 Directive Principles of State Policy and Fundamental Duties as an Additional Dimension for the Interpretation of Statutes

And Broadening the Scope of Writ Jurisdiction under Article 140 of the Constitution in Order to Make the Conduct of Certain private or Non-State Entities Amenable to Judicial Review

With the opening of novel areas of interpretation, dynamically extending the scope of interpretation of statutes, legal expertise tend to accuse judiciary for usurping legislative powers in the disguise of interpreting. However, from a Sri Lankan legal perspective, the cumulative effect of Article 16 and 80(3)\(^1\) of the constitution expressly ousting the operation of Judicial review of legislation\(^2\) could be interpreted as an influential barrier against the judicial power of our courts. Despite the possibility of legislative conduct or in a sense legislative ultravires growing to epidemic proportions by enacting legislation which are expressly contrary to the fundamental aspirations of sovereignty defined in terms of Article 3 and 4\(^3\) of the constitution, a limited number checks and balances have been imposed over the legislative power of the parliament. Currently, the only available check over the legislation is challenging a bill under Article 121\(^4\) of the constitution in terms of which the Supreme Court is empowered to ascertain the constitutionality of a bill on an application by a citizen or the president referring. However, this check appears insufficient due to the Article 122 special jurisdiction on constitutionality in respect of urgent bills where the necessity of Gazetting is dispensed with. On the other hand even though a bill is gazetted general public remains uninterested in the absence of strong media covering as witnessed in situations like the passing of Inland Revenue (Special provisions) Act

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\(^1\) Article 16(1)All existing written law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this chapter(chapter iii)
Article 80(3) where a bill becomes law upon the certificate of the president or the speaker, as the case may be , being endorsed thereon , no court or tribunal shall inquire into , pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever

\(^2\) publication of the Open University of Sri Lanka on Constitutional law

\(^3\) Article 3. In the Republic of Sri Lanka sovereignty is in the people ans it is inalienable. Sovereignty includes powers of government, fundamental rights and franchise.

Article 4. exercise of sovereignty, the combined impact of these Articles is that the legislative, executive, and judicial power of people are held in trust for people by legislature, executive and judiciary

\(^4\) Article 121. The jurisdiction of the Supreme Court to ordinarily to determine any question of constitutionality may be invoked by the president by a written reference addressed to chief justice, or by any citizen by a petition in writing addressed to supreme court. Such reference shall be made or such petition shall be filled from the bill being placed on the order paper of parliament..........................
No.10 of 2003 granting unconstitutional tax amnesties⁵. Furthermore, the above reference to the legislative ultravires growing to epidemic proportions could apparently be observed in the light of contemporary world scenarios as if the harmful consequences of privatizing Water Management in Argentina which will be further discussed during the course of this essay. Thus, a desirable alternative mechanism of Judicial review is of utmost and urgent importance especially on account of the prevailing circumstances involving the development of overwhelmingly influential private sector with large scale multinational corporations, cartels and international organizations like IMF, World bank etc who can influence the legislative direction.

The chapter VI of the constitution on Directive principle of state policy and fundamental duties being interpreted in the light of preamble to constitution must operate as ideals or the ultimate guide by which the legislature must constantly strive to be bound. Nevertheless, except in several judgments focusing on the persuasive effect of Directive principles that will be analyzed during the course of this essay, these principles have been restricted to mere book value.

However, an analytical perspective to Sri Lankan constitutional jurisprudence especially in the republican context⁶ would undoubtedly reveal the capacity of our judiciary to Act as hyper-active guardians of peoples’ rights by means of creative interpretation of existing law. Thus a series of decisions in spear of constitutional jurisprudence from a republican context ranging from W.K.C Perera V Professor Daya Edirisinghe⁷, Dr Shiranthi Perea V PIGM university. Of Colombo⁸, Dr Kunanandan V University of Jaffna⁹, Eppawela Phosphate case¹⁰, Environmental

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⁵ Although Inland Revenue (Special Provisions) Act No10 of 2003 was passed during the bill stage unnoticeably without being challenged by virtue of subsequent exercise of consultative jurisdiction by the president in terms of Article 129 of the constitution, it was held the Supreme Court that such Act was unconstitutional but at that moment such law had been passed and obtained legal validity that could not be struck off except by another legislation.

⁶ Dr Jayantha De Almenda Guneratne, Law College Law Review 2005, New Vistas For Judicial Review In The Sphere Of Employment And Other Contractual Relationships

⁷ 1995(1)SLR 148
⁸ CA application NO 2246/2004
⁹ 2005(1)SLR 293

¹⁰ ) BULANKULAMA AND OTHERS v. SECRETARY, MINISTRY OF INDUSTRIAL DEVELOPMENT AND THEIRS (EPPAWELA CASE)——— undoubtedly, the State has the right to exploit its own resources, pursuant, however to its own environmental and development policies. (Cf. Principle 21 of the U.N. Stockholm Declaration (1972) and Principle 2 of the U.N. Rio de Janeiro Declaration (1992). Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration). Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the
Foundation V UDA (Galle Face Green)\textsuperscript{11(a)} to Water’s Edge case\textsuperscript{11(b)} giving life to influential concepts such as Public Trust doctrine, Legitimate Expectation, persuasive effect of international treaties as soft laws etc. reflect the capacity of our judiciary to act in the interest of people, in spite of legal barriers and the legal arguments by which the judiciary tactfully overcame legal bars imposed by legislature. Moreover, the decisions like Ramchandra V HNB\textsuperscript{12} and Attapattu V Peoples’ Bank\textsuperscript{13} are random instances in which the judiciary had exercised a silent and disguised form of judicial review.

Thus, the objectives of the Chapter 1 and 2 of this essay could be defined as

1- Ascertain the possibilities of introducing judicial review of legislation to Sri Lanka, in spite of the absence of expressed constitutional provisions governing judicial review of legislation

2- Extending the scope of prevailing fundamental rights jurisdiction by identifying directive principles of state policy and fundamental duties by discovering the directive principles of state policy that are incidental to expressly specified fundamental rights provisions in our constitution and structuring an enforcement mechanism to implement Article 28 dealing with fundamental duties.

\textit{Introduction to Chapter 3}

\textit{Broadening the Scope of Writ Jurisdiction Under Article 140 of the Constitution in Order to Make the Conduct of Certain private or Non-State Entities Amenable to Judicial Review}

On account of the gradual decline of state centered Economy, in the light of rapidly expanding market economy and Neo-Liberal Economic models, the private sector ranging from large scale multinational corporations, cartels to limited liability companies will inevitably take on the control of areas of utmost public importance. Therefore, the scope of public law spear must be extended in a broad sense to provide relief against the conduct of certain private and non-state entities, which were conventionally untouched by the judicial review and fundamental rights jurisdiction but governed exclusively by private law, since it is undesirable and unjust to restrict the remedies of vulnerable individual, to private law, in confronting powerful companies. On the basis that private sector is solely governed by profit interests\textsuperscript{14} but not bound by social development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration). In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way which an Act of our Parliament would be. It may be. It may be regarded merely as ‘soft law’. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become

\textsuperscript{11} Water’s Edge Case[ 2008]SCFR Extracts from the Judgment reported in Sunday Times dated 12\textsuperscript{th} September

\textsuperscript{12} 2006 (1) Sri LR 393

\textsuperscript{13} 1997(1)SLR 208 -222 Mark Fernanado J

\textsuperscript{14} - The author of this essay observes the concept of Corporate –Social Responsibility is no-manner whatsoever sufficient to remedy consequences.
responsibility as if state, an individual representing general public with no-bargaining power is absolutely vulnerable as opposed to large scale corporations with power and huge capital. In this regard, contemporary world scenarios involving the ideals of neo liberal economic models have evidenced the harmful out-come of the extremes of market economy growing to epidemic proportions. The privatized health sector of the United States of America which is controlled by Insurance companies\textsuperscript{15}, the operation of multinational pharmaceutical corporations in Africa and in other underdeveloped nations and harmful consequences suffered by Argentina after the privatization of Water Management\textsuperscript{16} are some of such consequences. Moreover, in the light of recent experiences involving large scale frauds and misconducts such as Golden key credit card company fraud, VAT fraud, Pramuka bank fraud etc which still remain un-remedied have developed a huge skepticism towards the public authorities and the entire system. Therefore, under the aforesaid circumstances an urgent need has sprung up among general public and our legal system to develop a new genre of Republican Jurisprudence by interpreting law from an innovative dimension.

From a strict pragmatic perspective, the legal mechanisms developed by this essay defined in all three chapters and new concepts introduced by this essay like Derivative Administrative conduct and the use of Hans Kelsen’s Kelsonian jurisprudence to give Validity to legal norms and concepts pronounced in judgments independently of the factual context in which they appear, use of \textit{Harjani V Indian Overseas Bank} may appear a bit idealistic or incomprehensive to be directly used in Actual courts. But, however broad or idealistic these novel elements may appear at first sight, the purpose of this essay is to provide insights into the jurisprudential structures and legal arguments that further need to be sharpened by skilled professional craftsmanship, making constant attempts at courts. Thus, despite such incomprehensive or idealistic nature, dynamism on the part of both judiciary and legal professionals will undoubtedly provide a solid and elaborate legal basis to apply this form of legal logic, especially in the light of the aforesaid urgent need.

\textbf{The Three Dimensional Mechanism Giving Effect to Judicial Review of Legislation}

1- The Degree of Compliance or the extent to which the operation of Article 27 of the constitution becomes mandatory will be ascertained with reference to opinions of writers like Bindra, Maxwell, Crawford and Sarathi

\textsuperscript{15} “SICO” famous documentary by Michael Moore, this illustrates how American citizens with or without Health Insurance suffer on account of narrow minded profit oriented operation of Insurance companies

\textsuperscript{16} Argentinean Water Management Privatization see reference14
2- The ultimate outcome of the aforesaid degree of compliance arrived at the moment it is interpreted in the light of Ut Res Margis Valeat Quam Pereat doctrine

3- The substantive grounds for subduing the impact of Article 29 of the constitution that in a sense functions as an ouster clause (Preclusive Clause) - Exfacie noncompliance with the provisions of chapter VI of the constitution (Blatant withdrawal from Directive principles) as opposed to mere non-compliance due to practicalities- the application of Mischief rule of Interpretation.

1-The Degree of Compliance or the extent to which the operation of Article 27 of the constitution becomes mandatory will be ascertained with reference to opinions of writers like Bindra, Maxwell, Crawford and Sarathi

Article 27(1) The Directive principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.

In accordance with Sarathi, who is an Indian jurist the question whether a particular provision is mandatory or directory depends on the language in which the intention of the legislature is clothed. Therefore, on the basis that the expression “shall guide” is used in the Article 27 at first sight this provision appears as a mandatory provision guiding both parliament and the executive in the enactment of laws as well as in the governance. However, this view of Sarathi is highly disputed, on account of many liberal interpretations reflecting that the Actual intention of the legislature must be ascertained with reference to other decisive factors rather than strictly depending on the language. Thus, a more forceful basis is required in rebutting the legal barrier expressly ousting the justiciability of these principles.

Crawford in his ‘Statutory Construction’ states;

“A statute or one or more of its provisions, may be either mandatory or directory. While usually in order to ascertain whether a statute is mandatory or directory, one must apply the rules relating to construction of statute: yet it may be stated, as a general rule, that those whose provisions relate to essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely a matter of convenience rather than of substance, are directory”17

The application of different rules relating to construction to Directive Principles provisions as Crawford brings out will be discussed under 2nd and 3rd headings of this chapter.

17 Crawford, Statutory Construction pg104
Apparently, Article 27 can be defined as a substantive law, dealing with the essence of the thing to be performed. Since Article 27 is neither a procedural requirement nor a matter of convenience, in the opinion of Crawford, this provision could be construed as a mandatory requirement. However, most formidable task to which a court is confronted in such a situation is to determine the degree of compliance applicable to these provisions. In this regard, Bindra referring to D.A Koregaonkar V State and Ismail V Labour Appellate Tribunal\(^\text{18}\) states that “one of the most important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and if it does the courts would say that that provision must be complied with and that it is obligatory in its character”

Similarly, according to Maxwell the issue that arises in such a situation is to determine the nature of the provision with reference to consequence of compliance or non compliance.

Thus, the basic issue that must be analyzed is whether a serious inconvenience or in-justice would result due to non-compliance with provisions of the chapter VI of the constitution. With regard to this analysis, the blatant withdrawal from Directive principles provisions must be emphatically distinguished from the mere non-compliance due to practicalities.

At first sight these provisions may appear extremely broad or idealistic that the attainment of such goals appears as if an impossible scenario. However, it could be argued that the attainment of these ideals is an on-going process, running through undefined time periods. Therefore, the sovereignty of people operating through legislature, executive or judiciary must constantly function with the view of obtaining such heights someday rather than disregarding them to perish. Thus, every piece of legislation must conform or act in the direction of these ideals as opposed to moving in the contrary direction. Consequently, the blatant withdrawal from Directive principles can be interpreted as a suppression of state ideals that manifestly abuses the legislative power of the people that is held in trust for people in terms of Article 3 and 4(a) of the constitution.

The ‘Blatant Withdrawal’ may be ascertained with reference to factual circumstances involving an enactment as contrary to the provisions of this chapter VI.

Thus, from an overall perspective, in terms of the provisions of directive principles a contextually dependent degree of compliance is required however broad or idealistic these provisions may be.

\(^{18}\) - D.A Koregaonkar V State and Ismail V Labour Appellate Tribunal 4 AIR1958 Bom 167,ILR 1957 Bom120 and AIR 1957 Bom
2- *Ut Res Margis Valeat Quam Pareat Doctrine (Presumption of Validity)*

In an instance in which the courts are confronted with two or more alternative constructions, with one giving validity to a statute and others declaring them invalid, the courts must give life to the interpretation that provides validity to a statute.

In the Sri Lankan case *Umbichy Ltd V Hede Navigation (PTE) Ltd*

“in interpreting a statute which purports to confer jurisdiction the maxim *Ut Res Margis Valeat Quam Pareat* was applicable (Maxwell 12th Ed p45) ; even if there was an ambiguity, that interpretation should be preferred which gives effect to a statute rather than that would create a lacuna in the law or reduce the legislation to futility”\(^{19}\)

The withdrawal involving these principles is raised before the courts as Article 27 conflicts with ambiguity, in terms of the practical validity of directive principles arises, when a question of blatant withdrawal is raised before the courts as article 27 conflicts with Article 29 removing the justiciability of these provisions. Furthermore, in the absence of implementation, even though lacuna of law does not arise a lacuna of factors justice, that deprives the public from a remedy against the abuse of legislative power springs up.

In terms of constitutional interpretation, this doctrine is said to have a greater force and validity than its application to ordinary statutes.

Bindra in explaining reasons for this refers to *Crawford V Spooner* “While the scope for application in the case of ordinary enactment is very narrow, the caution being that the courts should not pose as the legislator.”\(^{20}\)

\(^{1}\)“A constitution of a government is the living and organic thing, which of all instruments has the greatest claim to be construed *Ut Res Margis Valeat Quam Pareat*”\(^{21}\)

Therefore, the Directive principles of state policy which constitutes a part of our constitution stands with the claim of being construed *Ut Res Margis Valeat Quam Pareat*.

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\(^{19}\) 2000(3) SLR 15 to 20

\(^{20}\) 1846(6) Moor PC 9

\(^{21}\) In re Motor Spirit Taxation Act AIR1939 FC 1; Govind Prasad V S factors tate of Bopal AIR 1952 Bhopal 1, P.K More V Union of India AIR Bom134
The moment the aforesaid contextually dependent degree of compliance is interpreted in the light of *Ut Res Margis Valeat Quam Pareat* doctrine, the possibility of the operation of judicial review of legislation with existing legal provisions stands with a great likelihood.

3-The substantive grounds for subduing the impact of Article 29 of the constitution that in a sense functions as an ouster clause (Preclusive Clause) - Exfacie noncompliance with the provisions of chapter VI of the constitution (Blatant withdrawal from Directive principles) as opposed to mere non-compliance due to practicalities- the application of Mischief rule of Interpretation.

The Next significant step is to overcome the legal obstacles involving Article 29 ousting the enforceability of these provisions. This provision in a sense functions as an ouster clause. A disguised form of judicial review in *Attapattu V peoples’ Bank and wickremabandu V Hearth* that was enforced through a dynamic judicial interpretation that overcame the legal barriers ousting jurisdiction in terms of *section 22* of the Interpretation Ordinance and *section 8* of the *Public Security Ordinance*. The following passage by Justice Mark Fernando reflects a silent application of mischief rule of interpretation.

“*Apart from any consideration if it became necessary to decide which was to prevail, an ouster clause in an ordinary law or a constitutional provision conferring writ jurisdiction on a superior court” subjected to provisions of the constitution”* - I would unhesitatingly hold that the latter prevails, because the presumption must always be in favor of a jurisdiction which enhances the protection of rule of law and against the ouster clause which tends to undermine it”

In this context, undermining rule of law can be identified as the mischief and an interpretation in favor of the jurisdiction that enhances the protection of rule of law is an interpretation suppressing the mischief.

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22 Argentina has suffered through decades of military rule, dictatorships, corruption and a collapsed economy. When Carlos Menem was elected president in 1989 the country was relying heavily on advice and loans from the International Monetary Fund. With the IMF’s backing, Menem passed the “National Administrative Law,” a declaration of a state of emergency that gave him the power to privatize public utilities by decree. The blanket privatization of public assets was meant to be a cure for the country’s hyper-inflation, which at that time was close to 5000%.
Article 29. The provisions of this chapter do not confer or impose legal rights or obligations, and are not enforceable in any-court or tribunal. No question of inconsistency with such provisions shall be raised in any-court or tribunal.

It could be argued that the operation of this provision does not extend to legislation that exfaciely withdraw from the provisions of this chapter (Blatant withdrawal) on account of such exfacie withdrawal contradicting with the manifested intention of legislation defined in Article 27.

The Construction of Chapter VI of the Constitution in the light of Mischief Rule of Interpretation

The following passage in River Wear Commissioners V Adamson Lord Blackburn quoting observations of Lord Coke in Haydon’s case reflects the criteria of Haydon’s rule or Mischief Rule.

“Those for sure and true interpretation of all statutes in general four things are to be discerned. 1- what was the common law before the Act 2-what was the effect and mischief for which common law did not provide 3- what remedy the parliament hath resolved and appointed to cure 4- the true reason of the remedy and then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for the continuance of the mischief and pro primitoe commodo”23

G.W Paton in his text book of Jurisprudence writes: “---- the mischief rule that emphasizes the general policy of the statute and the evil which it was directed”

In Dorothy Silva V Inspector of Police, It was held that “the aim of the Brothels Ordinance is to suppress prostitution which is the mischief intended to be prevented by the legislature. If any premises is used to promote such Activities such premises has all the attributes of a Brothel for the purpose of Brothels Ordinance. An interpretation that fulfills the purpose of the legislature should be adopted”24

23 - N.S Bindra, Interpretation of Statutes pg 94,95
24 78 NLR 553
As specifically defined in Article 27 the manifested intention of the legislature in enacting the chapter VI of the constitution is to provide a guide line for parliament and for the executive for enactment of laws and for the governance with the ultimate object of establishing a just and free society as embodied in the preamble to the constitution as well. Therefore, however broad or idealistic these provisions may be the legislature must constantly strive to obtain these ideals since the attainment of these ideals is an ongoing process running through undefined time periods. Consequently, any piece of legislation moving in the contrary direction appears as a suppression of state ideals as previously stated. The apparent mischief intended to be focused by the legislature in this situation is the blatant withdrawal from directive principles reflecting an abuse of the legislative power of people that is held in trust for people in terms of Article 3 and 4(a) of the constitution.

Hereafter, several practical instances to which the unified application of the aforesaid three dimensional mechanisms could be applied will be given attention.

The Inland Revenue (Special provisions) Act no. 10 of 2003 granting certain Tax Amnesties was passed without being challenged during the bill stage for unconstitutionality despite some provisions of this apparently violating Article 12 of the constitution. However, at a subsequent exercise of consultative jurisdiction by the president seeking opinion from the Supreme Court it was held that this Act is unconstitutional although this legislation cannot be struck down since the judicial review of legislation is unavailable in Sri Lanka.

In this situation, the extension of the Article 12 of the constitution to the directive principles provisions that are incidental in terms of the implementation of Article 12 equality can be discerned as 26(6), 27(7), and 27(8) (depending on the circumstances involving the unreasonable granting of tax amnesties). Thus, such unreasonable provisions could be struck down for Blatant Withdrawal from the directive principles

In an extremely hypothetical situation if a legislation is passed granting a monopoly involving essential goods such as Liquid Petroleum Gas (LPG), Petrol, diesel, etc is granted to a private company or an multinational company such legislation can be struck down for blatant withdrawal from 26(7), 26(8) and 26(9) depending on the factual circumstances.
The legislations developing unreasonable state monopolies can also be challenged in a similar manner.

In another hypothetical situation if a legislation in the nature of the proposed Water Management bill (with reference to the comments made in mass media) is passed undetected during the bill stage exposing to Sri Lankan to a catastrophic situation similarly to the way in which Argentina suffered subsequent to the privatization of Water Management25

Ex-if the issue involving the Eppawala Phosphate case that deals with a joint venture to mine Phosphate with Free Port Mc Moran Company causing irreparable economic, social, and environmental hazards is passed through legislation, such legislation can also be struck down resorting to this argument.

**Random Instances in which the Courts Disguisedly and Silently Applied Judicial Review**

In *Attapattu V People’s Bank* on the question whether an ouster clause in an ordinary law protected by Interpretation Ordinance (amendment) Act No.18 of 1972, the following reasoning was adopted observing the language used in both Article 140 and Articles like 138 by *M.D.H Fernando J.*

The language of Article 140 that confers writ jurisdiction on the court of appeal states merely that “subjected to provisions of the constitution” but Article 138 in respect of the jurisdiction of the Court of Appeal states that “subject to provisions of the constitution and any-other law”. Thus, the intention was to empower the Court of Appeal, in terms of Article 140 judicial review is to empower the court of appeal with an unfettered authority that is not subjected to any other laws like the Interpretation ordinance (Amendment) Act No. 18 of 1972 or any other ouster clause like the ouster clause in Finance Act.

Hence, on account of the aforesaid reasoning by Justice Mark Fernando, *section 22* of the Interpretation ordinance (Amendment) Act No. 18 of 1972 and the ouster clause in *section 71* of Finance Act have been struck off due to being inconsistent with Article 140 of the constitution or in other words due to unconstitutionality. This reflects a disguised form of judicial review of legislation

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25 Ibid 22
Chapter 2-Extension of the Prevailing Fundamental Rights Jurisdiction by Identifying the Provisions of Directive Principles of State policy and Fundamental Duties that are Incidental to the operation of expressly Specified Fundamental Rights

The Definition of Incidental Directive Principles and Fundamental duties -The instances in which our courts have given life to Directive principles-The application of Edjusdem Generis doctrine to Article 12(2) -Duty Conscious Citizens-the Mechanism giving life to Fundamental Duties

As reflected in Vienna Declaration and Program of Action, “All Human Rights are Universal, Indivisible, Interdependent and Interrelated”\textsuperscript{26}

Thus, no fundamental rights provision can be interpreted in isolation since they inevitably take color and shape from other surrounding provisions such as incidental human rights on directive principles and fundamental duties.

“Incidental Rights” is defined as rights in relation to chapter VI of the constitution that are inevitable in terms of the operation of expressed fundamental rights in chapter III, on account of the indivisibility, interdependence and interrelatedness of the concept of Human rights.

Justice Sharvananda in \textit{In Re the 13\textsuperscript{th} Amendment to the Constitution} states that Referring to Article 27(1) he states that “True the principles of state policy is not enforceable in a court of law but that shortcoming does not detract them from their value as projecting aims and aspirations of a democratic government. The democratic government requires to be implemented by legislation. In our view the two bills represent steps in the direction of implementing the program envisaged by the constitution makers to build a social and democratic society.”\textsuperscript{27}

\textit{Bindra} under “Harmonious Construction” states that “one section of the Act cannot be held Ultravires of another section of the Act. In a contingency of this kind the only cause open to courts is to put a harmonious interpretation thereon. In determining the scope and the ambit of fundamental rights, court may not entirely ignore the directive principles of state policy laid

\textsuperscript{26}World Conference on Human Rights,1993
\textsuperscript{27}D.A Koregaonkar V State and Ismail V Labour Appellate Tribunal 4 AIR1958 Bom 167,ILR 1957 Bom120 and AIR 1957 Bom 584
down in part 4 of the constitution and adopt the principle of harmonious construction and should attempt to give effect to both as much as possible”

**The Mechanism of Such Expansion of Fundamental Rights Jurisdiction**

In accordance with Article 12(2) “no citizen shall be discriminated on the grounds of race, religion, caste, sex, political opinion, place or any-one of such grounds”

In terms of this Article, specifically enumerated ground such as race religion, caste etc have been followed by a general term “any-one of such grounds”

Bindra quoting Indian cases brings out criteria as Pre-requisites for the application of Edjusdem Generis doctrine.

1- the statute contains an enumeration by specific words
2- The members of the enumeration constitute a class or category (genus)
3- the class is not exhausted by the enumeration
4- a general term follows the enumeration
5- there is a distinct genus comprising of more than one specie
6- There is no clearly manifested an intention that the general term must be given a broader meaning than the doctrine requires

Apparently, the class or the genus in Article 12 (2) has not been exhausted by the specifically enumerated grounds. The distinct genus or the class could be identified as the grounds on which an individual may be discriminated (Individual Discriminatory Grounds) which is a broad class giving space for the inclusion of other individual discriminatory grounds.

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28 2000(3) SLR 15 to 20
29 1846(6) Moor PC 9
The moment Article 12(2) containing the aforesaid general term is interpreted in the light of Article27 (9) the state shall secure social security and welfare and 27(7) The state shall eliminate economic and social privilege and disparity and exploitation of man by man or by state, some new grounds for the specifically defined enumeration description under Article 12(2) can be identified. They are Level of Income and Social privilege.

When these factors are cumulatively analyzed, it could be approved, that in terms of the operation of Article 12(2) of the constitution, Article 27(9) and 27(7) are incidental rights declaring incidental rights.

Ex- The failure on the part of the health minister or health ministry officials to give due attention to administrative issues and creating consequent industrial disputes in health sector and thereby depriving people from health services

In such a situation, resorting to the aforesaid argument, health minister or health ministry officials could be made respondents on the basis that ordinary citizens with low levels of income and lesser degree of social privilege are compelled to resort to private hospitals bearing high costs.

However, since very often the compensation paid to aggrieved parties becomes a burden on public funds of the state. Ultimately, the general public will compensate on behalf the wrong doers. As most of the state funds are tax payments by citizens and of which more than 85 % are indirect taxes paid by ordinary citizens ranging from beggar on the street to high grade officials and businessman, such implementation of rights will result in remedying injustice by unjust means. Consequently, a dynamic operation of law is urgently needed to overcome this complicated legal scenario.

**Duty Conscious Citizens**

A dynamic interpretation of law stands with a great likely hood as far as Article 28 of the constitution defining fundamental duties is concerned. In a sense, this provision appears as a provision reflecting moral obligations, but this could be made enforceable once it is interpreted in the light of previously discussed arguments.
Article 28 “The exercise and enjoyment of rights and freedoms is an inseparable from the performance of duties and obligations and accordingly it is the duty of every person of Sri Lanka to (a) to uphold and defend the constitution and the law;

(b) To further national interest and to foster national unity;

(c) To work consciously in chosen occupation;

(d) To preserve and protect public property; and to combat misuse and waste of public property;

(e) To respect rights and freedoms of others; and

(f) To promote nature and conserve it’s riches.

The collective effect of Article 12(2) being interpreted in the light of Article 27(7) and 27(9) which are incidental to Article 12(2) must be construed in view of Article 28 (Fundamental Duties), in order to arrive at a dynamic interpretation, theoretically eliminating the previously discussed injustices.

The moment this interpretation is applied to the dispute involving health ministry, we can observe an increase of number of respondents who can be compelled to pay compensation.

Considering this issue, the fundamental duties will have a strong validity if a patient suffers death or any other serious injury due to the arbitrary strike or any-conduct disregarding humanity by health sector servants. The health sector servants in this context refers to nurses, attendants, doctors, or any-other category of health sector servants who acts arbitrarily in such situation. Furthermore, even in the absence of such serious injury, due to the fear of imminent injury compensation could be claimed. This form of compensation criteria can be extended to situations where an individual citizen is compelled to resort to private medical institutions bearing high costs.

Although health sector servants like doctors and nurses can be made individually liable, other persons like the minister and officials can also be made individually liable Article 28- “it is the duty of the every person in Sri Lanka to(c) to work consciously in his chosen occupation (d) preserve and protect public property and combat misuse and waste of public property. (e) Respect the rights and freedoms of others.

Thus, even though a minister and officials are not individually liable in an official capacity by resorting to Article 28, they could be made individually liable.
EX 2-Arbitrary or corrupt executive conduct resulting a creation of a monopoly in terms of an essential industry like LPG (Liquid Petroleum Gas)

Although ordinary writ application and fundamental rights factors Action are possible remedies in such a situation the Locus Standi with regard to ordinary citizens who are harmfully affected by the creation of such monopoly is a disputable issue.

The application of Edjusdem Generis doctrine to Article 12(2) being extended to 27(7) and 27(8) would create substantive grounds for legal Action by ordinary citizens who are not directly are parties to such dispute although harmfully affected.

The further extension of this fundamental rights jurisdiction to fundamental duties (Article 28) would make the relevant officials individually liable in an individual capacity. From a fundamental duties perspective, even a foreign or multinational company could be made respondents irrespective of nationality provided that they Act arbitrarily disregarding the duties defined in Article 28.

**Chapter 1 and 2 Conclusion**

Considering all those factors as a whole, it could be approved that despite the absence of expressed constitutional provisions governing the judicial review of legislation, judicial review of legislation could be made effective by dynamically interpreting the existing constitutional provisions that provide a considerable freedom for liberal interpretations in the interest of people. Moreover, an extension of the prevailing fundamental rights jurisdiction by resorting to directive principles reflects the capacity of judiciary to function as hyperactive guardian of peoples’ rights within the scope of prevailing powers. The enforcement mechanism involving fundamental duties conveys the culmination of that capacity.

**Chapter 3-**

*Broadening the Scope of Writ Jurisdiction Under Article 140 of the Constitution in Order to Make the Conduct of Certain private or Non-State Entities Amenable to Judicial Review*
This mechanism that attempts to make the conduct of private or non-state entities amenable for judicial review under Article 140 of the Constitution has also been structured by resorting to a three dimensional approach.

1-Expanding the scope of Administrative Conduct by virtue of “Derivative Administrative Action”.

2-The use of Hans Kelson’s Jurisprudence in order to give validity to legal norms or concepts pronounced in judgments independently of the factual circumstances under which they appear

3- How far the judicial attitude has developed in terms of making private and non state entities amenable to Judicial review with the use of Ex parte Datfin (R v Panel on Takeovers and Mergers) and the Sri Lankan Approach of Harjani V Indian Overseas Bank-

*Thereafter, the manner in which Fundamental Rights Jurisdiction Operate against Private Entities will be discussed

1-Expanding the scope of Administrative Conduct by virtue of “Derivative Administrative Action”

In the light of recent experiences involving large scale frauds and misconducts such as Golden key credit card company fraud, VAT fraud, Pramuka bank fraud, Pyramid investments .etc which still remain un-remedied have developed a huge skepticism towards the public authorities and the entire system. Moreover, those circumstances have created a massive reputation for non-Action, silence or ineffectiveness of our authorities in spite of being expressly bound and empowered to Act against such misconducts. Therefore, on account of the ordinary public being constantly being deprived of remedy against such ineffectiveness of such public and statutory authorities and consequently being vulnerable towards the conduct of private non state entities or persons who very often run away unpunished after committing gigantic frauds and abuses of public property by having fraudulent understandings with public authorities. It is a tragedy as well as noteworthy that due to bribery and corruption being a well established tradition in public service, from the eyes of ordinary public, it is extremely difficult to name a government department, corporation or ministry, where services could be acquired without resorting to bribes and over the years bribery laws have been unsuccessful in remedying the situation.

Article 4(d) of the Constitution-writ jurisdiction being entrenched within the scope of fundamental rights jurisdiction-consequent expansion of writ jurisdiction- the extended notion of Derivative Administrative Action-Omissions breach of statutory duty of public authorities- extending the scope of judicial review to cover the conduct of non-state or private entities
which is directly traceable to a breach of duty on the part of relevant public authority – the alleged conduct of the both relevant administrative authority and the alleged private entity being considered as an integral transaction – making both the relevant public authority and private of non-state entity respondents to the Action.

Article 4(d) of the Constitution is as follows

“The fundamental rights which are by the constitution declared and recognized shall be respected, secured and advanced by all organs of government, and shall not be abridged, restricted or denied save in the manner hereinafter provided…”

In the case of Environmental Foundation V Urban Development Authority (UDA), Battaramulla popularly known as Galle Face Green case\(^{30}\), this constitutional provision was used to impose a duty on UDA to compel to stop bare denial of access to official information. The underlying principle behind this Article is to impose a duty on all public authorities to take all possible steps to respect, secure and advance fundamental rights and thereby ensure the protection of people’s rights. In other words, if the relevant public authority is expressly empowered to Act in respect of misconducts they must use their powers entrusted to them by law to perform public duty without waiting ineffective as if blind or deaf.

In terms of Article 126(3) of the constitution, writ jurisdiction has been entrenched within the scope of fundamental rights jurisdiction. Consequently, the scope of writ has become enlarged on account of it being entrenched within Fundamental rights\(^{31}\).

“Article 126(3)-Where in the course of hearing in the Court of Appeal into an application for orders in the nature of writs ………..it appears to court that there is a prima facie evidence of an infringement of chapter iii or iv by a party to such application, such court shall forthwith refer such matter for determination by the Supreme Court”

In W.K.C Perera V professor Daya Edirisinghe it was held that

“By entrenching fundamental rights jurisdiction in the constitution the scope of writs has become enlarged and it is implicit in Article 126(3)….“

By virtue of this principle, all principles in relation to the fundamental rights can be made use in view of writ applications. Therefore, the underlying principle behind Article 4(d) of the constitution although it focuses on fundamental rights jurisdiction, can be used to expand the scope of judicial review under Article 140 of the constitution.

\(^{30}\) SC FR 47/2004 17

\(^{31}\) This legal concept has been adopted from Dr Jayantha De Almella Gunaratne, Law College Law Review 2005, New Vistas For Judicial Review In The Sphere Of Employment And Other Contractual Relationships
A further extension of the underlying principle behind Article 4(d) could be used to develop the concept of Derivative Administrative Action.

**Derivative Administrative Action**

If a particular administrative authority is expressly empowered and bound by law to exercise supervision and control over the conduct of private corporations and if an individual is aggrieved owing to misconduct on the part of the private or non-state entity in terms of which the concerned statutory authority is expressly empowered and bound to exercise supervision, irrespective of the fact whether such aggrieved individual is entitled to seek relief under private law for breach of contract or otherwise, and if the misconduct of the alleged private or non-state entity is in direct implication is traceable to the Act, omission or the breach of statutory duty on the part of the concerned Administrative authority to a sufficient degree of burden, the alleged misconduct of private or the ‘non-state entity’ and the alleged conduct of the administrative or public authority must be considered as one complete conduct or an integral transaction. Since the misconduct of private or non-state entity derives from the failure to exercise powers by which the administrative authority is expressly empowered by law such Action is termed as “Derivative Administrative Action”

Thus, by virtue of Derivative Administrative Action, even the conduct of private entities can be made amenable to judicial review and in the process concerned Administrative Authority as well as alleged private entity must be made respondents while making both liable proportionately to the degree of fault.

One may argue that this notion takes away the discretion by which the administrative authorities are empowered to a certain degree. However, the fact which must be emphasized is the powers exercised by authorities are not in any manner absolute or unfettered but these powers are held in trust for people in respect of Article 3 and 4 of the constitution as upheld in Dr Shiranthi Perera V PIGM University of Colombo

**The Practical Instances in which this form of legal Arguments could be applied**

The passage given below is an excerpt taken from an analytical news paper Article published in The Sunday Times by Prbath Jayakody which is titled “Financial Stability : who takes responsibility?”

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32 Dr Shiranthi Perera V PIGM University of Colombo. There are no absolute unfettered discretions in public law; discretions are conferred on public functionaries in trust for public to be used for the public good and the propriety of exercise of such discretions is to be judged by reference to purposes for which they were entrusted. Ii, supra
“It’s just few years since the occurrence of one of the biggest ever financial scandals in Sri Lankan history, the collapse of the Pramuka Bank, which led to thousands of depositors being helpless and desperate after being deprived of monies deposited with the bank. Immediately after the collapse of the bank, there was a serious discussion as to who was responsible for the mismanagement of the bank. There was widespread criticism of the manner and the extent of the process of supervision conducted by the Central Bank of Sri Lanka (CBSL) over the operations of banks and financial institutions of the country. Besides, the public perception of the effectiveness of statutory audits carried out by leading audit firms was also affected by the incident at that time. Another unfortunate incident has taken place now, just a few years later, which has resulted in similar implications on the society as in case of the one mentioned earlier.

The main difference between the two cases is that the Pramuka Bank was an approved Savings and Development Bank, which had been authorized by the CBSL to accept deposits from the general public whereas in the most recent case (Sakvithi Group Case) it has been an unauthorized unit which had obtained deposits from the public and its officials then disappeared. While the depositors of Pramuka Bank are still striving to recover from the desperation caused by that collapse, thousands of complaints have begun to occupy the complaint books of the Police Department from another set of desperate depositors. Once again the role and the responsibilities of the CBSL has been the subject of widespread discussion in society while similar discussion is taking place with regard to the responsibilities of the national media.

CBSL and the Financial Sector Stability

As per the revised objectives of the CBSL, it’s specifically entrusted with the preservation of the financial sector stability of the country. In order to ensure such financial stability, the CBSL needs to maintain closer and continuous scrutiny and supervision over the various institutions, which are engaged in diverse financial operations such as accepting deposits from the public, lending(loans and advances), leasing and hire-purchasing, foreign exchange transactions, etc. This process of supervising and controlling the financial Activities within the country is facilitated by a large number of laws (Acts and statutes) whereas the CBSL itself has been vested with the authority to issue directives over such financial Activities. The CBSL is the main institution, which is statutorily established, resourced and authorized to supervise, investigate into and control the financial operations within the country. For this purpose, in order to determine the urgency and the degree of supervision that such Activities deserve, the CBSL may consider the materiality of the Activities in terms of their nature and size, taken either as a single unit/transaction or collectively, and the nature and magnitude of the likely implications on the financial stability and law and order within the country.”

Furthermore, the following is an extract taken from a news paper Article By Bandula Sirimanna published in the Sunday Times titled Central Bank rules out any probe into Golden Key.

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33 The Sunday Times
“The Central Bank (CB) has ruled out any investigation or intervention into the Golden Key Credit Card Company scam because it is a credit card company and does not come within the supervisory framework of the Central Bank.

The CB is not conducting any investigations into the Golden Key financial crisis, officials said, when asked to respond as to why the CB didn’t seize the books and documents at Golden Key, similar to what was done in the Sakvithi case.34

A senior CB official told The Sunday Times FT as far as the Central Bank is concerned they are satisfied with the company’s audit report submitted to them during their investigations in 2006 and had only learnt that it was a forged document after recent newspaper reports. He added that the Golden Key Co had functioned without any supervision of the Central Bank and it is not a registered finance company. He said the company had no authority to obtain money from the public, as deposits or to grant loans on interest, or invest money in any way, as per financial regulations. The official said Golden Key had accepted security deposits to issue credit cards but that the CB was unaware of large sums being accepted from depositors paying them high interest rates ranging from 12% to 30%.

Golden Key had invested these deposits in around 40 different projects including the Golden Key Hospital in Rajagiriya. However he said that according to company officials, difficulties had arisen when paying interest to depositors and also when supplying money for withdrawals and this was one of the major reasons for the financial crisis in the company. He added that he was not aware about any court directive to the Central Bank to conduct an inquiry and submit a report on the company. Legal experts said that the officers of the Central Bank including its Governor cannot abandon their responsibilities with regard to the Golden Key crisis as they are now made aware of the fact that the company was accepting deposits from the public without a license under the Banking Act and or the Finance Companies Act.

They said the CB is responsible in maintaining financial stability and has extensive powers to intervene in various ways where the stability of the financial system is at any risk at any time.

The experts expressed concern as to why the CB had allowed Golden Key to continue its dealings without a fuller probe after the 2006 inspection.”

Apparently in relation to Pramuka Bank fraud and the Sakvithi case, the central Bank of Sri Lanka (CBSL) had been well empowered by law conduct supervision. Especially with regard to Pramuka Bank fraud, CBSL had gone to the extent of authorizing the Pramuka Bank as an approved Savings and Development Bank, which had been authorized by the CBSL to accept deposits from the general public.

CBSL has been expressly empowered and bound to exercise supervision and control over financial institutions by the following laws and ensure financial stability of the country. The key

34The Sunday Times
Acts relevant to the regulatory role of the Central Bank are the Monetary Law Act, the Local Treasury Bills Ordinance, Registered Stocks and Securities Ordinance, Exchange Control Act, Banking Act, Finance Companies Act, Finance Leasing Act, Payment and Settlement Systems Act and Financial Transactions Reporting Act and the central bank was established by Monetary law Act.

While making CBSL respondents on account of CBSL’s failure to exercise proper supervision and control over private non-state entities like Pramuka bank, Sakvithi (provided that don’t escape from the country), Golden key credit card company etc. other respondents by making their conduct amenable to judicial review.

The advantage of this approach is that the state involvement is guaranteed to provide relief when the court makes a desirable order and as a result of making both authorities and non-state private entity liable the scope of relief available to aggrieved individual becomes enlarged strengthening the protection of Administration of Justice.

2-The use of Hans Kelsen’s Jurisprudence in order to give validity to legal norms or concepts pronounced in Judgments independently of the factual circumstances under which they appear

Hans Kelsen’s jurisprudence based on pure theory of Law attempts to develop a theory with an undiminished purity in the structural frame work and which is independent and uninfected by other extraneous disciplines such as natural science, sociology, politics etc.

According to professor G.L Perris

“Kelsen was convinced that one of the aberrations of legal science in the modern age was an imprecise and logically unsatisfactory demarcation of the subject. He criticized many other approaches of jurisprudence, including Austin’s exposition of analytical positivism on the ground that these approaches tend to dilute the analysis of law by encroaching on extraneous fields, where the subject matter treated is basically of a different character.”

Kelsen distinguished “Facts” from “norms”

A fact relates to the area of “is”

Norm relates to “ought propositions”

35 Professor G.L Peris, the publication of the Open University of Sri Lanka
In other words, other disciplines like natural science focuses on “what is” in explaining the nature of the world. However, in contrary law is a normative discipline which is focused on norms or legal norms which are ought propositions or what is ought to be but not what actually is in the world.

From a Kelsorian dimension, “norm by it’s very nature can be derived only from another norm and never from a fact. In other words, norm can never be explained convincingly in relation to a physical fact or series of facts”

Professor G.L Perris under the Heading “Kelsen’s Conception of Hierarchy of Norms” states that

“Kelsen’s basic analysis was that each norm derived validity from another norm and, in explaining the overall conception of legal system, one would resort to hierarchy of norms in the shape of a pyramid”

Fundamental essence of Kelsen’s jurisprudence is the ‘Grund Norm’ which is the basic or apex norm giving validity to all other norms in terms of the chain of hierarchy of norms in the shape of a pyramid. The validity of any law which is a norm is ultimately traceable to the Grund Norm.

“One of the most controversial aspects of Kelsen’s theory relates to his conception of Grund Norm. The grund norm to Kelsen’s mind represented the point beyond which it was impossible to proceed in the search for a basis for the recognition of legal system. Kelsen postulated it as the essence of substantial effectiveness. The grund norm therefore, as it was conceived of by Kelsen, was a fictitious extra legal norm”

From a Sri Lankan perspective, all laws ranging from regulations made by local authority, ordinary legislation, case law to the constitution which is the Supreme law can ultimately be traced to the 1st republican constitution of 1972, which is an autochthonous constitution having absolutely no-continuity to previous legal regimes like Ceylon constitutional Order in Council in1946, Soulbury constitution or any other previous legal regime.

The fact that any law which is a norm forming an ought to proposition can exclusively give validity to another norm of law but not in any manner to a fact is of vital significance to the legal arguments structured by this chapter. Thus, all legal norms or concepts pronounced in a case law judgment derive validity from the 1st republican constitution which is highest apex norm in terms of the Sri Lankan Kelsonion Hierarchy of norms. Therefore, on the basis that a legal norm can exclusively give validity to another norm of law but not in any manner to a Act, the 1st and 2nd republican constitutions in 1972 and 1978 which are the supreme legal norms with the former giving validity to the latter can exclusively give validity to legal norms or principles in a judgments irrespective of the fact whether such legal norms are Ratio Dictum of Obiter dicta but
not in any manner to the factual circumstances under which such judgment is pronounced. This application of Kelsonian principles is contrary to Stare decisis doctrine where obiter and ratio of a judgment are distinguished.

*L.J.M Cooray* quoting Cross explains *Stare Deicis* “Every court is bound to follow any reported case decided by a court above it as some appellate courts are bound by their own decisions.”

However, the exceptions to *Stare decisis* principle in terms of which the future inferior courts are not bound by the decisions of superior courts are abrogated decisions, incura rule (per in curia), precedents subsilentio, affirmation or reversal on a different ground, the effect of changing social and economic considerations. Therefore, an analysis of these exceptions would reveal that an addition of another exception from a Kelsonian dimension would not in any manner be contrary to the rationale or the purpose of *Stare Decisis* which is to provide a consistency and predictability to the legal system.

In *Jayewardene V The Peoples’ Bank* although it was held that “since mandamus now essentially belongs to public law, it’s applicability cannot be extended to an area where relief is available under private law restricting the scope of writ jurisdiction, one of the legal principles pronounced in that was in order to apply mandamus there must be a public duty.

“Courts will always be ready and willing to apply the constitutional remedy of mandamus in the appropriate case. The appropriate case must necessarily be a situation where there is a public duty”

In *Ratnayake V perera* Sharvananda J observed that “today the chief function of the writ is to compel the performance of public duties prescribed by statute though it lies as well for the enforcement of a common law public duty.”

The effect of these legal norms is that in order to operate judicial review by way of Mandamus there must be a public duty or statutory public duty. If that normative principle is distinguished from the factual context under which they appear, same principle could be used to another factual context independently of the previous factual circumstances.

Ex – if a licensed commercial bank which derives it’s powers by virtue of Banking Act no 30 of 1988 and Recovery of loans by Banks (special provisions) Act no 4 of 1990 and if a private individual is aggrieved by the conduct of such bank by Acting ultravires in respect of the powers

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36 L.J.M. Cooray, Introduction to Legal Systems in Sri Lanka pg 157

37 2002(3) SLR 17

38 1982(2)SLR 451
prescribed by those statutes, invariably the bank breaches the statutorily prescribed public duty in line with aforesaid public duties.\(^\text{39}\n\)

3- How far the judicial attitude has developed in terms of making private and non state entities amenable to judicial review with the use of Exparte Datafin ( R v Panel on Takeovers and Mergers ) and the Sri Lanka Approach of Harjani V Indian Overseas Bank-

In Administrative Law 10\(^{th}\) Edition by H.W.R WADE AND FORSYTH pg 540 under the chapter titled “Realms Beyond Law” it has been stated that

“The law has been driven from these familiar moorings by the impetus of expanding judicial review, which has been expanded to two kinds of non-statutory Action. 1- Is where the bodies which are unquestionably governmental do things for which no statutory power if necessary, such as issuing circulars or other forms of information? Examples have already been given to show how courts will entertain Actions disputing statements if law, and even of policy, in government statements and circulars, although mere statements have no legal effect.

2-is where judicial review is extended to bodies by which , by traditional test, would not be subjected to judicial review and, which in some cases , fall outside the spear of government altogether. A variety of commercial, professional, sporting and other Activities are regulated by powerful bodies which are devoid of statutory status and may have an effective monopoly.\(^\text{40}\n\)

The 1\(^{st}\) category identified in the above extract has already been adopted in W.KC Perera V Professor Daya Edirisinghe

“there is no doubt that Article 12 ensures equality and equal treatment even where a right is not granted by common law statute law or regulation and this is confirmed by the provisions of Article 3 and 4(d). Thus, whether the rules and examination criteria have statutory force or not.

\(^{39}\text{ this situation will be discussed with reference to Harjani V Indian Overseas Bank under next heading}\n
\(^{40}\text{ H.W.R WADE AND FORSYTH, 10\(^{th}\) Edition. Administrative Law by pg 540 under the chapter titled “Realms Beyond Law}\n
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the rules and examination criteria read with Article 12 confer a right on duly qualified candidate to the award of a degree."

This judicial attitude reflects the preliminary stages of jurisprudential structure in which the scope of judicial review and Fundamental Rights jurisdiction broadened by drawing away from conventional approach that ultimately expands writ jurisdiction to cover the conduct of private or non state entities.

In respect of the 2nd category, *Exparte Datafin* can be identified as the most influential landmark judgment.

*R v Panel on Take –overs and Merges exparte Datafin* 42

On the question whether the panel on Take-overs and Merges having the qualities of not being incorporated, having no-statutory, prerogative or common law powers and having no contractual relationship with the financial market or with those who deal with in that market, SIR JOHN DONALDSON MR reasons that

“The principle issue in this appeal, and the only issue which may matter in the longer term, is whether this remarkable body is above law. I do not doubt one moment that it is intended to do and does operate in public interest and that the enormously wide discretion which it arrogates to itself is necessary if it is to function effectively and efficiently. While not wishing to become involved in political controversy on relative merits of self regulation and governmental or statutory regulation, I am content to assume for the purposes of this appeal that self regulation is preferable in public interest. but that said, what is to happen if the panel goes off the rails, Suppose, perish the thought that it were to use its powers in a way in which was manifestly unfair. What then? Counsel for the panel submits that the panel would lose the support of public opinion of in the financial market and would be unable to continue to operate. Further or alternatively parliament could and would intervene. May be, but how long would that take and who in the mean time could or would come to the assistance of those who were being oppressed by such conduct." 43

Thus, it was held that “in determining whether the decisions of a particular body were subjected to judicial review and the court was not confined to considering the source of that body’s powers and duties but could also look at that nature. Accordingly if the duty imposed on a body whether expressly or by implication a public duty was and the body was exercising public law functions the court had jurisdiction to entertain an application for judicial review of that body’s decisions. Having regard to the wide ranging nature and importance of the matters covered by the city code on Take-overs and Merges and to the public consequences of non-compliance with the code, the panel on Take overs and mergers was performing a public duty when prescribing and

41 W.K.C. Perera V Professor Daya Edirisinghe supra
42 1987(1)AER 564 R v Panel on Take –overs and Merges exparte Datafin
43 Ibid pg568
administering the code and it’s rules and was subjected to public law remedies. Accordingly an application for judicial review of it’s decisions would lie in the appropriate case." 

Therefore, it could be discerned that the fundamental principle underlying this decision is that whether the alleged body or entity is performing functions of public nature or whether such body was performing a public duty irrespective of whether body has statutory underpinnings.

In the local case *Saheer V Board of Governors Zahira College*[^45] , other question whether parents of children studying at Zahira College are entitled to a writ against the Board of Governors of Zahira College, it was held that;

“Within the scheme of national education, the Board of governors is a statutory public authority receiving and spending funds being subjected to government regulations in the administration of students, employment of teachers etc and Zahira College is a public authority”

*Harjani and another V Indian Overseas Bank*[^46] is the most influential land marks judgment that specifically establishes that judicial review is available even against a private bank provided that required criteria is fulfilled.

The fact in issue was that the respondent bank which is an incorporated legal entity under Banking Companies Act in India and also a licensed commercial bank within the meaning of Banking Act No. 30 of 1988 is subjected to judicial review.

The reasoning of Justice Slaleem Marsoof P.C makes reference to the following English case laws

Aforesaid, *R v Panel on Take –overs and Merges exparte Datafin, R V international Stock Exchange of UK and the Republic of Ireland, R v FIMBRA exparte Cochrane etc*

With reference to these cases, it was held that although the judicial review is not available in the context of purely contractual powers, the authority of contractual nature which various self regulating areas have over their members help these organizations to perform public functions, and accordingly the failure of such organization to perform a contractual obligation may be subjected to judicial review. The rationale of making such non-statutory bodies amenable to prerogative remedies appears to be that they are discharging functions of public nature.

Thus, it was held that 1. The 1st respondent bank has sought to take advantage of Recovery of Loans by Banks (Special Provisions) Act relating to parate execution which were defined in section 22 of the Act.

[^44]: ibid pg564
[^45]: 2002(3) SLR 405
[^46]: 2005(1)SLR167 30,supra
The Act lays down special procedure for the exercise of powers conferred on such banks.

*Justice Saleem Marsoof P.C* states that;

“I am of the opinion that this court is bound to exercise supervisory jurisdiction over the exercise of such powers despite the fact that some at least of these banks are local or foreign Banking companies”

**The Corresponding Developments in terms of the Fundamental Rights Jurisdiction**

(The manner in which the judicial attitude has evolved in making FR Jurisdiction Available against the Conduct of Non-state entities)

The invariable implications involving Article 126(3) making writ jurisdiction being entrenched within FR Jurisdiction-Article 126

Various tests Developed by case Law:

1- Test of Governmental Agency 2- the Test of Government Control 3-the Test of Deep and Pervasive Control

It is noteworthy that on account of Article 126(3) in terms of which, writ jurisdiction is entrenched within the scope of Fundamental rights jurisdiction, all corresponding developments of law in respect of writ jurisdiction will invariably be applied to fundamental Rights Jurisdiction.

The issue in question in instituting FR Action against the conduct of non-state entities is whether such non-state entity could be identified, in view of executive or administrative Action in respect of Article 126(1) of the constitution. In ascertaining whether a particular entity satisfy the criteria of executive or administrative, aforesaid three tests have been developed.

**The Test of Governmental Agency or Instrumentality**

Justice e Athukorale in *Rajarathne V Airlanka Ltd*[^47] held that air lanka is an agent or an organ of government and it’s Actions were designated as executive or Administrative based on the following reasoning.

Athukorale J

[^47]: 1987(2)SLR 128
“All the above circumstances enumerated by me show that Air-lanka is no ordinary company. It has been brought into existence by the government, financed almost wholly by the government and managed and controlled by the government through its nominee directors. It has been so created for the purpose of carrying out functions of great public importance which was once carried out by the government”

The test of Government Control

It was pointed out in this Wijetunga V Insurance Corporation\(^48\) that by virtue of Article 4(d) of the constitution which mandated that the fundamental rights which are by the constitution declared and recognized shall be respected, secured and advanced by all organs of government, and shall not be abridged, restricted or denied reflects that Action by government alone constitutes executive or administrative Action.

Sharvananda CJ states

“It is true that the minister appoints its members and the corporation, in the exercise of its powers and performance of its duties, is subjected to the general or special directions of the minister. But these even when taken together do not outweigh the Act that the Act confers on the corporation powers, which are given to it to be exercised at its own discretion and in its name”

Deep and Pervasive Control Test

Leo Samson V Sri Lanka Airlines Ltd\(^49\)

The question arose was whether when government corporations are privatized to a certain degree but not totally whether such entity satisfy the criteria of executive and administrative Action.

Under the circumstances that the management power control, authority over and responsibility for the business affairs of a company being vested with Emirates for the implementation of an approved business plan and certain management decisions being exclusively vested in Emirates, it was discerned that the “Deep and Pervasive” control was lacking in Sri Lankan Airlines Ltd.

Thus, it was held that

Executive or administrative Action would include executive or administrative Action of the state or its agents or instrumentalities

“It is clear from the provisions of the memorandum and Articles of associations and the shareholders’ agreements that the management, power control and authority over the business...

\(^{48}\) 1982(1)SLR 1

\(^{49}\) 2001(1) SLR 94
of the company is vested in the investor with certain management decisions being vested exclusively in it”.

“Applying the test of government agency or instrumentality, it is clear upon a consideration of the provisions of the amended Articles of association and the shareholders’ agreements... that the government has lost the” Deep and Pervasive” control exercised by it over the company earlier. The Action taken by Sri Lankan Airlines cannot now be designated executive or administrative Action.”

**Chapter 3- Conclusion**

The administrative law or public law remedies available to an individual aggrieved, consequent to the conduct of private or non-state entities designate a wide scope; especially on account of unique republican features of our constitution that warrants liberal interpretations from innovative dimensions. These remedies ranging from derivative administrative Action, practical use of Kelsen’s jurisprudence to Harjani V Indian Overseas Bank and Exparte Datafin approach constitute a solid foundation with some approaches being well established and others requiring further sharpening by skilled professional craftsmanship, in order to be applied directly in courts. Moreover, by virtue of writ jurisdiction being entrenched within the scope of fundamental rights jurisdiction in terms of Article 126(3) of the constitution, all judicial developments in relation to judicial review under Article 140 will have an invariable application over the fundamental rights law.

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