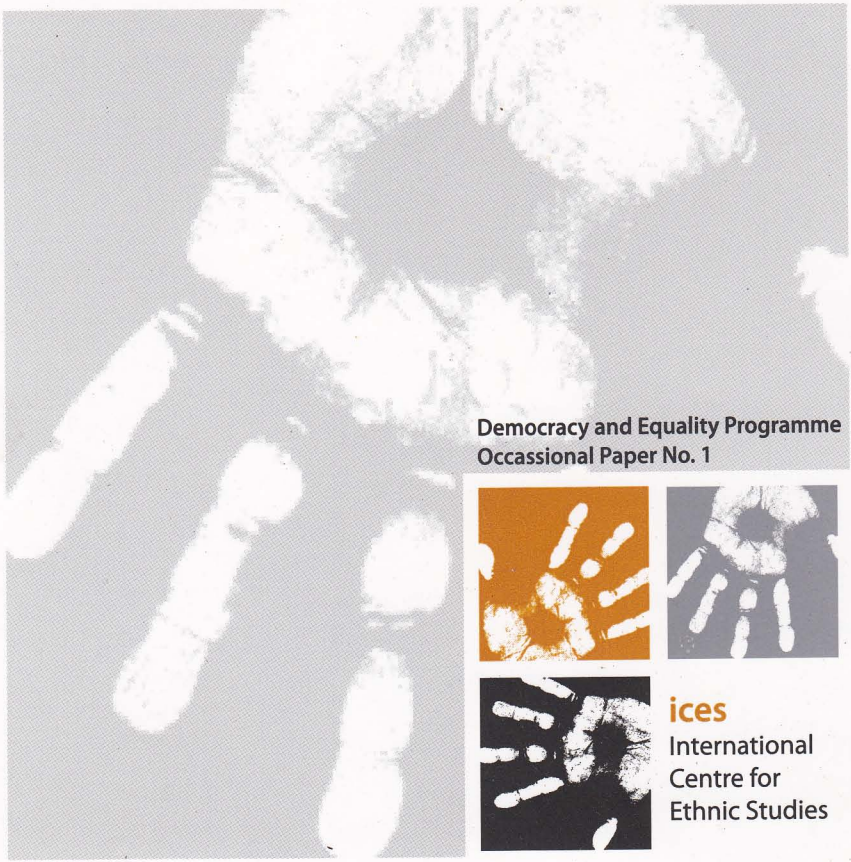
Public Trust Doctrine

The Sri Lankan Version



Democracy and Equality Programme
Occassional Paper No. 1

ices
International
Centre for
Ethnic Studies

Dinesha Samararatne

Public Trust Doctrine: The Sri Lankan Version

Public Trust Doctrine

The Sri Lankan Version

Dinesha Samararatne

LL.B. (Hons) (Colombo), LL.M. (Harvard), Attorney-at-Law
Lecturer, Department of Public & International Law, Faculty of Law,
University of Colombo, Sri Lanka

International Centre for Ethnic Studies (ICES)
Colombo

Acknowledgements

The original idea of developing a comprehensive legal analysis of the Public Trust Doctrine in Sri Lanka was proposed to me by Dr. Nishan De Mel, Executive Director of the International Centre for Ethnic Studies, (ICES) in 2009. The initial idea was to analyse the scope of the doctrine in light of its recent revival by the Supreme Court. Over a period of almost a year, this work evolved into a more comprehensive piece that has attempted to capture the development of the doctrine in Sri Lanka from a historical perspective, and also from regional and international perspectives. I am thankful to Nishan, to Lahiru Pathmalal (project co-ordinator at ICES) and to ICES for their support in developing this piece.

An initial draft of this paper was presented at the Junior Bar National Conference in 2009.This paper has benefitted from the responses given by the panellists at that session – namely, Mr. M.A. Sumanthiran (Attorney-at-Law), Mr. J.C. Weliammuna (Attorney-at-Law) and Mr. Shavindra Fernando (Deputy Solicitor General). I also benefitted from the responses to the initial draft by Mr. N. Selvakkumaran, (Dean/Senior Lecturer, Faculty of Law, University of Colombo).

I am also grateful for the initial research assistance provided by Ms. Sankhitha Guneratne and Mr. Damitha Karunaratne, third year undergraduates at the Faculty of Law, University of Colombo.

I am extremely appreciative of the comments given by Dr. Mario Gomez, (Law Commissioner, Sri Lanka Law Commission, former Senior Lecturer, Faculty of Law, University of Colombo), in reviewing this paper. Those comments were very helpful in refining my arguments and in teasing out more nuances of the doctrine of public trust in Sri Lanka.

Dinesha Samararatne

October, 2010

Research for this paper was carried out during September 2009 to August 2010.

Abbreviations

CPC	Ceylon Petroleum Corporation
EFL	Environmental Foundation Limited
ICJ	International Court of Justice
IDPs	Internally Displaced Persons
JKH	John Keels Holdings
LMSL	Lanka Marine Services Limited
PERC	Public Enterprise Reform Commission
PIL	Public Interest Litigation
PTD	Public Trust Doctrine
SC	Supreme Court
SLBC	Sri Lanka Broadcasting Corporation
SLIC	Sri Lanka Insurance Corporation
UDA	Urban Development Authority
USA	United States of America

Contents

1

Recent Revival of the Doctrine of Public Trust

1.1. Overview of the Paper

The Public Trust Doctrine (hereinafter "PTD") was relied on by the Sri Lankan Supreme Court (hereinafter the "SC") in three cases that were decided over the last two years; commonly known as the *SLIC* case,[1] the *Water's Edge* case[2] and the *LMSL* case.[3] Unprecedented orders were made by the SC in those cases. The declaration by the Court that the privatisation of SLIC, the transfer of land in the privatisation of LMSL and the lease of land in the *Water's Edge* case was null and void, was received differently by various quarters in Sri Lanka.[4] A common criticism that was made was that the SC was overstepping its role under the Constitution and arrogating powers to itself. On the other hand, those decisions were welcomed by some others who perceived

1 *Vasudeva Nanayakkara* v. *K N Choksy and Others*, S.C. (FR) No 158/2007, Supreme Court Minutes 4th June 2009.

2 *Sugathpala Mendis and Others* v. *C B Kumaratunge and Others*, SC (FR) No 352/2007, Supreme Court Minutes 8th October 2008.

3 *Vasudeva Nanayakkara* v. *N K Choksy and 30 Others*, S.C. (FR) 209/2007, Supreme Court Minutes 21st July, 2008.

4 See for instance, *Disputed Justice*, Lanka Business Online, accessed at, http://www.lankabusinessonline.com/fullstory.php?nid=2032090498, *Economic Impact*, 18th September 2009, Lanka Business Online, accessed at, http://www.lankabusinessonline.com/fullstory.php?nid=1177305189, *Choices Unravel*, 18th September 2009, Lanka Business Online, accessed at http://www.lankabusinessonline.com/fullstory.php?nid=1427517323, *PIL: The Good, the Bad and the Ugly - A rebuttal from Nihal's lawyers*, http://www.thebottomline.lk/2009/11/11/news1.html

them as a signal that the SC is willing to engage in judicial activism in the face of blatant abuse of executive power.

Two petitions related to violation of fundamental rights of internally displaced persons (hereinafter the IDPs), were brought before the SC over the last year.[5] In the case where the detention of IDPs was challenged, Justice Amaratunga, speaking on behalf of the Court, questioned the standing of the organisation that filed the petition in "public interest." Those concerns were raised again by the Senior State Counsel in the second case, where the same organisation sought leave to proceed with regard to the alleged violations of the right of franchise of the IDPs.[6]

The above mentioned examples of cases indicate that the validity and/or applicability of the PTD and Public Interest Litigation (hereinafter "PIL") is perhaps not a settled point of law in Sri Lanka. This paper attempts to revisit one of those concepts - the Public Trust Doctrine - as introduced and applied in Sri Lankan Public Law. It will be suggested that even though the PTD is a result of judicial activism, that it (along with the concept of PIL) forms an integral part of the Sri Lankan legal system and its underlying constitutional values. However, suitable measures need to be taken to settle those aspects of the law and bring in a higher measure of clarity and predictability, so that those two concepts can be continued to be used against the abuse of public power and the exploitation of public resources.

The objective of this paper is to use the recent revival of the PTD as a platform to engage in a detailed and critical analysis of the doctrine. The first part will therefore give a brief introduction to the recent cases that relied on PTD. The second part of the paper will explore two possible origins for the doctrine and also analyse briefly the use of the doctrine in Public International Law and two foreign jurisdictions; United States and India. The

5 *Centre for Policy Alternatives and Another* v. *Minister of Defence and Others*, S.C. (FR) 457/2009, *Centre for Policy Alternatives and Another* v. *Commissioner of Elections and Others*, S.C. (FR) 111/2010.

6 *Centre for Policy Alternatives and Another* v. *Commissioner of Elections and Others, supra.*

third section of the paper will analyse PTD as developed in Sri Lanka and an attempt will be made to identify the characteristics of the doctrine as evident from case law. The fourth part of the paper will seek to establish the unique nature of PTD as developed in Sri Lanka and consider whether it can be a separate ground of review for executive and administrative action. The fifth part will be a set of proposals as to how a framework could be developed for "Public Trust Litigation."

1.2. The Three Recent Cases at a Glance

In all three of the recent cases the petitioners claimed that their right to equal treatment before the law, which is guaranteed under Article 12(1) of the Constitution, had been violated due to executive and administrative actions that were illegal.[7] Additionally, the petitioners claimed that they were standing before the Court as public spirited individuals who were bringing this complaint on behalf of the citizens of the country.

A. *Vasudeva Nanayakkara v K N Choksy and 30 Others:*[8] the "LMSL"[9] Case

This case was with regard to the privatisation of Lanka Marine Services Ltd., (hereinafter "LMSL") which, prior to privatisation, was a fully owned subsidiary of the Ceylon Petroleum Corporation (CPC). LMSL had a monopoly in the Colombo Port, in providing bunkering services, both within the port and offshore. The impugned executive actions of the sale of the shares of LMSL to John Keels Holdings (JKH) took place between the years 2000 and 2002.

On a detailed examination of the facts, the Court found that the entire process of privatisation had been carried out by

---

7 "*All persons are equal before the law and are entitled to the equal protection of the law.*" Art. 12 (1) of the Constitution of Sri Lanka, 1978 (hereinafter "the Constitution").

8 *Vasudeva Nanayakkara* v. *N K Choksy and 30 Others,* SC (FR) 209/2007, Supreme Court Minutes 21st July, 2008.

9 Acronym for Lanka Marine Services Ltd.

the Chairman of the Public Enterprise Reform Commission (hereinafter referred to as "PERC") without any authorisation or supervision of the Cabinet of Ministers.[10] The Court declared therefore that the grant of over eight acres of land to JKH and the agreement providing for a monopoly in bunkering services for JKH was null and void[11] and that all agreements between the Board of Investment and LMSL were also null and void. In effect in the *LMSL* decision, the SC reversed all transactions, except for the sale of shares in the privatisation process that was undertaken by the Chairman of PERC.

B. *Sugathpala Mendis & Others v C B Kumaratunge and Others:*[12] the "Water's Edge" Case

The lease and subsequent transfer to Asia Pacific Ltd., land that had been acquired under the Land Acquisition Act[13] for the purpose of urban development was challenged in this case.[14] From

10 For instance, while the entire process was outside the procedure prescribed by law, the decisions made by the Chairman of PERC was in direct contravention of the decisions that the Cabinet of Ministers had made with regard to LMSL. On the 22nd of June 2000, the Cabinet had considered a Memorandum that was submitted to it regarding the liberalisation of bunkering in the Colombo Port and decided that a Committee of Ministers should consider the issue and submit a report. The outcome of the Report and the recommendations made by the Minster of Shipping was a decision to initiate a staggered process of liberalisation of bunkering services and that the monopoly of bunkering that LMSL enjoyed at the moment should be liberalised over the period of a year. The final outcome of the actions of the Chairman of PERC however was a transfer of 90% of the ownership of LMSL to John Keels Holdings for the price that was found to be significantly below the actual value of LMSL, the provision of a tax holiday of 3 years for JKH on account of the purchase, the transfer of a land of over eight acres to JKH for which no consideration was paid to the government and the provision of a monopoly for JKH bunkering services.

11 i.e. the Common User Facility Agreement dated 20th August 2002.

12 *Sugathpala Mendis and Others* v. *C B Kumaratunge and Others, supra.*

13 Land Acquisition Act No. 9 of 1950 as amended.

14 The acquisition was executed under the Land Acquisition Act *supra*, s. 5,

1997 to 2003 a series of actions were taken by the Executive i.e. the Cabinet of Ministers and the Urban Development Authority (hereinafter the "UDA"), which resulted in the ownership of this land being transferred to Asia Pacific Golf Course Ltd., at a price that, as held by Court, which was significantly below the actual value of the land. The central conclusion of the Court was that even though the land had been acquired to be utilized for a "public purpose",[15] it was evident through the series of events that took place from 1997-2003, that the Executive had not had a public purpose in mind, but rather, had acted both illegally and irresponsibly in alienating the land for profit.

On a thorough examination of the facts, the Court ordered *inter alia* that the transfer of title and lease of land to Asia Pacific Ltd., during the material period was null and void, that such land be vested back with the UDA and that the land be used for the public purpose of *"relocation of governmental agencies as a means of decentralising it from Colombo's commercially sensitive areas"* and for flood retention purposes. [16] Additionally, the Court ordered the UDA to compensate Asia Pacific Ltd., for the improvements made on the land.

C. *Vasudeva Nanayakkara v K N Choksy and Others:*[17] the "Sri Lanka Insurance" Case

The reversal of the privatisation of Sri Lankan Insurance Corporation (hereinafter "SLIC") was a consequence of the fundamental

---

in 1984 by the Minister of Lands and vested with the Urban Development Authority under the Certificate of Vesting. That Certificate of Vesting stipulated that *"the land should not be utilised for any other purpose than that for which it was originally acquired". Sugathpala Mendis and Others* v. *C B Kumaratunge and Others, supra* at p. 7.

15 Under s. 5 of the Act, land may be acquired under the Act for a public purpose.

16 *Sugathpala Mendis and Others* v. *C B Kumaratunge and Others, supra* at p. 59.

17 *Vasudeva Nanayakkara v K N Choksy and Others*, S.C. (FR) No 158/2007, Supreme Court Minutes 4th June 2009.

rights petition that challenged the privatisation process on the basis that it amounted to an arbitrary and illegal exercise of executive power. Court found, *inter alia*, that the Secretary to the Treasury had acted beyond the executive authority vested in him in several instances in the privatisation process. In appointing the Tender Board for the privatisation process, for instance, it was established that the Secretary to the Treasury had ignored the requirement that the Tender Board should be appointed by the Cabinet and had bypassed the Cabinet in constituting the same. Moreover, Court found that the companies that eventually purchased the SLIC had not been a party to the bidding process and were not in existence at the time the privatisation process for SLIC had commenced, i.e. Milford Holdings (Pvt) Ltd and Greenfield Pacific E. M. Holdings Ltd, both being companies that were incorporated in Gibraltar. Based on those findings, the SC ordered *inter alia*, that the Share Purchase Agreement signed for the sale of 90% of SLIC shares was null and void.[18]

In all three of the above described cases, the SC relied on the PTD in granting leave to proceed with the fundamental rights applications and also in determining the merits of each case. The common thread in the judicial attitude in those three cases is that executive power can only be exercised in trust and for public benefit. It was also evident that Court was of the view, that when an application before it clearly establishes that the PTD has been violated, that the doctrine itself requires that the Court intervenes and vindicates the sovereignty of the People.[19]

---

18 See in this regard, Edwards, B., *Unlawful Privatization in Sri Lanka: The Role of the Auditors*, Report published by the Government Accountability Project, Washington D.C., 2009. The report highlights the failure on the part of the auditors to expose the fraud and irregularities of the privatization process.

19 See in this regard, Articles 3 and 4 of the Constitution").

2

Possible Origins of Public Trust Doctrine

This section reviews existing legal scholarship and comparative judicial opinions in an effort to identify the possible sources for the PTD. This paper takes the position that there are two possible origins for this doctrine; one in Roman law and the other in the equitable jurisdiction of the Chancery Courts in England. The Roman law idea essentially means that certain natural resources must be protected by the state for sustainable use of the present and future generations. The English law idea of public trusts requires generally, that public power must only be exercised in furtherance of public purposes for which such power was given. Elsewhere in this paper, it will be argued that while both those stands have clearly influenced the development of the PTD in Sri Lanka – that the Sri Lankan "version" of that doctrine, is clearly a home grown one.[20]

2.1. The Concept of "Trust" in Equity and English Public Law

A. Public Trusts in English Public Law

"Trusts" and "Equity" are two concepts that have been developed in the Court of the Chancellor in England, to mitigate the harshness of the automatic application of black letter law.[21] The concept of trust provides that in certain contexts, property can

20 See the discussion under sections 4 and 5 of this paper.

21 See in general in this regard, Oakley, A.J., *Paker and Mellows, The Modern Law of Trusts*, (9th Ed., Sweet & Maxwell, London, 2008).

be held by one person, on behalf of and for the benefit of another. The types of trusts include express, implied, constructive and charitable trusts.[22] The Sri Lankan law, which includes a large body of law that was inherited from the British during the colonial era, includes that concept of trusts. The Sri Lankan law of Trusts is found in the Trust Ordinance[23] and the concept of Trusts is also used in other legislation such as the Trust Receipt Ordinance[24] and the Muslim Mosques and Charitable Trusts or Waqfs Ordinance.[25]

It is possible that this concept of trusts have influenced the PTD in Sri Lanka. That argument is made on the basis of the characterisation given to "Public Trusts" in English Public Law, by John Barratt, in an article in the Modern Law Review.[26] According to John Barratt, "public trusts" in English Public Law was developed through the concepts of equity in the Chancery Court and is now an established concept in the law.[27] Barrat

22 *Ibid.*

23 No. 9 of 1917 as amended. S. 3 of the Ordinance defines a "trust" as follows - *" trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another person, or of another person and the owner, of such a character that, while the ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested or to be vested in such other person, or in such other person concurrently with the owner."*

24 No 12 of 1947 as amended.

25 No 51 of 1956. See in general with regard to the concept of "trusts" in Sri Lanka, Cooray, A., *Oriental and Occidental Laws in Harmonious Co-existence: The Case of Trusts in Sri Lanka,* Electronic Journal of Comparative Law, (2008) 12(1), available at http://www.ejcl.org.

26 Barrat, J., *Public Trusts,* (2006) 69(4) M.L.R. 514-542. See in this regard, Oakley, A.J., *supra,* at pp. 1-23.

27 Barrat cites the case of *Attorney General* v. *Dublin Corporation* 1 Bligh NS 312, where the Court held, (with regard to whether a corporation under a local legislation, were personally liable for misuse of funds), *"It is expedient in such cases, that there should be a remedy, and highly important that persons in the receipt of public money should know, that they are*

establishes through analysis of English case law, that the use of public funds were subject to principles of equity and gave rise to the idea of a public trust.[28]

Barrat's article traces the development of this concept in English Public Law. Through an examination of case law and statutes, Barrat demonstrates how the English Courts developed the concept of public trust and subsequently made a retreat from it. Two factors that led to this retreat were the use of the mechanism of audit surcharges and the incorporation of equitable remedies with the legal remedies.[29] However, according to Barrat, the concept was continued to be employed through the recognition of the fiduciary duty owed by a local authority councillor to the tax payer. That, according to Barrat, is another mechanism that recognises the concept of public trusts.[30] *Magill* v. *Porter*[31] is a recent case that upheld an audit surcharge against

---

liable to account, in a Court of Equity, as well for the misapplication of, as for withholding, the funds.", Barrat, *supra* at p. 520.

28 "*Public funds could now be protected in Chancery against misappropriation, and losses from misappropriation made good by those responsible. These 'public trusts' resulted from the separate application of permanent equitable jurisdiction long applied to protect charitable funds.*" Barrat, *supra* at p.521. He cites the following cases as authority for this proposition: *Attorney General* v. *Brown* 1 Swans 265, *Attorney General* v. *Dublin Corporation* 1 Bligh NS 312, *Parr* v. *Attorney General* 8 Cl & Fin 409.

29 "*Despite public trusts doctrine's permanent basis, two nineteenth century remedial changes increasingly diverted its practical application: local authority audit surcharges and the fusion of legal equitable remedies. Audit surcharges were an administrative substitute for public trusts litigation in the Chancery. Remedial fusion enabled the other equitable public trusts remedies to be applied in the Queen's Bench Division without the need to base them explicitly on public trust status.*" Barrat at *supra* p. 525.

30 Barrat *supra*, at p. 526 onwards. *Roberts* v. *Hopwood* [1925] A.C. 578, *Prescott* v *Birmingham Corporation* 1 Ch 210 (Ch), *Bromley LBC* v. *GLC* [1983] A.C. 768.

31 *Magill* v. *Porter* [2001] U.K.H.L. 67.

local councillors who had misused public funds. The House of Lords in that case affirmed that "*Powers conferred on a local authority may be exercised for the public purpose for which the powers were conferred and not otherwise.*"[32]

The Court further held that,

> "*It follows from the proposition that public powers are conferred as if upon trust, that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves.*"[33]

Since 2000 however, the remedy of an audit surcharge has been abolished in English Administrative Law. Therefore Barrat

---

32 *Magill* v. *Porter, supra,* para 19. Lord Bingham of Cornhill cites Wade W., and Forsyth, C.F., *Administrative Law* (8th ed., Oxford University Press, Oxford, 2000) at pp 356-357, and Lord Bridge of Harwich in *R* v. *Tower Hamlets London Borough Council Ex p Chetnik Developments Ltd* [1988] AC 858 at 872, "*Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended . . .*"

33 The House of Lords in this judgement quotes from the Lord Chancellor of Ireland in *Attorney General* v. *Belfast Corporation* (1855) 4 IR Ch 119 at 160-161, "*Municipal Corporations would cease to be tangible bodies for any purpose of redress on account of a breach of trust, if the individuals who constituted the executive, and by whom the injury has been committed, cannot be made responsible. They are a collection of persons doing acts that, when done, are the acts of the Corporation, but which are induced by the individuals who recommend and support them; and this Court holds that persons who withdraw themselves from the duties of their office may be rendered equally answerable for the acts of those whom they allow, by their absence, to have exclusive dominion over the corporate property . . . As the trustees of the corporate estate, nominated by the Legislature, and appointed by their fellow-citizens, it is their duty to attend to the interests of the Corporation, conduct themselves honestly and uprightly, and to see that every one acts for the interests of the trust over which he and they are placed.*"

argues for a revival of the concept of public trusts through the recognition of the fiduciary duty owed by a local authority to the tax payer. On that basis, a councillor could be personally liable for the misuse of public funds.[34]

This interpretation of "public trusts" has a similarity to the *doctrine* of public trust. The idea that public funds are held in trust for the community and that those persons in public office can be held personally liable for its misuse or mishandling of it, (which is the rationale for an audit surcharge) has been extended in English Public Law, to mean that statutory power exercised by public authorities is held in trust. In the case of *Porter* v. *Magill*, the House of Lords endorses an observation made by Wade & Forsyth in this regard,

> *"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended . . ."*[35]

That interpretation has also been used by the Sri Lankan SC in developing the legal basis for the PTD.[36] Therefore, it seems that the concept of "public trusts" as developed by the Chancery Court of England, could be one source from which the Sri Lankan PTD has emerged.

---

34 *"...since mid-nineteenth century government saw a need to create a more efficient, professionally objective and less costly alternative process then litigation to replenish misappropriated public funds, based on the already-provided local audit system, a similar initiative today could be beneficial. Making use of the existing central and local audit systems it could, with considerable advantage, clearly confine the personal liability involved to the consequences of wilful misconduct instead of discretionary equitable jurisdiction relating to unlawfulness."* Barrat, *supra* at p. 542.

35 Court cites, Wade W., and Forsyth, C.F., *Administrative Law, supra* at pp 356-357, at para 19 of *Porter* v. *Magill, supra.*

36 See discussion under subheading 2.1.B. in this regard.

B Principle of Trust in the Exercise of Public Power in English Administrative Law

It has been suggested that, the values of good governance sought to be enforced through the PTD can be found in the existing principles of British and Sri Lankan administrative law and therefore that the doctrine is neither new nor unique. For instance, one of the principles of administrative law is that discretion vested in an administrative officer through statues or the Constitution, cannot be abused.[37] There are three principal grounds on which the abuse of discretion is reviewed by Court; exercise of discretion for an improper purpose, where relevant considerations have not been taken to account and/or irrelevant considerations have been taken into account[38] and where discretion is exercised in bad faith.[39] In such instances, the Court could issue a writ of certiorari to quash that decision.[40]Craig makes the following observations with regard to review of administrative discretion by court.

> *"The Courts have, ever since the origins of judicial review, exerted control over the discretion exercised by tribunal, agencies and the like, in order to prevent that power from being misused or abused."*[41]

Using those principles related to the exercise of administrative discretion as an example, it could be demonstrated that the PTD is in fact a re-incarnation of established principles of English Administrative Law as applied in Sri Lanka.

The overarching idea here is, that when public power is conferred upon an office – it is necessarily implied that such power can only be used to fulfil the objective of such conferment

37 See in general, Craig, P., *Administrative Law,* (6th ed., Sweet & Maxwell, London, 2008) and Wade W., and Forsyth, C.F., *supra.*

38 Craig, P., *supra,* p. 559.

39 Craig, P., *supra,* p. 562.

40 Craig, P., *supra,* p. 555.

41 Craig, P., *supra* at p. 55.

of power and within the limits of that power. Those factors are in fact, a vital aspect of the PTD as will be illustrated in section three of this paper.

2.2. Public Trust Doctrine in Environmental Law: International and Comparative Jurisdictions

A. Origins of the Concept in Roman Law and its Adoption in English Law

The second possible source and/or origin of the PTD in Sri Lankan Public Law, is the Roman law idea, that certain natural resources must be held in trust for the public. Most judicial opinions and legal scholarship on the PTD in environmental law refer to the Institutes of Justinian, where it is stated that, the public had unrestricted rights to *"the air, running water, the sea and the sea shore"*.[42] Those natural resources therefore, were incapable of private ownership and were commonly owned for the benefit of everyone.[43] English law developed this idea further to the effect that;

---

42 As per Justinian, *"By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea. No one, therefore is forbidden to approach the sea-shore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations"*. and the commentary on that rule is as follows, *"The particular people or nation in whose territory public things lie may permit all the world to make use of them, but exercise a special jurisdiction to prevent any one from injuring them. In this light even the shore of the sea was said, though not very strictly, to be a res public: it is not the property of the particular people whose territory is adjacent to the shore, but it belongs to them to see that none of the uses of the shore are lost by the act of individuals...with the opinions of other jurists, we must understand populi Romani esse to mean "are subject to the guardianship of the Roman people"*. Sandards, Thomas Collett, *The Institutes of Justinian*, , (3rd ed, London, 1865) at pp. 168 -167.

43 Also see in this regard, David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, (2008) 16 New York University Environmental Law Journal 711. According to Takacs, the Institutes of Justinian influenced both common and civil law in Europe and along with it the public trust doctrine was also introduced.

> *"The Crown was thought to have ownership of waters and the beds below them in order to control the highways of commerce and navigation for the advantage of the public; thus the sovereign held this property in trust for the people."*[44]

That concept has been employed in modern environmental law, to argue for the responsibility of the state to preserve certain aspects of the natural environment not only for the use and enjoyment of society but also for the sustainable use of future generations.[45] For instance, this concept has been incorporated into the South African legal system[46] through constitutional provisions[47] and also through legislation for management of natural resources.[48]

---

44 Scanlan, Melissa Kwaterski, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin,* (2004), Vol 27, Ecology Law Quarterly 135, at p. 140 citing the case of *Willow River Club* v. *Wade,* 76 N.W. 273, 278-79 (Wis. 1898).

45 See in this regard the case of *Juan Antonio Oposa and Others* v. *The Honourable Fulgencio S. Factoran and Another* G.R.No: 101083 Supreme Court (Philippines). In this case, the Supreme Court of Phlippines relied on the principle of inter-generational equity and upheld the petition brought by minors alleging that the destruction of the forest cover in the Philippines was in violation of the rights of the unborn to the enjoyment of rainforests of the country.

46 See, in general - Robyn Stein, *Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System,* (2005), Vol. 83, Texas Law Review 2167.

47 S. 24 of the South African Constitution of 1996 provides as follows, *"Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

48 S. 3 of the National Water Act 36 of 1998 of South Africa titled, "Public trusteeship of nation's water resources" provides, *"3. (1) As the public trustee of the nation's water resources the National Government, acting*

B. Use of the Concept in the United States

This idea of Public Trusts is also used in the United States of America (hereinafter the "USA"). Navigable waters and underlying river beds for instance are considered to be held in trust exclusively for the public and for public benefit.[49]

The case of *Illinois Central Railroad* v. *Illinois,*[50] is considered to be a landmark case of the application of this doctrine in American law. In that case the Supreme Court of USA held that the State of Illinois cannot abdicate its authority over navigation in the waters of Lake Michigan, by grant of submerged lands to the Illinois Central Railroad. The Illinois legislature had made a grant to the Central Railroad that included all land underlying Lake Michigan, one mile outwards from the shoreline of the lake, which amounted to the shoreline of the waterfront of the commercial area of the city. [51]In holding that the land under navigable waters of Lake Michigan should be held in trust for the public, the Court made the following observation;

> *"The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties...than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government, the use of such powers*

---

through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate. (2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values. (3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic."

49 Melissa Kwaterski Scanlan, *supra.*

50 *Illinois Central Railroad* v. *Illinois* 146 US 387 (1892).

51 See, Sax, J., *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* (1970), 68 Michigan Law Review , 471-566, at p. 489 – 491 for a discussion on this case.

> *may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state."*[52]

Subsequent courts in the USA have continued to rely on the PTD, and held that certain natural resources must be held by the state in trust for the people.[53]

The most authoritative scholarship in this regard is the law review article written by Joseph Sax, titled, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* in the Michigan Law Review in 1970.[54] Courts in the USA, India and South Africa have relied on the academic arguments made in that article, in applying the doctrine of public trust within their own jurisdictions.[55] According to Sax, the doctrine of public trusts should meet three criteria.

> *"If the doctrine is to provide a satisfactory tool...it must contain some concept of a legal right in the general public; it must be*

---

52 *Illinois Central Railroad* v. *Illinois, supra* at p. 454.

53 *Hudson County Water Co.* v. *McCarter* 209 U.S. 349 (1908), Great Lakes Charter Annex 2001, *WJF Realty Corp.* v. *State* 672 N.Y.2d 1007 (N.Y. App. Div. 1998) – upheld a restriction by law of development in a particular area in Long Island, *In re* Wai'ola O Moloka'i, Inc., 83 P.3d 664 (Haw. 2004), *Save Ourselves, Inc.* v. *Louisiana Environmental Control Commission* 452 So. 2d 1152 (La. 1984), *Pullen* v. *Ulmer* 923 P.2d 54 (Alaska 1996), *Arizona Center for Law in the Public Interest* v. *Hassell* 837 P.2d 158 (Ariz. Ct. App. 1991), *San Carlos Apache Tribe* v. *Superior Court ex rel. Maricopa* 972 P.2d 179 (Ariz. 1999), *Avenal* v. *State,* 886 So.2d 1085, 1101-02, 1109-10 (La. 2004)- Upheld a diversion project - as discussed in Alexandra B. Klass, *Modern Public Trust Principles: Recognising Rights and Integrating Standards,* (2006), 82(2), Notre Dame Law Review, 699 at 711.

54 Sax, J., *supra.*

55 See for example the case of *Mehta* v. *Kamal Nath, infra.*

> *enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental quality."*[56]

There are three consequences that arise from the application of the doctrine.

> *"Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property, subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses."*[57]

To Sax, the "conceptual support" for the doctrine arose from the idea that given the particular nature of certain natural resources, such as navigable waters, such resources are incapable of private ownership.[58] It is evident from his writing that he perceived the doctrine to apply only for the preservation and equitable use of natural resources. The concept, in his view, had only a limited application.

---

56 Sax, J., *supra*, p. 471.

57 Sax, J., *supra*, p. 477.

58 Sax, J., *supra*, p. 484 – on "conceptual support" for PTD, Sax comments as follows, "*The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs...An allied principle holds that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace.*" At p. 485- "*...that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.*" See also in this regard, David Takacs, *supra*, "*The Public Trust Doctrine's power comes from the longstanding idea that some parts of the natural world are gifts of nature so essential to human life that private interests cannot usurp them, and so the sovereign must steward them to prevent such capture. The philosophy and the obligation are the central elements of the doctrine, not the specific resources to which the ideas and duties attach. As such, the Public Trust Doctrine's reach seems constrained only by the imagination of those who would protect both the natural world and the public's right to the sustainable use of that world.*"

> *"It is clear that the historical scope of public trust law is quite narrow. Its coverage includes, with some variation among the states, that aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence...Traditional public trust law also embraces parklands, especially if they have been donated to the public for specific purposes; and, as a minimum, it operates to require that such lands not be used for nonpark purposes."*[59]

Even though the doctrine had been applied by the judiciary, Sax recognises that the ultimate guardian of the "public" should be the legislature. Therefore, according to him, through the application of the doctrine, the judiciary should push the legislature towards increased adherence to the PTD. "Public resource litigation" as Sax calls it – is a situation where,

> *"...a diffuse majority is made subject to the will of a concerted minority. For self-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests. Thus, the function which the courts must perform, and have been performing, is to promote equality of political power for a disorganised and diffuse majority by remanding appropriate cases to the legislature after public opinion has been aroused."*[60]

Alexandra Klass writing about the contemporary use of the PTD in the USA, echoes Sax in saying that the primary responsibility under that doctrine vests with the legislature and that the Court should only perform a gap filling function.[61]

---

59 Sax, J., *supra*, p. 556.

60 Sax, J., *supra*, pp. 559-560.

61 *"In the end, state public trust principles will not and should not be a substitute for strong legislative protection for natural resources and the environment. Our current regulatory state surely provides far more protection for natural resources and the environment than the system in place prior to the 1970s. However, there are many gaps in the system*

C. Public Trust Doctrine in India

The Indian experience is directly relevant to this analysis, in that the Sri Lankan Courts have made express references to Indian judicial authorities, in employing the doctrine in Sri Lanka.

The PTD has been held to be part of the law of India in the case of *Mehta* v. *Kamal Nath.*[62] The Indian Supreme Court interpreted the right to life in the Indian Constitution to include a corresponding duty of the state to apply the PTD.[63] This case involved the construction of a resort on a river bank, resulting in the change in the course of the river. Applying the PTD, the Court ordered *inter alia,* that the applicable lease should be cancelled and that compensation be paid for damages caused to the environment. Several significant observations were made by the Court with regard to the doctrine in coming to that conclusion. According to the Court, the doctrine applied only in relation to natural resources that are not capable of private ownership.[64] However, Court adopts a dynamic approach in

---

resulting from lack of enforcement, lack of political will, lack of resources and a host of other impediments to the enactment and enforcement of strong environmental protection laws. Public trust principles as implemented by state courts can play a significant role in filling those gaps, if scholars expand their view of these principles and more lawyers and judges follow the lead of the decisions...In this way, those in the legal academy and the legal profession can begin the process of creating a more comprehensive approach to natural resources protection that relies upon the public trust doctrine along with statutory and constitutional policies and standards. Such an approach goes beyond the formalistic distinctions in the law to see that all these sources of law form a cohesive whole and, in the process, move the legal doctrine to the next level in addressing contemporary environmental and natural resource issues." Alexandra B. Klass, *supra,* at p. 753.

62 *Mehta* v. *Kamal Nath* 1997 1 S.C.C. 388.

63 "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*" Art. 21 of the Indian Constitution of 1949 as amended.

64 "*The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance*

identifying the types of natural resources that fall within the ambit of the doctrine as in the American jurisprudence.[65] In the opinion of the Court, the doctrine was always a part of the Indian jurisprudence and could be used for the protection of particular natural resources for public use.

> *"Our legal system - based on English common law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."*[66]

Several other cases have followed this judicial approach in India.[67] Takacs commenting on that approach, points out that

---

to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes." Mehta v. *Kamal Nath, supra,* para 25.

65 *"It is no doubt correct that the public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine... We see no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources." Mehta* v. *Kamal Nath, supra,* para 25.

66 *Mehta* v. *Kamal Nath, supra,* para 34.

67 As cited in, David Takacs, *supra, M.I. Builders Pvt. Ltd.* v. *Radhey Shyam Sahu* 1999 S.C.C. 464 (a public park and market are public trust resources that may not be replaced with a shopping complex. Also see, *Perumatty Grama Panchayat* v. *State of Kerala* (2003) (Coca-Cola groundwater exploitation case) – held that ground water belongs to the public and that its excessive use can be challenged before courts, *M.I. Builders Pvt. Ltd.* v. *Radhey Shyam Sahu and Others* (1999) 6 SCC 464, *Intellectuals*

the doctrinal basis may not be very clear.

> *"Even after reading these cases and various interpretations thereof, I do not understand how exactly the Indian Supreme Court pulled off this manoeuvre. The decisions do not reveal whether the judges are saying, this Public Trust Doctrine has always been a part of Indian law, or whether it is a new provision. Mostly, they seem to say that United States law has always found the Public Trust Doctrine to be part of its common law heritage as a British colony, and it should obtain in India, too. What is clear, however, is that the court felt the Public Trust Doctrine was necessary to bolster its demands on the government to advance constitutionally protected rights."*[68]

However, in analysing the recent cases such as *Intellectuals Forum, Tirupathi* v. *State of AP and Others*[69]and *Karnataka Industrial Areas Development Board* v. *C Kenchappa and Others*[70] it could be argued that the Indian Supreme Court has sought to further develop its jurisprudence with regard to PTD.

The *Intellectuals Forum* case[71] involved the alienation of the tank bed-lands of two tanks mainly for housing purposes. The petitioners challenged the alienation as violating PTD and as a violation of the state's obligation to protect the environment including water resources. In making its determination, the Court expounded the jurisprudential basis of PTD in India and its implications; and identified the right to equality,[72] right

---

Forum, Tirupathi v. *State of A.P. and Others* (2006) 3 SCC 549, *Fomento Resorts and Hotels Ltd. and Another* v. *Minguel Martins and Others* Civil Appeal Nos.4155 and 4156 of 2000.

68 David Takacs, *supra.*

69 *Intellectuals Forum, Tirupathi* v. *State of AP and Others* (2006) AIR SC 1350.

70 *Karnataka Industrial Areas Development Board* v. *C Kenchappa and Others* (2006) AIR SC 2546.

71 *Intellectuals Forum, Tirupathi* v. *State of AP and Others, supra.*

72 Article 14 of the Indian Constitution.

to life[73] and the other fundamental rights recognised in the Constitution, as providing the framework for PTD.[74] However, in the opinion of the Court, PTD is located most firmly in the constitutional value of protection of the environment.[75] Citing the duty of the state and the duty of the citizen to protect the environment, Court comments as follows:

> *"Article 48A of the Constitution of India mandates that the State shall endeavour to protect and improve the environment to safeguard the forests and wild life of the country. Article 51A of the Constitution of India, enjoins that it shall be the duty of every citizen of India, inter alia, to protect and improve national environment, including forests, lakes, rivers, wild life and to have compassion for living creatures. These two Articles are not only fundamental in the governance of the country but also it shall be the duty of the State to apply these principles in making laws and further these two articles are to be kept in mind in understanding the scope and purport of the fundamental rights guaranteed by the Constitution..."*[76]

The Court makes reference to the Roman and English law origins of the doctrine, its development in the USA and reaffirms the *dicta* of the *Mehta* case.[77] In this case however, the Court goes a step further and holds that the strict scrutiny test should be applied in matters that involve the PTD.

> *"...when the state holds a resource that is feely available for the use of the public, it provides for a high degree of judicial scrutiny upon any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinize such actions of the Government, the Courts must make a distinction between the government's*

---

73 Article 21, *ibid.*

74 *Intellectuals Forum, Tirupathi* v. *State of AP and Others, supra.*

75 Article 48A and 51A of the Indian Constitution.

76 *Intellectuals Forum, Tirupathi* v. *State of AP and Others, supra.*

77 *Mehta* v. *Kamal Nath, supra.*

> *general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources."*[78]

This judicial view is endorsed in the subsequent case of *Karnataka Industrial Areas Development Board* v. *C. Kenchappa and Others.*[79]This case involved a challenge to the acquisition of land for non-industrial purposes in different villages on the basis that those lands should be preserved for agricultural and grazing purposes. Court held with the petitioner and ruled that the PTD requires that a reasonable balance is struck between development and protection of the environment.

The foregoing analysis suggests that the Indian development and application of PTD is firmly located within principles of environmental law. PTD is seen as a central link in the application of international principles of environmental law such as sustainable development, precautionary principle and the polluter pays principle.[80]

D. International Environmental Law and the Doctrine of Public Trust

The concept of public trust as it relates to natural resources has also been used in international law, particularly in the case of *Hungary* v. *Slovakia*[81] determined in the International Court of Justice (hereinafter the "ICJ") in the separate opinion of Judge C. G. Weeramantry. That case involved a treaty between Hungary and Czechoslovakia regarding the construction of a system of locks

78 *Intellectuals Forum, Tirupathi* v. *State of AP and Others, supra.*

79 *Karnataka Industrial Areas Development Board* v. *C Kenchappa and Others, supra.*

80 See in general in this regard, *Karnataka Industrial Areas Development Board* v. *C Kenchappa and Others, supra.*

81 25th September, 1997. A dispute arose between Hungary and Slovakia regarding an agreement to build and operate certain "locks" on the Danube.

on the Danube as a "joint investment" by contracting parties.[82] Slovakia seceded from Czechoslovakia in 1993. In 1989, Hungary had abandoned the construction project that it had undertaken under the treaty of 1977. The two parties referred the matter to the ICJ for a determination *inter alia* as to whether Hungary was entitled to have had abandoned the project in 1989. In referring to the implementation of the treaty, the Court makes reference to the principles of International Environmental Law and holds that the parties have an obligation to follow those principles in carrying out the construction project. In his separate opinion, Judge Weeramantry (at that time Vice President of the ICJ) addresses generally, the obligation of the state parties to comply with the principles of International Environmental Law and specifically, the principle of sustainable development.[83]

The case of *Hungary* v. *Slovakia* is the first time that the ICJ makes a ruling on the principle of sustainable development. In tracing the development of that principle, Judge Weeramantry draws *inter alia* from the traditional legal history of Sri Lanka, Sub-Saharan Africa and the Islamic tradition. In that judgement his Excellency quotes extensively from Sri Lankan history to support the idea, that natural resources are to be held in trust by those in power for *inter alia* the purpose of public benefit. In addressing the dispute from the perspective of sustainable development, Judge Weeramantry makes the observation that;

---

82 A treaty "concerning the construction and operation of the Gabcilcovo-Nagymaros System of Locks," 1977.

83 "*Three issues on which I wish to make some observations, supplementary to those of the Court, are the role played by the principle of sustainable development in balancing the competing demands of development and environmental protection; the protection given to Hungary by what I would describe as the principle of continuing environmental impact assessment; and the appropriateness of the use of inter partes legal principles, such as estoppel, for the resolution of problems with an erga omnes connotation such as environmental damage.*", Introduction, *Hungary* v. *Slovakia, supra,* Separate Opinion of Judge Weeramantry.

> *"Among those which may be extracted from the systems already referred to are such far-reaching principles as the principle of trusteeship of earth resources, the principle of intergenerational rights, and the principle that development and environmental conservation must go hand in hand. Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community. When it is used by humans, every opportunity should be afforded to it to replenish itself...there is a duty lying upon all members of the community to preserve the integrity and purity of the environment."*[84]

Yet again, as in the USA and Indian jurisprudence, the application of PTD is confined to the preservation of environmental resources, with emphasis on the sustainable use of the same. The other aspect of the idea of "trusteeship" as expounded by Judge Weeramantry is the concept of "collective ownership" of natural resources.

> *"Natural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people. There should be no waste, and there should be a maximization of the use of plant and animal species, while preserving their regenerative powers. The purpose of development is the betterment of the condition of the people."*[85]

The principle of sustainable development along with the concept of trusteeship of natural resources, according to this separate opinion, is "*one of the most ancient ideas in the human heritage*" which modern international law has now incorporated into its customary and treaty law.[86]

---

84 *Hungary v Slovakia*, Separate Opinion of Judge Weeramantry, *supra.*

85 *Ibid.*

86 See for example, the Rio Declaration of 1992 and the Declaration on the Right to Development of 1986.

3

Judicial Development of Public Trust Doctrine in Sri Lanka

3.1. Basis of the Doctrine

The Sri Lankan Constitution does not expressly recognise the PTD. It is a judicial innovation based on the overarching values of the Constitution. The Court generally makes reference to Articles 3,[1] 4[2] and 12(1)[3] of the Constitution when relying on

1 *"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."* Art. 3 of the Constitution.

2 *"The Sovereignty of the People shall be exercised and enjoyed in the following manner:- (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum; (b) the executive power of the People including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People: (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law: (d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided: and (e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who being qualified to be an elector as hereinafter provided, has his name entered in the register of electors."* Art. 4 of the Constitution.

3 *"All persons are equal before the law and are entitled to the equal protection of the law."* Art. 12(1) of the Constitution.

the PTD. In tracing the use of the PTD in Sri Lankan law, it is evident that it is a relatively new concept that has been used by the Sri Lankan SC in responding to either abuse of discretionary public power, exploitation of natural and national resources for private benefit or in response to actions that are considered to be in violation of the "Sovereignty of the People."[4]

3.2. A Doctrine that Limits Exercise of Discretionary Power

It seems that the PTD made its advent to Sri Lankan jurisprudence as a principle that prevents the abuse of discretionary public power. This development is attributable to Justice M.D.H. Fernando who has presided over almost all the judgements that have employed the doctrine to that end.

The earliest reference to public trust found in reported judgements is in the case of *De Silva* v. *Atukorale*.[5] This case involved a divestiture of land acquired under the Land Acquisitions Act, which was challenged on the basis that the divestiture is not for a "public purpose."[6] In interpreting the term "public purpose" under that Act, Fernando J., relied on the following opinion of H. W. Wade.

> *"...Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."*[7]

Based on that observation, the Court held that discretion of a public authority is not absolute, and that such discretion must be used exclusively for the "public good."[8] Similarly, the discretion vested with the Minister under the Act to restore acquired land

---

4 Art. 3 and 4 of the Constitution.

5 *De Silva* v. *Atukorale* [1993] 1 Sri L.R. 283.

6 S. 5 of the Land Acquisition Act, *supra.*

7 Wade W., and Forsyth, C.F., *supra,* at 353-354.

8 *"Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.", supra* note 19 at p. 354

to owner, is also not absolute. Commenting on that power, Fernando J observes,

> *"It was a power conferred solely to be used for the public good, and not for his personal benefit; it was held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest."*[9]

Additionally the Court observes that this is a principle that can be found in British, American and French law and can be applied not only in the "*sphere of administration*" but that "*...it operates wherever discretion is given for some public purpose.*"[10]

A similar approach can be found in the case of *Bandara* v. *Premachandra*[11] which was also decided by Fernando J. This case was a fundamental rights application challenging the termination of services on grounds of discrimination. Court reiterated in this case that discretionary powers of appointment and dismissal are not absolute powers and that they can only be exercised for public benefit.[12] *Jayawardene* v. *Wijayatilake*[13]

---

9 *De Silva* v. *Atukorale, supra,* at p. 297.

10 *Ibid.*

11 *Bandara* v. *Premachandra* [1994] 1 Sri L.R. 301.

12 Fernando J, *"Powers of appointment and dismissal are conferred by the Constitution on various authorities in the public interest, and not for private benefit, and their exercise must be governed by reason and not caprice; they cannot be regarded as absolute, unfettered, or arbitrary, unless the enabling provisions compel such a construction." Bandara* v. *Premachandra, supra,* at p.312.

13 *Jayawardene* v. *Wijayatilake* [2001] 1 Sri LR 132. This case involved a fundamental rights application challenging the cancellation of an appointment of an Inquirer into sudden deaths. Fernando J, follows *Bandara v Premachandra, supra,* and held that, *"It is accepted today that powers of appointment and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice..."* at p. 159.

and *Premachandra* v. *Montague Jayawickrama*[14] are two other subsequent cases that rely on the holdings of *Atukorale*[15] and *Bandara.*[16] In both those decisions, Fernando J., reaffirms that discretion is not absolute and that it can only be exercised in public interest. In this line of cases, the Court seems to locate the PTD in English Administrative law principles which provide that statutory powers are not absolute and that such powers can only be exercised for the benefit of the public.

3.3 Trusteeship of Natural and National Resources

Natural and national resources are two distinctive categories of resources that could overlap in certain instances. The SC has issued several judgements in which the Court has consistently held that the exploitation of abuse of both types of resources can amount to a violation of PTD. As discussed elsewhere in this paper, the Sri Lankan jurisprudence is unique in that regard; the USA and Indian courts have relied on PTD only for the protection of *natural* resources for public use and benefit.

A. Trusteeship of Natural Resources

The PTD has been used for the protection and preservation of natural resources from exploitation by the Sri Lankan SC. The celebrated judgement of *Bulankulama* v. *Secy, Ministry of Industrial Development*[17] is the case in point. This case involved an

---

14 *Premachandra* v. *Montague Jayawickrama* [1994] 2 Sri L.R 90. This case involved a challenge to the exercise of the power of the Governor of two provinces in appointing chief ministers to the respective provinces. Fernando J, makes reference to the same quotation from Wade, W., and Forsyth C.F., as cited in *Atukorale*'s case, *supra. "There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted."* at p. 105.

15 *De Silva* v. *Atukorale, supra.*

16 *Bandara* v. *Premachandra, supra.*

17 *Bulankulama* v. *Secy, Ministry of Industrial Development* [2000] 3 Sri

application, claiming an imminent infringement of fundamental rights due to a proposed agreement between the government and a foreign company for exploration and mining of phosphate. [18] In recognising a violation of fundamental rights in that case, Amerasinghe J., elaborated as to the scope of the PTD as applied in Sri Lanka.

The *Bulankulama* case seems to be the first judicial pronunciation of the nexus between Article 3 of the Constitution and the PTD. Amerasinghe J., holds that Article 3 is an expression of democratic values, in that it affirms that the People are the ultimate sovereigns and that holders of powers of government are only temporary bearers of those powers. The logical conclusion therefore is that such powers can only be exercised to further the interests of the People.

> *"The Constitution declares that sovereignty is in the People and is inalienable (Article 3). Being a representative democracy, the powers of the People are exercised through persons who are for the time being entrusted with certain functions."*[19]

Having established the idea of democracy and sovereignty of the People as the basis for the public trust idea, Amerasinghe J, goes on to provide reasons as to why the management of natural resources should be considered to be a fundamental aspect of that doctrine.

Relying on Sri Lankan political history under a monarchy, as recorded in the *Mahavamsa,* and the Sri Lankan Constitution, Amerasinghe J. holds that organs of state are guardians who are required to exercise that power in trust. In making that argument, Amerasinghe J also relies on the approach adopted

---

L.R. 243.

18 Under art. 126 (1), an application can be made for a violation of fundamental rights or an imminent violation of fundamental rights.

19 *Bulankulama* v. *Secy, Ministry of Industrial Development, supra* at p. 253.

by Judge C. G. Weeramantry in the case of *Hungary v Slovakia.*[20] In the *Bulankulama* case, Amersinghe J, affirms that the same is applicable to the modern constitutional regime in Sri Lanka and that it leads to a much broader scope of the public trust doctrine through the idea of *"shared responsibility"*[21] in comparison to the doctrine as applied in India or in the USA.[22]

In the opinion of the Court, even though the task of resource management rests primarily with the executive, the legislature and the judiciary also share in that responsibility: the former by developing legal standards for resource management and the latter by providing interpretations for those legal standards and subjecting actions of the Executive to judicial review.[23]

The respondents in this case sought to rely on PTD to argue that the Court could not "interfere" in the exercise of discretion of the government in situations where the government acts as a "trustee." It was argued that the Court may only review such decisions in relation to due process. The Court rejected that argument and held that under articles 4, 17 and 126 of the Constitution, the Court is expressly authorised to exercise its jurisdiction where the actions/omissions of the executive violates

---

20 *Hungary* v. *Slovakia, supra.* See section 2.2.D. for a discussion of that case.

21 *Bulankulama* v. *Secy, Ministry of Industrial Development, supra* at p. 256.

22 In coming to this conclusion, the Court looked at the cases of *Illinois Central R Co v Illinois* 146 U.S. 387 and *M C Mehta v Kamal Nath* (1977) 1 SCC 388.

23 *"The Executive does have a significant role in resource management conferred by law, yet, the management of natural resources has not been placed exclusively in the hands of the Executive. The exercise of Executive power is subject to judicial review. Moreover, Parliament may, as it has done on many occasions, legislate on matters concerning natural resources, and the Courts have the task of interpreting such legislation in giving effect to the will of the people as expressed by Parliament." Bulankulama* v. *Secy, Ministry of Industrial Development, supra* at p. 257.

fundamental rights and that such jurisdiction applies to powers that the government exercises even as a trustee.

The concept of "shared responsibility" introduced by the Court, is broader than the concept of PTD, not only because it emphasises the responsibility of all organs of the state, but also that of the individual.[24] The Court relies on historical evidence of "shared responsibility" towards natural resources (or more specifically the use of land) to argue that it is the applicable standard in Sri Lanka.

---

24 *"For the present limited purpose, what I do wish to point out is that there is justification in looking at the concept of tenure, not as a thing in itself, but rather a way of thinking about rights and usages about land. H.W. Codrington, Ancient Land Tenure and Revenue in Ceylon, pp-5-6, refers to the fact that the King was bhupati or bhupala -'lord of the earth', 'protector of the earth'-'lord - adhipati - of the fields of all'. He quotes Moreland with approval in support of the view that at first, the question of 'ownership' was of little or no significance. Moreland wrote as follows: "Traditionally there were two parties, and only two, to be taken into account; these parties were the ruler and the subject, and if a subject occupied land, he was required to pay a share of its gross produce to the ruler in return for the protection he was entitled to receive. It will be observed that under this system the question of ownership of land does not arise: the system is in fact antecedent to that process of disentangling the conception of private right from political allegiance which has made so much progress during the last century, but is not even now fully accomplished..." Later, grantees, in general, it seems were given the enjoyment of lands for services rendered or to be rendered in consideration of their holdings, or lands were given for pious and public purposes unrelated to any return. For their part, grantees were under an obligation to make proper use of the lands consistent with the grant or, in default, suffer their loss or incur penalties.*

The public trust doctrine, relied upon by learned counsel on both sides, since the decision in Illinois Central R. Co. u. Illinois(3), commencing with a recognition of public rights in navigation and fishing in and commerce over certain waters, has been extended in the United States on a case by case basis. Nevertheless, in my view, it is comparatively restrictive in scope and I should prefer to continue to look at our resources and the environment as our anscestors did, and our contemporaries do, recognizing a shared responsibility." Bulankulama v. *Secy, Ministry of Industrial Development, supra* at p. 256.

Subsequent cases have upheld the particular interpretation of PTD presented in the *Eppawala* case. In the case of *Watte Gedara Wijebanda* v. *Conservator General of Forests and Others*[25] Shiranee Tilakawardane J., echoed the judicial reasoning of Justice Amerasinghe in holding that PTD requires all organs of the state to ensure that natural resources are protected and preserved for public benefit. This case was a fundamental rights application made by an individual who had been refused a permit to mine a quarry in a location close to a national reserve. The petitioner claimed that his right to equality had been violated as another individual, similarly situated, had been granted a permit. Even though the Court held that the other individual had been granted a permit in violation of the applicable rules and the PTD, Court also held that the petitioner's right to equality had been violated due to the arbitrary refusal of a permit. In this judgement, Tilakawardane J., also reaffirms the nexus between PTD, sustainable development and inter-generational equity and holds that the state has an obligation to comply with those principles in all decisions it takes in relation to natural resources.[26]

---

25 *Watte Gedara Wijebanda* v. *Conservator General of Forests and Others*, S.C. Application No. 118/2004, Supreme Court Minutes 5th April 2007.

26 *"The doctrine of public trust was initially developed in ancient Roman jurisprudence and was founded on the principle that certain common property resources such as rivers, forests and air were held by the government in trusteeship for the free and unimpeded use of the general public. This doctrine emphasizes the obligation of the government to protect and conserve these resources for public use and protect it from exploitation by private individuals for short term monetary or commercial gains. Such resources being an endowment of nature should be available freely to the general public, irrespective of the individual's status or income level in life. This doctrine is an "affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands surrendering the right of protection only in the rarest of cases, when the abandonment of that trust is consistent with fundamental and larger interest of the purposes of that trust. Contemporary concerns with*

In the case of *Singalanka Standard Chemicals Ltd.* v. *Thalangama Appuhamilage Sirisena and Others*[27] Ranjith Silva J., writing for the Court of Appeal also followed the *Eppawala* case. The main issue before the Court in this case was whether the jurisdiction of the Magistrate to make orders in relation to public nuisance under the Penal Code[28] had been superseded or replaced by the National Environmental Authority Act.[29] In holding that the jurisdiction of the Magistrate has not been superseded, the Court relied on the argument made by Judge Weeramantry in *Hungary* v. *Slovakia,* where his Excellency reasoned that the basic principles of International Environmental Law give rise to universal obligations and therefore adjudication of those rights cannot be restricted by general rules that apply to conventional forms of litigation.[30] In supporting that argument, the Court makes reference to the idea of "shared responsibility"

---

the state and its role in the protection of the environment have close links with this doctrine of public trust. As part of this responsibility governments make policy decisions related to the environment and its useful utilisation, conservation and protection and should always be only in the interest of the general public with a long term view of such being conserved for intergenerational use. For this doctrine is closely linked with the principle of intergenerational equity. Human kind of one generation holds the guardianship and conservation of the natural resources in trust for future generations, a sacred duty to be carried out with the highest level of accountability.

Under the public trust doctrine as adopted in Sri Lanka, the state is enjoined to consider contemporaneously, the demands of sustainable development through the efficient management of resources for the benefit of all and the protection and regeneration of our environment and its resources." Watte Gedara Wijebanda v. *Conservator General of Forests and Others, supra,* pp. 17-18.

27 *Singalanka Standard Chemicals Ltd.* v. *Thalangama Appuhamilage Sirisena and Others,* C.A. 85/1998, decided on 1st of October 2009.

28 Penal Code, Ordinance No. 2 of 1883 as amended.

29 National Environmental Authority Act, No. 47 of 1980 as amended.

30 *Hungary v Slovakia, supra.*

referred to in the *Eppawala* case.[31]

B. Trusteeship of National Resources

The trusteeship of natural resources has been extended by the SC to trusteeship of *national* resources as well. In *Fernando* v. *Sri Lanka Broadcasting Corporation (SLBC)*[32] and *Environmental Foundation Limited* v. *Urban Development Authority (Galle Face Green case)*[33]the SC used the PTD to that end.

In the *SLBC* case, the petitioner alleged that the arbitrary termination of a radio programme violated his right to freedom of expression, as he had been a regular listener of the programme. In recognizing a violation in that instance, Fernando J., writing for the Court, held that, airwaves are a limited resource and that the state or any other actor "*operating on them*" must do so "*subject to a correspondingly greater obligation to be sensitive to the rights and interests of the public.*"[34]

The *Galle Face Green* case[35] involved an agreement that the UDA had signed with a private company for the management of a large beach front and promenade in the capital, Colombo. The fundamental rights application was made by a Non-Governmental Organisation, Environmental Foundation Limited (hereinafter "EFL") that focuses on issues related to the environment. When the petitioner organisation had requested for information related to the agreement, the UDA had refused to provide any information without providing any reasons for such refusal. In its petition therefore EFL alleged that its right

31 See further the case of *Environmental Foundation Ltd and Others* v. *Mahaweli Authority and Others*, S.C. (FR) 459/08, Supreme Court Minutes 17th June 2010.

32 *Fernando* v *Sri Lanka Broadcasting Corporation*, [1996] 1 Sri L.R. 157.

33 *Environmental Foundation Limited* v. *Urban Development Authority*, S.C. (F/R) Supreme Court Minutes 28th November 2005.

34 *Fernando* v *Sri Lanka Broadcasting Corporation, supra*, at p.172.

35 *Environmental Foundation Limited* v. *Urban Development Authority, supra.*

to information and right to equality had been violated as the UDA had entered into an agreement *ultra vires* the authorising statute.

The Court upheld the arguments made by the petitioner and held that even though the agreement between the UDA and the private company was an agreement for the management of the Galle Face Green, that it *amounted* to a lease: the main reason for that conclusion was that under the agreement, the private company had agreed to make payments to the UDA.[36] The Court held that the agreement was *ultra vires* as the title to the land in question had not been vested with the UDA at any point of time. In a brief outline of the history of the Galle Face Green, the Court points out that the entire area had been dedicated for the use of "Ladies and Children of Colombo" by the English Governor, Sir Henry Ward, who initiated the project in 1856. The tablet marking the establishment of the walk, states that the Governor recommends the same "to his successors." On that basis the Court holds as follows;

> *"The Galle Face Green should be maintained as a public utility in continuance of the dedication made by Sir Henry Ward and necessary resources for this purpose should be made available by the Government of Sri Lanka, being the successor to the Colonial Governor who made the dedication..."*[37]

The implications of the above *dicta* of the judgment are somewhat unclear. Does it mean that the Galle Face Green cannot be leased at all? Is that beach front dedicated exclusively for the use of the public with the role of the state restricted to that of a trustee? Another concern with regard to this judicial opinion is that at no point does the Court make any reference to PTD. The Court mentions in passing, that the Galle Face Green is an area "*dedicated to public benefit*" but the Court makes no attempt to

36 *Ibid*, p. 2.

37 *Ibid.*, p. 9.

use PTD as a legal basis for its conclusion, that the area should be "*maintained as a public utility.*" The Court could have relied on its own jurisprudence such as the *Eppawala* case[38] and foreign jurisprudence such as the case of *Illinois Central Railroad* v. *Illinois*[39] and developed an argument based on PTD in reaching its conclusion. Such a route to the conclusion of the *Galle Face Green* case would have provided a stronger legal basis for the case and it would have been opportunity to develop PTD in relation to *national* resources.

The *SLBC* case and the *Galle Face Green* case can be taken as examples of the use of PTD to protect *national* resources in addition to certain *natural* resources. One common factor in both of those types of public resources is that they are incapable of private ownership.

3.4. Public Trust: A Doctrine that Promotes the Rule of Law

The third strand of judicial opinion regarding the scope and nature of the PTD is different in that it brings together the previous two strands of judicial interpretation under one broader idea of overarching restriction on all powers of government. This argument has been developed mainly on the basis of Articles 3 and 4 of the Constitution, i.e. the notion of "Sovereignty of the People."[40]

This particular approach is set out in the judicial opinion in regard to *the Nineteenth Amendment to the Constitution.*[41] In reviewing the constitutionality of the proposed nineteenth amendment to the Constitution, the former Chief Justice, Sarath N. Silva, proposed that sovereignty;

> *"...continues to be reposed in the People and organs of government are only custodians for the time being, that exercise the power for*

38 *Bulankulama* v. *Secy, Ministry of Industrial Development, supra.*

39 *Illinois* v. *Illinoi Central Railroad, supra.*

40 Articles 3 and 4 of the Constitution.

41 *In Re the Nineteenth Amendment to the Constitution* [2002] 3 Sri L.R. 85

> *the People. Sovereignty is thus a continuing reality reposed in the People."*[42]

Moreover,

> *"The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust."*[43]

Reference is made to English law by the Court in concluding that trust is "*implicit in the conferment of power.*"[44]

Against this background, the Court holds that sovereignty of the People can only be exercised through the balance of power that is set out in Article 4 of the Constitution; and that the exercise of powers of government and the check by one organ of government on other organs can only be carried out in trust for the People.[45]

The Court is essentially affirming that the rule of law requires organs of state to be accountable to each other. "Rule of law" as

---

42 *Ibid.*, at p.98.

43 *Ibid.*, at p. 99.

44 *Ibid.*, Court also relied on Wade, W., and Forsyth C.F., *"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used on the right and proper way which Parliament when conferring it is presumed to have intended."* Wade, W., Forsyth, C.F. *supra*, at p. 356.

45 *"(1) the powers of government are included in the sovereignty of the People as proclaimed in Article 3 of the Constitution.(2) These powers of government continue to be reposed in the People and they are separated and attributed to the three organs of government; the Executive, the Legislature and the Judiciary, being the custodians who exercise such powers in trust for the People.(3) The powers attributed to the respective organs of government include powers that operate as checks in relation to other organs that have been put in place to maintain and sustain the balance of power that has been struck in the Constitution, which power should be exercised only in trust for the People." In Re the Nineteenth Amendment to the Constitution, supra,* at pp. 100-101.

a concept has been elaborated on as a primary basis for the role of Courts in several previous cases in Sri Lanka. For instance, in the case of *Elmore Perera* v. *Montague Jayawickrama,*[46] the Court made the following observation.

> *"The principle of equality before the law embodied in Article 12 is a necessary corollary to the high concept of the Rule of Law underlying the Constitution. By virtue of this provision, the Supreme Court is enabled to review and strike down any exercise of discretion by the Executive which exhibits discrimination."*[47]

The affirmation of the sovereignty of the People and the re-affirmation of the rule of law, as the basis for PTD are brought together and considered as a whole in the case of *Mundy and Others* v. *Central Environmental Authority and Others.*[48] This case was a writ application that challenged the proposed route of the southern expressway, of which the appeal was heard by the SC.

In this case Justice Fernando traces the genealogy of the PTD in Sri Lankan jurisprudence and presents a categorisation of the different rules of the doctrine as developed by the Court over time. Even though this analysis is presented in relation to the writ jurisdiction of the Court, it is evident that, in the opinion of the Court, the doctrine is a cornerstone of Sri Lankan Public Law as a whole.

Fernando J.,

> *"...this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes...Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular*

46 *Elmore Perera* v. *Montague Jayawickrama* [1985] 1 Sri L.R. 285.

47 *Ibdi,* at pp. 320 – 321.

48 *Mundy and Others* v. *Central Environmental Authority and Others,* S.C. Appeal, 58/2003, Supreme Courts Minutes 20th January 2004.

which guarantees equality before the law and the equal protection of the law. ..."[49]

The view of the SC as evidenced in the above discussed cases seems to be that PTD and the broad discretion that the Court assumes in applying the doctrine is in fact a reaffirmation not merely of the law in the sense of enforcing positive, black letter law, but in the sense of enforcing the constitutional values that underlie the rule of law, particularly the protection of fundamental rights of people against arbitrary exercise of public power.

3.5. Public Trust as Revived in the Trilogy of Cases

The trilogy of recent cases decided by the SC on the basis of the PTD rely on all of the cases that have been analysed in this section, *except,* for the *Heather Mundy* case.[50] However, from the above analysis it seems that it is the holding of the *Heather Mundy* case that would have provided the Court with authority to hold certain actions of the executive as void.

The dynamics of the SC during this period would be relevant perhaps in understanding why the SC overlooked the *Mundy* decision in its subsequent cases. Justice M.D.H. Fernando, considered to be very progressive, was the senior most judge of the SC at the time Chief Justice Sarath N. Silva was appointed as Chief Justice from his then position as Attorney-General.[51] The International Bar Association in two reports issued on Sri Lanka during Chief Justice Silva's period, is one example of several serious criticisms levelled at the SC for lack of independence, a retrogressive approach to fundamental rights, politicisation of the Court and also for the development of inconsistent jurisprudence.[52] Justice M D H Fernando who

---

49 *Ibid,* at p. 13.

50 *Mundy and Others* v. *Central Environmental Authority and Others, supra.*

51 See in general in this regard the report of the International Bar Association, *"Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary,"* (2001), para 1.12 at p. 15 and para 2.9. at p. 22.

52 *"The judiciary is currently vulnerable to two forms of political influence:*

had been repeatedly left out of benches that heard matters of Constitutional significance, eventually opted for early retirement. The *Mundy* case was one of the last judgements written by Justice Fernando, and it is a reaffirmation of his purposive and progressive interpretation of the relevant constitutional provisions. However, the Silva Court, looking at similar issues in a subsequent case, has overlooked that authority.

In the *LMSL* case, in using PTD reliance was placed on Article 3 and 4 of the Constitution to hold that, *"the respective organs of Government, the Legislature, the Executive and the Judiciary are reposed with power as custodians for the time being to be exercised for the People."*[53] Citing the case of, *Bulankaluma,*

---

from the Government and from the Chief Justice himself. The nature and degree of influence oscillates between the two and depends on the relationship between them at the time. The perception that the judiciary suffers from political influence has arisen in recent years due to the excessive influence of the Chief Justice, the apparently inconsistent jurisprudence of the Supreme Court in relation to certain issues, and through tensions between the judiciary and the executive.

Chief Justice Silva is perceived to be a domineering personality who is very much in control of all aspects of the functioning of the judiciary. As a result of his control over the listing of cases in the Supreme Court, it is commonly believed that he has used the administration of the case allocation procedure as a tool to sideline senior Supreme Court judges from hearing politically sensitive cases. The perceived close relationship between the Chief Justice and the Government has from time to time made individual judges reluctant to return judgements which may be perceived to be critical of the executive. This may be illustrated by the scarcity of dissenting judgements during his tenure in office.

The IBAHRI is concerned that the recent expansion of the concept of the doctrine of locus standi and of the constitutional right to equality in fundamental rights cases is based on the inclination of the Chief Justice to pronounce on populist issues rather than on a sound rationalisation of legal principles. Furthermore, the apparent decline in the number of fundamental rights applications being lodged in recent years is a matter of significant concern." Report of the International Bar Association, *"Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka,"* (2009), pp. 7-8.

53 *Vasudeva Nanayakkara* v. *N K Choksy and 30 Others, supra,* at p. 67.

the Court holds that *all* resources of the state should be managed with accountability and in furtherance of the best interests of the People.[54]

Justice Thilakawardene, writing for the Court in the *Water's Edge* judgment, seems to shed more light on both the nature of the PTD and its implications. Examining the nature of executive power under the Constitution, Thilkawardene J. holds that in spite of the personal immunity that is granted to a sitting President under Article 35 of the Constitution,[55] the power that is exercised is by no means absolute but must be exercised *only* for the benefit of the People.[56] That observation is an example of the specific application of the doctrine. Elsewhere in the decision, Thilakawardene J. echoes of the approach taken in *Heather Mundy* in that, the PTD is presented as applicable to specific types of functions of the Executive i.e. management of land, other assets and even economic opportunities.

---

54 *Ibid.*

55 Art. 35 (1) "*While any persona holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal is respect of anything done or omitted to be done by him either in his official or private capacity.*"

56 Writing in reference to the office the President, (the 1st respondent in the case), Thilakawardene J., held that, "*...it is important to specifically understand that no single position of office created by the Constitution has unlimited power and the Constitution itself circumscribes the scope and ambit of even the power vested with any President who sits as the head of this country.*". p. 40 and "*While the exercise of Presidential power is a duty that must accord with the Rule of Law, such compliance should also come from one's own conscience and sense of integrity as owed to its People. This means that while they can use their private power and their private property in an unfettered manner when granting any privileges or favours and, even in an overwhelming act of great generosity, give all their private property away,* their public power must only be strictly used for the larger benefit of the People, the long term sustainable development of the country and in accordance with the Rule of law." *Sugathpala Mendis and Others* v. *C B Kumaratunge and Others, supra,* at p. 41 (emphasis not added).

> *"...it is to be noted for our purposes that all facets of the country – its land, economic opportunities or other assets – are to be handled and administered under the stringent limitations of the trusteeship posed by the public trust doctrine and must be used in a manner for economic growth and always for the benefit of the entirety of the citizenry of the country, and, we repeat, not for the benefit of granting gracious favours to a privileged few, their family and/or friends."*[57]

From the subsequent analysis of the Court, it can be gathered that the PTD can be used to challenge decisions of the executive that do not have any direct co-relation to public benefit and to impose accountability. As per the case, not exercising continuous and meaningful supervision of the execution of powers that stem from a particular executive role, can amount to a violation of the responsibility that is vested in trust on that office.[58]

Another significant and new position adopted by Court regarding the implications of the PTD is that legislative policy can *only* be developed as an expression of the Sovereignty of the People and *only* in pursuance of the PTD.[59] This judicial observation is made by the Court in making the criticism that the existing legal framework for investment is excessively politicised.[60]

---

57 *Ibid.*

58 This holding was made in reference to the attempt by the 1st respondent, i.e. the former President, to distance herself from the manner in which the Cabinet exercised executive power in relation to the concessions provided for Asia Pacific Holdings. *Sugathpala Mendis and Others* v. *C B Kumaratunge and Others, supra,* at p. 44.

59 *Sugathpala Mendis and Others* v. *C B Kumaratunge and Others, supra,* at pp. 56-57.

60 *"The fundamental flaw in the investment system I see is that, despite such alleged autonomy, the fact remains that such bodies are ultimately "under the thumb", so to speak, of the executive heads of this country, whether it be the Minister of Finance at the helm of the BOI, the Minister of Urban Development at the helm of the UDA, the President-appointed Board of the BOI, the directives of the Cabinet of Ministers or even of the President. There can never be any expectation that corruption will not rear its ugly*

Does this mean that the Court could make recommendations for legal reform where it finds that a piece of legislation contradicts PTD? The reasoning of the Court does not elaborate on this aspect. Whether this line of judicial interpretation will take root as an aspect of PTD remains to be seen.

The PTD as elaborated in the *SLIC* case, the most recent of the trilogy of cases, is a reaffirmation of the approach of the *Water's Edge* case.[61] The Court takes the analysis a step further by articulating in clear terms the nexus between public trust, rule of law, right to equality before the law and public interest. According to the Court,

> *"The Rule of Law is the principle which keeps all organs of the State within the limits of the law and the public trust doctrine operates as a check to ensure that the powers delegated to the organs of government are held in trust and properly exercised to the benefit of the people and not to their detriment. When the Executive, which is the custodian of the People's Executive Power*

---

head when no definitive, public guidelines to ensure transparency and accountability exist. As long as the investment infrastructure remains politicized to the extent as revealed in this case, coercive forces will continue to relegate the autonomy afforded to these agencies to the realm of theory and transactions laced with characteristics of fraud and corruption which will continue to be shuffled through to completion. The main method by which such imbalance can be countered is through establishing appropriate guidelines by which state actors are to operate, a terrain largely left empty by current legislation. While Court cannot enact legislation, Court is able to direct the appropriate state authorities to accordingly pursue, concretise and legislate law that will serve as checks and balances to fill the void in the law of the lack of supervision. The UDA and BOI, and all other agencies involved with the investment process in Sri Lanka must take steps to create publicly available guidelines regarding mechanisms of approval... Whatever the legislation drafted, it must ultimately accord with the Sovereignty vested in the People, by furthering the Doctrine of Public Trust." Sugathpala Mendis and Others v. *C B Kumaratunge and Others,* per Thilakawardene J., *supra,* at pp. 56-57.

61 *Sugathpala Mendis and Others* v. *C B Kumaratunge and Others, supra,* at p. 57.

> *"act ultra vires and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to implead such action before Court."...the public interest to keep the executive within the power given to it by law is the "positive component" in the right to equality."*[62]

3.6. The Scope of the Doctrine

In tracing and analysing the use of the PTD by the Sri Lankan SC over almost two decades, with particular emphasis on the recent trilogy of cases, it is possible to identify several principles that form the core of the concept.

One is the principle of trusteeship over natural and national resources and the shared responsibility towards the protection of the same.63 The state is required to act as a trustee on behalf of the People, in administering and preserving natural and national resources that are vested with the state. This approach is similar to the approach found in American law, in that the role of trusteeship requires that the state can use and/or alienate ownership of natural resources, *only* for public benefit. Where the "public benefit" condition is not met, such action could be void or voidable.64 An extension of this principle is that of trusteeship of resources in general, whether natural or economic.65 All resources vested with the state can only be used or alienated in furtherance of public benefit. The notion of 'shared responsibility' however seems to be a unique one adopted by the Sri Lankan courts and it requires citizens to fulfil their role in the protection of national and natural resources.

The principle of public benefit places a limit to the exercise of power by the state. Up to now, courts have not attempted to

---

62 *Ibid.*

63 See in this regard the discussion under subheading 3.3.

64 See the discussion on the case of *Heather Mundy* under subheading 4.2.

65 See the observations made in the *Water's Edge* case, as discussed under subheading 3.5.

define what "public benefit" would include, but it is a term that is used frequently as a measure in determining whether organs of government have violated the public trust placed in them. In determining "public benefit" the court is called to balance the competing need for development, protection of the environment, protection of areas of cultural and/or historical significance and individual rights. This complex balancing act, requires the court to be both cautious and creative.

"Public interest" is another principle that is central to PTD. Wherever the court has relied on PTD, it has also satisfied itself that there is an element of "public interest" in the fundamental rights application. As in the case of "public benefit", the court has not elaborated on the meaning of this concept but rather has identified different petitioners as acting in the public interest; in the case of organisations, the court has examined the objectives of that organisation and in the case of individuals, it has looked at their role in the public realm.[66] The court seemed to have required involvement in public affairs as a pre-requisite for persons/organisations raising matters of public interest. Issues of national significance and/or issues related to natural/national resources have so far been identified by Court as matters of "public interest."

The increase in the use of PTD by the SC could also be seen as an increase of citizen participation in governance. The recognition and endorsement of public interest by the SC is a positive development. It empowers civil society and brings into focus the concept of the sovereignty of the People.

Another principle of PTD is that no discretionary power is absolute.[67] All discretionary powers whether statutory or constitutional, should only be exercised for the benefit of the People, who are ultimately sovereign. The image of a trustee is used in this instance to emphasise that although the law grants

66 See in this regard the observations of the court in the *Galle Face Green* case, under subheading 3.3.B.

67 See in this regard the discussion under subheading 3.2.

discretionary powers, that discretion can only be exercised *on behalf* of the People. This is a fundamental principle in constitutional and administrative law in general and has been relied on by courts consistently. The reliance by court on this principle in relation to PTD at the most has reaffirmed its place as a basic value of the Sri Lankan Constitution.

Reference has also been made to trusteeship in the exercise of legislative power. The formulation of legislative policy should promote and further public benefit and the court has assumed to itself a supervisory role in that regard. *Obiter dicta* in the *Water's Edge* case suggests that, the Court can both recommend the development of legislative policy for the protection and promotion of public benefit and it can also interpret existing laws to achieve the same objective.[68] It must be noted however that only the *Water's Edge* case proposes the idea of trusteeship in the exercise of legislative power. Whether the court can make interventions in that regard is also debatable, given that the constitution does not recognise judicial review of legislation and upholds Parliamentary Sovereignty, the only exception being judicial review at the pre-enactment stage.[69] Therefore, whether this principle can be given effect to in practice remains to be seen.

It can be gathered from the above discussed principles that the underlying values of the PTD are *democracy* which is rearticulated in terms of sovereignty of the People and the *rule of law* which requires *inter alia* that no one is above the law and everyone is accountable under the law. The concept of the rule of law is interpreted in relation to the right to equality. By locating the rule of law in the right to equality, it has become possible to make applications related to PTD as fundamental rights applications. Therefore, in almost all of the cases in which the PTD has been employed, equality before the law is also used as a supporting argument.

---

68 *Sugathpala Mendis and Others* v. *C B Kumaratunge and Others, supra.*

69 See in this regard, Article 120 of the Constitution.

4

Making a Case for a Sri Lankan Version of the Doctrine of Public Trust

This section will seek to advance the argument that the Sri Lankan judiciary has developed a version of the PTD that is unique to Sri Lanka. The arguments for and against that proposition will be examined in establishing that position.

4.1. Public Trust Doctrine as a Re-articulation of Existing Principles of Public Law

Before considering whether the PTD as developed by the Sri Lankan SC is unique, this section would examine the argument that PTD is in fact a new term used to refer to existing principles of Sri Lankan Public Law.

A. A Re-wording of Existing Principles of Administrative Law

It is possible to argue that the PTD is merely a re-articulation of the values already encompassed in traditional, common law principles of Administrative Law. Those principles require that whenever a public officer exercises his discretion, he must do so in accordance with the purpose for which such discretion has been vested with him and that such power must be exercised, as if it were exercised "in trust."[1] Moreover, individuals have been vested with the right to seek judicial review of administrative actions that are deemed *ultra vires* i.e. beyond the scope of the

1 Wade W., and Forsyth C.F., *supra*, note 89.

powers vested with such officer or government institution.[2] It is possible therefore to perceive the judicial pronouncements with regard to PTD in Sri Lanka as a re-formulation of the already existing principles of administrative law.

The *dicta* of the Indian case of *Intellectuals Forum, Tirupathi* v. *State of AP and Others*[3] is perhaps instructive in considering whether PTD is in fact *only* a re-articulation of existing principles of administrative law. In that case, the Court makes a distinction between the general obligation to act "*for public benefit*" from the "*special, more demanding obligation which it may have as a trustee of certain public resources.*"[4] The case law discussed in this article illustrate that there are special rules that apply – those public resources cannot be alienated, cannot be vested with third parties for private use and must be maintained by the state for public use, including for the use of future generations. In instances where PTD is used to review the exercise of public power, it could be argued, following the *dicta* in the *Intellectuals Forum* case, that a higher standard of scrutiny is applied by the courts. Therefore, it is possible to argue that while PTD has stemmed from traditional foundational ideas of Administrative Law that it is a new concept that seeks to expand the horizons of this body of law.

B. Public Trust Doctrine - A Component of the Right to Equality

It could also be argued that the PTD is no more than a progressive interpretation of the right to equality. Whenever the Sri Lankan Courts have relied on the doctrine, they have used article 12(1) as a platform for its application. Gomez argues that the contemporary idea of equality includes the idea that no administrative or executive action can violate expressly set out procedure or the common law based principles of public law, such as legitimate

2 See in general, Wade W., and Forsyth, C.F., *supra,* and Craig, P. *supra.*

3 *Intellectuals Forum, Tirupathi* v. *State of AP and Others, supra.*

4 *Ibid.*

expectation. As per that view, the PTD would be an articulation of the collective right to equality of society.

> *"Discretionary powers given to public institutions are never untrammeled. They are to be used to achieve the purpose for which they were conferred. Arbitrary and unreasonable decisions are the antithesis of fair play and equal treatment and violate the 'trust' placed in public officials."*[5]

This approach to the PTD emphasizes that any exercise of public power that does not fulfill the objective for which such power was conferred is *arbitrary* and therefore contrary to the right of all persons to be treated equally under the law. Viewed from this perspective, the PTD can easily be accommodated within an interpretation of the right to equality and equal treatment before the law.

4.2. The Sri Lankan Version of Public Trust Doctrine

While it is accepted that the Sri Lankan PTD has aspects of it which are drawn from principles of English Administrative law as applied in Sri Lanka and has a bearing on the contemporary understanding of the right to equality and equal treatment before the law, it seems that the scope of the doctrine as it stands today is unique and it has amounted to a separate ground of review of administrative and executive action in Sri Lankan courts.

A. Public Trust Doctrine as a Separate Ground of Review

The more recent case law has used the PTD as an independent ground of review and has held that actions that are contrary to the doctrine are null and void. The first reference to the PTD as a separate ground of review is made in the *Heather Mundy* case;

> *"...this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference*

5 Gomez, M., *supra*, p. 457.

> *to those purposes...Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law. ...the "protection of the law" would include the right to notice and to be heard. Administrative acts and decisions contrary to the "public trust" doctrine and violative of fundamental rights would be in excess or abuse of power and therefore void or voidable."*[6](Emphasis added).

According to the Court, the basis for the doctrine is both the Constitution and the Common Law. In the *Water's Edge* case, Thilakwardena J., reaffirms PTD as a separate ground of review and holds that the Court can review any exercise of public power, even if an express provision of the law grants immunity to the exercise of that power. As per her Ladyship's view, the review power of the Court could even extend to the exercise of legislative power of the Court and the doctrine should be followed by the executive, even when making decisions with regard to economic opportunities.

Therefore it is evident that the doctrine as developed by the Court, provides it with a sweeping power of review and the power to make varied orders, including for instance, the annulment of contracts entered into by the government *even* when there is no express law that empowers the Court to make such orders. By relying on the Constitution and the Common Law, the Court extends its power of judicial review and it perceives PTD as a separate ground of review for administrative action. That view is possibly unique to Sri Lankan Public Law.

Mario Gomez, in his recent article, *Blending Rights with Writs: Sri Lankan Public Law's New Brew,* makes the following observation in agreeing with the *dicta* of the *Heather Mundy* case:

> *"The Supreme Court, in a pioneering piece of jurisprudence, explicitly recognized two new grounds of review: the 'public*

6 *Heather Mundy and Others* v. *Central Environmental Authority and Others, supra,* at p. 13.

> *trust doctrine' and 'fundamental rights'. According to the Court, administrative decisions that contravened either the public trust doctrine or fundamental rights would be an excess or abuse of power and would therefore be void or voidable."*[7]

PTD as a separate ground review could on one hand be commended as being useful and necessary particularly in a context where cases such as the trilogy of cases discussed in this article take place. However, such blanket extensions of the Court's power is not necessarily helpful; the very vagueness of the extension could very well be its weakness. Subsequent courts could shy away from following that approach due to the weakness of the arguments used in developing this extension of the purview of the court.

B. Public Trust Doctrine as Empowering the Court and the Public Spirited Individual

Another characteristic of the PTD is that it provides a constitutional basis for public interest litigation. From the *Bulankulama* case,[8] to the *Heather Mundy* case,[9] the SC has expressly referred to Articles 3 and 4 of the Sri Lankan Constitution as justification for allowing matters related to PTD as PIL. For instance, in the trilogy of cases, the Court accepts the petitioner's standing on the basis that he is a "public spirited individual."

The sovereignty of the People has been relied on by the Court in extending the traditional rules of standing in such instances.[10] The Court seems to recognize that in certain cases

---

7 Gomez, M., *Blending Rights with Writs: Sri Lankan Public Law's New Brew*, (2006, Supplement), Acta Juridica, at p. 455.

8 *Bulankulama* v. *Secy, Ministry of Industrial Development, supra.*

9 *Heather Mundy and Others* v. *Central Environmental Authority and Others, supra.*

10 See in general in this regard, Udagama, D., *Some Reflections on the Emerging Jurisprudence on Public Interest Litigation in Sri Lanka*, paper presented at "Law in Context: An Agenda for Reform," Faculty of Law, University of Colombo, October, 2008.

where the PTD has been violated, the average citizen may not be able to bring the matter to the attention of the Court due to difficulties in relation to access to information and resources, complexities of the procedures involved etc. Individuals, more often than not, would not even be aware of certain instances of abuse of authority. In such instances, the Court has used the mechanism of PIL to complement its role in enforcing the PTD. For instance, the privatisation of SLIC was an act which affected the public at large. However, only a public spirited individual and/or organisation that had access to the particular information could have made that application to Court.

PTD therefore can be seen as a doctrine that empowers both the public spirited individual and the Court in the promotion of accountability, transparency and the rule of law – in instances where the traditional checks and balances established by law have not been effective.

4.3. Centrality of Judicial Discretion in the Public Trust Doctrine

It is evident that the PTD, as developed by the Sri Lankan SC, vests very broad powers of review in the Court. The line of cases where the Court has relied on the PTD suggest, particularly in the recent trilogy of cases, that the judges are expanding both procedural rules and substantive law, i.e. their scope of review, to respond to applications that come before them. An argument is advanced by some quarters that, the judiciary is an unelected body which is not accountable to any other organ as to the exercise of its powers; therefore, it should confine itself to the *application* of the law to disputes that come before it, rather than engage in judicial activism. That criticism is even more relevant to the SC when it exercises its jurisdiction with regard to fundamental rights applications, as there is no right of appeal from the decision of the Court. Therefore, the argument runs, the arm of the government that applies the PTD itself exercises it in a context that goes against the spirit of the doctrine i.e. without any accountability or review by other organs of government.

The only form of review available within the Court system for a fundamental rights application is a revisionary application which is also subject to the discretion of the Court. This section seeks to examine those issues briefly.

A. PTD in Fundamental Rights Cases; the Supreme Court as the First and Final Court

As discussed elsewhere in this paper PTD has been applied through article 12(1), i.e. the right to equality and through the fundamental rights jurisdiction of the Court. The Constitution vests power to determine fundamental rights applications exclusively with the SC.[11] Where evidence is found of a violation of fundamental rights before the Court of Appeal in a writ matter, the Court is required to refer that matter to the SC.[12]

This leads to an interesting question as to whether the Court of Appeal may or may not rely on PTD. The cases discussed above establish a clear line of authority linking the right to equality with PTD. If PTD is therefore a matter of fundamental rights, does the Court of Appeal lose its jurisdiction over such matters? The Court is yet to make a ruling on that issue. There is at least one case related to the environment in which the Court of Appeal has relied on PTD.[13] The judicial view therefore seems to be that the Court of Appeal may rely on PTD.

When PTD is applied by the SC in fundamental rights cases, it does so as the first and final court. As will be discussed below, evidence in those cases is by affidavit without oral testimony.[14] Whether the fundamental rights mechanism is the

11 This applies only in cases where the application is made to challenge executive or administrative action. An action can be brought before the District Court against private parties who violate fundamental rights.

12 See in this regard, Article 126(3) of the Constitution.

13 *Singalanka Standard Chemicals Ltd.* v. *Thalangama Appuhamilage Sirisena and Others, supra.*

14 See in this regard the rules 44 and 45 of the Rules of the Supreme Court of Sri Lanka 1991, published in gazette extraordinary 665/32, 7th June 1991.

most appropriate to determine PTD cases such as the trilogy of cases, is therefore debatable. The only mechanism available for revisiting the judgements issues by the SC in fundamental rights matters is an application for revision.[15] The scope of that mechanism however is very limited, especially since the revisionary jurisdiction of the Court can be activated only at the discretion of the Court.

It is relevant to note here that two revisionary applications were made to the SC regarding the recent trilogy of cases. One was in relation to the judgements and orders itself of the Court in the *Water's Edge* case and the other was with regard to the affidavit that had been tendered to Court by the Secretary to the Treasury, to the effect that he will not assume any public office in the future.[16] This paper will only analyse the former revisionary application. The second application gives rise to several critical issues that cannot be addressed within the confines of this paper.

In the case of *Sugathapala Mendis and Others* v. *Chandrika Bandaranayke Kumaratunga and Others*[17] the intervening petitioners sought revisions of the judgement and the incidental orders by Court on the basis that it had caused injustice to them. The SC refused revision on the basis that the petitioner had delayed making that application and also on the basis that

15 Article 128 of the Constitution.

16 S.C. (F/R) Application 209/2007, Supreme Court Minutes 13th October 2009. Dr. P.B. Jayasundara, whose actions as Secretary to the Treasury and Chairmen of PERC had been held to have violated the Doctrine of Public Trust in the trilogy of cases. In the course of proceedings in the *LMSL* case, Dr. Jayasundara gave un undertaking to Court, by way of affidavit, that he will not undertake any public office in the future. In the revisionary application, Dr. Jayasundara sought to withdraw that affidavit. In a 6 to 1 majority decision, the Court permitted him to withdraw that undertaking. Justice Shiranee Tilakawardene dissented.

17 *Sugathapala Mendis and Others* v. *Chandrika Bandaranayke Kumaratunga and Others*, S.C. (F/R) No. 352/2007, Supreme Court Minutes 7th August 2009.

judgements made by the SC in the exercise of its fundamental rights jurisdiction is final. The finality of the decision arises, in the opinion of the Court, from the very unique nature of the powers vested with the Court to determine fundamental rights applications.

> *"...inherent to the effective supervision of matters pertaining to Fundamental Rights is the ability and power of the Supreme Court to administer relief and make directions so long as such relief and directions are "just and equitable" – a simple and unqualified two-word threshold clearly meant to give the broad discretion and power required of the Supreme Court to effectively address the infinitely myriad ways in which fundamental rights can be violated...the Supreme Court's broad powers over matters of Fundamental Rights stem, not from an overzealous interpretation of judicial power, but from an understanding of the very nature of these matters for which the Court has been empowered to protect. Fundamental Rights applications are qualitatively different from other types of appeals heard before this Court and warrant greater latitude in their consideration and to grant redress in order to encompass the equitable jurisdiction exercised in these applications."*[18]

The view of the Court seems to be that the "just and equitable" jurisdiction of the Court provides it with the sweeping authority with which it could undertake review of administrative and executive action and that revision of such decisions will lie only in exceptional cases.

B. "Who guards the guards?"

The question then is – can a body of unelected judges, use the PTD, to hold the executive accountable, when they themselves will not be held accountable by either another court or by the other organs of government? Can they rely on a doctrine that is almost exclusively a judicial creation in assuming such power?

---

18 *Ibid.*, p. 7.

The issue as to whether an unelected judiciary can engage in "law making" and the degree of their accountability is an ongoing debate. One view is that judges may only act as umpires and make determinations as to the legality or illegality of actions/disputes brought before them. Another view is that the constitution vests the judiciary with the authority to act as a check on the executive and the legislature; in exercising that authority, judges are not confined to the mere application of the black letter law but are also expected to flesh out the values that underlie a constitution as and when relevant. In the matter of its PD jurisprudence, it seems that the Sri Lankan SC has embraced the later view.

However, expansion of the law by the judiciary should over time be followed by relevant constitutional reform; the sustainable and consistent development of those expansions can only take place within an identified constitutional framework. An open ended and unqualified use of the PTD, by the Court, albeit the highest court of the land, could result in the inconsistent and irregular application of PTD; the neglect of the *dicta* of the *Heather Mundy* judgement in the trilogy of cases is an example. The Court, in such situations, takes the risk of seeming selective and even political.

An analysis of legal argument (or the lack of it) and the constitutional framework alone will not provide a satisfactory narrative of PTD as developed in Sri Lanka. The motivation for the particular approach adopted by the Court could be found in how the Court perceives its role in relation to the Executive branch of government.

In a context where the executive abuses its power (at the macro or the micro level) and where other legislative, executive and judicial mechanisms have repeatedly failed to check those excesses, over an extended period of time, it seems that the SC uses the idea of Public Trust to step in. In doing so, it sometimes takes upon itself, the role of governance. The classic response to this "assumption of power" by the judiciary is to point out that

as an institution that is not based on democratic elections, that the judiciary has no legitimacy to assume that role.

In considering the impact of the decisions related to governance, made by the judiciary, under the guise of the PTD, it is also relevant to identify the fall out of it. In many of the cases discussed in this paper, the "cause" of the diffuse majority of society is upheld by Court against those in power in society i.e. a minority. This could be compared against the generally understood role of Court, in exercising its jurisdiction under the fundamental rights chapter. That exercise of power is often characterised as a defence of minorities, (whether political, religious, ethnic etc.) against a majority. However in both cases the Court is called upon to defend the powerless, against the powerful. Seen in that light, the use of PTD by Court to engage in acts of governance might perhaps be more acceptable.

5

Proposals for Development of Public Trust Litigation In Sri Lanka

This section explores the idea of "Public Trust Litigation" as a distinctive form of litigation in Sri Lankan Public Law. This essay so far, has sought to establish that, PTD is an entrenched component of Sri Lankan Public Law and that the Sri Lankan Courts have developed a unique form of the doctrine. If that doctrine is to be relied on as an independent ground of review of executive and administrative action, this essay proposes that such litigation should take place within a certain and reasonable framework. This section seeks to identify some issues that have to be addressed in developing such a framework.

5.1. Questions of a Threshold and Constitutional Basis

The jurisprudence on PTD in Sri Lanka is not particularly helpful in understanding whether there is a specific criterion for the applicability of the doctrine. Clear evidence of abuse of executive or administrative power, application to court as a last resort and an application made in good faith seem to emerge as criteria used by the courts in the cases analysed, but the point has been made that those criteria apply in general to judicial review of administrative action. The uniqueness of the application of PTD perhaps seems to lie in the remedies that the Court has afforded through the doctrine, which is discussed elsewhere in this section.[1]

Whether the Court should continue to rely on its fundamental rights jurisdiction in applying PTD is a question both in relation

1 See the discussion under section 5.4.

to procedure and substance. As mentioned before, fundamental rights applications are determined on the basis of affidavits filed by parties.[2] There is no trial and/or leading of evidence. In dealing with disputes as complex as the privatisation of a state owned enterprise or the tax concessions granted by the state, leading evidence by affidavit alone could be inadequate. Moreover, no appeal may lie against the determinations of the SC. The procedure for determining fundamental rights applications therefore may not be appropriate for the application of PTD in many cases.

In terms of substantive law, the cases discussed in this paper illustrate that the right to equality has been the channel whereby the fundamental rights jurisdiction of the Court has been activated in matters that involve PTD. The right to equality has been expanded to include protection against arbitrary actions of the state. The issues of governance that the Court has sought to address however, do not seem to fall comfortably within the realm of individual or collective fundamental rights. It is necessary therefore to consider whether a more relevant constitutional remedy should be introduced for cases that require the application of the doctrine.

Through the development of a new remedy, the PTD, as it stands today, can be used in Sri Lanka to justify judicial intervention in situations that have not been expressly provided for elsewhere in the Constitution. It would result in certainty in the applicability of the doctrine and provide a firm guarantee that the Court will respond effectively to complaints regarding blatant abuse of executive power, when such matters are brought before the Court. The doctrine therefore can have a positive impact, for instance, on the economy, in promoting the confidence of investors as to the uniform applicability of law and the role of the SC in ensuring accountability for blatant abuse of executive power. It will also increase the confidence of the public in the judiciary as a guardian of their sovereignty.

---

2 See in this regard the Rules of the Supreme Court of Sri Lanka 1991, *supra.*

5.2. Forum for Public Trust Litigation

Whether the SC is the appropriate forum for determination of PTD cases should also be reflected on. The general view is that an apex court should only concern itself with matters of law and not fact. The fundamental rights jurisdiction of the Sri Lankan SC has been an exception to that.

It may be possible to consider the involvement of two different courts in public trust litigation as in the case of an application for a writ of *habeas corpus.* A *habeas corpus* writ can be filed in the Provincial High Court or in the Court of Appeal.[3] Once such application is allowed to proceed, the Court would send the matter to an appropriate Magistrate's Court for an inquiry regarding the detention of the *corpus.* Similarly, it may be possible to envisage a mechanism whereby the SC could send a Public Trust litigation to the District Court for an inquiry with regard to the facts. Upon such determination, the SC could make its decision as to whether the PTD applies.

5.3 Standing in Public Trust Litigation

Even though Article 126 restricts the standing to a victim of an infringement (or imminent infringement) of a fundamental rights application, or her attorney-at-law,[4] the SC has liberalised those rules through judicial interpretation.[5] In general, the Court has accepted the standing of the next of kin, where the victim has died as a result of the violation, or the public spirited individual or organisations, to bring certain fundamental rights applications.[6]

Therefore, standing may not be an obstacle in taking up a PTD case. The Court has been progressive in general and used

3 See in this regard articles 141 and 154G of the Constitution.

4 Art. 126 of the Constitution.

5 See in general in this regard, Udagama, D., *Some Reflections on the Emerging Jurisprudence on Public Interest Litigation in Sri Lanka,supra.*

6 See for instance the cases of *Wijesiri* v. *Siriwardena* [1982] Sri L.R. 171 and *Sriyani Silva* v. *OIC Payagala* [2003] 1 Sri L.R. 14.

the notion of "public interest" loosely in entertaining applications that allege the violation of PTD. However, as discussed before, in the interest of certainty and consistency, it is necessary to introduce constitutional reform in this regard.

5.4. Remedies and Follow up Mechanisms

It is possible to argue that the trilogy of cases focused on, in this article, are significant not necessarily in terms of their contribution to the development of the jurisprudence on PTD but rather for the type of remedies offered by the Court for the violation of fundamental rights that it upheld. Re-vesting SLIC with the state, declaring the lease agreement in the *Water's Edge* case as null and void and the declaration of several agreements related to the privatisation of LMSL to be null and void were unprecedented in Sri Lanka. Those developments highlight the question as to the scope of the jurisdiction of SC in the application of PTD.

Article 126 authorises the SC to make an order that it deems to be "just and equitable."[7] The general approach of the Court in granting remedies under Article 126 has been to grant compensation to the individual, if the Court finds a violation of fundamental rights. In that regard, the debate has been as to whether the amount of compensation should be nominal or whether the amount has to be determined after consideration for the actual damage suffered. Different judicial and academic views have been expressed in this regard.[8]

In fundamental rights applications made in the "public interest" and/or instances where the Court would make findings with regard to violations of PTD at a national level as in the trilogy of cases discussed in this article, compensation for the

7 Art. 126 (4) of the Constitution.

8 See for instance, *Saman* v. *Leeladasa* [1989] 1 Sri L.R. 1, De Almeida Guneratne, J., *Judicial Protection of Human Rights,* in, *"Sri Lanka: State of Human Rights 2004,"* (Law & Society Trust, 2005), p. 121, Attappattu, S., *"Judicial Protection of Human Rights"* in *"Sri Lanka: State of Human Rights 2002,"* (Law & Society Trust, Colombo, 2001), at p. 16

individual would not be an appropriate remedy. The impact of the violation of PTD would more often than not impact on the collective and the type of remedies that such violations require would need to take that into account.

The issue of remedies is connected to the ongoing debate as to the role of the Courts in general. The general view is that the expertise of the Court is strictly in the area of the application of the law and that it should not engage in law making, development of public policies etc. The executive and the legislature specialise in those functions. However, it is evident that when issues such as those raised in the trilogy of cases discussed are brought before the Court, it is compelled to go beyond its traditional role and reconsider the question of an appropriate remedy.

It is regrettable that the SC does not engage in an analysis of the jurisprudential basis for its orders in any of the recent judgements which were based on PTD. Rather, the approach of the Court has been to identify the relevant facts, make observations with regard to PTD and proceed to make a ruling on a remedy. Consequently the SC attracted the typical criticism; that is has overstepped its boundaries in ordering remedies that had negative implications, particularly for the country's economy. Those judgements were issued at a time when the SC was making several other orders that were considered by many in the legal community and the general public, as an undue interference in the executive and legislative powers of the other organs of government. Recommendations regarding the policy for admission of Grade 1 students to schools,[9] monitoring of arrests and detention,[10] and recommendations regarding standards for noise emissions[11] are a few examples.

---

9 *Ranjith Haputhantirige and Thinuri Wihansa Haputhantirige* v. *Karunawathie and Others*, S.C. (FR) No. 10/07, Supreme Court Minutes 30th July 2007.

10 *Ceylon Workers Congress* v. *Minister of Defence*, S.C. (FR), S.C. Minutes December 2007 to September 2008.

11 *Ashik and Others* v. *O.I.C. Weligama and Others*, S.C. (FR) 38/2005, Supreme Court Minutes 0th September 2007.

Taken at face value, the remedies provided by the SC in the trilogy of cases, and the activism of the Silva Court in general, is acceptable. The impression that the Court stepped in when the other organs of government failed is quite strong. Moreover the PTD, as demonstrated in this article, does provide a jurisprudential basis for the approach of the Court. However, the Court fails to develop that jurisprudential basis and does not pay adequate attention to developing a justification for the exceptional remedies that it provides in those cases. As a result, the "legality" of those remedies and the legitimacy of the Court in making those orders will remain in doubt. This also reduces the possibility of any future court following or replicating the "activist" approach of the Silva Court in relation to PTD.

It is also relevant to consider how existing mechanisms and procedures for accountability of the state could be used as a follow up to a ruling on PTD. PTD should not be seen as a conclusive process of litigation but perhaps as a catalyst for highlighting the failure of the other organs of government to act as a check. As analysed above, the outcome of a ruling on PTD is generally restricted to declaring actions that are contrary to PTD to be null and void. Once the Court makes such an order, it is necessary to remedy the exposed abuse of power, through other particular remedies provided by law, for instance in Criminal Law. The failure to do so could result in the actual perpetrators remaining at large and/or continuing to act with impunity.[12]

Additionally, professional bodies should be required to conduct disciplinary investigations into the conduct of professionals who are involved in misconduct and fraud that is exposed through PTD cases.[13]

---

12 For instance, one person held responsible by the Supreme Court for the illegal privatisation of SLIC has re-assumed the post of Secretary to the Treasury while another person is the Minister of Justice and Law Reforms.

13 See for instance, the report published by the Governmental Accountability Project. See also, GAP Report: Inaction on corruption in Sri Lanka, 4th April 2010, *Sunday Times, Sri Lanka,* accessed at, http://sundaytimes.lk/100404/BusinessTimes/bt17.html

6

Public Trust Doctrine; A Judicial Pilgrimage?[1]

This article has sought to engage in a thorough analysis of the Public Trust Doctrine as developed by the Supreme Court of Sri Lanka. An attempt was made to identify possible origins of the doctrine and also to identify the characteristics of the doctrine in Sri Lanka. The main contention of this essay has been that the Sri Lankan version of the doctrine is unique, in that it draws from at least two different approaches to the idea of a "public trust." The result has been a home grown "Doctrine of Public Trust" rooted in the notion of the sovereignty of the People. Of course, the weakness of this doctrine is that it vests a broad discretion with the judiciary. In an attempt to address that, this paper has put forward proposals as to how a framework could be developed to provide better guidelines for the Court in employing this doctrine.

Constitutional reform is both useful and necessary for the future development of the Public Trust Doctrine. Until such reforms come to pass, future Sri Lankan Supreme Court would do well to develop a consistent, progressive and creative jurisprudence in this area that would promote the principles of good governance and strengthen the credibility of the Court. The

1 "Journey of judicial pilgrimage" is a phrase used in the case of *Karnataka Industrial Areas Development Board* v. *C Kenchappa and Others, supra,* by Bhandari J., writing for the Indian Supreme Court at para 102.

following comment made by Mario Gomez, would be instructive in that regard.

> *"The credibility of the court will be enhanced if the values that underlie judicial decisions are made articulate. It will be amplified if those values are participatory. It will be magnified greatly if the values are humane and democratic."*[2]

2 Gomez, M., *In the Public Interest, Essays on Public Interest litigation and Participatory Justice,* (Legal Aid Centre, University of Colombo, Colombo, 1993) p. 153.

References

Case Law

Sri Lankan

Reported

Bandara v. *Premachandra* [1994] 1 Sri L.R. 301.

Bulankulama v. *Sec, Ministry of Industrial Development* [2000] 3 Sri L.R. 243.

De Silva v. *Atukorale* [1993] 1 Sri L.R. 283.

Elmore Perera v. *Montague Jayawickrama* [1985] 1 Sri L.R. 285.

Fernando v *Sri Lanka Broadcasting Corporation (SLBC)* [1996] 1 Sri L.R. 157.

The Nineteenth Amendment to the Constitution [2002] 3 Sri L.R. 85.

Jayawardene v. *Wijayatilake* [2001] 1 Sri LR 132.

Premachandra v. *Montague Jayawickrama* [1994] 2 Sri L.R 90.

Saman v. *Leeladasa* [1989] 1 Sri L.R. 1.

Sriyani Silva v. *OIC Payagala* [2003] 1 Sri L.R. 14.

Wijesiri v. *Siriwardena* [1982] Sri L.R. 171.

Unreported

Ashik and Others v. *O.I.C. Weligama and Others*, S.C. (FR) 38/2005, S.C. Minutes 0th September 2007.

Centre for Policy Alternatives and Another v. *Commissioner of Elections and Others*, S.C. (FR) 111/2010.

Centre for Policy Alternatives and Another v. *Minister of Defence and Others*, S.C. (FR) 457/2009.

Ceylon Workers Congress v. *Minister of Defence*, S.C. (FR), S.C. Minutes December 2007 to September 2008.

Environmental Foundation Limited v. *Urban Development Authority* S.C. (F/R) Supreme Court Minutes 28th November 2005.

Environmental Foundation Ltd and Others v. *Mahaweli Authority and Others*, S.C. (FR) 459/08, Supreme Court Minutes 17th June 2010.

Mundy and Others v. *Central Environmental Authority and Others*, S.C. Appeal, 58/2003, Supreme Court. Minutes 20th January 2004.

Ranjith Haputhantirige and Thinuri Wihansa Haputhantirige v. *Karunawathie and Others*, S.C. (FR) No. 10/07, S.C. Minutes 30th July 2007.

Singalanka Standard Chemicals Ltd. v. *Thalangama Appuhamilage Sirisena and Others*, C.A. 85/1998, decided on 1st of October 2009.

Sugathpala Mendis and Others v. *C B Kumaratunge and Others* SC (FR) No 352/2007, Supreme Court Minutes 8th October 2008.

Vasudeva Nanayakkara v. *K N Choksy and Others*, S.C. (FR) No 158/2007, Supreme Court Minutes 4th June 2009.

Vasudeva Nanayakkara v. *N K Choksy and 30 Others*, SC (FR) 209/2007, Supreme Court Minutes 21st July, 2008.

Watte Gedara Wijebanda v. *Conservator General of Forests and Others*, S.C. Application No. 118/2004, Supreme Court Minutes 5th April 2007.

Indian

Fomento Resorts and Hotels Ltd. and Another v. *Minguel Martins and Others* Civil Appeal Nos.4155 and 4156 of 2000.

Intellectuals Forum, Tirupathi v. *State of A.P. and Others* (2006) 3 SCC 549.

Intellectuals Forum, Tirupathi v. *State of AP and Others* (2006) AIR SC 1350.

Karnataka Industrial Areas Development Board v. *C Kenchappa and Others* (2006) AIR SC 2546.

M.I. Builders Pvt. Ltd. v. *Radhey Shyam Sahu* (1999) 6 S.C.C. 464.

Mehta v. *Kamal Nath* (1997) 1 S.C.C. 388.

Perumatty Grama Panchayat v. *State of Kerala* (2003).

United Kingdom

Attorney General v. *Belfast Corporation* (1855) 4 IR Ch 119.

Attorney General v. *Brown* 1 Swans 265.

Attorney General v. *Dublin Corporation* 1 Bligh NS 312.

Bromley LBC v. *GLC* [1983] A.C. 768.

Magill v. *Porter* [2001] U.K.H.L. 67.

Parr v. *Attorney General* 8 Cl & Fin 409.

Prescott v. *Birmingham Corporation* 1 Ch 210 (Ch).

R v. *Tower Hamlets London Borough Council Ex p Chetnik Developments Ltd* [1988] AC 858.

Roberts v. *Hopwood* [1925] A.C. 578.

United States

Arizona Center for Law in the Public Interest v. *Hassell* 837 P.2d 158 (Ariz. Ct. App. 1991).

Avenal v. *State*, 886 So.2d 1085, 1101-02, 1109-10 (La. 2004).

Hudson County Water Co. v. *McCarter* 209 U.S. 349 (1908).

Illinois Central Railroad v. *Illinois*, 146 US 387 (1892).

In re Wai'ola O Moloka'i, Inc., 83 P.3d 664 (Haw. 2004).

Pullen v. *Ulmer* 923 P.2d 54 (Alaska 1996).

San Carlos Apache Tribe v. *Superior Court ex rel. Maricopa* 972 P.2d 179 (Ariz. 1999).

Save Ourselves, Inc. v. *Louisiana Environmental Control Commission* 452 So. 2d 1152 (La. 1984).

Willow River Club v. *Wade*, 76 N.W. 273, 278-79 (Wis. 1898).

WJF Realty Corp. v. *State* 672 N.Y.2d 1007 (N.Y. App. Div. 1998).

International

Hungary v. *Slovakia ICJ* 25th September, 1997.

Philippines

Juan Antonio Oposa and Others v. *The Honourable Fulgencio S. Factoran and Another* G.R.No: 101083 Supreme Court.

Constitutions

The Indian Constitution 1949.

The South African Constitution 1996.

The Sri Lankan Constitution 1978.

Statutes

Sri Lankan

Land Acquisition Act No. 9 of 1950.

Muslim Mosques and Charitable Trusts or Waqfs Ordinance. No 51 of 1956.

National Environmental Authority Act, No. 47 of 1980.

Penal Code, Ordinance No. 2 of 1883.

Trust Ordinance No. 9 of 1917.

Trust Receipt Ordinance No 12 of 1947.

South African

National Water Act No. 36 of 1998.

International Declarations

Declaration on the Right to Development of 1986.

Rio Declaration of 1992.

Books

"Sri Lanka: State of Human Rights 2002," (Law & Society Trust, Colombo, 2001).

A.J. Oakley, *Paker and Mellows, The Modern Law of Trusts,* (9th Ed., Sweet & Maxwell, London, 2008).

M. Gomez, *In the Public Interest, Essays on Public Interest litigation and Participatory Justice,* (Legal Aid Centre, University of Colombo, Colombo, 1993).

P. Craig, *Administrative Law,* (6th ed., Sweet & Maxwell, London, 2008)

Thomas Collett Sandards, *The Institutes of Justinian,*(3rd ed, London, 1865).

Wade and Forsyth, *Administrative Law,* (8th ed, Oxford University Press, Oxford, 2000).

Law Review Articles and Papers

Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards,* (2006), 82(2), Notre Dame Law Review, 699.

David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,* (2008) 16 New York University Environmental Law Journal 711.

De Almeida Guneratne, J., *Judicial Protection of Human Rights,* in, *"Sri Lanka: State of Human Rights 2004,"* (Law & Society Trust, 2005) Gomez, M., *Blending Rights with Writs: Sri Lankan Public Law's New Brew,* (2006, Supplement), Acta Juridica.

J. Barrat, *Public Trusts,* (2006) 69(4) M.L.R. 514-542.

J. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* (1970), 68 Michigan Law Review , 471-566.

Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin,* (2004), Vol. 27, Ecology Law Quarterly 135.

Robyn Stein, *Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System,* (2005), Vol. 83, Texas Law Review 2167.

See in general in this regard, Udagama, D., *Some Reflections on the Emerging Jurisprudence on Public Interest Litigation in Sri Lanka,* paper presented at "Law in Context: An Agenda for Reform," Faculty of Law, University of Colombo, October, 2008.

Websites

Choices Unravel, 18th September 2009, Lanka Business Online, accessed at http://www.lankabusinessonline.com/fullstory.php?nid=1427517323.

Disputed Justice, Lanka Business Online, accessed at, http://www.lankabusinessonline.com/fullstory.php?nid=2032090498,

*Economic Impact,*18th September 2009, Lanka Business Online, accessed at, http://www.lankabusinessonline.com/fullstory.php?nid=1177305189.

GAP Report: Inaction on corruption in Sri Lanka, 4th April 2010, *Sunday Times, Sri Lanka,* accessed at, http://sundaytimes.lk/100404/BusinessTimes/bt17.html.

PIL: The Good, the Bad and the Ugly - A rebuttal from Nihal's lawyers, http://www.thebottomline.lk/2009/11/11/news1.html.

Cooray, A., *Oriental and Occidental Laws in Harmonious Co-existance: The Case of Trusts in Sri Lanka,* Electronic Journal of Comparative Law, (2008) 12(1), available at http://www.ejcl.org.

Reports

Edwards, B., *Unlawful Privatization in Sri Lanka: The Role of the Auditors,* Report published by the Government Accountability Project, Washington D.C., 2009.

Report of the International Bar Association, *"Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka,"* (2009).

Report of the International Bar Association, *"Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary,"* (2001).

Rules

Rules of the Supreme Court of Sri Lanka 1991, published in gazette extraordinary 665/32, 7th June, 1991.

COLOMBO

Kumaran Press (Pvt) Ltd.
kumbhlk@gmail.com