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ARTICLE

Mixing Writs with Rights: The Implications for Public Law in Sri Lanka

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Abstract

Beginning around 1990, judicial interpretation transformed public law in Sri Lanka by blending writs with fundamental rights. On the one hand, the Supreme Court has defined and expanded the constitutional right 'to equality and equal protection of the law' by drawing on administrative law concepts of natural justice, reasonableness, legitimate expectation, the duty to provide reasons for decision-making, and proportionality. On the other hand, judges have relied on the Bill of Rights as a standard to assess the decisions of public authorities in writ matters. This relationship between the writs and the rights has had important implications for the growth of public law in Sri Lanka. There has also emerged an incipient ground of review, 'rights-based review', as part of the writ jurisdiction, and the 'public trust doctrine' in fundamental rights review. Public law has been strengthened by the growth of public interest litigation and the use of new judicial remedies. This article looks at how the writ jurisdiction and rights-based review have evolved in recent times and considers how the two remedies have been used and fused, in a country where the legal and constitutional history has taken a different trajectory to some other post-colonial societies. The article concludes by arguing that this fusion of constitutional and administrative law concepts, together with the expansion in the rules of standing and the emergence of the new concepts of public trust doctrine and fairness, have generated a more robust legal framework that can better protect constitutional rights and democratic freedoms.

Writs and fundamental rights have been two of the most important ways in which the courts have supervised the exercise of public power and administrative discretion. While writs date back to colonial times, fundamental rights review is a relatively new jurisdiction in Sri Lanka. This article looks at how the writ jurisdiction and rights-based review have evolved in recent times and considers how the two remedies have been used and fused, in a country where legal and constitutional history has taken a different trajectory to some other post-colonial societies.

Sri Lanka's post-colonial experience is different from other British colonies in three important ways. First, unlike countries such as India and Malaysia, Sri Lanka did not introduce an enforceable Bill of Rights till several years after independence. It was only in 1978, thirty years after independence, that the Constitution introduced an enforceable Bill of Rights with a constitutional remedy. This shifted the locus of public law from writs to fundamental rights litigation. It has also resulted in a merger of writ jurisprudence with rights-based interpretation.

Sri Lanka was different from other post-colonial societies in another way: the constitutional writs were not expressly encapsulated in the first post-independence constitution in 1947. While the writs

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were used in at least one important case (the *Bracegirdle Case*) to challenge the colonial administration, it was only in 1978 that a constitutional foundation was provided to the writs. This has allowed courts to take the view that it can depart from judicial interpretations of the writ jurisprudence prior to 1978, and this approach has had an impact on how public law jurisprudence evolved thereafter.

Sri Lanka's public law experience is different in a third way: the courts were not expressly given the power to review the constitutionality of legislation. This was teased out by the courts under the 1947 Constitution, but that power was used only sparingly. Both under the 1972 Constitution and the 1978 Constitution, the power to review legislation after enactment was expressly excluded. 'Pre-enactment review', that is the power to review the constitutionality of a Bill prior to enactment, however, remains.

From around 1990, judicial interpretation has transformed public law in Sri Lanka by blending the writs with fundamental rights. On the one hand, the Supreme Court (SC), has defined and expanded the constitutional right 'to equality and equal protection of the law' by drawing on administrative law concepts of natural justice, reasonableness, legitimate expectation, the duty to provide reasons for decision-making and proportionality. On the other hand, judges have relied on the Bill of Rights as a standard to assess the decisions of public authorities in writ matters. There has also emerged an incipient ground of review, 'rights-based review', as part of the writ jurisdiction and the 'public trust doctrine' in fundamental rights review. This relationship between the writs and the rights has shaped and will continue to shape the way public law in Sri Lanka evolves.[1] Beyond the fusion of the writs and rights, public law has also been strengthened by the growth of public interest litigation, the emergence of public trust and fairness as new concepts of judicial review, and the use of new judicial remedies.

Against this post-colonial constitutional history, this article examines the transformation of public law in Sri Lanka through a process of incremental judicial interpretation. In doing this, the article considers how concepts from the older writ jurisdiction have influenced the newer fundamental rights jurisdiction. It also considers how the Bill of Rights and the constitutional foundation provided to the writs in 1978 have shaped the evolution of public law in Sri Lanka.

The expansion in the rules of standing, the concepts of 'the public trust' and 'fairness' and the new remedies that have emerged, have enabled the courts to control and supervise the exercise of public power more effectively.

This article starts by looking at a politically significant decision where the writ of habeas corpus was used to challenge the exercise of power under the colonial administration. It will then look briefly at how public law, principally constitutional law, evolved in the immediate aftermath of the 1947 Constitution, and how judges exercising power under that constitution reviewed, or failed to adequately review, executive action.

The article then analyses developments after the adoption of the 1978 Constitution where the SC used concepts from administrative law to expand fundamental rights, especially the right to 'equal protection of the law', and writ decisions where the courts used fundamental rights to expand the scope of the writs. We also look at the emergence of the public trust doctrine and fairness as new grounds of judicial review, the expansion in the rules of standing, and the emergence of new remedies, all of which have enhanced the capacity of the judiciary to review administrative discretion. Before we conclude we will look at how the writs and the rights have been used together to supervise the exercise of executive power around the same set of facts.

This article argues that the fundamental rights jurisdiction has benefitted by drawing on ideas that are found in the writ jurisdiction. Similarly, the writs have benefitted by relying on standards drawn from rights-based review. This fusion between the two strands of review has occurred

[1]Mario Gomez, 'Blending Rights with Writs: Sri Lankan Public Law's New Brew' [2006] Acta Juridica 451;Mario Gomez, 'The Modern Benchmarks of Sri Lankan Public Law' (2001) 118 South African Law Journal 581.

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through a process of incremental judicial interpretation over a period of many years. The constitutional foundation provided to the writs in the 1978 Constitution, the introduction of rights-based review in the Constitution, and legal personalities, both judges and lawyers, have facilitated the transformation of public law in Sri Lanka. The article concludes by arguing that this fusion of constitutional and administrative law concepts together with the expansion in the rules of standing and the emergence of the new concepts of public trust doctrine and fairness, have generated a more robust legal framework that can better protect constitutional rights and democratic freedoms. It has strengthened the constitutional guarantee on equal protection of the law, expanded the ambit of writ-based remedies by infusing rights-based standards, and created a foundation for more effective judicial review of administrative discretion and executive power. This new robust framework of judicial review has implications after the adoption of the 20th Amendment (hereinafter '20A') to the Constitution in 2020. The 20A returned Sri Lanka to a system of hyper-presidentialism with power concentrated once more in the Executive Presidency. In the absence of judicial review of legislation, judicial review of administrative action becomes the only way of ensuring that the executive remains within its constitutional limits and a more robust public law framework enhances the counter-majoritarian capacity of the courts.

Challenging the Colonial Regime: The Writs before Independence

The writs were used to challenge the dominance of the colonial regime in the *Bracegirdle Case*.[2] It was a challenge that emerged from *within the system* and the writ jurisdiction was used to provide a check against the exercise of power by the then-British colonial governor.

Mark Anthony Bracegirdle, a British subject and a recent immigrant to Australia, arrived in Ceylon to work for a tea estate company. He was a labour activist who worked closely with the tea plantation workers and was a prominent member of a left party in Sri Lanka. After a speech critical of the colonial regime, the then-Governor of Ceylon issued an order of deportation on Bracegirdle requiring him to leave the country in four days. Bracegirdle resisted the order and was arrested. In an application for a writ of habeas corpus, the SC held that the Governor's powers of deportation were not absolute and declared that the arrest and detention of Bracegirdle was illegal and that he should be released. One of the issues was whether the Governor could issue an order for deportation in the absence of an 'emergency', and the court held that the Governor had exceeded his power in doing so.[3] De Silva observes that the Bracegirdle incident provoked a constitutional crisis of the 'first magnitude' and contends that this was the 'most notable political and constitutional crisis of the Donoughmore era'.[4]

A Giant Step Back, A Modest Step Forward: Public Law After Independence

Sri Lanka did not get a Bill of Rights at independence, mainly because constitutional architect Ivor Jennings did not favour the inclusion of a Bill of Rights.[5] Instead what the country did get was

[2] *In Re Mark Anthony Bracegirdle*, Application for a writ of habeas corpus against the Deputy Inspector-General of Police (1937) 39 NLR 193.

[3] See also ARB Amerasinghe, 'H.V. Perera', in *Legal Personalities: Sri Lanka* (Law & Society Trust 2005) 186–253 (H.V Perera was the lawyer for the applicant); AJ Canagaratna (ed), *Selected Writings of Regi Siriwardena* (International Centre for Ethnic Studies 2006) 307–329; Wesley S Muthiah & Sydney Wanasinghe (eds), *The Bracegirdle Affair* (Young Socialist 1999).

[4] KM de Silva, *A History of Ceylon*, (Vijitha Yapa 2005) 540. The Donoughmore Constitution (named after the Earl of Donoughmore who chaired the commission on constitutional reform appointed in 1927) provided limited self-government to colonial Ceylon and came into effect in 1931.

[5] JAL Cooray, *Constitutional and Administrative Law of Sri Lanka (Ceylon)* (Hansa Publishers 1973) 508–510.

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Section 29(2) that restrained Parliament from passing legislation that would infringe the rights of different ethnic and religious communities.[6]

In this section we examine illustrative examples of how the courts reviewed executive power in the immediate aftermath of independence, as a prelude to examining more recent interpretations of rights thereafter. We consider interpretations of Section 29 as an illustration of how the SC grappled with constitutional interpretation in this period, consider briefly the case of *Nakkuda Ali*¸ which had ramifications for the growth of administrative law in many parts of the Commonwealth, and contrast these decisions with the more expansive interpretations of the separation of powers doctrine and personal liberty, in some other cases decided by the SC.[7] While judicial review of legislation was not expressly provided for in the 1948 Constitution, the courts took the position that they could exercise this power.[8]

No law was declared to be invalid on the grounds that it violated Section 29(2) and this may have had implications on why Tamil groups resorted to violence in the 1970s and 1980s. In the early years after independence, several issues of fundamental constitutional importance surfaced, including those relating to minority rights, but the courts tended to bypass them, deciding these cases on narrow technical issues.[9] The central questions were often addressed only superficially, if at all; the conclusions being based on technical reasoning, as the following cases illustrate.

In the cases of *Kodakan Pillai* and *Mudanayake*, the validity of the *Citizenship Act* and the *Ceylon (Parliamentary Elections) Amendment Act* were challenged on the ground that they violated Section 29 of the Constitution.[10] The cumulative effect of these Acts was to disenfranchise large numbers of Tamils of recent Indian Origin.[11]

The SC in *Mudanayake* rejected the contention that the statutes conflicted with Section 29 and refused to consider the social and political impact of the legislation or their motives. On appeal (reported as *Kodakan Pillai v Mudanayake*), the Judicial Committee of the Privy Council (PC) held with the SC that the legislation did not make persons of the Indian Tamil community subject to disabilities other communities were not subject to. Ignoring the cumulative impact of these two laws, the court held that it would not be 'astute' to attribute to Parliament objects or motives which are beyond its power. The petitioner had failed to establish that the legislature had done an act indirectly, which it had no power to do directly. De Silva observes that '(t)hese decisions had a profound effect on the subsequent political history of Sri Lanka, … to the detriment of the

[6]Constitution of the Dominion of Ceylon 1947, s 29(2), in Legislative Enactments of Ceylon (1956 Edition), vol XI ch 379. The 1947 Constitution was contained in the Ceylon (Constitution) Order in Council 1946, the three Ceylon (Constitution) (Amendment) Orders in Council of 1947, and the Ceylon (Independence) Order in Council of 1947. Cooray, citing Jennings, suggests that Section 29(2) was modelled on section 5 of the Government of Ireland Act of 1920: Cooray, *Constitutional and Administrative Law of Sri Lanka* (n 5) 509. In *Bribery Commissioner v Ranasinghe*, Lord Pearce commenting on Section 29 observed that '(t)he entrenched religious and racial matters, which shall not be the subject of legislation … represent the solemn balance of rights between citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution': (1964) 66 NLR 73, 78. See also *Ibralebbe v The Queen* where Viscount Radcliffe observed that the reservations contained in section 29(2) were 'fundamental': 65 NLR 433, 443.

[7]Jennings was to later regret his decision on the exclusion of a Bill of Rights. In a talk over the British Broadcasting Corporation's Overseas Service in 1961, he stated that a Bill of Rights would have been desirable for a society like Ceylon. He noted, 'If I knew then, as much about the problems of Ceylon, as I do now, some of the provisions would have been different': Cooray, *Constitutional and Administrative Law of Sri Lanka* (n 5) 509.

[8]MJA Cooray, *Judicial Role Under the Constitutions of Ceylon/ Sri Lanka: An Historical and Comparative Study*, (Lake House Investments 1982).

[9]*Kodakan Pillai v Mudanayake* 54 NLR 433, *Mudanayake v Sivagnanasunderam* 53 NLR 25, and *Sundaralingam v I.P. Kankasanthurai* 74 NLR 457 were unsuccessful attempts.

[10]*Kodakan Pillai v Mudanayake* (1954) 54 NLR 433; *Mudanayake v Sivagnanasunderam* (1951) 53 NLR 25.

[11]For a discussion of some of the social and political issues pertaining to the Up-country Tamils, or Tamils of recent Indian origin, see Daniel Bass & B Skanthakumar (eds), '*Up-country Tamils: Charting a New Future in Sri Lanka*' (ICES 2019).

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minorities. … Had those decisions gone the other way, the political history of modern Sri Lanka would in all probability have been quite different'.[12]

In a subsequent case the courts took an even more technical approach with regard to minority rights. In *Attorney General v Kodeswaran*, a government officer challenged the validity of a government circular.[13] The circular was issued as a consequence of the *Official Languages Act* – which made Sinhala, the language of the majority community, the sole official language. The circular made it imperative that the officer, a Tamil, acquire a proficiency in Sinhala. The circular was challenged on the grounds that it violated Section 29 of the Constitution.

The District Court upheld the plaintiff's contention. The SC however, set aside the lower court's judgement on the ground that the plaintiff had no legal right which could be made the subject of a declaration. The major issues – the validity of the Official Languages Act and the circular – were not addressed. On appeal, the PC too bypassed the main issue.[14]

A similar technical and narrow approach to judicial interpretation is evident in the case of *Nakkuda Ali*. In *Nakkuda Ali,* the Controller of Textiles had withdrawn a textile dealer's license.[15] The Controller had written to the trader and given him an opportunity to reply to the charges against him. The trader's lawyer was permitted to make representations before the Controller and the trader was also permitted to appear at an inquiry held before an Assistant Controller. The SC held that the circumstances demanded a hearing and that a hearing had been provided. On appeal, however, the PC held that the circumstances of the case did not warrant a hearing. The PC held that the Controller of Textiles was not determining a question, but only withdrawing a privilege. He was thus not acting judicially or quasi-judicially, and consequently, a hearing was not required. The duty to observe the rules of natural justice arose only in circumstances where the body was performing a judicial or quasi-judicial function. Since it was a PC decision, this approach to natural justice had consequences for the evolution of administrative law in several parts of the Commonwealth, till it was overruled by the House of Lords in *Ridge v Baldwin*.[16]

These narrow judicial approaches to minority rights and natural justice by the SC and PC, must be contrasted with the bolder approaches to interpretation adopted by the SC in other cases relating to freedom of movement and illegal detention during this period, and the separation of powers. In a case involving the impounding of a passport, the SC held that unreasonable restrictions could not be placed on the freedom of movement of a person who was in possession of a valid passport and return ticket, and that he should be entitled to leave and return to the country unhindered.[17] In similar vein, an Emergency Regulation issued under the *Public Security Ordinance*, that sought to prevent the SC from granting a writ of habeas corpus, was held to be inapplicable in those cases where the detention order was illegal and therefore the detention was unlawful.[18]

The interpretations given to the separation of powers in the case of *Liyanage* had important consequences for constitutional government in the country.[19] The case emerged after a group of retired military and police officers attempted overthrow the elected government in January 1962 and

[12]HL de Silva, 'Pluralism and the Judiciary in Sri Lanka', in Neelan Tiruchelvam & Radhika Coomaraswamy (eds), *The Role of the Judiciary in Plural Societies* (Frances Pinter 1987) 86, 87.

[13]70 NLR 121.

[14]*Kodeswaran v Attorney General* 72 NLR 337.

[15]*Nakkuda Ali v Jayaratne* [1951] AC 66 (PC).

[16]*Ridge v Baldwin* [1964] AC 322. See Sir William Wade & Christopher Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 414–417.

[17]*Aseerwathan v Permanent Secretary, Ministry of Defence* (case citation unknown); LG Weeramantry, 'Digest of Judicial Decisions on Aspects of the Rule of Law' (1965) VI(2) Journal of the International Commission of Jurists 307, 319–320.

[18]*Hirdramani v Ratnavale* 75 NLR 67.

[19]*Liyanage v The Queen*, where the Privy Council held that the constitution recognised a separation of powers and neither the legislature nor executive could usurp the powers that legitimately belonged to the judiciary: 68 NLR 265; 1 All ER 650 (PC).

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capture state power.[20] Since the then existing criminal law, the law of evidence, and law of criminal procedure was inadequate, Parliament passed a special law, to respond retrospectively, to the events of January 1962.[21] The SC held that that the attempt of the Minister of Justice to constitute a trial-at-bar to try 24 persons who were involved in the coup in 1962, was unconstitutional. According to the court the judicial power vested in the judiciary alone and therefore the Minister's act was unconstitutional.[22] The PC in a similar decision held that the legislature had encroached on the separation of powers, by passing the law in question.[23]

The decision led one scholar to describe it as 'the most remarkable exercise in judicial activism performed by the Privy Council';[24] and another to remark that that '… no other Ceylon case attracted so much attention, admiration and criticism as did *Liyanage v The Queen*'.[25] This case parallels a case in 2018, which also had important implications for constitutional government in the country, discussed below.[26] However, it was in relation to the rights of the minorities, both the Northern Tamils and the Tamils of recent Indian origin, where narrow interpretations of Section 29(2) of the Constitution by the SC and PC at that time, had the most impact and contributed to the resort to extra-constitutional means by Tamil groups to achieve their political goals.

Against this backdrop of contrasting judicial interpretations soon after independence, we move in the next section to analysing judicial developments after the adoption of the 1978 constitution, and consider in some detail how the constitutional foundation provided to the writs and the introduction of a Bill of Rights in that constitution influenced judicial interpretations and created a more effective framework for the scrutiny of administrative and executive power and the protection of rights and freedoms.

A New Phase in Judicial Interpretation: Mixing Writs and Rights

In the 1990s, the interpretation of constitutional rights and administrative law concepts went through a sharp transformation under the Supreme Court, headed by former Chief Justice GPS de Silva, with Justices Mark Fernando and ARB Amerasinghe playing important roles in the development of the jurisprudence during that period. These developments have had important implications on how the courts have supervised the exercise of administrative and executive action since then and strengthened the capacity of the courts to review the acts of state entities.

In this section we analyse through illustrative examples from the case law, the changes during this phase of judicial interpretation. We first look at how the constitutional foundation that was provided to the writs in 1978 presented a platform to move away from older interpretations that had previously hampered the development of the writ jurisprudence. Thereafter, we consider writ applications in which the court relied on fundamental rights standards to review administrative action and the emergence of a new ground of 'rights-based' review associated with the writs.

We then examine and reflect on examples where the SC drew on established standards of judicial review from administrative law – natural justice, the right to receive reasons, unreasonableness, and legitimate expectation – to expand the interpretation of the constitutional right to equality and equal protection.

[20]Donald Horowitz, *Coup Theories and Officers' Motives: Sri Lanka in Comparative Perspective* (Princeton University Press 1980).

[21]*The Criminal Law (Special Provisions) Act,* No 1 of 1962.

[22]*The Queen v Liyanage* (1962) 64 NLR 313 (SC).

[23]The PC observed: 'The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to, or be shared by, the executive or the legislature': *Liyanage v The Queen*, (1965) 68 NLR 265, 282; [1966] All ER 250, 658.

[24]SA de Smith, 'The Separation of Powers in a New Dress' (1966) 12 McGill Law Journal 491, 492.

[25]Cooray, *Judicial Role* (n 8) 157.

[26]*Sampanthan v Attorney General*, SC Minutes (13 Dec 2018).

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Apart from the fusion of the writs and the rights, public law has also been transformed by other developments. In this section we reflect on three important developments. We then discuss the emergence of two key concepts, 'fairness' and the 'public trust doctrine' that have influenced the SC's interpretation of Article 12 and consequently strengthened it capacity to review executive action. After that, we examine changing approaches to the rules of standing in both the writ and fundamental rights jurisdictions and considers how public interest litigation has become entrenched part of public law in Sri Lanka. Finally, we look at how the SC has used its constitutional 'just and equitable jurisdiction' and has given a range of different orders. These three developments have also facilitated the creation of a more effective legal regime to supervise the exercise of public power.

The Writs and the Constitution

Although the writ jurisdiction had been exercised by the courts for over a century, the 1978 Constitution provided a constitutional foundation to the writ jurisdiction for the first time.[27] The Court of Appeal (CA) was given the power to issue writs, and through a constitutional amendment in 1987 the Provincial High Courts were given the power to issue writs in limited circumstances.[28] In some circumstances Parliament may specify that the writ jurisdiction of the CA be exercised by the SC.[29]

Using the constitutional foundation as a basis, the SC departed from previous restrictive interpretations and asserted that the power of the courts to issue writs after the adoption of the 1978 Constitution was a very broad power. According to the SC, the courts' powers under Article 140 is not confined to the prerogative writs or the 'extraordinary remedies' but extends subject to the provisions of the Constitution, to orders '*in the nature of writs*'. As several decisions have asserted, the power of the CA under Article 140 of the Constitution to issue writs is an '*unfettered one*'.[30] According to the SC, '… no obligation or deference is due to the Crown or its agents, and these 'orders' are one of the principal safeguards against abuse of power by the executive'.[31]

The current Sri Lankan Constitution contains a provision that preserves past law even though it conflicts with the provisions on fundamental rights in the Constitution.[32] This was done mainly to preserve the legality of the Muslim Law and Tesavalamai, two personal laws with a history that goes back to colonial times, and that apply in limited circumstances.[33] This is subject to the provision that past laws are valid 'unless the Constitution otherwise provides'.[34] This provision was used

[27]There was a brief reference to the power of the courts to issue writs in the 1972 Constitution's Article 121(3). The power to grant writs was provided for by ordinary law in the Courts Ordinance, No 1 of 1889, and prior to that by the Administration of Justice Ordinance, No 11 of 1868, and the Royal Charters of Justice of 1833 and 1801. See Sunil Coorey, *Principles of Administrative Law in Sri Lanka* (vol II, 4th edn, self-published 2020) 888–893 for a discussion of this history. See also the Administration of Justice Law, No 44 of 1973.

[28]See 1978 Constitution, arts 140, 141, 142 and 154P; Coorey (n 27) 892–896.

[29]See 1978 Constitution, art 140 (proviso). Article 140 provides that as a general rule the Court of Appeal will have the power to issue writs. However, Parliament may specify that in some circumstances the Supreme Court shall exercise that jurisdiction and not the Court of Appeal.

[30]See *Peter Attappattu v People's Bank* [1997] 1 Sri LR 208; *Sirisena Cooray v Tissa Dias Bandaranayake* [1999] 1 Sri LR 1; *Wijayapala Mendis v P R P Perera* [1999] 2 Sri LR 110; and *Moosajees v Arthur*, SC Minutes (5 Dec 2002).

[31]*Heather Therese Mundy v Central Environmental Authority*, SC Minutes (20 Jan 2004) (Judgment of Mark Fernando J) and followed by several decisions of the Supreme Court since then.

[32]See Article 16 (1) of the Constitution which states that 'All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter'.

[33]For a discussion of the three personal laws, Kandyan Law, Muslim Law and the Thesavalamai, see Lakshman Marasinghe and Sharya Scharenguivel, (eds), *Compilation of Selected Aspects of The Special Laws of Sri Lanka* (Vijitha Yapa, 2015).

[34]See Constitution, art 168.

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by the courts to argue that in the case of the writs the '*constitution does provide*', and therefore the past law dealing with writs is of limited relevance after the 1978 Constitution.[35]

In a case involving the impeachment of a Chief Justice, the CA held that the writ jurisdiction extended to reviewing the acts of Parliament and its committees.[36] However, this case was overruled by the SC in appeal which held that the power of the CA did not extend to Parliament and its Select Committees.[37]

These interpretations of the Constitution have had other implications. Because the provisions dealing with the writ jurisdiction are brief and less curtailed by procedural restrictions like those which apply to fundamental rights, the courts will be able to develop the writ jurisdiction in a way that advances rights and promotes judicial review over administrative discretion in a more robust way.

Article 12 and the Writs

Sri Lankan courts have accepted for some time now that administrative acts must be lawful, reasonable and in accordance with the rules of natural justice – the traditional grounds of judicial review in administrative law. The courts have also accepted proportionality and legitimate expectation as additional grounds of review in some cases. There have also been a series of cases that have held that public law requires the disclosure of reasons for decisions, either to the applicant, or at least to the court when the matter is litigated.

Beyond that, there are a select group of cases where the court has held that administrative acts must not contravene fundamental rights and specifically Article 12(1) of the constitution, the guarantee on equality and equal protection of the law.[38] In exercising the writ jurisdiction the SC has observed that power must be exercised fairly and without discrimination and so as not to infringe the fundamental right to equality in the constitution. As a result of this interpretation, fundamental rights and specifically the right to equality and equal protection, with all its ambiguities, has emerged as an additional ground of review in a writ application.

In an application for mandamus, the SC observed that a public authority must act fairly and consistently. If it makes inconsistent decisions, unfairly or unjustly, it misuses its powers. This would be discriminatory and unlawful and in violation of Article 12 of the Constitution. The court observed that although the case was not an application for a violation of fundamental rights, acts of officials contravening Article 12 of the Constitution were unlawful, not permitted and of no force or avail in law.[39]

In other applications for a writ, the SC has asserted that the guarantee of equality contained in Article 12 of the Constitution required that discretionary power be exercised in a non-discriminatory manner and in consonance with Article 12. In an application for mandamus by a student of fine arts, the court observed that Article 12 of the Constitution, when read together with the rules and examination criteria of the University, gave a duly qualified candidate a right to a degree. The university had a duty to award the degree without discrimination, and even where the university had reserved some discretion, such discretion should be exercised without discrimination.[40]

In developing a duty to provide reasons for administrative decision-making, the SC has referred to Article 12 to support its conclusion that natural justice required that reasons be provided for

[35]See the cases cited in (n 31) and (n 32). For a different view, see *Pigera Jayawardena v Pegasus Hotels*, Court of Appeal Minutes (23 Sep 2004).

[36]*Dr Shirani Bandaranayake v Chamal Rajapakse, Speaker of Parliament*, CA (Writ) Application No 411/2012, CA Minutes (7 Jan 2013).

[37]*Attorney General v Shirani Bandaranayake*, SC Appeal No 67 of 2013, SC Minutes (21 Feb 2014).

[38]Constitution, art 12(1): '*All persons are equal before the law and are entitled to the equal protection of the law*'.

[39]*Piyadasa v Land Reform Commission*, SC Minutes (8 Jul 1998) 23.

[40]*Perera v Prof Daya Edirisinghe* [1995] 1 Sri LR 148, 156.

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public decisions.[41] The giving of reasons was an important 'protection of the law' as contained in Article 12 of the constitution and facilitated a subsequent review of the decision. Article 12 made it 'even more compelling' that a person be told the reasons for an adverse decision, said the court. The CA has held that natural justice is an integral part of equality assured by Article 12 and administrative actions must be fair, just, and reasonable.[42]

This reasoning was taken a step further in a recent case that involved a challenge to a court martial. The petitioner had been convicted for murder and sentenced to life imprisonment by a court martial under the *Air Force Act*.[43] One of the main arguments of the petitioner was that no reasons were provided by the members of the court martial for their decision. The CA was emphatic that reasons should have been provided for the decision and that this failure meant that certiorari would be issued to quash the decision. Reasons were part of the rule of law, a basic requirement of natural justice and inherent in the justice system of 'any civilized society'.[44] The court referred to both Article 12(1) and Article 13 (4) of the Constitution to support its decision.

Article 13(4) of the Constitution states that, 'No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law'. In interpreting this provision, the court observed:

> Procedure established by law' encapsulates within its orbit reasons for decisions as a requirement of the law, particularly when, I stress, a man is convicted of murder and punished with the death sentence or life imprisonment.[45]

In *Mundy*, the Court held that the appellants were entitled to notice and to be heard because their 'fundamental right to equal treatment and equal protection of the law' entitled them to notice and a hearing.[46] What previous cases established was that the actions of a public authority must harmonise with Article 12 of the Constitution: the right to equality before the law and equal protection of the law. Where the actions of a public body fail to meet this test, then such actions can be struck down by way of an application for a writ under Article 140 of the Constitution.[47] Some later cases have taken this jurisprudence one step further by holding that a public authority's actions must not violate *any* of the fundamental rights, not just Article 12, and if this test is not met then a remedy under Article 140 will issue. As the SC noted in *Mundy*:

> … 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.[48]

Article 12 has been relied on in cases from other areas of the law as well. In a criminal appeal against a conviction of murder, one of the judges of the SC referred to the fundamental right to a fair trial

[41] *Karunadasa v Unique Gemstones*, [1997] 1 Sri LR 256. See also the dissenting judgment of Justice Kodagoda in *Jayalath v Karannagoda*, SC Minutes of 11 January 2023, 129 – 130.

[42] *Rajakaruna v University of Ruhuna*, CA Minutes (19 Jul 2004).

[43] *Kumara v Gunathilaka*, CA Minutes (1 Jun 2020).

[44] ibid 16.

[45] ibid 120. However, see *Jayalath v Karannagoda*, (n 41), where a majority held that a Court Martial is *not* required to provide reasons. Justice Kodagoda, after a detailed review of Sri Lankan, Indian, and English case law and academic writing, dissented, holding that both the common law and Article 12 of the Constitution imposed a duty on a Court Martial to provide reasons. It is submitted with respect, that Justice Kodagoda's view is the 'better reasoned' one. See also s 35 of the Right to Information Act, No 12 of 2016, that requires the disclosure of reasons.

[46] *Mundy* (n 31) 14.

[47] *Perera* (n 40), *Karunadasa* (n 41), and *Piyadasa* (n 39).

[48] *Mundy* (n 31) 14.

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contained in Article 13(3) of the Constitution in overturning the conviction.[49] Failure to disclose relevant information to the accused violated the constitutional guarantee and therefore the conviction would be quashed in appeal.

In an action brought under Article 99(13) of the Constitution, the SC noted that Article 12 demanded an expansive, rather than a restrictive interpretation of the principles of natural justice.[50] To the court, fairness lay at the root of equality and equal protection.[51] In a similar application under Article 99(13) it was held that the Constitution of a political party cannot be framed in such a way as to oust a remedy provided in the Constitution.[52] Under Sri Lanka's proportional representation system a Member of Parliament (MP) who is expelled from his or her party automatically loses his or her seat in Parliament. However, the MP has the right to petition the SC within a month and the court has held in a number of cases that the court's inquiry in these cases is not confined to reviewing for legality but extends to a review of the merits as well.[53] In this case, the court held that a provision in the Constitution of the United National Party was inconsistent with this remedy and was in breach of the rules of natural justice.

Redefining Article 12 of the Constitution

In 1972, the country adopted a Bill of Rights for the first time. However, lawyers, judges and activists made limited use of this and its impact on the legal system and political culture of the country was marginal. The 1978 Constitution included a Bill of Rights with a specific remedy.[54]

In its interpretation of that Bill of Rights, the SC was initially hesitant to strike down governmental action as being a violation of fundamental rights. Few petitions succeeded, and the interpretations placed on the standards were narrow. This was a result of several factors. First, it was a new jurisdiction, and the court was hesitant to develop broad interpretations of rights. Second, there was an ongoing ethnic war and the court's interpretation of rights such as the freedom from torture and illegal arrest tended to favour the state. Third, the court itself was reconstituted with the adoption of the new constitution in where some judges were not appointed to the new court and others were demoted.[55] Fourth, when the court did hold against the state, there was intimidation on the part of the state. For example, in *Vivienne Goonewardena*, days after the court decision holding that the fundamental rights of a politician had been violated by the police, mobs demonstrated outside the houses of the judges involved. The President spoke out against the decision, the state paid the compensation on behalf of the police officers, and the police officers involved were promoted.[56]

In the second phase, beginning around 1989, the fundamental rights jurisdiction proliferated. The rate of petitioner success was higher, and this fueled even more applications. Many of the older interpretations of rights were jettisoned and the SC began to develop a new jurisprudence on fundamental rights.[57] In a fundamental rights application, the SC is both the first and final

[49]*Danwatte Wijepala v The Attorney-General*, SC Minutes (5 Dec 2000). Reported in (2001) 161 Law & Society Trust Review 39.

[50]*Dissanayake v Kaleel* [1993] 2 Sri LR 135, 184.

[51]ibid.

[52]*Rohitha Bogallagama v United National Party*, SC Minutes (15 Feb 2005).

[53]Constitution, Art 99(13). *Sarath Amunugama v Karu Jayasuriya* [2000] 1 Sri LR 172; *Dissanayake v Kaleel* [1993] 2 Sri LR 135; *Jayatillake v Kaleel* [1994] 1 Sri LR 319; *Gooneratne v Premachandra* [1994] 2 Sri LR 137; *Silva v Kaleel* [1994] 3 Sri LR 138; *Galappaththi v Bulegoda* [1997] 1 Sri LR 393; *Ramamoorthy v Douglas Devananda* [1998] 2 Sri LR 278.

[54]Constitution, art 17; Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (3rd edn, Stamford Lake 2021).

[55]Constitution, art 163.

[56]Mario Gomez, 'The Failure of Transformative Constitution-Making in Sri Lanka', in Ngoc Son Bui & Mara Malagodi (eds), *Asian Comparative Constitutional Law Volume 1 – Constitution-Making* (Hart, forthcoming 2023).

[57]Mario Gomez, 'The Supreme Court in the 1990s: Controlling Public Power through the Law' [2000] Bar Association Law Journal 54; Mario Gomez, 'Fundamental Rights and the Sri Lankan Supreme Court' (1995) 8 Colombo Law Review 73.

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court of adjudication. The court has adopted a two-tiered process: a 'leave to proceed' stage, often without reasons, and a final adjudication on the merits of the case. Applications are argued and disposed of within 18 to 24 months, and in the context of lengthy delays in the courts system, this has encouraged many petitioners to couch their claims as rights claims.

Starting around the 1990s, the SC began to use older administrative law jurisprudence to define the right to equality and equal protection under the Constitution.[58] Established standards of judicial review – natural justice, the right to receive reasons, unreasonableness, legitimate expectation and proportionality – were relied on by the court in its interpretation of the constitutional right to equality and equal protection.[59] In several cases the SC relied extensively on English and Commonwealth administrative law authorities, in its interpretation of Article 12.[60] Two judicial personalities had an important impact on how the jurisprudence evolved in the 1990s: Justices ARB Amerasinghe and Mark Fernando. The Chief Justice at that time also ensured that the court was not drawn into political controversy and stayed independent. Moreover, the political culture, which did not result in judges facing adverse consequences when they held against the state, enabled the court to be bold and principled in its approach to judicial interpretation.

The SC has continued to apply this approach. In 2019, the court conducted a detailed analysis of the English, Indian and Sri Lankan law on legitimate expectation and held that the court will consider the arbitrary frustration of a petitioner's legitimate expectation in deciding if there had been a violation of Article 12 of the Constitution.[61]

Administrative law ideas, stemming from a much older jurisprudence, and one with which the courts of the country were more familiar, has provided an important resource for judges to dip into in developing the more recent fundamental rights jurisprudence. Sri Lankan judges have not been reluctant to do that. The availability of well-developed administrative jurisprudence in English law and other jurisdictions have facilitated this process.

The argument thus far has been that the fusion of writs with rights has created a more effective public law framework for reviewing executive power. Article 12 has been expanded through a reliance on administrative law concepts, and the ambit of writs has been expanded by reviewing executive acts against rights-based standards. The next three sub-sections look at three key developments which also contributed to strengthening the legal regime to review the exercise of public power. We look first at the emergence of the concepts the public trust and fairness. Next, at the emergence of public interest litigation, and then at how the SC has developed new remedies for a violation of fundamental rights.

Fairness and the Public Trust Doctrine

Since the 1990s, two key concepts have shaped the SC's interpretation of the equality and equal protection constitutional guarantee: fairness and the public trust doctrine. Through a process of judicial interpretation, the right to equality and equal protection of the law has emerged as a *de facto* right to 'fair and just administrative action'.

[58]Gomez, 'Blending Rights with Writs' (n 1); Gomez, 'The Modern Benchmarks' (n 1).

[59]See for example *Sirimal v Board of Directors, CWE* [2003] 2 Sri LR 23, where the Supreme Court dealt at length with substantive and procedural legitimate expectations in the context of Article 12. See also *Sampanthan v Attorney General* (n 26) where the court said that the right to equality and equal protection of the law in Article 12(1) provided protection against arbitrary and the mala fide exercise of power while guaranteeing natural justice and legitimate expectations.

[60]See for example the cases of *Hapuarachchi v Commissioner of Elections* and *Deepthi Gunaratne v Commissioner of Elections*, SC Minutes (19 Mar 2009).

[61]*Ariyarathne v Inspector-General of Police*, SC Minutes (30 Jul 2019) 56 (per Prasanna Jayawardena J). See also *Fernando v Associated Newspapers of Ceylon* [2006] 3 Sri LR 141, 147, *Nimalsri v Fernando*, SC FR No 256/2010, SC Minutes of 17 September 2015], and *Dayaratne v Minister of Health and Indigenous Medicine*, [1999] 1 Sr LR 393.

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In several cases, the SC has noted that public power must be exercised fairly, which has meant that public power must be exercised openly, reasonably, rationally, and for proper purposes. In some instances, this would mean that rules of natural justice should be observed before power is exercised. It also means that reasons should exist before power is exercised. They may not always have to be disclosed to the person affected but they will certainly have to be disclosed to the court if the exercise of that power is challenged. Fairness also meant that the state should observe rigorously its own internal standards and guidelines. Fairness may also require a response that is proportionate to the alleged misconduct. To the SC, 'fairness lay at the root of equality and equal protection'.[62]

The other key concept that has shaped the law in this area has been the concept of 'the public trust'. The court has observed that those who wield public power hold such power in trust.[63] Discretionary powers given to public institutions are never untrammeled. They are to be used to achieve the purpose for which they were conferred. Arbitrary and unreasonable decisions are the antithesis of fair play and equal treatment and violate the 'trust' placed in public officials. The legislature, executive and the judiciary are trustees by virtue of being custodians of powers vested in them by the constitution, and their powers must be exercised for and on behalf of the People and for no other purpose.[64] In *Mundy*, the SC brought the notion of the public trust into an application for a writ and held that it was a separate ground of review.

The Emergence of Public Interest Litigation

One of the most remarkable transformations in public law has occurred with regard to *locus standi*. The older approach to standing is illustrated by the PC decision in *Durayappah v Fernando*, where Alfred Durayappah, Mayor of Jaffna, sought judicial review of the dissolution of the Municipal Council of Jaffna by the Minister of Local Government. The PC held that the Minister should have observed the rules of natural justice and heard the Council before dissolution. However, it was held that the mayor lacked standing to question this action and the acts of the Minister could only be declared invalid on an application brought by the Municipal Council, not the mayor. The Minister's action in dissolving the Council was not a 'nullity' but was only 'voidable' in an action by the Council.[65]

For many years, Sri Lankan public law seemed immune to the huge shift that had occurred in India, where public interest litigation was making waves.[66] Even as late as 1990, the Sri Lankan SC refused to permit a wife to appear on behalf of her husband in a case involving an allegation of torture.[67] Twelve years later, the SC permitted a widow to institute an action under Article 126

[62]See Gomez, 'Blending Rights with Writs' (n 1) and Gomez, 'The Modern Benchmarks' (n 1) for an analysis of previous case law.

[63]See eg, *Premachandra v Montague Jayawickrema* [1994] 2 Sri LR 90; *de Silva v Atukorale* [1993] 1 Sri LR 283; *Jayawardene v Wijayatilake* [2001] 1 Sri LR 132; *Bandara v Premachandra* [1994] 1 Sri LR 301; *Mundy* (n 31); *Sugathapala Mendis v Chandrika Kumaratunga* [2008] 2 Sri LR 339; and the 'Chunnakam Case', ie, *Gunawardena v Central Environmental Authority*, SC Minutes (4 Apr 2019).

[64]Supreme Court Special Determination on the 'Special Goods and Service Tax' bill, SC SD 01-9/2022, 22–23.

[65]*Durayappah v Fernando* (1969) 69 NLR 265 and [1967] 2 AC 337. This case must be contrasted with the bolder approach of the Judicial Committee of the Privy Council on the separation powers in *Queen v Liyanage*, discussed above.

[66]Mario Gomez, *Emerging Trends in Public Law* (Vijitha Yapa 1998); Mario Gomez, *In the Public Interest: Essays on Public Interest Litigation and Participatory Justice* (University of Colombo 1993); Mario Gomez, 'Litigating to Change: Public Interest Litigation and Sri Lanka' [2004] Law College Law Review 104. See also Dinesha Samararatne, 'Judicial borrowing and creeping influences: Indian jurisprudence in Sri Lankan public law' [2018] Indian Law Review 205 (for an analysis of the influence of Indian jurisprudence on Sri Lankan public law).

[67]*Somawathie v Weerasinghe* [1990] 2 Sri LR 121. One of the judges dissented in this case.

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of the constitution where her husband had died as a result of being tortured by the respondents.[68] Today, public interest litigation is an important part of the legal landscape of the country.[69]

Between 1987 and 1989, the political violence of the Janatha Vimukthi Peramuna (People's Liberation Front, or JVP) also had an impact on how the rules of standing evolved in Sri Lanka. The violence of that period resulted in the incarceration of several thousand persons under emergency regulations and the national security laws in place at that time. In a series of cases that was referred to as the '*Boosa Applications*', the situation of several thousand persons who were held in detention were reviewed and relief provided.[70]

In November 1989, the Chief Justice received a letter purportedly signed by over 1,000 persons detained in the Boosa Detention Camp. The letter alleged that the signatories were being unlawfully detained and sough release or early trial. After hearing the Attorney-General, the Court decided not to pursue the matter.[71] Another letter was received by the Chief Justice in January 1990. This time after hearing the Attorney-General, the SC directed the Secretary of the Ministry of Defence to provide an opportunity for the detainees to prepare affidavits and to enable them to bring their cases before the court.[72] Several more letters reached the court and by the end of 1993, 5,457 letters had been received by the court from those being detained.[73]

The court responded to these letters despite the absence of specific legal procedures.[74] Where there was prima facie evidence to show that the detention was unconstitutional, leave to proceed was granted and the matter adjudicated as a fundamental rights application. These procedures were then incorporated into the Supreme Court Rules in April 1992.[75] These procedures were similar in many respects to the procedure followed by the Indian Supreme Court in public interest litigation where letters are converted to writ petitions and the matter adjudicated.

It was in the writ jurisdiction however, that changes to standing rules first began to occur, influenced by changes in English law and other Commonwealth jurisdictions.[76] In an early case, the court permitted a MP to appear on behalf of applicants who sought employment in the public service.[77] In a case involving the proposed mining of a phosphate deposit in North-Central Sri Lanka, the court observed that the several petitioners had a right to be before the court and were not disqualified merely because their rights were collective in nature, and linked to the rights shared by the other people of the country.[78]

A year later, this position was taken a step further when the SC concluded that a citizen's right to vote includes the right to freely choose her representatives through a genuine election which

[68] *Sriyani Silva v Iddamalgoda* [2003] 1 Sri LR 14. On the right to life, see *Vidanage v Jayasundara*, SC Minutes of 11 January 2023 (the Easter Bombings case).

[69] *Environmental Foundation v UDA* (henceforth the 'Galle Face' Case), SC Minutes (28 Nov 2005); *Sugathapala Mendis, Azath Salley v Colombo Municipal Council* [2009] 1 Sri LR 365; Chunnakam Case (n 63).

[70] Gomez, 'Emerging Trends' (n 66) 30–34; Gomez, 'Fundamental Rights' (n 57).

[71] SC Application No 6/89 (Spl), Order of the SC (4 Dec 1989).

[72] SC Order (19 Jan 1990).

[73] Minute of the Registrar of the SC (1 Mar 1994); see Gomez, 'Emerging Trends' (n 66) 31.

[74] See SC Order (18 Sep 1990).

[75] Constitution, art 136. See [1992] 4 Bar Association Law Journal (Supplement); Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary), No 665/32 (7 Jun 1991).

[76] *Forbes & Walker Tea Brokers v Maligaspe* [1998] 2 Sri LR 378, 407 and 409; *Merill v Dayananda v Silva* [2001] 3 Sri LR 11, 41–42; *Dilan Perera v Rajitha Senaratne* [2000] 2 Sri LR 79, 100–101, *Public Interest Law Foundation v the Attorney General*, CA Minutes (17 Dec 2003); *Perera, Chairman, Ceylon Association of Ships' Agents v Central Freight Bureau,* CA Minutes (10 Jan 2005); *Environmental Foundation v A H M Fowzie*, CA Orders (8 Jul and 25 Jul 2005); *Dr Piyasena Dissanayake v Nanayakkara*, CA Minutes (8 Nov 2004); *Jayatilleke v Jeevan Kumaratunge,* CA Minutes (29 Jul 2004). On third party intervention see *Shell Gas v Consumer Affairs Authority*, CA Minutes (23 Aug 2004).

[77] *Wijesiri v Siriwardene* [1982] 1 Sri LR 171. See also *Bandaranaike v de Alwis* [1982] 2 Sri LR 664; *Lalanath de Silva* v *Ekanayake*, SC Minutes (2 Nov 1999); *Gunaratne v Kotakadeniya* [1990] 2 Sri LR 14; *EFL v Land Commissioner* (1994) 1 South Asian Environmental Law Reporter 53.

[78] *Bulankulama v Minister of Industrial Development* [2000] 3 Sri LR 243, 258 (per ARB Amerasinghe J).

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guarantees the free expression of the will of the electors: not just her own. A citizen is not only entitled to vote at a free, equal, and secret poll, but has the right to a genuine election guaranteeing the free expression of the will of the entire electorate to which she belongs.[79]

The petitioners' complaint was not that '*their*' right to vote was infringed. Instead, their complaint was that the right of '*others*' to vote was infringed. The petitioners were given standing because, in the eyes of the court, the infringement of another's right to vote affects the rest of the population in that electoral district too.[80] Where the 'just and equitable relief' that the court granted would have an impact on the general public, standing rules should be broadened to enable public interest litigation.[81]

In a subsequent case, the SC, departing from previous authorities, held that the wife of a person who had died had the right to file an application under Article 126 of the Constitution.[82] In its first order dealing with two preliminary objections, the SC held that 'every right must have a remedy'. It would be absurd to contend that a right ceased and became ineffective due to death. The court noted that a literal interpretation of the constitution must be avoided if it were to produce such an 'absurd result'.[83] In its final order in the same case, the court recognised that the right to life was implied in the constitution, especially in Article 13(4).[84] Where an infringement of the right to life was concerned, the court must interpret the word 'person' contained in Article 126(2) broadly, so as to include an heir or dependent of the person who had been put to death.[85] This reasoning has been followed in subsequent cases.[86]

On the other hand, a trade union was denied the right to represent its members on the basis that the application was not a public interest petition, nor was it filed on behalf of a socially disadvantaged group.[87] Standing was also denied to a Singaporean company that had been supplying coal regularly to the state, to challenge a contract for the purchase of coal. Despite refusing to grant standing, the court recognised that all organs of the state must act within the limits of their powers and within the provisions of the Constitution. Dismissing a case merely because a petitioner had no *locus standi* would leave state entities free to violate the law and be contrary to the public interest and against the rule of law.[88] In a recent writ application challenging the citizenship status of one of the main Presidential candidates at the November 2019 election, the CA while dismissing the case and refusing leave to proceed, stated that the petition was not a 'genuine public interest petition' filed to see that the law is obeyed, but filed for a collateral purpose.[89]

Although the Sri Lankan legal system does not currently permit judicial review of legislation, it does allow for judicial review of bills.[90] At this stage, 'any citizen' may challenge the constitutionality of a bill, thus recognizing at this level the concept of a public interest action. This jurisdiction has been invoked by citizens and groups on several occasions.[91] The constitution also gives the SC the

[79] *Egodawele v Commissioner of Elections,* SC Minutes (3 Apr 2001) 26.

[80] See also *Wimal Weerawansa v Attorney General*, SC Minutes (15 Jul 2005) (Interim Order of the Court); *Sobitha Thero v Commissioner of Elections*, SC Minutes (26 Aug 2005).

[81] *Weerawansa* (n 80).

[82] *Sriyani Silva v Iddamalgoda*, SC Minutes (10 Dec 2002) and SC Minutes (8 Aug 2003).

[83] SC Minutes (10 Dec 2002) 7 (per Bandaranayake J).

[84] The right to life is not explicitly recognised as a fundamental right in the Sri Lankan constitution.

[85] SC Minutes (8 Aug 2003) (per Fernando J).

[86] *Hewage v OIC Minor Offences, Seeduwa Police Station*, SC Minutes (26 Jul 2004) 17 and 19. See also *Kanapathipillai v OIC, Army Camp, Plantain Point*, SC Minutes (31 Mar 2005).

[87] *Ceylon Electricity Board Accountants' Association v Min of Power and Energy*, SC Minutes (3 May 2016).

[88] *Noble Resources v Min of Power and Energy*, SC Minutes (24 Jun 2016).

[89] *Viyangoda and Thenuwara v Controller of Immigration and Emigration*, CA Minutes (15 Oct 2019).

[90] Constitution, arts 120–124.

[91] See eg, Supreme Court Special Determination on the 'Special Goods and Service Tax' bill (n 64).

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discretion to allow a third party to intervene in litigation.[92] It is very rarely that the court itself appoints an *amicus* to help the Court.[93]

The 'Just and Equitable Jurisdiction' of the Court

The constitution permits the court to 'grant such relief or make such directions as it may deem just and equitable in the circumstance'.[94] As a consequence, the court has made a broad range of orders including compensation against public officials and even against private actors where a nexus was established between the private actor and the action or inaction of the public official that resulted in the rights violation.[95] In a recent case, a privately run power plant that was found to be polluting the ground water was ordered to pay compensation to the residents in the area and state entities were tasked with monitoring the operation of the plant.[96]

In the *P-TOMS Case*, the SC noted that since the application was filed in the public interest, the 'just and equitable relief' that was granted would have an impact on the entire public, including the victims of the tsunami in the six districts that the agreement was meant to cover.[97] A group of thirty-nine MPs from the JVP challenged the Post-Tsunami Operational Management Structure (P-TOMS), an agreement between the then Liberation Tigers of Tamil Eelam (LTTE) and the Government of Sri Lanka to disburse aid after the Indian Ocean tsunami of December 2004.[98] The petitioners contended that while their rights would be directly infringed, the rights of the people of Sri Lanka would also be infringed by the proposed arrangement for the disbursement of tsunami relief and aid. The court issued an interim order staying the operation of P-TOMS and the arrangement was never implemented.

Using the Writs and Rights in Tandem

In the previous section we considered the implications of constitutionalising the writ jurisdiction, and the development of a new ground of rights-based review in writ applications. We examined the fusion between the writs and the rights, analysed some of the relevant case law, considered the emergence of the concepts of public trust and fairness as standards of judicial review, the growth of public interest litigation, and the new remedies being employed through the SC's 'just and

[92]Constitution, art 134(3).

[93]In *Abeysundera v Abeysundera* [1998] 1 Sri LR 185, the court sought the assistance of an *amicus curiae*.

[94]Constitution, art 126(4).

[95]*Nalika Kumudini v OIC. Hungama Police* [1997] 3 Sri LR 331; *Mohamed Faiz v Attorney-General* [1995] 1 Sri LR 372. In *Karunapala v Siriwardhana*, SC Minutes (12 Feb 2021), the court made an order against a teacher in a state-run school for assault on a student. See also *Manohari v Secretary, Ministry of Education*, SC Minutes (28 Sep 2016), which involved a case of sexual harassment at the workplace in a state-run school. In *Captain Abeygunewardena v Sri Lanka Ports Authority*, SC Minutes (20 Jan 2017), the court took a broad approach to the 'the public function test'.

[96]The 'Chunnakam Case' (n 63). In this case, the SC held that citizens have a fundamental right to be free from unlawful, arbitrary, or unreasonable executive or administrative acts or omissions which result in pollution or degradation of the environment, even though the right is not explicitly recognised in the Constitution (p 52). The court also observed that 'access to clean water is a necessity of life and is inherent in Art 27(2)(c) of the Constitution'. The court reached this conclusion by reading Article 12(1) of the constitution, the right to equality and equal protection, together with Art 27(14), which declares that 'The State shall protect, preserve and improve the environment for the benefit of the community' and Art 27(2)(c), which declares that the state must ensure to all citizens 'an adequate standard of living for themselves and their families including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities' (p 53). Both articles are part of the non-enforceable Directive Principles of State Policy in the constitution. See also *Vidanage v Jayasundara*, SC Minutes of 11 January 2023, (the Easter Bombings case) where the SC made a broad range of orders, including an order against the former President Sirisena, whom it held was responsible for the security lapses that resulted in the bombings on Easter Sunday, 2019.

[97]*Weerawansa* (n 80).

[98]ibid.

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equitable jurisdiction'. All these developments have contributed to creating a robust framework for reviewing executive and administrative action and for promoting rights and democratic freedoms.

In this section we analyse how the writs and rights have been used in tandem to challenge the exercise of public power in relation to the same set of facts. We discuss two cases. The first, a landmark case and one of the highpoints in the history of judicial interpretation, saw a reaffirmation of fundamental principles of constitutionalism and the rule of law. This case is also important for its reliance on administrative law concepts to define constitutional rights. The second case deals with the ongoing litigation around the abolishment of the death penalty.

The Constitutional Crisis of 2018

Several legal challenges were launched consequent to the constitutional crisis that erupted in October 2018. On 26 October 2018, former President Sirisena purported to sack sitting Prime Minister Ranil Wickremesinghe and replaced him with former President Rajapaksa.[99] Sirisena then prorogued Parliament to allow Rajapakse to gather the requisite majority in Parliament.[100]

Wickremesinghe contended that he remained Prime Minister, his ouster was illegal and remained in occupation of the official residence of the PM.[101] When it transpired that Rajapaksa had not been able to obtain a majority, Sirisena attempted to dissolve Parliament and announced a parliamentary election for January. After the passage of the 19th Amendment in 2015, the constitution was clear that Parliament could not be dissolved for four and a half years. Despite this express provision, Sirisena decided to proceed with the dissolution.

The decision to dissolve Parliament and call an election was challenged by multiple fundamental rights petitions in the SC. The petitions were taken up immediately and after two days of hearings, the SC issued an interim order staying the dissolution of Parliament and preventing the Elections Commission from conducting an election.

After further hearings, the SC held that the President could not dissolve Parliament till the lapse of four and a half years. In reaching this decision, the Supreme Court drew widely from several key public law principles.[102] The court re-stated the principles that all public authorities and functionaries, including the President, must function according to the law and the Constitution and that the rule of law was the foundation of the constitution. Constitutional interpretation should advance the rule of law.[103] To the court, all three organs have equal status and must be able to maintain effective checks and balances on each other.[104]

The court further declared that the principle of constitutional supremacy was part of Sri Lanka's constitutional fabric, and this allowed the court to strike down unconstitutional executive action.[105] In nullifying the President's act, the court held that the right to equality and equal protection of the law in Article 12(1) provided protection against arbitrary and the mala fide exercise of power while guaranteeing natural justice and legitimate expectations.[106]

The decision to appoint Rajapakse was also challenged by way of a writ of quo warranto in the CA by 122 MPs.[107] The 122 MPs in their application stated that there were two no-confidence

[99]Mario Gomez, 'The Courts Respond to Executive Tyranny in Sri Lanka' (I-CONnect Blog, 24 Jan 2019) <http://www.iconnectblog.com/2019/01/the-courts-respond-to-executive-tyranny-in-sri-lanka> accessed 1 Feb 2023.

[100]Darisha Bastians, 'The Siege: Inside 52 Days Of Constitutional Crisis In Sri Lanka', in Asanga Welikala (ed), *Constitutional Reform and Crisis in Sri Lanka* (Centre for Policy Alternatives 2019) 24–27.

[101]ibid Bastians, op cit.

[102]*Sampanthan v Attorney General* (n 26) 73–75.

[103]ibid 74.

[104]ibid 75.

[105]ibid 69.

[106]ibid 86.

[107]In 1920, the Courts Ordinance of 1883 was amended by section 2 of the Ordinance No 4 of 1920, that granted the SC to issue the writ of quo warranto. See Coorey (n 27) 890, 1056–1069. See also *Chandrasena v De Silva* (1961) 63 NLR 308, 310;

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motions passed in Parliament against the Rajapaksa-led government and therefore he and his government had no right to continue in office. The CA issued an interim order restraining Rajapaksa and his Cabinet from functioning until a final determination was made on the merits.[108]

Rajapaksa appealed against this order to the SC, but the court refused to vacate the interim order and instead ordered that the matter be taken up later. As a result of these decisions, Rajapaksa resigned and Wickremesinghe was re-appointed as Prime Minister ending 50 days of political turmoil and an unprecedented constitutional crisis.

The Tussle over the Death Penalty

The writs and rights were also used in the ongoing tussle over the legality of the death penalty. The death penalty remains a part of the Sri Lankan legal regime: trial courts are required to impose it for convictions of murder, and it can be imposed in the case of drug related offences.[109] However, the country's last execution was in 1976 and successive Presidents since then, have refrained from implementing it or commuted the sentence to life imprisonment.[110]

In June 2019, it was reported that the former President Sirisena had signed the warrants for the executions of four prisoners on death row – three men and one woman – who were convicted of drug-related offences.[111] It was not known on what basis these four persons were selected for the first executions after 46 years. Approximately 1,299 prisoners were on death row at that time, including 48 convicted of drug offences.[112] Several applications were filed in courts. The first in the CA, sought a writ of prohibition against the Commissioner of Prisons from proceeding with the executions. Several fundamental rights applications were also initiated in the SC. This included applications by several prisoners on death row, and other public interest petitioners including members of the clergy.

In the CA, a journalist public interest petitioner, contended that the Commissioner of Prisons and the Superintendent of the Prison in question, had no legal power to execute a prisoner sentenced to death. The Commissioner's power extended only to receive and keep a prisoner in custody till the sentence was carried out.[113] In the fundamental rights petitions, it was contended that the actions of the President would amount to a violation of Article 12, the right against torture and cruel, inhuman or degrading treatment, and the proviso to Article 34(1).[114] Since then, the SC has issued several interim orders staying executions and the matter remains on the docket of the court at the time of writing. However, the CA application has been withdrawn by the applicant and it only the applications in the SC that are currently pending.

As these examples show, the writs and fundamental rights have been used in tandem to review the exercise of power by the executive. In the first case, both decisions of the writ court and the fundamental rights court reaffirmed important principles on constitutionalism and the rule of law. The

Geetha Kumarasinghe v Buwaneka Lalitha Keembiela, SC Appeal No 91 of 2017, SC Minutes (2 Nov 2017); Melissa Crouch, 'The Prerogative Writs as Constitutional Transfer' (2018) 38 Oxford Journal of Legal Studies 653.

[108]CA (Writ) Application No 363/2018, CA Minutes (3 Dec 2018).

[109]Section 296 of the Penal Code of Sri Lanka which prescribes the sentence for murder. See also Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance, as amended, which states that, any person who 'manufactures any of the following dangerous drugs, namely heroin or cocaine or morphine or opium shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury be liable to a sentence of death or life imprisonment'.

[110]See the statement of the Civil Rights Movement, E 01/09/09 (31 Aug 2009)(on file with the author).

[111]ibid. See also Ruki Fernando, 'Death Penalty: License for Judicial Killings' (Groundviews, 28 Jun 2019) <https://groundviews.org/2019/06/28/death-penalty-license-for-judicial-killings/> accessed 1 Feb 2023.

[112]Mario Gomez, 'The Death Penalty in Sri Lanka: Hanging by a Thread' (I-CONnect Blog, 8 Aug 2019) <http://www.iconnectblog.com/2019/08/the-death-penalty-in-sri-lanka:-hanging-by-a-thread> accessed 1 Feb 2023.

[113]*Malinda Seneviratne v Commissioner General of Prisons* CA (Writ) Application No 272 of 2019 (on file with the author).

[114]Human Rights Commission of Sri Lanka, 'Recommendation to Abolish the Death Penalty in Sri Lanka' (1 Jan 2016) 3 (on file with the author).

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combination of the writ application and the fundamental rights application contributed to resolving an unprecedented constitutional crisis within the parameters of the law. In politically and socially sensitive matters, a writ may potentially attract less attention than a fundamental rights action and may enable more principled decision-making on the part of the judiciary. It is unfortunate that the writ application against the death penalty was discontinued by the petitioner since this process may have been more effective in placing a permanent moratorium on the implementation of the death penalty.

Writs on Top of Rights: The Implications for Public Law

What then are the implications of these developments in public law over the past forty-three years? How have these developments strengthened the capacity of the courts to review executive power? First, these judicial interpretations have expanded the content of the equal protection of the law guarantee in the constitution and transformed it into a *de facto* right to administrative justice. By infusing the administrative law concepts of natural justice, the right to receive reasons, unreasonableness, legitimate expectation, and proportionality, into the interpretation of Article 12, the SC has been able to rely on the evolving jurisprudence from other parts of the Commonwealth, on these concepts to review the acts of public authorities. The 'protection' provided in this constitutional guarantee now includes a broad spectrum of judicial review standards found in administrative law. The case on legitimate expectation discussed above and the other cases on Article 12 covered previously illustrate this.[115] As we noted, the locus of public law has shifted from the writs to fundamental rights after the adoption of the Bill of Rights in 1978. This expansion in the equal protection guarantee then, provides a more effective legal framework for the courts to review the exercise of executive power.

Second, the writs have been infused with standards of rights which enables a writ court to review administrative action against fundamental rights standards in the constitution.[116] This again expands the reach of the writ jurisdiction and strengthens the legal framework on judicial review of administrative action. Some of the incipient jurisprudence suggests that fundamental rights may be used as standards of review in other areas of the law apart from the writs.[117]

In addition to fusing writs and rights, the courts have developed new concepts: the public trust doctrine and the concept of fairness. Both are ambiguous but as the recent determination on a bill shows, these new concepts, especially the public trust concept provide a potent conceptual tool for courts to review executive power.[118] These developments around the writs and the rights have been accompanied by the expansion in the rules of standing which allow public interest petitioners to come before the courts in both fundamental rights cases and writ matters. Where the Sri Lankan courts need to develop new interpretations is with regard to the right of interveners, or *amicus curiae*, to present arguments before the courts. Interveners are often well-equipped to place additional material before the court, and this can enhance the quality of judicial decision-making and the final outcome. We also saw how the SC has used its 'just and equitable' jurisdiction to provide a range of different remedies. The *Chunnakam* case, discussed above, is an illustration of the remedies the court could potentially offer through this constitutional jurisdiction.

The fusion of the writs and the rights, the emergence of the public trust and fairness as grounds of review, the growth in public interest litigation, and the emergence of new remedies, have placed Sri Lankan public law in a more robust position to review the exercise of public power than it was 40 years ago. All these developments put the courts in a stronger counter-majoritarian position to review the exercise of executive and administrative power.

[115] *Ariyarathne* (n 61). See also the dissenting judgment of Justice Kodagoda in *Jayalath v Karannagoda* (n 41).

[116] See *Mundy* (n 31) and the other cases discussed in the first and second sections in the Part 'A New Phase in Judicial Interpretation' above.

[117] See the cases in the second section in the Part 'A New Phase in Judicial Interpretation' above.

[118] SC Special Determination on the 'Special Goods and Service Tax' bill (n 64).

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The courts have been through periods of inertia and robustness, and the country has been through periods of constitutional authoritarianism and constitutional democracy. Despite the ebb and flow of democracy, judges are now better equipped, with stronger conceptual tools, to uphold and promote rights, supervise the exercise of public power and discretion, and ensure that the executive stays within constitutional limits. In the absence of political interference and political fear, the courts are more likely to uphold constitutional values and hold against the state than in previous eras. This approach to writs and rights is likely to continue, even if the country goes through another period of constitutional authoritarianism.

The Bill of Rights in the 1978 Constitution has had an important impact on the way public law has evolved in Sri Lanka. Even if the process has been slow, judges have shown a willingness to use constitutional values and norms as standards against which to assess the exercise of public power. The Sri Lankan Constitution does not provide for judicial review of legislation and has provisions that preserve the sanctity of past law, even if they conflict with the Bill of Rights. Despite these provisions, there are indications to suggest that the courts are moving public law to a position where constitutional supremacy dominates as an interpretive value. This approach has been recently endorsed by both the SC and the CA in three significant decisions.[119] In all these cases the courts reinforced the notion that the exercise of public power and discretion by public officials, including the President, must be in accordance with the constitution and they must act within its parameters.[120] This approach has been supported by the resort to international norms to interpret the Constitution and statutes in some judicial decisions.[121]

This robust public law framework has additional implications after the adoption of the 20A. The 20A passed in October 2020, concentrates power once more in a strong Executive, enables the President to dismiss the Prime Minister at will, and removed other checks and balances that came into effect after the 19A was passed in 2015. In the absence of the power of judicial review of legislation, an effective legal regime to review the exercise of executive power becomes even more important and enhances the capacity of the courts act as a restraint on unbridled presidentialism.

Public law has evolved slowly and incrementally in Sri Lanka. Sometimes infuriatingly slowly. Yet the Sri Lankan experience shows that slow change has been durable, and resilient enough to bounce back even after periods of constitutional authoritarianism.

[119]*Sampanthan v Attorney General* (n 26); *Viyangoda v Controller of Immigration and Emigration* (n 89); SC Special Determination on the 'Special Goods and Service Tax' bill (n 64) 22–23.

[120]In its determination on the constitutionality of the 20A, the SC stated that the President's official acts should remain subject to review by the court under its fundamental rights jurisdiction. If this provision was to be amended, it would require a two-thirds Parliamentary majority, *and* approval at a referendum. As a result, the 20A retained the provision that made the President's official acts subject to judicial review, a provision that was introduced by the 19th Amendment in May 2015. See SC Special Determination Nos 01/2020–39/2020 published in the Hansard, 20 Oct 2020, 1084: The Parliament of Sri Lanka, 'Home' <www.parliament.lk> accessed 1 Feb 2023.

[121]For the use of international norms see the 'Chunnakam Case' (n 63); *Weerawansa* (n 80) 409; *Ceylon Tobacco v Minister of Health*, CA Minutes (12 May 2014) 29; *Bulankulama* (n 78); *Sirisena Cooray* (n 30); *Centre for Policy Alternatives v Commissioner of Elections* [2003] 1 Sri LR 277; *Sanjeewa v Suraweera,* SC Minutes (4 Apr 2003); *Centre for Environmental Justice v Satharasinghe*, CA Minutes (16 Nov 2020); *Karunapala v Siriwardhana*, SC Minutes (12 Feb 2021). See also *Manohari* (n 95), where the Supreme Court held that sexual harassment at the workplace was a violation of the constitutional prohibition on sex-based discrimination. The court observed: '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) … and in pursuance of these international obligations, Sri Lanka has also enacted several (laws) to give vent to these global rights in favour of women' (p 16): see Mario Gomez, 'Women, Gender and the Constitution in Sri Lanka', in Wen-Chen Chang et al (eds), *Gender, Sexuality and Constitutionalism in Asia* (Hart 2023).

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