

THE “TIMOROUS SOULS” AND “BOLD SPIRITS” – THE ROLE OF LORDS AS “GODS” IN ENSURING RIGHTS OF THE CITIZENS

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Introduction

In terms of the Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka, “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.” (Constitution of the Democratic Socialist Republic of Sri Lanka, Art. 3) The concept of ‘Sovereignty of the People’, which is considered as the foundation of our second republican Constitution of 1978, ensures that all the governmental powers are derived from the people, and thus all the governmental agencies, legislative, executive and judiciary, are answerable to the people. The three organs of the government must exercise their power in trust for the people and in accordance with the ‘Rule of Law’ (JUSTICE THROUGH LAW: FIVE PUBLIC LAW PERSPECTIVES, 2012).

When the legislature fails in playing its proactive role and the executive is wielding a higher degree of power, which is practically uncontrollable, the role of judiciary can be interpreted as a “many-faceted instrument of public welfare”. But, ‘Power corrupts, and absolute power corrupts absolutely’. Therefore, it is strictly needed to ensure the fact that all the

government agencies will act in adherence with the mechanism of checks and balances.

In a society where the legislature enacts the rights of the citizens, the executive is empowered with the authority to ensure the consumption of those rights, the judiciary is considered as the guardian of the rights vested on the citizens.

The judges make new laws by way of interpreting the existing laws. The judiciary can follow precedents established in previous decisions; it can also over-rule such precedents, and thereby makes new laws to be followed. The importance of the judiciary in a democratic society can hardly be exaggerated. Judiciary is a part of the democratic process. Judiciary not only administers justice, and also it protects the rights of the citizens while acting as the interpreter and guardian of the constitution. In many states the judiciary enjoys the power of judicial review by virtue of which the judiciary decides the constitutional validity of the laws enacted or of the decree issued. It can invalidate such laws and decrees which are not constitutional (Rana, March 7, 2014). Sri Lanka, being a nation which does not have a judiciary vested with the power of judicial review of legislation (Constitution of the Democratic Socialist

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Republic of Sri Lanka, Art. 80(3)), is vested with 'pre-enactment judicial review'.

Though the judicial officers in US and India are enjoying the concept of judicial review, the Sri Lankan Bench does not have such a benefit in order to uphold the rights of the people (Abeysekara, 2015). And when it comes to the standards that had been set by international institutions, the six basic principles on the independence of the judiciary, which were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders which was held in Milan from 26 August to 6 September 1985 and endorsed by the United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (The United Nation-Human Rights, 2020) and Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) which ensures the equal justice, fair trial and independency and impartiality of the tribunals established by law (United Nations Human Rights, 2020) are prominent.

Thus, when it comes to the Sri Lankan scenario, challenge before the Sri Lankan judiciary is on playing the role of "Bold Spirits" as it was pronounced by Lord Denning, in a context where the country's legislature has failed to incorporate these provisions into the domestic legal literature, while ensuring the fact that "...*the rule of law binds the judiciary as well as other organs of Government.*", as it was stated by Justice Mark Fernando in his judgment of the case *Faiz v. Attorney General* (Faiz v. Attorney General, 1995).

Legal Analysis

"Amidst the cross currents and shifting sands of public life, the law is like a great ark upon which a man may set his foot and be safe"

-Lord Chancellor Sankey

(C.G.Weeramantry, *The Law In Crisis; Bridges of Understanding*, 1975).

Lord Chancellor Sankey explains the role of law in a society where the public has to spend their lives "*Amidst the cross currents and shifting sands*", while it is the judiciary who is responsible for constructing the "*great ark upon which a man may set his foot and be safe*" in order to give life to this role. The "Lords" - the "Judges" - are the craftsmen who are functioning besides the law and the courts, in giving life to their roles as "the most potent agencies for the public good" (C.G.Weeramantry, *The Law In Crisis; Bridges of Understanding*, 1975).

In realizing the "expectations of justice", it is the role of the judges which matters the most, as they are the human beings who gives life to the black letters of the statute – interpretation of statutes and application of Legal principles. Lord Denning also has shed light on the role of judges through one of his remarkable statements as follows: "*the development of law completely depends on 'bold spirits' and 'timorous souls'*".

Justice Hobart once attributed his authority in respect of legislation to "*that liberty and authority that judges have over laws, especially...statute laws, according to reason and best convenience, to mould them to the truest and best use*". Thus, development of law, being the process of resolving the scourge of unpredictability, it

is the instance where the judiciary is needed to play its proactive role for the purpose of 'expanding canvas'.

Judiciary, in performing its role as "a many-faceted instrument of public welfare", is essential to see it in light of the persons who are meant to serve this function (C.G. Weeramantry, *The Law In Crisis; Bridges of Understanding*, 1975). Thus, it is the "discretion" imposed upon the judiciary and "independence of the judiciary" that matters.

The Supreme Law of the country - the Constitution - has a separate set of Articles (Constitution of the Democratic Socialist Republic of Sri Lanka, Art. (107 to 117)), named "Independence of the Judiciary" in Chapter xv, which provides for the law relating to "The Judiciary". Further, these Articles provide for the independence of the judiciary by providing a transparent and unbiased procedure for the appointments and removal of the Superior Court Judges. And also it provides for the procedure as to the payment of salaries, while declaring the fact that the interference with judiciary as an offence (Constitution of the Democratic Socialist Republic of Sri Lanka, Art. (116)).

Expressing an extra-judicial opinion, Sharwananda C.J., has stated that, "*Independence of the judiciary means the independence of the judges that constitute the judiciary*" (Bulankulame v. Secretary Ministry of Industrial Development, 2000). Further, Blackstone regards an independent judiciary as the main preservation of public liberty. Therefore, eradicating undue influences while ensuring ethno-political-justice that should be employed by our "Lords" in addressing the social realities, classifies them as "bold spirits". "It is a very

strong commitment", as it was stated by Mr. K.Kang-Isvaran P.C., [at the oration delivered on the inaugural K.C. Kamalabayson, P.C. Memorial Oration in 2009, which was titled "The Tissue of Justice and Judicial Attitudes - A Wind of Change over Hulftsdorp Hill?"] (*JUSTICE THROUGH LAW: FIVE PUBLIC LAW PERSPECTIVES*, 2012).

According to Andrew Terry, "*Reaping without sowing will continue to haunt, until one of Lord Denning's "bold spirits" pushes back the perceived limits of judicial doctrine and formalities in the judiciary's sphere of influence*". Andrew Terry's statement is a clear portrayal of the role of judges in scourges of unpredictability, in establishing the rule of law for the purpose of ensuring public welfare. The public interest litigation system is one such revolutionary litigating system which is being adopted by many countries that have a "colonially inherited legal system", that fails in addressing the current social realities, while having a very powerful executive - a social context which is very similar to what exists in Sri Lanka.

Our neighboring nation, India, is one country who has adopted this public interest litigation system and their attempts flag the commitments of Indian judiciary - Indian judges - in addressing public interests and individual rights of their citizens against the corruptions that occur as a result of the absolute power vested on the officials; as it is the surest protection to shield the public. Former Chief Justice, P. N. Bhagwati, Justice V. R. Krishna Iyer can be referred to as the judges who pioneered public interest litigation system in India.

Even in the Sri Lankan legal system, the role played by judges ranks a premium place, as judges enjoy a high public profile in our legal system. And also we pay great attention to what courts say, as a nation which is adhered into realistic legal philosophy. The courts, the Supreme Court in particular, have articulated a set of benchmarks in administering justice. The *Bulankulama Case* (*Bulankulame v. Secretary Ministry of Industrial Development*, 2000) can be referred to as the first significant case in this regard, which depicted the active participation of the judiciary in ensuring the rights of the individuals - judicial activism - as a response to the societal needs of the country. Three sensational cases; the *Lanka Marine Services case* (*Vasudeva Nanayakkara v. K.N. Choksy and Others*, 2008), the *Waters Edge case* (*Mendis and 9 Others v. Kumaratunge and Others*, 2008) and the privatization of the Sri Lanka insurance Corporation case (*Vasudeva Nanayakkara v. K.N. Choksy and Others*, 2009), may also be considered as the high watermarks of public interest litigation system in Sri Lanka; broadening the rules of standing and scope of such litigation (Goonetilleke, 2014). Former Chief Justice Sarath N. Silva can be referred to as a Judge who did a great service in broadening the scope of public interest litigation system in Sri Lanka.

Through a process of interpretation, that has involved a blending of administrative law concepts, democratic values and constitutional text, the Supreme Court has articulated a right to administrative justice. The predilection of the judges, that has moved from the black letter law to an interest which lies more in public policy, the dynamic two-way relationship that has

been developed in between the principles of administrative law and fundamental rights, the cross fertilization of domestic law with the principles of international law, the intersection of different legal paradigms - specially with the human rights arena - , the different approaches that has been newly adopted - specially the rights based approach - are some clear depictions where the judges had taken pains to enlighten the social realities through a "culture of justification" and through a "culture of interpretation".

Although these efforts has been interpreted as "judicial hunt" and also as "judicial thugrism" by many critics, it is the "judicial activism" that is "in need" to the society. These processes of using naked power - using discretion as they please - could be justified under the norms of natural justice as it is being used for the sake of public interest in addressing the social realities.

The question '*quis custodiet custodet?*', '*Who guards the guards?*', as it was posed by Mr. Faisz Musthapa, P.C., [at the oration delivered on the inaugural K.C. Kamalabayson, P.C. Memorial Oration in 2011, which was titled "Fundamental Rights - Changing Judicial Attitudes?" by referring to an oration delivered by Mr. R.K.W. Goonesekera on the occasion of the 60th anniversary of the Law Faculty], (JUSTICE THROUGH LAW: FIVE PUBLIC LAW PERSPECTIVES, 2012), is a question which is still unanswered and will always be on debate, as it will always be a circumstantial matter that should be addressed according to the facts of each case.

Conclusion

As per Kevin Mackey, “Legal Realism was an engine of change” (Mackey, 2004). Thus legal realism being the school of jurisprudence which believed that ‘law is what judges say it is’, it is the best “engine” to address the social realities in a context where Sri Lanka being a Democratic Nation, which has an executive vested with practically uncontrollable powers.

Formalism – ‘the official theory of judging’ - being a feature of mechanical jurisprudence and being the antithesis of realism should be replaced with legal instrumentalism where the creativity in the interpretation of legal texts is justified in order to assure that the law serves good public policy and social interests, as legal instrumentalists could also see the end of law as the promotion of justice or the protection of human rights.

As the great American Judge, Justice Cardozo stated, law should be viewed “not solely as an authoritative technique for the resolution of strife, but chiefly as a social process for recognizing and marshalling the values that we prize” (Wyzanski, 1952). So, it is the duty of “bold spirits” to “sow” the “social values that we prize” as to “reap” “the expectations of justice” while heading towards “perfect justice”, without being sticking into the “black letters” and being “timorous souls”, and it will mark their roles as “Gods” in a needy society.

In the process of strengthening judicial power, independence of the judiciary is an essential element as it is a basic feature of the rule of law. Sri Lanka, being a nation leading towards a process of post conflict development, in all its social, cultural,

economical and legal aspects, and being in a context where the country’s hot debate is on the drafting and enactment of a new Constitution – the Supreme Law of the country – the only hope that the Sri Lankans being Democratic Nationalists, have is to “hope for the best”, in relation to rule of law and on the independence of the judiciary that would pave path for the rising of “bold spirits” as to create a proper legal instrumentalism with the social realities of the country.

But, there’s always a BUT; As ‘Power corrupts, and absolute power corrupts absolutely’, a reminder alert which was raised by Mr. Soli Sorabjee, a former Attorney General of India is cautioned as follows:

“It must never be forgotten that in a democracy people have every right to scrutinize and appraise not merely what the judiciary actually delivers but the integrity of the judicial process. The judiciary must constantly guard against the danger of judicial populism. It should not by hyper exercise of judicial power usurp decision making power from the legislature, the cabinet or civil service, in respect of matters of policy. That would be impermissible judicialisation of politics, an encroachment on other wings of the State.”

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