

LORDS SAVE THE CONSTITUTION!
INTERPRETING THE SRI LANKAN CONSTITUTION: ITS DIMENSIONS AND FACETS

Thilini Vidanagama

Attorney-at-Law,
LLB (Honours)(London), PGDL (London)

Abraham Lincoln, while commending the sacrifices of those who fought for their liberties, rightfully said; *“that these dead shall not have died in vain that this nation, under God, shall have a new birth of freedom and that government of the people, by the people, for the people, shall not perish from the earth”*¹.

Preceded by a long struggle for independence, the architects of the Constitution of the Democratic Socialist Republic of Sri Lanka have embarked on a long journey passing several milestones from the First Republican Constitution in 1972 to the Second Republican Constitution in 1978. Sri Lanka is a country where sovereignty is vested in people and is inalienable². Therefore, the

numerous amendments³ made to the Constitution over the years, could be regarded as attempts made to reflect the mandate of the people.

Manifestly, it is critical to facilitate a harmonious interpretation of the provisions of the Constitution to ensure the sovereignty of the people and accountability to the people, and to undermine the unfettered exercise of State power. Therefore, being one of the three organs of the State, the judiciary is vested with an immense responsibility to interpret the constitutional provisions confined to the lines drawn by architects of the Constitution. The Judiciary is thus duty bound to interpret these provisions to ensure that any executive or administrative action do not infringe the

¹ (White & Ronald, 2008)

² Article 3 of the Constitution of Democratic Socialist Republic of Sri Lanka states that *“In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise”*.

³ The First Amendment to the Nineteenth Amendment to the Constitution of the Democratic Socialist of Sri Lanka

fundamental rights guaranteed under the Constitution.

The author ascertains Their Lordships' efforts in facilitating a harmonious interpretation of the Constitution while safeguarding the intention behind the texts of the Constitution and its structure. However, the scope of this article is limited to the fundamental rights jurisdiction of the Supreme Court⁴.

There is a robust arrangement of case law developed over time in the fundamental rights jurisdiction. In observing recent jurisprudence, especially the following, the author believes that it aptly shows the attempts of Their Lordships of the Supreme Court to broaden horizons of the fundamental rights jurisdiction. The pragmatic approach taken by Their Lordships to facilitate a harmonious interpretation in par with the international standards⁵ is remarkable.

⁴ With regard to the applications made under and in terms of Articles 17 and 126 of the Constitution.

⁵ (Moeckli, Shah, & Sivakumaran, 2014)

The author seeks to begin this journey with a remarkable judgment delivered by a Bench of nine Judges of the Supreme Court in terms of Article 12(1). In terms of the scope of Article 12(1), it is stated that [it] “(...) *perhaps has the most dynamic jurisprudence in our Constitutional law, offers all persons a protection against arbitrary and mala fide exercise of power and guarantees natural justice and legitimate expectations*”⁶.

Sampanthan and others vs Attorney General (2018)⁷

On 9th November 2018, the news of His Excellency the President⁸ dissolving the Parliament⁹, broke the internet as well as

⁶ (Sampanthan and others v. Attorney General and others (2018), SCFR 351-361/2018, SCM 13-12-2018.)

⁷ (Sampanthan and others v. Attorney General and others (2018), SCFR 351-361/2018, SCM 13-12-2018.)

⁸ His Excellency Maithripala Sirisena, The President of the Democratic Socialist Republic of Sri Lanka

⁹ The Proclamation, which was published in the Extraordinary Gazette No. 2096/70 dated 9th November 2018 stated that such proclamation was issued by virtue of the powers vested in His Excellency the President by paragraph (5) of Article 70 of the Constitution of the Democratic Socialist Republic of Sri Lanka to be read with paragraph (2) (c), of Article 33 of the Constitution of the Democratic Socialist Republic of Sri Lanka and paragraph (2) of Article 62 of the Constitution of the Democratic Socialist Republic of Sri Lanka and in pursuance of the provisions of section 10 of the Parliamentary Elections Act, No. 01 of 1981.

the national and international confidence on political stability. Several cases were filed to invoke the fundamental rights jurisdiction of the Supreme Court to maintain the sanctity of the Constitution.

It was a ground-breaking moment in the Sri Lankan history, when a Bench of nine Judges in the Supreme Court unanimously held that the said Proclamation violated the petitioners' rights guaranteed under Article 12(1). The Court, thus, made an order quashing the said Proclamation and declaring the said Proclamation null, *void ab initio* and without force or effect in law. Thereby, the Supreme Court upheld that it is the inalienable right of every citizen of Sri Lanka to invoke the fundamental rights jurisdiction of the Supreme Court. Such right is a cornerstone of the sovereignty of the people, which is the 'Grundnorm' of the Constitution.

Lord Chief Justice H.N.J. Perera, emphasised the fact that "*The Constitution governs the nation. Disregarding the Constitution will cast our country into great peril and mortal danger. The Court has a*

duty to uphold and enforce the Constitution". His Lordship thereby reiterated the Court's declaration that "*In Sri Lanka, however, it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary*"¹⁰.

In the author's opinion, it was a well-articulated judgement armed with profound reasoning and conclusions¹¹ and a situation it is right to say that the penmanship has done justice to the ink. A few significant standpoints of this judgment as identified by the author are as follows;

- The mere existence of the procedure described in Article

¹⁰ (Premachandra vs. Major Montague Jayawickrema (1994) 2SLR 90)

¹¹ His Lordship the Chief Justice emphasised the basis for the judgment as "*To my mind, the reasoning and conclusions set out above gives effect to the first principle of statutory interpretation that the words of a statute must be given their plain and ordinary meaning and that the clear and unequivocal language of a statute must be enforced. The rule that provisions in the Constitution must be harmoniously read and applied so that the scheme of the Constitution can be made effective without rendering any provision superfluous or redundant, is complied with. Further, the reasoning and conclusions set out above ensures that the words in the relevant provisions are not strained or twisted in an attempt to reach a conclusion which is not justified by the provisions themselves. To my mind, the effect of this interpretation also accords with the duty cast on this Court to read and give effect to the provisions in the Constitution so as to uphold democracy, the Rule of Law and the separation of powers and ensure that no unqualified and unfettered powers are vested in any public authority*".

38(2)¹², which the Respondents claimed as being solely a power vested in Legislature, cannot deprive those Petitioners, who are Members of Parliament, of the inalienable right of every citizen of our country to invoke the fundamental rights jurisdiction;

- “*Since the proviso to Article 35 (1)*¹³ *grants the right to challenge acts or omission by the President “in his official capacity” only by way of the specific procedure of making a fundamental rights application under Article 126 of the Constitution, it follows that “executive or administrative action” by the President “in his official capacity” may be challenged in*

*terms of the proviso to Article 35 (1)*¹⁴”;

- The exercise of the power of dissolution of Parliament which is listed as one of the powers of the President in Article 33, which is within CHAPTER-VII¹⁵, is one manner in which the President exercises executive power;
- The Court, while clarifying the position taken in several other judgments¹⁶, held that “*our Law does not recognise that any public authority, whether they be the President or an officer of the State or an organ of the State, has unfettered or absolute discretion or power*”;

- While reiterating the basic principle, nothing valid can result from the illegality, the Court

¹² Article 38(2) of the Constitution states, *inter alia*, that any Member of Parliament may give the Hon. Speaker written notice of a resolution alleging that the President then in office is incapable of discharging the functions of his office by reason of physical or mental infirmity because the President then in office is guilty of intentional violation of the Constitution and/or misconduct or corruption involving the abuse of the powers of his office and/or three other grounds and seeking an inquiry and report thereon by the Supreme Court.

¹³ The proviso to Article 35 (1) of the Constitution was introduced by the 19th Amendment to the Constitution introduced a very significant change. It reads that “Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity.”

¹⁴ With the exclusion of the power to declare War and Peace under Article 33 (2) (g) from the ambit of the Proviso to Article 35(1) of the Constitution.

¹⁵ CHAPTER-VII of the Constitution titled “*THE EXECUTIVE the President of the Republic*

¹⁶ *Visuvalingam vs. Liyanage* (1983) 1 SLR 203, p.222; *Singarasa vs. The AG* (2013) 1 SLR 245; *Maithripala Senanayake vs. Mahindasoma* (1998) 2 SLR 333

emphasized the fundamental premise that any exercise of the franchise, must be at a duly and lawfully held election, which satisfies the Rule of Law¹⁷. “A departure from that rule will result in the negation of the requirement of the Rule of Law that an election must be lawfully called and be lawfully held and, thereby, adversely affect the results of an ensuing election”¹⁸.

- “The suggestion that Article 33(2)(c) vests in the President an unfettered discretion to summon, prorogue and dissolve Parliament at his sole wish and without reference to the clear and specific provisions of Article 70 is anathema to that fundamental rule and therefore must be rejected. Article 62(2) does not

¹⁷ Article 105 of the Constitution places a duty on the Supreme Court to protect, vindicate and enforce the rights of the people which include the right of franchise and the Court acknowledged that it is obliged to act to uphold the Rule of Law.

¹⁸ “The Court further held that decision to issue the said proclamation may have been a political decision, the power to dissolve Parliament is specified in the Constitution, and, therefore, this Court has both the power and the duty to examine whether the issue of the said Proclamation was in accordance with the Constitution”.

*vest any separate or independent power in the President to dissolve Parliament outside the mechanism specified in Article 70(1)*¹⁹”.

- While emphasising the evolution jurisprudence under Article 12(1) since the doctrine of classification, the Court held that “In a Constitutional democracy where three organs of the State exercise their power in trust of the People, it is a misnomer to equate Equal protection’ with reasonable classification’. It would clothe with immunity a vast majority of executive and administrative acts that are otherwise reviewable under the jurisdiction of Article 126. More pertinently, if this Court were to deny relief merely on the basis that the Petitioners have failed to establish unequal treatment’, we would in fact be inviting the State to equally violate the law.’ It is

¹⁹ Therefore, the Court held that “any dissolution of Parliament referred to in Article 33 (2) (c) and Article 62 (2) can only be effected by way of a Proclamation issued under Article 70 (1) which, in turn, can be issued only subject to the limitations specified in the second paragraph of Article 70 (1)”.

blasphemous and would strike at the very heart of Article 4(d) which mandates every organ of the State to respect, secure and advance the fundamental rights recognized by the Constitution. Rule of Law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal. It does not require positive discrimination or unequal treatment. An act that is prohibited by the law receives no legitimacy merely because it does not discriminate between people”.

In contrast, the recent judgment of the Supreme Court of the United Kingdom in **R v The Prime Minister (2019)**²⁰ refers to a prorogation of the Parliament in a country clothed with an Unwritten Constitution, as opposed to a dissolution of the Parliament in a country with a Written Constitution. Admittedly, there is a difference as to the consequence of the prorogation as opposed to the dissolution. However, the subject matter in question is relatively similar, because in the said

²⁰ (R (on the application of Miller) (Appellant) v The. Prime Minister (Respondent). Cherry and others (Respondents) v Advocate [2019] UKSC 41)

judgment of **R v The Prime Minister (2019)**²¹, it was held that the said propagation was null and void for being founded on an unlawful advice, which was outside the scope of the powers of the Prime Minister.

Thus, the author observes a pattern reflecting the willingness of the judiciary in a Democratic setup to cut down the wings of plenary powers and unfettered discretion and to uphold the Rule of Law.

Wickramanayake and Kumarasinghe vs Mahinda Balasooriya, Inspector General of Police (2019)²²,

This case invoked the fundamental rights jurisdiction in terms of Article 12(1) infringement of two Police officers. They were given transfers to other stations as a result of alleged insubordination occurred when discharging their duties impartially. This alleged insubordination occurred when they refused to follow unlawful Orders of Senior Officers during the

²¹ (R (on the application of Miller) (Appellant) v The. Prime Minister (Respondent). Cherry and others (Respondents) v Advocate [2019] UKSC 41)

²² (Wickramanayake and 1 other vs Mahinda Balasooriya, Inspector General of Police and others, SCFR81/2010, SCM 27-08-2019)

Presidential Election held in the year 2010.

In following a plethora of jurisprudence in similar matters²³, His Lordship, Justice Padman Surasena, while declaring the said transfers null and void, held that;

“This Court thinks this is a fit occasion to commend the forthrightness displayed by the Petitioners even in the face of the aforementioned adversary circumstances. There is no doubt that they had undergone a difficult time for mere upholding the rule of law in the country. Therefore, this Court decides to award a compensation in a sum of Rs. 1,000,000/= to each of the Petitioners payable by the 1st Respondent and the 3rd Respondent in equal shares.”

The author verily believes that the Court has considered the effect of this application on future implications of similar nature and to has taken this as an opportunity to empower the Public Officers not to ponder on unwarranted consequences, before resisting an illegal Order, in defending the Rule of Law.

²³ Wijesuriya and another v. State 77 NLR 25; Deshapriya v. Rukmani, Divisional Secretary, Dodangoda and Others 1999 2 SLR 412

*Christopher Mariyadas Nevis for Mariyadas Nevis Delrokson (Deceased) v. Superintendent of Vavuniya Prison (2019)*²⁴,

This case involves a fundamental rights application filed by the father of a deceased, who was arrested under Prevention of Terrorism Act²⁵ and had been later involved in a hunger strike when he was detained at Vavuniya prison. In the majority judgment, the Court held that in the circumstances of the case that it was not a violation. However, in the dissenting judgment of His Lordship Justice E.A.G.R. Amarasekara in *Christopher Mariyadas Nevis for Mariyadas Nevis Delrokson (Deceased) v. Superintendent of Vavuniya Prison(2019)*²⁶, whereby his Lordship held that denial of timely medical care amounts to a violation of the deceased’s fundamental rights.

²⁴ (Christopher Mariyadas Nevis for Mariyadas Nevis Delrokson (Deceased) v. Superintendent of Vavuniya Prison, SCFR 660/2012, SCM 23-05-2019)

²⁵ Prevention of Terrorism Act No. 48 of 1979

²⁶ (Christopher Mariyadas Nevis for Mariyadas Nevis Delrokson (Deceased) v. Superintendent of Vavuniya Prison, SCFR 660/2012, SCM 23-05-2019)

The author observes that the international law is of persuasive value to the Supreme Court. The Supreme Court has expressly absorbed decision in Linton v. Jamaica²⁷ where denial of medical care for injuries suffered even in an escape attempt was considered cruel and inhuman, and thus, held as such would be violative of Article 11 of the Constitution. Similarly, Thomas v Jamaica²⁸ and Bailey v Jamaica²⁹ took the same view on the denial of medical care. The author also observes that the decision in Thomas v Jamaica³⁰ was also cited in Somawardena v. Superintendent of Prisons & Others³¹ for the proposition that the failure to provide medical treatment to a person whose shoulder had been dislocated by an assault by the police was “cruel”.

²⁷ (Linton v. Jamaica, Communication No. 255/1987, U.N. Doc. CCPR/C/46/D/255/1987 (1992))

²⁸ (Thomas v Jamaica Communication No. 321/1988, Views of the U.N. Human Rights Committee, 19 October 1993)

²⁹ (Bailey v Jamaica Communication No. 334/1988, Adoption of Views by the UNHRC 31 March 1993)

³⁰ (Thomas v Jamaica Communication No. 321/1988, Views of the U.N. Human Rights Committee, 19 October 1993)

³¹ (Somawardena v. Superintendent of Prisons & Others Sc App 494/93 SPL SCM 22 March 1995)

Anjali (Minor) vs Bogahawatte, Matara Police Station(2019)³²

In this case, His Lordship Justice Buvaneka Aluvihare held that conduct of the respondent Woman Police Officer amount to a violation of minor child’s fundamental rights guaranteed under Articles 11, 12(1), 13(1) and 13(2) of the Constitution. Such conduct included initiating the investigation of an alleged sexual abuse in public, failing to appreciate the dignity of the child, failing to consider the child’s education and other social concerns, preventing the child to be associated with a parent or guardian, detaining the victimized child with another adult female inmate, and performing a medical examination without consent.

In view of the circumstance of this case, the Supreme Court recognized that “*what amounts to a ‘high degree of maltreatment’ in relation to an adult does not always resonate with the mental constitution of a minor. Therefore, when a minor complains of degrading treatment, the Court as the*

³² (Anjali (Minor) and 1 other vs Bogahawatte, Matara Police Station and others, SCFR 677/12 SCM 12.06.2019)

upper guardian must not be quick to dismiss the claims for failing to meet the same high threshold of maltreatment. Instead, it must carefully consider the impact the alleged treatment may have had on the mentality and the growth of the child”.

His Lordship, thus, laid down several guidelines to be followed by the law enforcement officials, in securing and advancing the fundamental rights of the public. The author further observes that the said decision of the Supreme Court has considered international instruments such as *United Nations Convention on the Rights of the Child* and *United Nations Rules for the Juvenile Deprived of their Liberty*. Additionally, the author deems that the Apex Court of Sri Lanka is sensitive to the questions as to how do this girl and her family feel? If it happened to one of our daughters, as parents, we would realise the suffering experienced by the child and her family. The author verily believes that every law enforcement official shall be aware of these guidelines and duly take cognisance of it in discharging their duties.

Conclusion

Evidently, *“the judge’s role when interpreting the Constitution is like that of an artist drawing a picture: the frame of the picture and the artist’s tools must always be drawn from the texts of the Constitution, its structure and the country’s history, but there must also be some measure of the artist’s own vision and understanding”*³³.

The author verily believes that as the society advances with culture and mannerism, and the laws shall be progressive to enable demands of a disciplined society. Therefore, there shall only be room for improvement in safeguarding the fundamental rights of the people, who hold sovereignty. Manifestly, Their Lordships in the Supreme Court are cloaked with an immense responsibility to ensure that the Constitutional guarantees are harmoniously interpreted through case law to protect these constitutional safeguards available to people³⁴ and to uphold the Rule of Law.

In the author’s opinion, the liberal attitude of the Honourable Judges in discharging Their Lordships’ duty to

³³ (Nariman, 2018)

³⁴ (Karim, 2016 and 2018)

ensure of the sovereignty of the people
exercised in terms of the Article 4(d) of

the Constitution is plausible. Indeed, the
Lords save the Constitution!