PUBLIC INTEREST LITIGATION:

A Species Of Direct Democracy And Good Governance

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ABSTRACT

In the ancient Greek city states people have participated in decision making known as direct democracy. The expansion of population over time made this mode of direct decision making impossible and so representative democracy was born. It evolved to have the separation of powers; legislative, executive and judicial.

The separation of powers of the State enables the judiciary keeps the executive and administrative functions in check. The courts however, have restricted the right to intervene to those persons whose interests were directly affected rather than allow busy bodies wanting fame and fan fare waste the time of court. Thus while decisions of the executive and measures taken by the administration affect the rights of individuals on matters such as land acquisition, licencing, issuing of permits, taxation, and the nationalization of industries, only those affected and not the public could petition court.

The present Constitution is a step in facilitating direct democracy. The gradual willingness of the judiciary to allow the public to intervene in matters that they would traditionally have been shut out of, have enabled both the courts and the public to affect the decision making process and its implementation. The Eppawala Phosphate mining case, the Southern Expressway case, the Waters Edge case, cancellation of privatization of Sri Lanka Insurance Corporation, the cancellation of sale of Lanka Marine Service to John Keels Holdings and de-merging of North and East Provincial Councils are among notable instances of public interest litigation.

This paper will analyze the expansion of public interest litigation, the principles of good governance propounded by court including the public trust doctrine, and the impact it has had on administrative and policy decision making.

Key Words: Public interest, Public Interest Litigation, Good Governance, Democracy

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Introduction

Since the introduction of the second Republican Constitution of Sri Lanka in 1978, there has been a gradual increase in the awareness of fundamental rights and the exercise of these rights through the jurisdiction of the Supreme Court by various persons and interest groups.

As a tool of activism on the part of interested persons, fundamental rights cases have lead to the Supreme Court issuing orders and making pronouncements on matters which hitherto were in the policy making sphere: School admission criteria, promotion criteria in the public service, gas, electricity and fuel prices, privatization of State institutions, land acquisition and environmental pollution to name a few.

In effect, citizens or groups of interested persons using the mechanism of fundamental rights are not only holding policy makers and administrators accountable for their decisions but are in fact though their Applications to court, directly participating in the decision making and administrative process.

The progress of this species of direct democracy and its limits will be examined below together with the desirability of this course of action.

Democracy and Governance

There are many theories of how societies stay together; one such is the theory of the social contract (Appadurai, 1975). This theory presumes that there is an unwritten contract between the members of the society, according to which each member gives up a part of his freedom so that society can function. For example, the freedom to drive a car anywhere on the road is given up for orderly progress of traffic. The ability to give up absolute individual freedom to live in a society presumes also a democracy; in an autocracy, society stays together by force (Hart, 1972).

If the society is small in number each member may join in the decision making process. This was how the early Greek City States operated democracy several thousands of years ago (Blainey, 2012). This kind of democracy can still been seen today in social clubs and commercial companies. The members meet at Annual General Meetings to elect their executive officials, to get a report of how the company or society has progressed and to vote on matters including on how to spend the money of the club or company. The individual members have a say in the affairs of the company or club and on an individual level are able to bring resolutions for consideration at a meeting.

In terms of governance, such societies being small and inclusive are more responsive to the needs of the members. If the elected executive is not doing its job it will be changed quickly. If the administrators whether hired or members themselves, are not performing, the situation will be quickly brought to the attention of the group and a resolution will be brought to change the relevant person or take remedial action. It could be said therefore that direct democracy is more responsive and a better form of governance.

Yet even in these instances, there is the influence of more powerful members on the majority and the danger of majority rule. The advantage with private clubs, societies and companies is that firstly, the members have a common interest and back ground, hence likelihood of fundamental differences would be minimal. Secondly, any member dissatisfied with the majority rule will leave the club, society or sell off his shares in the company. This course of action is not possible in society at large. This is one of the reasons adduced for devolution of power so that homogenous societies would be able to take decisions that affect themselves without coming into conflict with the majorities that do not share their interests nor live among them (Dissanayake, 1988)

The increase in numbers makes direct democracy and this mode of administration of the affairs of a society impractical. Hence in a modern democratic State it is necessary to have a representative democracy where instead of individuals' personally taking part in the affairs of the community, it is delegated to the specific persons who represent the group. There are many forms of representative democracy such as first past the post system, proportional representation, or even a bicameral legislature with two chambers. The essence of all these forms of democracy is that the decision making process and the administration of the matters of the society or State are delegated (Laski, 2003). From this concept, flows the doctrine of the "Public Trust"; that all power is held in trust for the public good and hence no power is absolute but limited both in scope and reason (Premachandra v. Jayawickrema.1994 (2) Sri.L.R). The public trust doctrine has been developed and used as a tool by the courts in giving effect to public interest litigation.

A parallel development of representative democracy is the concept of separation of powers, put forward by Locke and espoused most eloquently by Montesquieu;

When the legislative and executive powers are the same person or body, there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to enforce them in a tyrannical manner…were the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control,

for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor (Laski, 2003, p.297)

In this background that there has been an evolution of the legislature, executive and the judiciary as separate organs of government in various forms in different jurisdictions.

In the English Legal system, a citizen could take an administrative body to court to control its executive decisions by way of a writ. The primary function of the writ was for a court to call before it and examine the decisions of the administrative bodies whether they are Municipal Councils or Commissioners or any other administrative body (Wade, 1994).

The limitation with the writ was two fold: firstly, the courts would only examine whether the administrative body was acting within its power, a concept known as intra vires. If not, the action of the administrator would be struck down as ultra vires – acting beyond their power. The issue with this line of inquiry was that if the administrator was acting within the power given to it by the law, the courts would not question the decision of the administrator on the merits of the decision. Thus the ability of the individual to influence the decision or the policymaker was limited. Secondly, it was not every person that could petition the court. The capacity to petition court is known as the doctrine of 'standing'. The early English tradition was that only a person directly affected by the decision of the administrator could challenge it (ex Parte, Sidebotham (1880) 14 Ch.D). It was not therefore possible for an interested member of the Public to challenge an administrative or policy decision if it did not affect him directly. The only remedy for such a person was to vote out the administration at the next election (Craig, 2008).

There have since been developments in the English law permitting interested persons not just affected persons to challenge administrative decisions (Wadehra, 2012). There is also a development permitting courts to examine the merits of the policy on an expansion of the doctrine of legitimate expectation (Keerthisinghe, 2001). However, there are limits to this creative interpretation of the law in England as it is not a fundamental right based approach.

Sri Lanka, formerly Ceylon inherited its Independence Constitution and Constitutional traditions from the British Westminster Constitutional Model (Cooray, 2005). It comes as no surprise then that the Ceylonese/ Sri Lankan courts adopted and adapted to the English Legal tradition and developments. Hence, the limitations imposed by the English legal tradition on challenging administrative action and policy, continued in Sri

Lanka as well. Even after the introduction of fundamental rights in the 1978 Constitution, it took considerable time to broaden the role of standing to allow not only affected person but interested persons to challenge administrative decisions (Gomez, 1993).

It is observed that the increase in the size and scope of the State, the evolution of organs of government and specialized administrative mechanisms, all served to distance the individual from administrative and policy decisions except in the broadest sense to change the government at an election. It meant that there was no immediate input into the decision making system and at times the populace is compelled to live with an unpopular government till the next election, leading to a change of government at times with an overwhelming majority, which in turn creates political imbalances that affect the decision making process.

In short, in such a system, the administration is not as responsive to the views of the peoples as in a system of direct democracy and has the effect of making bold the administrators both elected and un-elected to pursue their decisions assuming that they are pursuing what is good for the people.

A further adverse effect of this system is the attitude that builds up among officials that their actions should not be challenged or that the person challenging their decision is out of line with authority. Nothing can be further from the truth, for the administrators both elected and un-elected are in fact holding power in trust for the public and the public have every right to see that such power is at all times used for the public good. This is what the courts in recent times have been at pains to point out (Perera v. Balapatabendi and Others. SCM.2004).

A New Constitution, Fundamental Rights and The Referendum

The Constitution of 1978 had many novel features and was a departure from previous systems of government in Ceylon/ Sri Lanka. It introduced an Executive President somewhat similar to the United States of America and France together with the unique feature of the Referendum; to obtain the opinion of the people on an important matter, to pass a law defeated in Parliament and to obtain the concurrence of parliamentary legislation seeking to amend certain articles of the Constitution deemed basic to its structure.

The Referendum is seen as necessary in Sri Lanka by certain constitutional scholars in the context of election of the legislature by a system of proportional representation which makes it difficult to obtain clear majorities in Parliament (Wilson, 1980). This was the experience till

recently, and may have continued to be so if not for the recent decisions of the Supreme Court permitting members of one political party to cross party lines without losing their seat in Parliament. (Rajakaruna, 2008)

The feature of a chapter on fundamental rights in the Constitution enforceable by the Supreme Court enables individuals to challenge administrative and policy decisions like never before. It broadens the scope of challenge not only to test the vires or legality of the decision of the administration but also the merits thereof (Wickremaratne, 2006).

The chapter on fundamental rights is also protected by the referendum in that it cannot be amended without a special majority in parliament and a referendum obtaining the concurrence of the people to do so (Judgment of the Supreme Court on the 19th Amendment to the Constitution.[2002] 3 Sri.L.R).

These features in combination have served to make present administrative and policy decisions more liable to public scrutiny and capable of being influenced by public input through the decisions of court. The process enables ordinary citizens or interest groups to have their say in public affairs with greater clout. This has happened gradually, and sometimes in a pendulum fashion, with rights been advanced and thereafter slowed down or pulled back by other decisions of court if it is felt that previous decisions have opened the door too wide. These decisions will be examined below.

The Liberalization and Expansion of Standing

It is a prerequisite to the furtherance of public interest litigation that parties are able to litigate either on their behalf or on behalf of others. Article 126(2) of the Constitution itself permits any person either by himself or through an Attorney at law on his behalf to petition the Supreme Court in respect of a violation of a fundamental right. This was recognized by Kultunge J. in the case of Somawathie v. Weerasinghe.[1990] 2 Sri L.R. The Court in the cases of Sriyani Silva v. Iddamalgod [2003] 1 Sri.L.R and Lamaheage Lal v. Officer in Charge, Minor Offences, Seeduwa Police Station,[2005] 1 Sri. L.R. also permitted related parties to petition court especially in instances when the person whose rights affected was incarcerated or dead. The Court pointed out that it would be futile to give rights to persons and deny those rights on the basis that they cannot be enforced as the person was dead.

A more important development that has taken place is the ability of third parties to bring actions on a wide variety of mattes on the basis that it affects their rights and the rights of the public at large.

The first significant case in this regard is that of Bulankulame v. Secretary Ministry of Industrial Development [2000] 3 Sri.L.R . The petition was filed by a group of persons resident in Eppawela, North Central Province, challenging the government's decision to enter into an Agreement with Freeport Macmoran to mine a greater part of the rock phosphate in the area. The petitioners argued that such mining affected their rights, their environment and the national interest. The Respondents argued that the petitioners had no standing to bring such an action. Rejecting the objection, the court held that the petitioners had sufficient standing in a matter such as this as it affected their lives.

In Egodawele v Dayananda Dissanayake,SCM 2001 the Court permitted the petitioner to proceed with a petition on the basis that the petitioner's fundamental rights were infringed as others could not freely express their franchise. In this instance 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. In this case also an objection was taken to the standing of the petitioner to bring such an action. It was argued in objection to the petition that the only persons that could complain were the candidates at the election and that there was a mechanism through an election petition to challenge an election that was not free and fair. The Court while recognizing that that an election could not be set aside in a fundamental rights case, overruled the objection and granted the petitioner a declaration that his rights were infringed as there was no free and fair election on the basis that the case involved not only the rights of the petitioner but the rights of the public..

In Visuvalingam v. Liyanage, [1984] 2 Sri. L.R. the court permitted a reader of a newspaper standing to challenge an order made banning the printing and the publication of a newspaper. Similarly in Fernando v. Sri Lanka Broadcasting Corporation, [1996] 1 Sri.L.R. the court granted standing to a listener to complain about the stoppage of a non formal learning programme, broadcast on the radio.

These cases dealt with individuals or groups of individuals petitioning court that their rights enjoyed together with others had been infringed. A further expansion of standing took place in the case of Environmental Foundation Ltd. v. Urban Development Authority, (2004) where corporate body acting in the public interest petitioned court in respect of the proposed privatization of the management of the Galle Face Green.

More recently, three sensational cases; the Lanka Marine Services case, the Waters Edge case and the privatization of the Sri Lanka insurance Corporation case, may be considered the high watermark of public interest litigation in Sri Lanka; broadening the rules of standing and scope of such litigation.

In Vasudeva Nanayakkara v. K,N. Choksy and Others also known as the Lanka Marine Service (LMS) Case, [2008] B.L.R., the petitioner a politician and social worker filed the case in the public interest challenging the privatization of Lanka Marine Services Limited, a profit making and taxpaying subsidiary of the Ceylon Petroleum Corporation, to John Keels Ltd, without the approval of the Cabinet of Ministers.

The Court struck down this transaction as illegal and held in regard to standing that "… where the executive being the custodian of the Peoples power act ultra vires and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to implead such action before Court"(emphasis added) [2008] B.L.R.42.

The Court also referred to its pervious judgment in the 19th Amendment to the Constitution and the case of Bulankulame to draw attention to the principle that the organs of government; executive, legislative and judicial were exercised in trust for the people. Thus, the court recognized and invited the public as having a duty to petition court where public resources were misused by the organs of government. The door to public interest litigation was opened wide by this decision of court.

The invitation given by court to the public to implead such actions before court was accepted in the filing of the subsequent case of Mendis and 9 Others v. Kumaratunge and Others [2008] B.L.R also known as the Waters Edge case.

The petitioners of this case, also filed in the public interest, challenged the decision to acquire land for a public purpose and thereafter to sell such land to a private entrepreneur to develop a golf course named "The Waters Edge". The Court noted that a public purpose required as its primary object, general interest of the community and that in this instance the land acquired had not been put to such use. The Court ordered that the land be returned to the State and that it be put to use for the benefit of the public.

The Court also made some interesting pronouncements in this case. It reiterated the Public Trust Doctrine stating that;

The Public Trust Doctrine taken together with the Constitutional Directives of Article 27, reveal that all state actors are so principally obliged to act in furtherance of the trust of the people they must follow this duty even when a furtherance of this trust necessarily renders inadequate an act or omission that would otherwise legally suffice. In other words, it is not enough to argue that procedure has been followed, when procedural compliance results in a violation of the public trust." [2008] B.L.R. 7

In effect the court is saying that public officials would not be able to hide behind procedure and rules to say they have done their duty, when State resources have been used contrary to the public good.

The Court also drew attention to its previous decision in Bandara v. Premachandra, [1994] 1 Sri.L.R.,in regard to the standards expected of the public service;

"The State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the judiciary must endeavor to ensure that this expectation is realized…" We recognize that this duty has to be upheld not only in the name of good governance but also for sustainable economic development of the nation and all its people especially the economically challenged, the disadvantaged and the marginalized." [2008] B.L.R. 7

This dicta above raises not only an expectation of an efficient and upright public service working for the public good, the last sentence hints that public interest litigation may be used as a tool to advance the interests of the economically underprivileged and the marginalized sections of society as has been the case in India (Malik, 2013).

The last of the three cases referred to above is also titled Vasudeva Nanayakkara v. K.N. Choksy and Others [2009] B.L.R.,and involves the issue of the privatization of the Sri Lanka Insurance Corporation.

In this case, too, the court found that the privatization of the Sri Lanka Insurance Corporation had been contrary to law and set it aside. Justice Ameratunge, delivering the judgment of Court referred to, reiterated and relied on the doctrine of the 'public trust' developed in the case of Bulankulama and applied with force in the Lanka Marine Services case:

The concept of the public trust which curtailed the absolute power of the monarch is in perfect harmony with the doctrine of the public trust developed by the Supreme Court on the basis of sovereignty of the people set out Articles 3 and 4 of the Constitution, Article 12 (1) and the principles of the Rule of Law, which is the basis of our Constitution. The Rule of Law is the principle which keeps all organs of the State within the limits of the law and the public trust doctrine operates as a check to endure that the power delegated to the organs of the government are held in trust and properly exercised to the benefit of the people and not to their detriment. [2009] B.L.R.28

The above dictum clearly demonstrates that the doctrine of the public trust as developed by the Supreme Court in successive decisions is well established.

Another feature of the Sri Lanka Insurance Corporation case was the legal basis to extend the doctrine of standing in matters of public interest litigation by a reference to a 'fundamental duty' of every citizen, set out in Article 28 (d) of the Constitution to preserve and protect public property. While fundamental duties set out in Article 28 of the Constitution cannot be enforced, the view of the Court was that if a citizen acting in good faith relying upon the duty set out in Article 28 brought to the attention of court a misuse of public property the court was bound to act;

…if a person, on his own volition decides to invoke the jurisdiction of this Court, in terms of Articles 12(1), 17, 126 (1) and 28(d) can this court prevent that? My considered answer is in the negative. On the other hand, when the court has to deal with any objection to such application the Court has to consider Articles 12(1), 17, 126 and 28(d) in combination. These articles do not merely confer power on this Court to issue directions or orders for enforcement of fundamental rights but also lays down a constitutional duty to protect the fundamental rights of the people and for that purpose confer on this Court all incidental and ancillary powers necessary to progressively move forward to fashion and adopt, within the framework of the law, new strategies for the purpose of securing enforcement of the peoples fundamental rights. It must be remembered that these two applications have been filed in the public interest to make the fundamental right enshrined in this article meaningful –that is to make in "tangible" and "palpable"… what I have set out above is also relevant to the question of locus standi of the petitioners and I overrule all objections relating to the standing of the petitioners. (Emphasis added) [2009] B.L.R 29-29.

The Court is mindful not only of the citizens' duty to protect public property but the courts' duty to do so and is bold enough to state that it will fashion and adopt new strategies to secure fundamental rights through public interest litigation.

Taking Stock of Reality

Having examined the above decisions of the Supreme Court, the following legal principles can be set out with regard to the present position of public interest litigation in Sri Lanka;

1) An Individual affected by an administrative or policy decision can petition either the Supreme Court by way of a fundamental rights Application or the Court of Appeal in a writ Application.

2) An individual may petition court on a matter that affects him and the others similarly situate having sufficient interest to do so

3) Even a corporate body can act in the public interest on a matter on which it is concerned with

4) A person can petition the Supreme Court in the public interest on a matter that does not impact him individually, so long as he does so as a citizen and a public spirited person seeking to do his duty in protecting public resources.

5) All power and all organs of government are under a duty to act in terms of the rule of law

6) Public resources and public power is held in trust by officials elected and unelected to be used for the benefit of the public

7) Officials in acting for the public benefit must not mechanically follow procedures and rules but look at the final result to ascertain if their policy or actions result in benefit to the people. This is the high standard of efficiency and effectiveness expected of the public service.

8) The courts will be creative, within the framework of the law in giving effective relief in respect of public interest litigation.

The above conclusions indicate that all barriers to standing in regard to public interest litigation via a fundamental rights Application in the Supreme Court have been removed and that the stage is set for more persons to challenge administrative policy and actions.

Suprisingly, once these legal barriers to standing have been removed; there has not been a plethora of cases filed in the public interest especially on behalf of the underprivileged and the marginalized as hinted by court in the Waters Edge case. Certainly in India, this is the thrust of public interest litigation, which seeks to curtail air pollution, improve the standards of sanitation, prison reform, improving access to education and the like, filed on behalf of persons who are too indigent or ignorant of their rights to vindicate them (Wadehra, 2012).

In taking stock of this situation it would be necessary to look at the ground reality. The success of public interest litigation is not only dependant on the legal regime, but also on a vigilant public, the attitude of the judiciary and in the end on the implementing agency.

One of the criticisms of the Human Rights Commission (HRC) in Sri Lanka is that it has no teeth to implement its decisions; in terms of the Human Rights Commission Act, the executive is not bound to implement the recommendations of the HRC; hence many orders of the HRC are not given effect to. Likewise, the Supreme Court was in grave danger of embarrassment when in the case of Karunanayake v. Ceylon Petroleum Corporation and Others,(SCM 2008), when the court ordered that petroleum be sold at a particular price. That interim order of court was initially complied with only by the Lanka Indian Oil Company (LIOC), the Ceylon Petroleum Corporation continued to sell petroleum at its predetermined price. Soon LIOC also followed suit and disregarded the court order. The petitioners in that case moved to withdraw the case, preventing further embarrassment to the court and a clash between the judiciary and the executive organs of government.

In reality therefore, there are limits to public interest litigation, for the court must be willing to act, and the executive must be willing to comply.

Another criticism of public interest litigation expanding in scope is the degree to which the court has expertise to step into the realm of the executive. In the traditional English law model, the court would only strike down a particular act of the administration, it would not venture to step into the shoes of the administrator for it was accepted that the court did not have the expertise to do so. However, in rights jurisprudence, especially in terms of Article 126(4) of the Constitution, the Court is empowered to "grant such relief or make such directions at it may deem just and equitable in the circumstance". This phrase has been interpreted to grant the Supreme Court wide powers to make directions not only in the negative sense of striking down a policy or administrative decision but also in the positive sense in substituting the courts decision for that of the administrator.

The danger of an overactive judiciary is also caught up in Montesquieu's rationale for separation of powers: "…were the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor" (Laski, 2003, p.297).

In effect a public interest petition most often seeks to do just what Motesquieu forbade: for the Court to legislate or substitute its orders for the executive by making directions as in the case of noise pollution, fuel and gas prices or programme content of broadcasts.

Conclusion

In order for public interest litigation to be meaningful and accepted as a tool for people to directly participate in the administrative process a balance has to be stuck between over active judicial process and an process that is not responsive to the needs of the people.

There are indeed situations where the executive does not act, or acts brazenly in disregard to the interests of the public. Is a citizen to wait till the next election for some relief or should there be a more effective and timely remedy?

Public interest litigation fills this gap, by allowing persons to hold the administration accountable for acting or not acting in a particular way. It goes further, in allowing citizens to participate more directly in the affairs of administration. The benefits of doing do have been referred to; that small and inclusive societies in which direct democracy is present are far more responsive in acting for the benefit of its members. This benefit is extended to the public at large by the tool of public interest litigation.

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