² During this inquiry, the Superintendent of Currency appearing on behalf of the Governor of the Central Bank, undertook to follow a trilingual policy in issuing currency notes in the future.⁶³ However, the Rs. 500.00 note issued to commemorate the Commonwealth Heads of Government (CHOGM) in Sri Lanka was printed only in Sinhala, violating the undertaking before the Human Rights Commission.⁶⁴ Thereafter, the petitioners filed a case before the Supreme Court that continuation of printing currency notes only in Sinhala when the constitution provides for ‘two official/national/administrative languages’ as a violation of their language rights as well as Fundamental Rights.⁶⁵

There are numerous other instances where complaints have been filed with the Official Language Commissions and Human Rights Commission of Sri Lanka to insist upon the implementation of language rights.⁶⁶ For example, complaints were filed against several street name boards not being displayed in all three languages within the Kalmunai

⁶¹ *ibid* 5.

⁶² Under the inquiry number HRC/2184/12.

⁶³ S.C. (FR) 417/2013 at 5-6.

⁶⁴ *ibid* 6-7.

⁶⁵ *ibid* 7.

⁶⁶ Based on the information provided by the Outreach Unit of the Centre for Policy Alternatives.

Municipal Council,⁶⁷ Thirukkivil Pradeshiya Sabha limits,⁶⁸ Maharagama Urban Council,⁶⁹ and Thirappanai Pradeshiya Sabha.⁷⁰ Similarly, complaints were made that Name Boards of the National Schools are not displayed in Tamil.⁷¹ Further complaints have been filed against the Secretary, Ministry of Private Transportation Services, and Sri Lanka Transport Board for buses on North and East routes of Sri Lanka not displaying their destinations in Sinhala.⁷² Similarly, complaints were filed against the Railways Department for passenger instructions not being provided in Tamil in Anuradhapura, Galoya, Mahawa, and Polgahawela.⁷³ Complaints were also made against the Immigration Department for not making Naval Embarkation forms available in Tamil.⁷⁴ Further such complaints also include challenging the state bank, private bank and financial corporation loan forms not being available in Sinhala and Tamil,⁷⁵ application form to seek approval for building construction within the Colombo Municipal Council not being available in Tamil,⁷⁶ failure to publish the land procedure code in Tamil,⁷⁷ and numerous instances where

⁶⁷ OLC/C/179; HRC/KL/178/11/R.

⁶⁸ OLC/C/186; HRC/KL/177/11/R.

⁶⁹ OLC/C/184; HRC/3462/11.

⁷⁰ OLC/C/182; HRC/AP/555/2011(1).

⁷¹ HRC/4380/12.

⁷² HRC/283/12; HRC/284/12.

⁷³ OLC/C/188; HRC/3464/11; HRC/3465/11; HRC/3466/11.

⁷⁴ OLC/C/180; HRC/3461/11.

⁷⁵ HRC/3613/12; HRC/3614/12; HRC/3615/12.

⁷⁶ OLC/C/2012/W/2/11; HRC/636/2012.

⁷⁷ OLC /C/2012 /W/ 1/ 7; HRC /296/12.

Police officers took down statements of Tamil speaking persons in the Sinhala language (at Ampara, Mannar, Trincomalee, and Vavuniya).⁷⁸ Most of these complaints received responses through the mechanisms available through the Official Languages Commission and the Human Rights Commission of Sri Lanka, with litigation strategically listed as another tool to pressurise the administrative authorities where necessary.

5. Role of language rights litigation in empowering linguistic minorities

Language performs a dual function: as a means of communication and as means of nurturing group identity.⁷⁹ This section is concerned with the latter function of the language and how public interest litigation can empower linguistic minorities.

Expanding on Article 27 of the International Covenant on Civil and Political Rights on the rights of minorities, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 emphasises the importance of protecting and promoting the linguistic identities of minorities.⁸⁰ Izsák, in the capacity of

⁷⁸OLC/C/178(b), HRC/3468/11; OLC/C/183, HRC/3469/11; OLC/C/185, HRC/3470/11; OLC /C/181.

⁷⁹ S Wright, *Language policy and language planning: From nationalism to globalisation* (2nd edn, Palgrave Macmillan 2016) 7.

⁸⁰ Adopted by General Assembly resolution 47/135 of 18 December 1992; See also, PV Ramaga, 'The Group Concept in Minority Protection' [1993] 15(3) Human Rights Quarterly 575-588.

the United Nations Independent Expert on minority issues, views language as ‘a central element and expression of their identity and of key importance in the preservation of group identity.’⁸¹ Dunbar categorises that international law on upholding minority rights can be categorised into provisions that call for 'linguistic tolerance' and provisions that call for the promotion of language rights requiring positive actions from the state.⁸² Justifications for the protection of language rights are generally based on the person focused argument that language is significant for the individual and communal identities of people and the language focused argument that protection of languages nurtures linguistic diversity.⁸³

As Lador-Lederer states that “suffocation of language has always been part of policies of domination and the struggle for its maintenance was always a precondition for any political movement of liberation, whenever it might become possible.”⁸⁴ Sri Lanka's dismal history of language rights demonstrates this.⁸⁵ The Official Language Act 1956

⁸¹ Rita Izsák, 'Report of the Independent Expert on minority issues,' (31 December 2012) 6, <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/22/49> accessed 24 February 2021.

⁸² R Dunbar, 'Minority Language Rights in International Law' [2001] 50(1) *The International and Comparative Law Quarterly* 91-92.

⁸³ S May, 'Language rights and language policy: addressing the gap(s) between principles and practices' [2014] 16(4) *Current Issues in Language Planning* <<https://doi.org/10.1080/14664208.2014.979649>> accessed 24 February 2021.

⁸⁴ J Lador-ederer, *International Group Protection: Aims and Methods in Human Rights* (A W Sijthoff 1968) 25.

⁸⁵ B Perera, To Build Many Bridges: Constitutional Design of a Language Policy in Sri Lanka. in H Jayawardene and S Scharenguivel (eds), *Perspectives on*

guaranteed the official language status only to the Sinhala Language and the Tamil speaking communities faced severe discrimination and disempowerment as a consequence.⁸⁶ The issue that arose in *Kodeeswaran v Attorney General*,⁸⁷ where a Tamil civil servant was denied his promotion because he did not pass the test on Sinhala proficiency, is a harrowing example of this.

Despite the backlash against this Sinhala-only policy, the First Republican Constitution of 1972 entrenched this position constitutionally. It was further endorsed by the Second Republican Constitution of 1978 until the Thirteenth Amendment and the Sixteenth Amendment to the Constitution changed this position by recognising Tamil as an official language and English as the link language. These language rights which are constitutionally enshrined after a protracted struggle are made meaningful through public interest litigation.

Izsák states that preservation and promotion of language rights are crucial for “non-dominant communities seeking to maintain their distinct group and cultural identity, sometimes under conditions of marginalisation, exclusion and discrimination.”⁸⁸ In the Sri Lankan context, failure and

Constitutional Reform in Sri Lanka (International And Comparative Law Society 2021) 282-284.

⁸⁶ K Loganathan, *Sri Lanka: Lost Opportunities: Past Attempts and Resolving Ethnic Conflict* (Centre for Policy Research and Analysis 1996).

⁸⁷ See (n13).

⁸⁸ Rita Izsák (n81); See also, A Pattern and W Kymlicka, Introduction: Language Rights and Political Theory: Context, Issues and Approaches. in A Pattern and W

delays to the language rights of the Tamil speaking communities have resulted in deeply affecting the dignity of these communities and curtailing their opportunities for advancement.⁸⁹ At a broad level, these denials have led to the aggravation and perpetuation of conflicts among the different communities living in Sri Lanka. Through denial of language rights, the Tamil speaking communities were treated as second-class citizens in the country, which led to Tamil nationalism and separatism.⁹⁰

Public Interest Litigation can play an important role in upholding that the language rights of the minorities are upheld. For example, in *Sanjeewa Sudath Perera and two others v H.E. Maithreepala Sirisena*, the petitioners challenged that singing the national anthem in Tamil on Independence Day 2016 was unconstitutional.⁹¹ CPA intervened in the case filing an intervention-petition that this was constitutional.⁹² CPA argued that Article 7 and the Third Schedule of the Tamil version of the Constitution of Sri Lanka provide for the Tamil National Anthem, which is a

Kymlicka (eds), *Language Rights and Political Theory* (Oxford University Press 2003) 13.

⁸⁹ J Osiejewicz, 'Supranational Protection of Language Rights in Universal and European Context' [2019] 1(1) *Journal of Humanities and Culture* <<https://revistas.uam.es/bajopalabra/article/view/8952>> accessed 24 February 2021.

⁹⁰ R Edrisinha and others, *Power-Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (Centre for Policy Alternatives 2008) 207-270, 254-259.

⁹¹ S.C. (FR)67/2016.

⁹² Petition of 4th March 2016, <https://www.cpalanka.org/wpcontent/uploads/2018/02/anthem_intervention_petition.pdf> accessed 24 February 2021.

translation of the Sinhala version.⁹³ The intervening-petition highlighted that there is no provision in the Constitution that the Sinhala version of the Constitution will prevail over that of Tamil.⁹⁴ It was argued that this upholds the language rights of Tamils as well as their right to equality and non-discrimination based on language.⁹⁵ The intervening petition also highlights the importance of promoting linguistic diversity in the country in the post-civil-war context to achieve reconciliation, citing the LLRC Report which emphasises the unifying effect of implementing an inclusive language policy.⁹⁶

Loganathan presents how denial of language rights to the Tamil speaking communities has resulted not only in the suppression of their cultural and social identity but also in access to State Administrative services as well as educational and employment opportunities.⁹⁷ Therefore, enforcement of language rights has an overarching significance in the daily lives of the people. As Izsák elaborates, use of minority languages in public life, education, media, public administration and judicial fields, use in names, place names and public signs, economic and political life, and provision of information and services in

⁹³ *ibid* 5.

⁹⁴ *ibid*.

⁹⁵ *ibid* 6.

⁹⁶ *ibid* 7.

⁹⁷ Ketheshwaran Loganathan (n 86).

minority languages are important elements in promoting language rights of minorities.⁹⁸

Canadian cases such as *Mahe v Alberta*,⁹⁹ and *Arsenault-Cameron v Prince Edward Island*,¹⁰⁰ illustrate the constitutional significance of facilitating the education in the language of minorities. The court in *Mahe v Alberta* states that “any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it.”¹⁰¹ Similarly, in *Arsenault-Cameron*, the court takes a purposive interpretation of Section 23 of the Canadian Charter of Rights in Part I of the Constitution Act of 1982, providing for minority educational rights, as seeking to redress “past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced.”¹⁰² Indian Supreme Court in *The Ahmedabad St. Xaviers College v Gujarat* also reiterates that Article 30 of their Constitution recognises the right of minorities to “establish and administer educational institutions” based on religion or language as special

⁹⁸ Rita Izsák (n 81) 45-72.

⁹⁹ [1990] 1 SCR 342 < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/580/index.do> > accessed 1 December 2021.

¹⁰⁰ [2000] 1 SCR 3 < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1762/index.do> > accessed 1 December 2021.

¹⁰¹ *Mahe* (n 99).

¹⁰² *Arsenault-Cameron* (n100).

protection for minorities within the fundamental rights chapter so that they are not left to feel like 'second-class citizens.'¹⁰³ Public interest litigation is well suited for language rights cases because litigation on language rights adds pressure on the bureaucracy to implement the rights in these various areas.¹⁰⁴

Another minority that is disempowered and severely affected by the lack of guaranteeing their language rights are persons with disabilities. Sri Lanka's ratification of the Convention on the Rights of Persons with Disabilities (CRPD),¹⁰⁵ which also emphasises that the language rights of persons with disabilities have to be upheld. Article 21 of the CRPD on freedom of expression and opinion and access to information enshrines that "the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes, and formats of communication of their choice by persons with disabilities in official interactions" must be accepted and facilitated. The Article also insists that private entities and mass media must also provide their information in accessible formats and that sign language must be promoted by the State's Language rights are also part of its Article 9 on ensuring accessibility for persons with disabilities. Article 9 (e) requires that "forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters."

¹⁰³ 1974 AIR 1389 < <https://indiankanoon.org/doc/703393/>> accessed 1 December 2021.

¹⁰⁴ Denvir (n1) 1135.

¹⁰⁵ U.N. Doc. A/RES/61/106 (3 December 2006).

Sri Lanka has also acceded to the Marrakesh Treaty which aims to eliminate the book famine faced by persons with print disabilities.¹⁰⁶

The country is yet to see enabling legislation for the CRPD and despite the presence of numerous policy documents on these rights of persons with disabilities effective enforcement mechanisms to uphold these rights.¹⁰⁷ However, the two cases decided by the Sri Lankan Supreme Court on persons with disabilities under public interest litigation focus upon the implementation of the Accessibility regulations of 2006 and 2009 and thus on improving accessibility of the environment to the persons with disabilities.¹⁰⁸ Therefore, upholding the language rights of persons with disabilities is an area in which public interest litigation has the future potential to bring about positive social change.

¹⁰⁶ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on June 27, 2013. Sri Lanka introduced amendments to the country's Intellectual Property Act No.36 of 2003 by Act No.8 of 2021 (section 12A) to permit exceptions for persons with print disabilities.

¹⁰⁷ Mendis and Perera (n2).

¹⁰⁸ *Perera v Minister of Social Services* S.C. (FR) 221/200. ; *Perera v Minister of Social Services*, S.C. (FR) 273/2018
<http://www.supremecourt.lk/images/documents/sc_fr_273_2018.pdf>
accessed 24 February 2021.

6. Impact of the Language of the Supreme Court on Public Interest Litigation

The language of the courts, recognised through Article 24 of the Constitution of Sri Lanka, is a significant aspect of upholding language rights. Public interest litigation concerning language rights takes place before the Supreme Court of Sri Lanka under the Fundamental Rights jurisdiction of the court set out in Article 126 of the Constitution of Sri Lanka. The process before the Supreme Court, consisting of both the legal framework and the practices, has a significant impact on public interest litigation. This section assesses the impact of the language of the Supreme Court and the language related power dynamics of the courts upon public interest litigation.

The directions issued by the Minister of Justice in concurrence with the Cabinet of Ministers in 1978, according to Article 24 (4) of the Constitution, provides that courts other than the Supreme Court and the Court of Appeal may use “a language other than a national language” when “the conduct of the proceedings in a national language might be prejudicial to a proper adjudication of any matter in such proceedings.”¹⁰⁹ However, the Supreme Court in *Coomaraswamy v Shanmugaratna Iyar*,¹¹⁰ held that proviso of the direction that the pleadings, applications, and motions in all such cases must also be in the national language used

¹⁰⁹ Gazette Extraordinary No. 1/6 of 07 September 1978.

¹¹⁰ [1978-79-80] 1 Sri LR 323.

by the courts is invalid insofar as it undermines the Article 24 (2) entitlement of parties appear before the courts in Sinhala or Tamil. This case specifically upheld that the parties appearing before the District Court of Colombo were entitled to file documents only in Tamil.

Therefore, the Supreme Court considered the right of the parties to participate in the court procedure in national languages as a constitutional entitlement that cannot be superseded by the direction of the Minister. Nevertheless, as the direction of the Minister of Justice indicates, the Supreme Court of Sri Lanka functions primarily in English. This gives rise to several issues concerning public interest litigation as well as upholding language rights.

The first issue is the impact of Supreme Court proceedings solely being in English on access to justice and how this affects public interest litigation.¹¹¹ The litigants are required to retain lawyers who practice in English and file the pleadings and motions in English. This language gap can be bridged through the assistance of organisations such as the CPA. This is evidenced through cases such as *Mariyathas Basilraj v Gotabaya Rajapaksha* where the CPA assisted the lawyers and human rights organisations in Jaffna in collecting information regarding the incident and also assisted the lawyers in filing Fundamental Rights cases before the Supreme Court.¹¹² *Mavai Somasundaram*

¹¹¹ See generally, D Rhode, 'Whatever Happened to Access to Justice' [2009] 42(1) *Loyola of Los Angeles Law Review* 869.

¹¹² See (n26).

Senathirajah v Gotabaya Rajapaksha is a similar example where the CPA assisted the case in various capacities including drafting the petition.¹¹³ However, this results in distancing the litigants from the courts.

Second is the language related power dynamics of the legal profession and its impact on public interest litigation. The Supreme Court functioning in English means that the lawyers who argue before this court will have to be not only conversant, but fluent in English to engage in successful litigation. The first implication of this is that not every lawyer would be able to litigate before this court. The lawyers who are proficient in the National languages and practising in courts of the first instance throughout the country would face a disproportionate impact of this. In this situation, the Court becomes a site of perpetuating the language-based privileges and hierarchies that is a legacy of colonialism.¹¹⁴ The second implication is that lawyers who are fluent in English would also be expensive to retain unless they have an individual commitment to take up *pro bono* litigation. In such a situation, the success of public interest

¹¹³ Centre for Policy Alternatives, (Registrations in North) (SC FR 73/2011) <<https://www.cpalanka.org/1mavai-somasundaram-senathirajah-vs-gotabaya-rajapaksha-registrations-in-northsc-fr-732011/>> accessed 24 February 2021.

¹¹⁴ A Corradi, 'The Linguistic Colonialism of English' (Brown Political Review , 25th June) <<https://brownpoliticalreview.org/2017/04/linguistic-colonialism-english/>> accessed 24 February 2021.

litigation indirectly aligns with the depth of the pocket of the client.¹¹⁵

The third is the availability of judgements on public interest litigation only in English and its impact on the reach of this jurisprudence due to constraints on language and translation.¹¹⁶ This raises questions about whether the educational function of the Supreme Court is fulfilled in this instance because the wider public is generally conversant in the native languages. The question of translating jurisprudence and whether that has the intended impact of reaching out to the public in ways that will educate them and transform their attitudes remains questionable.¹¹⁷

For these reasons, it is important to consider proposals to enhance the linguistic accessibility of the Fundamental Rights and language rights jurisdiction. The Writ jurisdiction of the Court of Appeal has been devolved to the Provinces through Article 154P of the Constitution. Proposals to devolve the Fundamental Rights jurisdiction to the provinces in a parallel manner has been suggested by the

¹¹⁵ M Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change. in H Kritzer and S Silbey (eds), *In Litigation: Do the "Haves" Still Come Out Ahead?* (Stanford Law and Politics 2003) 15-26.

¹¹⁶ 'Even in the simplest case... there is a sense in which translation is necessarily imperfect; as speech becomes more complex, the imperfections increase...' J White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press 1994) 235.; Also see, S Kahaner, 'The Administration of Justice in a Multilingual Society - Open to Interpretation or Lost in Translation' [2009] 92(5) *Judicature* 224.

¹¹⁷ See generally, RT Shepard, 'Access to Justice for People Who Do Not Speak English' [207] 40(1) *Indiana Law Review* 643.

Report on Public Representations on Constitutional Reform,¹¹⁸ and the Report of the Sub Committee on Fundamental Rights.¹¹⁹ The language rights jurisdiction needs to be devolved simultaneously and also for such jurisdiction to be accessible in both the national languages of Sri Lanka. Further facilities need to be provided to persons with disabilities, such as sign language interpreters, braille, and electronic copies of documents as required. Furthermore, the Supreme Court needs to also consider providing at least the summaries of the Fundamental Rights judgements in the national languages in the light of the best practices from countries such as Canada, where the judgements of the Supreme Court are available in both the official languages: English and French.¹²⁰

7. Conclusion

I have analysed several aspects of the significance and potential in litigating language rights in the public interest. Litigating language rights facilitates the gamut of other human rights, those that are enshrined in the Constitution of Sri Lanka as well as those that are not enshrined therein even though the country has ratified the relevant international

¹¹⁸ Public Representations Committee on Constitutional Reform, *Report on Public Representations on Constitutional Reform* (May 2016) 128.

¹¹⁹ The Steering Committee of the Constitutional Assembly, *Report of the Sub Committee on Fundamental Rights* (2017) 18-19.

¹²⁰ Constitution Act of 1982, section 16; Official Languages Act 1985 (Canada); Supreme Court of Canada (2020) English: <<https://www.scc-csc.ca/home-accueil/index-eng.aspx>> French: <<https://www.scc-csc.ca/home-accueil/index-fra.aspx>> accessed 24 February 2021.

conventions. Upholding language rights has a dual impact: for individuals and society collectively. For these reasons, litigating language rights contributes to upholding the human rights of large sections of communities. Language rights are not only a means of communication but also a means of preserving group identities. Therefore, upholding language rights preserves the group identity, dignity, and rights of linguistic minorities. Public interest litigation in Sri Lanka has so far focused on the rights of Sinhala and Tamil speaking communities, but there is further potential to engage in litigation to uphold the language rights of persons with disabilities. The fact that the Supreme Court of Sri Lanka, on which the language rights jurisdiction is concentrated, functions in English, has a restrictive impact on linguistic access by the litigants, lawyers. The jurisprudence of the court being in English limits the reach of the Supreme Court's progressive interpretations of rights to the people of Sri Lanka. There is potential for the Fundamental Rights jurisdiction of the court to devolve and simultaneously expand its linguistic accessibility.

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Public Interest Litigation for the Realisation of Gender Rights in Sri Lanka: Lessons from the South Asian Region

Khyati Wikramanayake and Inshira Faliq

1. Introduction

Gender equality is the equal enjoyment of ‘socially valued goods, opportunities, resources and rewards’, regardless of one's gender.¹ It recognises that no person should be denied equal treatment or recognition, as a result of their gender. While it is widely recognised as a fundamental human right, and despite some significant progress over the years, gender inequality remains a major challenge in the South Asian region.² However, much more remains to be done in ensuring that no person is prevented from accessing the choices and freedoms that they are entitled to in a democratic society, as a result of a characteristic as arbitrary as their gender. This chapter examines the application of public interest litigation (PIL) in achieving gender justice in the South Asian region and draws upon case law from Sri Lanka, India, Nepal and Bangladesh. On an analysis of constitutional law and case studies of landmark Supreme

¹ UNFPA, 'Frequently asked questions about gender equality' (*United Nations Population Fund*, 2005) <<https://www.unfpa.org/resources/frequently-asked-questions-about-gender-equality>> accessed 31 December 2021.

² D Filmer and others, *Gender Disparity in South Asia: Comparisons between and within Countries* (World Bank 1998).

Court decisions, the authors argue that PIL has great potential for advancing gender equality. While PIL has been a vital tool in promoting gender justice in several South Asian jurisdictions, Sri Lanka has lagged behind. There have, however, been a few judgments that have set a progressive precedent, opening the pathway for future litigation on gender justice in the country.

This chapter will first set out the legal provisions and jurisprudence relating to gender within the legal framework of Sri Lanka. Thereafter, looking at comparative jurisdiction it will go on to explore the ways forward, in using PIL as an effective tool for achieving long lasting gender justice. Holistic change, however, cannot be achieved through judicial intervention alone and will require a cultural change stemming from legal and structural reform, a change in political culture and awareness starting from the grassroots of Sri Lankan society. Moreover, changing societal attitudes and perceptions on gender, and breaking centuries old stereotypes on gender roles cannot happen overnight. It will take consistent effort and sustained work from all stakeholders, in the long run, to push for a society in which gender equality is upheld.

2. Gender and the Law in Sri Lanka

Article 12 (2) of the Sri Lankan Constitution prohibits discrimination on the basis of “race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.” On the face of it, the Constitution thus guarantees

formal equality to women. However, it is noteworthy that the Constitution does not guarantee non-discrimination on grounds of gender,³ sexual orientation or marital status. The phrasing of the Article suggests that the protection from discrimination is limited to the grounds contained therein, though this question remains open to interpretation. Additionally, Article 12 (4) appears to permit affirmative action to further the interests of women, as it provides that “nothing in this Article shall prevent special provision being made, by law, subordinate legislation or Executive action, for the advancement of women, children or disabled persons.” Despite the guarantee of formal equality in Article 12 (2), Article 16 of the Constitution provides that any law or custom in place prior to the enactment of the Constitution shall not be invalid on the basis of inconsistency with the Fundamental Rights guaranteed therein. Several old laws overtly discriminate based on sex and their validity is protected by Article 16.⁴

The guarantee of non-discrimination on the grounds of sex under Article 12 (2) has multiple consequences, two of which have a major bearing on litigation. Firstly, by way of

³ Though often used interchangeably, sex and gender connote different things; sex is a biological concept, which categorizes people based on their reproductive organs, while gender relates to a person’s identity, in relation to the cultural, behavioural and psychological traits associated with different sexes.

⁴ For example, the Land Development Ordinance, the Vagrants Ordinance, Muslim Marriages and Divorce Act, Kandyan Law, The Jaffna Matrimonial Rights and Inheritance Ordinance, Muslim Intestate Succession Ordinance and The Buddhist Temporalities Ordinance contain provisions which are discriminatory towards women.

Article 17 read with Article 126 (1), Fundamental Rights are enforceable before the Supreme Court. If any Executive or Administrative action discriminates on the basis of sex, then it can be challenged by way of a Fundamental Rights Application. The second consequence of the guarantee under Article 12 (2) is that if Parliament wishes to introduce a new law that discriminates on the basis of sex, the law can be challenged before the Supreme Court by way of pre-enactment review.⁵ If the law is in fact found to be discriminatory, it does not mean that the Bill cannot be passed, but adds a procedural step requiring that it be passed by a two thirds majority in Parliament. However, Sri Lanka does not permit post enactment judicial review,⁶ which means that once a bill has been passed into law, the Supreme Court in the country does not have the power to strike it down even if it contains discriminatory provisions.

3. Gender and Public Law litigation in Sri Lanka

Despite the enforceability of the right to non-discrimination on the basis of sex guaranteed under the Constitution, there have been a dearth of cases in which the violation of this right has been challenged before the Courts.⁷

⁵ Articles 120 and 121 of the Constitution give the Supreme Court jurisdiction to determine the Constitutionality of Bills. Citizens can invoke this jurisdiction within one week of the Bill being placed on the order paper of Parliament

⁶ Article 18 (3) of the Constitution provides that no court shall pronounce upon or in any manner call in question the validity of any law after it has been passed.

⁷ D Samararatne, 'Recent Trends in Sri Lanka's Fundamental Rights Jurisdiction' [2016] XXII(1) Bar Association Law Journal 234.

In 1999, in the case of *Bernard Maximillian Fischer v The Controller of Immigration and Emigration*⁸ the Supreme Court quashed a discriminatory rule which applied different visa criteria for the spouses of male and female Sri Lankans. This archaic immigration rule required the foreign spouse of a Sri Lankan woman to obtain an expensive residential visa as well as proof of a considerable inward foreign remittance to reside in Sri Lanka, while there was no such requirement imposed on a foreign spouse of a Sri Lankan man. The German spouse of a Sri Lankan woman successfully challenged this law, and the Court directed the Respondents to make and publish guidelines and procedures for the grant of visas to foreign spouses that conformed with Articles 12 of the Constitution.

However, courts haven't always held favourably when deciding on matters of sex and gender. In 2013, two circulars issued by the Sri Lanka Bureau of Foreign Employment required that female migrant workers seeking foreign employment as domestic labour obtain permission from their husbands and/or other officials and required that they prove that their children would be safe during their absence.⁹ This circular was challenged by a female migrant worker on the basis that, *inter alia*, it violated her right to equality, and the rights of similarly victimised women, under Article 12

⁸ S.C. (FR) 436/1999.

⁹International Labour Organization, *Sri Lankan Female Migrant Workers and the Family Background Report* (ILO 2018).

(2) of the Constitution.¹⁰ The Supreme Court refused leave to proceed in this case, reportedly on the basis that the circular was not discriminatory in the context of Sri Lankan tradition and culture, wherein the woman is a strong binding force in the family unit.¹¹ In doing so, the court missed an invaluable opportunity to establish a standard that the judicial system would not tolerate discrimination on the basis of sex and gender, and instead further entrenched archaic gender roles and stereotypes.

In 2010, Article 12 (4), which provides scope for affirmative action, was subject to judicial interpretation when the constitutionality of the Local Authorities (Special Provisions) Bill and Local Authorities Elections (Amendment) Bill were challenged before the Supreme Court by multiple parties.¹² Clause 22 of the Bill sought to introduce a non-mandatory quota of 25% for women and youth, and several petitioners argued that this weak clause did not meet the obligations of the State under the Convention on Elimination of All Forms of Discrimination

¹⁰ Feizal Samath, 'Migrant worker challenges Govt. over restrictive rule' *The Sunday Times*, (Colombo, 1 Sept 2013) <<https://www.sundaytimes.lk/130901/business-times/migrant-worker-challenges-govt-over-restrictive-rule-59771.html>> accessed 31 December 2021.

¹¹ The Sunday Times, 'Supreme Court refuses appeal of migrant worker' *The Sunday Times*, (Colombo, 22 Sept 2013) <<https://www.sundaytimes.lk/130922/business-times/supreme-court-refuses-appeal-of-migrant-worker-62614.html>> accessed 31 December 2021.

¹² *In Re Local Authorities (Special Provisions) Bill and Local Authorities Elections (Amendment) Bill* S.C. (SD) 2-11/2010.

Against Women (CEDAW), and Women’s Charter.¹³ The petitioners also took up the position that Article 12 (4) of the Constitution permitted the state to allocate a special quota for women.

The court however rejected these arguments and held that “Article 12 (4) of the Constitution is not a weapon, but only a shield for the state in order to justify any kind of departure from the mainstream purely to encourage the advancement of women, children and disabled persons. Accordingly, Article 12 (4) cannot be used to authorise affirmative action on behalf of women, children and disabled persons”. While the court holds that Article 12 (4) of the Constitution cannot be used to justify affirmative action, the difference between the use of this clause as a shield as opposed to a weapon is unclear as the court goes on to say that it can be used as a “shield for the State in order to justify any kind of departure from the mainstream purely to encourage the advancement of women, children or disable persons.” It does not explain how this is different to affirmative action, and what the parameters of either the weapon or the shield are in this context.

In the paragraphs following, the court goes a step further and states that “in order to ensure equal treatment in elections, especially for the voters to choose the most suitable

¹³ J Arulanantham and A Schubert, 'A critique of the Local Authorities Elections (Amendment) Bill' (*Groundviews*, 1st March) <<https://groundviews.org/2011/01/03/a-critique-of-the-local-authorities-elections-amendment-bill/>> accessed 31 December 2021.

candidate it would be essential to remove any unnecessary restriction in order to have meaningful exercise of franchise. Introduction of restrictive quotas would not be a meaningful step in the light of ensuring such franchise and also would not be taken to guarantee the right to equal protection in terms of Article 12 of the Constitution.”

The court takes a fairly superficial position and fails to recognise how the introduction of mandatory quotas would in fact in the long run improve franchise in a context where social and cultural barriers have prevented the entry of women into politics and governance.¹⁴ In a country where female representation is abysmally low, the court in this case missed an opportunity to promote equality between the sexes.

Another case in which the court made a determination on matters relating to gender and sex is the case of *Manohari Pelaketiya v Gunasekara and others*,¹⁵ though it was not filed in terms of Article 12 (2) and based on discrimination on gender. In this application, the petitioner, a schoolteacher,

¹⁴ Chulani Kodikara, *The Struggle for Equal Political Representation of Women in Sri Lanka: A Stocktaking Report for the Ministry of Child Development and Women's Empowerment and the United Nations Development Programme* (UNDP 2009). ; Sathya Karunarathne 'Sri Lanka's women are deprived of positions in political power yet again', *Economy Next* (Colombo 25 Aug 2020) <<https://economynext.com/sri-lankas-women-are-deprived-of-positions-in-political-power-yet-again-73329/>> accessed 31 December 2021. ; Bansari Kamdar 'Women in Sri Lanka Make up 56% of Voters, But Only 5% of Legislators', *The Diplomat*, (Arlington 25 Sept 2020) <<https://thediplomat.com/2020/09/women-in-sri-lanka-make-up-56-of-voters-but-only-5-of-legislators/>> accessed 31 December 2021.

¹⁵ S.C. (FR) 72/2012.

was interdicted for making statements in the media about sexual harassment she was facing at the workplace, which was contrary to the provisions of the Establishment Code.¹⁶ While the court did finally find that there was a violation of her freedom of expression and her right to equal protection of the law, it also did make certain pertinent observations about sexual harassment, and the obligations of the State towards women. The court held that;

“Sri Lanka boasts of both constitutional as well as international obligations to ensure equity and gender-neutral equality which this Court cannot simply ignore.

Article 12 (2) declares that no citizen shall be discriminated against on the ground of sex and Article 12 (4) of the Constitution emphasises that nothing in Article 12 shall prevent special provisions being made by law, subordinate legislation or Executive action for the advancement of women, children and disabled person.

These constitutional provisions articulate the constitutional imperative of giving due recognition to womenfolk resulting in equality and non-discrimination among sexes. These rights can only be restricted or limited by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedom of others or meeting the just

¹⁶ Establishment Code of the Government of the Democratic Socialist Republic of Sri Lanka 1985.

requirement of the general welfare of the democratic society - see Article 15 (7) of the Constitution.

Therefore, this Court is of the view that sexual harassment or work place stress and strain occasioned by oppressive and burdensome conduct under colour of Executive office would be an infringement of the Fundamental Rights of the petitioner and clearly the fact that the petitioner in this case snapped under the long and prolonged oppressive conduct directed towards her cannot be held against the petitioner in the advancement and enforcement of Fundamental Rights which this Court is perforce bound to promote and protect.

Sri Lanka has undertaken international obligations to eliminate all forms of discrimination against women by acceding to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 17.07.1998 and in pursuance of these international obligation Sri Lanka has also enacted several to give vent to these global rights in favour of women. In the circumstances this Court holds that the regime of affirmative rights referred to above cannot be restricted or limited by the provisions of the Establishment Code...”

This is one of the most progressive steps the Judiciary has taken, within the public law sphere, to recognise the struggles that women endure, and emphasise the role that the

State must play in creating a system within which women are given equal status.

In addition to these decided cases, there are several cases pending before the courts at present which involve questions of gender rights. An antiquated Excise Notification under the Excise Ordinance prevented liquor from being sold to women in the premises of a tavern and prohibited women from being employed in several roles including in the manufacture and transportation of liquor.¹⁷ In 2018 the then Minister of Finance issued a gazette amending this to allow females over the age of 18 to purchase alcohol and be employed in licensed premises without prior approval from the Excise Commissioner.¹⁸ However, several days later, reportedly due to the involvement of the then President and the cabinet, a new Gazette Notification was issued reintroducing the previous restrictions.¹⁹ Several Fundamental Rights Applications were filed in the public interest²⁰, challenging the validity of the Gazette containing

¹⁷ See Excise Notification No. 666 promulgated in terms of the provisions of the Excise Ordinance No 08. of 1912 published in Gazette notification dated 31 December 1979.

¹⁸ The Hindu, 'Sri Lanka lifts ban on women buying, selling alcohol', *The Hindu* (Chennai, 12 Jan 2018) <<https://www.thehindu.com/news/international/sri-lanka-lifts-ban-on-women-buying-selling-alcohol/article22428875.ece>> accessed 31 December 2021.

¹⁹ Reuters. 'Sri Lanka reimposes women alcohol ban days after it was lifted', *Reuters* (Colombo, 15 Jan 2018) <<https://www.reuters.com/article/us-sri-lanka-alcohol-idUSKBN1F411Q>> accessed 31 December 2021.

²⁰ Five petitions were filed: S.C. (FR) 25/2018, S.C. (FR) 32-34/2018 and 74/2018. For more information on some of the cases see Centre for Policy Alternatives, 'Centre for Policy Alternatives v Mangala Samaraweera and Two

the reintroduction, on the basis that it violated numerous rights including the guarantee of equal protection of the law guaranteed under Article 12 (1) and non-discrimination based on sex under Article 12 (2) of the Constitution.²¹

Two others presently pending Fundamental Rights Applications which have a bearing on sex and gender involve promotions within the ranks of the Police. In a case filed in 2016, several female sub-inspectors of the police filed an application praying for an increase in the number of female cadre positions in certain higher ranks of the police, starting from the rank of Superintendent. They complained that despite carrying out the same work and accruing the same number of years of experience as their male counterparts, there was limited scope for the promotion of female officers²². In a more recent case filed in 2021,²³ several men holding the rank of Senior Superintendent of

Others [SC FR 34/2018] & Bhavani Fonseka and Four Others [SC FR 33/ 2018]' <<https://www.cpalanka.org/centre-for-policy-alternatives-v-mangala-samaraweera-and-two-others-sc-fr-34-2018-bhavani-fonseka-and-four-others-sc-fr-33-2018/>>accessed 31 December 2021.

²¹ Centre for Policy Alternatives, 'Two Fundamental Rights Petitions Challenging Excise Notification No 4/2018' <<https://www.cpalanka.org/two-fundamental-rights-petitions-challenging-excise-notification-no-4-2018/>> accessed 31 December 2021.

²²S.C. (FR) 91/2016; Namini Wijedasa, 'An ornamental Police Force', *Sunday Times* (Colombo, 21 Feb 2021) <<https://www.sundaytimes.lk/210221/news/an-ornamental-police-force-433384.html>> accessed 31 December 2021.

²³ S.C. (FR) 354/2020; Yoshiha Perera, 'FR over Bimshani's DIG appointment: Alleged falsehood in petition to SC', *The Morning* (Colombo, 16th May 2021) <<https://www.themorning.lk/fr-over-bimshanis-dig-appointment-alleged-falsehood-in-petition-to-sc/>> accessed 31 December 2021.

Police challenged the appointment of a woman to the position of Deputy Inspector General of Police, on the basis that there are no cadre positions allocated for females in the said rank.²⁴ Both these cases offer the Judiciary an opportunity to make decisions that have a positive impact on gender equality.

Finally, while examining how the Judiciary has addressed questions on gender in Sri Lanka, an observation made by Justice Dr. A. R. B. Amerasinghe in *Bulankulama and others v Secretary, Ministry of Industrial development and others*²⁵ is noteworthy. While the case is well studied for the findings on sustainable development and numerous other public law concepts, comments on the use of the word ‘he’ in a statute are of fundamental importance. His Lordship held that “it is time, indeed it is high time, that the laws of this country be stated in gender-neutral terms and that laws formulated in discriminatory terms should not be allowed to exist, although protected for the time being as ‘existing law’ within the meaning of Article 16 of the Constitution. The argument advanced that the provision in the law relating to the interpretation of statutes that ‘his’ includes ‘her’ is clearly insufficient: it displays, in my considered opinion, a gross ignorance or callous disregard of such a matter of fundamental importance as the fact that there are two species of humans.”²⁶

²⁴ *ibid*

²⁵ [2000] 3 Sri LR 244.

²⁶ *ibid* 312.

These cases demonstrate two things. One is that there is no consistent position that the Sri Lankan Judiciary has taken when dealing with questions on sex and gender. The Judiciary has on occasion acted fairly progressively in their recognition of the rights guaranteed under Article 12 (2), but has also, on numerous occasions taken a restrictive approach, and even been guided by archaic stereotypes on gender.

The second is that matters of gender are rarely litigated, and there are so few instances in which applications have been filed utilising the guarantee of non-discrimination based on sex. However, this is not to say that women in Sri Lanka do not face discrimination. The instances in which Fundamental Rights Applications have been filed in relation to sex and gender rights are when the state has failed in its negative obligations, i. e., it has failed to refrain from acting in a manner that violates Fundamental Rights. There are many ways in which the State has and continues to fail in its positive obligations towards women, i. e., actively taking action to protect against the violation of rights. These failures are yet to be challenged in court. The preceding sections of this chapter will explore how PIL has been used in the South Asian region to ensure that the State meets its positive obligations towards women.

However, there cannot be reliance on the Judiciary alone to foster change. There needs to be a holistic effort involving policy and cultural change to ensure that there is sustainable change in the interest of gender equality. Without legislative

and structural reforms, along with awareness aimed at tackling archaic stereotypes, PIL alone will be limited in its power to make an impact.

4. Judicial Response to an Unresponsive Legislature

A trend seen across much of the South Asian region is that, in the face of the lack of political will and initiative to further gender rights, the judiciary has stepped up as the most powerful gender advocate, protecting and enhancing the status of women.²⁷ India, regarded as the birthplace of PIL in the form of a jurisdiction,²⁸ stands as the best example of this, where PIL has been used as an effective tool for the protection of women.²⁹ Over the years, the Indian judiciary has used its immense power in hearing PIL to “design innovative solutions, direct policy change, catalyse law making, reprimand officials and enforce orders.”³⁰

In theory, the role of law making belongs to Parliament; in a democracy, all power is reposed in the people, and it is the legislature who are directly elected by the people, and

²⁷ J Stevenson, 'Public Interest Litigation & Women's Rights: Cases from Nepal & India' [2019] 1(1) Student Research & Creative Works Symposium <https://dc.ewu.edu/cgi/viewcontent.cgi?article=1001&context=srcw_2019> accessed 31 December 2021.

²⁸ A Bhuwania, 'Courting the people: The rise of Public Interest Litigation in Post-Emergency India' [2014] 34(2) Comparative Studies of South Asia, Africa and the Middle East 314-335.

²⁹ Stevenson (n27).

³⁰ Bhuwania (n28).

ideally representative of all or most of society. Scholars are often critical of this role being usurped by the Courts, as it is assumed that elected legislators can better understand the sentiments of the people than unelected judges.³¹

There are, however, two caveats that must be considered. The first caveat is that legislatures are not always representative of all the people and can be unresponsive to the needs of the people. While a representative democracy is sometimes treated as a sacrilegious concept, it must be considered in the context of its constitutional reality. The extent to which a representative democracy is in fact representative depends on a plethora of factors such as the electoral system in place, and the demographics of a country. Moreover, how responsive a legislature is to the needs of the people too is subject to numerous realities, and lawmakers are often not as responsive to the need for reform as the concept of a representative democracy would require.

In fact, in India, the broad PIL jurisdiction that exists today is in some part credited to the judicial acknowledgement that a representative democracy has its flaws and its questioning of the legitimacy of the legislature having a monopoly over

³¹ Kartikeya Tanna 'Tyranny of the unelected: It is time judges recognised the limits of their powers' *Firstpost*, (New Delhi, 20 April 2021) <<https://www.firstpost.com/blogs/blog-india/tyranny-of-the-unelected-why-judges-must-be-conscious-of-limits-of-their-powers-9546531.html>> accessed 31 December 2021. ; Jayant Siram 'Are courts encroaching on the powers of the executive?' *The Hindu*, (Chennai, 22 Jan 2021) <<https://www.thehindu.com/opinion/op-ed/are-courts-encroaching-on-the-powers-of-the-executive/article33629172.ece>> accessed 31 December 2021.

speaking for the people.³² In the famous judgement of *Kesavananda Barathi v State of Kerala and anr*,³³ the court recognised that “Two-thirds of the members of the two Houses of Parliament need not necessarily represent even the majority of the people of [India]. Our electoral system is such that even a minority of voters can elect more than two-thirds of the members of either House of Parliament.” In Sri Lanka, where social and structural barriers exist that discourage the representation of women in the legislature, the legislative arm of government cannot be truly representative of even a majority of the people.³⁴ Further, where there is a culture of elections, won on promises that seldom materialise, the legislature is not responsive to the needs of women.³⁵

The second caveat is that while judges are not elected, they are the protectors of the Constitution, entrusted with the role of ensuring that constitutionally mandated limits on power are respected. The Constitution in turn is a document enacted by the people, and thus when the courts step in to protect the values and principles enshrined in the Constitution, they are in fact playing a role essential to a healthy democracy. There are basic protections that must be shielded from the tyranny

³² Bhuwania (n28) 323.

³³ (1973) 4 SCC 225; AIR 1973 SC 1461.

³⁴ Center for Policy Alternatives, ‘Legal Reform to Combat Sexual and Gender-Based Violence, Part I: Reforming Existing Laws and Policies, November 2020 <<https://www.cpalanka.org/wp-content/uploads/2020/11/Law-Reform-to-combat-SGBV-PART-1-General-Centre-for-Policy-Alternatives.pdf>> accessed 31 December 2021.

³⁵ *ibid* 28.

of the majority, and the Courts play an essential role in guaranteeing these protections.

The contextual reality is that law reform to ensure the safety and equal status of women in Sri Lanka has not been forthcoming. In failing to do so, the State has consistently failed to protect a part of its citizenry and guarantee their constitutionally enshrined rights. As the protectors of the Constitution, the courts can thus legitimately take on this role, and be the catalyst for reform. The Constitution does in fact empower the Supreme Court to do this, as it is empowered to “make such decisions as it may deem just and equitable”,³⁶ in the exercise of its Fundamental Rights jurisdiction.

While acknowledging that in a healthy democracy legal reform must come from the people’s elected representatives, the Judiciary, through PIL can play an important role when the other arms of Government fail to carry out their duty. While an argument can be made that an overly activist Judiciary is intrinsically undemocratic as their decisions do not stem from the sentiments of the populace, a balance is struck when the Fundamental Rights guaranteed by the Constitution are used to direct such change. The Judiciary, in doing so, is not acting on its own whims, but rather, directing that the minimum standards decided by the people and enshrined in the Constitution are adhered to.

³⁶ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Art. 126(4).

In other South Asian jurisdictions, courts have used PIL both as an avenue for the promotion of awareness about issues faced by women, and to create policies that lead to social change.³⁷ Two of the most significant ways in which these judiciaries have done this are by ordering the legislature to reform laws, and by making and implementing guidelines themselves. While Sri Lanka does not yet have strong precedence of judicial activism for the protection of gender rights, there are trends in judicial pronouncements that suggest that the Judiciary does recognise the need to take on this role.

However, that said, though the judicial system, through PIL, can play a crucial role in furthering gender justice, in South Asian countries, as patriarchal ideologies and structures are enabled in all layers of governance and culture, there is a pressing need for the Executive and the Legislative arms of Government to step in to take a more active role in addressing gender inequality.

4.1 Directing Legislative and Policy Change

*Laxmi v Union of India*³⁸ is a landmark decision of the Supreme Court that resulted in new laws being implemented impacting gender justice in India. Until 2013 India had no specific laws to regulate the sale of acids, despite the fact

³⁷ M Dasgupta, 'Social Action for Women? Public Interest Litigation in India's Supreme Court, Law, Social Justice & Global Development' [2002] 1(1) Social Justice and Global Development Review.

³⁸ *Laxmi v Union of India* Writ Petition (Criminal) No. 129 Of 2006.

that acid attacks, which especially targeted women and girls, had been a growing concern in the country.³⁹ In 2006, a PIL application was filed by Laxmi, a 15 year old girl who suffered an acid attack after rejecting a marriage proposal. Through her application, she requested the court to enforce controls over the sale of acid, regulations for the compensation to survivors and for victims' access to medical care. The Court directed the state governments and the Union territories to make appropriate rules for the sale of acid, and through a series of orders, followed up on their progress in doing so.⁴⁰ The court also required the Central Government to provide a set of draft guidelines, which served as minimum standards for the regulations implemented by each state or union territory.

In *Advocate Meera Dhungana v Government of Nepal*,⁴¹ the Supreme Court of Nepal, considering the exclusion of marital rape from the definition of rape, stated that “a man who commits the heinous and inhuman crime of rape to a woman cannot be immune from criminal law simply because he is her husband”. The court issued directives on the Ministry of Law, Justice and Parliamentary Affairs to introduce a bill for introducing necessary amendments acknowledging marital rape as a crime. Subsequent to the judgment, the chapter on Rape in the Country Code was

³⁹ S Goswami and R Handa , 'The Peril of Acid Attacks in India and Susceptibility of Women' [2020] 1(1) Journal of Victimology and Victim Justice.

⁴⁰ Several of these orders can be found at <https://www.casemine.com/judgement/in/5790b247e561097e45a4e2a3>

⁴¹ *Advocate Meera Dhungana v Government of Nepal*, Writ No 55 of 2001.

amended introducing a punishment of 6 months for the offence of Marital rape.⁴² Thereafter, another PIL application was filed challenging the new law on the basis that the punishment was insufficient and that it should be equivalent to the punishment prescribed for other offences of rape, as otherwise, it would be contrary and inconsistent with the right to equality.⁴³ The court, agreeing with the petitioners' contention, found that punishing marital rape differently from other forms of rape violated equal rights provisions in the Interim Constitution and international law, especially considering that sentencing guidelines of three to six months put the victim in danger of repeated violence and rape. Thus, the Court issued a directive order in the name of the Ministry of Law, Justice and Parliamentary Affairs to take necessary and justifiable actions to harmonise between penal provisions for marital and non-marital rape.

In Sri Lanka, while the court has not issued directions to reform laws in relation to issues on gender, there are instances in which it has observed the need for law reform. There is also precedence in which the court has made orders for certain policy changes to be implemented. In the case of *Azath Salley v Colombo Municipal Council and others*,⁴⁴ the

⁴² Harsh Mahaseth, 'Nepal's Parliament raises punishment for marital rape – but differentiates' *South Asia Journal* (13 April 2018) <<http://southasiajournal.net/nepals-parliament-raises-punishment-for-marital-rape-but-differentiates/>> accessed 31 December 2021.

⁴³ *Jit Kumari Pangeni and Others v Government of Nepal* (2006) Writ no: 064-0035.

⁴⁴ [2009] 1 Sri LR 365.

Petitioner challenged the manner in which the Colombo Municipal Council was authorising hoardings, and the failure to remove unauthorised hoardings. The Court held with the petitioner, and among the relief granted was a direction that the Respondents “take immediate steps to revise the present guidelines, considering the globally accepted detailed policies on hoardings and outdoor advertising in keeping with the practice of other organisations such as the Road Development Authority conducting auctions to enhance the financial viability in the process. Such revision of guidelines to be carried out as an urgent requirement by the 1st respondent Council and to consider the proposals for this purpose that could be submitted by the 6th and 7th respondents, who are the President and the Secretary General of the Outdoor Advertising Association of Sri Lanka, respectively.” The court further provided a date by which the guidelines had to be implemented. While the order only relates to Municipal guidelines, by providing the standards that had to be met, and a timeline for doing so, the court demonstrated its willingness to direct policy change.

There have also been several instances where the Supreme Court has suggested to Parliament that certain laws in our statute books are outdated and need to be amended. In the 2016 criminal appeal of *Galabada Payagalage Sanath Wimalasiri v OIC, Police Station, Maradana, and another*⁴⁵ the Supreme Court singled the need for progressive reforms

⁴⁵ *Wimalasiri v OIC, Police Station Maradana S.C. (Appeal) 32/2011.*

in order to ensure the freedom of sexual rights of the LGBTQ+ community in the country. While acknowledging that the offence of gross indecency was still very much part of the local law, the court noted that the rationale behind the repeal of buggery, gross indecency and sodomy as offences in England may have been the contemporary thinking developed over the years, that consensual sex between adults should not be policed by the State and should not be grounds for criminalisation. The Supreme Court bench, though affirming the conviction by the Magistrate, held that since the Appellant and the other accused did not have any prior conviction, nor a criminal history, and given that the act was consensual, a custodial sentence was not warranted. This progressive judgement, therefore, sets a precedent for possible future jurisprudence in relation to the rights of the LGBTQ+ community.

Furthermore, a 2018 Supreme Court Judgment recommended amendments to Section 19 of the Marriage Registration Ordinance, to expand the grounds for divorce beyond the fault-based grounds currently in our law.⁴⁶ At present, the only grounds for divorce in Sri Lanka are adultery subsequent to marriage, malicious desertion or incurable impotence at the time of such marriage. The court held that “cases such as the present one raises the question of whether there should be changes to our law which is presently set out in Section 19 of the Marriage Registration

⁴⁶ *Guneshi Mallika Gomes v Jammagalage Ravindra Gomes S.C. (Appeal)* 123/2014.

Ordinance, which was enacted over a century ago”. Further, they said that “It appears to me that these are grave questions which befit the attention of the Law Commission of Sri Lanka and the Legislature.”⁴⁷

4.2 Making Guidelines

Where the other organs of government have failed to ensure gender rights, there have been several instances wherein courts in jurisdictions including India, Nepal and Bangladesh have stepped in themselves and made guidelines in PIL applications for the advancement of women. A landmark case in this regard is that of the Indian Supreme Court case of *Vishaka and others v State of Rajasthan*.⁴⁸ In this case, a PIL application was made by several women’s rights organisations, in response to the absences of legislative measures to counter sexual harassment faced by working women. In a powerful judgment, the Supreme Court of India laid down mandatory guidelines for combating sexual harassment in the workplace. These guidelines, directed toward employers, included a definition of sexual harassment, a list of steps for harassment prevention, and a description of complaint procedures to be “strictly observed in all workplaces for the preservation and enforcement of the right to gender equality”. The bench justified the decision to lay down binding guidelines based on the powers vested in the judiciary by the Constitution,⁴⁹

⁴⁷ *ibid* 19.

⁴⁸ *Vishaka and others v State of Rajasthan* AIR 1997 SC 3011.

⁴⁹ Article 32 of the Constitution of India

Fundamental Rights guaranteed by the Constitution,⁵⁰ the Directive Principle requiring the state to secure just and humane conditions of work and maternity relief,⁵¹ and the fundamental duty it imposes on all Indian citizens to renounce practices derogatory to the dignity of women.⁵² Incorporating a broad reading of the Constitution, the *Vishaka* judgement recognised that sexual harassment violates the constitutional guarantee of gender equality as well as women's Fundamental Rights to life with dignity, to personal liberty, and to carry on any occupation. The guidelines remained in place as India's substantive law on workplace sexual harassment from 1997 until the legislature enacted a law in 2013.⁵³

Similarly, the Supreme Court of Bangladesh, in the case of *Bangladesh National Women Lawyers' Association (BNWLA) v Bangladesh*,⁵⁴ taking up the need to address sexual harassment in workplaces, educational institutions/universities and so on, noted that there is an urgent need to address the issue as there was no specific

⁵⁰ Article 14, Article 19 (1) (g) , Article 21 of the Constitution of India

⁵¹ Article 42 of the Constitution of India

⁵² Article 51A of the Constitution of India

⁵³ For more on the Vishaka Judgement See: Naina Kapur, "Workplace Sexual Harassment: The Way Things Are." *Economic and Political Weekly* (2013), Batool Zahoor Qazi 'Sexual Harassment Law In India: Thus Far and Further' (2014)., Aadish Goel, 'Vishaka and Others v the State of Rajasthan: The Importance of Due Process and Its Effectiveness in Addressing Sexual Harassment' (2021).

⁵⁴ *Bangladesh National Women Lawyers Association (BNWLA) v Bangladesh and Others*, Writ Petition No. 5916 of 2008.

legislation to address harassment of women and girls. Following the *Vishaka* judgement, the Supreme Court of Bangladesh defined sexual harassment and laid down directives in the form of guidelines applicable at the workplace and educational institutions, in both the public and private sectors, which were to “be followed and observed... until adequate legislation is made in this field”.⁵⁵ Subsequently, in another Writ petition by the same petitioner in 2011,⁵⁶ the Court determined that sexual harassment outside workplaces and educational institutions must also be addressed. The court, upholding the 2009 judgement, issued a supplementary set of guidelines to cover all private and public places.

The Supreme Court of Nepal has similarly, on multiple occasions, used its jurisdiction to ensure the protection of women and girls. In *Sapana Pradhan Malla v the Government of Nepal*, the Supreme Court of Nepal issued directive policy guidelines in maintaining confidentiality in cases related to violence against women and people living with HIV and AIDS.⁵⁷ These guidelines guaranteed a crucial right of victims of gender violence and other abuse, opening a window for them to seek justice without fearing further injury from social stigma, discrimination, or retaliation.

⁵⁵ *ibid* para 55.

⁵⁶ *Bangladesh National Women Lawyers' Association v Bangladesh* 2011 BLD (HCD) 31.

⁵⁷ *Sapana Pradhan Malla v Office of Prime Minister and Council of Minister and Others* Writ No. 3561 of 2006.

In Sri Lanka too, there have been progressive attempts by the Judiciary in recent times to develop guidelines on important areas of law. In 2019, delivering a judgement in a Fundamental Rights application⁵⁸ filed by a minor girl who was unlawfully arrested and detained, the Supreme Court of Sri Lanka noted that the number of such incidents was concerning, and directed the Inspector General of Police to issue guidelines which “reflect the legal safeguards in our law, international instruments and global best practices. The objective is to reinforce the content of the law, clarify any obscure areas and shed light on the rights and obligations of concerned parties”. The Court listed 20 aspects to be encompassed in the guidelines, including three which recognised the need to afford women protection. Noteworthy among them is that ‘law Enforcement Officials shall exercise due diligence to prevent, investigate and make arrests for all acts of violence against women and children, whether perpetrated by public officials or private persons, in the home, in the community, or in official institutions.’

While it is creditworthy that the judiciary acknowledged that there was a long standing problem to which a solution had not been introduced by other arms of government, the impact of this decision is limited from having far reaching outcomes, such as those which resulted from the *Vishaka* Judgement. The Court in the *Vishaka* case specifically held that “These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field.”

⁵⁸*Landage Ishara Anjali v Wijesinghe Chulangani* S.C. (FR) 677/2012.

Without any binding effect, the court is unable to monitor and ensure that the guidelines they directed are in fact followed.

The Judiciary alone cannot bear sole responsibility in furthering everlasting gender justice in a country. Much broader structural and policy reforms need to be undertaken by all arms of Government, with specific innervations to address gender discrimination. Guidelines should only serve as a temporary measure, for the interim while new laws are enacted. Policy and legal reform from the other arms of Government signal to the populous that discriminatory is frowned upon by the State, which can be a catalyst for social change.

5. Judicial Response to Discriminatory and Antiquated Laws and Practices

5.1 Invalidating Discriminatory Laws

In Sri Lanka, the court's power to change laws that discriminate on the basis of sex or gender is expressly limited, by way of Articles 16 and 80 (3) of the Constitution, which, respectively, prevent a court from determining that any law or unwritten law in existence before the passage of the Constitution is invalid for being inconsistent with the Fundamental Rights Chapter, and in any way questioning the validity of laws once passed by Parliament. Courts in other South Asian jurisdictions have, however, on several

occasions, struck down legislation that has been discriminatory towards women.

In 2018, the Indian Supreme Court, in the case of *Joseph Shine v Union of India*⁵⁹, struck down Section 497⁶⁰ of the Indian Penal Code which dealt with adultery, criminalising a man having intercourse with another man's wife 'without the consent or connivance of that man'. The Court held that the provision violated Articles 14 (equality before the law), 15 (1) (prohibition of discrimination) and 21(right to life) of the Constitution and stated that the law "treats the woman as a chattel" and "as the property of man and totally subservient to the will of the master".⁶¹

In Sri Lanka, while the courts have recognised instances in which laws need to be changed, making recommendations for law reform is as far as the bench has been able to go. Courts have, however, on occasion used interpretation to bring laws in conformity with rights and equitable standards. In *Gunaratnam v Registrar General*,⁶² the court had to reconcile two provisions of the 1995 amendment to the

⁵⁹ *Joseph Shine v Union of India* 2018 Writ Petition (Criminal) No. 194 of 2017.

⁶⁰ Section 497 Indian Penal Code- Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such a case the wife shall not be punishable as an abettor."

⁶¹ *ibid* para 22.

⁶² [2002] 2 Sri LR 302.

Marriage Registration Ordinance; one which increased the minimum age of marriage to 18 years, and another which amended the requirement for parental consent for marriage from below 21 years to below 18 years. The court found that despite the latter provision, the bar on those below the age of 18 getting married was absolute, and thus despite the provision thus becoming redundant, there could be no valid marriage when a party was below 18, even with parental consent. In *Abeysondere v Abeysondere*⁶³ the court interpreted the law to hold that a man married under the general law could not unilaterally convert to Islam and contract a second marriage. However, while the outcomes of both these cases have an impact on gender rights, this was not a consideration in either judgement.

5.2 Invalidating Discriminatory Cultural and Religious Practices

Though Article 16 speaks about ‘unwritten law’, this term is not defined in the Constitution. While it may be debated that custom can form unwritten law, several conditions need to be met in order for a custom to be accepted by a court,⁶⁴ two of which are that the custom must be reasonable,⁶⁵ and the custom must be in conformity with statute and common law.⁶⁶ Thus, even if customs could be treated as unwritten

⁶³ [1998] 1 Sri LR 185.

⁶⁴ LJM Cooray, *An Introduction to the legal system of Sri Lanka* (Stamford Lake (Pvt) Ltd 2003) 189.

⁶⁵ *ibid* 191.

⁶⁶ *ibid* 192.

law, a discriminatory custom cannot be considered reasonable or in conformity with the law of the land, and thus cannot be afforded the protection for ‘unwritten laws’ in Article 16. On this basis, courts must be able to determine if a custom is violative of the Fundamental Rights guaranteed under the Constitution.

In 2017, by a 2:3 majority, the Indian Supreme Court declared that the practice of triple talaq (a mode of instant and unilateral, divorce available to Muslim men) was unconstitutional.⁶⁷ This is considered a landmark judgement, in light of the court's previous reluctance to undertake an in depth analysis of personal laws conflicting with Fundamental Rights,⁶⁸ and practising a "hands-off approach", leaving such questions to legislators.⁶⁹ However, the Judgement has been subjected to criticism, as, while the outcome is favourable to women, the reasoning of the courts was not grounded on sex equality and the recognition of the status of the woman,⁷⁰ but rather, on the preservation of

⁶⁷*Shayara Bano v Union of India*, Writ petition (C) No. 118 of 2016.

⁶⁸ T Herklotz, ‘Shayara Bano versus Union of India and Others. The Indian Supreme Court’s Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice’. (*Humboldt University*, 2017) <<https://www.rewi.hu-berlin.de/de/lf/lis/dnn/staff/th/shayara-bano-versus-union-of-india-and-others-the-indian-supreme-courts-ban-of-triple-talaq-and-the-debate-around-muslim-personal-law-and-gender-justice>> accessed 31 December 2021.

⁶⁹Jaising I, Gender Justice and the Supreme Court. in B N Kirpal and others (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000).

⁷⁰ C A MacKinnon, ‘Sex Equality under the Constitution of India: Problems, Prospects and “Personal Laws”’ [2006] 4 *International Journal of Constitutional Law* 181.

marriage and protection of women.⁷¹ *Indian Young Lawyers Association v The State of Kerala*,⁷² more popularly known as the ‘Sabrimala temple’ case, is a highly lauded decision of the same court. The Sabarimala temple in Kerala prohibited women of ‘reproductive age’, i. e., between 10 to 50 years, from entering the temple for numerous reasons.⁷³ This exclusion had previously been challenged in 1991 and the Kerala High Court ruled that the restriction had been the practice prevalent since time immemorial and was not violative of the Constitution.⁷⁴ However, in 2006, the Indian Young Lawyers Association filed a PIL application in the Supreme Court challenging the custom. They sought a declaration that the custom was unconstitutional, being violative of Articles 14, 15, 25 and 51A (e) of the Indian Constitution.⁷⁵ They further requested the court to pass directives for the safety of women pilgrims.⁷⁶ In 2018, a 4:1 majority delivered their verdict, lifting the ban, and held that the practise was illegal and unconstitutional.

⁷¹ R Kapur, ‘Triple Talaq Verdict: Wherein Lies the Much-Hailed Victory?’ *The Wire*, (New Delhi, 28 Aug 2017) <<https://thewire.in/gender/triple-talaq-verdict-wherein-lies-the-much-hailed-victory>> accessed 31 December 2021.

⁷² *Indian Young Lawyers Association v The State of Kerala* Writ Petition (Civil) No. 373 Of 2006.

⁷³ *ibid* para 53 - the presence of women between the age group of 10 to 50 years may cause “deviation from celibacy and austerity observed by the deity; paras 44-48 - devotees visited the temple after observing 41 days of penance and women between the age of 10 and 50 were not able to do so due to physiological reasons; para 24 menstruating women were “impure” and “polluted” and would lead to the desecration of the sacred spirit of the Temple

⁷⁴ *S. Mahendran v The Secretary, Travancore* AIR 1993 Ker 42.

⁷⁵ *ibid* para 5.

⁷⁶ *ibid*.

Chief Justice, Dipak Misra in his verdict said,

“...The society has to undergo a perceptual shift from being the propagator of hegemonic patriarchal notions of demanding more exacting standards of purity and chastity solely from women to be the cultivator of equality where the woman is in no way considered frailer, lesser or inferior to man...”⁷⁷

“...expression of devotion cannot be circumscribed by dogmatic notions of biological or physiological factors arising out of rigid socio-cultural attitudes which do not meet the constitutionally prescribed tests... Any rule based on discrimination or segregation of women pertaining to biological characteristics is not only unfounded, indefensible and implausible but can also never pass the muster of constitutionality.”⁷⁸

Nariman, J. concurring with Chief justice Dipak Misra added that,

“In civic as in social life, women have been subjected to prejudice, stereotypes and social exclusion. In religious life, exclusionary traditional customs assert a claim to legitimacy which owes its origin to patriarchal structures. These forms of discrimination are not mutually exclusive. The intersection of identities in social and religious life

⁷⁷ *ibid* para 2.

⁷⁸ *ibid* para 3.

produces a unique form of discrimination that denies women equal citizenship under the Constitution. Recognising these forms of intersectional discrimination is the first step towards extending constitutional protection against discrimination attached to intersecting identities.”⁷⁹

In Sri Lanka, the court has not yet adjudicated on questions of customs that discriminated on the basis of sex or gender. However, on the question of custom, in 2017, deciding a Writ Application filed before it, the High Court of Jaffna banned permits being granted for animal sacrifice rituals being held in Kovils.⁸⁰ The order included follow up action directed on authorities including the Police and directed that the public could file applications for contempt of court if this order was violated. In appeal, the Court of Appeal, however, reversed this decision⁸¹ on several technical grounds, including that the High Court Judge had acted in excess of his powers. However, notable is the cursory comment made by the Appeal Court that “Cases under the popular banner of ‘Public Interest Litigation’ shall not be filed and decided as publicity stunts. This is textbook case of that kind.”⁸² While the case before the High Court may have contained technical

⁷⁹ *ibid* para 116.

⁸⁰ S Karunaratna, ‘Jaffna High Court bans animal sacrifice at Hindu kovils’, *Ada Derana*, (Colombo, 24 Oct 2017)

<<http://www.adaderana.lk/news/43767/jaffna-high-court-bans-animal-sacrifice-at-hindu-kovils->> accessed 31 December 2021.

⁸¹ *Sinnathurai Pushparajah v Sivakolunthu Sothimuthu*, C.A. (PHC) 171/2017.

⁸² *ibid* 8.

flaws, the critical view with which the Court of Appeal regarded PIL is concerning, as it could set back the potential impact of the PIL Jurisdiction in Sri Lanka.

The Constitution, including the Fundamental Rights chapter is the supreme law in Sri Lanka, and the Judiciary plays a crucial role in ensuring that the rights contained therein are recognised. When an application is filed in the public interest, it is the Constitutionality of the actions (or inactions) challenged that must be adjudicated on, and not who the Application has been filed by. While the other arms of Government have been unresponsive for decades, the Judiciary can be the catalyst for progressive change in ensuring that Fundamental Rights are fully recognised.

6. Conclusion

The use of PIL as a tool for achieving gender equality is examined in this chapter, taking lessons from Judiciaries across the South Asian region. South Asian Judiciaries have responded to unresponsive legislatures that have failed to bring about necessary change. While the role of formulating legal and policy change to ensure gender equality is traditionally vested in the Legislative and Executive arms of Government, elected by the people, in a democracy, the Court when stepping in to ensure gender equality is not necessarily imposing their own whims and fancies but is ensuring that constitutionally guaranteed rights are adhered to and respected.

Courts in the region have used PIL as a tool for change both by directing other arms of Government to introduce necessary reforms and by themselves making guidelines to serve in the absence of laws. They have also had to respond to discriminatory laws and practices already in place. While the Sri Lankan Constitution bars the Judiciary from calling into question laws already passed and the Court's hands are tied in that regard, the court is empowered to use its wide Fundamental Rights jurisdiction to follow the trend set by other South Asian Judiciaries in all other regards, widely interpreting the rights enshrined in the Constitution to direct that women are treated equally. Where consecutive governments have failed the female population of the country, the Judiciary has an opportune moment to step in and ensure that the wheels of change are put into motion.

However, the Judiciary acting alone cannot create sustainable and holistic change, it is important that all organs of Government are more responsive to the need for change in order to achieve gender equality. Policy and legal reforms need to be put into place,⁸³ along with promoting awareness, in order to tackle the antiquated norms and stereotypes that shackle women from enjoying the same rights and freedoms as men.

⁸³ Center for Policy Alternatives (n34) 29.

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Public Interest Litigation and the Freedom of Religion and Belief

Asanga Welikala and Charya Samarakoon

The interplay between Article 9 of the Constitution (the Buddhism Chapter of the Constitution) and the Fundamental Rights Chapter, especially Articles 10, 12 and 14 which guarantee freedom of thought, conscience and religion, the right to equality and the freedom of speech, assembly and association, respectively, has long been a contentious issue.

This chapter offers a historical overview of the Buddhism Chapter in Sri Lanka's Constitutions, gives a brief analysis of its use in litigation focusing on selected cases, and discusses options for reform which would ensure more meaningful enjoyment of the Fundamental Rights guaranteed by the Constitution.

The History of the Constitutionalisation of the Buddhism Chapter

The long standing grievances and demands that gave rise to the Buddhism Chapter – and its parallel provisions for promoting Buddhism and protecting Fundamental Rights – are similar to those expressed today. These demands emerged initially in reaction to the 1948 Constitution, which was felt to be inadequate in regard to the State's role in the protection of Buddhism and other religions. Even today, debates over these provisions bear the imprints of these struggles for independence, sovereignty, and cultural revival

that define the period from the 1940s to 1972.¹

The Buddhism Chapter is not, and was never intended to be, a precise and univocal provision; rather, it was designed purposefully as a vague and multivocal clause in order to avoid and/or bridge the demands of multiple groups. The formulation adopted by the 1972 Constitution, and with a slight amendment the 1978 Constitution, seeks to reflect two types of compromise: first, an inter-religious compromise between those who demanded special prerogatives for Buddhism and those who wanted equal protections for all religions; and second, an intra-religious compromise between Buddhists who wanted greater State supervision over Buddhism and those who wanted to protect monastic autonomy.²

Many of the deepest disagreements regarding the Buddhism Chapter occurred not between Buddhists and non-Buddhists, but among Buddhists themselves. One of the main reasons that the Buddhism Chapter adopted the language of “foremost place” was because Buddhists could not agree as to how much influence the Government should have over the

¹ All Ceylon Buddhist Congress, *Buddhism and the State: Resolutions and Memorandum of the All Ceylon Buddhist Congress* (Oriental Press 1951).

² A Welikala, Specialist in Omniscience? Nationalism, Constitutionalism, and Sir Ivor Jennings' Engagement with Ceylon. in H Kumarasingham (ed), *Constitution-making in Asia: Decolonisation and Statebuilding in the Aftermath of the British Empire* (Routledge 2016).

affairs of Buddhist monks. These disagreements continue into today.³

The use of the Buddhism Chapter in litigation

CPA challenge to the Bill on Prohibition of Forcible Conversion

Background

On the 27th of August 2004, the Centre for Policy Alternatives (CPA) filed a petition in the Supreme Court,⁴ challenging the constitutionality of the Draft Bill titled the ‘Prohibition of Forcible Conversion of Religions’. The Bill was described in its preamble as an act to provide for the prohibition of conversion from one religion to another by use of force, allurement or fraudulent means.⁵

The anti-conversion Bill was first proposed in 2004 by Jathika Hela Urumaya, a newly emergent political party then consisting entirely of Buddhist monks. The ‘Prohibition of

³ B Schonthal and A Welikala, 'Buddhism and the regulation of religion in the new constitution: Past debates, present challenges, and future options' [2016] CPA Working Papers on Constitutional Reform 3
<<https://www.cpalanka.org/wp-content/uploads/2016/08/Buddhism-and-the-regulation-of-religion-in-the-new-constitution-Working-Paper-3.pdf>> accessed 31 December 2021.

⁴ *In Re Prohibition of Forcible Conversion of Religions Bill* S.C. (SD) 21/2004.

⁵ Centre for Policy Alternatives, "The Prohibition of Forcible Conversion of Religion" Bill' (*Centre for Policy Alternatives*, 23 August 2007)
<<https://www.cpalanka.org/the-prohibition-of-forcible-conversion-of-religion-bill/>> accessed 15 February 2022.

Forcible Conversion of Religions’ was submitted as a private members bill by Ven. Omalpe Sobhita on the 28th of May 2004. The Bill was tabled in Parliament in July 2004. The provisions of the Bill caused major concern, not only among several religious bodies, but also other policy-oriented organisations in Sri Lanka. In total, the Bill was challenged by 21 petitions (and 21 intervenient petitions) before the Supreme Court.⁶

In this case, the petitioners and intervenient petitioners in favour of the Bill used the Buddhism Chapter to justify attempts to limit the activities of Christian groups that, they alleged, had improperly mixed proselytism and financial inducements in order to gain converts. The Bill was perceived as an effort to protect Buddhism against the effects of “profaning” religion, by which is meant the purportedly improper mixing of things deemed religious with those deemed economic or commercial.

Summary of CPA’s challenge to the Bill

At the outset, CPA submitted in its petition that the Bill was before the Supreme Court⁷ in a manner contrary to fundamental norms of law making, in that it had not been made available to the members of civil society or to other

⁶ S.C. (SD) 2-22/2004. ; M Hertzberg, ‘The Anti-Conversion Bill: Political Buddhism, ‘Unethical Conversions’ and Religious Freedom in Sri Lanka’, PhD thesis, University of Bergen 2016).

⁷ Hereinafter referred to as the Court.

religious leaders in Sri Lanka for study in depth as befitting a bill of this grave nature.

Clause 2 of the draft Bill prohibited the conversion or attempt to convert any person ‘by the use of force, by allurement or by any fraudulent means.’ The Bill defined these terms as follows.⁸

1. “allurement” means the offer of any temptation in the form of —
 - (i) Any gift or gratification whether in cash or kind;
 - (ii) A grant of any material benefit, whether monetary or otherwise;
 - (iii) The grant of employment or grant of promotion in any employment presently engaged in.
2. “force” means a show of force and includes a threat of harm or injury of any threat of religious disgrace or condemnation of any religion or religious faith;
3. “fraudulent” means any misinterpretation or any other fraudulent contrivance used;

CPA submitted in its petition that these definitions are ambiguous in import as well as imprecise and over-wide, and is consequently in violation of Article 10, Article 14 (1) (a) and Article 14 (1) (e).

⁸ Clause 8(a), 8(c), and 8(d) of the Bill.

CPA further submitted that clause 3 of the Bill was inconsistent with the freedoms guaranteed by Article 10 and Article 14 (1) (e) of the Constitution in that it imposes arbitrary restrictions on the right to freely adopt a religion of one's choice thereby infringing the freedom of information as subsumed in the freedom of thought. Clause 3 of the Bill requires mandatory intimation to the Divisional Secretary where a conversion of religion takes place. Failure to do so would, upon conviction before a Magistrate, be punished with imprisonment for a term not exceeding five years or with a fine, not exceeding rupees one hundred and fifty thousand.⁹

Clause 5 of the Bill empowered specific persons to institute proceedings before a magistrate in respect of an alleged infringement of the clauses 2 and 3 of the bill. CPA submitted that this was arbitrary in effect in the classes of persons to whom this power is bequeathed, which included 'Attorneys-at-law' and 'any person authorised by the Minister'. This would infringe the right to equality guaranteed by Article 12 (1) of the Constitution as well as the freedom of thought, conscience and religion and the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching guaranteed by Articles 10 and 14 (1) (e) of the Constitution.

CPA also submitted that the proviso to clause 4 of the bill as well as the schedule to the Bill which classifies persons

⁹ Clause 4(b) of the Bill.

needing enhanced protection from forcible conversions was arbitrary and outdated in its inclusion of women as requiring enhanced protection and in violation of Articles 10, 12 (1) and 14 (1) (e) of the Constitution. However, the Court found that this did not violate Article 12 in view of the special protection granted to women and children under Article 12 of the Constitution.

CPA further submitted that the provision for the Minister to prescribe by regulation, any other category of persons for inclusion in the schedule paves the way for amendment of a law by Executive fiat which is contrary to Articles 10 and 14 (1) (e) as well as inimical to Article 4 of the Constitution which enshrines the doctrine of the separation of powers.

Due to these reasons, CPA submitted that the Bill was unconstitutional and in violation of the Fundamental Rights Chapter as well as Article 3 and 4 of the Constitution which specifies that sovereignty is in the people and is inalienable. Sovereignty includes the powers of Government, Fundamental Rights and the franchise which have no meaning unless they are to be exercised for the benefit of the people who accordingly should be protected from laws that stipulate an unequal protection of their rights, including their religious rights.

Summary of the Supreme Court Special Determination on the Bill

The Court¹⁰ stated that Article 10 includes the right to hold any religion or belief, no matter how bizarre or irrational it might be and the right to change one's religion but stated that the Bill only tried to prevent conversions through fraud, force or allurement.

The Court also made reference to Article 18 (2) of the International Covenant on Civil and Political Rights (ICCPR) which stated that "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

The Court noted that the petitioners' argument that the definition of allurement would include any acts of benevolence or charity merits their consideration. Reference was made to the case of *Kokkinakis v Greece*,¹¹ which sought to distinguish true evangelism from improper proselytism.

The Supreme Court was of the opinion that subject to certain changes in the Clause 8 (a), (c) and (d) of the Bill, which mainly included the definitions of what constitutes fraud, force and allurement, (which, in the opinion of the Court was, to a great extent consistent with similar provisions in the Penal Code), Clause 2 of the Bill read with Clause 8 was not inconsistent with Articles 9, 10, 14 (1) (e), 12 (1) and 12

¹⁰ S.C. (SD) 2-22 of 2004.

¹¹ European Court of Human Rights Vol.260.

(2) of the Constitution. The proposed changes were as follows.

1. “allurement” means the offer of any temptation ‘for the purpose of converting a person from one religion to another religion’,¹² in the form of —

- (i) Any gift or gratification whether in cash or kind;
- (ii) A grant of any material benefit, whether monetary or otherwise;
- (iii) The grant of employment or grant of promotion in any employment presently engaged in;

2. “force” means a show of force and includes a threat of harm or injury of any threat of religious disgrace or condemnation of any religion or religious faith ‘for the purpose of converting a person from one religion to another religion’;

3. “Fraudulent” means any ‘wilful’ misinterpretation or any other fraudulent contrivance used ‘for the purpose of converting a person from one religion to another religion’.

The Court agreed that Clause 3 which included a stipulation that the convert, the facilitator and a witness to the ceremony should notify the Divisional Secretary of the conversion, was inconsistent with Article 10 of the Constitution.

¹² The italicised words inserted on the recommendation of the Court.

The Court also stated that Clause 4 relating to implementation of Clause 3, and the non-applicability of the criminal procedure code rendered Clause 4 inconsistent with Article 10. The Court recommended that Clauses 3 and 4 (b) be deleted and Clause 4 (a) be amended by deleting the words ‘Notwithstanding anything to the contrary to any provision in the Code of Criminal Procedure Act.’

Similarly, Clause 5 relating to the institution of proceedings in the Magistrate’s Court and clause 6 relating to the power of the minister to make rules and regulations were also inconsistent with Article 12 (right to equality) and Article 76 (1) of the Constitution (legislative power of Parliament). The Court recommended the amendment of this Clause to specify that any institution of proceedings be in accordance with the provisions of the Code of Criminal Procedure Act and subject to the written sanction of the Attorney General.

The Court recommended that the Bill be passed with a 2/3 majority in Parliament and be approved by the people at a Referendum. The Supreme Court, however, decided that the general aim of the bill was constitutionally sound, as the bill “seeks to address forcible conversions by way of legislation” and that “the restrictions sought to be placed by the Bill through Article 15 (7) on Article 14 (1) (e) are designed to ensure public order, morality and the purpose of meeting the just requirements of the general welfare of a democratic society.”

Aftermath

The decision of the Supreme Court led to concern from Christian and civil rights groups. In particular, the Bill's definitions of conversion by 'allurement', 'force' and 'fraudulent means' were still open-ended despite the amendments recommended by the Court, and it was feared that all religious conversions would be encompassed by it.¹³

In 2005, a report by UN Special Rapporteur on freedom of religion or belief, Asma Jahangir, took a critical stance towards the anti-conversion proposals circulating in Sri Lanka. The report stated that 'the Special Rapporteur is of the opinion that the draft legislation is not an appropriate response to the religious tensions and is not compatible with human rights law' and further still that 'the very principle of these laws as well as their wording could engender widespread persecution of certain religious minorities'¹⁴.

Following the decision of the Supreme Court, the Bill was sent for further consideration by a Legislative Standing Committee of Parliament. The committee initiated a meeting between Buddhist and Catholic lawyers in an attempt to find a compromise acceptable to both parties. Earlier Jathika

¹³ Christian Solidarity Worldwide, 'Sri Lankan Supreme Court rules part of anti-conversion bill unconstitutional', (*CSW*, 24 Aug 2004) <<https://www.csw.org.uk/2004/08/23/press/366/article.htm>> accessed on 09 April 2021.

¹⁴ UN Commission on Human Rights, 'Report submitted on freedom of religion or belief, Addendum, Mission to Sri Lanka', (*UNCHR*, 12 Dec 2005) <<https://www.refworld.org/docid/441181e90.html>> accessed 9 April 2021.

Hela Urumaya and other Buddhist nationalists ignored other actors when ensuring backing for the Bill. But after the comments of the Supreme Court along with the international response, cooperation with the Catholic Church was seen as critical to make the Bill pass in Government. However, this group left out the Evangelical Christian groups, at whom the bill was mainly directed, and despite several meetings, the parties involved were unable to arrive at a compromise. In the end, the draft version of the Bill that was proposed by the Standing Committee in late 2008 was backed solely by the Buddhist nationalists. The next step would have been to table it for the final debate and take a vote on it. However, the committee of party leaders never included this Bill on the agenda. The unofficial explanation by the Government of Sri Lanka was that they were in agreement with the Bill, but they were not in a position to support the Bill due to the international pressure on it.¹⁵

Karuwalagaswewa Vidanelage Swarna Manjula and others v Pushpakumara, Officer-in-Charge, Police Station, Kekirawa and others

Facts

The two Petitioners were a mother and a daughter living in a village within the area of the Kekirawa Police Station. They are both Jehovah's Witnesses, a Christian denomination which has over 6000 members in Sri Lanka.

¹⁵ Hertzberg (n6).

In the course of one of their public ministries carried out on 1st March 2014, the petitioners entered the house of one B. P. Chandima at her invitation. They were discussing the Bible and the message it carries and the petitioners gave some religious publications to Chandima. During this discussion, an unidentified man came into the house and inquired as to what the petitioners were doing, took some of the religious publications and left. About 10 minutes later, two Buddhist monks and two uniformed Police officers entered the compound, “berated” the petitioners for “attempting to forcefully convert persons for monetary gain” and the two police officers then took the petitioners to the Kekirawa Police Station.

They were denied bail, kept in custody overnight and released the next day. However, no case was filed or has been later filed against the petitioners. They subsequently filed a Fundamental Rights Application alleging that their Fundamental Rights guaranteed by Articles 12 (1), 13 (1) and 14 (1) (e) of the Constitution have been violated by the actions of the respondents.

Article 12 (1)

Article 12 (1) provides: “All persons are equal before the law and are entitled to the equal protection of the law”.

In light of the fact that the petitioners had been ‘unnecessarily, unreasonably and unlawfully detained overnight’ and that they were ‘berated, humiliated and threatened while at the Kekirawa Police Station,’ the Court

determined that the 1st respondent and officers acting under his directions and with his authority had acted in a manner which is ‘manifestly unreasonable, arbitrary and unlawful.’ The Court also considered the fact that the petitioners were never produced before a Magistrate in determining that their Fundamental Right to the equal protection of the law, guaranteed by Article 12 (1), had been violated.

Article 13(1)

Article 13(1), provides: “No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest”.

Following a detailed examination of the facts of the case and the relevant statutory and case law, the Court determined that the arrest of the petitioners had been unlawful, and that the 1st respondent had violated the petitioners’ Fundamental Rights guaranteed by Article 13 (1) of the Constitution. Adopting a progressive interpretation of the law, the Court emphasised the need to apply an objective test to determine whether the arrest was pursuant to reasonable suspicion or a reasonable complaint, and when determining whether the arresting officer had reasonable grounds to decide that an arrest should be made because one or more of the circumstances enumerated in section 32 (1) (b) of the Criminal Procedure Code (or other applicable provision of the Law) were present.

Article 14 (1) (e)

Article 14 (1) (e) provides: “[Every citizen is entitled to] the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.”

In interpreting the scope of Article 14 (1) (e), the Court emphasised its duty to refrain from unwittingly extending the ‘reach of the Fundamental Rights protected by Article 14 outside the extent of their fullest proper meaning, which is to be gathered from the specific words used in Article 14 and the relevant principles of the Law’. The Court concluded that none of the petitioners’ activities with respect to their ministry fell within the scope of the freedom to manifest religion or belief, as they did not constitute ‘worship’, ‘observance’, ‘practice’ or ‘teaching’ as interpreted by the Court.

This line of reasoning was supported by a comparative analysis of the Indian Constitution, which explicitly recognises the right to ‘propagate’ religion. The Court observed that the petitioners’ actions fall within the description of an act of “propagation”, and thus not within the scope of the rights guaranteed under the Sri Lankan Constitution.

It was further observed that although the Constitution of India, which is a secular State, confers the right to “propagate” a religion, the Sri Lankan Constitution does not. The Court stated that the drafters of the Constitution of Sri

Lanka appear to have taken a considered decision to omit granting a right to “propagate” religion or beliefs in Sri Lanka and to grant only a more private and confined right to “teach” religion or beliefs. Among other reasons, the Court conjectures that this might be due to the fact that Article 9 of our Constitution vests in the Republic, a duty to give Buddhism the foremost place. In support of this conclusion, the Court cited previous determinations of the Supreme Court which had consistently held that the citizens of Sri Lanka do not possess a constitutionally protected freedom to “propagate” their religion or beliefs, as this would conflict with Article 9 of the Constitution, which formally guarantees to Buddhism the ‘foremost place’ and places a duty on the State to protect and foster the Buddha Sasana.¹⁶

It has been suggested, however, that Article 9 in fact;

“clarifies that it is the duty of the State to protect and foster the Buddha Sāsana **while assuring to all religions the rights granted by Articles 10 and 14 (1) (e)**. In this context, Article 9 does not influence the scope of article 14 (1) (e) and the duty of the State under Article 9, is subject to the freedom of all persons to manifest religion or belief.”¹⁷

¹⁶ *In Re Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation) Bill* S.C. (SD) 19/2003.; *In Re Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill* S.C. (SD) 2/2001.

¹⁷ G Gunatilleke, “The Jehovah’s Witnesses Case’[2020] The Bar Association Law Journal.

Options for Reform or Reformulation of the Buddhism Chapter

In order to resolve this contradictory interaction between the Buddhism Chapter and the Fundamental Rights Chapter, there are several potential reforms which could be brought to the Buddhism Chapter.

The first option would be to declare in the Constitution a principle of equal status for religions, religious neutrality, or secularism, while omitting special treatment for Buddhism. This would give a clear signal that the Constitution aims to be inclusive. However, secularism, as a legal principle and term, is no less contested than Buddhism. In the light of Sri Lanka's history and culture, better results might be achieved by foregrounding the value of pluralism rather than equality (in its more rigid formalistic sense as uniformity) in approaching the issue of religion(s) in the Constitution and public life more broadly. The more effective way to use law to induce impartiality in regard to religion may be through Judicial decisions and common law rather than the Constitution. Sri Lanka's higher Judiciary has recognised a common law principle of secularism on multiple occasions.¹⁸

As proposed in the 2015-2017 Constitutional Reforms process, the Constitution might attempt to express both commitments, that is, the protection of Buddhism and the

¹⁸ *Alhaj M.T.M. Ashik and others v R.P.S.Bandula, OIC Weligama and others S.C. (FR) 38/2005.*

rights guaranteed to those of other religions, in the same section. A variety of options have been proposed by the PRC, including the retention of Article 9 (Chapter II) of the current constitution with no change, changing the title of Chapter II of the current Constitution Religions (rather than Buddhism), and rewriting Article 9 as follows: “The Republic of Sri Lanka shall give all religions equal status. The State shall protect and foster Buddhism and the Buddha Sāsana while assuring to all religions the rights granted by Articles 10 and 14 (1) (e) of the current Constitution.”¹⁹

A Constitutional Clause that suggests both the primacy of Buddhism and the equal rights of all religions may be more successful in satisfying a broader swathe of politicians, interest groups, and public, than one that privileges one or other view. This may also be thought to (re)balance competing demands using ambiguous legal rhetoric.

However, this option also perpetuates a number of legal contradictions and inconsistencies. As it stands, neither the text of Article 9 nor its case law gives a clear indication as to the intended balance between Buddhist prerogatives and Fundamental Rights. If these ambiguities are left unaddressed, it leaves open the possibility that an activist Judiciary – or a very active public interest litigation campaign- might disrupt what is a very precarious balance.

The final option would be to unequivocally clarify the question of balance between Buddhist prerogatives and

¹⁹ Schonthal and Welikala (n3).

Fundamental Rights with an amendment to the Buddhism Chapter in the Constitution.

This is our recommended option if Article 9 is to be amended. For example, this could be done through replacing the language of “assuring” with more precise language such as “subject to,” meaning that the Buddhism Chapter would read:

“The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the state to protect and foster the Buddha Sāsana, subject to the rights granted by Articles 10 & 14 (1) (e) to all.”

This formula would clarify the relationship between promoting Buddhism and protecting general religious rights guaranteed by the chapter on Fundamental Rights to individuals, which moreover are enforceable by the Supreme Court under Article 126 as a special constitutional jurisdiction. Incidentally, those individual religious rights would also apply to Buddhists, thus ensuring that State actions to promote Buddhism do not infringe upon the religious rights of individual Buddhists.

Second, the Constitution could clarify the mechanism of enforcement for the Buddhism provisions. This could be done in multiple ways. The first is to render the Buddhism clause non-justiciable and more a guiding principle by moving it to the chapter on Directive Principles of State Policy. While this is perhaps the most appropriate way to

give expressive recognition to Buddhism, opinion poll data²⁰ suggest little public support for such a reform, and it is likely Buddhist opinion would be as outraged by this seeming ‘demotion’ as if the Buddhism clause was removed altogether from the Constitution. If, therefore, the Buddhism Clause should remain justiciable, then there are other ways of ensuring that it is not invoked except on significant cases where there is a clear need and justification for judicial intervention.

This aim could be achieved by establishing a special leave to proceed requirement being met prior to any pleading of or on the Buddhism Clause before the courts.

Making protections for Buddhism advisory or aspirational – or specifying the parameters of justiciability for it – preserves the expressive importance of the provision, while curbing its serious regulatory downsides. To put it simply, it ensures that Buddhism is not a matter to be dealt with through normal legal procedures. After all, these bodies are populated by laypersons who are for the most part non experts in Buddhism vis-à-vis members of the *sangha*. Taking Buddhism out of the competence of judicial authorities opens the possibility for it to be more productively supported by other Government and nongovernment bodies, such as the Ministry of Buddhist

²⁰ Centre for Policy Alternatives, ‘Democracy in Post War Sri Lanka: Top Line Report’ (*Social Indicator*, 2015) <https://www.cpalanka.org/wp-content/uploads/2015/12/Democracy-survey-DEC-2015_Final-report_Dec18.pdf> accessed 15 February 2022.

Affairs and the *sangha* itself. These bodies do have the authority, experience, and expertise to assist Buddhism in targeted and specialised ways.

The approach of giving special but non-justiciable (or a limited justiciability) constitutional protections to Buddhism is common among other Theravada Buddhist countries such as Thailand and Myanmar. In those countries, support for Buddhism tends to be channelled mainly through Government offices (like the Ministry of Buddhist Affairs), *dāyakas*, and the *sangha* itself, rather than through court orders and Writs. Legally speaking, Buddhists would continue to be protected under general religious rights provisions, Penal Code provisions, and other laws and regulations, and Buddhism and Buddha Sāsana would be supported in more useful ways by Executive and Legislative action.

However, it must be noted that the current Buddhism Chapter is a productive ambiguity designed to satisfy a highly polarised population. Attempts to tweak Article 9 may give rise to fierce political competition and possibly aggravate the very lines of fissure that the provision was designed to sidestep. This is not a small risk.²¹

²¹ Schonthal and Welikala (n3).

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The Right to Vote: Judicial Interpretation and Evolution

Pasan Jayasinghe

This chapter examines the right to vote within contemporary Sri Lankan jurisprudence, with a particular focus on judicial interventions resulting from public interest litigation (PIL) and their impact on evolving conceptions of the right. The chapter argues that in the context of a legal framework that implicitly provides for the right to vote, PIL initiated jurisprudence has provided a meaningful avenue of securing and enhancing the right to vote in Sri Lanka. However, the narrow parameters of that legal framework constrains the value of such efforts. This becomes evident when the chapter looks at particular applications of the right to vote. The chapter concludes by imagining the right to vote and how it may be interpreted and advanced under different legal and conceptual frameworks.

Legal Framework on the Right to Vote

The right to vote is not explicitly recognised by the Constitution of Sri Lanka as a Fundamental Right in its Chapter III. Instead, there are a number of references to the franchise from which the right to vote can be construed. Foremost among these is Article 3, which holds that:

“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.”

In addition, Article 4(e) provides that:

“The franchise shall be exercisable at the election of the Presidency 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.”

The Constitution also specifies who is entitled to the franchise in Article 88:

“Every person shall... be qualified to be an elector at the election of the President and of the Members of Parliament or to vote at any Referendum: Provided that no such person shall be entitled to vote unless his name is entered in the appropriate register of electors.”

Finally, Article 93 provides *how* the franchise is to be exercised:

“The voting for the election of the President of the Republic and of the Members of Parliament and at any Referendum shall be free, equal and by secret ballot.”

Chapter XIV (the Franchise and Elections) then goes on to make detailed provisions regarding franchise and elections,

enumerated at the Presidential and Parliamentary election levels.

In the Constitution, the matter of the franchise is intimately bound up with who is authorised to operationalise it. In its original formulation in 1978, the Constitution empowered the Commissioner of Elections who headed the Department of Elections to conduct elections.¹ Through the 17th Amendment to the Constitution in 2001, this function was transferred to an Election Commission, though this was only properly operationalised following the 19th Amendment in 2015. Whilst the back-and-forths of constitutional amendment from the 17th to the 21st Amendments changed the composition and rules of appointment of the Commission's members, its responsibility to discharge elections has remained fundamentally the same. As presently expressed, "the object of the Commission shall be to conduct free and fair elections and Referenda" (Article 103 (2)). The Commission must also exercise, perform and discharge all powers, duties and functions conferred, imposed on or assigned to it by the Constitution relating to all elections, and enforce all laws relating to such elections (Articles 104B (1) and (2)).

Because the right to vote is indirectly expressed in the Constitution, the question of which authority is empowered to interpret and enforce must be derived somewhat

¹ This was itself carried over from the first Republican Constitution of 1972, which had first constitutionalised the role after its establishment in 1955 when the Departments of Parliamentary Elections and of Local Authorities Elections were combined.

circuitously. In essence, the Constitution empowers the Courts to adjudicate on matters of noncompliance with the Commission's conduct of elections. Failure for a public officer, public corporation employee, government-vested business or majority government owned company to refuse or fail to cooperate with the Commission or its guidelines is an offence which the High Court has jurisdiction to hear and determine (Article 104GG). The Constitution also charges the Supreme Court with the specific power of determining Writs concerning the Commission's exercise of the powers conferred on it by the Constitution or by any other law (Article 104H).

Accordingly, this is a schema that relates to discharging the operation of the franchise in practice. It does not relate to interpreting the right to vote as such. How this came to eventuate and how a more direct right to vote was derived was a result of evolving jurisprudence. It is to this that this chapter now turns to.

The Right to Vote as a Fundamental Right

Jurisprudence on the right to vote in Sri Lanka shows a steady widening of the scope of the right to vote. The way that this scope has been widened—particularly in the recognition of the right as a Fundamental Right under the Constitution—has also had important consequences in terms of *who* may seek for the right to be enforced.

The provisions of the Constitution relating to the franchise came up for interpretation in *Atukorale v Attorney General*² which concerned a Bill to amend the Pradeshiya Sabha Act No. 15 of 1987, and specifically provisions allowing the relevant Minister to vary the limits of Pradeshiya Sabhas. The Petitioner argued that Article 4(e)—which explicitly mentions elections for the Presidency, for Members of Parliament and for Referendums—is not exhaustive in terms of where the franchise can be exercised, and that it included Pradeshiya Sabha elections as well by implication.

The Court took a narrow view of Article 4(e) as being limited only to the elections it expressly mentions.³ It affirmed the previous decision of *Re: the Thirteenth Amendment to the Constitution*⁴ where Article 4 was held to be not entrenched and open to amendment by Parliament so long as it did not prejudice the sovereignty of the People. Since Parliament had enacted no such amendment, however, the Article could only contemplate elections for President, Parliament and Referendums.

There are, of course, a number of instances where Sri Lankan voters exercise the franchise outside of those specified expressly by Article 4, which also existed at the time of the Court's ruling. Besides Pradeshiya Sabhas, this included elections for all other local government bodies, as well as Provincial Councils. Legislation and regulations

² [1996] 1 Sri LR 238.

³ *ibid* 238 to 242.

⁴ *Re: the Thirteenth Amendment to the Constitution* [1987] 2 Sri LR 312.

concerning local government body elections have also been subject to more rigorous amendment and scrutiny by Parliament than any other type of election throughout the existence of the present 1978 Constitution.

The scope of the right to vote was revisited again in *Karunathilake and Another v Dayananda Dissanayake, Commissioner of Elections and Others*,⁵ this time in the context of Provincial Council elections. The case concerned elections for the Central, Uva, North Central, Western and Sabaragamuwa Provincial Councils, which had been fixed for 28th August 1998, upon their five-year terms coming to an end in June 1998 and nominations having been called. Notice that the postal ballot papers would be issued on 4th August 1998 had also been given by all the returning officers. In a telegram dated August 3rd, however, the respective returning officers under the direction of the Commissioner of Elections suspended postal voting. On 4th August, the President issued a proclamation under Section 2(1) of the Public Security Ordinance declaring an island-wide State of Emergency, and an Emergency Regulation declaring inoperative the Commissioner's notice relating to the date of the poll. This manoeuvre by the President circumvented the requirement for constitutional amendment to postpone Provincial Council elections. The reason given by the Government for the postponement of the elections was that it was not possible to provide security for election related activities due to the ongoing war in the North-East.

⁵ [1991] 1 Sri LR 157.

The Presidential Proclamation was challenged on the grounds that the impugned emergency regulation was contrary to Article 155(2) of the Constitution as it had the effect of overriding and suspending constitutional provisions relating to the continued existence of the five provincial Councils, the franchise under (Article 4(e)) as well as the petitioner's fundamental right to equality and freedom of expression under Articles 12(1) and 14(1)(a). It was argued that because the prevailing security situation did not justify a nationwide state of emergency being declared—since there was no change from the Councils' dissolution until the Proclamation; and as numerous national and local elections were held despite the ongoing war—the Proclamation was made in bad faith for the clear purpose of postponing the elections.

The Supreme Court upheld the Petition challenging the postponement of elections, and regarding the alleged violations of the franchise and fundamental rights specifically interpreted the right to vote under the right to freedom of speech and expression, holding that:

“The right to freedom of speech and expression includes the right to vote. This silent and secret expression is no less an exercise of the freedom of speech and expression, than the most eloquent speech from a political platform. To hold otherwise is to undermine the very foundation of the Constitution.”

The Court also ruled that since the Commissioner's conduct was unauthorised by law, Articles 15(2) and (7) which impose restrictions on the exercise of fundamental rights if they are prescribed by law or by emergency regulations were inapplicable. This affirmed that the right to franchise, so interpreted as a Fundamental Right under the freedom of speech and expression, cannot be restricted by law or by emergency regulations beyond judicial scrutiny.

The importance of this recognition of the right to vote under the freedom of expression is that it created the ability to bring issues concerning the right to vote before the Supreme Court under its fundamental rights jurisdiction, as per Article 121(1). Under a constitutional scheme where the right to vote was not explicitly articulated, this was clearly a breakthrough decision. It affirmed the right of anyone to bring a Fundamental Rights petition to challenge violations of their right to vote.

In the aftermath of *Karunathilake*, the right to vote received further Court attention in *Janatha Vimukthi Peramuna v Attorney General and Five others*⁶ when the Government introduced a Bill titled the Provincial Councils Elections (Special Provisions) Bill to enable elections for the five expired Provincial Councils to be conducted. The Bill sought to enable the Commissioner to fix a new polling date for the elections. Petitions challenging the Bill averred that the Bill was a legislative intrusion into the Commissioner's

⁶ S.C. (SD) 9/1998.

existing and exclusive discretionary power to fix new polling dates for pending elections.⁷ They also argued that the nomination process violated the right to vote as it enabled political party secretaries to unilaterally replace any candidate in already submitted nomination papers.

In its judgment, the Court thus went beyond the narrow, literalist interpretation of Article 4(e) in *Atukorale* to bring elections not expressly mentioned in the Article under its ambit. The Court reasoned that Article 4(e) does not specifically mention elections to Provincial Councils simply because Provincial Councils were introduced by the 13th Amendment in 1987, subsequent to the Constitution's promulgation in 1978. This reasoning suggests that the Court would not necessarily interpret Article 4(e) to include any kind of election but would consider elections for those representative bodies created through constitutional amendment, which is nonetheless an improvement over the narrow interpretation of *Atukorale*. It suggests that the right to vote could extend to future elected bodies created through amendments to the Constitution, for instance, a second chamber to Parliament or other types of local government bodies.

In similar vein, the Court has expanded the scope of Article 4(e) to include local authorities as well. *Sarath Jayasinghe and Others v the Attorney General*⁸ considered Articles 3

⁷ In section 22(6) of the Provincial Councils Elections Act No. 2 of 1988.

⁸ Hansard dated 18/06/2003.

and 4(e) in light of the Local Authorities (Special Provisions) Bill introduced in March 2002. The Bill sought to nullify, with a view of calling for fresh nominations, all nomination papers submitted for various local authorities in the Northern and Eastern Provinces.⁹

The Court held that local authorities did indeed come under Article 4(e) despite not being explicitly mentioned. In particular, it held that local authorities had acquired constitutional status, particularly after the enactment of the 13th Amendment in 1987. Interestingly, the Court also noted that the franchise “is not limited to a right to vote” and as contemplated in the Constitution includes the rights of persons to present themselves as candidates. The imagining of the “franchise” as the focal legal concept that includes the right to vote as well as other democratic exercises under it is perhaps compelled necessarily by Constitution itself which does not contain an explicit right to vote. It stands in contrast to democratic schemes elsewhere which proceed from the right to vote as the starting point and other democratic exercises as expressions of it.¹⁰

The ruling in *Mediwake and Others v Dayananda Dissanayake, Commissioner of Elections and Others*¹¹ is an

⁹ Under section 28 of the Local Authorities Elections Ordinance.

¹⁰ See, for example, Article 49 of the Constitution of Portugal. See also, Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights.

¹¹ S.C. (FR) 412/1999. The case is sometimes also reported as *Jayantha Adikari Egodawele v Dayananda Dissanayake, Commissioner of Elections* [2001] FRD (2)

important recognition of the right to vote because it held that the right could be litigated on behalf not just of oneself, but others as well. In this case, the petitioner's complaint was not that the petitioner could not vote but that by others not being able to vote there was no free and fair election, violating their own right to vote.

The Court held that:

“the citizen's right to vote includes the right to freely choose his representatives through a genuine election which guarantees the free expression of the will of the electors: not just his own. Therefore, not only is a citizen entitled himself to vote at a free, equal and secret poll, but he also has the right to a genuine election guaranteeing the free expression of the will of the entire electorate to which he belongs”.

The Court went on to recognise that “the freedom of expression, of like-minded voters, when exercised through the electoral process is a collective one, although they may not be members of any group or association. This is by no means unique. A scrutiny of Article 14 reveals that many Fundamental Rights have both an individual and a collective aspect.”

In holding that the right to vote had both an individual and collective character, the Court affirmed that any voter had standing to challenge violations of any other voter's right to

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vote. Thus, the expansion of the right to vote under the freedom of expression for an individual's right being violated under *Karunathilake* was extended to a collective degree, meaning that anyone could challenge violations of the right to vote on behalf of anyone else. *Mediwake* also accords with a number of cases at the time,¹² which were expanding the scope of public interest litigation by recognising the ability of third parties to bring actions on the basis that it affects their rights and the rights of the public at large.¹³

The right to vote has thus seen a consistent evolution, from starting out as not being explicitly mentioned in the Constitution, to being interpreted as part of the Fundamental Right of the freedom of expression, to one that goes beyond the explicit dictates of the kinds of elections noted in Article 4 (e), to being recognised as a right applicable individually and collectively.

¹² Such as, for instance, *Kottabadu Durage Sriyani Silva v Chanaka Iddamal goda S.C. (FR) 471/2000*; *H. Dilanka Wijesekera & Others v Gamini Kulawansa Lokuge & Others S.C. (FR) 342/2009*. ; *Bulankulame v Secretary Ministry of Industrial Development* [2000] 3 Sri LR 243. ; *Environmental Foundation Ltd. v Urban Development Authority* [2009] 1 Sri LR 123. ; *Vasudeva Nanayakkara v K.N. Choksy and Others* [2008] 1 Sri LR 134 and *Vasudeva Nanayakkara v K.N. Choksy and Others* [2009] B.L.R 1 (the Sri Lanka Insurance Corporation case).

¹³ R Goonetilleke, 'Public Interest Litigation: A Species Of Direct Democracy And Good Governance' [2014] 4(1) Sri Lanka Journal of Development Administration 88-92.

Applications of the Right to Vote

This section examines some particular applications of the right to vote as interpreted by the courts. These applications show both the possibilities offered by advancing litigation in courts to interpret the right to vote, as well as the limitations in doing so.

Misuse of State Resources for Elections

There is a steady body of jurisprudence on state resources being misused for election purposes. *Edirisinha v Dissanayake*¹⁴ concerned an imminent infringement of Fundamental Rights just prior to the elections of the Western, Central, North Central, Sabaragamuwa and Uva Provincial Councils in March 1999. The petitioners alleged that large-scale abuse of electoral laws at the previous North Western Provincial Council election raised a legitimate fear of similar violations during the upcoming five elections. In its final Order, the Supreme Court observed that “in the context of a free, equal and secret ballot, a serious question arises as to the use of vehicles, personnel and weapons provided by the State for political activities connected with elections”.¹⁵

In *Deshapriya v Rukmani, Divisional Secretary, Dodangoda and others*,¹⁶ the Supreme Court similarly held that that “the use of resources of the State – including human resources –

¹⁴ S.C. (FR) 265/1999.

¹⁵ *ibid.*

¹⁶ [1999] 2 Sri LR 412 at 418.

for the benefit of one political party or group, constitute unequal treatment and political discrimination because thereby an advantage is conferred on one political party which is denied to its rivals.”

Likewise, a group of voters petitioned the Court of Appeal prior to the Presidential Election December 1999, stating that the misuse of State resources during the Presidential Election campaign was a violation of the Supreme Court Order on the imminent infringement of Fundamental Rights.¹⁷ The Petitioners asked Court for a Writ of prohibition against the Minister of Samurdhi Affairs and the Samurdhi Authority prohibiting them from deploying or permitting the deployment of Samurdhi Officers for partisan political purposes, and for a Writ of mandamus against the Acting Commissioner of Elections directing him to take appropriate action in respect of the alleged incidents.

The respondents in the petition gave an undertaking to the Court that although they do not accept the allegations levelled against them, they would instruct the Samurdhi Officers not to carry out any political work for candidates in the course of performing their official duties. The petitioners subsequently withdrew their application upon this undertaking. While the case did not go to judgment, it nevertheless secured the Court’s recognition of the responsibility of the authorities concerned to ensure the right to vote and the conduct of a free and fair election.

¹⁷ R Edrisinha and S de Alwis, *The Right To Vote: Its Impact On Election Laws In Sri Lanka* (Centre for Policy Alternatives, 2007).

Prior to the Parliamentary Elections scheduled for 10th October 2000, several members of the United National Party made a similar application to the Court of Appeal.¹⁸ The petitioners sought a Writ of prohibition and mandamus against the Samurdhi Authority of Sri Lanka. A settlement was reached in this case, too, upon the respondent agreeing to inform the Samurdhi Managers and Samurdhi Development Officers by letter not to engage in political activities and to also publish a copy of the Court settlement in national newspapers.

In *Sampath Anura Hettiarachchi v Mahaweli Authority and others*,¹⁹ an Assistant Security Supervisor employed by the Mahaweli Authority of Sri Lanka petitioned that his Fundamental Right under Article 12(1) was infringed when he was penalised for having resisted an improper attempt by the respondents to make him be a party to misusing state resources for election purposes. The Court reiterated the position it had taken in *Deshapriya v Rukmani* and stated that “the use of State and Corporation resources (whether land, buildings, vehicles, equipment, funds or other facilities, or human resources) directly or indirectly for the benefit of one political party or group, would constitute unequal treatment and political discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals”.

¹⁸ *ibid.*

¹⁹ S.C. (FR) No. 131/2000.

These cases on the misuse of state resources for election cases reveal to an extent certain limits of the current scheme where the right to vote is interpreted solely by the highest courts. Because election campaigns and elections take place within timeframes that are often shorter than the time it takes for the higher Courts to deliver a decision, the Courts may be unable to prevent or effectively remedy particular election offences which impair citizens' right to vote. The above-mentioned cases do demonstrate some instances where Writs can be used to procure more immediate results, but this relies on assiduous and targeted PIL.

Voting Accessibility

Issues of access to voting facilities and procedures have been considered as part of the right to vote by Courts. The landmark case of *Thavaneethan and Others v Dayananda Dissanayake*,²⁰ for instance, concerned some 55,000 voters from 'uncleared', LTTE-held areas in the Batticaloa and the Vanni districts who were prevented from voting by the army at the General Election held on 5th December, 2001. The case is prominent within right to vote jurisprudence for affirming both the *Karunathilake* and *Mediwake* decisions by construing the right to vote as part of the freedom of expression along with its expression as a collective right.

The Court's primary ruling was that the restriction of the voters from voting violated their freedom of expression

²⁰ [2003] 1 Sri LR 74.

under Article 14(1) (a) which is “a collective right enjoyed by them with all other voters”.²¹ The lack of restrictions placed on voters in the Trincomalee district and permitting important persons to vote at their residences was also held to infringe the right to equality under Article 12(1). In particular, the Court ruled that the impairment of the rights of voters elsewhere diluted the value of the Petitioners’ own votes. For this reason, the Court did not see the Petitioners’ applications as being ‘public interest litigation’ to enforce the rights of others, as “it is not the right of others, or of the public, which they seek to vindicate, but an integral aspect of their own Fundamental Rights”.²²

The Court also stressed that “Respect for the Rule of Law required that the decision making process particularly in a matter relating to the franchise should not have been shrouded in secrecy”.²³ This is a particularly important pronouncement in the context of repeated Executive interference in elections in Sri Lanka, and the use of narratives of security to carry out partisan electoral objectives.

In other instances concerning voting accessibility, however, the Court has been less forthcoming. For example, a Fundamental Rights petition²⁴ filed by the Centre for Policy Alternatives in May 2000 concerned internally displaced Muslims from the North and East living in Puttalam who had

²¹ *ibid* 75.

²² *ibid* 100.

²³ *ibid* 91-92.

²⁴ Fundamental Rights Petition, Centre for Policy Alternatives, 11 May 2000.

not been included in the electoral register. The Supreme Court dismissed the petition and refused to declare infringements of the petitioners' right to equality under Article 12(1) read with Articles 3, 4(e) and 14(1)(a). It held that the voter registration laws provided adequate provisions for the public to scrutinise and object to the revised Electoral Registers, ignoring the difficulties such displaced persons would have in accessing the Registers from the North and East and in producing correct identification.

Similarly, a Fundamental Rights petition²⁵ filed by the Centre for Policy Alternatives in October 2008 on behalf of registered voters voting in the North Central and the Sabaragamuwa Provincial Council Elections on 23rd August 2008, further set out issues relating to temporary identification documents of the registered voters. The petitioner alleged that the arbitrary, unfair and inconsistent practices of the Election Commissioner and other respondents deprived registered voters of their right to vote, infringing their Fundamental Rights under Articles 12(1), 12(2) and 14(1)(a) of the Constitution. The case was not granted leave to proceed.

This demonstrates the extent to which judicial interpretation can be a blunt and unreliable instrument in enforcing the right to vote, particularly when it comes to difficult practical realities. Even in the case of *Thavaneethan*, the Court's remedy was only compensation for the petitioners; the

²⁵ *Centre for Policy Alternatives v Dayananda Dissanayake S.C.* (FR) 378/2008.

practical effect of thousands being disenfranchised was not, and could not be, addressed post-election.

Filling Vacancies

The case of *Centre for Policy Alternatives, Saravanamuttu and Edrisinha v Dissanayake and Weerawanni* (2002)²⁶ concerned appointments to fill vacancies in Provincial Councils. Under section 65(2) of the Provincial Councils Election Act, the Secretary of the party to which the member creating the vacancy belonged to is entitled to nominate a person to fill the vacancy. The question arising in the case was whether the Secretary could nominate any person to fill the vacancy or only those persons who contested the election and thus had their names on the nomination list. The petitioners here argued that permitting a party Secretary to nominate any person, ahead of persons who sought nominations, campaigned and were subject to voter scrutiny at the election, was contrary to the exercise of the franchise.

The Court agreed and held that the Secretary of the relevant party is not permitted to nominate any person to fill the vacancy and can only nominate candidates whose names appeared in the original nomination paper and who secured some preferences at the election. Importantly, it also held with regards to possibly conflicting provisions that:

²⁶ S.C. (Writ) 26 and 27/2002.

“When constitutional or statutory provisions have to be interpreted, and it is found that there are two possible interpretations, a Court is not justified in adopting that interpretation which has undemocratic consequences in preference to an alternative more consistent with democratic principles, simply because there are other provisions, whether in the Constitution or in another statute, which appear to be undemocratic.”

The practical effect of this ruling was to affirm that the voters held a degree of supremacy over political parties as agents in the democratic process, as the right to the franchise as an expression of the sovereignty of the people trumped the discretion of political parties.

However, this same principle has not been universally applied by the Court in comparable situations. For instance, in *Centre for Policy Alternatives v Kabir Hashim and others*,²⁷ the petitioner challenged an appointment to fill a vacancy created by the death of a Member of Parliament who was elected under Article 99A of the Constitution (the National List). The appointed person’s name was not included in the National List nor any nomination paper for any electoral district contested by that party in the preceding Parliamentary Election.

The Court refused to grant leave to proceed for the petitioner, stating that Article 99A of the Constitution does

²⁷ S.C. (FR) 54/2016.

not extend to cover a situation where the seat of a National List member has fallen vacant and the provisions contained in section 64(5) of the Parliamentary Elections Act No. 1 of 1981 with regards to filling vacancies—which authorise party secretaries to appoint “any member” of the party to fill a vacancy—would apply.²⁸ The capricious nature of the Court’s application of its own stated principles, even against evidently unconstitutional provisions such as section 64(5),²⁹ again demonstrates the limits of judicial interpretation of the right to vote.

Constitutional Amendment

On 8th August 2000, the Government proposed a constitutional amendment in Parliament to replace the existing Parliamentary electoral system based on proportional representation with a new system which combined first-past-the-post seats with district wise proportional representation seats and National List seats. The amendment, which effectively diluted and eroded the principle of proportional representation, was referred to the Supreme Court by the Cabinet of Ministers as an urgent Bill. It was challenged by a number of petitioners on the grounds that it fundamentally affected the right of franchise

²⁸ *ibid.*

²⁹ Section 64(5) was enacted in 1988 under urgency. The Supreme Court heard the case on the 18th April 1988 and by the 21st April 1988, the determination of the Supreme Court had been read out in Parliament.

guaranteed under Articles 3 and 4 (e) read with Article 14(1)(a) of the Constitution.

In its Special Determination, the Supreme Court did not address most of the issues brought up by the petitioners and held that the Bill need not be approved by the people at a Referendum. It was felt that the Court's response was particularly egregious in condoning by far "the most contemptible attempt made by a political party in power to secure electoral victory".³⁰ The government eventually proceeded to not pursue the constitutional amendment.

In contrast is the 2017 government proposed constitutional amendment which sought to hold elections for Provincial Councils on the same date and give Parliament the power to determine when Provincial Councils stood dissolved. In Petitions challenging the Bill in the Supreme Court,³¹ petitioners argued that Parliament holding the power to determine the date a Provincial Council stood dissolved negatively affected the right to vote of citizens of those Provincial Councils.³² This was because it would delay the opportunity of citizens in Provinces whose Provincial Council terms end *before* that date of dissolution to vote for a new Provincial Council until then; and equally cut short

³⁰ Edrisinha and de Alwis (n17) 29.

³¹ *Twentieth Amendment To The Constitution Bill* S.C. (SD) 20/2017 to S.C. (SD) 32/2017.

³² *Centre for Policy Alternatives v Attorney-General* S.C. (SD) 24/2017.

the mandate citizens have given to Provincial Councils whose terms end *after the* date of dissolution.

In its Special Determination, the Court reaffirmed that local authorities including Provincial Councils have acquired constitutional status under Articles 3 and 4(e). It further determined that the simultaneous postponement of some Provincial Councils' elections and curtailment of others' terms envisaged in the Bill violated those Articles, recognising the sovereignty of the People, and the franchise as a part of that sovereignty, and as such it was required to be passed by a referendum. The amendment was not pursued further by the Government.

These two instances show the Supreme Court's wildly inconsistent applications of even a well-defined right to vote when it comes to Executive-driven electoral reform efforts. The right to vote is therefore not immune to being a casualty of the Sri Lankan courts' repeatedly demonstrated deference to the Executive.

Future Directions for the Right to Vote

In taking the demonstrated strengths and constraints of the judicially determined approach to the right to vote into account, alternate frameworks and arrangements that enable the right can also be imagined. The most obvious of these would be constitutionalising a direct right to vote, either as

an amendment to the current constitution or as part of a new constitution. This would do much to clarify the right as one that exists on its own. Indeed, such a direct right was mooted as part of the last constitutional reform undertaken in Sri Lanka.³³

However, merely having a direct right to vote will not resolve all the issues with the existing framework on the right. Here, the role which institutions are authorised to interpret the right to vote requires focus. Aside from the Supreme Court, the other relevant institution in the Sri Lankan context is the Election Commission. In addition to being limited to operationalising the right to vote, however, the Commission also faces a lack of clarity, both internally and conceptually, about whether it has the authority to go to Courts to resolve disputes or seek clarification on points of law.³⁴

A variety of arrangements on which institutions are empowered to interpret the right to vote operate in jurisdictions worldwide. These range from Constitutional Courts that lie separate to the ordinary Courts, to specialised Electoral Courts.³⁵ In numerous jurisdictions, electoral

³³ Panel of Experts of the Constitutional Assembly, 'Discussion Paper based on the Interim Report and the Subcommittee Reports' ("Draft Zero"), 11 January 2019.

³⁴ Dinesha Samararatne, 'Sri Lanka's First Election Commission: Strengthening Electoral Management or Advancing Electoral Integrity?' [2021] *Asian Journal of Comparative Law* 1-21.

³⁵ Jesús Orozco-Henríquez, Ayman Ayoub and Andrew Ellis, *Electoral Justice: The International IDEA Handbook* (International IDEA, 2010) 18-19.

management bodies (EMBs) such as the Election Commission also act as adjudicative bodies of first instance in hearing complaints, resolving disputes and ordering remedies concerning violations of the right to vote. This may have the advantage of reducing possible discrepancies between the Commission and the Courts in deciding on the right to vote. It also offers clear advantages in terms of responsiveness and efficiency, particularly during election periods. This may also come with increased accessibility for citizens to seek clarity on and enforcement of their right to vote, especially as approaching the Courts is often an expensive endeavour. The Sri Lankan Election Commission, with its extensive administrative network, is potentially well placed to act as such a site of adjudication.

These possibilities, however, are still within the institutional realm. Providing for the right to vote in a substantive sense and allowing for it to be interpreted fairly and towards maximising electoral justice, requires imagining frameworks and conceptual orders that are far broader. Such imaginings need to ponder not just how the right to vote is conceptualised, but how citizens can best access it to position themselves in the country's democracy. In a country like Sri Lanka, where the democratic positioning of different citizens has always been subject to fierce contestation, particularly with regards to ethnicity, this is a tall order. But it is one that anyone interested in ensuring that all Sri Lankans have a meaningful right to vote must fully commit to.

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The ‘Pass System’; The military detention of Internally Displaced Persons (IDPs) and restrictions on their freedom of movement

*Renuka Senanayake*¹

Introduction

At the heart of democracy lies the autonomy of the individual guaranteed through a number of freedoms. Critical to the enjoyment of these freedoms is the freedom of movement free from government interference. While the freedom of movement ensures that government favours all individuals equally in providing opportunity to contribute to society and receive

¹ This narrative is a tribute to Arumugam Vadivelu (Peter) – a brave person who was willing to put his life and that of his family at risk to challenge a military practice that had a detrimental impact on the lives of thousands of internally displaced persons in wartime Sri Lanka. I first came to know of the detention of internally displaced persons entering Vavuniya in 1995 and the restrictions on the movement of people as a result of the pass system when I travelled to carry out research in Vavuniya. To enter Vavuniya we had to get permission from the Ministry of Defence. Prior to entering Vavuniya we had to show our pass at a military checkpoint and on arriving in Vavuniya we had to attend the Police Station to extend the pass that would enable us to stay overnight in Vavuniya. But what we were not prepared to see were the thousands of people locked up in camps. Over a period, I witnessed first-hand the gradual wasting of the people held within the camps. Later as a legal researcher of the CPA, I had the opportunity to undertake research into the human rights violations of internally displaced persons. The information gathered from this research paved the way for this litigation. This landmark litigation was made possible due to the support of Rohan Edrisinha, pro bono legal representation by M A Sumanthiran, S Ravindran, Regional Coordinator, Human Rights Commission of Sri Lanka; Petitioners Laskshan Dias and Arumugam Vadivel (Peter) and the research team made up of Vanessa Gosselin, E Vijayalakshmi and Renuka Senanayake.

services, it also facilitates debate, the exchange of ideas and participatory decision making and is critical for the enjoyment of other constitutionally guaranteed rights such as the freedom of speech, expression, peaceful assembly and association.

From 1992 to 2001 in two districts in Sri Lanka we had a military imposed pass system similar to the infamous ‘pass laws’ of apartheid South Africa. In November 2001 and January 2002, the Centre for Policy Alternatives (CPA) assisted petitioners Gardiyawasam Seekkuhewase Lakshan Jagath Solomon Dias and Arumugam Vadivelu (Peter) to challenge the military imposed restrictions on their movement through a complex system of passes that was in operation in Government-controlled areas of Vavuniya and Mannar Districts.²

In July 2002, the Supreme Court dismissed the case of Gardiyawasam Seekkuhewase Lakshan Jagath Solomon Dias while upholding that the pass system was a violation of petitioner Arumugam Peter Vadivelu’s Fundamental Right to freedom of movement guaranteed under Article 14 (1) (h) of the Constitution of the Democratic Socialist Republic of Sri Lanka (the Constitution).³ The Court’s decision coincided with the newly elected government of Ranil Wickremesinghe’s Peace

² Centre for Policy Alternatives, ‘Public Interest Litigation – Case List – 1998 to 2000’ (*Centre for Policy Alternatives*, 23 August 2007) <<https://www.cpalanka.org/public-interest-litigationcase-list1998-to-2000/>> accessed 31 December 2021.

³ *Gardiyawasam Seekkuhewase Lakshan Jagath Solomon v Defence Secretary and others* S.C. (FR) 604/2001.; *Vadivelu v Officer in Charge, Sithambarapuram Regional Camp Police Post, Vavuniya and Others*, S.C. (FR) 44/2002.

talks and decision to dismantle the military-imposed pass system.

The dismantling of the pass system on 5 March 2002, while enabling free movement for the residents of Vavuniya and Mannar, importantly, freed over 10,971 families who were detained in Government run camps, where they were held against their will for over 7 years, from 1995 to 2002.⁴ They were now free to leave these places of detention to return to their former homes, move to another part of the country or leave the country as some of them did.

This chapter looks at litigation that challenged this system. The chapter starts with an overview of the context of the military-imposed pass system and the events that led to the petitioners' restrictions on their movement. It then discusses the legal challenge to the constitutionality of the restrictions on the Petitioners' freedom of movement and the key aspects of the two petitions brought before the Supreme Court. The chapter concludes with the outcome of this litigation and a brief discussion on the contribution made to the understanding of the constitutional right on the freedom of movement, limitations in the interest of public security and some observations on the court's rulings.

⁴ Law Society and Trust, *State of Human Rights* (2003). ; S Xavier, *Beyond the Wall-Life in Sri Lanka's Welfare Centres* (2002) 21.

The Pass System

The pass system, likened to the infamous ‘pass laws’ of apartheid South Africa,⁵ was introduced by the military to the Government-controlled areas of Vavuniya and Mannar Districts in 1992.⁶ In operation from 1992 to 2002, the pass system was used to control the movement of the largely Tamil civilian population of these two Districts and those travelling into these areas from other parts of the North and East.⁷ In 1995, it was further expanded to control the movement of the 4635 families of more than 10,000 people⁸ who sought refuge in Vavuniya and Mannar due to the military operation ‘Riviresa’ and subsequent military operations.

The “Pass” itself was a little chit of paper. There were fifteen types of passes which provided different rights depending on who you were, and your place of residence.⁹ There were 4 hour passes, day passes, and permanent passes for long term

⁵ The Pass Laws Act of 1952 required black South Africans over the age of 16 to carry a pass book, known as a *dompas*, everywhere and at all times. Forgetting to carry the *dompas*, misplacing it, or having it stolen rendered one liable to arrest and imprisonment. Each year, over 250,000 black South Africans were arrested for technical offenses under the Pass Laws. As a result, the *dompas* became the most despised symbol of apartheid. The Helen Suzman Foundation, ‘Key Legislation in the Formation of Apartheid’ (*Helen Suzman*, 3 March 2009) <<https://www.cortland.edu/cgis/suzman/apartheid.html>> accessed 31 December 2021.

⁶ Vavuniya District, Situation Report by the Government Agent of Vavuniya, K. Ganesh dated 30.09.2001.

⁷ Xavier (n4).; Centre for Policy Alternatives *Monograph on Human Rights Violations of Internally Displaced Persons and Government Policies classified by reference to the UN Guiding Principles on Internal Displacement* (2001).

⁸ Xavier (n4).

⁹ Centre for Policy Alternatives (n7).

residents of Vavuniya, temporary passes for visitors, emergency passes and travel passes to leave the district.¹⁰

To obtain the pass, applicants had to provide proof of residency, police clearances and a guarantor. Normally this would mean that the head of the household had to either be a registered voter of Vavuniya and provide confirmation of residency from the Grama Sevaka or proof of employment. If the person wished to leave the district, they had to apply for permission to exit by providing a legitimate reason for travel, a surety to guarantee the persons return and information on the place of residence outside the district. Once the police had carried out the necessary checks and if satisfied with the information provided, the applicant would be issued with a “travel pass”. All this could take up to a week or longer making urgent travel for medical or other reasons near impossible.¹¹

The national security consideration of the pass system was to control the infiltration of members of Liberation Tigers of Tamil Eelam (LTTE) into Government-controlled areas.¹² Critics observed that the pass system was also used to achieve a multitude of other State objectives.¹³ By isolating these areas and requiring prior Military permission from travellers from the

¹⁰ (n6).

¹¹ R Senanayake, 'Sri Lanka: Fleeing War, Civilians In Penury In Refugee Camps' (*Inter Press Service*, 2 February 1999) <<http://www.ipsnews.net/1999/02/sri-lanka-fleeing-war-civilians-in-penury-in-refugee-camps/>> accessed 31 December 2021.

¹² *Vadivelu v Officer in Charge, Sithambarapuram Regional Camp Police Post, Vavuniya and Others* S.C. (FR) 44/2002.

¹³ Nirupama Subramaniam, *Sri Lanka: Voices from a war zone* (Penguin India, 2005).

South of Sri Lanka, to travel to these areas, the Military and Government of the day effectively controlled and contained media coverage of the conflict and access to local and international aid and human rights workers among others.¹⁴ The lack of free access to these parts also meant the detention and unlawful restrictions on the movement of the civilian population continued without public scrutiny.

Operation Riviresa, the 1995 Exodus and ongoing displacement

A key to the expansion of the ‘pass system’ and creation of closed camps was the 1995 military Operation ‘Riviresa’ which aimed to gain control of the Jaffna peninsula which at the time was under LTTE control. As the military advanced the LTTE fled into the Vanni forcing the civilian population of Jaffna along with them.¹⁵ The result was the mass scale exodus of over 500,000 people.¹⁶ With food shortages and the need to isolate the LTTE from the civilian population, the Government responded by inviting the civilian population into the Government-controlled town of Vavuniya promising the displaced safe passage to and from Vavuniya to other parts of

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ Vanni- refers to the districts of Mullaitivu, Kilinochchi and Vavuniya: The exodus is believed to be between 300,000 and 500,000 people from the Jaffna Peninsula. University Teachers for Human Rights Jaffna, *Exodus from Jaffna* (1995).

the country.¹⁷ Initially 17,000 people took up this offer but as the fighting and attacks on the Vanni increased they were later joined by thousands of others.¹⁸

The Government, however, renegeing on their promise detained the people initially in 11 makeshift centres which were later increased to 14.¹⁹ These centres were set up in abandoned warehouses, schools, factories and abandoned commercial establishments that were ill equipped to deal with the needs of such a large number of people. There was inadequate shelter, sanitation and privacy.²⁰ Families were provided a space of approximately 5 ft. by 12ft. with only a piece of cloth or mat acting as a screen to offer them privacy from their neighbours.²¹ They had to cook, eat, and sleep in this space.²²

The Centres euphemistically called ‘Welfare Centres’ were in essence closed camp. Initially the occupants were not allowed to leave the camps.²³ The restrictions on movement applied to the old and young without distinction. In the years to come those detained were allowed to apply for permission to leave

¹⁷ University Teachers for Human Rights Jaffna, *Vanni: A People Crushed Between Cycles of Violence*, (1996).

¹⁸ B Jeganathan, ‘Branded Refugees’ *Sunday Times* (Colombo, 15 December 1996) <<https://www.sundaytimes.lk/961215/plus2.html>> accessed 31 December 2021.

¹⁹ *ibid.*

²⁰ *ibid* ;UTHR (n17).

²¹ Xavier (n4). ; Centre for Policy Alternatives (n7).

²² Xavier (n4).

²³ Centre for Policy Alternatives (n7). ; *Vadivelu v Officer in Charge, Sithambarapuram Regional Camp Police Post, Vavuniya and Others.*

the Centre.²⁴ Their movement was now subject to the pre-existing military-imposed pass system that restricted and controlled the movement of persons within the Vavuniya District.

As the petitioner Vadivelu states in his petition each time a detainee left the camp they had to register at the police post located at the camp entrance.²⁵ The delays in registering on leaving the camp impacted on their ability to hold a job, report to work on time, forcing camp inmates to be dependent on Government food handouts. Children were denied access to education, sick people had difficulty accessing medical services and there were instances where people died due to the delays in applying and obtaining clearance to travel out of the district and access to timely medical care.²⁶ Dysentery, sickness and suicides were common.²⁷

The displaced were also constantly at risk of harassment and persecution by members of the paramilitary operating in Vavuniya.²⁸ The paramilitary worked closely with the military and were often used to weed out alleged members of the LTTE and their sympathisers within the camp.²⁹ If an attack on the Military, Government or paramilitary took place in Vavuniya, the displaced and those outside the camp at the time would be

²⁴ *Vadivelu v Officer in Charge, Sithambarapuram Regional Camp Police Post, Vavuniya and Others.*

²⁵ UTHR (n17).

²⁶ Centre for Policy Alternatives (n7); Senanayake (n11).

²⁷ *ibid.*

²⁸ UTHR (n17).

²⁹ *ibid.*; Xavier (n4); UTHR (n17).

subject to an identification parade from which members of the paramilitary would identify people for questioning.³⁰ Those identified were often removed from the camp, and in some instances never heard of again.³¹

Challenging the legality of the Pass System

In 2001, CPA conducted research on the human rights issues faced by the internally displaced. Once again, the pass system was found to be central to the many disadvantages and discriminations faced by the displaced residing in Vavuniya and Mannar. The arbitrary nature of the pass system and resulting restrictions on the freedom of movement was a matter of concern to CPA which resulted in it supporting two Fundamental Rights Applications by Lawyer Lakshan Dias who was working at the YMCA at the time and Arumugam (Peter) Vadivel an inmate of the Sithampbarapuram “refugee” camp in Vavuniya.

The Case of SOLOMAN DIAS v SECRETARY, MINISTRY OF DEFENCE AND OTHERS³²

Attorney-at-Law Lakshan Dias, a Sinhalese Lawyer from the South was employed as the Executive Secretary of the Peace

³⁰ *ibid.*

³¹ Centre for Policy Alternatives (n7).

³² *Gardiyawsam Seekkuhewase Lakshan Jagath Solomon v Defence Secretary and others.*

and Reconciliation Committee, National Council of YMCAs of Sri Lanka and was involved in carrying out programs for the internally displaced persons on human rights and legal aid in Vavuniya.

In his petition to the Supreme Court, he submitted that on 05.09.2001, he travelled to Vavuniya by bus on work. On the way the bus was stopped at a checkpoint and upon producing his identity card he was allowed to proceed without a pass. On his return the same day, the bus was stopped, and the officer-in-charge of the checkpoint severely admonished him for not obtaining a pass, even though he said that he was a lawyer. Due to the delay, his bus proceeded without him; and having found other means of travel, he returned to Colombo only at 4 am the next morning.

His next complaint was that on 04.10.2001, he left for Vavuniya by train. At the railway station the next morning, police officers instructed passengers to obtain passes and for that purpose to join either the queue for permanent residents of Vavuniya or the queue for visitors; his request to leave the railway station without obtaining a pass was refused. Upon submitting his identity card, he was issued a six day pass, and he was allowed to leave the station after his bags were checked by the police. After finishing his work, he returned by bus on 08.10.2001. The bus was stopped at the Erat Periyakulam checkpoint, and all passengers were asked to submit their passes. The petitioner produced his Bar Association identity card and was allowed to continue his journey although he had not produced his pass.

His third grievance was that the pass system applicable to travel between Colombo and Vavuniya, and the manner in which it was being implemented, constituted an imminent infringement of Articles 12 (1) and 14 (1) (h), as in the future too, persons having to travel in a sudden emergency would be liable to arrest if they did not have travel passes.

In his petition to the Supreme Court, he submitted that Principle 25 (3) of the Guiding Principles on Internal Displacement formulated by the UN Special Representative on Internally Displaced Persons imposed a duty on national authorities to grant and facilitate persons engaged in the provision of humanitarian assistance rapid and unimpeded access to the internally displaced.³³ He further contended that Article 12 (1) embodied the principle of equality before the law and that Article 14 (1) (h) guaranteed freedom of movement within Sri Lanka, free from arbitrary and unjustified restrictions; and that the "travel pass" system constituted an arbitrary and unreasonable restriction of those Fundamental Rights, and was not authorised by or under law or regulations made under the law relating to public security.

The Court dismissing his case held his first complaint was out of time as the incident referred to took place on 05 September 2001, and his application was filed 2 months later on 08 November 2001, finding that the experience of 05.10.2001 was 'no more than minor irritations and that there was no violation of his rights under Article 14 (1) (h) as the travel pass system did not in any way hinder his return journey on 08.10.2001 as

³³ *ibid.*

he was not even asked to produce the pass issued to him on 05.10.2001. The Court viewed the formalities to which he was subject to on his journey to Vavuniya on 05.10.2001, such as queueing up, obtaining a pass, and having his baggage security-checked, were in the circumstances ‘no more than minor irritations’. The Supreme Court also found it was unnecessary to consider his 3rd contention as the pass system was not in operation at the time of decision.

**The case of Vadivelu v Officer-in-Charge,
Sithambarapuram Refugee Camp Police Post, Vavuniya³⁴**

Arumugam Vadivel (Peter) was a Tamil IDP living in the Sithambarapuram “refugee” camp in Vavuniya. He had been living in Kilinochchi and carrying on business as a merchant when in 1990, he along with his family fled Sri Lanka for India, due to armed conflict and fighting at the time. In 1995, he along with other refugees’ resident in India volunteered to return to Sri Lanka on an invitation of the Sri Lankan Government and promise of peace.³⁵ Their return and resettlement was facilitated by the United Nations High Commissioner for Refugees (UNHCR) and on their arrival they were placed in the Sithambarapuram Refugee Camp in Vavuniya. Soon after he and his family took up residence at the Sithambarapuram camp, they found that they were detainees in the camp and had to

³⁴ *Vadivelu v Officer in Charge, Sithambarapuram Regional Camp Police Post, Vavuniya and Others.*

³⁵ Subramaniam (n13).

apply and obtain a pass each time they wished to leave the camp.³⁶

In December 2001, Arumugam Vadivelu travelled to Colombo to visit a sick relative. During this visit he met with CPA to discuss legal redress to his and his fellow camp inmates' plight as a result of the pass system and restrictions on their movement. On the 16th of January 2002, with the assistance of CPA and pro bono legal representation from Mr. M A Sumanthiran, he filed a petition invoking the Supreme Court jurisdiction under Article 17 read with Article 126 of the Constitution stating that his Fundamental Rights guaranteed to citizens in the Constitution under Article 11, Article 12 (1), 12 (2) and 14 (1) (h), had been infringed.³⁷

Arumugam Vadivelu contended that the several conditions imposed on him were restrictions on his freedom of movement, that those conditions and restrictions had not been imposed on other persons similarly circumstanced, and that they had been imposed on him on account of his race; and that they were not authorised or imposed by any law or emergency regulation.

In his petition to the Supreme Court, he submitted he was not permitted to leave the Camp premises without obtaining a pass.

³⁶ *ibid.*

³⁷ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

Article 11 recognizes that that 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment', Article 12 (1) that 'all persons are equal before the law and are entitled to the equal protection of the law' and 12 (2) that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds' and 14 (1) (h), and that 'every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka' had been infringed.

At first, a pass was valid only for the date of issue, but later it was valid for three months at a time. The pass entitled the holder to travel only in the areas "cleared" by the Security Forces, and that too only within the Vavuniya District. He claimed that because of the restrictions on travel imposed by the pass system that he and other members of his family were unable to obtain any form of gainful employment. He also submitted that due to the inhuman conditions and restrictions on their movement that his son took his life while a resident in the camp. He referred to instances of having to apply for a travel pass. The first was in June 2001, when his three year old granddaughter suffered attacks of epilepsy, and was admitted to the Vavuniya General Hospital from where she was transferred to the Anuradhapura General Hospital where it was advised that she be taken to Colombo.

He stated that to take his granddaughter to Colombo, he had to apply for travel passes for himself, his daughter and granddaughter. The process involved submission of a "Referral" by the District Medical officer Vavuniya and a sponsor who would act as surety and guarantee their return. Following his application for a travel pass they were granted travel passes limited to seven days, and therefore, had to return within seven days even though the child's treatment had not been completed.

He further submitted that on 19.12.2001, that he received a telegram that his wife's uncle was seriously ill in Colombo and wished to see his family. He complained of the several delays and difficulties he and his two children experienced in regard to their application for a travel pass and journey to Colombo to see

their sick relative which involved the purchase of an application form; supply of photographs; their intended residence in Colombo; and a sponsor, "a person who was deemed as a qualified surety by the Police for this purpose", who would guarantee their return. He made his application on 22.12.2001, giving an address at Modara, and was told to go back to the Camp and wait until a response was received from the Modara police.

He had to pay the sponsor a sum of Rs. 1,000, present themselves for an inquiry at the Sanasa police post in Vavuniya and satisfy the police that their travel was for a bona fide purpose. The sponsor had to surrender her own "pass" and was given time till 25.01.2002 to produce the petitioner and his two children in order to reclaim her "pass". On 02.01.2002, the petitioner and his two children were video graphed at the police post, and given two week travel passes. The instructions on the reverse of the travel pass required the holder, on reaching his destination, to hand over the pass to the OIC of the relevant police station "and obtain a Residence Registration Pass within 24 hours on arrival", and, on his return, to surrender the Residence Registration Pass to the police, to recover the travel pass from the police, and to hand it back to the authority which issued it.

He complied with all those conditions and did not risk overstaying in Colombo, fearing that the police might take them into custody and that the sponsor might forfeit her own pass, and decided to return to Vavuniya on time.

The Respondents contended that while the “‘Residential and Travel Pass System’ was not introduced by any law or emergency regulation, it was implemented in the Vavuniya District as a security measure in the interests of national security, a responsibility bestowed on the State”.³⁸ They argued that it applied to all people placed in a similar position to the Applicant as it applied to those who wished to enter Vavuniya as well. Rather they submitted that the petitioner, a displaced person in Vavuniya residing in a welfare centre stood to gain from the "travel pass" as it helped establish his identity within a short period and avoid undue delays and inconvenience to visitors such as the petitioner.³⁹

In response to the petitioner’s travel of June 2001, the respondents submitted that there was flexibility with regards to extending the petitioner's travel pass which could have been extended “up to a period of 3 months”. The respondents further submitted that in any event that the petitioner's application was out of time.

The Court observed that the respondent's contentions raised two issues: were the procedures and restrictions no more than mere formalities; was the freedom of movement, intrinsically and inherently, subject to implied restrictions?

³⁸ *Vadivelu v Officer in Charge, Sithambarapuram Regional Camp Police Post, Vavuniya and Others.*

³⁹ This contention is contradictory to the many incidents documented about the arrest and detention of IDPs both within and outside welfare centres. See Xavier (n4).; Centre for Policy Alternatives (n7).

Finding that procedures were more than mere formalities, and in fact quite ‘burdensome, time-consuming and costly, and effectively restricted the right of travel and residence’ the court reasoned that: the pass system and its processes went far beyond maintaining a record of the identity of persons travelling to and from Vavuniya; the processes in regard to notifying a place of residence and obtaining a residence registration pass had the effect of discouraging a change of residence in Colombo, and to that extent affected the Petitioner’s movement and residence within Colombo; the relevant circulars and memoranda governing the pass system and its application were unpublished and inaccessible and that the restrictions on the freedom to travel arising from the pass system were “comparable to procedures when obtaining a visa for travel to a foreign country where there was no assurance that permission would be granted. The court further noted that the nature of the restrictions placed on the petitioner's right to travel to Colombo tended to weaken rather than protect the family and family ties and did not facilitate the full realisation of the Petitioners Fundamental Rights and freedoms as contemplated by Article 27 (2) (a) of the Directive Principles of State Policy finding that cumulatively and as a result that there were significant restrictions on the petitioner's freedom of movement and residence guaranteed by Article 14 (1) (h).

In response to the second contention, the court recognised that while there is force in the respondent's contention, that the restrictions complained of were imposed in the interests of national security and were reasonably necessary for that purpose and there could be inherent restrictions imposed on the

freedom of movement that Articles 15 (6) and 15 (7). Article 15 (7) required that such restrictions be imposed by a law, or by regulations made under the law relating to public security. The court found that the travel pass system was not authorised by Article 15 (7) holding that the petitioner's Fundamental Right under Article 14 (1) (h) had been infringed by Executive action by the application to him of the travel pass system.

The court's finding is in keeping with Sri Lanka's obligations under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which recognises that the right to liberty of movement and freedom to choose one's residence can only be restricted according to law in the interests of national security, public order, public health or morals or the rights and freedoms of others, which importantly are consistent with the other rights recognised in the Covenant.

In determining whether the application was time barred as the petitioner should have challenged the system within one month of being subject to the pass system and that by not doing so had acquiesced to the system, the court's position was that each occasion the petitioner was subject to pass system gives rise to a separate cause of action, finding that the petitioners complaint in respect of the December Travel pass was within time and was not barred by acquiescence.

The Applicant was granted costs and nominal compensation in a sum of Rs. 30,000.

This case was heard and decided at the height of the civil war in a highly militarised environment where national security

considerations were paramount. There was a sense that security considerations trumped all others and any efforts to say otherwise would be considered unpatriotic. Despite this, the court in this case demonstrates its willingness to examine the constitutionally guaranteed rights and limitations on those rights in the interest of national security considerations for the petitioner.

In this case, the Court sets out the parameters of the freedom of movement and the extent to which the inherent restrictions on this freedom as articulated in Article 15 (6) and 15 (7) can be used to curtail it. Importantly the Court found that national security considerations cannot arbitrarily override the freedom of movement and the choice of one's residence. The Court identified some key considerations in assessing the lawfulness of any restrictions to the freedom of movement: that restrictions be made according to law and be made public; not 'be burdensome, time-consuming and costly'; not impede change of address and that restrictions consider the impact on the Directive Principles of State Policy albeit the interference with family ties.

In *Arumugam Vadivelu's* case the restrictions were not made according to law or regulation as required by Article 15 (7), nor was it made public. It involved him having to provide a legitimate reason to travel, purchase a form, provide photographs, notify the onward residence and find and pay a person to act as surety who in turn ran the risk of losing his/her travel pass on the failure of the petitioner to return as promised on the day allotted.

The Court, however, did not concede a violation of Article 11, refusing leave to proceed and noting that while the restrictions imposed were undoubtedly “burdensome and inconvenient”, they were not cruel, inhuman or degrading. The Court also did not concede that the petitioner’s rights under Articles 12 (1) and 12 (2) had been infringed stating that there is evidence that the travel pass system applied not only to those living in refugee camps in Vavuniya, but to all those travelling to and from Vavuniya; and that they applied to persons of all communities.

In refusing to find with the plaintiff on Article 11 that the Respondents conduct gave rise to cruel, inhuman and degrading treatment, the Court appears to have only focussed on the procedural aspects of applying and obtaining a *travel pass* in finding the process to be ‘burdensome and inconvenient’ and not on the everyday experience of the internally displaced detained in welfare centres for the last 7 years and the cumulative impact this detention had on the applicant and his family.⁴⁰

Once again in refusing to find with Arumugam Vadivelu that his rights to equality and equal treatment under the law under Article 12 (1) and 12 (2) had been violated, the Court failed to consider the pass system in its totality and that it applied differently to visitors from the South albeit be they Sinhalese, to permanent residents of Vavuniya and Mannar and the internally displaced who were detained in Government run

⁴⁰ For experiences of those subject to the pass system see Xavier (n4). ; Centre for Policy Alternatives (n7). ; Subramaniam (n13). ; Senanayake (n11). ; UTHR (n17).

‘Welfare Centres’. The Court relied on submissions made by petitioner Lakshan Dias in *Dias v Secretary, Ministry of Defence* to show that the pass system in fact applied to “to those living in refugee camps in Vavuniya and to all those travelling to and from Vavuniya; and that they applied to persons of all communities”. But the case of *Lakshan Dias* in fact demonstrates the arbitrary application of the pass system to him, where on occasion he was required to provide a pass and others he could rely on his National Identity Card and Lawyer identification. His submissions also demonstrate that applying and obtaining a pass was not an onerous process for him. His experience suggests rather than applying uniformly to persons of all ethnicities, that in fact as a Sinhalese person and a lawyer from the South, that he was at times treated favourably and in so doing, Arumugam Vadivelu was treated differently.

The petitioner Arumugam’s case was heard and decided about the same time as the February and March 2000 case of *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and others*⁴¹ that also dealt with national security considerations. In this case the Petitioner challenged Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation No. 1 of 1998 (the Regulation)⁴² that prohibited the publication, *inter alia*, of “any publication pertaining to official conduct, morale, the performance of the Head or any member of the Armed Forces or the Police Force

⁴¹ S.C. (FR) 994/1999.

⁴² Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation No. 1 of 1998 (the Regulation) as published in Gazette Extraordinary No. 1030/28 of 5th June 1998 as amended on 6th June 1999.

or of any person authorised by the Commander in Chief of the Armed Forces for the purpose of rendering assistance in the preservation of national security”. The Regulation also provided for the setting up of a Competent Authority to prohibit the use of any press or equipment and to seize the same where there has been a contravention of the regulation through such media.

The petitioner’s argued that the regulation that was made under section 5 of the Public Security Ordinance deprived her of receiving information regarding the war and the ethnic conflict in breach of her rights under Article 10 of the Constitution,⁴³ was unwarranted, discriminatory, and arbitrary and violative of Article 12 (1);⁴⁴ and that it was overbroad and vague, and therefore, not necessary in a democratic State; hence it was violative of her rights under Article 14 (1) (a)⁴⁵ of the Constitution.

While Article 10 was not considered on the basis that the petitioner did not pursue the alleged infringement of her rights, the Court found that there was no violation of the petitioner’s rights under Article 12 (1) of the Constitution as the regulations were framed in reasonably precise terms and confined in their

⁴³ Every person is entitled to freedom of conscience and religion, including the freedom to have or to adopt a religion or belief of his choice. The Constitution of Democratic Socialist Republic of Sri Lanka 1978 Art. 10.

⁴⁴ All persons are equal before the law and are entitled to the equal protection of the law. The Constitution of Democratic Socialist Republic of Sri Lanka 1978 Art. 12(1).

⁴⁵ Every citizen is entitled to the freedom of speech and expression including publication. The Constitution of Democratic Socialist Republic of Sri Lanka 1978 Art. 14(1).

application to defined circumstances. Finding that the petitioner rights under 14 (1) (a) have not been infringed as the Regulations have been made according to law and was formulated with sufficient precision to enable the petitioner to foresee, to a degree that was reasonable in the circumstances, consequences which a given action may entail; and even though the discretion of the Competent Authority was wide, the scope of the discretion and the manner of its exercise were indicated with sufficient clarity to enable the discretion to be reviewable and gives the petitioner adequate protection against arbitrary interference and that the restrictions imposed were not disproportionate to the legitimate aim of the regulations, namely the furtherance of the interest of national security.

The emphasis of the court's reasoning in this case was not so much on the rights protected and consequence of the narrowing of these rights but rather on whether the limitations can be justified. The Court did not give due regard to the consequence of such broad sweeping powers and the lack of scrutiny that it enabled its impact on the democratic system of Government and rights of individuals.

Conclusion

The two petitions by *Gardiyawasam Seekkuhewase Lakshan Jagath Solomon v Defence Secretary and others* and *Vadivelu v Officer in Charge, Sithambarapuram Regional Camp Police Post, Vavuniya and Others* demonstrate the importance of a constitutional rights in curtailing Executive and Administrative

action. The petitions also question the adequacy of constitutional protections to individuals and the internally displaced in times of conflict.

During the conflict many from the minority ethnic community felt there was no redress for the many human rights abuses they faced and that the constitutional protections were of little significance as it was inaccessible and did not offer them any redress. The 7 year detention of the internally displaced in Vavuniya under the military-imposed pass system is testimony to this claim as is the militaries total disregard to the Supreme Court's ruling in *Arumugam Vadivelu's* case when in 2008, they reintroduced the pass system in Vavuniya, Kilinochchi, Mannar and Mullaitivu.⁴⁶

⁴⁶ Immigration and Refugee Board of Canada, 'Sri Lanka: Travel pass systems for Tamils from northern and eastern Sri Lanka, including Jaffna and Trincomalee' (*Refworld*, 2009) <<https://www.refworld.org/docid/4a70409a23.html>> accessed 31 December 2021.

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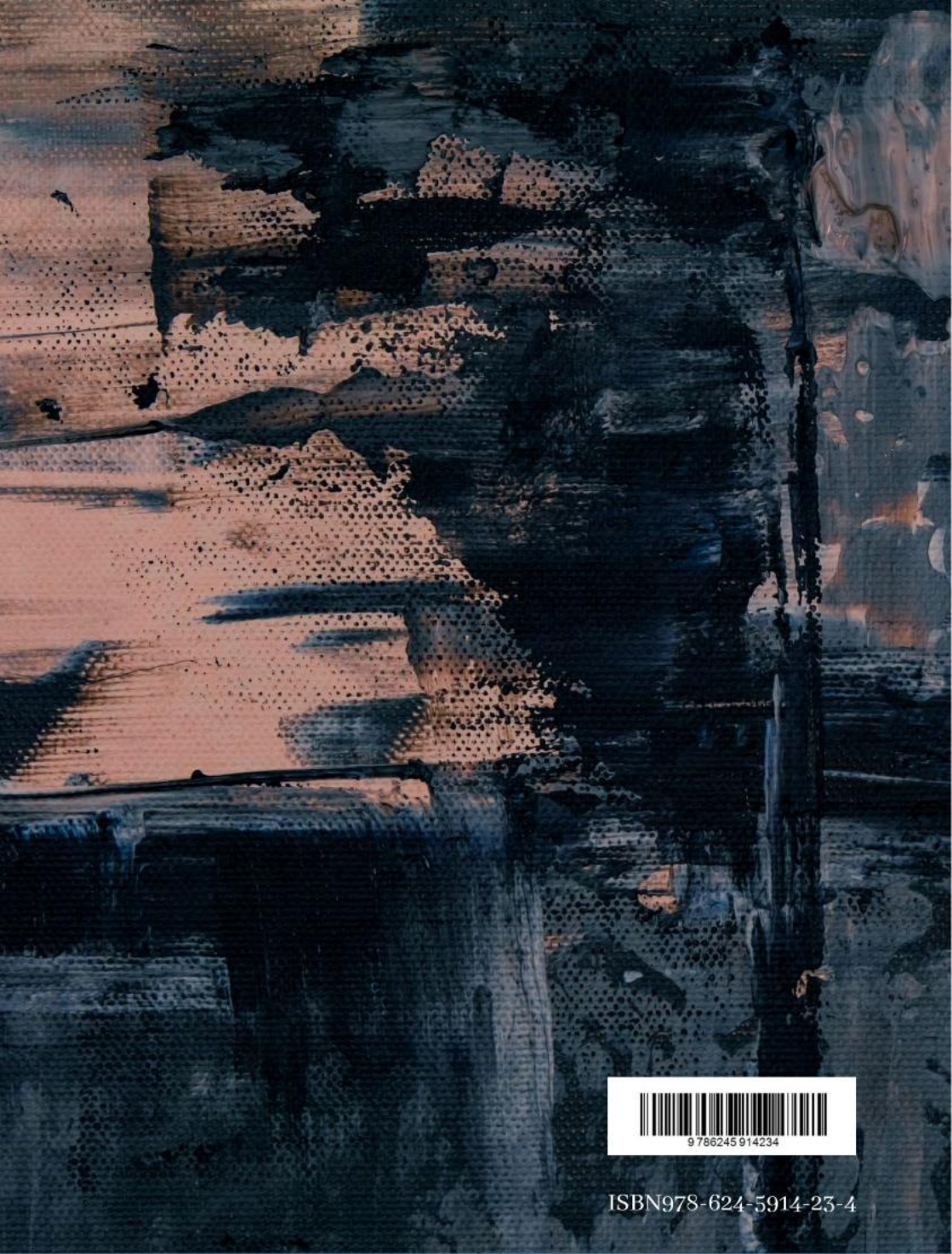
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